Voluntary return and the limits of individual responsibility in the EU Returns Directive

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PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van rector magnificus prof.dr.ir. H. Bijl,
volgens besluit van het college voor promoties
te verdedigen op donderdag 10 februari 2022
klokke 11.15 uur.

door

Christian Martijn Francis Mommers

geboren te Harmelen

in 1979

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	Prof. dr. M.H.A. Strik (Radboud Universiteit Nijmegen)

Lay-out: AlphaZet prepress, Bodegraven
Printwerk: Ipskamp Printing

Acknowledgements

This dissertation has been a process of stops and starts, trying to balance academic research with my professional and private life, more successfully during some periods than others. The various drafts have travelled with me from the Netherlands to Israel to Slovakia, back to the Netherlands, and finally to France. The relief of not having to pack up my notes and source materials if we decide to move again is almost worth it in itself.

I would not even have come close to completion without the wonderful and infinitely patient tandem of my promotor and co-promotor, professors Peter Rodrigues and Pieter Boeles. Pieter's openness and enthusiasm when I approached him many years ago provided me with the energy to dive into it. His approach of 'let's see how far we get' was the perfect way of giving me the freedom and confidence to explore my topic in different ways. While Peter 'inherited' me and my project after taking over Pieter's role at the Institute for Immigration Law, he was never anything less than fully supportive of my efforts, while also instilling in me a sense of structure and ensuring I kept my eye on the end goal of finishing. Although neither of them could have guessed at the time it would still take so long to get to this point, I hope this dissertation reflects the best of both worlds that Peter and Pieter's combined efforts brought.

I feel lucky to have benefitted from such a great doctorate committee, whose collective knowledge and track record made me very nervous, but whose comments were extremely helpful in putting the finishing touches on this dissertation: professor Gregor Noll, whose work inspired some of the key questions that helped shape my approach to this issue; professor Tineke Strik, with her unparalleled knowledge of the Directive and seemingly limitless supply of energy; professor Nico Schrijver, a preeminent voice on international law whose keen eye was invaluable; and professor Jorrit Rijpma, for bringing a crucial wider perspective on EU practice on readmission and showing how much there is still left to explore.

As an external PhD candidate, opportunities to engage in academic life were few and far between. But the moments I did get to spend at the Institute of Immigration Law, which later became part of the Europa Institute of the Leiden Law School, were always stimulating. I warmly thank current and past colleagues for always being welcoming and helpful during my infrequent visits. My gratitude also goes out to all other staff at the Europa Institute.

What I may have lost in being (very) external, I gained from keeping my feet firmly planted in practice. Colleagues in various organisations over the years have (maybe sometimes unwittingly) played an important role, whether it was by discussing current issues related to my topic or just

being interested in how I got on. I thank the mission of the International Organisation for Migration (IOM) in The Hague for giving me the initial space to embark on this process, and to all colleagues there for the many stimulating discussions about the dilemmas involved in voluntary return, which planted the seeds for this research. The Refugee Rights Clinic of Tel Aviv University gave me a 'home' and a place to stay grounded in Israel. I thank energetic, fun and dedicated colleagues in the Dutch section of Amnesty International, from whom I learned a lot on many different levels. And of course my current colleagues at the Office of the Council of Europe Commissioner for Human Rights, some of the brightest in the business, for their interest and support.

But most importantly, of course, I have to thank my family. They may not have fully understood what I was working on (or why), but they have mostly been so kind not to make fun of me for that. In that way it is hopefully a family achievement for my mother Ria and also my late father Frans, for whom the completion of this dissertation unfortunately did not come soon enough to be with us, but I hope he would have been excited about it. Thanks to my brothers Frans and Ardi, and their families: Josine, Isabelle, Emma, Jan, and Sielke. And, most of all, to my wife Mária, who has had to suffer through the entire process but gave me the space to hide away for periods – shirking my family duties – and giving up weekend and holiday time so I could write. Her equal measures of support and the necessary moments of 'isn't it about time you finish?' are part of the fabric of this dissertation. And finally, to my kids, Jonas, Zora and Hannah, who were not even born yet when I started, but who at last have an answer to their increasingly frequent question: 'daddy, when is your book done?'

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List of abbreviations

ACP	African, Caribbean and Pacific states
ACVZ	*Adviescommissie Vreemdelingenzaken* (Dutch Advisory Committee on Migration Affairs)
AFP	*Agence France-Presse*
AG	Advocate General
AP	Associated Press
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
AVR(R)	Assisted Voluntary Return (and Reintegration)
CFR	EU Charter of Fundamental Rights
CJEU	Court of Justice of the EU
CoE	Council of Europe
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC	Convention on the Rights of the Child
CTOC	UN Convention against Transnational Organised Crime
DG HOME	Directorate-General for Home Affairs of the European Commission
DIS	Danish Immigration Service
DRC	Danish Refugee Council
DT&V	*Dienst Terugkeer en Vertrek* (Dutch Repatriation and Departure Service)
ECHR	European Convention on Human Rights
EC	European Community
ECJ	European Court of Justice
ECommHR	European Commission on Human Rights
ECRE	European Council on Refugee and Exiles
ECSR	European Committee on Social Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEAS	European External Action Service
EFTA	European Free Trade Association
EP	European Parliament
EPRS	European Parliamentary Research Service
ERPUM	European Return Platform for Unaccompanied Minors
ESC	European Social Charter
ETS	European Treaty Series
EU	European Union
FAL Convention	Convention on Facilitation of International Maritime Traffic

FRA	EU Fundamental Rights Agency
HRC	Human Rights Committee
HRW	Human Rights Watch
ICAO	International Civil Aviation Organisation
ICCPR	International Covenant on Civil and Political Rights
ILC	UN International Law Commission
INLIA	*Internationaal Netwerk van Lokale Initiatieven met Asielzoekers* (International network of initiatives with asylum seekers)
IOM	International Organisation for Migration
IMO	International Maritime Organisation
IRB	Immigration and Refugee Board of Canada
LIBE	Committee on Civil Liberties, Justice and Home Affairs of the European Parliament
NGO	Non-governmental organisation
NOS	*Nationale Omroepstichting* (Dutch national broadcast service)
OAS	Organisation of American States
OHCHR	UN Office of the High Commissioner for Human Rights
PACE	Parliamentary Assembly of the Council of Europe
PICUM	Platform for International Cooperation on Undocumented Migrants
RD	Returns Directive
RDS	Repatriation and Departure Service
RWI	Raoul Wallenberg Institute
SBC	Schengen Borders Code
TI	Transparency International
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UNTS	United Nations Treaty Series
WODC	*Wetenschappelijk Onderzoek- en Documentatiecentrum* (Scientific Research and Documentation Centre of the Dutch Ministry of Justice)

1 Introduction

"The case manager puts his hand on a thick file: 'I have read that you have already made an effort to return. You have been to the embassy multiple times to get temporary travel documents. Without success. Do you actually want to return?'
The man answers: 'What do you think? The embassy does not want to help me. That is not my fault. I have no choice but to stay in the Netherlands. I have a child here, did you know? And I play in a band.'
Then the case manager says: 'I fully understand that, in your situation, you do not want to go back to your own country. But the Netherlands does not want illegal migrants. You have the duty to leave this country.'" [1]

"In return policy, foreign nationals' own responsibility for return is paramount. They have come to the Netherlands of their own accord, and they will, in principle, have to return of their own accord if their stay is not (or no longer) an option."[2]

1.1 Voluntary return and individual responsibility in the Returns Directive

Within European Union (EU) asylum and migration policy, one of the biggest challenges is to ensure the effective return of those who are not, or no longer, authorised to stay in a member state. At the time of writing, the legal framework for meeting this challenge is still Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, commonly known as the Returns Directive;[3] a recast proposal, introduced in September 2018, is under consideration by the Council and the Parliament.[4] The Directive sets out a return procedure in two stages. Under normal circumstances, persons who are required to return are first given an opportunity to do so of their own accord, or, in the parlance of the Directive, to return voluntarily. Only if they do not take advantage of this opportunity does the procedure move to the second stage.

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1 Zuidervaart 2010 (my translation).
2 Letter from the Dutch Minister for Immigration and Asylum to the Lower House of the Parliament, parliamentary year 2010-2011, document 19637 no. 1436, 12 July 2011 (my translation).
3 OJ L 394, 24 December 2008, pp. 98-107 (hereinafter: RD). The use of 'Returns Directive' or 'Return Directive' varies in the literature. In this dissertation, I will often just use 'the Directive,' unless a clear distinction needs to be made with other EU directives that may be relevant to the analysis.
4 COM(2018) 634 final, 12 September 2018.

This involves enforcement by the member state by removing such persons from its territory. Since the adoption of the Directive in 2008, and even in the years leading up to this, the issue of removal and related topics such as detention have received considerable attention, both in the case law of the Court of Justice of the European Union (CJEU) and in academic literature.[5] This same level of scrutiny has not been given to the voluntary return stage, even though the Directive prioritises voluntary return over enforced return and, if all goes well, the return procedure can end after the voluntary return stage because the person concerned will have left.

This dissertation seeks to redress this imbalance by discussing in detail the notion of voluntary return. Not only is this necessary because it is a key component of the return procedure set out in EU law, which nevertheless is only captured by a few – sometimes very brief – articles in the Directive. Also, while it first appears to be a simple concept, the term 'voluntary return' in the Directive in fact represents a major idea of considerable complexity.[6] Importantly, voluntary return changes the traditional paradigm of return, which has often been studied from the perspective of the state using physical coercion to implement what has been variously called 'forced return,' 'deportation' or – in the context of the Directive – 'removal.' Voluntary return, by contrast, shifts the focus from the actions of the authorities, and the state responsibilities that come with it, to those of the individual. Rather than being the object of state action, it casts the individual as the key actor who is made responsible for ensuring return takes place in a timely manner. The quotes at the start of this chapter, while relating to one specific member state, nonetheless illustrate this principle embedded in the Directive quite well: the problem of ensuring return, and overcoming any obstacles in this respect, is – first and foremost – one for the individual. Although this shift in responsibility may have benefits for both the individual and the member state,[7] it also raises new questions which are generally not applicable to, or much less prominent in, situations in which individuals are removed.[8] In particular, this includes questions about the boundaries of the responsibility allocated to the individual, both in terms of content and in terms of the time frame. In other words, it raises the question what exactly can be expected of individuals who are made responsible for their own return, and how much time they are actually given to meet this responsibility effectively. As will be discussed below, this hinges on two key concepts in the Directive, namely the obligation to return and the voluntary departure period.[9]

5 See, among others, Baldaccini 2009; Peers et al 2012, chapter 17; Basilien-Gainche 2015; Mitsilegas 2016; Mancano 2019, chapter 11; Majcher 2020, parts 4 and 5.
6 See 1.3 and 2.10.1.
7 See 2.2.1.
8 See 1.2.2.4 for the specific meaning of removal in the context of the Directive.
9 See 1.2.2.

This dissertation seeks to identify the boundaries of individual responsibility[10] by unpacking the meaning of these two concepts in the Directive, and by examining their interconnection. In particular, it tries to identify what actions individuals can and cannot be expected to take as part of the fulfilment of their obligation to return. And it seeks to clarify individuals' entitlement to, and the appropriate length of, the voluntary departure period. This, I will argue, requires looking at the relationships between the various actors involved, since responsibility only make sense from the perspective that it is owed by someone to someone else. However, given the inherently international nature of return from one country to another, these relevant actors do not only include the individual and the EU member state. It also encompasses the prospective country of return. The latter's decisions on, for example, readmission or the granting of travel documents have a clear impact not only on the question of whether return can take place as a practical matter, but helps set the normative framework in which individual responsibility should be understood. As a result, this dissertation looks at voluntary return as a process involving a triangle of actors: the third-country national, the EU member state and the country of return. It assesses how their respective rights and obligations, including those external to EU law, eventually impact on the individual's position within the context of the Directive.

This chapter will further explain the key issues at stake and sets out the framework for tackling these. Section 1.2 will first provide a broad outline of the return procedure in the Directive, with a specific focus on the role that voluntary return plays within it. Section 1.3 then proceeds to examine the notion of voluntary return in more detail, and sets out why, if it is not further clarified, it risks being a vague and open-ended concept. Section 1.4 sets out the research questions and approach of analysis in this dissertation. An overview of the subsequent chapters and their relation to the research questions is provided in section 1.5.

1.2 The Directive in a nutshell

This section provides, first, some background to the Directive, covering its adoption, objectives, personal scope, and applicability to member states (1.2.1). Second, it outlines the key elements of the return procedure that the Directive establishes, being the return decision, the obligation to return, the voluntary departure period, enforcement of the return decision, and several other elements of interest (1.2.2). Third, it will highlight the changes that the recast process of the Directive may bring (1.2.3).

10 As explained in 1.3, when using the term 'individual responsibility,' this is not to introduce a new and distinct legal concept, but rather to provide a useful shorthand for the legal obligations incumbent on individuals and the legal consequences that would arise if such obligations are not met.

1.2.1 Background to the Directive

Before discussing the concept of voluntary return, a brief explanation of the overall purpose and contents of the Directive, and thus the context in which the specific provisions relevant to voluntary return should be understood, is in order.

1.2.1.1 Adoption of the original Directive

The Directive has its legal basis in Article 79 of the Treaty on the Functioning of the EU (TFEU),[11] which provides for the development of a common immigration policy, which includes the adoption of legislative measures in the area of "illegal migration and unauthorised residence, including removal and repatriation of persons residing without authorisation."[12] After a long period in which forms of closer alignment of return standards and procedures in member states were sought through non-legislative measures,[13] the Commission presented an initial proposal for a Directive in 2005.[14] The Directive was to be the first important piece of legislation related to migration policy to be decided under the co-decision procedure,[15] and it took several years, with fits and starts, to be adopted.[16] On various points, it was a highly contested piece of legislation, especially as regards its implications for the fundamental rights of third-country nationals.[17] Nevertheless, in December 2008, it was finally adopted, with member states required to fully transpose it into national law within two years.[18]

1.2.1.2 Objectives of the Directive

The Directive, as its lengthy title indicates, establishes common standards and procedures to be applied by EU member states when dealing with the return of irregular migrants, rejected asylum seekers or any other non-EU citizens who do not (or no longer) have the right to enter or stay in the EU. The Directive incorporates a set of horizontal rules applicable to all relevant

11 OJ C 326, 26 October 2012, pp. 47-390.
12 TFEU, Article 79(2)(c).
13 Some of which are discussed in 2.2.1.
14 COM(2005) 391 final, 1 September 2005. A first legislative step towards closer cooperation and harmonisation had already come in the form of the Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals (the Mutual Recognition Directive), OJ L 146, 2 June 2001, pp. 34-36.
15 Acosta 2009a. Since the Lisbon Treaty, co-decision is now the ordinary procedure used to adopt all measures in this policy area. Also see Ripoll Servant 2011.
16 Lutz 2010, pp. 12-25.
17 EPRS 2019a, p. 31; Lutz 2010, pp. 73-80; Euractiv 2008.
18 RD Article 20(1). An exception was made for laws, regulations and administrative provisions in relation to legal aid under Article 13(4), which were subject to a three-year deadline.

member states, which should be clear, transparent and fair to provide for an effective return policy as a necessary element of a well-managed migration policy.[19] In this respect, the Directive sets out a number of obligations on member states on how they should ensure that the return procedure is implemented promptly and results in eventual return.[20] The rules in the Directive also aim to provide a "common minimum set of legal safeguards on decisions related to return … to guarantee effective protection of the interests of the individuals concerned."[21] Returns of individuals should take place "in a humane manner and with full respect for their fundamental rights and dignity."[22] The Directive thus requires that the common standards and procedures are applied in line with fundamental rights.[23] Some of the more general protections, such as taking into account the best interests of the child, family life, and the health of the third-country national, as well as respecting the principle of non-*refoulement*, are listed explicitly.[24] Similarly, the Directive sets out a number of specific obligations regarding the treatment of third-country nationals during the voluntary departure period.[25] As such, the Directive purports to balance the need for effective return across the EU and protection of those subject to return procedures, which is an important feature that will come back at various points in the analysis.

1.2.1.3 Scope of the Directive and applicability to member states

The Directive is applicable to 'illegally staying third-country nationals.'[26] It defines a third-country national as "any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty [on European Union] and who is not enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code."[27] A third-country national is considered illegally staying in a member state if he or she "does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State."[28]

In general, persons fitting these definitions are subject to the standards and procedures set out in the Directive. However, in some cases member states have the option of not applying the Directive to such persons,

19 RD Recitals 5 and 6.
20 See 1.2.2.
21 RD Recital 11.
22 RD Recital 2. On the protective function of the Directive, also see CJEU C-61/11 *El Dridi* [2011], paragraph 42.
23 RD Recital 24; Article 1.
24 RD Article 5.
25 RD Article 14(1).
26 See 2.10.2.1 on the use of the term 'illegal' in this context.
27 RD Article 3(1).
28 RD Article 3(2).

including when they are subject to a refusal of entry, or if they are apprehended or intercepted in connection with the irregular crossing of an external border and they have not subsequently obtained authorisation to stay.[29] Similarly, third-country nationals subject to return as a criminal law sanction or as a consequence of a criminal law sanction, or who are the subject of extradition procedures, can be excluded from the scope of the Directive.[30] This also means that the rules on voluntary return do not apply to them. This group is therefore not further discussed in this dissertation.[31] Any third-country national who is not covered by the provisions above, or who is covered but stays in a member state that has decided not to apply the exclusion possibilities, is subject to the procedure as discussed below.[32]

The Directive is applicable to all EU member states, except for Ireland.[33] Although "a development of the Schengen acquis,"[34] it applies also to the EU member states which are not (yet) part of Schengen.[35] It is also applicable to four non-EU member states, which are part of the Schengen area: Iceland, Liechtenstein, Norway and Switzerland.[36] As a result, the Directive covers an area that is both more limited and more expansive than the EU. Despite this, throughout this dissertation, the term 'EU member state' will be used as shorthand for those countries to which the Directive applies, unless there is a specific need to differentiate between them.

29 RD Article 2(2)(a). A 2013 evaluation of the Directive, carried out on behalf of the European Commission, found that 17 member states applied this exception, whilst only eight (Bulgaria, Estonia, Finland, Hungary, Poland, Portugal, Slovakia and Liechtenstein) did not. For the remaining four, the result was indeterminate. See DG HOME 2013, section 2.8. It should be noted that such persons, even whilst excluded from the Directive's procedures, are entitled to a set of minimum protections elaborated in the Directive, see Article 4(4). The application of this exception is limited to those situations in which there is a "direct temporal and spatial link with that crossing of the border" (CJEU C-47/15 *Affum* [2016], paragraph 72), and to the irregular crossing of external, not internal, borders (*ibid.*, paragraph 69), even if border checks are temporarily reintroduced at those internal borders (CJEU C-444/17 *Arib* [2019], paragraph 67).

30 RD Article 2(2)(b). RD Article 2(3) also states that persons enjoying free movement as defined in Article 2(5) of the SBC are excluded. However, this merely reiterates such persons are already not considered third-country nationals for the purpose of the Directive.

31 However, Pollet notes that the number of third-country nationals excluded from the Directive on this basis could be "potentially large." See Pollet 2011, p. 31.

32 And remains so as long as their stay has not been regularised, see CJEU C-47/15 *Affum* [2016], paragraph 61.

33 RD Recital 27. Even before its withdrawal from the EU, the Directive was not applicable to the United Kingdom. Denmark is implementing the Directive in accordance with the Protocol on the position of Denmark annexed to the TFEU, see, for example, Gammeltoft-Hansen & Scott Ford 2021, p. 31.

34 RD Recitals 26-30.

35 At the time of writing, Bulgaria, Croatia, Cyprus and Romania have not yet become part of the Schengen area.

36 RD Recitals 28-30.

1.2.2 Key elements of the return procedure

Below, key elements of the return procedure, including the return decision, the definition of return, the voluntary departure period, enforcement, and several other provisions are outlined.

1.2.2.1 The return decision: the start of the return procedure

Once a person is identified as an illegally staying third-country national within the scope of the Directive, the member state should issue a return decision.[37] Such a return decision is "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."[38] The return decision marks the starting point of the return procedure. The issuing of a return decision by member states is obligatory, unless one of the exceptions can be applied.[39] In this way, the Directive has set a framework in which member states are compelled to take action when faced with an illegally staying third-country national, and cannot choose to ignore their presence, as they might have been able to in the past. This is different in a limited number of situations. Firstly, when persons hold a valid residence permit or other authorisation of stay in another member state and they go there immediately.[40] Secondly, member states may refrain from issuing a return decision if third-country nationals are taken back by another member state under bilateral agreements or other arrangements.[41] They should also consider refraining from issuing a return decision if third-country nationals are the subject of a pending procedure for renewing their residence permit or other authorisation of stay.[42] Finally, member states can negate the need to issue a return decision by providing them a residence permit or authorisation, thus effectively ending their status as 'illegally staying.'[43]

In relation to voluntary return, the return decision is important for two reasons. First, as noted, it includes a reference to the person's obligation to return. The return decision thus serves as a mechanism to make the third-country national, rather than the member state, primarily responsible for the successful completion of the return procedure. This is a key feature of voluntary return. And second, the return decision should indicate how long third-country nationals will have to meet this obligation of their own

37 RD Article 6(1).
38 RD Article 3(4).
39 CJEU C-38/14 *Zaizoune* [2015], according to which a return decision or removal cannot be substituted by another consequence for irregular stay, such as a fine. Also see C(2017) 6505 final, 16 November 2017, Annex (Return Handbook), paragraph 5.
40 RD Article 6(2).
41 RD Article 6(3). In such cases, the member state that has taken him or her back should issue a return decision.
42 RD Article 6(5).
43 RD Article 6(4).

accord. In other words, the return decision indicates whether a voluntary departure period is granted, and if so, for how long. Both elements are discussed in more detail below.

1.2.2.2 The obligation to return: setting the parameters of individual responsibility

Although a key concept in the Directive, the phrase 'obligation to return' is not defined as such. However, the term 'return' by itself is. Article 3(3) of the Directive says that 'return' means:

> *"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"*

In this way, the obligation on the third-country national does not merely relate to the departure from the member state where he or she is staying without authorisation (despite the use of the term 'voluntary departure' elsewhere in the Directive), but to their return to one of three categories of destinations set out above.[44] The definition above acknowledges that such return does not just happen in a vacuum, but that this is a *process*. As such, the obligation on third-country nationals appears to be both to engage in this process, and to bring it to a successful conclusion by moving to one of the three destinations. It thus comprises both an obligation of effort and of result.

The importance of the definition in Article 3(3) in the Directive in general, and the responsibility allocated to individuals in relation to voluntary return specifically, cannot be overestimated. It is central to understanding what can be expected of third-country nationals faced with voluntary return. It sets the parameters of the actions that they should take during the voluntary departure period and provides the benchmark for assessing compliance with the obligation, which in turn is key to the question of enforcement.

1.2.2.3 The voluntary departure period: how much time to act responsibly is given?

The Directive defines voluntary departure as "compliance with the obligation to return within the time-limit fixed for that purpose in the return decision."[45] During this period, the member state must refrain from

44 However, see the discussion about the (sometimes confusing) use of the obligation to leave or to return in 9.4.

45 RD Article 3(8).

enforcing the return decision using coercive measures,[46] thus creating the space for third-country nationals to make arrangements for their own departure.[47] As a general principle, voluntary return should be preferred over forced return "[w]here there are no reasons to believe that this would undermine the purpose of a return procedure."[48] This priority of voluntary return as an EU legal principle is perhaps one of the biggest innovations of the Directive.[49] This priority is operationalised in Article 7 of the Directive. Article 7(1) requires that return decisions provide for an 'appropriate period' for voluntary departure. This period must be between seven and thirty days, to be decided by the member state.[50] Such a period can be granted automatically, or member states may adopt national legislation to require third-country nationals to apply for such a period.[51]

Article 7(2) says that this voluntary departure period should be extended by another appropriate period 'where necessary.' In assessing whether this is the case, member states should take into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.[52] A written confirmation of the extension should be provided to the third-country national.[53]

Despite the general priority of voluntary return, the Directive also sets out, in Article 7(4), several grounds for member states to decide to refrain from granting a period for voluntary departure, or to grant one shorter than seven days. This can be done in three cases: (1) if there is a risk of absconding; (2) if the individual's application for a legal stay has been dismissed as manifestly unfounded or fraudulent; or (3) if the third-country national concerned poses a risk to public policy, public security or national security.[54]

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46 See 1.2.2.4.

47 RD Article 8(2).

48 RD Recital 10.

49 Although numerous member states already had variations of this provision incorporated in their national laws, the Directive required harmonisation of these provisions. Furthermore, some states had to introduce, for the first time, legal provisions on voluntary return. See, for example, Acosta 2009b, p. 5; COM(2014) 199, 28 March 2014, p. 21: "In some Member States, a period for voluntary departure was not previously provided for in national law, or the length was not specified. All Member States have now introduced such a limit."

50 But see 11.2 on the limitations on member states' discretion in choosing the length of the voluntary departure period.

51 RD Article 7(1). Member states must then provide information about the possibility of making such an application. In 2017, the European Commission recommended to member states to grant a voluntary departure period only following an application, COM(2017) 1600 final, 7 March 2017, recommendation 17. However, the Commission's 2018 recast proposal does not include changes to the possibility to grant a voluntary departure period ex officio, COM(2018) 634 final, 19 September 2018, Article 8(1).

52 RD Article 7(2).

53 RD Article 14(2).

54 RD Article 7(4).

If no period for voluntary departure is granted, the member state may proceed with the enforcement of the return decision immediately.

If a period for voluntary departure is granted, Article 7(3) provides that member states may impose on third-country nationals certain obligations aimed at avoiding the risk of absconding.[55] It sets out a non-exhaustive list of these measures, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents, or the obligation to stay at a certain place.[56]

The provisions on the voluntary departure period are important to the analysis here, since they determine how much time third-country nationals get to meet their obligation to return. This then determines, to an important extent, whether third-country nationals can in fact complete the 'process of going back' themselves, or whether the member state eventually steps in and takes back full control over their return. The obligation to return, setting the content of the responsibility allocated to the individual, and the voluntary departure period, setting the temporal scope of that responsibility, are therefore interconnected. These two elements form the focal points of this dissertation. However, before discussing these in more detail, some other elements of the return procedure still need to be discussed first, to complete the picture of the return procedure.

1.2.2.4 Enforcement of the return decision

Voluntary return represents the first stage of the Directive's procedure. Ideally, third-country nationals meet their obligation to return within the voluntary departure period, thus concluding the return procedure altogether. But if they fail to do so, or if no voluntary departure period is granted, the second stage of the procedure kicks in: enforcement. I will only deal with this stage very briefly, since the focus of this dissertation is on voluntary return. As noted, the various aspects of enforcement – in contrast to voluntary return – have received considerable attention in both the case law of the CJEU of the EU and academic writing.[57] However, it is useful to outline in general what happens when third-country nationals fail to comply voluntarily with the return decision.

Under Article 8(1) of the Directive the obligation on member states to take "all necessary measures to enforce the return decision" comes into play "if no period for voluntary departure has been granted … or if the obligation to return has not been complied with within the period for voluntary

55 RD Article 7(3).

56 RD Article 7(3).

57 The majority of judgments rendered by the CJEU in relation to the Returns Directive have touched upon aspects of enforcement, including detention. For an overview, see, inter alia, Basilien-Gainche 2015; Majcher 2020, parts 4 and 5, and further references in note 5 above.

departure."[58] This results in removal – that is, the physical transportation of third-country nationals out of the member state.[59] As a last resort, member states may use coercive measures to carry out the removal of third-country nationals who resist, provided these are proportionate and do not exceed reasonable force.[60] Such measures must be provided for in national legislation and should be in accordance with fundamental rights and due respect for the dignity and the physical integrity of the third-country national.[61] In order to prepare the return and/or carry out the removal process, member states may keep third-country nationals in detention, but only if no other sufficient but less coercive measures can be applied effectively.[62] Detention may be used particularly when there is a risk of absconding, or if the third-country national avoids or hampers the preparation of return or the removal process.[63] The Directive sets out a number of safeguards in relation, for example, to the review of a decision to detain, and the length of detention.[64] These are not further discussed as this falls outside the scope of the question of voluntary return.

1.2.2.5 Other elements

Some other notable features of the Directive include the introduction of an entry ban, which is an administrative or judicial decision or act prohibiting entry into and stay on the territory of a member state for a specified period.[65] Such an entry ban should normally not exceed five years, although it can be longer if the third-country national represents a serious threat to public policy, public security or national security.[66] If third-country nationals fail to meet their obligation to return within the voluntary departure period, or if such a period is denied, member states must impose an entry ban.[67] This should incentivise third-country nationals to take up voluntary return, as this would help them avoid an entry ban, which would prevent them from applying for authorisation to come back to the member state and the Schengen area more broadly in the future. However, member states may choose to impose entry bans even when third-country nationals leave voluntarily,[68] which would arguably undermine its role as an incentive for voluntary departure.

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58 RD Article 8(1).
59 RD Article 3(5).
60 RD Article 8(4).
61 RD Article 8(3).
62 RD Article 15(1).
63 RD Article 15(2).
64 RD Chapter V.
65 RD Article 3(6).
66 RD Article 11(2).
67 RD Article 11(1).
68 *Ibid*.

Throughout all stages of the Directive, member states are required to take due account of the best interests of the child, family life, and the state of health of the third-country national concerned. They must also respect the principle of non-*refoulement*.[69] Pending return, several other principles must be taken into account "as far as possible," including during the voluntary departure period. These are the maintenance of family unity with family members present in the member state; the provision of emergency health care and essential treatment of illness; granting access to the basic education system for minors, subject to the length of their stay; and taking account of the special needs of vulnerable persons.[70] With regard to the latter, some further provisions specifically apply to children. For example, beyond the general principle of the best interests of the child, member states should grant unaccompanied minors assistance by "appropriate bodies" before issuing a return decision.[71] They should also ensure that unaccompanied minors will be returned to a family member, nominated guardian or adequate reception facilities in the state of return.[72] The position of victims of trafficking is briefly addressed, but only in relation to their exclusion from being subject to entry bans.[73]

Finally, third-country nationals must be accorded an effective remedy to appeal against, or seek review of, the return decision, decisions related to entry bans and decisions on removal, before an impartial and independent judicial or administrative body, which has the competence to review such decisions and to temporarily suspend the enforcement of these decisions.[74] Third-country nationals must also have the possibility to obtain legal advice and representation – which in some cases must be granted free of charge on request – as well as linguistic assistance (such as an interpreter) where necessary.[75]

1.2.3 The recast proposal

The completion of this dissertation comes at a time when the legislation analysed here may soon be replaced. In September 2018, almost ten years after the adoption of the Directive, the Commission published a proposal to recast the Directive.[76] At the time of writing, this proposal is still under

69 RD Article 5.
70 RD Article 14(1). Article 3(9) defines vulnerable persons as "minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence."
71 RD Article 10(1).
72 RD Article 10(2).
73 RD Article 11(3).
74 RD Article 13(1) and (2)
75 RD Article 13(3) and (4).
76 COM(2018) 634 final, 12 September 2018.

consideration by the European Parliament and the Council.[77] As regards voluntary return, most of the basic principles and approach remain in place in the proposal. The priority of voluntary return over forced return, at least as a general principle, is maintained in the Commission's proposal in the same words. However, it proposes to add to the relevant recital the qualification that this would be "depending in particular on the prospect of return," and making a clearer reference to the grounds for denying a voluntary departure period.[78] The obligation to return, as the hinge on which the entire return procedure turns, is defined in the same way in the proposal as in the current Directive,[79] and so far there have not been any moves by the other institutions to change this. The provisions on the granting or denying of a voluntary departure period, however, may be subject to smaller as well as more fundamental changes. In the Commission's proposal, for example, the time provided for voluntary return would be defined as a period of "up to thirty days."[80] This would scrap the lower limit of seven days in the current Directive, and therefore also the requirement that a shorter period is only provided when one of the grounds for exceptions apply. By contrast, the Rapporteur of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) has instead suggested that all voluntary departure periods should be thirty days as standard.[81]

Additionally, the Commission's proposal seeks to make denial of a voluntary departure period mandatory when any of the three grounds (a risk of absconding, a risk to public policy, public security or national security, or dismissal of an application as fraudulent or manifestly unfounded) exists.[82] This contrasts the current situation, in which such denial is merely formulated as an option for member states. Mandatory denial may have a significant impact on the extent to which voluntary return is truly prioritised.[83]

77 At the time of completion of this dissertation (May 2021), the Rapporteur for the LIBE Committee had presented her draft report (EP doc. PE648.370v01-00, 21 February 2020) and amendments were being considered at Committee level (EP doc. PE658.738v01-00, 28 September 2020). On the side of the Council, a partial general approach was agreed in May 2019 (Council doc. 12099/18, 23 May 2019). The swift conclusion of negotiations on the recast of the Directive was identified as one of the priorities under the New Pact on Migration and Asylum, presented by the European Commission in September (COM(2020) 609 final, 23 September 2020, paragraph 2.6).

78 COM(2018) 634 final, Recital 13. For a discussion of the general priority of voluntary return, and its links to the specific grounds for denial of a voluntary departure period, see 10.2.

79 COM(2018) 634 final, Article 3(3). A small modification is proposed in relation to transit countries, changing the reference to "Community agreements" to "Union agreements," but this simply reflects the changed situation since the Lisbon Treaty.

80 COM(2018) 634 final, Article 9(1).

81 EP doc. PE648.370v01-00, amendment 62.

82 COM(2018) 634 final, Article 9(4).

83 See 10.7.

It is a step that is resisted by the LIBE Rapporteur,[84] and the Council proposes to keep denial optional in the case of the dismissal of an application as manifestly unfounded or fraudulent, or in the case third-country nationals concerned are minors or families with children.[85] A connected change proposed by the Commission is to introduce a set of indicators for the risk of absconding, which member states should, at a minimum, incorporate into their national laws.[86] The list proposed by the Commission is quite extensive, leaving some to fear that it would give member states a large measure of discretion in finding that a risk of absconding exists, and thus leading to the denial of a voluntary departure period.[87] Notwithstanding these changes, the Commission's proposals maintain that, when a voluntary departure period is granted, this should be for an appropriate period, and its possible extension is governed by rules set out in the same way as currently.

In addition to these specific changes to the provisions on voluntary departure, the recast proposal introduces a new article providing that member states shall impose on third-country nationals the obligation to cooperate with the competent authorities at all stages of the return procedures.[88] This was apparently motivated by a concern about frequent non-cooperation by third-country nationals with the return procedure. This obligation would include the duty to provide all elements necessary for establishing or verifying identity; the duty to provide information on third countries transited; the duty to remain present and available throughout the procedures; and the duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document.[89] It also includes new provisions on 'return management,' which, in addition to referring to the setting up and maintenance of return management systems by member states, also explicitly requires them to "establish programmes for providing logistical, financial and other material or in-kind assistance, in accordance with national legislation" to support the return of nationals of certain third countries.[90] The proposal foresees further changes to the return procedure,

84 EP doc. PE648.370v01-00, amendment 64, which furthermore seeks to limit possibilities for denial of a voluntary departure period to only those situations in which third-country nationals pose "a genuine and present risk to public security or national security."

85 Council doc. 9620/19, p. 59. It further proposes to add to these grounds the possibility of denying a voluntary departure period in case an application has been dismissed as inadmissible.

86 COM(2018) 634 final, Article 6.

87 EP doc. PE648.370v01-00, amendment 46, which seeks to delete this entire provision. Also see FRA 2019, pp. 45-51; ECRE 2018, pp. 7-8; Amnesty International EIO 2018, pp. 1-3.

88 COM(2018) 634 final, Article 7(1).

89 COM(2018) 634 final, Article 7(1)(a)-(d).

90 COM(2018) 634 final, Article 14, and particularly paragraph 3 on return assistance. The issue of return assistance and its linkage to the obligation to return is discussed in 9.3.

including with regard to remedies,[91] the expansion of grounds for detention and its duration,[92] and the introduction of a border procedure.[93]

On the basis of the Commission's recast proposal, as well as the first positions taken by the other institutions, it is likely that a number of key elements and principles of the Directive will remain in place. However, some proposals may result in differences with the current Directive. Nevertheless, many of the issues discussed in relation to the current Directive will continue to be of importance, both in terms of its proper transposition to national law and judicial interpretation, especially as they draw heavily on international frameworks that will remain relevant to any recast version of the Directive. While the analysis is firmly focused on the current Directive, comments about differences that – at least as can be foreseen in the Commission's recast proposal – a new Directive may bring are included in the following chapters where relevant.

1.3 Voluntary return: a potentially vague and open-ended concept?

So far, the issue of voluntary return has been discussed in terms of responsibility allocated to the individual to ensure their own return. When using the term 'individual responsibility' this is not meant to introduce a new legal concept into the analysis. Rather, it is used as a convenient shorthand to characterise the position of third-country nationals in the context of voluntary return. It follows McCorquodale's definition of responsibility, who simply uses it to refer to legal obligations, which, if breached, give rise to consequences.[94] Under the Directive, the rules applied to return procedures must be "clear, transparent and fair."[95] The consequences are relatively well set out in the Directive: non-compliance will be followed by removal, possibly in combination with detention and coercive measures, and by the imposition of an entry ban. However, it is questionable whether the circumstances under which third-country nationals can be found to have breached their legal obligations is equally unambiguous. In this respect, questions may be raised about both key elements of voluntary return: the obligation to return (1.3.1.), and the voluntary departure period (1.3.2), The implications of these questions are discussed in 1.3.3.

91 COM(2018) 634 final, Article 16.
92 COM(2018) 634 final, Article 18(1)(c) and (5).
93 COM(2018) 635 final, Article 22.
94 McCorquodale 2006, p. 314.
95 RD Recital 4.

1.3.1 The obligation to return

In examining the extent of individual responsibility, a proper understanding of the obligation to return is crucial, as it sets the specific scope of what can be expected of third-country nationals, and thus which actions, if not taken, lead to a non-compliance. Without clarity about this obligation, any finding of non-compliance may be arbitrary. One easy way to deal with this would simply to consider that any third-country national still in the member state after the expiry of the voluntary departure period has failed to comply with this obligation. However, it is questionable whether this is appropriate. The Directive does not establish continued presence in the member state as the trigger for enforcement. Rather, enforcement follows if a third-country national has not complied with the obligation to return within the time limit set for this.[96] The two could indeed overlap, but to say this is necessarily always the case would rest on a few assumptions. First, it would mean that it must be assumed that, if return does not materialise, it is always the third-country national who is at fault. This, in turn, would assume that the outcome of the return process is fully within the control of the individual. Only a cursory glance at the return process shows that this may not always be the case. Specifically, it would ignore the role of the country of return, which should take the third-country national back. Without this, no successful return is possible. There may be cases in which the country of return is unwilling to do so, which would make the obligation to return (at least towards that country) impossible to fulfil.[97]

However, this problem could also be turned back into an issue of individual responsibility. It might be argued, first of all, that Article 3(3) sets out a wide range of possible destinations, to which third-country nationals can be expected to return. This should normally always leave a country available for them to turn to, and indeed, at least one country – the country of origin – that can be assumed to be under a legal obligation to readmit them. Secondly, it is up to third-country nationals to ensure that they meet the necessary requirements to be allowed to return, so if a country of return does not take them back, this must be due to the individual having failed to take the appropriate steps. Both issues require further examination.

As regards the countries to which individuals can be expected to return, the Directive indeed sets a seemingly wide range of options. Third-country nationals can either return to their country of origin, which presumably would be required to readmit them, a transit country, or another third country. This could be read as ensuring there is always an obligatory destination for third-country nationals. However, this strongly depends on

96 Or if no such time limit was provided, see RD Article 8(1).

97 In such cases, it may be wondered whether such an obligation can even be legitimate. See, for example, Fuller 1969, who identifies as one of the principles providing for the legitimacy of legal obligations that they are indeed possible to fulfil.

the interpretation of each of these categories, as well as the qualifications attached to them in the Directive. Even the first of these, the country of origin, although the least problematic, raises some initial questions. This relates, in particular, to notion of 'origin.' This would likely encompass persons with the nationality of that country. But what about people who were born there, or lived there for a long time, but holding the nationality of another country? And importantly, how does this relate to stateless persons? If the notion of country of origin is broader than persons who are nationals, this may also have implications for the extent to which that country, as a matter of international law, is indeed required to take them back; and thus, for their possibilities to meet the obligation to return.

The second category, transit countries, also raises questions. These relate, for example, to the conditions to be fulfilled to consider it a transit. Does a situation in which an individual has spent a prolonged period in a country still count as transit? And does this cover all countries that third-country nationals may have passed through on their way to the EU, or only the last one? Furthermore, return to a transit country must be "in accordance with Community or bilateral readmission agreements or arrangements."[98] But are all agreements in place sufficient to trigger an obligation to return to a transit country? And what might such 'arrangements' be? Perhaps most confusing is the return to the third category of 'another third country', which is qualified in two ways. First, that the individual should "voluntarily decide" to go there, and secondly that he or she will be accepted there. Especially given the fact that the word 'voluntary' has a specific meaning in the Directive, which is disconnected from the individual's willingness to return,[99] this raises questions about the extent that such a destination can actually be considered obligatory.

That the elements of return that are explicitly mentioned in the Directive raise questions is one thing. Quite another, and potentially even bigger, issue is that the Directive does not clarify in any way what must be done to return. Article 3(3) only mentions "the process of going back," but not what this process might entail. Again, a wide reading would be possible here. It might be assumed that third-country nationals simply have to do whatever it takes to return, including meeting any requirements set by the country of return.[100] This would be in line with the notion that it is their responsibility to return, and failure to take any possible action that would lead to such return would thus be a breach of that responsibility.

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98 Since the Lisbon Treaty, "Community agreements" should be read as "Union agreements," also see footnote 71 above.

99 Also see 2.10.1.4.

100 In this context, the questions of defining the destinations and the particular steps to be taken by the third-country national are interconnected: what is necessary to ensure return may vary according to whether the intended destination is the country of origin, a transit country, or another third country.

While such a 'whatever it takes' approach may make sense at first glance, it can also lead to perverse results. As a thought experiment, let us think about the situation of the third-country national obligated to leave the Netherlands, quoted at the beginning of this chapter. He was unable to leave the country because he had not obtained travel documents from the embassy of his country of origin. The Netherlands, however, has an external border formed by the North Sea. If the overriding obligation, without any limitations, of the third-country national would truly be to remove himself from the territory of the Netherlands, he could – theoretically – be required to simply go to the coast, hire a rowing boat, and row out to sea. This, in a practical sense, would mean that the third-country national's irregular stay in the Netherlands had ended, and his obligation fulfilled.[101] Clearly, such an example is absurd, and no EU member state would ask this of any third-country national.[102] However, it illustrates that, at least at some level, there must be limits to what are acceptable expectations of third-country nationals in complying with their obligation to return. As will be discussed in later chapters, the obligation to return voluntarily has been interpreted in such a broad way that this might encompass making apologies to the authorities of the country of origin in order to ensure return,[103] paying bribes,[104] obtaining and using false or fraudulent documents,[105] or navigating return routes that are clearly unsafe.[106] All these, as I will show, were considered by the authorities of EU member states, and sometimes even endorsed by national courts, as part of the third-country national's own responsibility to return. These examples show the need for defining clearer contours of the obligation to return, and setting out more clearly what third-country nationals can be expected to do as part of that obligation, but also what they cannot be expected to do.

1.3.2 The voluntary departure period

Although the obligation to return is central to the allocation of responsibility to third-country nationals, the notion of voluntary return only works in combination with the granting of a voluntary departure period. Only if such a period has been granted do individuals have a chance to meet their

101 Whether he would ever reach a destination state in this way is, of course, another matter entirely.

102 Although Greece, for example, has been accused of putting irregular migrants intercepted while crossing the Aegean sea or found on the Greek islands on life rafts and pushing them back to sea. See, for example, Kingsley & Shoumali 2020; Commissioner for Human Rights 2021. However, such practices have been condemned as unlawful and clearly fall outside the scope of procedures provided for by the Directive.

103 See 4.2.5.

104 See 8.4.2.

105 See 8.4.3.

106 See 7.3.3.

obligation of their own accord. Lacking such a period, they will be subjected to enforcement measures by the state to ensure return. Regarding the voluntary departure period, two main issues come into focus. Firstly, whether such a period is granted at all. As discussed above, the Directive contains three grounds which allow a member state to make exceptions to the general rule that a voluntary departure period should be granted. Beyond setting out these grounds, the Directive provides very little guidance on how these should be interpreted and applied.[107] There is a significant risk that member states would veer towards an (overly) broad interpretation of these exceptions. This may particularly be the case when they see granting the possibility of voluntary return as a hindrance to the quick removal of third-country nationals. The question of the scope of member states' discretion in denying a voluntary departure period, or conversely, of third-country nationals' entitlement to such a period, is thus central to the identification of clearer boundaries of the concept of voluntary return in the Directive.

The second element concerns the length of a voluntary departure period. Even when such a period is granted, its length can have a significant impact on the extent to which third-country nationals can meet their obligation to return. If the period is too short to do this effectively, it would leave the priority of voluntary return as a paper tiger, rather than a key principle of the Directive to be given practical effect.[108] At the same time, member states will be wary of providing a period that is overly long, as it may unnecessarily delay effective return. By setting a seven to thirty-day range for voluntary departure periods, the Directive appears to leave significant discretion to member states. However, it also requires such a period to be 'appropriate' without giving more direction as to what this means. Furthermore, even though the Directive provides some examples of situations which member states should take into account in deciding whether a voluntary departure period should be extended beyond this initial period, it leaves considerable space to decide whether such an extension is indeed necessary. Finally, the above-mentioned grounds for denying a period for voluntary departure may also be used to grant a period shorter than seven days. Although the provisions related to the voluntary departure period are more elaborate than those covering the obligation to return, they still require a closer examination, in particular regarding their implications for third-country nationals' possibility to truly act on the responsibility allocated to them.

107 The recast proposal seeks to address this somewhat by setting out specific criteria for finding a risk of absconding. However, as discussed, some of these proposed criteria may worsen, rather than solve, the problem of interpretation. See 10.4.

108 Pollet 2011, p. 33.

1.3.3 Voluntary return as limitless responsibility?

As I suggest above, voluntary return cannot be framed as responsibility without limits. When it comes to the specific content of the responsibility, not only must it be acknowledged that third-country nationals themselves cannot fully control the outcome of the process. Even those elements that are within their control are necessarily subject to limits, especially where these may otherwise clash with their fundamental rights. Pollet has warned that "in many ways the directive only provides a very incomplete framework for return procedures in Member States, leaving much discretion to Member States."[109] This appears particularly relevant to the obligation to return, which, despite its importance, is not clarified at all in terms of what can (and cannot) be legitimately expected of third-country nationals. This is all left implicit, encompassed in a very broad reference to "the process of going back." Whilst it is often impossible, in either EU or domestic legislation, to set out rules for all eventualities, leaving individual obligations implicit to a large degree may also be problematic, not least from the perspective of legal certainty for the person faced with such an obligation.[110]

Beyond immediate questions in relation to the individual, the matter of the boundaries of the obligation to return also has more conceptual significance. Essentially, the notion of voluntary return presents member states with a difficult exercise in balancing autonomy and control. On the one hand, voluntary return puts the individual in the driver's seat. In effect, he or she becomes the main implementer of the objective of effective return. The role of the member state at this stage of the procedure will be more hands-off. Giving third-country nationals responsibility for return also implies giving them a degree of autonomy.[111] Indeed, Ten Berge has suggested that autonomy is a precondition to be governed and to allow individuals to fulfil obligations that states impose on them.[112] Whilst voluntary return does not mean a choice between staying or going, to be viable it will need to give the individual certain freedoms to make choices about how to achieve return, where to go and, to some extent, even when this will happen. If a member state would micro-manage all these aspects, this would also undermine some of the perceived benefits of voluntary return, especially that it would reduce administrative burdens.[113] On the other hand, member states retain ultimate responsibility, under EU law, to ensure effective return. And from this perspective, they will want, and are required to, keep control over the overall process, to ensure, for example, that third-country nationals are doing what they must do, and to prevent absconding.

109 Pollet 2011, p. 32.
110 Ten Berge 2007.
111 See, for example, Triandafyllidou 2017.
112 Ten Berge 2007, p. 28.
113 See 2.2.1.

Absconding would not only undermine the person's effective return, but member states have also frequently cited the security concerns relation to this.[114] This delicate balance between autonomy and control inherent in the concept of voluntary return can only be struck, in my view, when it is sufficiently clear what the obligation to return means.

The question of discretion in granting or denying voluntary departure periods, or in determining the length of such periods, may further impact on such issues. An overly broad notion of responsibility, without much clarification of the benchmark against which third-country nationals' behaviour is assessed, in and of itself, may already be problematic from the perspective of setting clear, transparent, and fair rules. But if this is combined with possibilities of member states to deny a voluntary departure period on broad grounds, or to grant only the shortest of periods, this problem will only be compounded. Allocating responsibility, after all, must also be accompanied by a fair chance for the individual to take the necessary action, especially if the consequences for non-compliance are so far-reaching for that individual, affecting his or her liberty and other fundamental rights. As such, setting out more clearly the limits of the entitlement of the individual to a voluntary departure period should be an integral part of providing more defined contours of the notion of responsibility that is inherent in voluntary return.

The importance of setting out these contours, ensuring that voluntary return is not an open-ended concept, is, first and foremost, a question of clarifying legal norms. However, the language of responsibility often has wider connotations, and may veer into the arena of morality. A person not being 'responsible' is easily understood not only as someone breaching certain rules, but as a reflection on their character. 'Irresponsible' persons cannot be trusted to do the right thing. What is more, because they are 'irresponsible' they may not be deserving of the same entitlements as responsible people are. While this may be true in certain cases, this wider connotation may strengthen tendencies to resort to repressive or coercive measures, impacting on fundamental rights or otherwise incompatible with (international) legal standards, as justifiable nonetheless. From this perspective too, it is even more important to provide clarity about the limits of legally acceptable responsibility for return.

114 Although there appear to be few clearly recorded instances of persons being granted an opportunity for voluntary return leading to serious security risks, the possibility of this is far from imaginary. This is shown, for example, by the fact that the suspected perpetrator of the terror attack in Nice on 29 October 2020, in which three people were killed, had reportedly arrived in Italy irregularly not long before, and had made his way to France after being subjected to an order to leave Italy of his own accord within one week. See, for example, France24 2020.

1.4 Research questions and approach

Having considered the implications of a potentially open-ended, but at the very least relatively vague, conception of voluntary return in the Directive, this section will set out more specific questions (1.4.1) and the approach taken in this analysis (1.4.2), which should help in filling this gap. It subsequently discusses the scope and limits of the analysis (1.4.3).

1.4.1 Overall research question and sub-questions

Considering the central role played by voluntary return in the Directive, and the need for more clarity about its exact scope and meaning, this dissertation will focus on the following overarching question:

> *What are the boundaries of the responsibility allocated to third-country nationals, as encompassed by the concept of voluntary return in the Returns Directive?*

Answering this question requires engaging with two sets of sub-questions, namely:

1. Questions related to the appropriate *scope of the obligation to return*:
   a. Which actions can third-country nationals be expected to take to ensure they meet their obligation to return?
   b. Are there any actions that third-country nationals cannot legitimately be expected to take, even if they would theoretically contribute to effective return, and if so, which?

2. Questions related to the *application of the voluntary departure period*:
   a. What is the nature and the extent of third-country nationals' entitlement to a voluntary departure period, in the light of the priority for voluntary return but also the grounds for exceptions as set out in the Directive?
   b. How should provisions regarding the initial length, extension and shortening of a voluntary departure period be interpreted so that the opportunity of third-country nationals to meet their obligation to return of their own accord is effective?

1.4.2 Methodology and approach

The key aim in answering these questions is to fill a crucial normative gap in relation to the formal application of the rules related to voluntary return. It will focus on how the notion of voluntary return, and the specific elements above, should be interpreted as a matter of EU law, in such a way that it meets the objectives of the Directive, but also – as discussed below – consistently with the international frameworks in which return inevitably

needs to take shape.[115] Authoritative interpretations of this, notably by the Court of Justice of the EU (CJEU), are so far lacking, with some small exceptions.[116] This contributes to the risk that EU member states' authorities and judiciaries treat voluntary return as an open-ended concept and thus to them according virtually unlimited responsibility to individuals. As such, the analysis will be distinctly positivist in its focus. Based on the approach set out below, it will engage in a textual analysis of the Directive itself, case law of the Court of Justice of the EU (CJEU), related EU legislation, and relevant norms contained in sources and instruments of international law, as elaborated by the judgments or communications by (quasi)judicial bodies tasked with supervising them, or – where relevant – authoritative texts on those norms, such as codifications, interpretative notes or explanatory memoranda. Which norms are particularly relevant in this respect will be the subject of further discussion in Chapter 2.

Before such an analysis can take place, however, some conceptual groundwork must be laid. In particular, two key foundations of the analysis are set out below. First, this deals with the identification of specific elements of the obligation to return, which can provide a focal point for closer analysis. And second, this explains the use of the multiple legal relationships between the three actors involved in the return process (the third-country national, the EU member state, and the country of return), as a tool to clarify the relevant provisions of the Directive.

1.4.2.1 Breaking down the obligation to return into specific categories of action

As noted earlier, the content of the obligation to return is mostly implied, and the only explicit provision of the Directive clarifying it is Article 3(3), which sets out three destinations, and otherwise refers very generally to "the process of going back." This leaves a very nebulous target for analysis, including in relation to the norms that should be applied to clarify the obligation to return.[117] To provide a framework for discussing these questions, I suggest focusing on specific categories of action which can be considered to provide a minimum core of what needs to be done to achieve return.

First, this is ensuring that third-country nationals are indeed readmitted by the destination state (hereinafter: *return element (i)*). If such guarantees are not in place, third-country nationals will normally be unable to even attempt return. Or, if they would do so nonetheless, run the risk of being sent back to the EU member state immediately or, worse, remain in legal

115 While the analysis in some cases draws on examples of how member states have dealt with specific issues in practice, it does so to advance the normative analysis, rather than as an attempt to set out descriptively or comparatively member states' administrative or judicial practices in this regard (also see 1.4.3.4).

116 See 2.4 and its characterisation of the CJEU's judgement in the *Zh. And O.* case, and its extensive analysis in Chapter 10; CJEU C-554/13 *Zh. and O.* [2015].

117 See 1.4.2.

limbo between the EU member state and the country of return.[118] The question of readmission is therefore central to understanding the scope of the obligation to return. This question itself raises several further issues. First, which destinations are relevant in the individual case. As discussed, each of the three destinations set out in Article 3(3) raise questions of interpretation and application, and the extent to which individuals may be expected to make efforts to return to them, and to seek readmission there, may differ. Second, for each of these destinations, specific requirements for readmission may apply, which will have implications for the actions third-country nationals must take to return successfully. And third, if multiple destinations are available to third-country nationals, do they then have a choice between them, or can the member state decide where they should seek readmission? This is also particularly relevant when the third-country national has concerns about the suitability of specific destinations from a security perspective. These issues related to the destinations and the obligation to seek readmission will occupy a considerable part of this dissertation.[119]

A second necessary element of the process of going back relates to obtaining travel documents (*return element (ii)*). In the contemporary system for international travel, the possession of valid travel documents is crucial.[120] Beyond boarding transport, they are also needed for entry into the destination state. If third-country nationals are not already in possession of valid travel documents, renewing expired documents or replacing lost documents will be an essential step in securing voluntary return. In many cases, attempts to gain readmission and to obtain travel documents will overlap. For example, when returning to the country of origin, obtaining a travel document will usually also comprise permission to enter.[121] However, the actions may also be distinct, for example when third-country nationals seek to return to a country that is different from the country competent to issue travel documents. Furthermore, as will be discussed in the relevant chapters, legal frameworks for readmission and obtaining travel also draw on different sources, which reveal different limitations on the actions of third-country nationals as part of the voluntary return process. For this reason, it is useful to discuss them separately.

When readmission and travel documents are secured, a third necessary element still remains. This is comprised by the practical arrangements that third-country nationals should make to enable their travel from the EU

118 For this reason, for example, the Interpretative Notes to the CTOC Smuggling Protocol, in paragraph 113, suggest that states should not return individuals until their nationality or right of residence, which would form the basis for readmission, are duly verified.

119 On the identification of obligatory destinations, see Chapter 3. On the steps to be taken to gain readmission to such destinations, see Chapters 4 to 6.

120 For example, Inglés 1963, p. 13; Turack 1972; Hannum 1987, p. 20; Torpey 1999; Boeles et al 2014, p. 120.

121 Conversely, in some cases the formal notification by a transit country that it will accept the readmission of a third-country national can be used in lieu of a travel document, and no separate action in regard of travel documents will thus be needed, see 8.1.2.

member state to the destination country (*return element (iii)*). This generally means booking international transport and other arrangements to make travel possible. It also means clearing any obstacles to departure from the member state. This is another area in which concrete do's and don'ts as regards the obligation to return need to be identified.

Together, these three return elements thus provide a roadmap to establishing concrete actions that third-country nationals can and cannot be expected to take in returning voluntarily. This does not mean that other actions might not be relevant, but this would at least cover the types of actions that almost all third-country nationals coming within the scope of the Directive will have to take. In this respect, it should be noted that the actions that they can and cannot be expected to take provide two sides of the same coin. While sometimes concrete obligatory actions may be identified, it may also be the case that what member states can legitimately expect can only be defined negatively, by reference to actions that definitely cannot be expected. In this way, the process of making the nebulous concept of the obligation to return a bit more concrete will likely leave a grey area between actions that third-country nationals clearly have to take, and those that they cannot be expected to take. However, even in this way, it will provide a more solid basis than is currently available for assessing their compliance with the obligation to return during the voluntary departure period. As a result, each of the subsequent chapters dealing with the various elements of the obligation to return will try to provide answers to sub-questions 1a and 1b simultaneously.

It should be noted that this is not the case for sub-questions 2a and 2b. Although the issues of the entitlement to a voluntary departure period and the appropriate length are also connected, these are much more clearly laid down in the specific provisions of Article 7 of the Directive.[122] Analytically, they can more easily be separated, which allows for more in-depth discussion. The precise treatment of each of the sub-questions in the various chapters, including the return elements in relation to the obligation to return, will be discussed in section 1.5.

1.4.2.2 A triangle model for dealing with questions of responsibility

While the focus of this analysis is on the responsibility of third-country nationals, it is important to recognise that this responsibility does not exist in a vacuum. Not only are third-country nationals responsible *for* something (return), they also hold this responsibility *towards* someone or something, in this case the member state which has imposed this responsibility on them. In other words, responsibility is the product of a specific relationship between the third-country national and the member state. And this relationship is a two-way street. While the individual is responsible to the member

122 With the first mainly relying on Recital 10 and Article 7(4), with some elements of Article 7(3) as regards absconding, and the second being rooted clearly in Article 7(1) and 7(2).

state for fulfilling the obligation to return in a timely manner, the member state also has responsibilities, not least to safeguard the third-country national's fundamental rights during the return process. In legal terms, the rights and obligations that the third-country national and the member state hold vis-à-vis each other form the basis for this responsibility.

This means, in principle, that all the questions posed in relation to voluntary return could be approached from two sides. When talking about the extent of the actions third-country nationals must take to return, we may consider the state's rights to impose obligations, but also the individual's rights not to take certain actions. Similarly, the individual's entitlement to a voluntary departure period and the scope and limits of the state's ability to deny such a period under the Directive are two sides of the same coin. Furthermore, the relationship between the individual and the member state is dynamic. Specific actions and omissions on the part of one may have implications for the rights and obligations of the other. Seeing the scope of voluntary return not as a static issue, but as a dynamic one that is shaped by the relationship between the actors involved is a key element of the approach taken here. This relational approach becomes particularly important as voluntary return is not only shaped by the third-country national and the member state, but also by other actors, whose role should be taken into account.

Identifying the way these rights and obligations between third-country nationals and member states impact on the former's responsibility is one part of the puzzle, but by no means the only one. It merely identifies what could be termed the 'internal' dimension of the Directive's provisions. But this analysis also requires adding an 'external' dimension. While the rules in the Directive pertain only to the way EU member states should relate to third-country nationals staying on their territories, the fulfilment of these rules, by definition, stretches across the borders of the EU. The essence of the obligation to return, after all, is that third-country nationals move to a country *outside* the EU. This is ingrained in the definition of return, which – as noted – does not just require third-country nationals to leave the EU member state, but requires them to return to a non-EU state. Whether this can take place does not only depend on the actions and omissions of third-country nationals, but also on the extent to which the country of return allows them to enter. And, additionally, whether third-country nationals manage to obtain travel documents, which will also (usually) be in the hands of a non-EU state.[123] The importance of the cooperation of third countries is explicitly acknowledged in the Directive.[124]

The introduction of the country of return creates two new relationships of interest. First of all, there is the relationship between third-country nationals and the country to which they seek to return. But there is also a relationship between the country of return and the EU member state.

123 Although the state issuing travel documents is not necessarily the state of return, see 1.4.4.3.

124 RD Recital 7.

While in the context of voluntary return, it should mainly be third-country nationals who take action towards the country of return, many rules that govern return have been agreed between states. As such, the rights and obligations that the EU member state and the country of return hold towards each other may play an important role in shaping the boundaries of the concept of voluntary return. The analytical usefulness of separating out these different relationships to enhance the understanding of the legal issues arising in return situations has previously been noted by Noll.[125] This is particularly so for ensuring that the legal obligations involved are addressed to the appropriate actor, and that those obligations can be clearly defined.[126] Following on from this approach, schematically, the three sets of relationships – between the third-country national and the EU member state, the third-country national and the country of return, and the country of return and the EU member state – form a triangle (see figure 1 below).

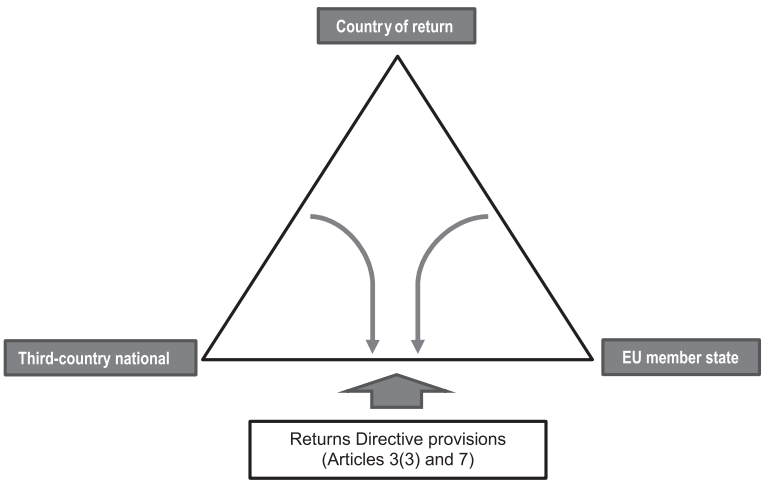

Figure 1: voluntary return as a triangle of relationships

The relationship between the third-country national and the EU member state is regulated by the Directive (the internal dimension). The other two are regulated by norms that are generally outside the scope of the Directive and thus represent an external dimension. Nevertheless, the analysis in this dissertation rests on the assumption that these external rules can and should play an important role in clarifying the boundaries of voluntary return within the Directive. Some of these rules may produce effects within the EU legal order, and could thus directly shape the interpretation of the relevant provisions in the Directive, which need to be applied in accordance with international law.[127] However, even when such direct effect in the EU legal

125 Noll 1999, p. 276; Noll 2003, pp. 62-63.
126 Noll 2003, pp. 70-74.
127 RD Article 1.

order does not exist, the importance of the external dimension for fulfilling the objectives of the Directive should, at the very least, prompt interpretations that are, as much as possible, consistent with the rules governing both the relationship between the third-country national and the country of return and that between the country of return and the EU member state. Discounting this external dimension would lead to a warped view of the Directive's provisions, in particular the obligation to return. After all, as noted, if countries of return are unwilling or unable to cooperate in the return of third-country nationals, this would make their obligation de facto impossible to meet.

To be of relevance to the analysis, this triangle model needs to be filled with concrete legal norms. The identification of these norms is an important step that requires some explanation as to their applicability to the topic of voluntary return and their possible effect on the provisions of the Directive. For this reason, the identification of the appropriate legal framework will be presented separately in Chapter 2, which will precede the substantive analysis of the component parts of voluntary return and the third-country national's responsibility.

Broadly speaking, this identification will be based on the presumption that voluntary return contains both elements of expulsion and international movement. From an international law perspective, expulsion deals with compelling the return of a non-national who is not or no longer allowed to stay on a host state's territory. As will become evident, voluntary return in the Directive should be considered a specific form of expulsion.[128] However, since third-country nationals are given an opportunity to make their own arrangements and to travel to the state of return freely, returning in this way will also have some characteristics of the process of crossing borders that are applicable to any person, regardless of the reason for their travel. As such, international rules on departure from states and entry into them may also provide some guidance for examining the scope of voluntary return. Relevant rules on expulsion and international movement can be found in particular in customary international law, certain international human rights instruments, a number of multilateral treaties governing different aspects of movement, and agreements concluded specifically on return and readmission by EU member states, either individually or collectively, with third countries. This complements the tools available within the EU legal order, such as the case law of the CJEU, the object and purpose of the Directive, the clarification of certain concepts in related EU legislation, fundamental rights, and, as a supplementary means, other 'soft law' guidance produced on the Directive. Taken together, they provide a rich palate of norms and principles from which to draw a closer analysis of the notion of voluntary return and the scope of the responsibility allocated in this respect to the third-country national.

128 See 2.3.1.

1.4.3 Scope of the analysis and limitations

Although the analysis of voluntary return and its meaning in the Directive aims to be broad-ranging, it will be subject to certain limitations, with regards to the specific part of the return procedure addressed, the scope of actors included, and the role of national practices. These will be discussed in turn below.

1.4.3.1 Specific focus on the voluntary return stage

As noted above, the focus of this dissertation is the scope of the responsibility of third-country nationals as arising out of the concept of voluntary return. It therefore limits its focus to the voluntary return stage of the Directive. This means, first of all, that it is not concerned with the process that precedes it. Questions about third-country nationals' admission to the EU member state, including any asylum procedure or other processes they have gone through, are not included in the analysis. Although I acknowledge that this may be an important part of the legitimacy of return,[129] as well as third-country nationals' acceptance of voluntary return, this analysis will not deal with whether the decision to require them to return was, in and of itself, fair. It only concerns itself with the application of the standards related to the implementation of the return. In this respect, it takes the issuing of a return decision as its starting point. Although there are important questions about such a decision as well, including the coming together of asylum decisions and return decisions, these are not addressed.[130]

Second, just as issues preceding voluntary return are excluded, so are issues that follow it, at least to a large extent. Questions of voluntary return and enforcement are closely related. After all, if a period for voluntary departure is not granted, or if third-country nationals have not complied with their obligation to return within that period, member states should enforce the return decision. What happens, and what does not, during the voluntary departure period thus has an impact on the issue of enforcement. This is also a key reason why it is important to establish more clearly what can be expected, and what not, of a third-country national in relation to voluntary return. This, after all, will have relevance for the use of coercive measures by the member state during the enforcement stage. This interlinkage will be discussed to some extent, especially in the discussion

129 In this respect, Cavinato warns that "in the absence of specific procedural safeguards and of fair and efficient asylum system[s] in some Member State[s], the risk of *refoulement* could still arise for third country nationals who may have international protection needs." Cavinato 2011, p. 48 (citations omitted).

130 On the interaction between the asylum procedure and the Directive, see, for example CJEU C-181/16 *Gnandi* [2018] and Progin-Theuerkauf 2019a. The Pact on Migration and Asylum, presented in September 2020, also seeks to connect more closely the asylum and return procedures. As such, the question of their interaction will likely become even more important in the future, but is not dealt with here.

of the length and end of the voluntary departure period.[131] Furthermore, the obligation to return, which is discussed here with regard to voluntary return, may have residual effects during the enforcement stage, for example with regard to the third-country national's cooperation with the steps necessary to remove him or her.[132] Despite this interlinkage between voluntary return and enforcement, the discussion will be limited to those points that are closely connected to the concept of voluntary return, as encompassed mainly by Articles 3(3) and 7 of the Directive. As mentioned, analyses of the enforcement stage in its own right, including the use of detention and other coercive measures, as well as the use of instruments such as the entry ban, have been provided by others, often in great detail.[133] They are not included here.

Third, the focus is on the substantive responsibility of third-country nationals as part of the concept of voluntary return. The analysis will therefore not pertain in substance to the treatment of third-country nationals by member states during the voluntary departure period, such as in relation to questions of reception conditions or access to health care.[134] The same goes for the undoubted gap the Directive leaves in resolving the situation of third-country nationals who, for whatever reason, cannot return or be returned. These are important questions that certainly closely relate to, but are slightly distinct from, the core normative issue of how the scope of individual responsibility to return voluntarily should be demarcated. Similarly, while the analysis deals in depth with questions of denial and the appropriate length of voluntary departure periods, questions of remedies against decisions on such matters remain outside its scope.

1.4.3.2 The scope of return issues

As mentioned above, an important blank spot in the Directive is that it leaves considerable open questions about what it means to 'return.' My initial attempt at providing an analytical framework for this, setting out the three main elements of the process of going back (readmission, travel documents and making arrangement for departure), is necessarily limited. Although getting third-country nationals from the EU member state in which they are staying to a country of return is clearly a key element of return, there are various aspects that could be added. Importantly, this would include the question of the third-country national's situation following arrival in the country of return. The analysis will address this matter to some extent in

131 See 11.3.

132 See in particular RD Article 15(1)(b) on the avoidance or hampering of the preparation of the return or removal process in respect of the legitimacy of detention, and Article 15(6) on lack of cooperation as a factor in extending the period of detention.

133 Note 5 above. On the entry ban, also specifically see Majcher 2020, part 3.

134 Although such issues are briefly touched upon in regard of member states putting 'undue pressure' on individuals to take up voluntary return, which may have an impact on the prohibition of refoulement, see 7.3.4.

relation to possible risks that the post-return situation might entail, and how this impacts on the responsibilities of the individual. However, it does so mainly by looking at issues related to *refoulement* in the country of return or dangers on the route to that country.

Although the analysis focuses on the responsibilities of individuals, it could be said that this approach is still quite state-centric in the sense that the situation of those individuals is mainly regarded in relation to their rights and obligations vis-à-vis states. It is important to acknowledge that, from the side of third-country nationals, the issue of return is much broader than just this legal (or, some might say, legalistic) matter. For example, for individuals, issues of insecurity in the country of return, or their perceptions thereof, may fall short of the bars set by the relevant legal frameworks on return in a way that would affect their rights and obligations towards the EU member state. However, even if such issues do not have a legal effect on the relationship with the EU member state, they may play an important role in individuals' choices and (in)actions with regard to returning voluntarily, which may then impact on the question of compliance. Similarly, the question of the socio-economic situation that individuals might find themselves in after return may play a very important role in shaping their engagement with the voluntary return process and their eventual compliance with the obligation to return. This importance, for the individual but also for the success of the voluntary return process, is increasingly acknowledged, for example, in the expansion of reintegration assistance provided to returnees. However, there are also important questions whether such assistance in and of itself can seriously impact on the prospects that individuals will have after their return.[135]

In the analysis, such important but complex questions of the interconnection between the (expected) post-return situation and the responsibility of individuals to return voluntarily from an EU member state are largely left outside the scope of this discussion. Whereas, as noted, there is a role to play for the potential risks associated with return, the question of the (expected) socio-economic situation of individuals faced with voluntary return is beyond its scope. While the issue is touched upon briefly in the discussion of specific elements, especially where such issues interconnect with questions of *refoulement* and safe return,[136] doing justice to this complex question would likely require a completely new dissertation.

1.4.3.3 The limits of the triangle model

As discussed in 1.4.2, the analysis is limited to the three key actors discussed above: the third-country national, the EU member state, and the destination state. However, it should be noted that the triangle model above, although already giving rise to sufficient complexity, is itself a simplification. Other

135 Strand et al 2008; Kuschminder 2018.
136 See 7.3.

actors could similarly be relevant in the voluntary return process. One issue with the triangle model that already has been identified is that, in some cases, the country of return and the country responsible for issuing travel documents to third-country nationals may be different. In such a situation, the model would more appropriately be a square, with the country responsible for issuing travel documents being connected to both the EU member state (regarding inter-state obligations to issue travel documents) and the third-country national (regarding human rights-based obligations). Although the analysis will mainly focus on situations in which the country of readmission and the country responsible for issuing travel documents overlap, the potential divergence cannot be ignored given the centrality of the question of obtaining travel documents.

However, even in such an expanded scope of actors, there are still many that may play a role but are not captured in this model. This includes countries that third-country nationals may have to pass through on their way back from the EU member state to the intended destination. This may be necessary if, for example, there are no direct transport links to the individual's intended destination.[137] They also include facilitators of voluntary return, such as the International Organisation for Migration or other international institutions, or non-governmental organisations (NGOs). Although the role of return assistance is discussed with regard to the third-country national's rights and obligations, the role of such organisations is not explored in detail. Furthermore, private individuals, such as the third-country national's family members and other contacts, either in the country of destination or in the EU member state, could play a role in ensuring all necessary information to make return possible. Their specific rights and obligation, if any, in the voluntary return process, are not specifically incorporated. On the side of EU actors, the subsequent chapters focus specifically on EU member states, which are in the end the ones that must implement the Directive, and thus give shape to the notion of voluntary return. However, EU agencies, specifically the EU Border and Coast Guard Agency (Frontex) will play an increasingly large role in return, including the implementation of voluntary returns.[138] This development notwithstanding, it will be left outside this analysis.

137 Somewhat confusingly, such countries to pass through on the way back may also be called 'transit countries.' They may be third countries, but also other EU member states. Furthermore, the fact that returnees pass through them on their return trip may be completely unrelated to whether they did so on their initial journey to the EU member state. As such, these are different 'transit countries' than those meant in Article 3(3), which deals with the destinations to which third-country nationals can be expected to return.

138 Regulation 2019/1896, Article 48(1)(a)(iii) and (iv), OJ L295/1, 14 November 2019. Also see, for example, Frontex 2020b and 2020c regarding the agency's facilitation of voluntary returns on charter flights.

1.4.3.4 *Specific circumstances of the actors included in the analysis*

Finally, the analysis focuses, as much as possible, on providing generally applicable clarifications of the key components of voluntary return and their implications for the responsibility of the individual. Since the analysis presented here is, to my best knowledge, the first in-depth attempt at scoping out the responsibilities of individuals for voluntary return, I will mostly look at the general rules applicable to all third-country nationals covered by the Directive. The situation of specific groups mentioned in the Directive, especially vulnerable groups, will largely remain outside the picture, unless specific sources outlined in Chapter 2 give rise to this.[139] This does not mean that these vulnerable groups do not warrant attention. However, as will become clear from the subsequent chapters, even unpacking the general rules is already a complex endeavour. This is especially the case because the circumstances of each and every case are unique and these will determine the outcomes of decisions about the scope of obligations for which the third-country national can be held responsible, as well as about the voluntary departure period.[140] Discussing specific sub-categories of third-country nationals covered by the Directive in detail would risk drawing attention away from the generally applicable rules, which still require considerable clarification.

Similarly, the analysis does not seek to incorporate issues arising out of specific states' administrative and judicial practices. It is of course in the member states where these provisions truly take shape and impact on individuals. The Directive as such does not impose obligations on individuals. Rather, member states must ensure that their own obligations under the Directive are accurately and effectively translated into obligations for individuals under national law. Member states may and do deal with this in different ways, and these may thus have different impacts on the scope of individual responsibility allocated to third-country nationals. However, the harmonisation of standards and procedures that the Directive aims to achieve also necessarily limits member states' discretion in this regard. From this perspective, the analysis seeks to identify some of those limits, without prejudice to areas where member states may choose different approaches. In this respect, the approach taken in the analysis is top-down. It extrapolates from norms of EU and international law to draw conclusions that should be applicable, at a minimum, in any member state implementing the Directive.[141]

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139 In this respect, although I will refer to the Trafficking Protocol, it is not my intention here to present a comprehensive analysis of the application of the Directive's provisions on the return of victims of trafficking. Similarly, as already noted above, I will not specifically deal with the situation of minors.

140 For a typology of irregular migrants and their different situations, see Carling 2007.

141 Similarly, the analysis will only look at the norms that would apply to all – or at least the vast majority – of countries of return, as a matter of international law.

As discussed above, it is this overarching normative approach that seems to be distinctly lacking in the current understanding of voluntary return in the Directive, and this will therefore be prioritised in this dissertation. At various points the analysis does acknowledge that national laws or regulations, for example on the admission of aliens or the provision of travel documents, may indeed impact on the situation of third-country nationals in specific ways. But it does not engage with this beyond those points where EU or international rules set specific limitations for such national rules.

By taking this approach, some of the discussion is necessarily somewhat abstract, talking about third-country nationals, EU member states and countries of return outside of the specific individual or national contexts in which issues of voluntary return need to be resolved. However, as an initial exercise in determining the contours of individual responsibility in relation to voluntary return, I believe that taking such an overarching, more abstract, approach is justifiable. Comparative research on the implementation of the Directive across member states, or doing in-depth case studies of return situations from a particular member state to one or several specific countries of return, may provide further insights. But combining these various approaches would likely make this analysis too unwieldy. However, to avoid certain issues becoming too abstract, examples drawn from real life, whether national judgments, policies or operational practices, are sometimes given to help provide background to particular points, and hopefully put the reason why such abstract discussions are included into a more practice-oriented perspective. In addition to some insights drawn from EU-wide evaluations of the Directive,[142] most of the practical examples have been taken from cases involving the Netherlands. This is, on the one hand, because the country has a long history, which precedes the Directive, of framing the issue of (voluntary) return as a question of individual responsibility,[143] something which has shaped the way it has handled different dilemmas that may arise in the voluntary return process, helping to make these visible. On the other hand, it is also simply the result of the fact that the Netherlands is the member state that I know best, where I have done a considerable part of my professional work on issues of return and where, as a result, many of the dilemmas that inspired the questions at the heart of this dissertation first arose. It should be kept in mind though, that these are illustrations to help the reader, and should not be perceived at attempts to provide a systematic analysis of the country's compliance with the interpretation of the Directive's provisions provided here.[144]

142 See, for example, European Commission 2013; Moraru & Renaudiere 2017.

143 Mommers & Velthuis 2010, p. 18.

144 Although inevitably, there will be certain examples that, on the basis of the more general analysis, must be identified as contradicting this interpretation.

1.4.3.5 *Time limits on sources used*

Unless specified otherwise, the analysis reflects the state of play in terms of the content of legal instruments,[145] case law of the CJEU and bodies supervising international instruments, or other sources used, at the end of April 2021. Some updates on relevant factual developments have subsequently been included up to the end of August 2021.

1.5 Chapter overview

The discussion in this dissertation will look as follows. *Chapter 2* will continue setting the scene for the substantive analysis of individual responsibility to return voluntarily. It will do so by providing, first of all, further background about the role that voluntary return plays in wider EU return policy, both conceptually and in practice. Secondly, it will discuss the various legal sources on which this analysis will draw, discussing their relevance to the issue of voluntary return, the place they occupy in the triangle model, and how they may impact on the interpretation of the Directive's provisions. And thirdly, it will clarify some of the concepts and terminology used.

Based on the frameworks set out in this chapter and Chapter 2, the other chapters will deal with the research questions in substance. This substantive discussion will be divided into two main blocks. The first block, consisting of Chapters 3 to 9, will discuss the questions related to the scope of the obligation to return. As noted above, questions 1a (on the steps third-country nationals must take) and 1b (on the steps which they cannot be expected to take) will often overlap, and they will be discussed simultaneously in these chapters. It was also noted that the discussion of these questions would cover three specific points which can be considered key elements of successful return: seeking readmission, obtaining travel documents, and making practical arrangements and leaving the EU member states.

The first element, identifying appropriate destinations and seeking readmission, will be discussed in four different chapters. *Chapter 3* will focus on the extent the specific categories of destinations set out in Article 3(3), namely the country of origin, transit countries, and other third countries, can indeed be considered obligatory. In other words, whether, and if so under which circumstances, third-country nationals can indeed be expected to return to such destinations, and be held responsible for their efforts in doing so. This chapter will find that only the country of origin and transit countries can be considered obligatory. As a result, *Chapter 4* will discuss readmission to the country of origin in more detail. It will look at the specific readmission obligations of countries of origin and what this

145 Some of which are regularly updated, such as the Chicago and FAL Conventions' Standards and Recommended Practices, see 2.7.1.

means for the precise steps that third-country nationals should and should not take in triggering those obligations to facilitate their voluntary return. However, it will also identify potential dilemmas regarding different sets of readmission obligations, notably those based on customary international law and inter-state agreements on the one hand, and those based on human rights obligations on the other. As a companion to Chapter 4, therefore, *Chapter 5* will present a discussion of the way these frameworks interact and what this means for individuals faced with an obligation to return. Following this, attention will turn to readmission to transit countries. Again, this will look at the specific readmission obligations of such transit countries and what implications this has for third-country nationals, together with EU member states, for the triggering of such obligations. This will be the focus of *Chapter 6*. Finally, the discussion of the first return element of readmission will be wrapped up in *Chapter 7*, which will look at the extent to which third-country nationals have a choice in picking their destinations, and what the role of concerns about the safety of certain destinations may play in this.

Chapter 8 will shift attention to the second element of the obligation to return, comprising action to obtain travel documents. It will set out in which situations this obligation is relevant, and to which authorities third-country nationals can be expected to turn for this purpose. It also discusses issues related to the individual's interactions with consular authorities, including ensuring effective access to them, and dealing with fees to be paid for such documents. Furthermore, it looks at the prevention of the use of fraudulent documents in the voluntary return process and the possibilities of EU member states to act as issuing authorities.

Chapter 9 will then turn to the third element of the obligation to return, making practical arrangements for return and leaving the EU member state. This will focus on three issues that may affect the scope of the individual's obligations: the fulfilment of any exit requirements, the role of return assistance, and the question when a person can actually be considered to have 'returned' within the meaning of the Directive.

The second, much shorter, block of chapters consists of Chapters 10 and 11, dealing with issues pertaining to the voluntary departure period, as set out in questions 2a and 2b. *Chapter 10*, first of all, deals with question 2a by assessing the exact nature of the priority of voluntary return and the connected matter of the individual's entitlement to a voluntary departure period. It will look at the general principles governing the priority of voluntary return, as well as the role of each of the three specific grounds for denying such a period. It will also consider the possibility of member states to issue a period shorter than seven days. *Chapter 11* subsequently covers research question 2b, by looking at the appropriate length of any voluntary departure period that is granted to third-country nationals. This will cover the basis on which the length of an initial voluntary departure period should be established, as well as decision making about the extension of such a period or, alternatively, cutting short an existing period.

Chapter 12, finally, presents the overall conclusions of the analysis. It will bring together the findings from both sets of research questions, related to the obligation to return and the voluntary departure period, while also offering more general conclusions on the notion of responsibility inherent in voluntary return. But it will also provide concrete answers on the application of its provisions on the obligation to return and the voluntary departure period. This will be done in the form of suggested guidelines, which may assist member states in applying the notion of individual responsibility for voluntary return in a fair and transparent manner, in compliance with fundamental rights, and consistently with the external dimension of the return process.

A schematic overview of the way that the research questions will be tackled, and their relation to the various chapters in this dissertation, is provided in box 1 on the next page.

Box 1: Schematic overview of chapters and relation to research questions

Background and legal framework → **Chapter 2**

Research questions 1a and 1b (scope of the obligation to return):
- *Return element (i)* (identifying relevant destinations and readmission):
  - Identifying obligatory destinations → **Chapter 3**
  - Readmission to countries of origin:
    - Readmission obligations of the country of origin → **Chapter 4**
    - Ineffective inter-state obligations and the right to return → **Chapter 5**
  - Readmission to transit countries → **Chapter 6**
  - Choice of destinations and avoiding unsafe returns → **Chapter 7**
- *Return element (ii)* (obtaining travel documents) → **Chapter 8**
- *Return element (iii)* (practical arrangements and departure) → **Chapter 9**

Research questions 2a and 2b (application of the voluntary departure period):
- *Research question 2a* (entitlement to a voluntary departure period) → **Chapter 10**
- *Research question 2b* (length of the voluntary departure period) → **Chapter 11**

Conclusions → **Chapter 12**

2 Background and legal framework

2.1 Introduction

This chapter acts as a bridge between the research questions set out in the previous chapter and the substantive analysis of each of the points identified in the later chapters. It does so in three ways. First, in section 2.2, it will provide further background to the matter of voluntary return. In particular, it will outline some of the historic reasons for prioritising voluntary return within EU policy, and elevating it to a legal standard applicable to member states. It will focus on presenting what the (perceived) benefits of giving preference to voluntary return are, both for member states and third-country nationals. It will also provide some figures and explanation of the role that voluntary return currently plays in return policy, especially as regards ensuring effective returns. Finally, it will also briefly outline how, despite these benefits and the importance for return policy, the notion that voluntary return should be prioritised may be under pressure.

Second, in the main part of this chapter (sections 2.3 to 2.9), the focus will be on setting out the legal framework for the analysis. In the previous chapter, mention was made of a range of EU and international norms that could be used to help clarify the scope of the relevant provisions in the Directive, even when they do not explicitly refer to voluntary return. Before going into specific sources of such norms, section 2.3 will discuss the importance of recognising voluntary return as both a form of expulsion and as related to international movement more generally. The linking of these various topics is of particular importance to identify which elements of international law are relevant to the issue of voluntary return.

This is followed, in section 2.4, by a discussion of specific sources, starting with the most obvious, namely norms of EU law itself, in particular case law of the CJEU on the Directive, other secondary law instruments with relevance to the Directive, and fundamental rights. The latter provides a natural transition to the role of international human rights norms. Section 2.5 discusses the dual role they play in this analysis, as they may impact both on the relationship between third-country nationals and the EU member state, and those individuals and the country of return. While a range of human rights norms are relevant, special attention will be paid to the rights to leave and to return, as key components of a successful return.

Section 2.6 examines the role of customary international law in the analysis, which again impacts on different elements. This includes the way in which the departure of third-country nationals from EU member states

is implemented, as an act of expulsion, and the question of readmission of expelled persons, which affects the relationship between the EU member state and the country of return.

Section 2.7 looks at the relevance of multilateral treaties for the question of voluntary return. It identifies, in particular, the international agreements on smuggling and trafficking in human beings, as well as those related more generally to air and maritime travel, as potentially having an impact on questions of return under the Directive, although their role will be much more limited than the sources and instruments discussed above.

Section 2.8 analyses the role of specific readmission agreements, concluded by the EU or individual member states with countries of return. Although EU readmission agreements are limited in number, and thus in terms of their practical impact on the overall practice of voluntary return, they deserve attention as instruments particularly designed to deal with the question of return and as a key tool to deal with the external element of return.

Finally, as regards the legal framework, section 2.9 discusses the role of various 'soft law' instruments, such as Commission recommendations, the Return Handbook, and other guidelines that may steer the interpretation of the relevant provisions of the Directive. Based on the various sources discussed in the above-mentioned sections, an update of the triangle model, with concrete norms that will help inform the analysis of the boundaries of individual responsibility for voluntary return, is also presented here.

In section 2.10, the third and final way part of this scene-setting chapter is provided. It aims to clarify several concepts and terms connected to the question of voluntary return, or otherwise of importance in relation to the Directive. It aims to distinguish this from other concepts with which they may be confused, and explains what terminology will be used in the following chapters. Some concluding remarks are provided in section 2.11.

2.2 Background

As noted above, this section provides background information that will help provide context to the discussion that follows in the subsequent chapters. First, it will set out how the priority for voluntary return evolved over the years from a good practice into a legal principle enshrined in the Directive. More specifically, the discussion will focus on the possible benefits that the drafters may have seen in making voluntary return the preferred option, both for member states and for third-country nationals (2.2.1). Second, it will look at the specific contribution that voluntary return plays in practice in achieving effective return of those not or no longer allowed to remain in EU member states (2.2.2). Finally, some comments will be made about the extent to which the priority of voluntary return may be under pressure (2.2.3).

2.2.1 The (perceived) benefits of giving legal priority to voluntary return

The idea that third-country nationals should be encouraged, or compelled, to leave EU member states of their own accord is hardly new.[1] The origins of the notion that migrants should be stimulated to return voluntarily can be found in policies developed in several western European countries from the 1970s onwards.[2] These initially focused on facilitating the return of so-called 'guest labourers,' but quickly also looked at possibilities to stimulate the voluntary departure of persons who did not, or no longer had, a right to remain in a particular member state. This included persons irregularly staying, but also those who had received international protection after fleeing conflict, and who were expected to return once that conflict was resolved. The clearest example of initiatives to encourage voluntary return were the assisted voluntary return (AVR) programmes discussed below,[3] which were first set up in the Federal Republic of Germany at the end of the 1970s, and subsequently adopted by others, such as Belgium in the mid-1980s and the Netherlands in the early 1990s.[4] These AVR programmes were generally paid for by the member states' governments and implemented by the International Organisation for Migration (IOM), an intergovernmental body providing 'migration services.'[5] Such programmes have now become commonplace throughout the EU.[6]

From the 1990s onwards, in addition to stimulating return assistance, there has been an EU level process to better coordinate member states' return policies. The European Commission has been instrumental in pushing this agenda forward by promoting harmonisation based on common principles, standards, and procedures. Early on in this process, the Commission identified the priority for voluntary return as one of the key principles on which a harmonised approach should be based. The Council has traditionally been more hesitant about harmonisation in general, and the inclusion of voluntary return as a key principle more specifically.

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1 Ensuring the individual's voluntary compliance with the obligation to leave, is a "primary consideration" of return policies, according to Noll 2000, p. 246.

2 Mommers & Velthuis 2010.

3 See 2.10.1.3. In recent years, these have generally been referred to as 'assisted voluntary return *and reintegration*' programmes, or AVRR, reflecting the fact that post-return reintegration assistance has become an increasingly important, and more frequently provided, part of the assistance package offered.

4 Mommers & Velthuis 2010.

5 IOM Constitution, including amendments up to Resolution 1385 of 28 October 2020, adopted by the Fourth Special Session of the Council of IOM, Article 1(c). Also see Article 1(d), which lays the basis for the provision of services "as requested by States, or in cooperation with other interested international organizations, for voluntary return migration, including voluntary repatriation." For a critical discussion of IOM's role in migration management, see, for example, Ashutosh & Mountz 2011, and in relation to its implementation of assistance programmes, see, among others, Koch 2014; Majcher 2020, pp. 568-573.

6 See 9.3 for further information about assistance programmes.

However, when it eventually came around to the need for harmonisation through legislation, the basic idea that voluntary departure should be the first step seems to have been accepted as well. It was a key element of the Commission's first proposal for the Directive in 2005, and survived negotiations relatively unscathed, although there were a number of changes to the original provisions.[7] None of these fundamentally challenged the need to try and have irregular migrants leave of their own accord as much as possible though.

It should be noted that the idea of laying down the priority of voluntary return in law also precedes the Directive. Several EU member states' domestic migration laws already contained provisions on voluntary departure, some of which in quite similar terms to those in the Directive. For them, the Directive may have required to make certain changes, or to incorporate more specific rules on the granting, extending or refusing of a voluntary departure period. For others, however, it was only with the transposition of the Directive that their national laws came to include specific provisions on voluntary return.[8]

While the Directive is, so far, the culmination of the move towards prioritising voluntary return that has taken place over decades, its text mostly leaves implicit why such prioritisation might be useful or necessary. As noted, the Directive aims to ensure both the effective and the humane and dignified return of third-country nationals from member states. It may be assumed that the centrality of voluntary return is the result of its possible contribution to both these goals. This is confirmed by looking at past documents of the EU institutions in which the role of voluntary return was discussed before the adoption of the Directive.

In relation to the situation of the third-country national, the Commission in various documents emphasised the benefits of voluntary return. For example, in its 2002 Green Paper on a Community Return Policy, the Commission noted that forced return represented "a very significant encroachment on the freedom and the wishes of the individual concerned."[9] In the Green Paper and subsequent documents, the Commission reiterated

7 For example, with regard to the voluntary departure period, no minimum length was provided, but it was simply suggested such a period should be "up to four weeks." It also did not include provisions on extending the voluntary departure period. And with regard to denying a voluntary return period, the initial proposal only mentions the risk of absconding and not the other two grounds currently also included. It also lacked today's definition of voluntary departure. Its definition of return contained the same three destinations, but in a slimmed-down version. For example, return to a transit country was not yet qualified by the phrase "in accordance with Community or bilateral agreements or arrangements." Similarly, although return to another third country was already part of the definition, the somewhat confusing phrase "to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted," was not.

8 Acosta, for example, points to the fact that Spain only introduced a voluntary departure period in its laws once it had to the transpose the Directive. See Acosta 2011, p. 13.

9 COM(2002) 175 final, 10 April 2002, paragraph 3.1.

that it would be sensible to give priority to voluntary return "for obvious humane reasons."[10] Although the Council has traditionally been more hesitant to translate the promotion of voluntary return as a good practice into a binding principle giving it priority over forced return, it has not been blind to the human dimension. As early as 1997, it noted that encouraging voluntary return "is in line with the European humanitarian tradition and may contribute to finding a dignified solution to reducing the number of illegally resident third-country nationals in the Member States."[11] Since it reduces interferences with third-country nationals' rights as compared to forced return, the inclusion of the priority of voluntary return in the Directive seems at least part of the translation of the European Council's call for "an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity" in its 2004 Conclusions,[12] as subsequently include in the Hague programme in 2005,[13] which laid the basis for the initial proposal for the Directive. The role of voluntary return as a mechanism to safeguard the fundamental rights of third-country nationals was recognised by the CJEU in 2015.[14] As such, voluntary return is presumed to be of benefit to third-country nationals, by giving them a way to avoid removal and the far-reaching consequences associated with it.[15]

With regard to the benefits of voluntary return for member states, the main focus in historical documents has been on its role in minimising administrative and financial burdens.[16] In 1994, the Commission first noted that voluntary return "can be cost-effective, when compared with the costs involved in involuntary repatriation."[17] In the 2002 Green Paper, the Commission emphasised, in addition to the humane element, that "voluntary return requires less administrative efforts than forced return."[18] In a subsequent Communication it added that voluntary return should be prioritised not only due to costs and efficiency, but also sustainability.[19]

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10 *Ibid*., paragraph 2.2.

11 Council doc. 97/340J/HA, Council Decision of 26 May 1997 on the exchange of information concerning assistance for the voluntary repatriation of third-country nationals.

12 Council of the EU, Presidency conclusions, Brussels European Council, 4-5 November 2004, paragraph 1.6.4.

13 OJ C 53/1-14, 3 March 2005, paragraph 1.6.4.

14 CJEU C-554/13 *Zh. and O.* [2015]. The judgment is discussed in detail in Chapter 10.

15 It has even been suggested that voluntary return also preserves the dignity of those charged with removal. See Council of Europe Commissioner for Human Rights 2001, para 13: "The best way to avoid using methods which might traumatise both those being expelled *and those responsible for enforcing expulsion orders* is to have the person concerned agree to return voluntarily." (my emphasis).

16 In this context, Noll has noted that "stringent return practices require considerable financial, personal and organisational resources." See Noll 2000, p. 245.

17 COM(94) 23 final, paragraph 111. Also see PACE 2010.

18 COM(2002) 175 final, 10 April 2002, paragraph 2.2.

19 COM(2002) 564 final, 14 October 2002, Communication on a Community Return Policy, paragraph 1.2.2.

The Communication does not elaborate on this, and it is unclear whether the Commission refers here to the sustainability of return simply in terms of third-country nationals staying in their country of return and not attempting to re-migrate to Europe, or whether this also involves their socio-economic reintegration after return.[20]

There may be other reasons why member states would want to prioritise voluntary return, which are not covered so explicitly in EU documents. Apart from efficiency considerations, voluntary return may also be an important tool in relation to the wider political and social context in which returns take place. From a domestic perspective, there are distinct benefits to putting voluntary return at the heart of the procedure. Whilst there is usually political and public pressure on member states' governments to take a tough line on irregular migration,[21] forced returns also evoke criticism and sometimes resistance.[22] Forced returns often trigger questioning of policy and may drive public action, such as petitions or demonstrations, or sometimes direct action to prevent removals. Whilst voluntary return is not beyond criticism, it tends to be perceived as a more 'friendly' approach and is therefore less likely to evoke strong negative reactions from the general public or politicians. A stronger focus on voluntary return thus helps create an atmosphere that may be more conducive to the effective implementation of return policy. Once voluntary return fails, it may also be more socially acceptable to enforce the return, and to use detention.[23]

Apart from the domestic political setting, there is also an international relations element. As recognised in various policy documents, cooperation with countries of return is an essential component of a successful return policy, and a "sensitive approach" to this is needed.[24] It is unsurprising that this element has become an increasingly prominent element of the EU's approach.[25] Promises to prioritise voluntary return may help broker bilateral or EU-wide agreements or other forms of cooperation with coun-

20 On this, see, for example, Newland & Salant 2018.

21 In this respect, scholars have talked about a "deportation turn," indicating the attempts of countries to significantly increase the numbers of forced returns of irregular migrants. See, for example, Gibney 2008; Poaletti 2010; Collyer 2012; Leerkes & Van Houte 2020.

22 Hayter 2004, p. 136-149; Nyers 2010.

23 For example, Collyer 2010, p. 285, notes the role of voluntary returns in increasing public acceptance. Cornelisse 2010, p. 1, notes the paradoxical development that the establishment of voluntary return as a preferred option seems to have coincided with the increased use of immigration detention. In relation to the Norwegian assisted voluntary return programme, Brekke has noted that "…the voluntary return program has a double function for Norwegian authorities. It stimulates return. But at the same time voluntary return is important as a strategic instrument. It serves to legitimize forced returns from Norway and is pivotal in negotiations on broader return agreements with returnees' home countries." See Brekke 2010, English summary.

24 Noll 2000, p. 258.

25 See, most recently, COM(2021) 56 final, 10 February 2021, which presents a first annual assessment of partner countries' cooperation on readmission, and sets out steps to enhance this.

tries of origin. For example, the preference for voluntary return has been an integral part in political declarations that the EU and its member states have adopted together with African counterparts.[26] At the bilateral level, the focus on voluntary return was an important element of the Memorandum of Understanding on returns signed between the Netherlands, Afghanistan and the UN High Commissioner for Refugees (UNHCR).[27] And the perceived failure of the Netherlands to ensure that voluntary returns were indeed the main focus led to problems in the effective return of Afghans who were now longer allowed to stay in that country.[28] In addition to the priority of voluntary return being used to facilitate cooperation, its role may sometimes even be more important. As discussed at various points in this book, EU member states have faced situations in which countries of origin have simply refused to readmit nationals who were removed, and limited their cooperation to voluntary returns.[29]

2.2.2 Voluntary return in practice: some facts and figures

Beyond safeguarding 'humane and dignified' returns, the other key objective of the Directive is to ensure the effectiveness of return procedures. Although this dissertation focuses on the normative aspects of voluntary return, rather than its practical implementation, it is useful to look at some key facts and figures. This will help contextualise the discussion, including in relation to the role of voluntary return. However, it should be noted that different sources, such as Eurostat, Frontex or (for assisted voluntary returns) IOM, all provide differing figures because they either look at different aspects or have different gaps in their data collection. Even within each of the sets of statistics there are usually gaps and disparities. For example, Eurostat, which is most cited, only started collecting data on voluntary returns in 2014 but member states only provide these on a voluntary basis, which leaves considerable uncertainty about the number

26 See, for example, the Political Declaration following the Valletta Summit of European and African heads of state and government on migration cooperation of 11-12 November 2015, in which the participants "agree to give preference to voluntary return and reaffirm that all returns must be carried out in full respect of human rights and human dignity." The same wording is included in the Final Declaration: Investing in Youth for Accelerated Inclusive Growth and Sustainable Development of 7 December 2017, adopted following the 5th African Union-European Union, held in Abidjan on 29-30 November 2017, paragraph 73.

27 Tripartite Memorandum of Understanding (the MoU) between the Islamic Traditional State of Afghanistan, the Government of the Netherlands and the United Nations High Commissioner for Refugees, Netherlands House of Representatives, session 2002-20013, 19637 no. 732, Annex 1. The priority of voluntary return is emphasised in Article 2 of the MoU, and a further 25 references to the voluntary nature of returns can be found in the document.

28 INLIA Foundation 2015; NOS 2020.

29 See, for example, 5.3.

of returns and the type (such as assisted or non-assisted).[30] Frontex figures encounter similar problems, whereas IOM only collects data about the returns that it has itself facilitated, which by definition cannot provide the full picture. What remains are perhaps at best rough indications of the state of play.

According to Eurostat, 491,200 non-EU citizens were 'ordered to leave' EU member states in 2019.[31] The most such orders were issued by France, Greece, Germany and Spain.[32] The largest groups of persons ordered to leave were nationals of Ukraine, Morocco, Albania, Afghanistan, Algeria, Pakistan, Iraq, Syria, Georgia and Turkey.[33] Frontex, which provides figures on return decisions, sets these at 298,190, a relatively stable trend over the last four years. It provides a largely overlapping but slightly different list of key countries of nationality in this regard, including Ukraine, Morocco, Afghanistan, Albania, Pakistan, Syria, Iraq, Algeria, Brazil and Turkey.[34] However, this only gives part of the picture since a large proportion of those ordered to leave or issued a return decision will be citizens of one of the many countries not included in these lists.[35]

A common issue identified in EU return policy is the large gap between persons ordered to leave or issued return decisions and the number of actual returns. According to Eurostat, 142,300 non-EU citizens were returned in 2019.[36] While an imperfect indicator, this results in a return rate (the number of returns as a proportion of the number of persons ordered to leave) of 29 per cent,[37] although a European Commission report rather puts it at 32 per cent.[38] Frontex figures as regards return decisions and effective returns, of which it recorded 138,860 in 2019, comes to a higher figure of about 46 per cent.[39] A list of top-10 nationalities of returnees shows some overlap between those ordered to leave and those actually returned, but also indicates that the gap between the two might be particularly big for

30 EPRS 2019b, p. 3.

31 Eurostat 2020. This may be an order in any form, and is thus a wider category than those issued with a return decision under the Directive. In this respect, as noted in Chapter 1, it is important to keep in mind that there may be situations in which no return decisions have to be issued, or in which persons refused at the border remain outside the Directive's scope.

32 *Ibid.*, Table 2.

33 *Ibid.*, Figure 4.

34 Frontex 2020a, Annex Table 11.

35 Frontex 2020a, Annex Table 11, for example, shows that the proportion of 'all other' nationalities is 45 per cent of the total.

36 Eurostat 2020, Figure 5.

37 The return rate, as also discussed below, is a commonly used measurement of the success of return policy. However, it may not actually accurately reflect effective returns, since there is no guarantee that the persons returning in 2019 were also ordered to leave in that same year. They could have received that order the year before, or indeed many years before.

38 SWD(2020) 207 final, 23 September 2020, p. 5 and figure 3.1.1. It also finds significant differences in return rates across different member states.

39 Frontex 2020a, Annex Table 12.

others. Eurostat lists as main countries of nationality of returnees Ukraine, Albania, Morocco, Georgia, Russia, Algeria, Iraq, Serbia, Moldova, and Turkey. Afghanistan, Pakistan and Syria, which rank third, fifth and sixth respectively in terms of orders to return, do not even feature in the top-10 in terms of returns.[40] Frontex lists as the main countries of effective return Ukraine, Albania, Morocco, Georgia, Algeria, Russia, Moldova, Tunisia, Brazil and Iraq, which again leaves off Afghanistan, Pakistan and Syria.[41]

Figures become particularly problematic when it comes to the role of voluntary returns. While Frontex data appears to have considerable gaps, it seems to be most consistent in recording which proportion of effective returns were voluntary returns. The table below shows the results of this, taking as its starting point 2011, the first year in which the Directive should have been fully transposed and implemented in all member states.

Year	Effective returns	Unspecified	Forced returns	Voluntary returns	*% of total effective returns*	*% of specified effective returns*
2011	149 045	11 066	80 809	57 170	38.4	41.4
2012	158 955	11 298	82 061	65 596	41.3	44.4
2013	160 699	8 365	87 359	64 975	40.4	42.7
2014	161 302	28 013	69 399	63 890	39.6	47.9
2015	175 173	20 392	72 839	82 032	46.8	53.0
2016	175 377	4 533	78 750	92 094	52.5	53.9
2017	151 398	326	75 115	75 957	50.2	50.2
2018	147 815	12	75 030	72 773	49.2	49.2
2019	138 860	41	71 163	67 656	48.7	48.7
TOTAL	**1 418 624**	**84 046**	**692 525**	**642 143**	**45.3**	**48.1**

Table 1: effective returns by type 2011-2019[42]

The data shows that, from 2011 to 2014, roughly four out of every ten effective returns were the result of voluntary returns. This can already be considered a significant contribution to overall return efforts. From 2015 onwards, however, the proportion of voluntary returns increases to around half of all effective returns. In 2015 and 2016, voluntary returns even significantly outweighed forced returns, before falling slightly back to a fifty-fifty situation from 2017 onwards.[43] By far the largest group of third-country nationals returning voluntarily in 2019 were from Ukraine, accounting for 36 per cent of the total. Otherwise, the picture is much more fragmented,

40 Pakistan ranks 14th and Afghanistan 15th, while Syria is not included even in the top-20.
41 Frontex 2020a, Annex Table 12.
42 Frontex 2014; Frontex 2020a.
43 These are also the years that the comparison between voluntary and forced returns is most accurate, because the number of 'unspecified' returns has become negligible.

with the second largest country of nationality, Georgia, accounting for 5.7 per cent. The top-10 is further comprised of Albania, Russia, Iraq, Belarus, Moldova, Pakistan, India and Turkey, with the rest (32 per cent of the total) from all other countries.[44] Although there are still some gaps in these data,[45] they indicate that voluntary return accounts for roughly half of effective returns over the past decade. Of course, given the centrality of voluntary return, at least in theory, such a contribution can be qualified in different ways. For example, Majcher, drawing on Eurostat figures, notes an upward trend but that, in 2017, "merely" 55 per cent of returns where voluntary.[46] This is actually a slightly higher proportion than emerging from the Frontex data presented above. Considering that the traditional paradigm of return has been to focus on removals, I would suggest that such figures indicate that voluntary return provides a significant contribution to the overall aim of an effective return policy.[47] However, it has been noted that the contribution of voluntary returns to overall effective return differs considerably across member states implementing the Directive.[48]

2.2.3 The priority of voluntary return under pressure?

Despite what seems to be a clear contribution to the overall goal of return policy, and of the Directive, there are some indications that the priority of voluntary return is under pressure. As already noted, member states may capitalise on the rather vague provisions of the Directive to limit, where they can, the granting, or at least the length, of voluntary departure periods. While this is difficult to say concretely, the tendency to give a wide interpretation, for example, of the risk of absconding has been noted by others.[49]

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44 Frontex 2020, Annex Table 13.

45 Data from some member states may sometimes be missing. For example, the Risk Analysis for 2018 notes that data on effective returns had not been available for Austria since 2016, and that no disaggregated data (voluntary or forced) existed for Spain (Frontex 2018, p. 53). Similarly, the Risk Analysis for 2014 notes that no data on effective returns was available for Ireland, and that disaggregated data was not available for Spain (Frontex 2014, p. 80).

46 Majcher 2020, p. 550.

47 Although the figures can evidently not reveal whether, if such voluntary returns had not taken place, they would have been replaced by removals. However, as will be discussed at various points in this dissertation, the link between voluntary return and removal is not always unambiguous. While enforcement should be a logical consequence of non-compliance with the obligation to return during the voluntary departure, there may be reasons why this is not possible, including because some countries of return do not cooperate in removals. See, for example, 5.3. Furthermore, as has been asserted in 2.2.1, a number of the benefits associated with voluntary return will disappear when moving towards enforcement. As such, it seems unlikely that the same number of effective returns could be achieved without resorting to voluntary returns alongside removals.

48 Majcher 2020, p. 550, noting that – at the extremes – almost all returns from some member states were voluntary, while in others the proportion of voluntary returns was negligible and almost all returns were removals, according to Eurostat data for 2017.

49 Moraru & Renaudiere 2017.

The issue of the extent to which member states should be required to issue a voluntary departure period, and if so, its length, was always contentious, with the Council wanting much more flexibility than the Parliament.[50]

Interestingly, the approach of the European Commission, which was driving forward the translation of the priority of voluntary return from a good practice to a legally binding principle, seems to have become more ambiguous too.[51] Whilst it continues to promote voluntary return, including by making proposals for better and more harmonised return assistance,[52] it has simultaneously made moves in the opposite direction. For example, in a 2017 Recommendation on effective return policy it recommends to member states only to grant a voluntary departure period following a request.[53] While the Directive indeed provides for this option, it also clearly allows member states to provide a voluntary departure period ex officio, which is not only administratively less burdensome for them, but can also be seen as making the possibility of voluntary return more easily accessible to third-country nationals.[54] Similarly, it recommended that member states only provide for "the shortest possible period for voluntary departure needed to organise and proceed with the return, taking into account the individual circumstances of the case."[55] While this is also not necessarily incompatible with the Directive,[56] it does appear to send a signal to member states not to be too generous with the possibility of voluntary return. On top of this, as discussed above, in its recast proposal, the Commission has suggested further barriers to the enjoyment of the possibility of voluntary return, such as the mandatory denial of a voluntary departure period if the grounds for exceptions are found to apply.[57]

These are just several indicators that, both in member states and within some of the EU institutions, voluntary return is seen more as a hindrance to effective return than an integral part of it. It is difficult to disconnect this from the increasing frustration over low (and dropping) return rates, which have become a key focus of discussions whether return policy and the Directive are doing their jobs.[58] It is doubtful that restricting voluntary return, however, is a solution to this, especially given the contribution

50 Acosta 2009a, p. 31.
51 Majcher 2020, pp. 552-555.
52 Such as in its 2018 recast proposal, discussed above.
53 C(2017) 1600 final, 7 March 2017, paragraph 17.
54 Majcher 2020, p. 554: "subjecting the offer of voluntary departure to a prior application by the person concerned may significantly restrict access to this measure, since, in practice, non-citizens may face procedural, practical or linguistic obstacles in applying for it."
55 *Ibid.*, paragraph 18.
56 But see my discussion of the appropriate length of voluntary departure periods in Chapter 11.
57 See 1.2.3.
58 Carrera 2016, Chapter 2; Also see Peel & Brundsen 2018, noting that the gap between orders to leave and returns from the EU has been greater than 200,000 for a decade; and Nielsen 2020, indicating that, in 2019, only 29 per cent of those ordered to leave had actually been found to have returned, the lowest rate since 2011.

of voluntary return to overall return figures. This has also been noted by ECRE, commenting on the Commission's 2017 Recommendation:

> *"Although the European Commission is aiming to increase those who return the current recommendations restrict the space for voluntary departure and encourage states to give the least time possible for individuals to make up their mind and prepare for return. This is neither realistic nor useful as it will lead to more (enforced) removals and detention, which is more harmful for individuals and families, more difficult for Member States to carry out, and more costly in all senses… There is no evidence that limiting voluntary return will increase overall return numbers – the opposite may well be true."*[59]

Nevertheless, the pressure on member states and EU institutions to address the perceived ineffectiveness of return policy may well be a powerful motivator to shift away from voluntary return and towards enforcement, since it sends out a forceful signal to the public and is a much more visible way of exerting migration control.[60] And, given the increasing concern over non-return of irregular migrants, member states may see such a signal as crucial. From the perspective that provisions of the Directive that give priority to voluntary return may be the subject of considerable political attention and pressure, it is all the more important that these are clarified, so that their relative vagueness does not end up undermining the priority of voluntary return which has solidified into a legal principle over many years.

2.3 Voluntary return as expulsion and as international movement

This section starts the discussion of the legal framework for clarifying the scope of individual responsibility inherent in the concept of voluntary return. Before going through the different sources in section 2.4, it is first useful to address two basic starting points for identifying the relevant norms within each of those sources. As noted in Chapter 1, given the specific nature of voluntary return, these norms can relate both to the issue of expulsion (2.3.1) and to international movement (2.3.2).

2.3.1 Voluntary return as expulsion

An important element for the discussion moving forward is to connect the notion of voluntary return to the concept of expulsion. Often, expulsion is seen in the context of removals, and it is not immediately clear that it would cover voluntary returns. The term 'expulsion' is not used anywhere in the Directive itself, but can be found in other EU law instruments. For example,

59 ECRE 2017, p. 3.

60 On the role of public visibility of measures to combat irregular migration, and the "spectacle" of migration control, see, for example, De Genova 2013.

Directive 2001/40/EC specifically deals with the mutual recognition of decisions on the expulsion of third-country nationals (the Mutual Recognition Directive).[61] But the Mutual Recognition Directive only defines an expulsion decision as "any decision which orders an expulsion taken by a competent administrative authority of an issuing Member State," which does not clarify the term expulsion itself.[62] However, it makes separate reference to enforcement measures, suggesting that expulsion has a wider meaning than just enforcement through removal.[63] The EU Charter of Fundamental Rights also makes reference to expulsion in Article 19, which deals with the prohibitions of collective expulsion and of expulsion when there is a serious risk of a person being subjected to the death penalty, torture or other inhuman or degrading or punishment. Again, the notion of expulsion is not further clarified. Advocate General Sharpston, in her opinion in the *Zh. and O.* case, repeatedly uses the term expulsion.[64] It remains somewhat unclear, however, in what precise way she uses it. She recalls that "expulsion of an illegally staying third-country national from a Member State's territory should be carried out through a fair and transparent procedure," reflecting one of the general principles of the Directive.[65] However, she also refers several times to "immediate expulsion" to denote a situation in which member states do not grant a period for voluntary departure and thus commence with enforcement.[66] Presumably, there would then also be expulsion that is not "immediate," which would be voluntary return, but this remains somewhat unclear. Where attempts have been made by EU institutions to provide a definition of expulsion, this has generally been in relation of the ending of legal stay or indicating the lack of a legal status, rather than on the process of how to ensure such persons subsequently leave member states.[67]

Some more clues might be found in the case law of the European Court of Human Rights (ECtHR), which has an important role in shaping some of the protections in the EU Charter.[68] In particular, the prohibition of collective expulsion in the Charter mirrors that in the European Convention on

61 OJ L 149, 2 June 2001, pp. 34-36.

62 Directive 2001/40/EC, Article 2(a). Directive 2004/38 (the Citizenship Directive) also uses the term expulsion, but in relation to EU citizens and their family members, and also without defining it.

63 Directive 2001/40/EC, Article 2(b).

64 CJEU, Opinion AG, C-554/13 *Zh. and O.* [2015].

65 CJEU, Opinion AG, C-554/13 *Zh. and O.* [2015], point 7.

66 CJEU, Opinion AG, C-554/13 *Zh. and O.* [2015], points 84 and 87-88.

67 The European Commission's Green Paper on a community return policy on illegal residents defines expulsion as an "[a]dministrative or judicial act, which terminates the legality of a pervious lawful residence e.g. in case of criminal offences", see COM/2002/0175 final, 10 April 2002, Annex. Similarly, the Council's Return Action Programme defines it as an "[a]dministrative or judicial act, which states – where applicable – the illegality of the entry, stay or residence or terminates the legality of a previous lawful residence e.g. in case of criminal offences," see Council doc. 14673/02, Brussels, 25 November 2002, Annex 1.

68 2.5.1 below.

Human Rights (ECHR).[69] The ECtHR has clarified that collective expulsion revolves around "any measure compelling aliens, as a group, to leave the country."[70] Ignoring the collective element, this suggests that expulsion should be read broadly, as any measure compelling aliens to leave a country, without necessarily limiting it to enforcement action.

In international law, the concept of expulsion is also generally interpreted as broader than just removal. This is evident, for example, from Goodwin-Gill's description of expulsion, which has long been one of the most-cited and widely accepted definitions whilst an official codification was lacking. He states that expulsion "is commonly used to describe that exercise of State power which secures the removal, either 'voluntarily', under threat of forcible removal, or forcibly, of an alien from the territory of a State."[71] From his definition it is already evident that the fact that a return is 'voluntary' does not necessarily mean it is not a form of expulsion. The UN International Law Commission's (ILC) draft articles on the expulsion of aliens, discussed in more detail below, also support this. Article 2(a) of the ILC's draft articles explains that expulsion is "a formal act or conduct attributable to a State by which an alien is compelled to leave the territory of that State."[72] The imposition of a return decision would be such a formal act. And as noted, the further implementation of the return decision can entail both voluntary return and removal. Both should thus be considered as forms of expulsion from the perspective of the ILC draft articles. In fact, draft article 21(1) provides that "[t]he expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion." This recognises even more clearly that expulsion can take different forms, including voluntary return.

As a result, this study will consider any norms and standards relating to expulsion equally applicable to situations of voluntary return as it does to situations of removal, unless this is explicitly excluded in the relevant instrument. As will become evident from the discussion below, this does not mean that it is always easy to apply these norms to voluntary return situations, as the drafters have often clearly had removal, rather than voluntary

69 ECHR, Article 4 of Protocol No. 4.

70 ECtHR *Khlaifia* [GC][2016], paragraph 237; ECtHR *Georgia v. Russia (I)* [GC][2014], paragraph 167; ECtHR *Sultani* [2007], paragraph 81; ECtHR *Čonka* [2002], paragraph 59; ECtHR *Andric* [1999].

71 Goodwin-Gill 1978, p. 201. Also see Gaja 1999, p. 289: "Normally expulsion finds its origin in an administrative or judicial measure enjoining the individual to leave the territory within a given period of time under penalty of being forcibly turned out."

72 The Commentary further clarifies that "[t]he formulation 'alien[s] subject to expulsion' used throughout the draft articles is sufficiently broad in meaning to cover, according to context, any alien facing any phase of the expulsion process. That process generally begins when a procedure is instituted that could lead to the adoption of an expulsion decision, in some cases followed by a judicial phase; it ends, in principle, with the implementation of the expulsion decision, whether that involves the voluntary departure of the alien concerned or the forcible implementation of the decision." See ILC 2014, general commentary, paragraph 3.

return, in mind. This can be explained at least in part by the fact that, as discussed earlier, the focus on voluntary return is more recent, and many of the instruments and sources were drafted or developed before its rise to prominence. Nevertheless, even when this was not explicitly foreseen, I suggest that norms and standards on expulsion can in many cases be helpful in clarifying the scope and content of voluntary return. This is the case for the imposition of obligations on the third-country national, but also for issues related to his or her readmission to a country of return.

2.3.2 Voluntary return as international movement

While it is important to recognise voluntary return as a specific form of expulsion, only seeing the relevant provisions of the Directive in this light may be too limited. As discussed, although they are both forms of expulsion, there are also important differences between voluntary return and removal. This difference is particularly evident in the relative autonomy that third-country nationals have in arranging their return when accorded an opportunity to comply voluntarily.[73] Indeed, this is part of the responsibility allocated to them. In many ways, both the preparation of voluntary return and its actual realisation have many elements of international travel as undertaken by any other person, regardless of whether they are legally compelled to do so. Unless a voluntary return would be carried out with government-provided special transportation, such as a charter flight, third-country nationals would have to take all the steps, and meet the requirements, of any other international traveller, including in terms of the necessary documentation for crossing international borders. This also means that, as a general starting point, normal rules on exit from the EU member state and entry into the country of return need to be observed.[74] Similarly, international frameworks for travel by air and sea, when this is the way in which voluntary return takes place, may be applicable. But, as will be discussed below, it additionally means that the international freedom of movement rights that all persons have, are equally applicable to third-country nationals engaged in voluntary return. In particular, this means that, despite the fact that they are under an obligation to leave the EU member state and return to a third country, persons faced with voluntary return should also continue to benefit from their right to leave any country,[75] as well as their right to return to their own country, as guaranteed by international human rights law.[76]

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73 Hannum 1987, p. 31, characterises international freedom of movement as relevant to "the fundamental autonomy of the individual, of which the right to leave and return is one of the most striking expressions."

74 On exit requirements, see 9.2.2.

75 See 2.5.1.2.

76 In particular by ECHR, Protocol 4, Articles 2(2) and 3(2); and ICCPR Articles 12(2) and 12(4).

Whilst thus being a form of expulsion, the act of voluntary returning can also be considered a type of international movement that is subject to a different set of EU and international rules. These rules can help clarify the scope and content of voluntary return. This is also the case because both expulsion rules and rules on international movement impact on the obligations of states to readmit persons. And this, as discussed in Chapter 1, is an important element for clarifying the obligations of third-country nationals under the Directive.

Sources and instruments discussed below have been specifically selected on the basis of their relevance for either expulsion issues or international movement and return. As regards international instruments, this selection has drawn, inter alia, from the list of around 40 international treaties identified by Chetail as relevant to international migration more broadly, which have been examined for specific provisions potentially applicable to voluntary return situations.[77]

2.4 EU law

In line with the aim of providing contours of individual responsibility as arising out of the notion of voluntary return in the Directive, as a matter of EU law,[78] the first port of call must of course be to look at what is already available within the EU legal framework. Beyond the provisions and the object and purpose of the Directive itself, means of interpretation can be found in particular in the case law of the Court of Justice of the EU (CJEU), including its application of general principles of EU law, in other EU secondary legislation using similar concepts as the Directive, and in EU fundamental rights.

Since the adoption of the Directive in 2008, the CJEU has delivered a considerable number of judgments in response to preliminary questions concerning its interpretation. However, only one of these judgments specifically deals with any of the provisions related to voluntary return. The judgment in *Zh. and O.* delivered in 2015, focuses on the possibilities to make exceptions to the granting of a voluntary departure period under Article 7(4) of the Directive.[79] What is more, it zooms in on the public policy exception, which itself is only one of the three broader exceptions listed in Article 7(4). As such, the CJEU's case law has only covered a very small part of the provisions that are relevant to an understanding of the individual responsibility of third-country nationals faced with voluntary return. Nevertheless, the *Zh. and O.* judgment is a useful jumping-off point for further clarification at least of the entitlement to a voluntary departure period and the discretion of member states to shorten or deny such a period. The judgment

77 Chetail 2012, pp. 62-64.
78 See 1.4.
79 CJEU C-554/13 *Zh. and O.* [2015].

and its wider implications will be discussed in detail in Chapter 10. Other judgments related to the Directive, even though not directly dealing with the issue of interest here, may also be useful. In particular, they provide guidance on the effective achievement of the key objectives of the Directive, which come into play in various discussions in the subsequent chapters. In particular, these are the principles that member states should both refrain from actions that would jeopardise the effective achievement of the Directive's objectives, and that they must sometimes take positive steps to ensure this effectiveness.[80] As such, the CJEU's case law also gives direction as to the application of general principles of EU law in this context, such as ensuring the relevant provisions' *effet utile*, but also, as will be particularly discussed in relation to decision-making on the voluntary departure period, the principle of proportionality. The case law thus provides an important starting point for the way member states should deal with voluntary return.

Other elements to help clarify the key provisions of the Directive can be found in other secondary EU legislation. This is particularly the case when they use the same concepts of the Directive and either define and clarify them directly, or have been subject to further explanations by the CJEU. This is the case, for example, in relation to the definition of 'country of origin,' a concept that can also be found in the recast Qualification Directive,[81] and the issue of 'risk of absconding' which is part of the Dublin III Regulation and has been the subject of consideration by the Court.[82] Other EU law instruments may not only provide help in interpreting specific concepts used in the Directive, but can also form the context in which specific provisions need to be implemented. This is particularly true for the Schengen Borders Code (SBC).[83] The Directive is considered a development of the Schengen *acquis* and draws on the SBC in relation to some of its key provisions, such as in defining who is a 'third-country national,[84] what is 'illegal stay,'[85] or when third-country nationals can be excluded from the scope of the Directive.[86] As such, the DNA of the SBC is woven into the Directive. The SBC may be particularly relevant in relation to the obligation to return imposed on third-country nationals, since it sets out certain requirements for the crossing of external borders. These requirements will have to be met by third-country nationals before they can leave and thus fulfil their obligation to return.[87]

80 See the discussion in 6.2.4.
81 Directive 2011/95/EU, OJ L 337, 20 December 2011, pp. 9-26.
82 Regulation 64/2013, OJ L 180, 29 June 2013, pp. 31-59.
83 Regulation 2016/399, OJ L 77, 23 March 2016, pp. 1-52.
84 RD Article 3(1).
85 RD Article 3(2). Although this definition also includes 'other conditions for entry, stay or residence' not captured in SBC Article 5.
86 Member states may decide not to apply the Directive to third-country nationals who are subject to a refusal of entry in accordance with Article 13 SBC.
87 See 9.2.2.

Individual rights will be particularly important in this analysis. As Cane suggests, "[r]ights play a central role in the law, and no account of the grounds and bounds of responsibility can be complete without reference to them."[88] Even though third-country nationals are under obligation to return, they remain rights-holders as well. Some of these rights may interact with the obligations imposed on third-country nationals, and in this interaction the boundaries of the concept of voluntary return may become clearer. In implementing EU legislation, member states are bound to respect fundamental rights as set out in the EU Charter of Fundamental Rights (Charter or CFR).[89] The Directive itself reiterates this and,[90] as discussed in 1.2.1.2 above, itself makes explicit references to fundamental rights. Certain rights, such as the right to dignity, the right to life, and the freedom from inhuman or degrading treatment may play a role in how expulsions, including voluntary returns, are implemented. Similarly, the protection against *refoulement* may be relevant, despite the fact that an individual is 'voluntarily' returning.[91] While the Charter also contains rights related to freedom of movement, these pertain to the rights of EU citizens, or third-country nationals legally resident in an EU member state, and they are thus not applicable to those coming within the scope of the Directive. However, this gap may be filled by international human rights instruments, which are discussed below.

2.5 International human rights law

Fundamental rights protections in EU law do not only arise from the Charter. International human rights law instruments may also influence such fundamental rights. However, in the context of a cross-border phenomenon like voluntary return, international human rights law may also impact on other relationships in the triangle model, more specifically the one between third-country nationals and their countries of return, subject to certain conditions. This dual role is discussed in 2.5.1 below. This is followed by a more extensive discussion of the key role played by international movement rights in this analysis, in particular the right to leave (2.5.2) and the right to return (2.5.3), as well as a brief discussion of some other instruments and provisions of relevance (2.5.4.).

88 Cane 2002, p. 197.
89 OJ C 326, 26 October 2012, pp. 391-407. As to the scope of application, see CFR Article 51(1).
90 RD Article 1.
91 See 7.3.

2.5.1 The dual role of international human rights law

The Directive clearly acknowledges the importance of international human rights and refugee law for the implementation of the Directive. Article 1 reads:

> *"[t]his Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations."*

When dealing with rights held by individuals vis-à-vis states, and imposing subsequent obligations on the latter, the triangle model shows that this may occur in two separate relationships. First, individuals may hold rights towards the EU member state where they are staying. In this respect, Article 1 of the Directive simply seems to clarify the long-standing principle that international human rights law instruments can have a direct bearing on the protections offered to an individual under EU law. The Charter itself explicitly recognises the relationship with the ECHR. If the Charter contains rights that have equivalents in the ECHR, the former must provide at least as much protection as the latter, as interpreted by the ECtHR.[92] Beyond its basis as a minimum standard for Charter rights, the rights contained in the ECHR are fundamental rights that constitute general principles of EU law, and are as such applicable to the interpretation of the Directive.[93] Furthermore, the CJEU has also drawn on other international human rights treaties to find such general principles, in particular the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).[94] Similarly, it has drawn on the 1951 Refugee Convention, which is also referred to in the Directive.[95]

However, as I have suggested in the introductory chapter, Article 1 of the Directive can also be read as implying not only this direct effect, but that international law, including human rights and refugee law, can have a certain impact on the Directive even when it does not have effect in terms of elaborating protection under EU law. The fact that the effective implementation of the Directive's return procedure is intrinsically tied up with whatever happens in the other two relationships in the triangle model, namely between third-country nationals and their country of return and between the country of return and the EU member state, would necessitate a reading of the Directive that is, as much as possible, consistent with the legal frame-

92 CFR Article 52(3).
93 TEU Article 6(3).
94 See, in particular, CJEU C-540/03 *Parliament v. Council* [2006], paragraph 35.
95 RD Article 1 says the common standards and procedures set out in the Directive must be implemented in accordance, inter alia, with "refugee law." The Preamble, Recital 23, explicitly notes that application of the Directive is without prejudice to obligations resulting from the 1951 Refugee Convention and the 1967 Protocol.

works governing those 'external' relationships. From this perspective it is important to acknowledge that international human rights law forms an important part of the legal framework for the relationship between the individual and the country of return, especially if it the latter is the country of nationality.

In the paragraph below, I will discuss a number of specific instruments, and provisions within them, that are of particular relevance to the discussion of voluntary return, often impacting on both relationships described above.[96] I will focus on those instruments and provisions whose relevance may not be immediately obvious. I will not devote further attention here to international instruments and provisions relating to the treatment of the individual by the EU member state. These protections, such as included in the ECHR, ICCPR and Refugee Convention, for example, often overlap with, or complement, protections already contained in the Charter. They may also be explicitly included in the Directive, such as the prohibition of *refoulement*. Further explanation is needed, however, in relation to international movement rights, particularly the right to leave and the right to return.

2.5.2 The right to leave any country, including one's own

The right to leave any country, including one's own, is enshrined in Article 13(2) of the Universal Declaration of Human Rights (UDHR). It was incorporated in the ICCPR in Article 12(2) as well as in Article 2(2) of Protocol No. 4 to the ECHR. Apart from the ICCPR and the ECHR, which will form the focus of the discussion below, the right to leave is also reiterated by various other human rights instruments, including the CRC, the UN Convention on the Elimination of All forms of Racial Discrimination (CERD), and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW). The right to leave is one of the international norms that is used in this dissertation to give further substance to the notion of voluntary return in the Directive. In the following paragraphs, several aspects relevant to this analysis are discussed. First, this is the potential role of the right to leave in the relationship between the third-country national and the EU member state (2.5.2.1), and in connection

96 For the sake of brevity, I group instruments related to human rights more generally, as well as those covering specific categories, especially refugees and stateless persons, into a broad category of 'human rights law.' I am aware that there are those that see refugee (and statelessness) law as distinct areas of law, separate from but complementary to human rights law, whilst others may consider the latter as sub-categories of the broader area of human rights law. It is not my intention here to go into this debate and, at any rate, the value of such a discussion to the analysis presented here would be limited. In this particular context, the grouping is made on the basis that all those instruments set out specific rights of individuals vis-à-vis states, and thus impose on the latter certain obligations of treatment. For a detailed discussion about the relation between human rights law and refugee law, see, for example, Chetail 2014.

to that, the extent to which the right to leave, as enshrined in international instruments, can have an effect on the interpretation of the Directive as a matter of EU law (2.5.2.2). Subsequently, the discussion will turn to the role of the right to leave with regard to travel documents, which mainly – although not exclusively – has bearing on the relationship between third-country nationals and their country of nationality (2.5.2.3).

2.5.2.1 The right to leave in the relationship between third-country national and the EU member state

The right to leave is held, first of all, by third-country nationals towards the state that they are leaving, in this case the EU member state issuing the return decision. However, it may be questioned whether this right can directly impact on the Directive's interpretation. This is connected to the question of the effect of the right to leave in EU law. The right to leave is not part of the Charter, which only deals with freedom of movement rights within the EU, and mainly for EU citizens and those lawfully staying.[97] The CJEU has never explicitly pronounced itself on a general right to leave of all individuals, regardless of their legal status in the EU, as a matter of EU law. In this respect, it can be noted that, although ECHR rights constitute fundamental rights as general principles of EU law, the right to leave is not contained in the ECHR's main text itself, but is part of Protocol No. 4. This Protocol, in contrast to the Convention itself, has not been ratified by all contracting parties. However, this concerns only one EU member state, Greece.[98] Even if this lack of universality would be an issue, the right to leave is a core part of the ICCPR, as well as other international instruments such as the CRC, from which the CJEU has been willing to draw inspiration in recognising certain rights as fundamental rights as general principles of EU law.[99] And these instruments have been universally ratified by EU member states. Furthermore, the CJEU has, in the past, recognised that other, closely related international freedom of movement rights, such as the right to return, should be considered relevant in the interpretation of EU legislation.[100]

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97 CFR Article 45.

98 Other states that have not ratified Protocol 4 are Switzerland, Turkey and the United Kingdom.

99 CJEU C-540/03 *Parliament v. Council* [2006], paragraph 35: "Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection on which the Member States have collaborated or to which they are signatories." As regards the Refugee Convention, see, for example, CJEU C175/08 *Salahdin Abdulla* [2010], paragraphs 51-53. As regards the ICCPR, see, for example, CJEU C-540/03 *Parliament v. Council* [2006]; CJEU C-347/87 *Orkem* [1989].

100 CJEU C-41/74 *Van Duyn* [1974], paragraph 22.

Given the repeated affirmation of a general right to leave any country in instruments which have been used by the CJEU as inspiration to elaborate general principles of EU law, the discussion in this dissertation will proceed on the assumption that the right to leave any country, including one's own, should be considered a fundamental right as a general principle of EU law. And as such can be used to interpret relevant provisions of the Directive, both in regard to the obligation to return and the third-country national's entitlement to a voluntary departure period.

2.5.1.2 The relevance of the right to leave to voluntary return under the Directive

The conclusion that the right to leave could be used to interpret the Directive does not yet answer what role it would then play. An initial question about the role of the right to return in this analysis is whether it can be relevant to the context of voluntary return at all. After all, there is something counterintuitive speaking about a right to leave when third-country nationals are in fact under an obligation to do so. Nevertheless, even in a situation where the individual does not have a choice whether or not to leave, the right to leave may still have a protective function.

As noted, voluntary return implies a certain degree of autonomy of action of the individual. And this, in turn, implies some space to exercise rights. This is particularly true for the right to leave. The case law of both the Human Rights Committee (HRC),[101] which supervises the ICCPR, and the ECtHR bears this out. The HRC notes that the right to leave applies regardless of the specific purpose or amount of time a person wishes to spend outside the country he is leaving. The HRC also specifically refers to the applicability of the right to leave to persons not lawfully staying in a country and being expelled.[102] The ECtHR, although not having dealt with this issue regarding unlawfully staying third country nationals, similarly notes that the right to leave "is intended to secure to *any person* a right … to leave," thus not making distinctions based on the legal status of that person.[103]

There are certain readings of the right to leave that would clearly clash with the obligations arising out of a return decision issued by an EU member state, as well as the right of states to expel aliens more generally. For example, a reading of the right to leave as encompassing a choice whether or not to leave cannot be maintained when third-country nationals

101 The committee is also often called the CCPR (Committee on Civil and Political Rights), to avoid confusion with the abbreviation of the UN Human Rights Council. However, since the latter body is not referred to in this analysis, I will maintain the use of 'HRC' for the Human Rights Committee supervising the ICCPR.

102 HRC General Comment No. 27, freedom of movement, UN doc. CCPR/C/21/Rev.1/Add.9, 1999, at paragraph 8. Also see HRC General Comment No. 15, the position of aliens under the Covenant, 1986, at paragraph 9.

103 ECtHR *Baumann* [2001], paragraph 61 (my emphasis).

are under an obligation to return. However, as will be discussed elsewhere, the right to leave may incorporate other guarantees that would remain relevant even in the face of compulsory return. This includes a measure of choice on the part of the third-country national where to go. This can play a role in clarifying the position of third-country nationals vis-à-vis the obligatory destinations set out in the Directive, and the extent to which they or the member state can decide which destination is the most appropriate to fulfil the obligation to return.[104] Similarly, the right to leave may have an impact on the question of the practical arrangements and de facto departure from the member state. As will be discussed, the right to leave may not only involve a choice of destination, but also choices about the means through which to effect departure. Importantly, the right to leave also limits the requirements that can be imposed on third-country nationals by the EU member state before they are allowed to leave its territory.[105] Finally, the right to leave may play a role in the determination of the scope of the third-country national's entitlement to a voluntary departure period.[106]

2.5.1.3 The right to leave and state obligations to issue travel documents

The right to leave does not only relate to the physical departure of an individual from a country, but also has implications for his or her right to have the specific means to do so. Specifically, the right to leave implies an associated right to be issued with travel documents necessary for departure.[107] As will be discussed in Chapter 8, such obligations specifically pertain to the individual's country of nationality. This follows from the views adopted by the HRC on the scope of Article 12 of the ICCPR. The ICCPR has been ratified by 173 states worldwide and this obligation would thus be applicable to the vast majority of countries of return, including virtually all of the most important destinations of voluntary returnees from EU countries.[108] In some cases, where ratification of the ICCPR has not taken place, regional treaties with similar provisions as the ICCPR may fill a gap in obligations.[109] The ECHR, although important with regard to the relationship between the third-country national and the EU member state, has less significance here. It binds any non-EU country of return on the European continent, and arguably provides a stronger basis, but each of these are also parties to the ICCPR. As indicated in the introductory chapter, countries of return and/or nationality are only discussed in the abstract, and the analysis that follows

104 See 7.2.2.
105 See 9.2.1.
106 See 10.2.2.1.
107 See, in particular, HRC *Lichtensztejn* [1983]; Inglés 1963, Hannum 1987.
108 Perhaps the most significant country that has not ratified the ICCPR with regard to (irregular) migration to the EU is China, which has only signed it.
109 African Charter on Human and Peoples' Rights (Banjul Charter), Article 12(2); American Convention of Human Rights, Article 22(5).

in the next chapters will presume Article 12 ICCPR is indeed applicable to the third-country national's country of nationality, keeping in mind that, in practice, limited exceptions could indeed apply.

Since the right to leave also encompasses a right to travel documents, this specific right impacts not only on the relationship between the third-country national and the EU member state, but also on another side of the triangle, namely the one covering the third-country national and the country of return.[110]

2.5.3 The right to return

International freedom of movement rights, in addition to the right to leave, also comprise another part. Article 3(2) of Protocol 4 of the ECHR provides that "[n]o one shall be deprived of the right to enter the territory of the state of which he is a national." Article 12(4) of the ICCPR formulates it slightly differently, providing that "[n]o one shall be arbitrarily deprived of the right to enter his own country."

Although put in terms of a 'right to enter,' these provisions are generally formulated as a right to return. As is clear from the above, there are some slight but significant differences between the ECHR and the ICCPR. Where the former prohibits depriving a right to enter to one's country of nationality, the latter does so in relation to one's 'own country.' As will be discussed later, the different formulation in the ICCPR may be of significance in terms of its applicability to different categories of third-country nationals, especially stateless persons.[111] The ICCPR additionally only prohibits 'arbitrary' deprivation, rather than any deprivation in the ECHR, although in practice this difference may be less relevant.[112]

In the triangle model, the right to return's role must be mainly located within the relationship between third-country nationals and the country to which they seek to return. From this perspective, the slightly different formulations of the right to return in the instruments mentioned above are not so relevant, since most countries of return will not be bound by the ECHR, whereas the vast majority is party to the ICCPR.[113] The significance

110 As noted in 1.4.3, strictly speaking, the triangle model may not be completely accurate in such cases. While the right to leave may trigger obligations on the country of nationality with regard to travel documents, this does not mean that the third-country national necessarily has to return to the country of nationality. For example, he may obtain travel documents from his country of nationality, and use these to travel to a transit country or another third country. It is therefore possible that the actual web of relationships in a given case includes the EU member state, the third-country national, a country of return, and the country of nationality which has to supply travel documents to make voluntary return possible.

111 See 4.3.4.

112 See 4.3.4.2.

113 It should be noted that all potential countries of return that are covered by the ECHR are also parties to the ICCPR. Even where differences in the scope of protection afforded to the right to return exist, the wider scope of the ICCPR would nonetheless be applicable.

of Article 12(4) ICCPR lies mainly in the fact that it provides third-country nationals a claim to be readmitted to any country that should be considered their 'own country.' In theory, this would ensure a useful complementarity in relation to voluntary return. On the one hand, third-country nationals are under obligation to return, while, on the other, they also have a clearly set out right to return to at least their own country. This should make the process of realising return easier. However, as will be discussed at length, the relationship between the obligation to return, on the one hand, and the individual right to return, on the other, is more complicated.[114]

Apart from the relationship between the third-country national and the country of return, the right to return may also have a residual effect for the relationship between third-country nationals and the EU member state. In particular, the EU member state may be subject to negative obligations not to unduly interfere with a third-country national's right to return. Although as a general point, EU member states may not have an interest in limiting the third-country national's return – as this would undermine the key objective of the return procedure – this may still impact on other issues, such as the freedom that the individual may or may not have in returning to his destination country of choice.[115] In line with the discussion above about the right to leave, it should be assumed that the CJEU would accept that the right to return, at the very least as a right to return to one's country of nationality as protected by Protocol No. 4 of the ECHR, as a fundamental rights as a general principle of EU law. Indeed, the Court, as early as 1974, recognised

> *"that it is a principle of international law, which the ECC Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence."*[116]

This finding does not specifically focus on the role of international human rights instruments, and seems to accept a right to return to the country of nationality as a more general principle of customary international law. It also dealt with the return of a person from one EU member state to another. But, in my view, it is an additional reason to assume that the right to return should be considered to have legal effect in EU law as well.

2.5.4 Remarks on the potential role of other instruments

Beyond the instruments discussed above, and especially their provisions on the right to leave and return, as well as their relevance for the treatment of persons in return procedures, other international human rights instruments only have a fairly marginal role to play in this analysis. However, as some

114 See 5.3.
115 See 7.2.
116 CJEU C-41/74 *Van Duyn* [1974], paragraph 22.

will come up in specific parts of the discussion, it is worth mentioning their role briefly. This section also identifies a few international human rights instruments that contain provisions on expulsion, international movement, or readmission, but which nonetheless will be left outside the scope of the analysis presented here.

The definition of third-country nationals covered by the Directive, and who are thus potentially subject to voluntary return, also includes stateless persons.[117] On this basis, it is useful to consider the role that international instruments on stateless persons, in particular the 1954 Convention relating to the status of Stateless Persons (hereinafter: the 1954 Statelessness Convention).[118] The 1954 Convention applies to persons who are "not considered as a national by any State under the operation of its law."[119] With regard to issues of return, the provisions of the Convention are very limited. However, the Convention may still be relevant to two of the legal relationships in the triangle. First, they may impact on the relationship between the third-country national and the country of return, to the extent that that country is a party to the Convention. In particular, the Convention contains some limited entitlements for stateless persons to obtain travel documents, which will be discussed in Chapter 8. This, of course, is of importance for the individual's possibilities to fulfil at least part of the obligation to return. Furthermore, this may lead to associated obligations of readmission by countries of return that have issued such travel documents.[120] Second, in specific situations, the provisions of the Convention on travel documents could also be read as implying obligations to issue these for the state in which the stateless person is currently staying, meaning the EU member state.[121] Although the CJEU has never commented on the role of the 1954 Statelessness Convention in EU law, there are reasons to assume that it would accept that it could be used to interpret provisions of secondary EU law. Firstly, in several cases, the CJEU has drawn on the 1961 Convention on the Reduction of Statelessness, which is a companion instrument to the 1954 Statelessness Convention.[122] Furthermore, the 1954 Statelessness Convention in many ways is the sibling of the 1951 Refugee Convention; they were elaborated in close connection. The Refugee Convention, as discussed above, has frequently been used by the CJEU in interpreting provisions of EU legislation.

Other instruments may well set out relevant provisions on specific categories of third-country nationals, but these are be left outside the scope of this analysis. This follows from the approach set out in Chapter 1, which

117 See 3.2.

118 The 1954 is also accompanied by the 1961 Convention on the Reduction of Statelessness, but this does not contain provisions directly relevant for the analysis here and is thus not discussed further.

119 1954 Statelessness Convention, Article 1.

120 See 6.3.

121 See 8.5.

122 CJEU C-135/08 *Rottmann* [2010]; CJEU C-221/17 *Tjebbes* [2019].

focuses on the generally applicable rules to all third-country nationals within the scope of the Directive, rather than more specific rules for particular categories, such as vulnerable persons, including children. From this perspective, this excludes from the analysis, for example, the CRC, which obviously would have an important role to play when dealing specifically with children to be returned, and is recognised as such in the Directive.[123] Another instrument that will be left out of the scope of the analysis is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW). Although it contains a number of provisions that could be relevant to the discussion of voluntary return in theory,[124] its actual impact, both on the relationship between the third-country national and the country of return, and on that between the third-country national and the EU member state, would be negligible or even non-existent. No EU member state, nor any of the EEA/EFTA states implementing the Directive, have ratified the CMW, and the chances of the CJEU accepting the CMW as an instrument inspiring general principles of EU law are, in my view, negligible.

Lastly, mention should be made of instruments in relation to the prevention of smuggling of persons and human trafficking. Although these could also be said to be focused on specific sub-groups of third-country nationals, I believe, for reasons to be set out below, they can and should be part of the analysis. However, the key instruments used here are the Protocols on Smuggling and on Trafficking to the UN Convention on Transnational Crime. Although they contain protective elements for individuals, their scope is wider. For this reason, they are included in the discussion of multilateral treaties in 2.7 below, rather than in this section on international human rights law.

2.6 Customary international law

A rule of customary international law exists when there is sufficiently consistent state practice, whilst that practice is followed by states out of a sense of legal obligation (*opinio juris*).[125] Customary international law is recognised as one of the sources of international law in the Statute of the International Court of Justice.[126] Customary international law, while being an important source for this study, has the distinct disadvantage of largely

123 RD Recital 22, and see, for example, the reference to the best interests of the child in Articles 5(a), 10(1) and 17(5), which is derived from the CRC.

124 For example, CMW Articles 22 and 23 on expulsion, and Article 67(1) on cooperation between states regarding the orderly return of migrant workers and their families, including those in an irregular situation.

125 ICJ *North Sea* [1969]; *Nicaragua* [1984]; ILC 2018, conclusion 2. Also see D'Amato 1971; Da Rocha Ferreira & others 2013.

126 ICJ Statute, Article 38(1)(b).

being comprised of unwritten rules. After all, they emerge from state practice and *opinio juris*, rather than from explicit agreements by states. However, international agreements may play a role in shaping customary international law.[127] Furthermore, rules of customary international law may eventually be codified in treaties or other documents.[128] In terms of its relevance to voluntary return, customary international law, like international human rights law, has a dual function. First, it may impact on the relationship between third-country nationals and the EU member state, specifically through its norms on expulsion (2.6.1). Second, of all the sources and instruments covered in this dissertation, customary international rules on readmission are the most important in shaping the relationship between the EU member state and the country of return with regard to the issue of readmission, as a precondition for successful voluntary return (2.6.2).

Beyond norms on expulsion and on readmission, customary international law informs some other aspects of the analysis. This is the case, for example, with regard to diplomatic relations, which play a role in the discussion of the third-country national's obligation to seek readmission and to obtain travel documents. However, these norms have largely been codified in the Vienna Convention on Consular Relations, and for this reason are discussed in the section on multilateral treaties (see 2.7).

2.6.1 Customary international norms on expulsion

It is a well-established and widely recognised principle of international law that states have the right to expel aliens who are not, or no longer, allowed to stay on their territories. This right is intrinsically bound up with the notion of state sovereignty. Brownlie notes that sovereignty, together with the related issue of the equality of states, "represents the basic constitutional doctrine of the law of nations."[129] Sovereignty is commonly understood as the legal status of a state which is not subject to any higher authority, at least to the extent that it deals with its internal affairs.[130] Sovereignty is connected, first of all, with the territory of the state in question, where the state itself sets the rules and should not be the subject of interference by other states. The external dimension of sovereignty is that, to the extent that the state is bound by rules of international law, it has become bound to these based on its consent. One of the ways in which a state can exercise its sovereignty is by controlling which non-citizens are granted access to,

127 Villigers 1985. Arguably, this has been the case with readmission agreements, which are seen by some scholars as evidence of state practice for finding that the obligation to readmit expelled nationals is indeed a rule of customary international law (see 4.2.2).

128 *Ibid*.

129 Brownlie 2008, p. 289.

130 See, for example, Steinberger 1987, p. 414.

and are allowed to stay on, its territory.[131] This implies that if non-citizens (or 'aliens') present themselves at the border of the state, gain entry without authorisation, or are initially authorised to enter but subsequently are no longer wanted by the state, it has the power to make them leave. In other words, it has the power (or right) to expel aliens. Being tied up with the "constitutional doctrine" of sovereignty, as an essential building block of international law, the right to expel can be considered as one of the foundations of the international system for states' interactions with non-citizens. However, the foundational nature of the right to expel does not mean that it is not subject to certain other requirements.[132]

2.6.1.1 Roles of customary international law with regard to expulsion

Traditionally, a key role of customary international law in relation to expulsion lies in the guarantees of fair and humane treatment of those individuals faced with expulsion. Over a century ago, international claims commissions already recognised the principles that expulsion should be accomplished "without unnecessary indignity or hardship"[133] and that it should be carried out "in the manner least injurious to the person affected."[134] International tribunals have also dealt with other aspects of expulsion, including claims for restitution of property lost due to the expulsion.[135] Today, international human rights law has largely taken over the role of guaranteeing the procedural fairness of expulsion decisions (which is outside the scope of this analysis) and the humane and dignified treatment of the expellee (which is not). Nevertheless, they can have useful residual effects, particularly by setting out general prohibitions of, for example, arbitrariness, non-discrimination and others that could be characterised as 'fair play' rules to be observed by states in the expulsion process which may go beyond human rights protections. They may also provide guidance on questions as regard to the legitimate destinations to which a person can be expelled, which must take due account of the prospective destination state's sovereignty and consent.

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131 See ECtHR *Abdulaziz* [1985], paragraph 67, and since than standing jurisprudence of the ECHR: "Moreover, the Court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory." Also see HRC *Winata* [2001], paragraph 7.3: "… there is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons." But, for a critique of the way this principle has been set out, especially by the ECtHR, see Dembour 2018.

132 Hannum 1987, p. 5; Plender 1988, pp. 3-4, observing that these requirements are now sufficiently developed to dispense with any claim to absolute state sovereignty in relation to expulsion.

133 Netherlands-Venezuela claims commission, *Maal* [1903].

134 Italian-Venezuelan claims commission, *Boffolo* [1903].

135 For example, Iran-US claims tribunal, *Yeager* [1987]. Also see Cove 1988; Brower & Brueschke 1998, pp. 812-813.

2.6.1.2 *The International Law Commission's draft articles on the expulsion of aliens*

These customary international norms have the distinct benefit over almost all other sources of international law that they are (almost) universally applicable.[136] However, the fact that these norms are unwritten sometimes makes it difficult to define them precisely. For this reason, the codification of such rules by the UN's International Law Commission is useful and will serve as an important instrument for the discussion in the subsequent chapters. The ILC consists of 34 experts in international law, whose work focuses on "the promotion of the progressive development of international law and its codification."[137] In 2000, the ILC identified the expulsion of aliens as a topic of interest, and it would continue working on this for a decade and a half. The process resulted in a rich body of work on international norms on expulsion, including a 664-page exploratory memorandum by the ILC secretariat, nine reports by the ILC's rapporteur, Maurice Kamto, numerous reports of discussions with member states' representatives and, eventually, the elaboration of a set of draft articles and accompanying commentaries, which were adopted by the ILC in 2014. The draft articles provide a useful guide on applicable norms. Other sets of draft articles, such as those on the responsibility of states for wrongful acts (ARSIWA, discussed in Chapter 5), have been considered authoritative. The draft articles on expulsion of aliens, although still relatively new, have already started influencing judicial practice. For example, in its 2016 judgment in *Khlaifia and others v. Italy*, the Grand Chamber of the ECtHR drew upon the draft articles, as well as the commentaries.[138]

It should be noted that not all rules contained in the draft articles represent codification of customary international law. Rather, some constitute the progressive development of these rules.[139] However, this is the case for a minority of the draft articles. In this dissertation, I will draw extensively on the work of the ILC. It should be noted that the draft articles contain both elements of customary international law and universally applicable treaties. As such, there may be overlap between some human rights treaties, including those able to inspire fundamental rights as general principles of

136 Although some exceptions may apply, for example in relation to regional custom (see 5.2.3.1) or on the basis of the persistent objector doctrine. On the latter point, ILC 2018, conclusion 15, notes that "[w]here a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection." This is provided that the objection is clearly expressed, made known to other states, maintained persistently, without prejudice to *jus cogens*. Also see Green 2016.

137 Article 1(1), Statute of the International Law Commission, adopted by the UN General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981.

138 ECtHR *Khlaifia* [GC][2016], see in particular and paragraphs 46-47 and 243-245; Also see ECtHR *N.D. and N.T.* [GC][2020], paragraphs 171-181.

139 ILC 2014, General commentary, paragraph 1; Neuman 2017.

EU law, and the draft articles. In practical terms, this simply means I will discuss these in relation to fundamental rights, whilst their possible inclusion as a customary norm can provide a 'backstop' in those cases where fundamental rights would leave gaps.

2.6.1.3 The role of customary international law in the interpretation of the Directive

There is wide recognition that customary international law forms part of EU law. For example, Article 3(5) TEU provides that the EU "shall uphold and promote … the strict observance and the development of international law," which includes customary international law as well. Furthermore, the CJEU has drawn on customary international law in numerous cases, although the way it has done so is sometimes characterised as 'inconsistent' or 'fragmented' and the exact way rules of customary international law impact on EU law is the subject of discussion.[140] In their 2009 study on the relationship between customary international law and EU law, Wouters and Van Eeckhoutte identify four specific functions that customary international law has played in the case law of the CJEU. First, it has been used to demarcate the limits of the jurisdiction and powers of the EU and EU member states. Secondly, it has provided rules of interpretation to be applied to provisions of EU law. Thirdly, it has acted as a 'gap-filler' in the absence of specific rules of EU law. And fourthly, customary international law may be used to challenge the validity of Union acts.[141] For our purposes, the first and third functions appear most relevant in more clearly defining the voluntary return-related provisions of the Directive. Although neither function is completely unqualified, customary international law is generally applied by the CJEU directly in numerous areas.[142] When applicable, rules of customary international law rank between EU primary and secondary law, at least in terms of interpretation of the latter instruments.[143] Accordingly, I will proceed on the basis that the Directive's provisions should be interpreted, as much as possible, in line with norms of customary international law that cover the situation of third-country nationals faced with the obligation to return voluntarily.

2.6.2 Customary international norms on readmission

In addition to its elaboration of norms related to expulsion, affecting the relationship between the third-country national and the EU member state, customary international law also has important implications for the relationship between the EU member state and the country of return. This is

140 See, for example, Konstantinides 2016.
141 Wouters & Van Eeckhoutte 2002.
142 Ziegler 2015, p. 7; CJEU C-162/96 *Racke* [1998], paragraph 46; CJEU C-286/90 *Poulsen* [1992], paragraph 12 and onwards.
143 CJEU C-162/96 *Racke* [1998], paragraph 45; CJEU 366/10 *ATAA* [2011], paragraphs 78, 84 and 107.

because customary international law provides a general framework for the readmission of aliens that are expelled. This framework would, generally speaking, require the country of which persons expelled by an EU member state are nationals to allow them to return.[144] As noted, such readmission obligations are key to the effective realisation of voluntary return, and the scope of the responsibility of the third-country national in this respect cannot be understood without them.

The obligation to readmit nationals is inextricably tied up with the sovereign right to expel unwanted aliens, which has been discussed above. This right to expel, it is argued, can only be made effective if another state takes back the expelled alien. This responsibility falls to the state of nationality of the alien. Nationality is considered a special bond between an individual and a state, which implies, amongst other things, that he or she always has somewhere to go.[145] This special bond is sometimes also expressed in terms of the personal sovereignty that the country of nationality can extend over the individual. As such, the obligation to readmit can be conceptualised as a function of the protection of the territorial sovereignty of the host state, which includes the right to expel, and the personal sovereignty of the state of nationality. This interplay is often further discussed in terms of a reciprocal relationship between the host state and the state of nationality, which mirrors the former's right to expel with the latter's right to extend diplomatic protection to its citizens abroad – again, a function of personal sovereignty.[146]

It is important to stress at this point that this customary obligation to readmit is one that is both conceptually and substantively different from readmission obligations arising out of human rights law. Although it is always the third-country national that is the object of the return, these obligations are part of different relationships in the triangle model. The customary obligation to readmit is owed by the country of return to the EU member state to make the latter's right to expel effective. The human rights-based obligation to return is owed by the country of return to the third-country national directly.[147] These two obligations may operate side by side and, it could be argued, in practice have the same purpose and effect. However, as will become obvious, it is important to separate them because their significance for voluntary return, and the extent of the individual's responsibility, is distinctly different. Furthermore, where the customary obligation mainly arises in relation to the expulsion of its nationals, the human rights-based obligation relates to any person for whom a country can be considered his 'own' within the meaning of Article 12(4) ICCPR, and thus has a different personal scope. Both differences will have significance for the analysis that is presented in the later chapters.

144 See 4.2.
145 Hailbronner 1997, p. 11.
146 *Ibid*.
147 See 4.2.4 and 5.3.

2.7 Multilateral treaties

While the case law of the CJEU, international human rights and customary international law form the key building blocks of the analysis presented here, certain other instruments may be helpful in given more robust meaning to the individual responsibility of the third-country national to return voluntarily. This includes a number of multilateral treaties governing different aspects of expulsion, return and readmission. While their role in the analysis is more limited, the legal framework would not be complete without them. As a general rule, treaties to which the EU itself is a party bind the EU, and the interpretation of secondary legislation, like the Directive, can be expected to be compatible with those.[148] However, treaties that have been universally ratified by member states, or those that codify customary rules of general international law, may also be used by the CJEU in the interpretation of secondary law.[149] Relevant instruments include those covering various aspects of cross-border travel, as a necessary step in ensuring return (2.7.1), instruments dealing with smuggling and trafficking (2.7.2), and one instrument dealing with consular relations (2.7.3).

2.7.1 Conventions on air and maritime traffic

General rules for the arrival and departure of persons by air are set out in the Chicago Convention on International Aviation (1944). The focus of the Convention is to establish "certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner," as well as ensuring that "international air transport services may be established on the basis of equality of opportunity and operated soundly and economically."[150] The Convention provides for a broad range of principles and arrangements, covering such issues as rules on the flight of aircraft over the territory of states, the nationality of aircraft, measures to facilitate air navigation and conditions to be fulfilled with respect to aircraft, such as safety standards and procedures. The Convention also establishes the International Civil Aviation Organization (ICAO) to "develop the principles and techniques of air navigation and to foster the planning and development of air transport."[151] In the context of this analysis, the Convention is of particular interest as it provides guidance on the entry and exit of air passengers, including those that are refused admission or are to be returned if they are unlawfully staying in the destination country. This happens in Annex 9 to the Convention, which sets out Standards and Recommended

148 TFEU Article 216(2); but also see Martines 2014 on potential limitations of direct effect of such treaties.
149 On the latter point see, for example, CJEU 308/06 *Intertanko* [2008], paragraph 51.
150 Chicago Convention, Preamble.
151 Chicago Convention, Article 44.

Practices.[152] The Annexes to the Convention are regularly amended by the ICAO Council. At the time of writing, the most recent version of Annex 9 is its fifteenth edition, which, as of 23 February 2018, supersedes all previous editions.[153]

Of particular interest in relation to return, Annex 9 tells states how to deal with 'deportees' and 'inadmissible persons.' The former relates to any person "who had legally been admitted to a State by its authorities or who had entered a State illegally, and who at some later time is formally ordered by the competent authorities to leave that State."[154] Notwithstanding the terminology, such persons could also be people returning voluntarily after being ordered to leave. They should be issued with a 'deportation order,' this is "[a] written order, issued by the competent authorities of a State and served upon a deportee, directing him to leave that State."[155] A return decision under the Directive may well act as such a deportation order, without prejudice to the voluntary or forced nature of the eventual return. The Convention does not specify that a 'deportee' must have arrived by air. It could cover all persons who have become irregular and are subsequently returned by air too. At a minimum, such deportees have to be admitted by the state of which they have the nationality.[156] States must also give "special consideration" to the admission of a person deported from another state "who holds evidence of valid and authorized residence within its territory."[157]

'Inadmissible persons,' by contrast concern any "[a] person who is or will be refused admission to a State by its authorities."[158] Such persons would only come within the scope of the Directive if the member state has not opted to exclude them in line with Article 2(2)(a) of the Directive. The provisions in Annex 9 on the return of inadmissible persons primarily

152 Standards and Recommended Practices find their basis in Article 37 of the Convention, which requires the ICAO to adopt and amend these as necessary. A Standard constitutes "[a]ny specification, the uniform observance of which has been recognized as practicable and as necessary to facilitate and improve some aspects of international air navigation … and in respect of which non-compliance must be notified by Contracting States to the Council in accordance with Article 38." Recommended Practices, by contrast, relate to "[a]ny specification of which has been recognized as generally practicable and highly desirable … and to which Contracting States will endeavour to conform in accordance with the Convention." See, Chicago Convention, Annex 9, fifteenth edition, foreword, general information, point 1(a)). While Standards and Recommended Practices thus have different implications, and states may even deviate from the former (if duly notified), AG Mengozzi suggests that they are binding on contracting states "to a greater or lesser degree," but that Annex 9 in particular was adopted to specify such obligations, including "to attain effective management of the process of border controls." See CJEU, Opinion AG, C-17/16 *Dakkak* [2016], paragraphs 48 and 50.

153 It incorporates all amendments adopted by the ICAO Council prior to 17 June 2017.

154 Chicago Convention, Annex 9, fifteenth edition, Chapter 1, Section A (definitions).

155 *Ibid.*

156 Chicago Convention, Annex 9, fifteenth edition, Standard 5.22.

157 *Ibid*., Standard 5.23.

158 *Ibid*., Chapter 1, Section A (definitions).

concern the role of the carrier that has transported the inadmissible person to the Member State. In contrast to deportees, then, for inadmissible persons there is a clear link with arrival by air. Carrier obligations are triggered by issuing a removal order.[159] Whereas a *deportation* order is issued to the individual who needs to leave, a *removal* order does not address the individual, but rather is a "written order served by a State on the operator on whose flight an inadmissible person travelled into that State," which directs the operator to remove that person from its territory.[160] In other words, the removal order imposes an obligation on the aircraft operator to provide transport out of the member state. However, like for deportees, the status as an inadmissible person may trigger obligations on other states, in particular the state where a person embarked who must accept that person for examination in view of possible readmission.[161]

Other rules under Annex 9 that may be relevant to situations of voluntary return relate to the cooperation by the expelling state and the state of return in relation to readmission and the furnishing of travel documents, as well as the prevention of the use of fraudulent documents. Together, although much more easily applicable to removal situations, they may impact on certain voluntary return situations too. In particular, the rules in the Chicago Convention may impact on the relationship between the EU member state and the destination state, in terms of its provisions on return and readmission. Certain provisions, however, such as limitations on where a third-country national can be expelled to, can also possibly have an impact on the relationship between the third-country national and the EU member state. In this respect, it should be noted that the EU is not a party to the Convention.[162] However, in the *Dakkak* case, the Advocate General suggested that, because the Convention has been ratified by all member states of the EU, it should be "taken into account for the interpretation of secondary provisions of Union law."[163] This appears to be consistent with the CJEU's approach in the *Intertanko* case, which also confirms the need to take into account treaties ratified by all member states.[164] Although leaving some space to manoeuvre, in general it would mean that the provisions of the EU legislation should be read as compatible with those international treaties, including the Chicago Convention.

The Convention on Facilitation of International Maritime Traffic (1965, as amended) contains several provisions on return and readmission that are similar in scope to those of the Chicago Convention, especially in relation to inadmissible persons, who arrive by sea. It furthermore also sets out specific obligations as regards stowaways, who, upon arrival in an EU member

159 *Ibid*., standard 5.5.
160 *Ibid*., Chapter 1, Section A (definitions).
161 *Ibid*., standard 5.12.
162 Indeed, the Convention only allows states and not international institutions to ratify it.
163 CJEU, Opinion AG, C17/16 *Dakkak* [2016], paragraph 48.
164 CJEU C-308/06 *Intertanko* [2008], paragraph 52.

state, may come within the scope of the Directive. Like the Chicago Convention, the FAL Convention's annex standards and recommended practices are regularly amended. The references in the text are those as they stand at the end of 2020. The standards and recommended practices relate, inter alia, to the return of inadmissible persons arriving by sea and stowaways. Again, these pertain, for example, to the treatment of such persons by the state in which they arrive, and the possible destinations to which they can be returned. To the extent that it contains provisions that could affect the relationship between the third-country national and the EU member state, I will work on the presumption that its effects in EU law should be considered similar as those discussed in relation to the Chicago Convention. Overall, it should be noted that the role of the Chicago and FAL Conventions in this analysis are limited, but they can be of relevance in particular in relation to returns to transit countries.[165]

2.7.2 The UN Convention on Transnational Crime and its Protocols on Migrant Smuggling and Trafficking in Human Beings

Another set of multilateral instruments relevant to questions of return are two Protocols to the UN Convention on Transnational Crime (CTOC), to which the EU is itself a party. Of particular interest here is the Protocol against the Smuggling of Migrants by Land, Sea and Air (2000), which, in addition to a range of obligations on states to prevent and punish smuggling, [166] also contains certain provisions on the return of smuggled migrants, their readmission and their treatment.[167] Besides the return of smuggled migrants to their country of nationality, these provisions also relate to the return to the country where they hold a residence permit, which may come into play when stateless persons must return,[168] including to transit countries.[169] Furthermore, the Protocol contains several provisions on the prevention of the use or spread of fraudulent documents, which may impact on the obligations of member states – and by extension those of third-country nationals – when obtaining replacement documents.[170] Similarly, CTOC itself, which contains provisions on combating corruption, may be of relevance in that area.

Although the analysis in this dissertation focuses on generally applicable rules and not on sub-categories of third-country nationals, smuggling as a way to enter the EU is sufficiently prevalent, in my view, to justify

165 See 6.4.

166 The CTOC Smuggling Protocol, Article 3(a), defines smuggling of migrants as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."

167 CTOC Smuggling Protocol, Article 18.

168 See 4.3.3.

169 See 6.3.

170 See 8.4.3.

including provisions on smuggled migrants, which may capture quite a wide range of third-country nationals faced with an obligation to return under the Directive. More specific is the situation of victims of trafficking, to whom provisions of the Protocol on to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) apply. The provisions on return and readmission in the Trafficking Protocol largely mirror those of the Smuggling Protocol, although they can be a bit more expansive, such as requiring readmission by a country where a victim of trafficking had a residence right at the moment of entering the EU member state, whereas under the Smuggling Protocol that residence right still needs to be valid.[171] The Trafficking Protocol is also noteworthy as it is the only instrument included in the analysis that specifically refers to voluntary return, in the sense that the return of victims of trafficking "shall preferably be voluntary."[172] As an integral part of the EU's and member states' commitments under CTOC, I will make mention of the Trafficking Protocol, but without the intention to go into depth on the situation of victims of trafficking.

2.7.3 The Vienna Convention on Consular Relations

A final instrument of relevance to the analysis is the 1963 Vienna Convention on Consular Relations. The Vienna Convention does not, in contrast to other instruments discussed here, contain provisions on return or expulsion as such. Rather, it deals with consular functions, which include issuing passports and travel documents to nationals of a state who are abroad.[173] It further contains provisions on access to consular authorities, which may impose obligations both on the state of return and on the EU member state. Since contacts with consular authorities may be essential for submitting a request to be readmitted, or to obtain travel documents, the Vienna Convention plays a role in establishing the scope of the responsibility for voluntary return in regard of this specific action. While it is a multilateral treaty to which only states can become parties, it is widely ratified, including by all EU member states. More importantly, its provisions generally constitute codifications of customary international rules, and by this route would be applicable to the interpretation of the Directive. Since the Vienna Convention is only discussed in Chapter 8, more information on relevant provisions will be presented there.

171 CTOC Trafficking Protocol, Article 8(1); CTOC Smuggling Protocol 18(1).
172 CTOC Trafficking Protocol, Article 8(2).
173 Vienna Convention, Article 5(d).

2.8 Readmission agreements and arrangements

In addition to norms based on international human rights law and customary international law, another set of instruments is relevant to the question of readmission of those expelled by EU member states. These are agreements that are concluded specifically between EU member states, either individually or collectively, with destination states to provide frameworks for readmission. Readmission agreements occupy a peculiar place in the triangle. Clearly, they regulate the relationship between the EU member state and any country of return that is party to such an agreement. However, readmission agreements, like other arrangements, are also specifically written into the text of the Directive. As noted, the definition of return destinations in Article 3(3) of the Directive makes obligatory return to a transit country subject the existence of "Community or bilateral readmission agreements and other arrangements." As such, these agreements both provide for the external context of voluntary return, regarding the relationship between the EU member state and the country of return, and simultaneously directly affect the implementation of one of the provisions in the Directive setting out the return obligation, and thus impacting on the relationship between the third-country national and the EU member state.

In this analysis, the main focus will be on so-called EU readmission agreements. Since 1999, the European Union (then: Community) has had the competence to conclude, on behalf of member states, agreements with third countries to facilitate the return and readmission of illegally staying third-country nationals.[174] At the time of writing, EU readmission agreements are in force with 18 states and territories.[175]These include some key countries from which third-country nationals found to be irregularly staying in EU member states come, such as Ukraine, Albania, Pakistan, the Russian Federation, North Macedonia and Serbia. Negotiations with other important states are under way, although it is questionable whether these will soon lead to concrete results. Negotiations with Morocco are still on-going, despite the adoption of negotiating directives in 2002. Mandates were provided to the Commission for China and Algeria in 2002, but negotiations have often been protracted.[176]

Readmission agreements may add value to existing readmission obligations under customary international law.[177] First, in terms of scope,

174 Prior to this, it was possible for member states to jointly conclude agreements as well. See, for example, the agreement between Schengen states and Switzerland (then not yet part of Schengen).

175 In order of their entry into force: Hong Kong, Macao (both since 2004), Sri Lanka (2005), Albania (2006), Russia (2007), Ukraine, North Macedonia, Bosnia and Herzegovina, Montenegro, Serbia, Moldova (all 2008), Pakistan (2010), Georgia (2011), Armenia, Azerbaijan, Turkey and Cape Verde (all 2014), and Belarus (2020). See European Commission n.d.

176 EPRS 2015.

177 Coleman 2009; Billet 2010; Carrera 2016.

they do not only cover nationals who are expelled, but may also include certain categories of persons who are not nationals.[178] Second, readmission agreements set out detailed procedures for readmission. This includes how a readmission request must be made, and which conditions must be met to show that a specific third-country national is eligible for readmission, including which types of evidence should be presented for this. Furthermore, they set out time frames by which the state where readmission is sought should respond to a readmission request, and deliver travel documents if these are necessary for the return. Although most EU readmission agreements broadly follow the same pattern, there are differences between each of them, for example in terms of the precise scope of persons covered, evidence to be provided for readmission, and time frames. These particularities of EU readmission agreements have been discussed in detail elsewhere, and it would neither be useful nor possible to do this within the framework of this dissertation.[179] However, to do justice to possible differences, this dissertation draws on six specific agreements, as a rough guide to the principles and provisions relevant to the analysis presented. These are ones that are relatively recent, and thus represent, in large part, the current approach to concluding such agreements, and also have particular relevance to the practice of return from the EU: the agreements with Albania,[180] the Russian Federation,[181] Ukraine,[182] Serbia,[183] Pakistan,[184] and Turkey.[185]

178 Confusingly, these are also called third-country nationals, as in persons who have neither the nationality of an EU member state nor of the state to which they may be returned under the agreement, see Chapter 6.

179 See, in particular, Coleman 2009. The newest agreement covered in Coleman's book, the EU-Albania agreement, is actually the oldest of the six I am covering. Given the organic nature in which agreements develop and change, it cannot be excluded that new variations have developed. Furthermore, for the purpose of elaborating parameters of the obligation to return, it is sometimes necessary to illustrate particular requirements, which can only be done by focusing on provisions in individual agreements, rather than providing a broad overview of what could be termed an 'average' or 'standard' EU readmission agreement.

180 Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorization (hereinafter: EU-Albania readmission agreement), OJ L 124, 17 May 2005, pp. 22-40.

181 Agreement between the European Community and the Russian Federation on readmission (hereinafter: EU-Russia readmission agreement), OJ L 129, 17 May 2007, pp. 40-60.

182 Agreement between the European Community and Ukraine on the readmission of persons (hereinafter: EU-Ukraine readmission agreement), OJ L 332, 18 December 2007, pp. 48-65.

183 Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorization (hereinafter: EU-Serbia readmission agreement), OJ L 334, 19 December 2007, pp. 46-64.

184 Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorization (hereinafter: EU-Pakistan readmission agreement), OJ L 287, 4 November 2010, pp. 52-67.

185 Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation (hereinafter: EU-Turkey readmission agreement), OJ L 134, 7 May 2014, pp. 3-27.

As will be discussed in 6.2, EU readmission agreements are generally written with the removal of third-country nationals in mind. However, I will argue that they may also have significance to voluntary return situations, although specific actions by member states to trigger a destination state's readmission obligations are then necessary. This results in questions about the extent to which an EU member state can trigger such obligations without the consent of the third-country national in voluntary return situations, and, conversely, whether the third-country national can require a member state to take action if this is in his or her interests.[186]

As noted above, EU readmission agreements are not the only instruments affecting the inter-state relationship. For example, member states may rely on bilateral agreements with destination states as well, as long as these have not yet been superseded by EU agreements.[187] The extent to which member states rely on such bilateral agreements will vary. For example, of the readmission agreements listed on the website of the Dutch Repatriation and Departure Service (DT&V), which is responsible for overseeing the effective execution of return decisions, only one covers a country which is not also covered by EU agreements. On the other hand, Switzerland, which as a non-EU state cannot benefit from EU readmission agreements, has dozens of active bilateral readmission agreements. The scope and content of bilateral readmission agreements may be more variable than EU agreements, since each member state may have specific interests and approaches in concluding them. Although bilateral readmission agreements will again come up in relation to the definition of 'transit countries' in Article 3(3) of the Directive, they will not be discussed specifically as sources of readmission obligations governing the relation between EU member states and countries of return separately.

In addition to 'proper' EU or bilateral readmission agreements, there are a number of other international instruments that refer to questions of return and readmission. Clauses on readmission, for example, have been included in political or economic cooperation agreements with (groups of) third countries. A prominent example of this is the so-called Cotonou Agreement, with is a partnership agreement between the EU and 79 African, Caribbean and Pacific (ACP) countries, which covers development cooperation, economic and trade cooperation, and a political dimension.[188]

186 See 6.2.4.

187 Member states must also refrain from negotiating new bilateral agreements with a particular destination state if the EC has been given a negotiating mandate for an EU agreement with that state.

188 Partnership Agreement between the African, Caribbean and Pacific (ACP) Group of States and the European Community and its member states of 23 June 2000, OJ L 317, 15 December 2000, pp. 3-353. The Cotonou Agreement was supposed to be replaced by a new agreement in 2020, and a political deal on this was reached in December 2020. However, the current Agreement's provisions will remain in force until at least 30 November 2021.

Similarly, such partnership agreements have been negotiated with other groups of states,[189] and the EU and its member states have also concluded numerous similar agreements with individual third countries. These may have a general bearing on migration cooperation, including as regards return and readmission. The Cotonou Agreement, for example, contains specific provisions on cooperation in the area of migration in its Article 13, which includes a commitment of all parties to accept the return and readmission of nationals illegally present on the territory of an ACP or EU state, at that state's request and without further formalities, and to provide documents for this purpose.[190] Furthermore, it commits the states, on the request of the other party, to conclude "in good faith and with due regard for the relevant rules of international law, bilateral agreements" on return and readmission of non-nationals.[191] In this analysis, however, such instruments do not have a prominent role. In regard of the return of nationals, they appear to provide little added value to established rules under customary international law, since they do not – in contrast to EU readmission agreements discussed above – provide for further clarification of the modalities for readmission. As regards the return of non-nationals, which specifically pertains to returns to transit countries in this analysis, the commitment to conclude agreements does not amount to a clear, self-standing readmission obligation.[192] For a further discussion of the role of such political or other agreements which contain clauses related to readmission, see 3.3.2.

Increasingly, the EU and individual member states are concluding more informal arrangements on readmission with a range of third countries.[193] This creates further complexity and challenges for any analysis of rules or practices on return. Given their informal nature, adapted to the specific needs and context of the situation, they will likely differ from each other much more than formal agreements, such as EU readmission agreements, which broadly follow an agreed template. A proper understanding of the role of informal arrangements would thus require a case-by-case analysis of each of them. That is, if the arrangements in question are even available in the public domain or clearly written down, which is not necessarily always the case. It would be impossible within the context of this disserta-

189 See, for example, the Political Dialogue and Cooperation Agreement between the European Community and its member states and the Andean Community and its member countries (Bolivia, Colombia, Ecuador, Peru and Venezuela), Council doc. JOIN(2016) 4 final, 3 February 2016. The Agreement contains a clause on return cooperation in Article 49..

190 Cotonou Agreement, Article 13(5)(c)(i).

191 Cotonou Agreement, Article 13(5)(c)(ii).

192 Although the EU has taken the position that Article 13 is self-executing, this is a matter of dispute – and indeed has been an issue in further negotiations between the parties. However, at least as regards the readmission of non-nationals, the text of the provision seems to be clear on an obligation to negotiate agreements, but not that it itself constitutes a clear basis for readmission. See, in this regards, Koeb & Hohlmeister 2010.

193 Cassarino 2017 and, for an updated overview, Cassarino n.d.

tion to discuss all these instruments separately, considering their number and differences in scope and content. Furthermore, being non-binding arrangements, they would not normally be able to have a clear effect on the interpretation of the legal scope of the responsibility to return. From that perspective, they could have been left out of this analysis altogether, since it is focused on formal rules and their impact on the obligations of each of the actors in the triangle. However, informal arrangements cannot be entirely ignored. After all, just like readmission agreements, they are specifically written into the text of the Directive. Not only that, they are mentioned in Article 3(3), which defines return specifically in relation to destination countries, including transit countries. The existence of an informal arrangement with a transit country makes it an obligatory destination for the individual, at least under circumstances to be elaborated.[194] It is in this context of the obligatory nature of returning to a transit country, that informal arrangements will figure in a general sense in the analysis. But even in that context, as discussed in 6.4, their impact on the scope of individual responsibility remains limited.

2.9 Policy documents and 'soft law' instruments

Finally, mention should be made of policy documents and 'soft law' instruments. In certain cases, these can provide further indications of the intentions of the drafters of the Directive, or otherwise give context to its interpretation. For example, the discussion of the rationale behind prioritising voluntary return, as set out in various EU documents, may be relevant to contextualise certain discussions regarding the individual responsibility of third-country nationals and their entitlement to a voluntary return period. Furthermore, some specific instruments had an important role in the shaping of the provisions of the Directive itself. Lutz notes, for example, how the Council of Europe Twenty Guidelines on Forced Return,[195] which are referenced in the preamble, were considered a "golden bridge" for reaching agreement during the negotiations on the Directive.[196] But 'soft law' instruments may also be particularly important in the way the interpretation and implementation of the Directive after its adoption was shaped. Slominski and Trauner specifically note that the use of 'soft law' instruments is becoming more prevalent in adjusting the EU's asylum and migration frameworks in a way that is much quicker and more flexible than formal legislative changes.[197] Some key documents in this respect include the European Commission's 2017 Recommendation on a making returns more

194 See the discussion of general requirements for this in 3.3.1, and the more specific application to informal arrangements in 6.4.
195 Council of Europe 2005.
196 RD Recital 3; Lutz 2010, p. 28.
197 Slominski & Trauner 2020.

effective when implementing the Directive, which also includes various recommendations to member states in relation to voluntary return.[198] Perhaps most prominently, the Commission published the first Return Handbook in 2015,[199] which was subsequently revised in September 2017 and also contains specific guidance to member states on various aspects of voluntary return.[200] While not constituting legally binding sources, they can be helpful in providing clarification of certain aspects of the key elements of individual responsibility for voluntary return.[201]

Based on the various sources and norms identified in sections 2.4 to 2.9, the triangle model, as presented in Chapter 1, can be further elaborated, as done in figure 2.

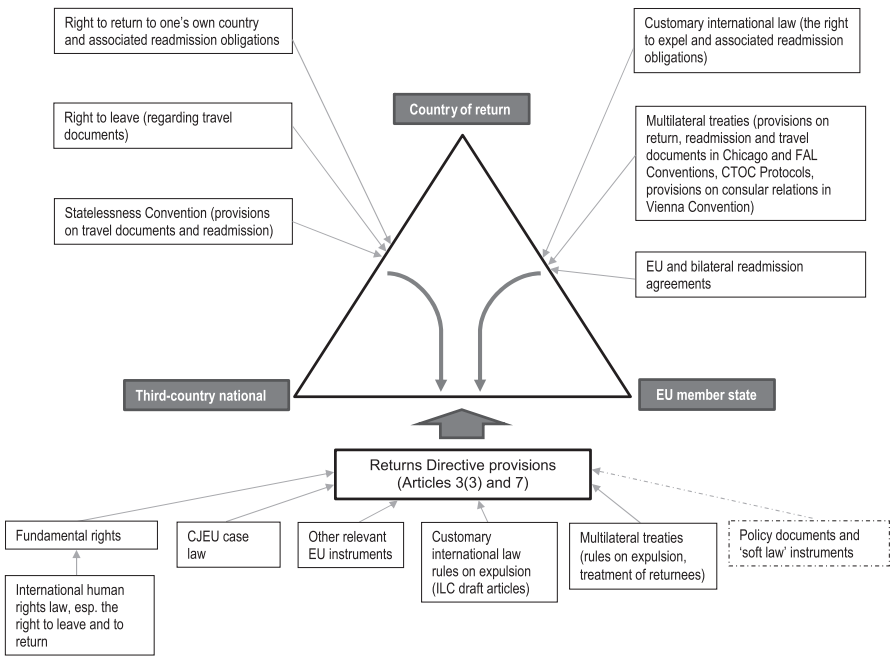

Figure 2: updated triangle model

198 C(2017) 1600 final, 7 March 2017.
199 C(2015) 6250 final.
200 C(2017) 6505 final, 16 November 2017, Annex.
201 Although, as will be evident in the subsequent chapters, I suggest that some of the approaches taken in the Commission's 2017 Recommendation and in the Handbook are difficult to maintain on the basis of an interpretation of the Directive, either in relation to its objective, purpose and provisions, or in light of the various (legally binding) instruments discussed above. Nevertheless, these 'soft law' instruments often provide a useful starting point for further discussion of some elements that are not clearly addressed in the substantive provisions of the Directive itself.

2.10 Concepts and terminology

Having set out the sources on which this analysis will draw, and the way they may impact on the scope of the responsibility related to voluntary return, one last issue remains to be discussed in this chapter. This is in regard of the concepts and terminology used. Some of these may give rise to questions. The first issue is that there are several potential sources of confusion in the use of the term 'voluntary return.' Since this is a key concept of analysis, specific attention to its clarification will be devoted in 2.10.1. Following this, some further related concepts, such as 'illegally staying third-country nationals' and 'destination countries,' will be clarified in 2.10.2.

2.10.1 Voluntary return and related concepts

Various concepts have a close relation with voluntary return or, conversely, may create confusion as they sound similar but have a different meaning or function. Below, the relation between voluntary return and voluntary departure, voluntary repatriation and assisted voluntary return are discussed. Finally, the overall notion of voluntariness, as used in the context of the Directive, is examined.

2.10.1.1 Voluntary return v. voluntary departure

The Directive uses both voluntary *return* and voluntary *departure*, which may lead to questions over their differences and overlap.[202] The Return Handbook tries to provide a clarification of the two concepts, which, in my view, is extremely unhelpful and actually misrepresents at least the first term. It suggests that voluntary return refers only to the return of *legally* staying third-country nationals, whereas voluntary departure is compliance with the obligation to return of *illegally* staying third-country nationals.[203] While the second part is clearly in line with the definition provided in Article 3(3) of the Directive, the first part appears out of thin air. As discussed, the Directive explicitly provides that voluntary return should be prioritised, and furthermore that voluntary return should be promoted through enhanced return assistance and counselling.[204] There can be no doubt that the phrase 'voluntary return' in this case refers to illegally staying third-country nationals. After all, this is the only group of

202 Indeed, on the website Researchgate.net, a specific discussion emerged between academics and practitioners on the basis of the question "Is it right to say that 'voluntary departure' in the meaning given by Directive 2008/115 and 'voluntary return' have the same meaning?"

203 C(2017) 6505 final, 16 November 2017 Annex, paragraph 1.7. The Handbook does try to clarify that the first scenario only applies to "truly" voluntary returns, but this still confuses the matter due to the Directive's explicit incorporation of the term.

204 RD Recital 10.

third-country nationals that the Directive is concerned with. It contains no mandate at all to promote the return of those who are still allowed to stay in member states; this is a matter that remains fully within the competence of those member states, so this cannot lie at the heart of the distinction.

The fact that both terms are used could simply be a matter of lack of attention in the drafting process. However, the Directive provides some indication that the two terms have specific functions in the text. This is particularly evident from Recital 10, which says that "[w]here there are no reasons to believe that this would undermine the purpose of a return procedure, *voluntary return* should be preferred over forced return," and furthermore, that in such cases "a period *for voluntary departure* should be granted." This suggests, in my view, that the phrase 'voluntary return' can be seen as the more general designation of the act that must be performed by the third-country national. In combination with the other parts of the Directive, it clarifies that return can be met either voluntarily (of one's own accord) or enforced, with the Directive explicitly aiming to give priority to the former.[205] 'Voluntary departure' however, is connected to the time limit provided for this, as defined in Article 3(3). In this way, granting a voluntary departure period is a means of enabling voluntary return. Or to put it in another way: *the obligation to return + a voluntary departure period = voluntary return*. This is the way the two terms are used in this analysis, as also evident from the research questions presented in Chapter 1.

The above also suggest that the terms 'return' and 'departure' are not consistently used in the Directive, by including both voluntary return and voluntary departure, which in the end must converge on the same action taken by the individual. The link between departure and return will be discussed in more detail elsewhere,[206] but it needs to be reiterated that the substance of the individual's responsibility is formed by the obligation to *return*. As discussed above, leaving a member state (the 'departure' element) is part of that obligation. Indeed, departing from an EU member state is a clear precondition for third-country nationals returning to their destination country. In practice, return cannot happen without departure, but the opposite is not true. A person leaving an EU member state by sea or by air has departed, but that does not mean that he or she has already entered the destination state. In fact, entry there might be denied. As such, return and departure can be seen as two interconnected, but different actions. However, nothing in the text of the Directive indicates that this subtle difference was in the mind of the drafters when including both terms in the Directive. I will therefore generally refer to the responsibility of third-country nationals in relation to returning, although the specific actions related to leaving the

205 Indeed, the initial proposal for the current Directive explicitly defined return as "the process of going back to one's country of origin, transit or another third country, *whether voluntarily or enforced*." COM(2005) 391 final, 1 September 2005, Article 3(c).

206 See 9.4.

member state must be considered a specific part of that responsibility, and this will also receive specific attention, notably in Chapter 9.

2.10.1.2 Voluntary return and the voluntary repatriation framework for refugees

A further potential source of confusion is that similar terms to voluntary return are used in closely related or overlapping legal and policy fields. Prominently, this includes the framework for 'voluntary repatriation' of refugees. This is one of the so-called durable solutions for those recognised as refugees, and is based on a specific framework of (soft law) principles.[207] It applies to a different category of persons, since those recognised as refugees or beneficiaries of subsidiary protection in EU member states would not be subject to a return decision, at least until such moment this status is withdrawn. Crucially, as well, the absence of pressure to return, in particular through legal compulsion, is a key feature distinguishing voluntary repatriation of refugees from voluntary return of third-country nationals illegally staying in EU member states. It should be noted that significant questions have been raised whether the voluntary repatriation framework, both conceptually and in practice, indeed sufficiently protects refugees' choice in returning.[208] However, such questions are beyond the scope of this analysis since those recognised as refugees in EU member states are not generally covered by the Directive.[209]

2.10.1.3 Voluntary return and assisted voluntary return programmes

The concept of voluntary return in the Directive should also be distinguished from very similar terms often used for programmes and activities that provide practical assistance to persons returning voluntarily. These programmes are often referred to as assisted voluntary return (AVR) or assisted voluntary return and reintegration (AVRR) programmes.[210] At

207 UNHCR 2004; Vedsted-Hansen 1997.

208 See, for example, Majcher 2020, p. 547. Although discussions about the extent to which the voluntary repatriation framework truly prevents pressure, in principle and in practice, is a matter of debate, see, for example, Zieck 2004; Crisp & Long 2016; Gerver 2018.

209 This may be different if cessation of their refugee status has taken place. Also, there is the theoretical possibility that a person who is recognised as a refugee as defined in the 1951 Refugee Convention in a third country would be subject of a return decision after traveling to an EU member state. Similarly, a person with refugee status in one EU member state, who subsequently is staying in another EU member state without fulfilling the requirements for entry, stay or residence, may also become subject to the return procedures of the Returns Directive, see CJEU C-673/19 *M and others* [2021], paragraph 30. However, these are very particular situations which would detract from the main focus of this analysis and a therefore not discussed further.

210 According to IOM 2017, p. 2, such programmes comprise "administrative, logistical and financial support provided to migrants unable or unwilling to remain in the host country who volunteer to return to their countries of origin and, where possible, supported with reintegration measures."

the EU level, the question of return assistance has mainly been one of policy. Various non-legislative attempts have been made to harmonise and streamline across member states.[211] While various member states' own laws already make specific provisions for return assistance, the alignment of voluntary return and such assistance as a matter of EU law is a much more recent development. The current Directive states that member states "should provide for enhanced return assistance and counselling," but does so only in the preamble and does not include operative provisions in this respect.[212] However, as noted, the Commission's recast proposal may change this. AVRR programmes may enable third-country nationals to take up voluntary return and in this way can play role in the timely fulfilment of the obligation to return. In this way, there is interaction between AVRR and voluntary return as a legal concept within the Directive, but they remain distinct.[213] The interconnection between voluntary return in the Directive and AVRR will be discussed in 9.3.

2.10.1.4 The notion of 'voluntariness': between coercion and choice?

Perhaps the largest potential source of confusion is not in the relationship of voluntary return and other concepts, but the way in which the term might be viewed itself. The word 'voluntary,' in its normal meaning, denotes a matter of choice or free will. As discussed above, the way in which it is framed in the Directive, however, revolves around compliance with an obligation. From that perspective, it is unsurprising that voluntary return has been criticised for false advertising,[214] as it is not actually something undertaken by individuals out of choice or free will, but rather the result of a legal order and the accompanying threat of physical coercion.[215] Indeed, in various documents it has produced over the years, the Commission has clearly struggled with this issue. In 2002, for example, its first attempt at a definition of voluntary return read as follows: "return to the country of origin or transit based on the decision of the returnee and without use of

211 Most recently, this has taken the form of the elaboration of an EU Voluntary Return and Reintegration Strategy, see COM(2021) 120 final, 27 April 2021.

212 RD Recital 10.

213 However, as noted by Majcher 2020, p. 571, where such programmes are used to support voluntary return under the Directive, the fact that such returns are not truly voluntary, within the common meaning of the word, also extends to such AVRR programmes, and the criticism of the use of the term 'voluntary' discussed below thus applies equally to them.

214 Both Peers 2015 and Majcher 2020, p. 547, refer to the term as "a euphemism." A similar conclusion is drawn by Cassarino 2019 in relation to the term expulsion, particularly also in view of various terms used in this respect, including voluntary return.

215 Majcher 2020, p. 547, noting that voluntary return in the Directive "is not genuinely voluntary and consent-based." Also see, for similar points, Webber 2011; De Haas 2013; Cassarino 2019.

coercive measures."[216] This appears to be quite close to the way it is framed in the Directive, as it leaves open the possibility this is based on legal compulsion to return. However, less than half a year later, it proposed a definition that appears to take a very different, if not diametrically opposite approach, by referring to the "assisted or independent departure to the country of origin, transit or another third country *based on the will of the returnee*."[217] Even though the Directive should have settled this matter, the discussion above about the definitions of voluntary return and departure in the Return Handbook suggests that this may still be a matter which creates confusion at the EU level.

Obviously, within the scheme of the Directive discussed above, the will of third-country nationals, at least as to whether they want to return or not, is not the starting point, since they are legally obliged to return. At best, voluntary return as used in the Directive gives individuals a certain autonomy to make decisions about the process of returning, as discussed in the following chapters, but not the choice whether to return. In this way, it has been noted that it blurs the lines between choice and coercion.[218] Whether this blurring of lines is intentional is difficult to say within the context of this analysis, but there are certainly (political) advantages to pairing legal compulsion to return with the seemingly friendly notion of voluntariness.[219] The question of the balance between choice and coercion is one that has given rise to important considerations. For example, various authors have noted that issues of force and choice in migration, whether departure or return, can best be seen as a continuum, rather than two mutually exclusive elements.[220] Such discussions notwithstanding, it is undisputable that the criticism that voluntary return, as used in the Directive, is not 'truly' voluntary in its ordinary meaning, is correct.

Various attempts at addressing this issue have been made over the years. For example, the use of voluntary return in Dutch policy long predates the Directive, but in the mid-1990s a choice was made to adopt the term 'independent return' or 'return of one's own accord' to better reflect the reality of the individual faced with a legal order to leave.[221] Others have modified this

216 Commission Green Paper on a Community Return Policy, COM(2002)175 final, 10 April 2002, Annex I.

217 Commission Communication on a Community Return Policy, COM(2002)564 final, 14 October 2002, Annex I.

218 Kalir 2017; Cassarino 2019.

219 See 2.2.1 above, and particularly the references to reducing resistance to returns and the role of voluntary return in international relations.

220 For a general discussion of the 'fuzzy' boundaries of choice and coercion in international migration, see Van Hear 1998, p. 44; Turton 2003, pp. 8-9; For specific applications of this, see, for example, Kunz 1973 and Richmond 1993 on refugee movements; Kim 2010 on victims of trafficking; and Middleton 2005, p. 3 and Crawley 2010, p. 5 on asylum seekers.

221 Mommers & Velthuis 2010, p. 7. The Dutch term used was 'zelfstandig.' The adoption of the Directive, however, brought the term voluntary back into policy and legal parlance.

into 'independent compulsory return.'[222] A well-known attempt to address this has been the one by the European Council of Refugees and Exiles (ECRE), which suggested using 'mandatory return' for all situations in which there is legal compulsion.[223] 'Accepted return' is another alternative that has been posited.[224] The term 'soft deportations' has even been used to denote returns which occur under compulsion but falling short of physical coercion.[225] The term 'self-deportation' was briefly in vogue in the United States at the time of the 2012 presidential elections.[226] While the critiques of the use 'voluntary' in this context are legitimate, and perhaps terminology that better describes the situation of third-country nationals would be more appropriate, the term has become embedded in the Directive, and is therefore used in implementing legislation in member states, as well as judgments of the CJEU. As such, the term voluntary return will be used here in the meaning given to it by the Directive, in the full awareness that this meaning is clearly disconnected from its common use outside the scope of the Directive.[227] Rather than focusing on the well-taken argument that such voluntary return is not truly voluntary, this analysis seeks to uncover what this concept means for the specific position of third-country nationals within the Directive, and their relations with the EU member state and the country of return.[228]

2.10.2 Other terminology

In addition to terms related to, or easily confused with, voluntary return, clarification is also necessary in relation to two further concepts used throughout this dissertation, illegally staying third-country nationals, and destination countries.

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222 Leerkes, Galloway & Kromhout 2011, p. 2.

223 ECRE 2003, p. 4.

224 DRC 2015; DRC 2018, p. 3.

225 Leerkes, Van Os & Boersema 2017, p. 8 noting "that such return has deportation-like properties, while acknowledging that it depends less on force and deterrence."; Also see Kalir 2017, and, in the same vein, Collyer 2012, p. 289, refers to the "assisted voluntary return model of *deportation*" (my emphasis).

226 The term was used by Republican candidate Mitt Romney. See, for example, Madison 2012; Pilkington 2012.

227 Where necessary, I will make this distinction explicitly, using 'truly voluntary return' to denote situations in which individuals can choose whether to return without legal or other coercion.

228 To make matters even more complicated, the notion of 'return' in this context has also been challenged. Cassarino, for example, has argued that the term expulsion is more appropriate to such situations. He suggests that, while 'return' should be viewed more generally be used as a stage of the migration cycle, expulsion "epitomises the brutal interruption of a migration cycle having severe consequences for migrants' well-being and opportunities to reintegrate", see Cassarino 2019, p. 3. As discussed in 2.3.1, I consider voluntary return, as used in the Directive, as a specific form of expulsion.

2.10.2.1 Third-country nationals, aliens, non-nationals, and illegal stay

Some comments are appropriate as regards the individuals that are the subject of this analysis, which the Directive defines as 'illegally staying third-country nationals.' In general, this dissertation will follow the term 'third-country national' as used in the Directive, although for stylistic reasons 'the individual' or other such terms for persons involved might be preferred. Specific variations on this arise out of international law. The term 'third-country national' is one derived from EU law.[229] In the context of expulsion and international movement, this term is not normally used. Rather, terms such as alien or non-national tend to be used for a person who does not possess the citizenship of the host country. In some cases, such instruments may use the term third-country national, but in a different way. This is the case for readmission agreements, which consider third-country nationals as persons who neither hold the nationality of the EU member state nor of the country of return.[230] As much as possible, I aim to use the terms relevant to the specific legal instrument being discussed at each point of the analysis. However, when this would lead to confusion, such as when discussing the interaction of international norms and the Directive, this may require sometimes choosing one or the other to avoid confusion. In some cases, for the sake of clarity I may also use terms that are not necessarily derived from legal instruments, such as migrant or returnee.

In trying to stick to the terminology used in the relevant legal instruments, the use of '*illegally staying* third-country national' is sometimes unavoidable. After all, this is the specific category of persons that fall within the scope of the Directive. However, it is important to acknowledge that attaching the term 'illegal' to a person has been criticised and is also discouraged by international organisations.[231] The term has been found to be dehumanising and criminalising.[232] As such, in various fields, other terms, such as 'irregular' or 'undocumented' are increasingly preferred.[233] It should also be noted that while the term 'illegally staying' is used in the English-language version of the Directive, which obviously forms the basis for discussions here, this is not the case in all other languages. For example, the French, Spanish and Portuguese versions use 'irregular' stay.[234] In her

229 The logic being that the EU member state of relevance is the first country, any other EU member state would be a second country, and any non-EU member state a third country.

230 See 6.1.

231 UN General Assembly Resolution No. 3449 of 9 December 1975, for example, calls for the use of 'irregular' rather than 'illegal' migrant. Also see UN Committee Migrant Workers General Comment No. 2, paragraph 4.

232 PICUM n.d.; EP doc. PE648.370v01-00.

233 For example, the AP press agency changed its style book to exclude the term 'illegal migrant' from its reporting. See Colford 2013.

234 Further variations exist. For example, while the Czech version uses the term 'neoprávněným pobytem', which could be seen as equivalent to 'illegal stay,' but might more appropriately be translated as 'unlawful stay' or 'stay contrary to the law.'

draft report, the LIBE Rapporteur on the recast proposal also suggests changing the term 'illegal' to 'irregular.'[235]

Although the term 'illegal' in the Directive is strictly speaking attached to the person's status, rather than the person him or herself, I am conscious of the negative connotations. Generally, I will just use the term 'third-country national' without the addition 'illegally staying,' since this dissertation only deals with those issued a return decision under the Directive, and a further qualification of their status is thus often not necessary. When referring to residence status, I will use, as much as possible, the term 'irregular.' I use this, rather than the often-used 'undocumented' to avoid confusion. An important part of the obligation to return is the question of having valid travel documents. In this respect, there are important differences between the situation of a person who already is in possession of such documents, and one who is not. I will therefore reserve the term 'undocumented' as a shorthand for those that do not already have all necessary documents for their return, although both documented and undocumented persons in this context fall within the broader category of those whose stay in the EU member state is irregular.

2.10.2.2 Destination countries

A final note on terminological clarity concerns the categories of destinations set out in the Directive. As discussed, the Directive mentions countries of origin, transit countries and other third countries.[236] I will use these designates when discussing each of these categories. However, in many cases the analysis will require referring to these countries jointly. As has been done above, I will use the terms 'destination countries' or 'countries of return' when doing so. Separately, as discussed below, a specific category of countries not explicitly mentioned in the Directive also plays an important role in ensuring voluntary return. This concerns countries competent to issue travel documents to individuals. This may overlap with the intended destination country of the third-country national, in which case the terms above can be used. However, sometimes a country may be involved in the issuance of travel documents even when it is not itself the intended destination. In such cases, they are mentioned separately.

235 EP doc. PE648.370v01-00, for example, amendment 6.

236 Within the context of EU law, third countries are any state that is not a member of the European Union. However, in the context of the Directive, it would arguably also exclude countries that are not members of the EU, but that implement the Directive.

2.11 Concluding remarks

The sources and instruments discussed in sections 2.4 to 2.9 will form the framework to investigate the individual responsibility of the third-country national in relation to voluntary return and the associated clarification of the obligation to return and the entitlement to a voluntary departure period. Not all these sources and instruments will be used equally. It should be emphasised that the length of the discussion above of each of the elements does not necessarily reflect their respective importance in the analysis. The key focus will be on the CJEU's judgments, the role of individual rights,[237] and customary international law. The other instruments will play their role in specific parts, but often in an auxiliary way.[238] Many of the sources and instruments discussed will have relevance for different, often overlapping topics. It was noted, for example, that questions of readmission and obtaining travel documents often coincide. To avoid repetition, some necessary discussions and elaborations have been allocated to one part of the analysis, and only cross-referenced in others where they are also relevant.

237 Whether as fundamental rights within the relationship between the third-country national and the EU member state or as international human rights in the relationship between the third-country national and the country of return.

238 Although EU readmission agreements have a central place in the discussion of return to transit countries in Chapter 6.

3 Identifying countries of return as obligatory destinations

3.1 Introduction

Having set out the context in which the notion of voluntary return should be understood, and the legal framework to be applied, this chapter marks the start of the substantive engagement with the first set of sub-questions, namely those related to the scope of the obligation to return. As noted, because of the overlap between the two, it will deal simultaneously with the question which actions third-country nationals can be expected to take to meet their obligation to return (*question 1a*), and which actions they cannot legitimately be expected to take (*question 1b*). Also, it was noted that answering these questions would require zooming in on specific types of actions which make up key elements of a successful return: seeking readmission, obtaining travel documents, and making practical arrangements for departure. This chapter, together with Chapters 4 to 7, will be devoted specifically to the first element, seeking readmission.[1] In particular, this chapter looks in detail at the destinations that form an integral part of the definition of return, and the implications for the obligation of third-country nationals to pursue return and readmission to such destinations.

As discussed in Chapter 1, the nature of the obligation to return hinges on the definition of return in Article 3(3) of the Directive. Apart from the somewhat vague reference to "the process of going back," which will be given more attention in the next chapters, Article 3(3) mainly defines the destinations to which a third-country national should return. Each of these destinations (the country of origin, a transit country or another third country) mentioned in Article 3(3) raises questions of scope and application. This is either because the specific wording (such as the meaning of 'origin' or 'transit') may lack clarity, or because specific qualifications are attached to the destinations (such as the requirement that return to a transit country is "in accordance with Community or bilateral readmission agreements or arrangements" or that individuals should "voluntarily decide" to return to another third country).[2]

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1 Obtaining travel documents and making practical arrangements for departure will be discussed in Chapters 8 and 9 respectively, completing the block of chapters focusing on the obligation to return.

2 See 1.3.1.

This chapter will examine these terms and qualifications with a view to establishing whether, and under which circumstances, each of these destinations can truly be considered obligatory. In other words, it will look at when third-country nationals can be expected to pursue return to one or more of these destinations, and thus be held responsible for their efforts (or lack thereof) in relation to these destinations. It could be argued that clarifying the obligatory nature of the destinations is unnecessary, since third-country nationals are under a general obligation to return, and they can thus be expected to seek return to any country where they may possibly be admitted. However, this would ignore the fact that the Directive provides a specific definition of return, which limits the scope of the obligation to return. Given the Directive's role in setting out common standards and procedures, member states would be prohibited, in law and practice, from expanding the obligation to return to include destinations that were not specifically agreed upon by the co-legislators. This would also be problematic from the perspective of legal certainty. Furthermore, as I have suggested earlier, setting clear boundaries for the obligation imposed on individuals is crucial so that they can subsequently be held responsible for non-compliance with that obligation, especially considering the far-reaching consequences for their fundamental rights.[3] As a result, this discussion of the destinations is based on the premise that the obligation to return only extends to seeking return to those countries clearly captured within the definition provided by Article 3(3). This is also emphasised in the Return Handbook, which states that the definition of return "implies that Member States must only carry out return to a third country in the circumstances exhaustively listed in one of [Article 3(3)'s] three indents."[4] Given that the definition of return applies to all stages of the Directive's procedure, this logically also extends to voluntary return. Thus, a country that does not fall within any of the three categories of destinations of this Article cannot be considered as an obligatory destination. And, as a result, third-country nationals cannot be held responsible for a failure to pursue return and seek readmission to such a country.

Even this may not appear to be too much of an issue in practice, since the three destinations, read together, could be considered to cover all possible instances. After all, if a country is not a country of origin or a transit country, it is another third country, which is also covered in the definition of return. However, as I will show in this chapter, the qualifications attached to the destination mean that, in any given individual case, the scope of obligatory destinations will actually be relatively narrow. And it will certainly not require third-country nationals to 'shop around' randomly and approach any country in the world to see if they would allow them

3 See 1.3.3.

4 C(2017) 6505 final, 16 November 2017, Annex, paragraph 1.3.

entry so that they can meet their obligation to return under the Directive.[5] This becomes obvious when the precise meaning of each of the three destinations is unpicked.

In the following sections, the scope of each of the destinations mentioned in the Directive will be discussed, with the aim of ascertaining when and for whom they are obligatory. In section 3.2, attention will first turn to the country of origin of the third-country national. While not further qualified, the issue of what constitutes 'origin' provides an important qualification to its obligatory nature. In section 3.3, transit countries will be discussed. This will cover both the meaning of transit and the qualification that return to such countries must be 'in accordance with Community or bilateral readmission agreements and arrangements.' In the latter case, I will also consider what kind of agreements or arrangements can be considered sufficient to make return to a transit country obligatory for third-country nationals. In section 3.4, the third and final destination, another third country, is examined. This hinges on two qualifications. First, that the third-country national is admitted there. And second, that the individual must 'voluntarily decide' to return to such a country. This second qualification particularly calls into question the obligatory nature of return to other third countries. Section 3.5 will discuss the findings of the preceding sections and the implications for third-country nationals faced with an obligation to return, as well as how these findings affect the further analysis.

3.2 The country of origin as an obligatory destination

The first destination set out in Article 3(3) is the 'country of origin.' This term may raise several questions. The country from which third-country nationals 'originated' could be read, for example, as the country where they were born, the country where they hold nationality, or the country where they had their last residence. All of these may, but do not necessarily, overlap. Other interpretations are also possible. Within the context of international travel, the country where third-country nationals 'originated' could be seen as the place from where they started their journey to arrive in the EU, or alternatively, the last place they passed through before arriving in the EU. As such, it is useful to clarify further under what circumstances this destination is indeed obligatory for third-country nationals.

5 Similarly, Ellerman 2010, p. 416, has described how member states may go "embassy shopping" during removal proceedings in the hope of finding a country of readmission. Also see Cleton & Chauvin 2020, pp. 301-302.

3.2.1 'Country of origin': a definition

The Directive itself does not provide any insight into the precise meaning of country of origin. Other pieces of EU legislation relating to either asylum or migration issues, such as Regulation 604/2013 (the Dublin III Regulation),[6] also use the term 'country of origin' without defining it.[7] However, Directive 2011/95 (the recast Qualification Directive) does provide a definition.[8] It defines a 'country of origin' as "the country or countries of nationality or, for stateless persons, of former habitual residence."[9] And while Directive 2013/32 (the recast Asylum Procedures Directive)[10] does not provide a specific definition, it uses the term country of origin in various parts,[11] including in the context of the concept of 'safe country of origin,' on which it provides some useful clarification. In particular, it states that a country can only be considered a 'safe country of origin' if "(a) he or she has the nationality of that country; or (b) he or she is a stateless person and was formerly habitually resident in that country."[12]

Although the same terminology in different pieces of EU legislation does not always have to have the same meaning, in this case there is reason to assume it does. In the case of the recast Qualification Directive, the concept of 'country of origin' is used in a different context, since it serves to assess the protection needs of an asylum applicant. In the recast Asylum Procedures Directive, the context is again slightly different, since it deals with the extent to which 'safe country' concepts can be applied in assessing the asylum claim. However, they both also deal with the matter of return in a way, since the concept is used to identify the place where the person might experience persecution or other circumstances relevant to the question of protection, if they were to return to it. Furthermore, the Returns Directive also covers persons who have had their asylum claims assessed based on the criteria of the recast Qualification Directive and on the basis of procedures set out in the Asylum Procedures Directive, and were rejected following that assessment. Although the Returns Directive covers a wider group of third-country nationals, it would be odd if a person's country of origin would be defined differently before and after the rejection of an asylum application. This is particularly the case since there are important

6 OJ L 180, 29 June 2013, pp. 31-59.
7 Regulation 604/2013, Articles 2(g), 9, and 16.
8 OJ L 337, 20 December 2011, pp. 9-26.
9 Directive 2011/95, Article 2(n).
10 OJ L 180, 29 June 2013, pp. 60-95.
11 Directive 2013/32 uses the term in numerous places, including Articles 30(b), 31(4) and 45(2)(b). It is also part of the concept of a 'safe country of origin,' see Article 36.
12 Directive 2013/32, Article 36(1).

areas of overlap between asylum and return procedures,[13] and this convergence is only likely to strengthen in the future.[14] Lutz notes that during the negotiations on the Returns Directive, it was suggested that the term 'country of origin' would conform to its use in the Qualification Directive.[15] This, he says, was either accepted, or at least not subject to disagreement.[16]

As a result, the definition of 'country of origin' as relating to the country or countries of nationality of third-country nationals, or to the country of habitual residence of stateless persons, should be considered applicable to the further analysis of the Returns Directive as well. This also means that, in the discussion below of the country of origin as an obligatory destination, its relevance to both persons with a nationality (3.2.2) and to those who are stateless (3.2.3) will need to be examined.

3.2.2 Application of 'country of origin' to individuals with a nationality

The fact that a third-country national's country of nationality falls within the scope of 'country of origin,' and thus counts as an obligatory destination, does not require much elaboration. Perhaps the most important addition here is that this would also apply to a person who has multiple nationalities. The definition above clearly refers to 'country or countries of nationality,' and there is no reason to assume that holding one nationality would exclude the obligation to also seek to return to another country of nationality, if necessary to meet the obligation to return.[17] Although a third-country national may be free to choose between those countries,[18] both remain as obligatory destinations. In this respect, we may think of the example of third-country nationals who are citizens of two different coun-

13 Indeed, persons who have seen their asylum applications rejected at first instance, but who are still awaiting the result of an appeal against such a decision, may nevertheless fall within the scope of the Returns Directive. In this respect, see CJEU C-181/16 *Gnandi* [2018], confirming that a rejection of an asylum application at first instance may coincide with the issuing of a return decision. However, all effects of the return decision, including the start of the voluntary departure period, should be suspended pending the appeal against the rejection of the asylum claim. Also see Progin-Theuerkauf 2019a; Moraru 2019.

14 The 'streamlining' of asylum and return procedures is an important objective of the Commission's proposal for a New Pact on Migration and Asylum, including the various legislative proposals which are part of it, see COM(2020) 609 final, 23 September 2020, paragraph 1.

15 At that point, this was Directive 2004/83/EC, which incorporated this definition in its Article 2(k). The Qualification Directive was subsequently recast as Directive 2011/95/EU. The definition of country of origin, however, has remained unchanged. The Commission's 2016 proposal for further reform of the Qualification Directive also maintains this definition, see COM(2016) 466 final, 13 July 2016, Article 2(13).

16 Lutz 2010, p. 37.

17 Also see the commentary to ILC draft Article 22, paragraph 1 of which identifies expulsion to a country of nationality as the main option. The commentary on this article reads: "In the case of a person who has several nationalities, the term 'his or her State of nationality' means each of the countries of which the person is a national."

18 See 7.2 on choice of destinations.

tries, A and B, and who have failed to return by the end of the voluntary departure period. If they have only made efforts to return to country A and not to country B, this would constitute prima facie non-compliance with the obligation to return, since it would require them to make efforts to return to any country of origin. This would be the case unless they can put forward some relevant justification for this.[19]

Perhaps the biggest question left open regarding the definition above is whether it specifically excludes from the scope of 'country of origin' the situation in which the person involved has the nationality of country C, but is habitually resident in country D. If that habitual residence in country D is tied to a continuing residence right, for example, there may be possibilities for the individual to return there, in addition to the possibility of returning to country of nationality C.[20] From the perspective of the member state, such a broad reading would clearly be preferable, since it would maximise the destinations to which third-country nationals can be compelled to return. However, the definition provided above would appear to be more limited. Either a third-country national has a nationality, in which case only the country of nationality is a 'country of origin' within the meaning of the Returns Directive. Or the individual is stateless, in which case the country of habitual residence is the 'country of origin' to which return is obligatory. These options are formulated as mutually exclusive. Swider comes to a similar conclusion in relation to the above-mentioned use of the 'safe country of origin' concept in the recast Asylum Procedures Directive.[21]

As noted above, there are important reasons to ensure that the concept of 'country of origin' in the Returns Directive remains aligned with its use in EU asylum law. This provides a strong reason that member states cannot consider a country of habitual residence of a person who is not stateless as a 'country of origin' for the purpose of return procedures. This, in my view, would not just follow from the need for consistency between different pieces of EU legislation, but also from international law. As will be discussed in Chapter 4, the notion underpinning the central role of the country of origin in the Directive is that such a country has a clear obligation, as a matter of customary international law, to readmit a person compelled to return by the EU member state. This is indeed the case (albeit with some limited exceptions) for the country of nationality. Furthermore, at least conceptually, although not necessarily in reality, when a person is stateless, the country of habitual residence becomes something of a surrogate for a country of nationality in relation to certain key state functions, including readmission.[22] However, given the key role of nationality in attributing such

19 See 7.3 on *refoulement*.

20 On the role of residence rights and readmission, see 6.2.2.2.

21 Swider 2014, p. 21: "This means that if a person is not stateless, his or her 'safe country of origin' can *only* be the country of his or her nationality, even if he or she enjoyed habitual residence in another country" (my emphasis).

22 See 4.3.

responsibilities to states, in particularly regarding expulsion and readmission, the same surrogate function cannot be assumed to exist for a country of habitual residence when the person involved holds citizenship elsewhere. While, for example, having a right of residence under the domestic law of the country of habitual residence may have certain implications in terms of such responsibility for the individual under international law, this is dependent on specific agreements and not a generally applicable principle.[23] For this reason too, it would not seem opportune to adopt a wider reading of 'country of origin.'

This does not mean, however, that countries of habitual residence of third-country nationals who hold citizenship elsewhere cannot be relevant to the return procedure. For one, such a country may, in certain cases, be consider a transit country, and therefore still an obligatory destination, albeit on different grounds.[24] Furthermore, such a country of habitual residence would at any rate be 'another third country' in the meaning of the third limb of Article 3(3) of the Directive. This implies that the Directive still leaves open the possibility for third-country nationals, even if they hold citizenship elsewhere, to seek return to their country of habitual residence, if this is their preference. This may be of importance, for example, for those who only formally hold the nationality of a country, but have no real links there.[25]

3.2.3 A stateless person's 'country of habitual residence'

The situation of stateless persons is not explicitly covered in the Directive.[26] Rather, it is generally subsumed within the category of 'third-country national,' which is mainly defined in relation to the absence of citizenship of an EU member state or the right of free movement.[27] Furthermore, in matters related to the Area of Freedom, Security and Justice, of which return policy is part, "stateless persons shall be treated as third-country nationals."[28] From both perspectives, there would not be a clear distinction between third-country nationals who have a nationality and those who are stateless. Nevertheless, they are in very different situations, especially in the light of the international law framework for readmission, but also in

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23 See 4.3.3 and 6.3.

24 See the example provided in 3.3.1.1 regarding a citizen of Afghanistan who had his habitual residence in Pakistan.

25 This may be the case, for example, for persons who left the country of nationality at a young age, or who were born outside that country but nonetheless hold its nationality.

26 As noted in 2.5.4, Article 1(1) of the 1954 Statelessness Convention defines stateless persons as anyone "not considered as a national by any State under the operation of its law." The text of the Directive only mentions stateless persons once, and then only because it is part of the full title of the Qualification Directive, to which Article 11(5) on entry bans makes a reference.

27 See 1.2.1.3.

28 TFEU Article 67(2).

areas such as obtaining travel documents.[29] This is also true, as discussed above, in relation to defining a country of origin to which stateless persons should return under the Directive. While nationality gives a clear benchmark for assigning a country of origin, identifying a country of habitual residence for stateless persons may be more problematic.

Neither the Returns Directive, nor the recast Qualification Directive from which this term derives, provides further clarification. There has been some consideration of what may be a 'country of former habitual residence' within the meaning of the Refugee Convention.[30] This may provide a useful guide, because the term in the recast Qualification Directive is itself derived from the Convention. The drafting history of the Refugee Convention shows that this term was meant to indicate "the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned."[31] Clearly, the issue of persecution is not applicable to our analysis, but this approach would suggest that habitual residence is connected, at the very least, to some kind of prior residence. Grahl-Madsen finds that such residence should be "of some standing or duration."[32] Others have also noted that the presence of the individual should be more than "simply transient."[33] This, according to Foster and Lambert, should be a "factual, not legal assessment."[34] Although recognising that this is not completely settled, they also find that legality of residence is not required for finding a state to be a stateless person's country of habitual residence.[35] However, residence would likely suggest some form of stability. Merely staying in a country for a short while, before moving on, even if this was with authorisation of the country involved, seems unlikely to be sufficient.[36] On the other hand, for a country to be considered a country of habitual residence, it is also clearly not necessary that individuals stayed there for the whole, or even the majority, of their lives. It has been noted that domestic courts have often taken into account such factors as a person's place of birth, the existence of family ties, or whether the country involved would be prepared to issue travel documents,[37] although none of these factors are likely to provide a sufficient, standalone criterion for defining whether a specific state is indeed a person's country of habitual residence.

Foster and Lambert note that stateless persons can have multiple countries of former habitual residence. They even suggest that a country of

29 See Chapters 5 and 9, respectively.
30 The term is introduced in Article 1(2) of the Refugee Convention, setting out the definition of a refugee, and subsequently used in various other provisions.
31 UN Document E/1618, p. 39. Also see UNHCR 2011, paragraph 103.
32 Grahl-Madsen 1966, p. 160.
33 Hathaway & Foster 2014, p. 68.
34 Foster & Lambert 2019, p. 135.
35 *Ibid*., p. 138.
36 However, such a country may be considered a transit country within the meaning of Article 3(3) of the Directive if further conditions, discussed in section 3.3, are met.
37 Hathaway & Foster 2014, p. 69.

former habitual residence in the context of the Refugee Convention could include entities that are not internationally recognised states.[38] However, to translate this to a situation of expulsion under the Directive would, in my view, at the very least require that such entities have the ability and power to authorise readmission, rather than this being controlled by another state. As a general point, not all the principles set out above may be equally easy to adopt within the context of the Directive. For example, it has been argued that, for the purpose of establishing a claim to refugee status "the claimant does not have to be legally able to return to a country of former habitual residence."[39] By contrast, in the case of the Directive, being able to return legally is, normally speaking, a crucial requirement for the successful completion of the return procedure.[40] And, as will be clear from the discussion in Chapter 5, in many cases, even if a country of habitual residence can be clearly identified, their readmission obligations, and thus the possibilities of the third-country national to return there, are often extremely limited. Nevertheless, where it can be established that a stateless person coming under the scope of the Directive has a country of habitual residence, the obligation to return extends, at a minimum, to that country.

3.3 A transit country as an obligatory destination

The second obligatory destination defined in Article 3(3) is "a transit country in accordance with Community or bilateral readmission agreements or other arrangements." This section looks at the general requirements arising out of this definition (3.3.1), and the role that specific types of agreements and arrangements can play in shaping the third-country national's obligation to return (3.3.2).

3.3.1 General requirements on transit countries being obligatory destinations

Below, some general requirements that would need to be fulfilled before a transit country can be considered an obligatory destination are discussed. This discussion focuses particularly on the questions whether a transit situation exists, whether return to a transit country is in line with international

38 Foster & Lambert 2019, p. 133. In this respect, they mention, for example, the Western Sahara or the Palestinian Territories.

39 Foster & Lambert 2019, p. 138. Also see Hathaway & Foster 2014, pp. 69-70, although noting this is a factor that could indeed be taken into account.

40 For example, if return would not be legally sanctioned, this would likely create problems in boarding international transportation, but also in actually being readmitted to the country of return upon arrival at its border. However, see by contrast the discussion of the right to return in the ECtHR's case law in 8.3.2, somewhat confusingly suggesting that respect for this right can sometimes be satisfied by states even when the re-entry into the country was unlawful.

(customary) rules on expulsion, and whether the scope and content of the agreements or arrangements in place are sufficient to make return to a transit country obligatory.

3.3.1.1 The existence of a transit situation and additional limitations

The first step in identifying a transit country as an obligatory destination is to examine what is meant by 'transit.' The word implies that third-country nationals stayed in, or passed through, a country on their way to the EU member state. This clearly excludes any country where third-country nationals have not previously stayed from the scope of 'transit country.' It also, in my view, would exclude requiring third-country nationals to seek return to a country where they had previously stayed, but which was not part of the specific journey to the EU. Take, for example, the situation of an Afghan national who has spent considerable time in Pakistan, and even continues to hold some right of residence there. But if she returned to Afghanistan first, and then moved to Greece via Iran and Turkey, Pakistan should not be considered a transit country in the sense of the Directive. However, if she had not first returned to Afghanistan, but went from Pakistan to Iran to Turkey to Greece, then Pakistan could be considered part of her migration journey at least. But even in that case questions may remain whether Pakistan should be considered a country of 'transit' in the strict sense. In this respect, Lutz suggests that, in the negotiations of the Directive, transit countries were regarded by the Council and the Commission as those from which the third-country national *directly* entered the EU. And that this argument was accepted by the Parliament.[41] From this perspective, only Turkey, notwithstanding the possibilities the third-country national might have to return to Iran or Pakistan, would be considered a transit country within the meaning of the Directive, and thus an obligatory destination.

However, given that 'transit' is not specifically circumscribed in this way in EU law, it may be assumed that member states have at least some discretion in interpreting the concept according to their needs. The possibility for a wider reading, also including countries further down the migration route than just those from which the third-country national directly entered the EU, may also find some support. In particular, it may be surmised from the fact that a key element of the definition in Article 3(3) relates to the agreements or arrangements in place. It would therefore also make sense to interpret the meaning of 'transit,' beyond the general requirement that the third-country national passed through a specific country, in relation to those agreements and arrangements. As Coleman notes in relation to EU readmission agreements, when these are negotiated there may be the possibility to include a clause to limit readmission obligations to those that have arrived directly from the transit country to the

41 Lutz 2010, p. 37.

EU.[42] In general, there will indeed be a requirement of direct transit. Five of the six EU readmission agreements studied in the context of this analysis make explicit reference to obligations to readmit non-nationals or stateless persons only following irregular entry into the EU directly from their territories.[43] But such a reference to direct entry is not included in the agreement with Albania.[44] This appears to be an exception, and for states sharing land borders with EU member states, the practical impact of this may be limited. However, for other states, such as Pakistan, the requirement of direct entry may severely restrict readmission obligations towards non-nationals who have passed through Pakistan as part of their irregular journey to the EU.[45] Other, multilateral agreements with potential relevance to returns to transit countries may also limit readmission obligations to those countries where a third-country national embarked a mode of transportation, which would indicate that only direct arrivals are covered.[46] But other instruments use other indicators for readmission obligations, which may also pertain to countries further down a third-country national's migration route.[47]

Often, therefore, only situations involving direct irregular entry will be sufficient to make a transit country an obligatory destination, as suggested by Lutz. However, since the text of the Directive does not indicate that only direct arrivals would be covered, and since transit countries are defined in relation to relevant agreements and arrangements, it would make sense to deal with this question by deferring to the provisions of those agreements and arrangements in the specific case. In other words, member states would

42 Coleman 2009, p. 95.

43 EU-Turkey readmission agreement, Article 4(1)(c); EU-Russia readmission agreement, Article 3(1)(c); EU-Ukraine readmission agreement, Article 3(1)(a); EU-Serbia readmission agreement, Article 3(1)b); EU-Pakistan readmission agreement 3(1)(b). The latter agreement further clarifies it considers direct arrival when a person arrived on the territory of an EU member state "by air or ship without having entered another country in-between."

44 EU-Albania readmission agreement, Article 3(1)(b), which only refers to persons who "entered the territory of the Member States after having stayed on, or transited through, the territory of Albania."

45 In the example of the Afghan national traveling from Pakistan to Greece via Iran and Turkey, no readmission obligation on the basis of the irregular entry clauses in the agreement would be applicable, although continuing residence rights could be a basis for such an obligation.

46 For example, under the Chicago Convention, countries where inadmissible persons have embarked an aircraft must accept them for examination, with a view to their possible readmission, see Annex 9, fifteenth edition, Chapter 5, Section B, standard 5.12. Similar obligations arise under the FAL Convention for states where inadmissible persons have embarked a ship (Annex, Section 3, Part A, Standard 3.3.6) or where it has been established that a stowaway embarked a ship (Annex, Section 4, Part E, Standard 14.12.1). The question of embarkation and readmission by transit countries is also discussed in 6.3.

47 In particular, this may be based on (prior) residence rights or authorisation of stay. Such obligations may arise from EU readmission agreements (see 4.3.2), or from the CTOC Smuggling and Trafficking Protocols, the Chicago Convention, and the FAL Convention (see 4.3.3).

be justified in considering direct entry not as an a priori element of 'transit,' but as an additional restriction of its scope if the relevant agreement or arrangement provides for this. Arguably, therefore, when the relevant agreement or arrangement does not explicitly restrict returns to transit countries to situations of direct entry, countries earlier on a third-country national's migration route to the EU could also be considered as falling within the scope of Article 3(3), provided all other conditions for obligatory return are met.

Another question, beyond the matter of direct arrival, is whether all forms of passing through a country are sufficient to consider it 'transit' within the meaning of the Directive. As mentioned above, third-country nationals may spend significant time in a particular country, and may even have had long-term residence there, before moving onward to the EU. By contrast, migrants may spend just days, or even hours, in a specific country as part of their journey to the EU. Again, the Directive does not clarify whether both forms of passing through – or any form in between – would count as 'transit.' In line with the discussion above, I would suggest that the scope and content of the agreement or arrangement on which return and readmission might be based provides for the most appropriate basis for assessing this. In relation to EU readmission agreements, Coleman has noted that airside transit or "mere transit without entering" can be excluded during the negotiations.[48] This is explicitly done in each of the agreements included here.[49] However, at least theoretically, if this is not excluded in the specific agreement, it must be assumed that such forms of passing through are also covered as transit, and would thus make the country in question an obligatory destination for the third-country national. Similarly, the extent to which an agreement or arrangement would include specific clauses on other circumstances, such as the fact that the third-country national passed through the country irregularly, would help determine the extent to which this constitutes transit, and making that country an obligatory destination.

3.3.1.2 Further requirements regarding the content of agreements and arrangements

The role of readmission agreements or arrangements in determining the scope of obligatory destinations is not limited to the specific conception of 'transit,' as discussed above. Rather, they are also a self-standing qualification. In particular, the fact that return to a transit country must be "in accordance" with such agreements or arrangements implies that no transit country can be considered an obligatory destination if such agreements

48 Coleman 2009, p. 95.

49 EU-Russia readmission agreement, Article 3(2)(a); EU-Ukraine readmission agreement, Article 3(2)(a) ; EU-Serbia readmission agreement, Article 3(2)(a); EU-Turkey readmission agreement, Article 4(2)(a); EU-Pakistan readmission agreement, Article 3(2)(a); EU-Albania readmission agreement, Article 4(2).

or arrangements have not been concluded with that country in the first place. While the way this is framed leaves quite wide space for the kinds of agreements or arrangements that are relevant, the EU member state must be able to show that these are indeed in place. By explicitly incorporating agreements and arrangements into the definition of transit country, member states would be precluded from relying on generally applicable principles related to the readmission of non-nationals, including those that might be part of customary international law.[50] It would also appear to exclude situations in which return and readmission to a transit country is practically possible, for example on the basis of provisions of the domestic law of the country in question, if this is not also underpinned by specific agreements or arrangements between that country and the EU member state from which the third-country national must return, or the EU as a whole.[51]

However, the reference to agreements and arrangements does appear to give flexibility, including whether these should provide for legally binding readmission duties on the transit country. This would follow, for example, from the general principle under international law that aliens can be expelled to countries that have an obligation to readmit them, but also to countries which are not under such an obligation but consent to receiving an expelled alien.[52] Even if there were theoretical possibilities to expel a person to a country that does not consent to their return,[53] in practice it is doubtful that this could be effected in the modern regime of international movement, especially as carriers will often want to see proof that the alien will indeed be accepted.[54] An agreement or arrangement that does not provide for an explicit duty to readmit under international law, but does express consent of the transit country to receive third-country nationals found to be irregularly staying in the EU, may thus also meet this requirement.

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50 But see Chapter 6 on the doubtful existence of, and strict limits on, any general duty to readmit non-nationals who have transited through a country.

51 Also see, in this regard, the discussion of informal arrangements in 3.3.2.

52 Plender 1972, p. 26. This would be conditional on such expulsion also being compliant with the expelling states' human rights obligations.

53 The ILC draft articles appear to leave this possibility open. Whereas draft Article 22(1) mentions as permissible destinations of expulsion, in addition to the country of nationality, "any State willing to accept him or her at the request of the expelling State or, where appropriate, of the alien in question." However, Article 22(2) expands that by stating that if no country under obligation or willing to receive the alien can be identified, "that alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State." While those instances may be covered by international agreements, this is not necessarily the case. Through its contrast with the first paragraph of Article 22, the second paragraph could be read as implying that such expulsion may (under conditions) take place without the consent of the state to which the alien is expelled.

54 In particular when the voluntary return takes place by air, it is unlikely the third-country national would even be able to set off on his journey from the EU member state without the appropriate authorisation of the transit country. Or, on arrival, he may be rejected at the border and returned to the expelling EU member state. In which case, responsibility for the individual would revert to the EU member state, see Plender 1988, p. 468.

This presupposes, of course, that the agreement or arrangement in question specifically deals with return and readmission. Provisions that deal more general with migration issues, such as a general commitment to cooperation in this area, would not suffice.[55] Furthermore, agreements or arrangements that only deal with the return and readmission of the country's own nationals clearly cannot be a basis for considering that country an obligatory destination, since return to a transit country always pertains to persons who are not their nationals.[56] Additionally, given that they do not provide a guarantee under international law of readmission, but must nonetheless enable third-country nationals to return *voluntarily*, such agreements or arrangements should, in my view, not only deal specifically with return and readmission in a general sense, but also provide a clear framework for the steps to be taken to be readmitted. To ensure that third-country nationals know what they can be held responsible for, they must thus clarify the specific conditions to be met to be readmitted, as well as the procedures that should be followed in order to request readmission and to provide the appropriate evidence of eligibility for readmission. Again, this comes down to the basic matter of legal certainty for the third-country national. But it is also a practical matter: if there are no clear and accessible criteria and procedures, third-country nationals would not know which steps to take in relation to the transit country to ensure their return there.

3.3.2 Specific instruments and their ability to make a transit country an obligatory destination

Having established the general requirements regarding the notion of transit and the content of the agreements and arrangements on which return would be based, some conclusions on the extent to which specific types of agreements or arrangements can make return to a transit country obligatory can be drawn. In Chapter 2, a number of such types were discussed, including EU or bilateral agreements specifically focused on readmission; other EU or bilateral agreements, usually focused on economic or political cooperation, which contain so-called enabling or migration management clauses; multilateral agreements covering the issues of return and readmission; and non-legally binding arrangements on readmission.[57]

The first category, agreements that have been specifically concluded, by the EU or by individual member states with a transit country to facilitate the return and readmission of persons who do not hold the nationality of that country, are clearly sufficient to make it an obligatory destination. The

55 See 3.3.2 .

56 Otherwise, it would fall under the 'country of origin' limb of Article 3(3). The agreements and arrangements must thus deal with third-country nationals not only as a matter of EU law in relation to the member state, but must also be considered third-country nationals from the perspective of the transit country.

57 See 2.8.

main issue here is that many EU and bilateral readmission agreements have mainly been concluded to facilitate removals, and that they often require a specific request from the EU member state to set the readmission procedure in motion.[58] How this affects voluntary return situations will be discussed in more detail in Chapter 6.

A clear conclusion can also be drawn about the second category, which have also been categorised as agreements related to readmission.[59] These generally only reiterate states' obligations to readmit their own nationals. As regards non-nationals, these typically set out a commitment to negotiate further arrangements for the readmission of non-nationals.[60] The fact that such agreements are in force with a transit country cannot be taken as a basis for considering it an obligatory destination. After all, no clear obligation nor procedure for return of non-nationals arises from them. And even if this were not an obstacle, they would likely still lack the requisite clarity to inform third-country nationals' actions to seek readmission of their own accord.

The third category, multilateral agreements, form somewhat of a conundrum in relation to the discussion above. It may be argued that instruments such as the Chicago Convention and the FAL Convention are neither "EU agreements" nor "bilateral" ones. Furthermore, they are also not specifically concluded for the purpose of facilitating return and readmission. As such, it may be questioned whether they can be considered "Community or bilateral readmission agreements" within the context of Article 3(3). However, they do provide important foundations for international air and maritime traffic rules, including in relation to the return of persons irregularly arriving in EU member states. Additionally, by broadly referring to agreements and other arrangements, the drafters appear to have wanted to ensure a degree of flexibility for member states in drawing upon a variety of instruments to ensure effective return of illegally staying third-country nationals to transit countries.[61] As a result, where they make specific provisions that would enable the voluntary return of third-country nationals, for example on the basis of the fact that they had embarked in the transit country, I will include this in my discussion. This prevents the analysis from being overly restrictive when the applicability of these instruments is not clearly excluded by the text of the Directive, even if their role in practice may be limited. The same goes for the Protocols on Smuggling and Trafficking, which may also play this role for smuggled persons or victims of trafficking who have (or had) a right of residence in a transit country. These Protocols are arguably also easier to subsume within the category of "EU agreements," since the EU is a party to both.

58 See 6.2.4.
59 Cassarino 2017.
60 See 2.8.
61 On this point, also particularly see the comments on 'other arrangements' below.

The category of 'other arrangements' is a rather amorphous one. Many documents agreed between the EU or individual member states with transit countries that fall short of creating legally binding obligations may be consider as such 'other arrangements.' Indeed, it has been suggested that this category is meant to be "wide enough to cover also memoranda of understanding or other informal working arrangements with third-country authorities."[62] Whether these conform to the requirements above can only be assessed on a case-by-case basis. However, based on those criteria, I suggest that this wide coverage cannot mean that all types of arrangements in place are sufficient to make a transit country an obligatory destination. At a minimum, the requirements of accessibility and legal certainty would exclude arrangements that are unwritten, or that remain secret from the general public.

Chapter 6 will discuss the specific obligations on third-country nationals faced with the prospect of return to transit countries. While a number of the instruments above will be discussed, the main focus will be on readmission agreements, as these are most clearly covered by the Directive and also provide for the clearest obligations and procedures for return to transit countries.

3.4 Another third country

The third category of destinations is defined in Article 3(3) of the Directive as "another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted." Any country that is not the third-country national's country of origin or his or her transit country could potentially qualify as 'another third country.' Read in the broadest way, this could imply that third-country nationals faced with the obligation to return could be expected to try and seek admission in any state worldwide, regardless of whether they had ever been there before. Of course, this provision is heavily qualified, first by the requirement that the third-country national 'voluntarily decides' to go there, and secondly that he or she must also be admitted there. The definition thus contains an element pertaining to the motivations of the third-country national, and one pertaining to the motivations or actions of the third country to which he or she may try to return. Both elements are discussed below. First, and crucially, the meaning of the phrase 'voluntarily decides,' and its implications for the analysis in the subsequent chapters, will be discussed (3.4.1). This is followed by a brief consideration of the requirement that the third-country national should be accepted in the third country (3.4.2).

62 Lutz 2010, p. 37.

3.4.1 Voluntarily deciding to go to another third country: meaning and implications

The individual element of the definition of another third country as a return destination is perhaps the source of most confusion. The phrasing 'voluntarily decides' is an extremely awkward one in the context of the Directive. Taken by its common meaning, this would imply that third-country nationals have a free choice whether to try and seek admission to any other country that is not their country of origin or a transit country. On the other hand, this destination is part of the definition of 'return' and therefore of the obligation to return. That implies that a third-country national may be *obliged* to engage in "the process of going back to … another third country, to which [he or she] *voluntarily* decides to return…"[63] Under any other circumstances, this should immediately be disqualified as a contradiction in terms. However, as already discussed, the term 'voluntary' has a specific meaning in the Directive, relating simply to complying with the obligation to return within the time limit fixed for that purpose.[64] From that perspective, it could be assumed that going to another third country is obligatory in the same way as it is for the other two destinations. But it is not just set out that the third-country national goes 'voluntarily.' Rather, the fact that the Directive uses the phrase 'voluntarily *decides*' might again suggest more of a choice than an obligation. At the very least, this phrasing has the potential to create a lot of confusion, which may have important implications. After all, there is a world of difference between saying that third-country nationals can be expected to seek readmission to any country that would accept them, and saying that they should be given the option of doing so, if that is what they want.

It should be noted that the provision related to returning to other third countries is formulated subtly differently in various language versions of the Directive. Whereas some follow the English version in setting out that the third-country national should "*voluntarily decide* to return" to another third country,[65] others rather formulate it as that the third-country national should "decide to *return voluntarily.*"[66] In other words, in those versions, the qualification of voluntariness is not attached to the decision, but to the return itself. In this formulation, the question is no longer what 'voluntarily decides' means, but whether third-country nationals have decided to engage in voluntary return to another third country. In such a reading, the suggestion is that return to another third country is only at issue during

63 My emphasis.

64 See 2.10.1.4.

65 See, for example, the Czech ("*dobrovolně rozhodne vrátit*") and Slovak ("*dobrovoľne rozhodne vrátiť*") versions that follow this pattern.

66 See, for example, the Dutch version, which uses the phrase "*besluit vrijwillig terug te keren*," the French ("*décide de retourner volontairement*") and the Spanish ("*decida volver voluntariamente*").

the voluntary return stage, and not during the forced return stage, which also explains why the decision of the third-country national is referenced. After all, during the voluntary return stage, any departure would be triggered by the action of the individual. This is also apparent from the German version, which omits the reference to a decision altogether and rather says it is necessary that the third-country national *wants* to return voluntarily ("*freiwillig zurückkehren will*") to another third country.

The Return Handbook, however, suggests that this provision cannot be applicable exclusively to voluntary return situations. It notes that:

> *"The term 'voluntarily decides to return' … is not tantamount to voluntary departure. 'Voluntary' in this context refers to the choice of the destination by the returnee. Such voluntary choice of the destination may also happen in the preparation of a removal operation: there may be cases in which the returnee prefers to be removed to another third country rather than to the country of transit or origin."*[67]

As such, the Handbook suggests that the phrase 'voluntarily decides' refers to the possibility of third-country nationals to express a preference to return to different country than their country of origin or a transit country during the return procedure. And that this could be done during the voluntary departure stage (when third-country nationals would themselves take action vis-à-vis the authorities of their intended destinations), but also during the removal stage (when it would be up to the EU member state's authorities to do so).

The drafting history of this provision is also of interest in this respect. The initial proposal by the Commission in 2005 simply said that return was "the process of going back to one's country of origin, transit or another third country, whether voluntary or forced."[68] Return to another third country thus appeared to be put at the same level as returning to the country of origin or a transit country, without any further qualifications as regards the motivations of the third-country national, and without any distinction between voluntary and forced return. Concerned that this would allow member states to 'parachute' third-country nationals into countries which had not consented to the return, the Council suggested that return to another third country could take place only if the third-country national would be accepted there.[69] This is the genesis of the second qualification to return to another third country which we now find in the Directive, acceptance by the third country, which will be discussed later. The Parliament, for its part, was concerned that this could oblige third-country nationals to return to a country completely unfamiliar to them, without social support networks or security of status.

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67 C(2017) 6505 final, 16 November 2017, Annex, paragraph 1.3.

68 COM(2005)391 final, 1 September 2005, Article 3(c).

69 Lutz 2010, p. 38. On the issue of consent of states to receive expelled aliens, also see Weis 1979, pp. 45-46; Hofmann 1992, p. 1005.

In the trilogue, a compromise solution was suggested, saying that return could take place to another third country in which the third-country national "has solid established ties or to which he/she decides voluntarily to return, in which the third-country national concerned will be accepted."[70] In this compromise, return to another third country would be conditional on acceptance by the destination state, but also on one of two other conditions being fulfilled: third-country nationals having solid established ties, or them voluntarily deciding to go there. Presumably, in the first case of solid establish ties, it was not necessary for the third-country national to voluntarily decide to go there. The Council, however, objected to both these qualifications, instead insisting on a clarification that third-country nationals could be expected to go to any other third country willing to accept them "whether in voluntary compliance with an obligation to return, or enforced."[71] Despite this objection, the final text kept the formulation 'voluntarily decides,' although the reference to solid established ties was scrapped. This meant that the formulation that was specifically aimed at embedding the consent or willingness of the third-country national in the return to other third countries survived. Also in this light, it is difficult to interpret this as anything other than allowing third-country nationals the choice whether to seek return to a country that is not their country of origin or a transit country. It is telling that Lutz, who was involved in the negotiations, also notes this inclusion as the only "innovative element compared to existing practice."[72] Indeed, this interpretation would mean that the Directive is arguably more restrictive than the general international framework for expulsion, including as elaborated in the ILC draft articles. For example, it would exclude compulsory return to a country where a third-country national has a right of residence, if this country is not a country of origin (as a country of habitual residence for a stateless person), or a transit country because the third-country national had not passed through this country as part of the migration journey to the EU.[73] This appears to be confirmed by a Commission document, published in 2018, setting out scenarios for the disembarkation of irregular migrants rescued or intercepted at sea, which states (although without further explanation) that: "[i]t is not possible under EU law on returns to send someone, against their will, to a country they do not originate from or have not transited through."[74]

On this basis, a distinction should be made between the country of origin and transit countries on the one hand, which set out countries to

70 Copy of the informal trilogue table, version of 28 April 2010, reproduced in Lutz 2010, p. 304, Annex 7.

71 Lutz 2010, Annex 7, at p. 304.

72 Lutz 2010, p. 38.

73 Again, see the example of the national of Afghanistan with residence in Pakistan above, with the latter's qualification as a transit country dependent on the specific migration route taken by the individual.

74 European Commission 2018, p. 5.

which third-country nationals can be expected (and forced) to return.[75] And 'another third country' on the other hand, which is qualified to make it clear that this cannot lead to concrete responsibilities for third-country nationals. Importantly, if third-country nationals fail to seek to return to another third country, the member state cannot hold them responsible for this within the framework for the Directive, and return to such a country cannot be enforced using coercive measures. Return to another third country is thus presented as an option to third-country nationals, to be used at their discretion. It is a means at the disposal of third-country nationals to avoid return to their country of origin or a transit country, whilst still meeting the overall obligation to return. This does not mean that third-country nationals can use this option to avoid return altogether, by choosing only to focus on returning to another third country, but eventually failing to gain admission. The obligation to seek to return to a country of origin or transit country will remain in place. However, as the Directive provides for this opportunity, member states should be considered to be prohibited from denying third-country nationals the opportunity of attempting to seek admission to another third country during the voluntary departure period.[76]

3.4.2 Admission to another third country

In relation to admission, which is the second qualification attached to return to another third country, some brief comments can be made. Since this is a matter of choice for third-country nationals, it will normally be up to them to secure appropriate guarantees that they will be, as it is phrased in the Directive, 'accepted.' Such guarantees will be necessary, in many cases, to be allowed to board transportation to that country. This also raises questions about the role of the EU member state. While their primary obligation would be one of non-interference with third-country nationals' attempts to seek return to another third country, there may be situations in which member states are required to actively facilitate this. For example, the member state may have confiscated travel documents, which would have to be given back to the individual to enable return to another third country. When they have confiscated these documents to prevent absconding, member states may be reluctant to hand these back too easily. This may raise questions about the degree to which the third-country national must prove that acceptance by the third country will take place, and possibly also about the specific quality of that acceptance. The notion of 'acceptance' is not further elaborated in the Directive, but would arguably have to be read as 'admission,' which would potentially cover all situations in which the third-country national is legally allowed to enter the third country, regard-

75 Although in the case of transit countries only if the condition that this can be done on the basis of EU or bilateral readmission agreements or other arrangements is met.

76 As noted above, they may also need to accommodate this option, as far as possible, during the forced return stage, but this is a matter outside the scope of this analysis.

less of the length of permitted stay that is attached to it.[77] Further questions may relate to the extent to which the EU member state would support the efforts of third-country nationals seeking to return to another third country, such as by providing return assistance, especially if this would be a more costly option than return to the country of origin of a transit country. Some of these issues will be discussed in other chapters.[78]

3.5 Conclusions

This chapter has focused on establishing which destinations listed in Article 3(3) of the Directive can be obligatory, in the sense that third-country nationals can be expected to seek to return there, and that they can be held responsible for their actions or inactions. The findings above thus allow drawing some initial conclusions as regards the scope of third-country nationals' obligation to return. These are set out in paragraph 3.5.1. But the findings, especially in relation to the non-obligatory nature of return to another third country, also have implications for the analysis in the subsequent chapters, which are discussed in 3.5.2.

3.5.1 Implications for the third-country national's responsibility

The discussion in the previous sections clearly show that, when it comes to the destinations to which third-country nationals must pursue return, these are more limited than Article 3(3) might suggest at first glance. First of all, the obligation to return to the country of origin only extends to the country or countries of nationality of the individual, or the country of habitual residence if that person is stateless. For persons who have multiple nationalities, each of those countries is an obligatory destination. However, if a person who is not stateless has, in addition to a country of nationality, another country of habitual residence, this is not covered by the term 'country of origin' in the Directive. For such a person, a country of habitual residence can only be considered an obligatory destination if it can be qualified as a transit country. For stateless persons, it may not be easy to identify whether a country is indeed a country of habitual residence. This will have to be done based on the relevant facts and circumstances of the case.

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77 While this would ensure that the other third country takes formal responsibility for the person involved, it does leave open the possibility that it will seek to return that individual to the EU member state once the period of permitted stay ends, especially if that period is very short. From that perspective, member states may be justified in seeking some kind of guarantee that the other third country to which the third-country national will return, will not seek to expel that person back to the EU member state within a short period of time.

78 See, for example, the discussion of the choice of destination in Chapter 7, the return of confiscated travel documents in Chapter 8, and the provision of return assistance in Chapter 9.

The obligatory nature of seeking return to a transit country is also constrained by several factors. First, there must have been a situation of transit, implying, at the very minimum, that the third-country national passed through that country as part of the migration journey to the EU member state. In some cases, this may be further limited only to those countries from which third-country nationals directly entered the EU member state, but the extent to which this is the case will depend on the content of the agreement or arrangement governing the return. This is also true for the possibility that some forms of transit, such as transit through an international airport, may not give rise to an obligation to return, if this is provided for in the relevant agreements or arrangements. Second, given the key role of agreements and arrangements in the definition of transit countries, no responsibility can arise for the individual if such agreements or arrangements do not exist. Both the condition that there was transit and that return would take place in accordance with such agreements and arrangements need to be fulfilled to make a country an obligatory destination. Third, those agreements and arrangements must meet several substantive conditions. They must, for example, explicitly cover the return of persons who are not nationals of the transit country, which would include stateless persons. Furthermore, they should provide for a duty on that country to readmit such non-nationals under international law, or, alternatively, provide for clear, general consent to admit such non-nationals. Particularly in the latter case, where clear international legal obligations of readmission are lacking, the agreements or arrangements should provide for clear procedures, which are accessible to third-country nationals, so that they can know what steps to take to gain readmission and what requirements need to be met. As such, the existence of unwritten or secret agreements cannot make return to a transit country obligatory.

Return to another third country, which is dependent on the third-country national voluntarily deciding to return there, is not obligatory. Rather, it is an option that member states must leave open to third-country nationals who prefer another third country over their country of origin or a transit country as their destination of return. The optional nature of return to another third country follows from the way it is defined in the Directive, and therefore applies even if there would be a clear prospect of being admitted there, for example on the basis of a right of residence in that country. Even in such cases, the fact that the third-country national has not sought to return to such a third country cannot be part of the assessment of compliance with the obligation to return.

3.5.2 Implications for the analysis

As noted in the introduction, the clarification of each of the destinations listed in Article 3(3) of the Directive, and their obligatory nature, is only one piece of the puzzle in setting out the contours of the obligation to return for which third-country nationals can be held responsible. Another important

element is to examine exactly which actions third-country nationals can and cannot be expected to take in relation to each of these obligatory destinations. The following chapters will do so. Chapters 4 and 5 will particularly look at specific actions of third-country nationals when seeking readmission to their country of origin, and any issues that may arise from them. Similarly, Chapter 6 will examine such actions in relation to transit countries. However, the same will not be done for readmission to another third country. This is due to the conclusion above that returning to such a country is a choice, not an obligation. As such, actions or omissions of third-country nationals to return and seek readmission to other third countries cannot be a basis for holding them responsible within the context of the Directive's procedures. While there are indeed questions that arise in terms of the *possibility* of readmission to such a country, as discussed above, this would not add to a further understanding of the scope of the obligation to return. As such, return to another third country will largely be left outside the discussion presented the subsequent chapters. However, there is one exception: in Chapter 7, the extent to which third-country nationals can freely choose between different destinations is considered. Since other third countries form part of the range of options available to third-country nationals, its role will be considered in that context.

4 Readmission obligations of the country of origin and implications for individual responsibility

4.1 Introduction

The previous chapter saw the beginning of the substantive examination of the actions that third-country nationals can and cannot be expected to take (*research questions 1a and 1b combined*), as well as the specific issue of seeking readmission (*return element (i)*). This chapter, however, shifts the focus from the overarching question of where third-country nationals can be expected to seek readmission, and starts zooming in on the question what can and cannot be expected of third-country nationals when seeking readmission to one particular destination: the country of origin. As discussed in the previous chapter, the concept 'country of origin' pertains to the country of nationality or, for stateless persons, their country of habitual residence. Since it is that country that will have to grant readmission, the full scope of the obligation incumbent on third-country nationals cannot be derived solely from the Directive. Rather, it requires engaging with the external dimension of return, which brings into focus the relationship between the country of origin and the individual, and between the country of origin and EU member state, respectively. This chapter particularly looks at the extent to which countries of origin are required, as a matter of international law, to readmit nationals or habitually resident stateless persons under an obligation to leave an EU member state. And, when such obligations exist, what their specific scope is. This will set the conditions third-country nationals must fulfil to gain readmission, and thus also determines to an important extent what they must do to meet the obligation to return under the Directive.

Because readmission obligations vis-à-vis expelled nationals differ from those applicable to habitually resident stateless persons, these will be discussed separately. Section 4.2 will focus on nationals, while section 4.3 will deal with the situation of stateless persons. The discussion in both sections will draw on different sets of international rules, in particular those arising out of inter-state frameworks (customary international law, readmission agreements and multilateral treaties) and human rights instruments. Following a mapping of the specific readmission duties of countries of origin on the basis of these rules, each section will discuss how these translate into concrete obligations for third-country nationals under the Directive. In the process, I will also identify certain conceptual, and potentially practical, implications that arise out of the differences in scope and function of inter-state and human rights-based readmission obligations. The two sections are followed by some (intermediary) conclusions in section 4.4.

4.2 The country of origin's obligation to readmit nationals and implications for individual responsibility

This section discusses the various sources of obligations on states to readmit their own nationals, being customary international law, readmission agreements, multilateral treaties, and human rights instruments. It will subsequently examine what these readmission obligations mean for the responsibility of individuals under the Directive.

4.2.1 Customary international law

The notion that states are under an obligation to readmit their nationals when they are expelled by other states is one of the foundational pillars of EU return policy. Although the Directive does not mention this explicitly, numerous EU policy documents, published both before and after the adoption of the Directive, have mentioned the explicit starting point that countries of nationality must readmit their nationals if EU member states decide to return them, as a matter of general international law.[1] It is also included in legislative instruments. Regulation 2016/1953, which deals with EU travel documents,[2] for example, states that "[t]he readmission of own nationals is an obligation under international customary law, with which all States are required to comply."[3]

In general, there is wide acceptance of the existence of an international obligation on states to readmit their nationals.[4] However, the pronouncement of the existence of a customary norm that states should readmit their nationals when these are expelled by another state is often based on several elements, which often tend to form overlapping considerations.[5] In particular, they may not always clearly separate situations in which persons want to return to their countries of origin, and situations in which they are expelled and thus compelled to do so, which may be of relevance. First, it is frequently argued that an obligation to readmit arises from the right of individuals to return to their own country. In this respect, reference is usually made to human rights instruments, but also to a more general principle encompassing such a right.[6] This ensures that persons staying in another

1 See Coleman 2009, p. 27, footnote 1, for various examples.
2 Such EU travel documents will be discussed in more detail in 8.5.
3 OJ L 311/13, 17 November 2016, 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, Recital 7.
4 Sohn & Buergenthal 1992, p. 39: "The proposition that every State must admit its own nationals into its territory is widely accepted and may now be regarded as an established principle of international law." Similarly, see Goodwin-Gill 1978, p. 137; Weis 1979, p. 47-48.
5 Coleman 2009, pp. 28-29; Giuffré 2015, p. 263.
6 As I will argue later, the conflation of human rights-based obligations and those arising from inter-state frameworks may be problematic (see Chapter 5), but for the moment this distinction is not particularly relevant.

state are expelled, they have a place to return to. This place is determined by the connection of nationality, which forms a special bond between the state and the individual,[7] with the former carrying a certain responsibility for the welfare of the latter.[8] However, this bond of nationality also comes with responsibility for individuals when another state expels them. This responsibility can furthermore be considered as tied up with personal sovereignty of the state over its citizens.[9]

A further element in the establishment of a customary obligation to readmit nationals is derived from the right to expel aliens as arising out of state sovereignty. Brownlie notes that sovereignty, together with the related issue of the equality of states, "represents the basic constitutional doctrine of the law of nations."[10] Sovereignty is commonly understood as the legal status of a state which is not subject to any higher authority, at least to the extent that it deals with its internal affairs.[11] Sovereignty is connected, first of all, to the territory of the state in question, where the state itself sets the rules and should not be the subject of interference by other states. The external dimension of sovereignty is that, to the extent that the state is bound by rules of international law, it has become bound to these based on its consent. One of the ways in which a state can exercise its sovereignty is by controlling which non-citizens are granted access to, and are allowed to stay on, its territory.[12] This implies that if non-citizens (or 'aliens') present themselves at the border of the state, gain entry without authorisation, or are initially authorised to enter but subsequently are no longer wanted by the state, it has the power to get rid of them. In other words, it has the power (or right) to expel aliens.[13] Being tied up with the "constitutional doctrine" of sovereignty, as an essential building block of international

7 ICJ *Nottebohm* [1955], p. 23; ECtHR *Petropavlovskis* [2015], paragraph 80; dissenting opinion of Judges Bianku and Lemmens in ECtHR *Levakovic* [2018]; also see Sohn & Buergenthal 1992, p. 39.

8 Hailbronner 1997, pp. 1-2.

9 This allows a state, for example, to exercise diplomatic protection over its citizens, even when they are abroad. Similarly, it may allow that state exert certain forms of control over those citizens, for example in relation to criminal law or civic duties, even when they are not present on its territory.

10 Brownlie 2008, p. 289.

11 Steinberger 1987, p. 414.

12 See ECtHR *Abdulaziz* [1985] and since than standing jurisprudence of the ECHR: "Moreover, the Court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory" (citations omitted). Also see, for example, ECtHR *Moustaquim* [1991], paragraph 43; ECtHR *Vilvarajah* [1991]; and ECtHR *Chahal* [1996], paragraph 73, as well as many other instances in which the ECtHR confirmed this. Although for a critical view of how 'well-established' this is, in particular in relation to pronouncement of this by the ECtHR, see Dembour 2018, especially p. 10.

13 See, for example, Jennings & Watts 1997, p. 940; Plender 1988, p. 459. For an extensive overview of international and domestic case law on the right to expel, see ILC 2006, p. 131-139.

law, the right to expel can be considered as one of the foundations of the international system for states' interactions with non-citizens. Despite some theoretical discussions about the existence of the right to expel, it has been confirmed on multiple occasions as a key element of the international regime for migration.[14] This right to expel, it is argued, can only be made effective if another state takes the expelled alien. In light of the special role of nationality, the duty to make this right to expel effective falls to the state of nationality of the alien.[15] As such, the obligation to readmit nationals also derives from sovereign control over state territory, in this case of the expelling state, which triggers reciprocal obligations on the part of the country of nationality.[16]

In comparison to doctrinal approaches establishing a customary duty to readmit nationals, efforts to establish the specific evidence of the two components of any such rule, state practice and *opinio juris*, are much rarer. Perhaps the most frequently cited study in this regard, which has already been mentioned several times above, is that by Hailbronner. On the basis of a range of sources, he finds sufficient evidence of the existence of this customary rule. Of particular importance for Hailbronner's findings is the role of a number of international treaties, usually concluded bilaterally, that set out readmission obligations. He identifies some thirty of those treaties. Hailbronner also addresses national case law, as well as European case law, in particular, the *Van Duyn* case in the European Court of Justice (ECJ, now the CJEU) as an important piece of evidence for the broad acceptance of an obligation on states to readmit their nationals when they are expelled.[17] Although this is not addressed very explicitly in these and most other studies, the implication of such findings generally suggests that the obligation to readmit expelled nationals is absolute: if an expelled person is found to be a national, he or she must be readmitted. A refusal to do so would constitute a clear violation of customary international law.[18]

The process of readmission may be subject to certain procedural requirements, particularly to establish that a person to be expelled is indeed a national. This is not necessarily a limit on or departure from this obliga-

14 Mixed Claims Commission Netherlands-Venezuela *Maal* [1903]; Mixed Claims Commission Italy-Venezuela *Boffolo* [1903]; Mixed Claims Commission Belgium-Venezuela *Paquet* [1903]; ECtHR *Abdulaziz* [1985] and subsequent case law (see footnote 13 above.) Although see, for example, Hannum 1987, p. 5, and Plender 1988, pp. 3-4, who note that sovereign control of migration is no longer absolute.

15 Hailbronner 1997, pp. 11-12 and references contained therein; Weis 1979, pp. 45-47; Goodwin-Gill 1978, pp. 136-137. For a counterpoint to this assumption of a reciprocal duty to readmit expelled nationals, see Noll 2003, and the discussion of his critique in 5.2.3.

16 See, for example, EP 2010, p. 13, noting that the practice of readmission of nationals is perhaps as old as the exercise of state sovereignty itself.

17 CJEU C-41/74 *Van Duyn* [1974], paragraph 22, cited in full in 2.5.3.

18 As discussed in 5.2.3, this absolute nature might be disputed by some countries of return. However, it appears to underpin the approach by the EU and its member states.

tion, but rather a necessary complement to make the obligation effective. However, "[s]tate practice … is not sufficiently uniform to enable the establishment of detailed rules about which documents constitute acceptable proof or about which form readmission procedures should take."[19] Normally, a valid passport would constitute prima facie evidence of nationality,[20] although not necessarily absolute proof. [21] However, even if the individual cannot provide clear proof of nationality, "the receiving state has to accept other documents or circumstantial evidence of the individual's nationality."[22] If it is sufficiently substantiated that the person is a national, and a travel document is necessary to make the expulsion possible, issuing such a document must be presumed to be part of the readmission obligation. While Hailbronner says that "it lies within the competence of each state to lay down the conditions under which substitute documents are issued," this competence must be exercised in good faith.[23] Disproportionately long delays and exaggerated preconditions for the issuing of travel documents would constitute an abusive exercise of this competence.[24]

It has been suggested that "in international decision making and literature, there is absolute agreement about the existence of such a rule" that states must admit their nationals when expelled by other countries.[25] Despite this assertion, the way this rule has been framed has not entirely been without criticism. While some elements of this criticism will be discussed later on, for now the discussion can proceed on the basis that the obligation to readmit, both regarding its existence and its scope as outlined above, is widely supported and, furthermore, clearly forms the basis for the EU's approach to issues of return and readmission.

4.2.2 Readmission agreements

Where EU or bilateral readmission agreements exists with countries of origin, these provide for a clear obligation to readmit nationals faced with return from an EU member state. Some attention in the literature has been devoted to the interplay between customary international law and readmission agreements, including whether the latter merely provide codification of the customary obligation of readmission of nationals, whether they act as a source for that customary obligation (by providing evidence of state practice),

19 Hailbronner 1997, p. 14.
20 Torpey 1999, p. 158 and 160, noting that states retain discretion in issuing passports, and there may be situations in which such passports are issued to certain categories of non-nationals.
21 Turack 1972, p. 250.
22 Hailbronner 1997, p. 14.
23 *Ibid*., p. 15.
24 Also see Chapter 9 on further issues related to travel documents.
25 ACVZ 2004, p. 14 (my translation).

or whether they may even undermine the customary nature of the obligation.[26] Whatever the case may be, readmission agreements provide for a similar basic obligation of readmission as discussed above in relation to customary international law, but add to this more specific rules on the evidence to be provided and the procedures to be followed in this respect.

In terms of establishing nationality, and thereby the existence of an obligation to readmit, EU readmission agreements provide for several categories of evidence to be presented, and related procedures to be followed.[27] Broadly speaking, there are four situations regarding evidence that are recognised in EU readmission agreements, although not all four are included in each agreement. Rather, each agreement normally makes provisions for two or three such situations and subsequent actions. A first situation arises when proof of nationality can be presented. When this is the case, readmission by the country of return is required unconditionally. What constitutes proof is set out in annexes to the agreements. They include passports of any kind.[28] Often, military service books and military identity cards, as well as seamen's registration books and skippers' service cards count as sufficient proof of nationality.[29] The same is true for national identity cards[30] and citizenship certificates (or other documents that mention citizenship).[31] Other documents or proofs may be specified in particular agreements. Almost all of the agreements (except the one with Turkey) explicitly note that the expiration of the document in question does not affect its status as proof of nationality.[32] Finally, all readmission agreements

26 Coleman 2009, pp. 37-41. Giuffré 2015, pp. 267-269.

27 Unless the national is already in possession of a valid passport, travel document, or identity card, in which case the state of return must also accept his readmission without a formal request. EU-Russia readmission agreement, Article 6(2); EU-Ukraine readmission agreement, Article 5(2); EU-Serbia readmission agreement, Article 6(2); EU-Pakistan readmission agreement, Article 4(2); EU-Turkey readmission agreement, Article 7(3).

28 Normally elaborated with mention of different types of passports, such as national passports, diplomatic passports, service passports, and surrogate passports. See EU-Albania readmission agreement, Annex 1; EU-Russia readmission agreement, Annex 2, EU-Ukraine readmission agreement, Annex 1; EU-Pakistan readmission agreement, Annex I; EU-Turkey readmission agreement, Annex 1 (which does not mention specific types of passports). In the case of Serbia, only passports issued after 1996 are included, see Annex 1.

29 *Ibid*. Although this is not the case for Serbia and Pakistan.

30 *Ibid*. In the case of Serbia, this is restricted to identity cards issued after 1 January 2000. In the case of Pakistan, the agreement speaks of "computerised national identity cards." As a general point, Torpey 1999, p. 165 calls identity cards a 'grey zone' as to their ability to provide evidence of nationality.

31 But not, for example, in the EU-Serbia readmission agreement.

32 EU-Albania readmission agreement, Article 8(1); EU-Russia readmission agreement, Article 9(1); EU-Ukraine readmission agreement, Article 6(1)(a); EU-Serbia readmission agreement, Article 8(1); EU-Pakistan readmission agreement, Article 6(1). Only in the case of Turkey does expiration of any of these documents 'relegate' them to prima facie evidence (see below), see EU-Turkey readmission agreement, Annex 2.

clearly stipulate that no obligation to readmit can be derived from any of the above documents if they are false.[33]

A second situation covered in all agreements except the one with Pakistan is when there is prima facie evidence of nationality.[34] Lists of documents that constitute prima facie evidence are also annexed to the agreements. The documents included in these lists are diverse and differ, for example, with regard to the acceptance of photocopies of documents. The agreements also provide for a catch-all category covering "any other document which may help to establish the nationality of the person concerned."[35] But prima facie evidence does not only have to come from documents. For example, most agreements that include the prima facie evidence procedure also accept statements by witnesses, or statements made by the person concerned and languages spoken by him or her, including by means of an official test result.[36] Other idiosyncrasies exist.[37] Faced with such prima facie evidence, the state in question in principle has to accept the readmission. However, in contrast to proof of nationality, prima facie evidence is rebuttable.[38] If the requested state can show that, in

33 EU-Albania readmission agreement, Article 8(1); EU-Russia readmission agreement, Article 9(3); EU-Ukraine readmission agreement, Article 6(1)(a) (referring to "forged or falsified documents"); EU-Serbia readmission agreement, Article 8(1); EU-Pakistan readmission agreement, Article 6(1) (Annex I also re-emphasises that all documents have to be genuine); EU-Turkey readmission agreement, Article 9(1).

34 Although in the case of Russia, it is called 'indirect evidence' rather than prima facie evidence.

35 See footnote 33. In the case of Turkey, this is accompanied by the phrase "including documents with pictures issued by the authorities in replacement of the passport."

36 *Ibid*. The Turkey agreement stipulates that statements must be captured in 'written accounts.' The Ukraine agreement clarifies that 'official tests' is "a test commissioned or conducted by the authorities of the requesting State and validated by the requested State." Russia, on the other hand, only accepts "official statements made for the purpose of accelerated procedures, in particular by border authority staff and witnesses who can testify to the person crossing the border." (Russia agreement, Annex 3A).

37 For example, the agreement with Serbia regards service books and military identity cards, seamen's registration books and skippers' service cards, and citizenship certificates or other certificates indicating nationality as prima facie evidence, whereas these are considered proof of nationality by the other states. The same goes for passports issued during certain periods. See EU-Serbia readmission agreement, Annex 2: "passports of any kind (national passports, diplomatic passports, service passports, collective passports including children's passports) issued between 27 April 1992 and 27 July 1996 and photocopies thereof" are regarded as prima facie evidence. The Turkey agreement is the only one to accept the broad category of "accurate information provided by official authorities and confirmed by the other Party" as prima facie evidence, see Turkey agreement, Annex 2.

38 Coleman 2009, p. 97; EU-Albania readmission agreement, Article 8(2); EU-Ukraine readmission agreement, Article 6(2); EU-Serbia readmission agreement, Article 8(1). There may be some slight variations: the EU-Russia readmission agreement, for example, does not use the term 'prima facie evidence', but includes a system that is de facto the same. See EU-Russia readmission agreement, Article 9(2).

spite of the evidence, the person in question is not a national, it does not have to accept readmission.[39] Failure to rebut, however, means that the state must readmit.

A third method, only included in the Pakistan and Russia agreements, is also based on prima facie evidence. However, in these cases prima facie evidence does not establish a rebuttable presumption of nationality, but rather an obligation to "initiate the process for establishing the nationality of the person concerned" (Pakistan)[40] or "as a ground to start an appropriate verification" (Russia).[41] Such evidence, then, is the input for an investigation, rather than immediate grounds for accepting readmission.[42] The fourth and final method, which is contained in all the agreements discussed here, is to establish the identity of the third-country national through an interview. This can take place in case none of the documents necessary under the previous three methods are available. The requested state must make arrangements for such an interview by the competent diplomatic and consular representation upon request of the member state.[43]

Readmission agreements also set clear deadlines for different steps of the procedure, including the time the presumed country of nationality has to respond to any request, and to issue travel documents or otherwise authorise re-entry if it is sufficiently established that the person involved is indeed one of its nationals. It is not necessary to deal with these in detail, as the question here is mainly one of eligibility for readmission and the subsequent obligations of the state of nationality. These deadlines will be

39 The agreements do not set out what such counter-evidence might be. It can be imagined, however, that possession of a driving license issued by a certain country, for example, would normally point to an irregular migrant's nationality. But driving licenses may also be issued to non-nationals, so the country of return can challenge this evidence.

40 EU-Pakistan readmission agreement, Article 6(3). Annex 2 lists digital fingerprints or other biometric data, temporary or provisional national identity cards, military cards and birth certificates are all triggers for an investigation. The same goes for photocopies of documents normally considered proof of nationality, (photocopies of) driving licences, (photocopies of) seamen's registration cards or skippers' service cards, other official documents that mention or indicate citizenship, or statements made by the person concerned.

41 EU-Russia readmission agreement, Article 9(2). According to Annex 3B, grounds for investigation are: (photocopies) of driving licences, (photocopies of) company identity cards, or any other official document issued by Russia, as well as statements by witnesses and written statements made by the person concerned and language spoken by him or her, including by means of an official test.

42 In the case of Pakistan, this procedure comes in place of the second method, whilst in the case of Russia, both the second and the third method are applicable, depending on the evidence presented.

43 EU-Albania readmission agreement, Article 8(3); EU-Russia readmission agreement, Article 9(4); EU-Ukraine readmission agreement, Article 6(2); EU-Serbia readmission agreement, Article 8(3); EU-Pakistan readmission agreement, Article 6(4); EU-Turkey readmission agreement, Article 9(3).

discussed in other chapters. As noted in Chapter 1, readmission agreements, as a general point, further require member states to make a request to the presumed country of nationality to set the readmission procedure in motion. Since this is more relevant to the return of third-country nationals to transit countries, where readmission agreements may be the only basis for readmission, the implications of this will be discussed in Chapter 6. In the specific context of this chapter, the key point is that readmission agreements set out in detail the types of evidence to be provided during the readmission procedure. However, all these types of evidence serve the same purpose: to establish whether the person faced with return from an EU member state is a national of the presumptive country of origin. When this is sufficiently established, the country of origin is under a duty to readmit the returnee.

4.2.3 Multilateral treaties

Obligations to readmit nationals can also be found, to various extents, in the multilateral treaties that were identified as potentially relevant in section 2.7. According to the UN Smuggling Protocol, for example, each state party must agree to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of smuggling and who is its national.[44] The Protocol does not provide guidance on the means of proof of eligibility for readmission. However, the Protocol does require the state of return, at the request of the expelling state, to verify whether a smuggled migrant is its national or has the right of permanent residence in its territory, again, without undue or unreasonable delay.[45] It does not clarify what constitutes an "undue or unreasonable delay." When a person is without proper documentation, the state of return should agree to issue such travel documents or other authorisation as may be necessary to enable the person to travel to and re-enter its territory.[46] The Interpretative Notes emphasise that a return shall not be undertaken before the nationality or right of permanent residence of the person whose return is sought has been duly verified.[47] The Trafficking Protocol contains provisions that are almost identical with regard to the readmission of nationals, although it specifies that returns of victims of trafficking should preferably be voluntary.[48]

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44 CTOC Smuggling Protocol, Article 18(1). The obligation also extends to smuggled persons with a valid residence permit, see 6.3.

45 CTOC Smuggling Protocol, Article 18(3).

46 CTOC Smuggling Protocol, Article 18(4).

47 Interpretative Notes, paragraph 113.

48 CTOC Trafficking Protocol, Article 8(2). A suggestion to include a similar reference to voluntary return of smuggled persons was discussed during the drafting process but not incorporated. See UNODC 2006, p. 548.

Multilateral treaties on air and maritime traffic also mainly reconfirm a general obligation on states to readmit their nationals who are not, or no longer, allowed to stay in another state. This is evident, for example, from the requirement of states to readmit their nationals who return by air as 'deportees' under the Chicago Convention, or those who are return after being found as stowaways on ships under the FAL Convention.[49] However, none of these provide any substantive expansion of the obligation to readmit under customary international law as described in 4.2.1 above, nor do they generally provide for more specific procedures, such as readmission agreements.

4.2.4 International human rights law

As noted in Chapter 2, the right to return is incorporated in various human rights instruments, most prominently Article 3(2) of Protocol No. 4 of the ECHR, and Article 12(4) of the ICCPR. Although the former may be considered to have a stronger normative impact on the practice of EU member states, due to the clear link with the Charter of Fundamental Rights and general principles of EU law more broadly, it is the latter that is of most importance when looking at the matter of return from the perspective of countries of origin. Although such countries of origin may include states that are parties to the ECHR, its reach is geographically limited. By contrast, the ICCPR is open to all countries worldwide, and it has been widely ratified, providing for almost universal coverage.[50] This also includes those states party to the ECHR, which are therefore also bound by the wider definition of the right to return under Article 12(4) ICCPR.[51] For this reason, it is the latter instrument that will be the focus of the discussion of readmission obligations, both here in relation to nationals, and later regarding stateless persons.

4.2.4.1 The content of the obligation to readmit as a function of the right to return

Under Article 12(4) ICCPR, any individual has the right not to be "arbitrarily deprived of the right to enter his own country." While the notion has broader implications, having the nationality of a country is a sufficient condition for that country to be a person's 'own country.'[52] This is also true

49 Chicago Convention, Annex 9, fifteenth edition, Chapter 5, Section C, Standard 5.22; FAL Convention, Annex, Section 4, Part E, Standard 4.11.1.

50 With some exceptions, see 2.5.

51 See 2.5 on the different formulations of these rights in these respective instruments. Although the provisions of the ICCPR are possibly considered by some states as less important, due to issues of direct effect in domestic law and the fact that, in contrast to the ECtHR, the HRC cannot deliver binding judgments, it should be emphasised that, as a matter of international law, the ICCPR is no less binding on those states as is the ECHR.

52 HRC General Comment No. 27, paragraphs 19-21.

for persons who have the nationality of a country, but are seeking entry for the first time, for example because they were born abroad.[53] The state of nationality's obligation to readmit appears to be qualified, since only arbitrary deprivations of the right to enter one's own country are prohibited.[54] The HRC has stated that the inclusion of this qualification "is intended to emphasize that it applies to all State action, legislative, administrative and judicial."[55] It requires that "even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant" and that it should be "reasonable in the particular circumstances."[56] At first glance, this does not seem to be an enormous barrier to deprivation of the right to enter. However, the HRC clarifies that "there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable."[57] This is also confirmed by the HRC's case law. For example, in *Nystrom*, the HRC found that Australia had not provided sufficient justification to expel the applicant, which would deprive him of his right to re-enter the country, even though he had amassed a very substantial criminal record, including aggravated rape, arson, and armed robbery.[58] In *Warsame*, the applicant's convictions for robbery (nine months imprisonment) and substance trafficking (two years imprisonment), were also not considered sufficient reason to deprive the applicant of his right to enter. [59] This still does not exclude completely that a graver threat may be sufficient to consider a denial of the right to enter as non-arbitrary. Perhaps states' recent actions to rescind the nationality of those who travelled abroad to join terrorist groups, which would also deprive them of the opportunity to return, will provide further occasion for the HRC to consider this. However, even in such cases other means of preventing threats to national security, including prosecution of the returning person, may be available, so it is by no means clear that this would satisfy the threshold in Article 12(4) ICCPR.[60] Overall, as some HRC members noted, the right to enter is "nearly

53 HRC General Comment No. 27, paragraph 19.

54 Contrast also with Article 3(2) Protocol No. 4 ECHR, which does not make such qualification, although it only protects the right to enter for nationals.

55 HRC General Comment No. 27, paragraph 21. Also see Hannum 1987, p. 44-45, who suggests that the drafters included the notion of 'arbitrary' deprivation to ensure it would cover a broader scope of actions than just situations in which the deprivation was not provided for by law.

56 HRC General Comment No. 27, paragraph 21.

57 HRC General Comment No. 27, paragraph 21.

58 HRC *Nystrom* [2001], paragraph 2.3; although its consideration of delays in the removal of the applicant in paragraph 7.6 may suggest implying that more expeditious proceedings might have diminished the risk of arbitrariness.

59 HRC *Warsame* [2001], paragraphs 2.3 and 8.6.

60 This may particularly be the case if the function of the rescinding of nationality was specifically to deny them an opportunity to return.

absolute," and arguably should be absolute.[61] Notwithstanding such issues, Goodwin-Gill has noted that:

> *"[t]he existence of the right to return and the duty to readmit are beyond dispute. Instances in which return has been denied or heavily qualified are generally part of broader contexts involving persecution, other violations of human rights, or situations in which political issues dominate legal entitlements."*[62]

As such, confronted with an attempt to return by a national, a state must, normally speaking, not prevent this. As such, it encompasses, at a minimum, a negative obligation for the state. Although this is less clear as for the right to leave,[63] the right to return may also trigger a positive obligation to make return possible. In *Jiménez Vaca*, the HRC found that Colombia had failed to provide a citizen abroad, who faced threats from a third party in Colombia, with effective domestic remedies that would allow him to return from involuntary exile in safety.[64] Colombia was therefore required to provide him with an "effective remedy, including compensation, and to take appropriate measures to protect his security of person and his life so as to allow him to return to the country."[65] In *Nystrom*, Australia, which was found to be the applicant's own country, and which had already expelled him, was required to provide a remedy, "including allowing the author to return and materially facilitating his return to Australia."[66] Both indicate at least some positive action to enable return when the person's stay abroad is due to the country of nationality's specific actions or omissions. However, it would be reasonable to presume that even for persons who find themselves outside their countries of nationality because of their own decision to travel abroad, some facilitation, at least by providing any necessary authorisation to enable his or her return, would be necessary. This would be in line with

61 HRC *Ilyasov* [2014], joint opinion of Neuman, Iwasawa and Kälin, paragraph 8 and footnote d. However, since the drafters could not agree on an absolute prohibition, there is (mostly theoretical) space for denial in some circumstances. Also see Zieck 1992, p. 145, noting that, during the drafting process of Article 12(4) ICCPR, some delegations wanted to see the complete removal of any qualifications, since any opening provided might be open to abuse. Nevertheless, in *Budlakoti* [2018], paragraph 9.4, for example, while upholding the notion that few, if any, circumstances would make deprivation of the right to enter one's own country reasonable, the HRC also found that, in the specific circumstances of the case, "interference with the author's rights under article 12(4) would be disproportionate to the stated legitimate aim of preventing the commission of further crimes." This could be read as implying that, at least theoretically, situations could be imagined when interference with the right to enter one's own country in relation to serious crimes would be proportionate. However, here again, even the fairly serious nature of the individual's crimes was not considered sufficient in this respect.

62 Goodwin-Gill 1996, p. 100.

63 See 8.3.3 on the obligation to issue travel documents to facilitate the right to leave.

64 HRC *Jiminez Vaca* [2002], paragraph 7.4.

65 *Ibid*., paragraph 9.

66 HRC *Nystrom* [2001], paragraph 9.

the country of nationality's obligations regarding the right to leave which is meant to complement the right to return.[67]

4.2.4.2 Should human rights-based obligations to readmit be distinguished from inter-state obligations?

Although it leaves questions about the exact way to implement it, the ICCPR, just like several other human rights instruments, provides for a very strong obligation to readmit nationals who wish to exercise their right to return. In this way, it might be argued, human rights law further strengthens the readmission obligations set out in the various inter-state instruments, and especially in customary international law, as discussed above. However, the counterpoint to this would be that, while such inter-state norms are specifically aimed at facilitating the effectiveness of a host state's right to expel, the function of the human right to return is different. It seeks to secure to individuals the enjoyment of that right, if they wish to exercise it. And in cases of expulsion it is not at all evident that individuals returning are aiming to exercise their right to return. After all, being expelled is not a choice, and return is the result of a legal obligation, backed up by the possibility of enforcement. As already discussed, this is also true for voluntary return under the Directive, regardless of the connotations that the word 'voluntary' normally has.[68] Nevertheless, there appears to be confusion over the way that readmission obligations on the basis of inter-state norms interact with those based on the human right to return.

One source of confusion seems to be the idea, discussed above in relation to customary international law, that 'the right to return' as a general concept is a key building block of the obligation to readmit. In this respect, Giuffré has observed that "the theory whereby the obligation to readmit depends on the individual right to return erroneously conflates the relationship between individuals and the State with the obligation owed by a State to another State."[69] A particular question that arises in this regard is whether those who refer to a right to return are precise enough about which right they mean. There is little doubt that customary international law on expulsion, long before the birth of international human rights law, had protective functions. This is evident, for example, from the fact that international tribunals, almost 120 years ago, already found that states had certain obligations as to the treatment of expelled aliens.[70] It is also very well possible that such international norms, especially in the light of the responsibility

67 See Chapter 8. This would also be in line with the obligations of states under customary international law to provide travel documents to make readmission possible.

68 See 2.10.1.4.

69 Giuffré 2015, p. 265.

70 See, for example, Mixed Claims Commission Netherlands-Venezuela *Maal* [1903]; Mixed Claims Commission Italy-Venezuela *Boffolo* [1903]; Mixed Claims Commission Belgium-Venezuela *Paquet* [1903].

of states for their nationals, provided for a 'right' to re-enter their countries of nationality. Although such a general rule existed, and provided protection to individuals, it must have necessarily been one functioning at the inter-state level, given the absence of clear international legal personality of individuals at that time. To the extent that individuals could assert their 'rights' this was done through inter-state claims. And while Hailbronner has noted that "individual rights have evolved out of interstate obligations," the specific incorporation of these rights into international human rights instruments has given them their own basis, which is no longer dependent on customary norms and provide broader protection.

Another reason why inter-state and human rights-based readmission obligations are frequently lumped together may be that they pertain to the same substance. In this regard, Hailbronner has observed that:

> *"[t]he obligation to readmit in fulfilment of a right to return derived from nationality is at the same time the fulfilment of an international obligation derived from the international regulation of responsibilities between the state of origin and state of residence…"*[71]

It is certainly true that, when a state readmits one of its nationals, it is virtually impossible for an outside observer to ascertain whether this was done on the basis of an inter-state obligation, or to secure the individual right to return. The effect of either, after all, would be the same: the person is readmitted. Even the readmitting state itself might not specifically distinguish between these situations. It will merely know, based on the various frameworks discussed above, that, if presented with a national seeking to enter for whatever reason, it is under an obligation to readmit. The specific framework applied might not be considered very relevant for this purpose.[72]

Nevertheless, this does not mean that the inter-state readmission obligation and the human rights-based readmission obligation are one and the same. At least as a theoretical point, this is also acknowledged by Hailbronner when he states that "[a]s an exclusive human rights guarantee the right to return to the state of origin would characteristically depend on the willingness of the individual to return."[73] However, he follows this by

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71 Hailbronner 1997, p. 4; also see Goodwin-Gill 1996, p. 100: "As an incidence of nationality, the duty to admit thus encompasses both the rights of other States [to expel aliens]… and the right of the individual to access his or her own country."

72 Indeed, the main point of reference for states is likely to be their domestic laws, which will likely provide for the right of entry of nationals, and in some cases may even be incorporated in their constitutions.

73 Hailbronner 1997, p. 4; also see Legomsky 2003, pp. 617, who discusses the issue of rights and obligations in relation to the return of asylum seekers to a country of first asylum, which he argues can be equated to their 'own country': "the person *does not want* to be readmitted to the first country of asylum; indeed he or she wants to avoid return… Under those circumstances, to speak of the asylum seeker's 'right' to be readmitted to the first country of asylum is irrelevant. To put the point slightly differently, surely the obligation that the first country of asylum owes under Article 12(4) is an obligation that it owes to the individual, not to another state" (emphasis in the original).

referring to the above-mentioned confluence of the two obligations as to their substance, which would make the distinction meaningless. I disagree with this. Conceptually, the two types of obligations pertain to different legal relationships.[74] This is evident from the triangle model described in Chapter 1, and elaborated in Chapter 2.[75] As I have suggested in the introductory chapter, being precise about the different legal relationships between the three key actors, and the different rights and obligations that make up these relationships, is an important way to establish which actor is responsible for what. And by extension, to establish when an actor, in this case the third-country national, can and cannot be held responsible. While an abstract point, it can also become a practical matter that comes to the fore if the inter-state obligation is somehow not effective, and the only obligation on the country of return to readmit an individual will be one based on international human rights instruments. In the next chapter, some possible instances of the ineffectiveness of inter-state norms in relation to the readmission of nationals are provided. The relevance of this issue is arguably further enhanced when readmission obligations become weaker, such as in the case of stateless persons below, leaving an even greater role for the right to return under human rights law.

For the moment, such considerations can be set aside when inter-state readmission obligations vis-à-vis nationals are effective, and the difference between those obligations and the human rights-based obligation is not of immediate practical significance.[76] On that assumption, some provisional conclusions on the implications of the readmission obligations discussed above for third-country nationals required to seek return to their country of nationality under the Directive can be drawn.

4.2.5 Implications for third-country nationals seeking return to their country of nationality

The inter-state legal framework provides for rather clear rules on the readmission of nationals. Based on these rules, both actions that must be considered within the scope of the third-country national's obligation to return, as well as some actions that must be considered outside that obligation, can be identified.

74 Hailbronner 1997, p. 1.

75 In this respect, also see Noll's insistence on clear separation of inter-state and human rights-based readmission obligations in Noll 1999, p. 276; Noll 2003, pp. 62-63, and as discussed in 1.4.2.2.

76 Situations in which this difference becomes relevant will be discussed in Chapter 5.

4.2.5.1 *Obligations on the third-country national to provide evidence of eligibility for readmission*

To meet their obligation to return, considering the conditions for readmission to their country of nationality, third-country nationals can, at a minimum, be expected to provide that country with relevant proof of their eligibility of readmission. Although this eligibility is based on nationality, it may be presumed that this also requires evidence of identity, if this cannot be established on the basis of the documentary evidence for nationality. The two are inextricably linked. While a passport or other document may serve simultaneously as evidence of nationality and identity, in some cases, authorities of the country of return may need further proof. For example, when third-country nationals present evidence of nationality that does not contain pictures or biometric data, such as may be the case for birth certificates, they may need to show that the document in question actually relates to their person. Furthermore, identity documents, or at the very least information pertaining to identity, may provide possibilities for further investigation by the presumed country of origin whether third-country nationals seeking readmission are indeed nationals, also if no specific evidence of nationality can be provided. For example, this may facilitate a search in civil registries or other administrative systems.[77]

Providing this evidence of nationality, in good faith, either directly to the country of nationality or via the EU member state,[78] is the responsibility of third-country nationals as part of their obligation to seek readmission during the voluntary departure period. The exact requirements to be fulfilled, in terms of evidence, are set by each member state, unless these are specifically regulated by readmission agreements. It is up to third-country nationals to ensure they meet these requirements. In relation to readmission agreements, Coleman distinguishes broadly between official documents directly capable of providing evidence of eligibility for readmission, other papers, and oral evidence.[79] Not all these trigger equally strong obligations on the part of presumed countries of nationality. Certain forms of evidence – for example those categorised as 'proof' in EU readmission agreements – will trigger an immediate and undisputed obligation to readmit. Others may only create a rebuttable presumption of an obligation to readmit, or an obligation on the presumed country of nationality to further investigate the readmission claim. As a result, it must be presumed that third-country nationals' obligations with regard to readmission do not only encompass

77 On the links between nationality and identity, see, inter alia, Engbersen & Broeders 2009, p. 872, who note that lack of establishment of an individual's "'true' legal identity" may cause expulsion to be resisted both from within the expelling state (by lawyers and judges) and from abroad (by the countries to which a person should return). Also see Van der Leun 2003, p. 108, who notes that "unidentifiable aliens are constitutionally rather invulnerable to expulsion."

78 In case of readmission agreements. See the more extensive discussion of this in Chapter 6.

79 Coleman 2009, p. 99.

the provision of evidence of nationality, but to provide the evidence at their disposal that will trigger the strongest possible obligation on the state of nationality.[80] Of course, this should be considered within the context of each third-country national's practical possibilities. Persons cannot supply evidence that they do not possess, although third-country nationals can be expected to make reasonable efforts to obtain evidence (school certificates, military service documents, etc.) through family members or others.[81] The possibility of obtaining evidence through others should also not negate or pause third-country nationals' other efforts to ensure the presumed country of nationality is able to assess their readmission claim.

As noted, in case documentary evidence is not sufficient in and of itself to establish eligibility for readmission, an additional method is further examination. This typically includes an interview with the consular authorities. If the readmission process cannot effectively continue without such an interview, the obligation of third-country nationals would also encompass agreeing to participate in such an interview and providing the necessary information during that interview. Refusal to participate in such an interview, or not showing up for such interviews without valid justification would prima facie constitute a failure to fully comply with the obligation to return.

4.2.5.2 Limits on the obligation to provide evidence for readmission

While the scope of the actions that individuals must take to secure readmission may be relatively obvious from the discussion in the preceding paragraphs, another matter, arguably at least as important, is whether there are any specific limits to those actions. While these may be less obvious, the international norms discussed above nevertheless provide a framework to identify such limits. In this respect, it is especially relevant that, in all the cases above, the trigger for the state's readmission obligations is that the individual is found to be a national. The norms discussed above do not

80 Although the non-provision of different types of evidence may have different effects on the ability to return, and therefore may not in all cases result in non-compliance with the obligation to return under the Directive, see 6.2.5.

81 This may be presumed to be dependent on such information being requested of others without endangering the safety of the third-country national or any family members. In this regard, situations when a return decision is issued with the denial of an asylum application, but an appeal is still pending, may require postponement of such an obligation under the Directive, to ensure compatibility with EU asylum law. See, in this regard Article 30 of Directive 2013/32 (the recast Asylum Procedures Directive), which prohibits member states from disclosing or obtaining information that would endanger the applicant or family members in the country of origin. In line with the approach that third-country nationals cannot be expected to put themselves in unsafe situations that would be prohibited if done by member states (see 7.3), this would imply that third-country nationals cannot be required to take such steps at least until their asylum applications are finally rejected. On potential conflicts between the Returns Directive and this provision of the recast Asylum Procedures Directive, see ECRE 2018, p. 9.

leave discretion to states in this regard. When third-country nationals can provide sufficient evidence of their nationality (provided there is also no doubt about identity), they must normally be readmitted. As such, proof of nationality is not only *necessary* to trigger the destination country's readmission obligation, it is also *sufficient*. Translated to third-country nationals' obligations under the Directive, therefore, the same must apply. This means that there is no need on the part of third-country nationals to acquiesce to any demands that are not specifically connected to the establishment of their nationality or identity, since this is not a necessary trigger for the country of nationality's readmission obligations. By extension, I suggest, there is no ground for EU member states to expect third-country nationals to take any action that is not directly connected to the verification of their nationality and identity, as part of their obligation to seek readmission under the Directive.

A well-known example of further requirements imposed on returnees can be found in relation to Eritrea. Given the severely restrictive (and deeply problematic) exit rules applied in Eritrea, persons leaving the country, in particular those who flee, are often found to have left 'unlawfully.' Similarly, people frequently leave the country to escape military service. Such actions can have severe consequences if individuals subsequently return to Eritrea. However, it may also impact on their readmission claims. In this respect, it has been reported that Eritreans seeking readmission, including after a failed asylum claim, have been required to 'regularise' or 'settle' their relationship with the state after leaving, in the eyes of the regime, unlawfully. This includes signing a so-called 'apology letter' or 'regret form,' as well as paying a highly controversial 'diaspora tax.'[82] Again, notwithstanding other concerns of compliance with international law of such practices, these additional demands cannot fall within the scope of the legitimate obligation to return imposed on individuals who are nationals of Eritrea.[83] The scope of unnecessary additional demands may also extend to the practice of asking potential returnees for a statement that they are willing to return, since willingness, at least as a matter of inter-state readmission obligations, is not a requirement for readmission.[84] That such statements are regularly demanded by certain states will be discussed later.[85] Further requirements, such as information about the reason for leaving the country of origin, activities in the EU member state (including political activities), or

82 See, for example, UK Home Office 2015; Immigration and Refugee Board of Canada 2015; Danish Immigration Service 2014; and a more general discussion by Plaut 2015.

83 In general, draft evasion may result in the legitimate denial of a passport, as part of the right to leave, see HRC *Peltonen* [1994]. However, virtually unlimited military service in Eritrea is widely considered to be a serious human rights violation and therefore cannot form the basis for such actions. At any rate, even legitimate considerations of avoiding military service, while possible to affect the right to leave, do not impact on the right to return.

84 Hailbronner 1997, p. 4.

85 See 5.3.1.

any information that might be demanded about third persons, such as the whereabouts or activities of family members, also clearly fall outside the scope of necessary elements for readmission. These thus also fall outside the legitimate expectations towards third-country nationals as part of their obligation to return.

In sum, the specific readmission obligations of countries of nationality set the boundaries of the obligation of third-country nationals to seek return there in two ways. First, they provide the framework for what evidence they can be expected to present and how to ensure that the process of establishing their eligibility for readmission can proceed, including by participating in interviews where necessary. And second, such obligations are limited to what is necessary to establish nationality and identity. And additional requirements, such as signing statements regarding their willingness to return, making apologies for 'dishonouring' the state by leaving or applying for asylum, paying sums of money unrelated to the readmission process, and other demands not directly related to nationality and identity, are all outside the scope of the third-country national's obligation in this respect.[86]

4.3 The readmission of habitually resident stateless persons and implications for their obligations

This section will focus attention on readmission obligations of countries of habitual residence towards stateless persons. Again, it will first map out such obligations arising out of different sources and instruments of international law, and subsequently discuss the implications for the obligations of stateless persons under the Directive. Before doing so, two comments need to be made. First, the term 'country of habitual residence' may be relevant from the perspective of the Directive, in determining where a stateless person may have to return. However, from the perspective of those countries, readmission obligations may not be explicitly defined in relation to habitual residence. Rather, they may focus, for example, on the individual's former citizenship, or on specific residence rights. This may overlap with the way that habitual residence might be framed, which – as discussed in Chapter 3 – is in itself not entirely settled and requires a case-by-case examination, but this overlap is not always complete. The discussion below proceeds on the basis that, in the individual case, a country of habitual residence has been determined to exist as part of the return procedure under the Directive. From that point on, any divergence in terminology used on the side of the prospective country of return is no longer relevant. Rather, the relevance lies in the extent that readmission obligations towards that individual can be identified, regardless of the particular basis and regard-

86 In relation to financial demands by the authorities of countries of return, also see the discussion about fees levied for the issuance of travel documents in 8.4.2.

less of whether the country of origin identifies the person as someone habitually resident or in another way.

The second comment relates to the fact that the definition of 'country of origin' in the Directive relates to one single category of stateless persons in a general sense. Again, the picture from the side of third countries' readmission obligations may be different. In dealing with international obligations, different authors have identified specific categories of returnees. This generally includes stateless persons, but also former nationals and third-country nationals.[87] While only the first of these categories specifically refers to stateless persons, the other two may also be relevant to their readmission. For former nationals, this may be the case if they have not required a new nationality since having lost their nationality of the country of origin. As regards third-country nationals (also 'foreign nationals'), it would first appear that this term is dependent on the individual having the nationality of another state than the prospective country of return. After all, if not, they would not be a 'national' of anything. Nonetheless, in relation to readmission, third-country nationals are often simply defined as those who do not have the nationality of the country of return, nor of the expelling state.[88] This may, therefore, also include stateless persons. Where relevant, therefore, provisions in relation to each of these sub-categories are discussed. However, it should be noted that specific provisions related to the readmission of third-country nationals as a broad category (including stateless persons) are only discussed summarily here, since they will be the subject of more detailed discussion in Chapter 6, which deals with returns and readmission to transit countries.

4.3.1 Customary international law

As discussed in 4.2.1, the logic of readmission obligations in expulsion situations under customary international law is tied up, first and foremost, with the overwhelming importance that is attached to the bond of nationality between the individual and the state. This raises important questions about the situation in which this bond of nationality does not formally exist. Following the doctrine discussed above, no readmission obligations can generally be assumed to exist for persons who are not nationals of the country of origin. In this respect, few if any authors appear to suggest that that there can be any customary readmission obligations arising just out of

87 Giuffré 2015, p. 264; Hailbronner 1997; Coleman 2009, p. 28. The latter refers, additionally, to protection seekers and recognised refugees (pp. 45-47). For reasons discussed in 1.4.3.2, I will leave any overlap with the category of protection or asylum seeker aside in this analysis.

88 Also see the fact that the Returns Directive itself defines third-country nationals in relation to the absence of their citizenship of an EU member state and/or their right to free movement, rather than in relation to having the nationality of another country, as well as the fact that stateless persons, within the Schengen acquis, are considered the same as third-country nationals (see 1.2.1.3).

the fact that the person seeking readmission is stateless. Specific circumstances as to their link to the country in question must therefore additionally be in place.

The above-mentioned category of persons who formerly had the nationality of the country of return but are now stateless, may be able to put forward such circumstances. It has been described how, in literature from the 18th and 19th centuries, a customary obligation to readmit former nationals was sometimes assumed to exist, but that in later years, especially in the first part of the 20th century, this was increasingly put in doubt.[89] However, an argument can be made that, just as for nationals, at least one state should assume responsibility for individuals to be expelled by other states, both to safeguard the welfare of those individuals and to guarantee the territorial rights of those states. It has been argued that there may be a principle of 'continuity of nationality,' that would put that burden on the former state of nationality, as former nationality provides the closest link between an individual and a state available.[90] However, Hailbronner outlines that this has both supporters and critics in contemporary scholarship.[91] Hofmann suggests that "[a]n examination of the practice of States, including their treaty practice, shows, however, that customary international law does not impose on the State of former nationality a duty of readmission."[92]

However, even in the absence of a clear rule to readmit former nationalities, a significant grey area may remain. For example, it has been suggested that an obligation to readmit may continue to exist if a state strips a person of nationality purely to prevent them from being returned.[93] In my view, this would be a logical consequence of the doctrine of readmission obligations as a corollary of other states' right to expel unwanted aliens. This, it has been argued, would both deliberately infringe on the host state's sovereign right to expel, and on the individual's right to return, and constitute violations of the principle of good faith, as well as an abuse of rights.[94] While denationalising a person is, in principle, a matter of sovereignty of the state doing so, it could be argued that this should not infringe on another state's sovereign right to expel.[95] As such, at least theoretically, a basis for a continuing obligation to readmit could exist in such cases.

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89 Hailbronner 1997, pp. 17-19.

90 Lessing 1937, p. 152 and onward.

91 Hailbronner 1997, p. 21.

92 Hofmann 1992, p. 1005.

93 See, for example, Weis 1979, p. 54; Hailbronner 1997, pp. 21-24.

94 Coleman 2009, p. 49. Although on the point of infringement of the right to return it must be noted that the right to return expands beyond nationality, as discussed in 4.3.4.2 below. Furthermore, this again raises issues to what extent individual rights can be used as a doctrinal underpinning for a customary (inter-state) readmission obligation.

95 It should be noted that such issues may in particular arise if denationalisation leaves the person stateless, which in and of itself may make the decision to strip citizenship unlawful.

However, if denationalisation indeed occurs with the implicit or explicit intent to prevent the return of the person, it is difficult to see how a state seeking to expel an individual could successfully invoke such an obligation in practice, which is not particularly clearly recognised generally, and will likely be rejected by the state of return at any rate.

In other situations, in which a person has lost the nationality of a state after leaving, it may be even more difficult to establish a basis for an obligation to readmit. This would particularly be the case if the loss of nationality is due to the specific links between the individual and the country of nationality disappearing over time, such as prolonged absence from the state. This is even more the case if persons have willingly renounced their nationality of the country of origin.[96] Readmission obligations towards former nationals who remain stateless thus appear to be limited to specific situations where the country of origin has deprived them of nationality after leaving for an EU member state. Even in that case, it is a matter open to discussion. But even if this principle is accepted by both the country of origin and the EU member state, it may be difficult to establish, in the individual case, that the readmission obligation is applicable, since this would require some form of evidence that the loss of nationality was due to a deliberate action by the country of origin. Nevertheless, evidence of former nationality may at least provide the starting point for an attempt to gain readmission.

Interestingly, the arguments made above as regards former nationals do not appear to be extended to those who were always stateless, but were nonetheless habitually resident in the presumptive country of origin. It might be presumed that the habitual residence of stateless persons, particularly if they were born in that country, may be the closest approximation of such a special relationship, which would trigger responsibility for such persons.[97] This might particularly be the case if the country in question had failed to end the situation of statelessness, although it could have reasonably done so.[98] However, there is little in the available literature to suggest that such circumstances are seen, from a doctrinal point of view, as sufficient to trigger readmission obligations under customary international law. Nor has much, if any, evidence of either consistent state practice or *opinio juris* in that regard been put forward. This is even the case if stateless persons held a right of residence in the country of origin prior to moving to the EU member state. While this situation is covered by other instruments, customary international law appears to leave a gap here. In this regard

96 See, for example, Coleman 2009, p. 48: "In case of voluntary renunciation of nationality one cannot rely on the above arguments concerning sovereignty, good faith, or an abuse of rights, which pertain exclusively to State interaction."

97 See, for example, Hathaway & Foster 2014, p. 67: "the fact of habitual residence is understood to give rise to a bond between the stateless individual and a state that approximates in critical respects the relationship between a citizen and her state." (emphasis in original omitted).

98 By analogy, see 4.3.4.2 below as regards the treatment of persons who are 'not mere aliens' under the ICCPR.

stateless persons appear to be treated the same as other foreign nationals. And, as will be discussed in section 6.1, no customary obligations exist for the readmission of that category. Rather, where such obligations exist, these are based on specific agreements.[99]

4.3.2 Readmission agreements

The situation of stateless persons aiming to return to their country of origin can be connected to the provisions of EU readmission agreements in several ways. First of all, most agreements provide for an obligation to readmit certain categories of former nationals, subject to conditions.[100] This normally covers persons who have renounced the nationality of the country of origin after entering the EU member state. In this way, a gap left by the customary framework, discussed above, seems to be filled by these provisions. Such readmission is dependent on the person either not having acquired the nationality of the EU member state, or not at least having been promised such nationality.[101] These clauses do not address the situation of persons who were already stateless at the time that they left their country of origin.

Readmission agreements may also provide for obligations to admit spouses or children of persons who should be readmitted, regardless of their nationality. This could thus include spouses or children that are stateless, if the primary person to be readmitted is at least a national or former national meeting the conditions above. In some cases, readmission agreements may make even more specific arrangements for the return of former nationals. In the case of Serbia, former nationals of the Socialist Federal Republic of Yugoslavia who have acquired no other nationality, and whose place of birth and place of permanent residence on 27 April 1992 was in the territory of Serbia, are also readmitted.[102] Beyond this, stateless persons are explicitly covered by the same provisions as those applicable to third-country nationals. In relation to habitual residence, the provisions referring to a right of residence as a basis for a readmission obligation on the part of the country of origin, may be most relevant. The different agree-

99 Hailbronner 1997, p. 37; Giuffré 2015, p. 271.

100 This possibility is only missing from the EU-Pakistan readmission agreement.

101 EU-Albania readmission agreement, Article 2(1); EU-Russia readmission agreement, Article 2(1) EU-Ukraine readmission agreement, Article 2(1); EU-Serbia readmission agreement, Article 2(3); EU-Turkey readmission agreement, Article 3(3). In the case of Russia, the agreement stipulates that no readmission is required if the person has acquired the nationality of the requesting Member State, *or any other State*.

102 EU-Serbia readmission agreement, Article 3(3). The date of 27 April 2002 is when Serbia and Montenegro proclaimed the Federal Republic of Yugoslavia, after Slovenia, Croatia, Macedonia and Bosnia and Herzegovina had each already declared independence. The date thus formally marks the end of the existence of the 'old' Yugoslavia (the Socialist Federal Republic). In 2006, Serbia and Montenegro subsequently became the independent states of today.

ments may vary slightly in this respect. While some require the person to still have a valid residence permit at the time of the readmission request,[103] others may provide that this was the case "at the time of entry" to the EU, which also provides for the obligation to readmit the person if that permit has since lapsed.[104] As such, if stateless persons who are irregularly staying in an EU member state can show evidence of still holding (or having held at the moment of arriving in the member state) a residence permit in the country of habitual residence, this would be sufficient to trigger a readmission obligation, unless specific exemption clauses apply. Such exemption clauses generally specify that no readmission obligation arises if the EU member state had itself issued a residence permit or a visa, although that may again be subject to an exception, for example if the country of origin issued a residence permit of longer duration than the one issued by the EU member state.[105] Similar clauses exist if the stateless person is in possession of a valid visa (at the moment of entry or at the moment of the readmission request, as the case may be), but this may be less relevant to the situation of persons who had their habitual residence in that state.

Furthermore, the readmission clauses related to direct irregular entry into the EU member state, which will be discussed in more detail in Chapter 6, in principle apply to stateless persons. While generally used in relation to transit countries, the fact that a stateless person was found to have irregularly entered an EU member state directly from the state with which a readmission agreement is in force, could also apply if that latter state is the individual's country of habitual residence. The evidence base for readmission in such situations is entirely different, relying not on evidence of residence, but on evidence of irregular entry into the EU member state, which has different implications for the responsibility of the individual.[106]

4.3.3 Multilateral treaties

Under the various multilateral treaties covered in this analysis, a distinction is generally only made between nationals and non-nationals, with the latter also encompassing stateless persons. As with readmission agreements, residence rights of stateless persons in their country of habitual residence may be relevant. While the Smuggling Protocol does not specifically mention stateless persons, it makes provision for the readmission of persons with a residence right. Like for nationals, states where smuggled persons have

103 EU-Pakistan readmission agreement, Article 3(1)(a); EU-Russia readmission agreement, Article 3(1)(b). The agreement with Turkey simply states that the person must "hold a valid resident permit" without specifying at what time (Article 4(1)(b)).

104 EU-Albania readmission agreement, Article 3(1)(a); EU-Serbia readmission agreement, Article 3(1)(a); EU-Ukraine readmission agreement, Article 3(1)(b).

105 In some cases, if the country of origin issued such a permit earlier, it will also be held to readmit, as well as in the situation that the EU member state issued a visa or residence permit on the basis of fraudulent documents.

106 See 6.1.

a permanent right of residence at the time of return must "facilitate and accept" their return, and do so "without undue or unreasonable delay."[107] According to the Interpretative Notes to the Protocol, 'permanent residence' should be read as "long-term, but not necessarily indefinite residence."[108] When the person had a right of permanent residence at least up until the point he or she entered the EU member state, and this right has now lapsed, the Protocol furthermore requires state parties to "consider the possibility" of accepting their return.[109] However, as Gallagher and David note, the wording of this paragraph makes the readmission of a person who previously had the right of permanent residence "almost entirely optional."[110] Similar obligations of readmission, connected to a permanent right of residence are also applicable to victims of trafficking under the Trafficking Protocol.[111] However, the obligation to readmit victims of trafficking also pertain to those who had a right of permanent residence at the moment of entering the EU member state, even if it has subsequently lapsed. Therefore, in contrast to the Smuggling Protocol, the readmission of victims of trafficking with an expired right of permanent residence is also obligatory.

Provisions on the readmission of non-nationals with residence rights can also be found in the FAL Convention on maritime traffic. This is the case if stateless persons arrived in the EU member state as stowaways on a ship.[112] The right of residence is not further qualified, but would appear to be any residence authorisation regardless of length, and would particularly not have to be permanent. It would, however, still need to be valid. The Convention leaves unclear whether this validity should be effective at the time of return, or whether it would be sufficient if it would still be active at the moment the individual arrives in an EU member state as a stowaway. Regarding air traffic, the Chicago Convention only provides for a very weak obligation with regard to holders of authorisation to remain under domestic law. This relates to the specific category of 'deportee.'[113] Under the Convention, state parties must give "special consideration" to the admission of a deportee "who holds evidence of valid and authorized residence within its

107 CTOC Smuggling Protocol, Article 18(1),

108 Interpretative Notes to CTOC Smuggling Protocol, paragraph 112. Also see Gallagher & David 2014, p. 697.

109 CTOC Smuggling Protocol, Article 18(2).

110 Gallagher & David 2014, p. 38.

111 CTOC Trafficking Protocol, Article 8(1).

112 The FAL Convention, Annex, Section 1, part A, defines a stowaway as: "[a] person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person and who is detected on board the ship after it has departed from a port, or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the master to the appropriate authorities."

113 Chicago Convention, Annex 9, fifteenth edition, Chapter 1, Section A (definitions): "[a] person who had legally been admitted to a State by its authorities or who had entered a State illegally, and who at some later time is formally ordered by the competent authorities to leave that State."

territory."[114] This hardly gives a clear guarantee of readmission, although it arguably presents a due diligence obligation on the prospective state of return to consider allowing readmission, and to provide reasons for refusal of this.

The FAL and Chicago Conventions also deal with returns to the point of embarkation, which – just like the third-country national clauses of readmission agreements – may also cover stateless persons. However, for inadmissible persons and stowaways under the FAL Convention this merely entails an obligation on the country of embarkation to accept them for examination. The same is true for inadmissible persons under the Chicago Convention. However, as will be discussed in Chapter 6, the extent to which each instrument provides for sufficiently clear procedures and allows stateless persons or other third-country nationals to independently make a readmission claim remains somewhat unclear. At any rate, this would be subject to evidence of the specific status of the person, as an inadmissible person or a stowaway, which will require an intervention from the EU member state at the very least. Again, the embarkation criterion implies that such obligations can only be triggered to enable the return of stateless persons to their country of habitual residence if they directly travelled to the EU member state from there.

4.3.4 Human rights instruments

It is evident that, while containing some provisions as regards stateless persons seeking readmission to their country of habitual residence, the inter-state frameworks above leave considerable gaps, and do not provide the same guarantees for the readmission of expelled stateless persons as for expelled nationals. In addition to inter-state considerations, such as preserving the right to expel of the host state, the individual right to return has already been flagged as a potentially important source of readmission obligations regarding stateless persons. Below, the obligations that arise out of human rights instruments, specifically the 1954 Statelessness Convention and the right to return to one's own country under the ICCPR, are discussed.

4.3.4.1 The 1954 Statelessness Convention

As the key instrument to deal with the plight of stateless persons worldwide, it might be assumed that the 1954 Convention on the Status of Stateless Persons, and its companion instrument the 1961 Convention on the Reduction of Statelessness, would play a key role also in matters of readmission. However, the 1961 Convention does not address this at all.

114 Chicago Convention, Annex 9, fifteenth edition, Standard 5.23.

And the readmission obligations arising out of the 1954 Convention are surprisingly limited.

In contrast to other instruments discussed, the 1954 Convention makes explicit reference to the country of habitual residence of a stateless person. However, this is in relation to ensuring equal treatment of stateless persons residing in such a country to that country's nationals in a limited number of areas.[115] When it comes to provisions on the international movement of stateless persons, including return and readmission, this is instead connected to their lawful residence in a country, and then only indirectly, since the lawful residence in and of itself is not the basis for readmission obligations. Rather, states where stateless persons are lawfully resident have an obligation to issue them with travel documents.[116] Such travel documents must be valid for at least three months and at most two years.[117] As long as the travel document is still valid, the stateless person has a right to re-enter the issuing state.[118] Considering the explicit connection between the validity of the travel document and the readmission obligation, it must be assumed that this is also applicable if the lawful residence of the stateless person has lapsed in the meantime, but the travel document is still valid. However, the reverse situation may also occur. In a strict reading of the provisions of the Convention, as soon as the travel document has expired, the right to re-entry on the basis of the Convention also lapses, if the document is not renewed.[119] This would be the case even if the person still has lawful residence there. However, in such a situation certain other international provisions, discussed above, may come into play. Stateless persons who are not in possession of a Convention travel document that is still valid, and also do no longer hold lawful residence in their country of origin, however, would be unable to benefit from any clear obligation of readmission under the 1954 Convention.

4.3.4.2 The right to return under the ICCPR

As already discussed above, the right to return to one's own country provides for an almost absolute guarantee of readmission. While this right clearly pertains to nationals of a country, the group of persons who might benefit from it is wider. This wide scope is potentially of great importance to stateless persons seeking readmission to their country of habitual residence. This particularly hinges on the definition of such a country of habitual residence as stateless persons' 'own country' under Article 12(4) ICCPR, which would trigger the obligation on that country to readmit them.

115 Specifically, the protection of artistic rights and industrial property under Article 14, and access to courts under Article 16.
116 1954 Statelessness Convention, Article 28.
117 1954 Statelessness Convention, Schedule, paragraph 5.
118 1954 Statelessness Convention, Schedule, paragraph 13.
119 On renewal of travel documents for stateless persons, see 8.3.4.

The HRC has provided fairly extensive guidance on this, by making findings in individual complaints and through General Comment No. 27, in which its sets out its position on issues related to freedom of movement, including the right to return.[120] The general approach of the HRC in defining one's 'own country' is based on its views in the case of *Stewart v. Canada*,[121] which was later confirmed in other cases,[122] and became the basis for General Comment No. 27. The right to return to a country follows from a special relationship between a person and a country. This, as discussed, is satisfied through the bond of nationality, but special ties or claims may also exist for a person who "cannot be considered a mere alien."[123] The HRC gives two examples of persons who would be considered as more than 'mere aliens': (1) nationals of a country who have been stripped of their nationality in violation of international law; and (2) individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied to them.[124] Both cases clearly encompass persons who have been made stateless or remain so due to specific actions of a state. However, the HRC notes that the language of Article 12(4) ICCPR also "permits a broader interpretation that *might* embrace other categories of long-term residents."[125] Here, the HRC particularly points to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of residence. It also clarifies, however, that this broader category is not limited to such stateless persons and that "other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country."[126]

According to this position of the HRC, stateless persons who are long-term residents should thus be able to benefit from readmission to a country that is, on this basis, their own. However, this leaves unclear whether such residence is subject to specific conditions, such as lawful residence, or whether just long-term presence in a country might suffice. This is particularly important for stateless persons whose resident rights in their country of habitual residence have expired, for example by virtue of their departure to an EU member state, or who never had lawful residence in the first place. In this regard, the extent to which 'other factors' may determine that a

120 Typically, the individual cases did not deal with the destination of an expellee and the obligation to readmit. Rather, the topic was the expulsion of long-term residents, who challenged the legitimacy of the expulsion because they argued that the expelling state was their "own country." Therefore, they should always be allowed to re-enter it, and subsequently, they could not be expelled. Whilst the context is different, the HRC's approach to define the concept of "own country" is similarly applicable to readmission situations.

121 HRC *Stewart* [1996].

122 See, in particular, HRC *Canepa* [1997].

123 HRC General Comment 27, paragraph 20.

124 *Ibid*.

125 *Ibid*. (my emphasis).

126 *Ibid*.

country is one's 'own country' may be of special relevance. Much of the discussion over the last years as regards such other factors has focused on questions of nationality. A particular point of contention has been whether persons who can consider country A, of which they are not a national, their 'own country' within the meaning of the ICCPR, if they have the nationality of country B, even if that nationality is only formal. That is a matter that is clearly not directly relevant to stateless persons. However, in the process of tackling this question, the HRC has provided further clarification of the other factors, which are indeed relevant to stateless persons without lawful residence, and who would seek readmission nonetheless.

This clarification particularly follows from two cases, *Nystrom v. Australia* and *Warsame v. Canada*, decided three days apart in 2001. In each of the cases, the HRC found violations of the right to enter one's own country involving non-nationals, both of whom held the nationality of another state. Mr Nystrom sought to establish Australia as his own country, where he was a long-term resident, but had Swedish nationality. Mr Warsame sought the same for Canada, although being from Somalia. In these cases, the HRC looked at both sides of the equation. First, with regard to the country for which a right to enter was claimed, it looked beyond the question of potentially arbitrary denial or unreasonable deprivation of the opportunity to (re)acquire nationality, as provided for in General Comment No. 27. Rather, it focused more on the social links that the applicant had there. In both cases, the HRC noted that the concept of own country "invite[s] consideration of such matters as long standing residence, close personal and family ties and intentions to remain."[127] The HRC considered the young age when the applicants arrived in their countries of residence (27 days for Mr Nystrom, 4 years for Mr Warsame), the presence of their nuclear families in Australia and Canada respectively, and the main language of the applicants. For Mr Nystrom, the HRC also noted an Australian court had pronounced that he was an "absorbed member of the Australian community," that he bore many of the duties of a citizen and was treated as one, and that the applicant had never acquired Australian citizenship because he thought he already was a citizen.[128] For Mr Warsame, the HRC noted he had lived in Canada "almost all his conscious life" and he received his entire education in that country.[129]

On the other side of the equation, the HRC noted that 'own country' required consideration of the absence of links elsewhere.[130] For Mr Warsame, this included the fact that he had never lived in Somalia,[131] he had no ties there and had difficulties speaking the language. Furthermore, it noted Mr Warsame's claim that he did not have any proof of Somali citizen-

127 HRC *Nystrom* [2001], paragraph 7.4; HRC *Warsame* [2001], paragraph 8.4.
128 HRC *Nystrom* [2001], paragraph 7.5.
129 *Ibid*,, paragraph 8.5.
130 HRC *Nystrom* [2001], paragraph 7.4; HRC *Warsame* [2001], paragraph 8.4.
131 His family moved to Canada from Saudi-Arabia, where he had been born.

ship, and at any rate, that he had "at best formal nationality" in Somalia.[132] Weighed against the ties with Canada, the HRC found that the latter could be considered his own country. In *Nystrom*, despite it being clear that the applicant had Swedish nationality, the HRC considered he had no ties in Sweden and also did not speak Swedish. Balancing his strong ties in Australia with "the lack of any other ties than nationality with Sweden," it found that Australia was Mr Nystrom's own country.[133]

The approach in *Nystrom* and *Warsame*, in which more weight is given to social links in the presumed 'own country' and the lack of links to other countries, even if the person has nationality there, was not uncontroversial, even within the HRC itself.[134] It has been argued that the provisions of Article 12(4) are primarily meant "to protect strongly the right of a state's own citizens not to be exiled or blocked from return," including by stripping them of their nationality first, and thus not to allocate a country where a person has never held nationality as his or her 'own.'[135] However, the approach taken in *Warsame* and *Nystrom* has since been confirmed, and this more expansive notion of 'own country' thus prevails over one that is purely based on (lost or rescinded) nationality.[136]

To meet the requirements above, stateless persons who have not been made stateless or arbitrarily deprived of citizenship would have to show close links with the country of habitual residence, including on the basis of "long standing residence, close personal and family ties and intentions to remain."[137] The *Nystrom* and *Warsame* cases would suggest that the first element could be satisfied also after lawful residence has ended. Whether long periods of irregular residence would also be considered as a relevant element is another matter, and not clear from those cases since both had had lawful residence in their countries up until the moment that the states in question had decided to rescind these. However, particularly long presence

132 HRC *Warsame* [2001], paragraph 8.5.

133 HRC *Nystrom* [2001], paragraph 7.5.

134 In *Nystrom*, two dissenting opinions, encompassing the views of six HRC members, were put forward. The views in the *Warsame* case were only adopted with the smallest possible margin, with seven of the sixteen participating members dissenting.

135 HRC *Nystrom* [2001], individual opinion of Committee members Neuman and Iwasawa (dissenting), Appendix, paragraph 3.1.

136 See HRC *Budlakoti* [2018], in which the Canadian government argued that "the Committee's Views in those cases [*Warsame* and *Nystrom*] represented a departure from the Committee's consistent Views with respect to the deportation of a long-term resident for serious criminality and that the outcomes in those cases were out of step with an appropriate interpretation of State obligations under the Covenant" (paragraph 4.16). However, the HRC clearly rejected this argument, as it proceeded to examine the merits of the case very much along the lines of its approach in *Warsame* and *Nystrom* (paragraphs 9.2-9.3). Furthermore, its findings of a violation of the right to enter one's own country on this basis did not elicit, in contrast to *Warsame* and *Nystrom*, any dissent from any of the fourteen members examining the case, further suggesting that this approach is now well-established and accepted within the HRC.

137 HRC *Nystrom* [2001], paragraph 7.4; HRC *Warsame* [2001], paragraph 8.4.

in a country, especially if the person was born in the country or had moved there at a young age, and leading to their integration there in terms of social links and language, would appear to weigh heavily for the HRC. The question of intentions to stay may throw up some issues in view of the stateless person's departure to the EU member state. But even this should not be fatal. After all, the right to return particularly guarantees the possibility of persons to leave a country (as the other part of international movement rights) and have the possibility to always come back. The fact that a stateless person has decided to move to an EU member state temporarily, even for a number of years, should not affect this, as it would not for a national. If the stateless person would have stayed in the EU member state for extremely long periods, this may change, as it might shift the balance of ties between the two countries.[138]

But barring such a scenario, in general there can be little question that the individual would have important ties in another state. This possibility was considered, and rejected, in the above-mentioned cases on the basis of the applicants having the nationality of another state. In the case of stateless persons, this would obviously not be the case. Overall, then, there would likely be little reason to believe that a stateless person would have strong ties to another country. As such, provided that they could show substantial ties, through long standing residence but also through social links, language and other factors, the balance of determining their 'own country' would almost certainly have to tilt towards the country of habitual residence. Which would subsequently have an obligation to readmit them if they were exercising their right to return.

As an aside, the discussion above also shows that the concept of 'own country' in the ICCPR is broader than 'country of origin' under the Directive. The findings of the HRC suggest that the former concept applies not only to nationals and to stateless persons with sufficient links, but also to persons with such links, but who still hold the nationality of another state, provided their links with that state of nationality are weak. Both applicants in *Nystrom* and *Warsame* had the nationality of another country, but this did not prevent the HRC from finding that the country where they had lived for most their lives was their 'own country.' On this basis, a person formally holding the nationality of Somalia, but who has no strong links there and who instead has strong links with Kenya, for example, may be justified in considering the latter country as his or her 'own.' And would thus have a right to return there. However, as discussed in Chapter 3, the country of habitual residence (or where an individual otherwise has strong links) for persons who possess the nationality of another state is not part of the definition of 'country of origin' in the Directive. As such, in the example above, an obligatory return to Kenya, as a country of habitual residence, would only arise if it could be identified as a transit country within the meaning

138 However, in that case the EU member state would be more likely to have become the stateless person's 'own country' which would exclude his or her expulsion.

of the Directive. If this is not the case, this would still not preclude return to such a country, but this would then be on the basis of it being 'another third country,' which remains an option for the individual as a return destination, but not an enforceable obligation.

4.3.5 Implications for stateless persons' obligations to seek readmission to their country of habitual residence

While the notion of 'country of origin' in the Directive groups together the situation of stateless persons for whom a country of habitual residence can be identified and that of persons with a country of nationality, these are clearly not equivalent cases. This is evident from the respective readmission obligations that pertain to such countries. Whereas countries of nationality have a clear, widely recognised obligation to readmit expelled citizens, with few if any exceptions, such obligations are much more diffuse for countries of habitual residence of stateless persons. Customary obligations may pertain to former nationals, although this may well be limited to those who were purposefully deprived of their nationality by the country of habitual residence, and even this continues to be a matter of contention. Rules contained in readmission agreements in relation to former nationals are slightly wider in that regard. In either case, at a minimum, evidence of former nationality would be necessary to trigger the readmission obligation. Third-country nationals may thus be expected to provide relevant documentary evidence of this, to the extent possible, or to provide the country of origin with such information necessary to help it establish whether they are indeed former nationals. The requirement under readmission agreements that the former nationals have not obtained, or have been promised, the citizenship of the EU member state may require that member state to assist those individuals, for example by providing them with a declaration attesting to this. Proving the circumstances under which a person was deprived of nationality, such as may be required for readmission under customary international law, may be more difficult. Rather, this is a question that the country of origin may have to answer itself, for example by examining whether there is any information available that would show that the individuals in question had relinquished their nationality willingly. However, countries of origin may not be very inclined to admit they had unlawfully deprived individuals of their nationality, particularly if this was done with the view to preventing their re-entry. In this respect, the customary obligation may be difficult to trigger in practice.

Stateless persons may also be expected, as part of their obligation to return, to provide evidence of a right to residence, either still effective or one that was valid at least until the moment of arrival in the EU member state, according to the instrument applicable. Again, any documentary evidence of this (former) right to residence would have to be made available to meet the obligation to return. The same goes for information that would enable the country of origin to check whether such a residence right exists

or existed if no sufficient documentary evidence can be supplied by the individual. If based on readmission agreements, additional evidence to be provided may include the absence of a visa or residence right provided by the EU member state, or at least only one that was shorter than the validity of the residence right in the country of origin. Again, the absence of this will be difficult to prove by individuals themselves and may require the EU member state to provide a declaration or other document attesting to this. As noted, in contrast to readmission agreements, multilateral treaties, while making provisions for readmission on the basis of residence rights in certain cases, do not set out clear procedures. This may be particularly problematic since not only evidence of residence is required, but, strictly speaking, it should also be clear that the individual falls within one of the categories covered by these treaties, such as a smuggled person, victim of trafficking, or as an inadmissible person or stowaway. Being an inadmissible person could be attested by providing a copy of the return decision, but for other categories, member states do not necessarily foresee in separate documentation from which their 'status' can be proven. This is particularly the case for smuggled persons. The fact that a person was smuggled may follow from their own statements, but this does not necessarily result, on the side of a member state, in the recognition of the individual as a smuggled person under the Protocol. This may be different for victims of trafficking, for which separate frameworks exist, but whether this leads to the individual having specific documentary evidence of this status may vary.[139] Also in this case, the obligation of the individual to seek readmission may have to coincide with specific action by the EU member state to make it effective.

For those who cannot meet the conditions regarding former nationality or residence, the irregular entry criterion may be applicable, but this will generally only be of relevance in relation to the country of habitual residence in case of direct entry, and would be nullified if the stateless person had transited through other countries on the way to the EU. The implications of this will be discussed in more detail in Chapter 6. For now, it must be noted that such readmissions require not only action by the individual, but by the member state as well.

Inter-state readmission obligations leave numerous gaps, both in terms of the categories of stateless persons who are habitually resident in a country, as well as the geographical coverage, especially if the main basis for

139 For example, a person cooperating with the authorities in the identification and prosecution of perpetrators of trafficking may be able to show as evidence a temporary residence permit issued to her or him for this purpose. After this permit ends, and the obligation to return kicks in, it may serve to prove that the individual was indeed a victim of trafficking. This status may also be clear when individuals are supported through specific return programmes for victims of trafficking, such as those administered by IOM. However, victims of trafficking who do not press charges or otherwise are granted a temporary residence permit in relation to the investigation or prosecution of trafficking in human beings, or who are not assisted through specialised programmes, may be lacking evidence of them being a victim of trafficking.

return is formed by EU or bilateral readmission agreements. Human rights-based readmission obligations could potentially fill this gap. However, the extent to which the main instrument dealing with stateless persons can actually do so is extremely limited. While the 1954 Statelessness Convention provides perhaps for the clearest evidentiary requirements, they are also very restrictive.[140] The limited provisions on readmission are tied up with the possession by the stateless person of a Convention travel document, previously issued by the country of habitual residence, which still needs to be valid. This is likely to create practical problems even for those who were issued such documents before leaving the country of habitual residence, since their validity is quite limited. While there are some provisions covering the extension of the validity of such a document while being in the EU member state, the stateless person must ensure that, at the time of seeking readmission, it is still valid. The Convention does not provide for an obligation to readmit on the basis of an expired travel document, much less on the basis of any other evidence of previous habitual residence. In addition, it should be reiterated that ratification of the Convention is far from universal, covering less than half of all states worldwide, and obviously no readmission obligations arise out of the Convention for states that are not a party to it.

By contrast, readmission obligations of states of habitual residence based on the right to return in the ICCPR, which is almost universally ratified, are wide-ranging. Potentially, therefore, those obligations would be able to fill significant gaps left not only by the Statelessness Convention, but also by inter-state frameworks. The main issue as regards third-country nationals' efforts to show eligibility for readmission on this basis lies in the fact that the conditions to be fulfilled are both highly dependent on the individual case, and require an assessment of the overall circumstances of that case, rather than a single document or evidence of a single fact, such as prior residence. As such, it is not a priori clear what evidence third-country nationals who may be able to find readmission based on the country of habitual residence being their 'own country' would have to provide. In all likelihood, even establishing what can be accepted as sufficient proof that a specific third country is a stateless person's 'own country' may require a process of exchange and negotiation between the individual and the authorities of that country. That, in turn, would depend on those authorities being willing to cooperate, and at least, as an initial starting point, accept that the individual may have a valid claim to readmission on this

140 This is true both for the scope of persons covered and the readmission obligations incumbent on states of habitual residence. The definition in the 1954 Convention only covers those who are not considered a national by any state under the operation of their laws, but not, for example, those who hold formal nationality which is to all extents and purposes ineffective. Under Article 1(2), it also excludes a number of categories of individuals who may well come within the scope of the Directive, and thus faced with an obligation to return, but unable to benefit of the already limited readmission obligations set out in the Convention.

basis, which is to be examined further. As such, practically there may be significant obstacles to stateless persons using their right to return to their own country to ensure readmission, and thus their departure from the EU member state. Nevertheless, at least normatively, the individual right to return is the widest in scope for stateless persons, and could thus be seen as a key way to fill the gaps left by inter-state instruments, especially in view of the virtually absolute nature of the right to return.

In terms of the limits of the obligations on the individual, the same as for nationals generally applies. Although the scope of conditions to be met for readmission is wider, the various instruments set several conditions that, if fulfilled, must lead to readmission. As such, readmission cannot be made dependent on additional conditions which are not strictly necessary. If countries of origin nevertheless make such additional demands, EU member states cannot expect third-country nationals to meet these, as these fall outside of their individual responsibility. It should further be acknowledged that, although some relatively clear requirements for readmission can be identified, providing documentary evidence of any kind, including of identity, may be particularly difficult for stateless persons. Their possibility for obtaining relevant documents may often be connected to citizenship or immigration status.[141] For example, even when stateless persons have lived in a country all their lives, the mere fact of their statelessness may have prevented them from being issued identity documents, birth certificates, military service booklets or other kinds of papers that may later on help them prove their eligibility for readmission. As a general point, therefore, EU member states, in determining whether stateless persons have done what is necessary to seek return to their country of habitual residence, should take the particular difficulties that they might have in providing documentary evidence into account.[142]

4.4 Conclusions

While Article 3(3) of the Directive does not provide for a hierarchy of destinations, the country of origin is clearly the first among equals. It is not further qualified, while the other destinations are. Furthermore, there would appear to be an underlying assumption that every third-country national

141 See Van Waas 2008, p. 371: "for many stateless populations around the world, in particular those with an uncertain immigration status, the acquisition of any documents – for travel or proof of identity or status – is reportedly very difficult and costly, if not impossible. And earlier in this work we have already seen what a problem access to birth and marriage certificates can pose for the stateless." (citations omitted).

142 Somewhat unsatisfactorily perhaps, I will leave this point as just a general conclusion. Clearly, this raises further practical issues about how exactly member states can do this in a way that both fully ensures that individuals are not failing to meet their obligations under the Directive, but also making clear provisions for the specific difficulties faced by stateless persons. The myriad issues that arise out of this would warrant a separate study.

has a country of origin to which he or she can return, thus guaranteeing, at least in theory, that there is always a pathway to effective compliance with the obligation to return. When it comes to persons who are nationals of the country of origin this largely holds true, since there appear to be well-established customary readmission obligations, further bolstered by a range of specific agreements. Although some challenges to the presumption of a customary obligation to readmit expelled nationals may be put forward,[143] the assumption that such a general and unconditional readmission obligations exist is one of the key conceptual pillars for EU return policy. These readmission obligations also translate quite neatly into actions to be taken by third-country nationals under the Directive, in terms of the evidence of nationality and identity to be provided. Furthermore, they set clear boundaries for what cannot be expected of third-country nationals, covering any demands not directly connected to establishing nationality and identity.

The situation of the second group faced with an obligation to return to their country of origin, stateless persons with habitual residence in such a country, is much more opaque. Readmission obligations, at least at the inter-state level, clearly fall short of ensuring that all stateless persons can be readmitted to their country of habitual residence. While such obligations may arguably exist for some categories of former nationals, both under customary international law and readmission agreements, some further conditions may be attached, as discussed above. Residence rights play an important role in readmission agreements and a number of multilateral treaties, although the extent to which such residence rights must still be active varies. These provisions are furthermore dependent on either their specific applicability between an EU member state and the country of origin, or on the third-country national falling within a specific category defined by such treaties. As such, considerable gaps in the inter-state readmission framework for habitually resident stateless persons remain, and the assumption that they would always be able to return to their country of origin under the Directive is therefore not true in all, and perhaps even the majority of, cases.

It is for this reason that the role of human rights-based obligations, especially under the ICCPR, may be of crucial importance, since they provide for very strong readmission obligations for nationals, but also potentially cover a wide range of stateless persons who have their habitual residence in a third country. However, this conclusion brings us back to the earlier point about the crucial differences between inter-state and human rights-based readmission obligations. As noted, these are owed by the country of return to different actors, namely the EU member state in the case of inter-state sources and instruments, and the third-country national in the case of the right to return. And, as noted, the exercise of the individual right to return may be regarded as something over which the third-country national

143 See 5.2.3.

should, at least theoretically, have discretion. At the same time, this brings a dilemma clearly into focus: how must we assess the situation in which returning is both an individual right and an obligation under the Directive? This relationship between rights and obligations is one that goes to the heart of the issue of individual responsibility, and the tension between choice and coercion that lies at the centre of the concept of voluntary return. It therefore requires closer examination. This will be done in the next chapter, in which I will discuss the extent to which third-country nationals can be expected to put their human right to return at the service of the EU member state's interest in an effective return procedure.

5 Ineffective inter-state readmission duties and the compulsory exercise of the right to return

5.1 Introduction

This chapter continues the examination of the obligations of third-country nationals to seek readmission to their country of origin, which was started in the previous chapter. In that chapter, it was noted that, while inter-state and human rights-based readmission obligations are often lumped together, there may be specific points on which they diverge. This distinction is important because, if inter-state obligations are somehow ineffective, this may draw attention to the question whether human rights, especially the right to return, can fill the gaps that are left, so as to ensure effective return. This chapter examines both the possibility of such a situation occurring, and the implications for the right to return, in particular the extent to which third-country nationals can be expected, or indeed compelled, to claim their individual right to return in order to ensure readmission to the country of origin.

In section 5.2, several reasons why inter-state obligations to readmit expelled nationals may be ineffective are discussed. This covers, first, the possibility that countries of origin refuse readmission when there are doubts about the lawfulness of expulsion. Second, it will examine possible justifications that countries of origin could put forward for not meeting their readmission obligations in exceptional circumstances. And third, the possibility that the views of countries of origin on the nature and scope of the obligation to readmit expelled nationals significantly diverge from those of EU member states. Each of these situations would leave the right to return as the main basis for readmission obligations.

Subsequently, the focus will shift to the relationship between the EU member state and the third-country national. If inter-state readmission obligations are indeed ineffective, but the right to return can fill that gap, there would be a clear interest for the EU member state to require third-country nationals to exercise that right. However, from the side of the third-country national it may be objected that the exercise of a right is for the rights holder alone to decide, and not the state. This, then, goes to the core of individual responsibility and how it relates to individual rights. Section 5.3, therefore, tries to answer whether the obligation to return under the Directive encompasses the compulsory exercise by individuals of their right to return, in order to ensure the return procedure can be concluded successfully. Conclusions are provided in section 5.4.

5.2 Reasons for the ineffectiveness of inter-state readmission obligations of countries of origin

This section sets out several potential reasons why, from a normative perspective, inter-state readmission obligations may become ineffective. In the previous chapter, it was already noted that inter-state readmission obligations towards habitually resident stateless persons are far from all-encompassing, potentially leaving a considerable part of this group outside their scope. This, therefore, already identifies one situation in which the onus is on the right to return, which does not need further explanation here. However, although often considered unconditional, there may indeed be situations in which even the obligation to readmit nationals is inapplicable, or where countries of origin may at least see it as such. This section examines some of those situations. It will only focus on those situations that impact on the effectiveness of the norms themselves, basically putting them out of operation. While there are important other reasons why readmission may fail, such as failure to take the necessary steps by the third-country national, or the country of origin simply ignoring its international obligations, these are not discussed here.

5.2.1 Unlawfulness of expulsion

One scenario in which a country of origin's readmission obligations are potentially ineffective is when they are negated by the way expulsion is decided by the EU member state. As a general point, in line with the doctrine of territorial sovereignty and the right to control migration, it is up to the EU member state to decide which third-country nationals are allowed to enter and remain on its territory, and when such persons can be required to return. When a decision to expel a third-country national is made, this is not, as such, a matter for the country of origin, which simply has to ensure that the return can take place by fulfilling its obligation to readmit. However, the right of states to expel is not unfettered but is limited, inter alia, by its human rights obligations, as well as residual safeguards for the treatment of aliens under customary international law. In the case of EU member states, when the presence of a third-country national is governed by provisions of EU law, the decision to deny lawful stay must also meet EU rules. If these various standards are not observed in the expulsion process, this could potentially have an effect for the country of origin.[1] In particular, it may be argued that unlawful acts by the EU member state cannot trigger any legal obligations for the country of origin. From this perspective, an unlawful decision to expel a person could be seen to negate the latter's

1 Especially as regards nationals, over which it continues to exert personal sovereignty, including in relation to diplomatic protection.

readmission obligation, as a matter of inter-state rules.[2] In particular, it has been argued that, in case of unlawful expulsion:

> *"the State of residence would not have a valid claim to the sovereign right to expel. It would in that case seem arguable that the country of nationality would be relieved of the obligation to readmit its national, while refusing readmission would not violate the sovereignty of the State of residence."*[3]

However, this appears to be a matter that is not clearly settled. Nonetheless, countries of origin may indeed perceive such a link, and use non-readmission to protect their citizens' interests. However, the country of origin and the EU member state may well have differing views about the lawfulness of expulsion. After all, as the expulsion is proceeding, it must be assumed that the EU member state is considering that it is acting lawfully. Nevertheless, if this is not the view of the country of origin, it could undermine the effectiveness of the inter-state framework, since it is the latter that has the final decision about readmission.

5.2.2 Justifications for non-readmission

A second scenario can be found in a set of rules of customary international law through which countries of origin may be excused from bearing responsibility for an internationally wrongful act, such as non-compliance with their readmission obligations. This may be the case if readmission becomes impossible or particularly harmful to the country of origin. In such situations, states may sometimes be able to provide acceptable justifications for failing to meet their obligations. While this does not mean that non-readmission becomes lawful, such justifications would preclude the responsibility of the state for that wrongful act. Like the draft articles on expulsion, these rules have been the subject of a codification exercise by the ILC, leading to the Articles on the Responsibility of States for International Wrongful Acts, or ARSIWA.[4] These articles do not in themselves have the status of law, but they are often cited as an authoritative representation of customary law on this issue.[5] Articles 20-25 ARSIWA set out six situations precluding wrongfulness. These are: (1) the state affected by the wrongful act has consented

2 Goodwin-Gill 1978, p. 136.
3 Coleman 2009, pp. 30-31.
4 ILC 2001.
5 Bordin 2014 sets out a number of noteworthy examples of the use of specific provisions of ARSIWA by the ICJ, including its judgment in *Gabčíkovo-Nagymaros* [1997], paragraph 38 (when the Articles were not yet adopted), and its judgment on merits in *Bosnia Genocide* [2007], paragraph 385, 398, 420 and 431. Also see UN Secretary-General, Report on the responsibility of States for internationally wrongful acts: compilation of decisions of international courts, tribunals and other bodies, UN doc. A/74/83, 23 April 2019.

to it;[6] (2) the wrongful act is committed in self-defence;[7] (3) the wrongful act is a countermeasure to a prior breach of an obligation by another state;[8] (4) the wrongful act is the result of *force majeure*;[9] (5) the wrongful act resulted from a situation of distress;[10] and (6) the wrongful act was a necessity.[11] It would go too far to analyse the possible denial of readmission against these justifications in detail. However, a short discussion is nonetheless in order. It should be noted that not all of these will be relevant to expulsion situations. It is unlikely, for example, that an expelling state would consent to non-readmission by the state of origin. Furthermore, self-defence will only be an issue in case of acts of aggression or war, whilst situations of distress only arise in case an immediate loss of life must be prevented. The other three, however, could theoretically be applicable to expulsion situations. However, these would be extremely exceptional situations and the country of return would have to provide very specific, well-founded reasons to be able to rely on these justifications. In such a situation, the right to return may remain as a basis for readmission. As will be discussed below, if individuals indicate to the country of origin their willingness to return, this can be taken as a sign of their intent to exercise their right to return, which would trigger the country of origin's readmission obligations under the ICCPR and other applicable human rights instruments.

5.2.2.1 Countermeasures

Countermeasures can be a justification when a state acts in breach of an international norm in reaction to a prior breach by another state, with the express purpose of making the latter cease its unlawful conduct.[12] In theory, we could consider the situation of non-readmission in the face of an unlawful expulsion, as discussed above, as giving rise to countermeasures. However, as noted, the argument for non-readmission in such a situation would likely be that the readmission obligation would be nullified by the unlawful expulsion, so a further excuse would not be necessary to justify a breach. But there may be other circumstances triggering a response by the country of return not to readmit expelled persons. For example, in 2014, Morocco suspended its cooperation with the Netherlands in relation to readmission of its nationals as a reaction to stated intention by the Netherlands to withdraw from a social security treaty between the two states.[13] This could potentially be explained as a countermeasure to the Netherlands' intended unilateral withdrawal from the treaty. However, Morocco's non-

6 ARSIWA, Article 20.
7 ARSIWA, Article 21.
8 ARSIWA, Article 22.
9 ARSIWA, Article 23.
10 ARSIWA, Article 24.
11 ARSIWA, Article 25.
12 Crawford 2002, p. 292; Lesaffre 2010.
13 For an overview, see Besselsen 2015.

readmission was arguably not in response to a breach by the Netherlands, since withdrawal from the treaty is possible under its terms. Even if the intended withdrawal had been a breach, however, it may be doubted that non-readmission could be seen as a response that is sufficiently closely connected to that initial breach. Such a situation might exist, for example, if the expelling state itself was not meeting its readmission obligations, which might justify the other state in doing the same. At first glance, such a situation is not very likely to arise between EU member states and destination states, since the flow of expulsions (and thus the burden of readmission) usually flows from the EU to other states, and much more rarely in the opposite direction. However, the reluctance of EU member states to take back nationals who are, for example, suspected of having taken part in terrorist activities in such destination states could perhaps be a trigger for countermeasures by such states.

5.2.2.2 Force majeure

Non-readmission could also be the result of *force majeure*, that is, an irresistible force or event, beyond the control of the state, making it materially impossible to perform according to the obligation.[14] The irresistible force can be rooted in natural or in human factors, or a combination of both. In principle, natural disasters, the outbreak of war or other conflict, as well as large-scale economic disasters could all be part of a *force majeure*-based argument.[15] In the context of expulsion and readmission, this may be the case when fighting or a natural disaster makes re-entry into the country practically impossible. Such practical impossibilities may also have arisen with the shutting down of air traffic to many countries because of the COVID-19 pandemic. The collapse of state institutions could similarly provide an insurmountable obstacle to readmission, as no travel documents can be issued. In this respect, the situation in Somalia in the 1990s and 2000s, which will be discussed in Chapter 8, may point to such a circumstance. During this time, there was virtually no state structure that could facilitate readmission, and it could thus be imagined as a situation in which *force majeure* could be invoked.[16] Even in a post-conflict or post-disaster period, there may be material difficulties in ensuring readmission. For example, if archives of civil registries have been damaged or destroyed, this may seriously hamper the verification of the eligibility for readmission of an individual who cannot provide documentary proof of nationality.

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14 "Materially impossible" means more than just materially difficult. The breach cannot be a result of choice by the state, no matter how undesirable the outcome. See Crawford 2002, p. 298.

15 Crawford 2002, p. 295; Szurek 2010.

16 It should be noted, however, that a *force majeure* situation would normally prevent all types of readmission. If the state would be making a distinction between voluntary returnees, who are readmitted, and forced returnees, who are not, this would undermine the argument that it is materially impossible to facilitate readmission.

5.2.2.3 *Necessity*

A third justification may be invoked when readmission is (theoretically) possible, but extremely undesirable and with grave consequences for the readmitting state and/or its population. This is the excuse of necessity, which acts as a "safety valve" which aims "to relieve the inevitably untoward consequences of a concern adhering at all costs to the letter of the law."[17] Necessity may not be invoked unless two strict circumstances are met. First, the breach must be the only way for a state to safeguard an essential interest against a grave and imminent peril. Second, failure to meet the obligation should not seriously impair an essential interest of the state(s) towards which the obligation exists, or the international community as a whole.[18] Additionally, necessity cannot be invoked if the international obligation in question excludes the possibility of invoking necessity, or if the state invoking necessity has itself contributed to the situation.[19]

To my knowledge, necessity has never been explicitly invoked as a justification for non-compliance with readmission.[20] However, there may be examples of states at least hinting at such situations. For example, in November 2011. The Iraqi authorities were limiting the readmission of persons who had had their asylum statuses revoked in the Netherlands.[21] They would no longer provide replacement travel documents for those who would be forcibly removed, nor accept forced returns on the basis of an EU travel document.[22] Similar restrictions were put on returns from other EU and western countries.[23] During the negotiations that followed, the Iraqi government appeared to justify its policy on different grounds. These included the country being in a reconstruction phase, whilst already dealing with 1.5 million internally displaced persons and numerous refugees waiting to return in neighbouring countries. This would put immense pressure on Iraq's fragile economic and social system.[24] Iraq never appears to have made an explicit appeal to the exception of necessity, although its objections to return do point in this direction. It is easy to see how its concerns about internal stability and an overwhelming strain on public

17 ILC, Eight report on State responsibility by Mr. Roberto Ago, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility, doc. A/CN.4/318 and Add.1 to 4, Yearbook of the ILC 1979, vol II(1), paragraph 80.

18 ARSIWA, article 25(1)(a) and (b).

19 ARSIWA, article 25(2)(a) and (b).

20 Although Boed 2000 devotes specific attention to the potential use and abuse of necessity in relation to border closures by states faced with large-scale influxes of asylum seekers.

21 *Trouw* 2011.

22 Netherlands Parliament, parliamentary session 2011-2012, appendix; 2011-2012, report no. 29; and 2011-2012, appendix 1313.

23 Netherlands Parliament, parliamentary session 2012-2013, doc. 33400-VII-4; 2013-2014, doc. 19637-1758.

24 Netherlands Parliament, parliamentary session 2011-2012, reports 90-9; 2011-2012, doc. 19637-1553; 2011-2012 doc. 19637-1569; 2012-2013, reports 2911.

services in case of large-scale returns, which could put the well-being and perhaps even the lives of Iraqi citizens at risk, would relate to clear essential interests. Whether the numbers of returnees and the consequences would be sufficient to present a 'grave and imminent peril,' however, may be more difficult to assess. The Iraqi government would also have had to argue there was 'no other way' to prevent this grave and imminent peril than limiting readmission to those returning voluntarily. This would be complicated by the fact that expelling states, in this case the Netherlands, were willing to provide financial assistance to help ease the Iraqi state's burden. Even if all these elements could have been put forward convincingly by Iraq, the refusal to readmit expelled nationals would still have to be balanced against the Netherlands' essential interests to decide on entry and stay of aliens on its territory. Additionally, Iraq continued to readmit voluntary returnees, which cast some doubt about the necessity of non-readmission of others, although it could be argued this would significantly reduce Iraq's burden, especially since voluntary returnees may have been better prepared to fend for themselves, including through support of assisted voluntary return programmes.[25]

Without aiming to draw definitive conclusions about the legitimacy of a potential appeal to necessity in a case like that presented above, which appears to have been resolved in 2014, it does show that certain situations occur in which justifications become more realistic. There have been other cases of countries, especially dealing with ongoing internal conflict or other serious problems, calling on EU member states to halt returns. For example, over the years, Afghanistan has repeatedly called on EU member states not to carry out removals.[26] However, these have continued, and generally returnees have not been refused readmission when arriving at Kabul's international airport.

Another prominent example can be found in the COVID-19 pandemic, which resulted, especially during the first half of 2020, in international traffic partially or wholly grinding to a halt, and many states closing their borders. This also had significant impact on the ability of EU member state to return irregular migrants to their countries of origin.[27] At least initially, non-readmission may have been perceived by other states, including EU member states, as legitimate, either on the basis of *force majeure* (for example due to the lack of flights mentioned above) or necessity in light of the public health crisis faced in some countries.

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25 It should be noted that the Netherlands offered additional financial support, including for the reintegration of forced returnees, but this was, at least at the time of negotiations, reject by the Iraqi government.

26 On the impact of returns to Afghanistan, in a broader sense, also see *Ariana News* 2018.

27 See, for example, COM(2021) 56 final, 10 February 2021, paragraph 2: "The COVID-19 pandemic has added a new layer of complexity to the functioning of return and readmission operations." Also see ECRE 2020; EMN 2021.

5.2.2.4 *Justifications and the link with the right to return*

The various justifications come with very high thresholds, which are difficult to meet. It is therefore not surprising that there is little evidence that countries of origin, even when they deny or make readmission more difficult, specifically aim to justify such action in these terms. This may also be due to other factors, including that they have other means of preventing nationals from returning which do not require them to make explicit that they are actually refusing readmission as a general policy, such as delaying investigations or denying that a person is indeed one of their nationals. Furthermore, when countries of origin are more explicit about non-readmission, this may also be aimed at extracting political concessions from EU member states, which cannot be a legitimate ground for invoking any of the justifications discussed above. This discussion is therefore not aimed at arguing under which precise circumstances such justifications for non-readmission may be successful, which is a matter of both law and practice that would need much more detailed examination. However, it shows that the notion that inter-state readmission obligations, including those considered beyond dispute by EU member states, may in limited cases legitimately become ineffective. Furthermore, while they may not be explicit about such considerations, countries of origin may indeed use these implicitly.

If such justifications apply, it is a bit more difficult to see how the right to return can fill this gap. Perhaps the clearest link is with countermeasures. These are aimed at forcing the other country – in this case the EU member state – to meet its obligations. It would therefore not pertain to nationals seeking to exercise their right to return. If there would be a *force majeure* situation, this would presumably affect all returns, whether on the basis of individuals' own choice or as a result of expulsion. However, there may be situations in which it is materially impossible for the country of origin to facilitate, for example, the proper reception of persons being escorted back by EU member state officials, and for whom specific arrangements must be made for their orderly handover. In such situations, perhaps a distinction can be made between voluntary returns and removals. Similarly, if there is a necessity not to readmit nationals due to the situation in the country of origin, this would likely affect all returns. However, arguments about the distinction between persons willing and unwilling to return, and the specific problems they and society may face, such as discussed with regard to Iraq, could possibly be relevant. In relation to non-readmission due to the COVID-19 pandemic, the resulting role for the right to return may be more obvious. In many cases, states still tried to find ways to allow their nationals who wanted to come back to do so. Arguably they would be required to do so as a result of the right to return, since this is not subject to limitations in relation to public health or other reasons states may invoke. This would be the case at least until they would proclaim a public emergency which would threaten the life of the nation, in line with Article 4 of the ICCPR, which would allow for derogation of their duties in relation to Article 12(4) ICCPR.

5.2.3 Diverging views on the existence of a customary duty to readmit?

The paragraphs above have dealt with situations in which countries of origin may consider inter-state readmission obligations either inapplicable, or that failure to meet these obligations may be justified due to pressing circumstances. While both may influence the practical implementation of readmission, neither challenge the validity of the readmission obligations discussed in the previous chapter as such, especially the readmission of expelled nationals as a matter of customary international law. This does not mean that those obligations cannot and have not been questioned, regardless of the EU's frequent framing of such obligations as undisputed. While it would go too far to analyse each of the instances in which such questions have been raised in detail, it is useful to outline at least the main arguments, as some may be used, implicitly or explicitly, by countries of origin.

5.2.3.1 Issues of evidence of the existence of a customary rule

The existence of a rule of customary international law depends on evidence of both consistent state practice and *opinio juris*.[28] While the majority of authors who have addressed this rule have argued for its existence, this has often relied on doctrinal arguments. Studies truly closely examining state practice and *opinio juris* are much less frequent, with the notable exception of the work of Hailbronner, which has been discussed in the previous chapter. A critique of the existence of a customary norm, in particular in relation to Hailbronner's findings, has been put forward most prominently by Noll,[29] although others have added important elements to this.[30]

Noll has observed that the existence of a general duty to readmit expelled nationals is "surprisingly difficult to document."[31] As regards the requirement of sufficiently widespread and uniform state practice, Noll suggests that this would best be borne out by statistical information:

> *"The numbers of undocumented migrants returned globally would need to be broken down. The number of voluntary returns and returns based on readmission agreements must be subtracted, as treaty law can be invoked to support those returns. Of interest is how many persons are forcibly sent back and accepted in the absence of treaty law. How does the number of the latter category compare to the number of undocumented migrants who cannot be sent back due to action or omission on behalf of the country of origin?"*[32]

However, such global statistics are largely missing. In this respect, it is noteworthy that even at the EU level, where significant efforts have been

28 See the discussion in 2.6.
29 Noll 1999, and further developed in Noll 2003.
30 See, in particular, Coleman 2009, pp. 31-41.
31 Noll 2003, p. 63.
32 *Ibid.*, p. 64.

made to improve data collection on returns, considerable gaps and differences in various data sets remain.[33] If this is the case for a well-resourced region like the EU, this problem is no doubt even bigger for many countries of return, which may lack the administrative capacities to collect such data. Furthermore, since they simply readmit their nationals, they might not have a reason to gather data in this regard. Nor do they normally specify the basis for a decision to readmit or refuse readmission, which may leave expelling states in the dark. Countries of origin may refuse readmission on the basis that they were unable to establish that the person to be returned is a national. Whether they have indeed been unable to establish this, or whether they simply refuse to readmit the person in breach of their presumed international obligations, will often be impossible to establish objectively when the person could not provide conclusive proof of nationality. Countries of origin that do not want to readmit their nationals for political, social, economic or other reasons have myriad possibilities to obfuscate or delay in the case of insufficient hard evidence. As such, more than a decade and a half after Noll's suggestion that better data may help clarify state practice, such data is still not readily available, and it may be questioned whether this will ever be the case.

Whether the elements of Noll's proposed indicator for state practice are all equally valid may be a matter of contention. For example, the extent to which voluntary returns should be excluded would depend on the precise way that 'voluntariness' is defined.[34] The role of specific readmission agreements in relation to customary law has also been interpreted in different ways. They can be seen as simply codifying a customary rule. The conclusion of such agreements can also be seen as providing further evidence of state practice, which either provides evidence of the existence of a rule, or helps bring it into existence. But if states feel it necessary to conclude agreements because they do not think there is an adequate pre-existing normative basis, this may undermine the existence of a customary rule. Coleman, in considering this relationship, concludes that readmission agreements, especially the "explosive development of treaty law since the early nineties … arguably represents a practice which is in support of a customary norm."[35] However, he also notes the possibility that the way they are negotiated, which focuses more on a *quid pro quo* exchange, may be pushing practice away from an unqualified duty to readmit. While beyond the scope

33 See 2.2.2.

34 In the meaning of the Directive, these are simply different ways to effect expulsion, so readmissions on this basis would presumably have to be included. However, as discussed below, situations in which the individual is willing to return (which would involve exercise of the right to return, and thus to be excluded) may not always be distinguished clearly from situations of voluntary compliance with an obligation to return. In the end, this may be an issue that would be virtually impossible to capture properly in statistics.

35 Coleman 2009, p. 41; also see Noll 2003, p. 67 for the proliferation of "return-in-exchange-of-aid."

of this analysis, the priority of voluntary return, especially as this is often implemented in conjunction with return and reintegration assistance, could conceivably be pushing state practice even further in this direction.[36]

Such expectations may also be influencing *opinio juris* as regards the specific duty to be fulfilled. This is another point put forward by Noll: even when there have been relatively clear expressions in support of readmission of nationals, this is usually insufficiently precise in clarifying whether this means recognition of a duty to readmit all nationals expelled, or of an obligation to readmit persons exercising their right to return. In this respect, he points, for example, to the 1994 Cairo Programme of Action,[37] as well as UN General Assembly resolutions.[38] More recent examples may be added. For example, the 2016 New York Declaration for Refugees and Migrants, which created the basis for two Global Compacts,[39] recalls "that States must readmit their returning nationals and ensure that they are duly received without undue delay, following confirmation of their nationalities in accordance with national legislation."[40] While this could easily be read as a confirmation of a duty to readmit *expelled* nationals, this is not made explicit. The Declaration further commits to "close cooperation" on return and readmission more generally, and that existing readmission agreements should be fully implemented.[41] The Comprehensive Refugee Response Framework, which is annexed to the declaration, does mention the return and readmission "of those who do not qualify for refugee status," but then only commits states to "facilitate" return and readmission.[42]

Similarly, the Global Compact for Safe, Orderly and Regular Migration says that states "commit to ensure that our nationals are duly received and readmitted, in full respect for the human right to return to one's own

36 While such assistance is generally focused on the individual returning, it may have wider benefits for the returnee's community, and thus indirectly for the country of origin. As such, expectations that returns are accompanied by certain forms of financial or in-kind assistance may be rising. This, to some extent, is also true for forced returns, with EU member states increasingly also providing additional support to forced returnees, including more general support to countries of origin. In this regard, see the example of the Netherlands offering additional aid to Iraq in order to convince it to accept forced returns in 5.2.2 above.

37 Programme of Action, of the International Conference on Population and Development, Cairo, 5-13 September 1994, UN doc. A/CONF.171/13, paragraph 10.20: "Governments of countries of origin of undocumented migrants and persons whose asylum claims have been rejected have the responsibility to accept the return and reintegration of those persons, and should not penalize such persons on their return."

38 Noll 2003, p. 66.

39 In addition to the Global Compact on Migration, referenced below, this is the Global Compact for Refugees, UN General Assembly, Resolution 71/151 of 17 December 2019, doc. A/RES/73/151, published 10 January 2019.

40 UN General Assembly, Resolution 71/1 of 19 September 2016, doc. A/RES/71/1 published 3 October 2016, paragraph 42.

41 *Ibid*., paragraphs 41 and 58

42 *Ibid*., Annex I, paragraph 5(i).

country and the obligation of States to readmit their own nationals."[43] This, again, may be read in favour of a clear inter-state duty to readmit expelled nationals, but also just as a reassertion of the duty to readmit as a consequence of the right to return. Or indeed any kind of mix of the two. Where the Compact deals with "cases of persons who do not have the legal right to stay on another State's territory," it includes a commitment to "cooperate on identification of nationals and issuance of travel documents" and furthermore to ensure their safe and dignified return and readmission.[44]

Issues of interpretation may also result from other, often-quoted sources in support of a customary norm, such as the *Van Duyn* judgment by the ECJ referred to in Chapter 4. It may be noted that this judgment was delivered in the context of a person who *wanted* to be readmitted to the United Kingdom, and it also specifically refers to the denial of the *right* of residence or entry of nationals.[45] As such, these documents, which purportedly should provide clarity, leave considerable scope for ambiguity.

5.2.3.2 Challenges to the reciprocal nature of the readmission obligations and other doctrinal issues

Another key critique by Noll of the way that the customary obligation to readmit has been framed deals with doctrine, in particular the argument that the host country's right to expel must be made effective by the country of nationality by readmitting the expelled person. According to Noll, assertion of such a correlative duty, by way of inductive reasoning from the right to expel, is a key element, since, he suggests, there have been "no serious attempts to show the existence of an interstate obligation to readmit as a customary norm not using this inductive method."[46] He suggests that, if international law is to be consistent, either the logic of correlative duties is accepted in all cases, or it should be rejected. In the former case, this logic should not only be applied to states' right to expel, but also to individuals' right to leave. The logic of correlative duties would then impose on other states an obligation to admit such individuals, because they would otherwise frustrate the effective exercise of the right to leave.[47] This clearly is not the state of affairs as regard international movement in the world today.

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43 UN General Assembly, Resolution 73/195 of 19 December 2018, UN doc. A/RES/73/195, published 11 January 2019, paragraph 37.

44 *Ibid.*, paragraph 37(c) and (e).

45 It should be noted that judgments by international courts generally are not seen as direct evidence for the existence or content of customary rules, but rather function as subsidiary means for determining such rules, see ILC, Draft conclusions on identification of customary international law, with commentaries Yearbook of the International Law Commission 2018, vol. II, Part Two, conclusion 13(1). Furthermore, if a customary obligation might be seen as simply as a "European" custom (see 5.2.3.3. below), the judgment would also not have wider implications.

46 Noll 2003, p. 64.

47 *Ibid.*, p. 70.

However, if the logic of correlative duties is rejected for the individual right to leave, consistent application would mean that this would also be the case for the right of states to expel. In such a case, he argues, what is left at most is not an obligation to readmit, but a weak duty to refrain from interfering with other countries' admission policies.[48] As such, this would lead to an all-or-nothing outcome.[49] The implication of this would be that only those situations in which individuals are willing to return would impose a clear obligation of readmission, since the right to return is clearly laid down in international instruments, in contrast to the inter-state obligation which, as a presumed customary norm, may be subject to different conceptions as to its precise scope and implications. Interestingly, this has not only been suggested by Noll.[50] Coleman describes two intriguing instances in which this possibility was raised within the sphere of the EU. First, he cites an opinion by the Council Legal Service, put forward in 1999, which noted:

> *"It is doubtful whether, in the absence of a specific agreement [on readmission] between the States concerned, a general principle of international law exists which would oblige those States to readmit their own nationals if they do not wish to return to their country of origin."*[51]

Unfortunately, only this excerpt is in the public domain, and the further argumentation was never released.[52] Around the same time, positions in support of this were also put forward.[53] Notwithstanding such doubts, it is clear that the EU, at least outwardly, is fully supporting the existence of such a customary duty, which countries of nationality need to fulfil unconditionally.[54]

48 *Ibid.*, p. 71.
49 *Ibid.*, p. 70.
50 *Ibid.*, p. 67.
51 Council Legal Service Opinion, doc. 6658/99, paragraph 6, cited in Statewatch 2000.
52 Attempts were made by Professor Steve Peers to obtain this document, but this was denied, see General Secretariat of the Council of the EU, ref. 14781/01, INF 147 API 91 JUR 363, 30 November 2001, published 12 August 2009. It cites as the grounds for denial that the opinion is considered internal to the Council and that its disclosure "could undermine the protection of the public interest in legal certainty and the stability of the Community legal order, given the interest of the Council to draw on an internal and independent legal advice," pursuant to Article 4(1) of Decision 93/731/EC on public access to Council documents (OJ L 340/43, 31 December 1993).
53 A paper by the Nordic Joint Advisory Group on Refugee Policy, which was submitted to the Migration/Expulsion Working Group of the Council in 1999, noted that, in relation to the duty to readmit expelled nationals, there only seemed to be "consensus as to the presence of a 'moral' obligation in that respect." Council doc. 7707/99, p. 6, cited in Coleman 2009, p. 31.
54 See 4.2.1.

5.2.3.3 *A North-South divide?*

The above discussion remains somewhat indeterminate. Noll himself, as the author having most clearly elaborated a critique of the customary obligation to readmit expelled nationals, sets out a number of interesting questions, especially as regards inconsistencies in the international framework for readmission, but does not appear to come to definitive conclusions. And, as mentioned, the overwhelming position in legal scholarship has, to varying degrees of certainty, asserted the existence of such a rule. The EU, notwithstanding some potentially differing internal opinions, has outwardly clearly stated its full confidence in the existence of such a customary obligation, without which a key pillar of its return policy would crumble.

Nonetheless, the work by Noll provides a fascinating sneak peek into potentially diverging perspectives. In this respect, he has also particularly noted the possible existence of a 'North-South divide.'[55] The same can be said about Coleman's discussion of the potential role of a more transactional approach to readmission. Often, lack of cooperation of countries of origin on readmission is attributed to various non-legal interests, such as extracting concessions from EU member states, preserving remittances of nationals living abroad, or preventing persons from minority groups or associated with political opposition movements from returning, to name a few. While this will no doubt play an important factor, the discussion above hints at the possibility of relevant legal arguments being employed by countries of origin. Noll observes that the dominant focus on state sovereignty "begs the question why one state's personal self-determination should be more important than that of another state."[56] The question why their sovereignty should be made subordinate to that of expelling states may be one that chimes with countries of origin. The idea that EU member states, and other expelling states, cannot simply force the hand of countries of origin will no doubt be attractive to them, especially in their attempts to push back at largely asymmetrical relationships between them on the issue of migration.[57] The problem is that such a legal position, if indeed it would be held by non-European countries, is almost never put forward clearly. Rather, when confronted with the undesirability of readmission, they are more likely to choose a strategy of evasion, rather than of confrontation.[58]

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55 Noll 2003, p. 66, speaking about affirmations of responsibility to accept the return of nationals in UN General Assembly resolutions: "To the North, it could mean an obligation to readmit whomever states wish to return, while the South can read an obligation to readmit those wishing to return into it."

56 Noll 2003, p. 71.

57 Notwithstanding the EU's increasing use of the language of 'partnership,' it largely keeps a dominant role over the extent to which migration from non-western states to the EU is possible, issues of the control of irregular migration, the link between development and migration, and related matters. See, with regard to the asymmetry of the EU's partnerships with African countries, Tardis 2018.

58 Noll 2003, p. 64.

In the course of my research, I have only come across one striking example of a country explicitly rejecting the dominant logic of correlative duties underpinning the customary obligation to readmit. During a discussion of the ILC's ongoing work in the United Nations General Assembly's Sixth Committee, the representative of Iran stated:

> *"The decision by a Government to expel an alien, as a unilateral act of that State, should not be regarded as imposing any obligation or commitment whatsoever on any other State, including the State of nationality, to receive that alien."*[59]

Rather, he noted, such issues should be resolved by "mutual agreement."[60] It must be admitted that this leaves many questions as to how widely such a perception would be shared,[61] or even to what extent this would have implications for Iran's own legal obligations.[62] However, it may provide some indications as to the reasons for ambiguity of global statements, such as those discussed above.

It can further be noted that attempts to identify evidence of a customary duty to readmit may also raise questions as to their global validity. Although Hailbronner's evidence base stretches further, one of the key elements presented by him are readmission agreements. Notwithstanding questions about the relationship between such treaties and custom,[63] it is noteworthy that, of the approximately thirty agreements he identified, all were concluded between states on the European continent, with the exception of two treaties concluded between the United States and Panama, and the United States and Canada, respectively.[64] Although Coleman noted in 2009 that at that point some 220 readmission agreements had been concluded worldwide, he also found that many of these involved European states.[65] Western states at large, and the EU and its member states in particular, appear to continue to be the main driving force behind the proliferation of readmission agreements. And although these have been concluded with numerous countries worldwide, these seem mainly to result from those countries being asked or encouraged by the EU and its member

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59 UNGA, Sixth Committee, Summary record of the 11th meeting, held on 24 October 2005, doc. A/C.6/60/SR.11, published 23 November 2005, paragraph 85.

60 *Ibid*.

61 Even within the context of the discussions of the ILC's work on the expulsion of aliens there is not much evidence of explicit support for this position from other states.

62 Under the 'persistent objector' doctrine, states may sometimes be exempt from customary rules, but this would depend on a lot more than one official statement as above. To be considered a persistent objector, a state must have objected while the contested rule was in the process of formation, and also done so persistently subsequently. See, ILC 2018, conclusion 15.

63 On the relationship between treaties and customary law more generally, see, for example, Villiger 1997.

64 Hailbronner 1997.

65 Coleman 2009, p. 36.

states to engage in negotiations. Much less evidence exists of non-western states seeking to negotiate such agreements with other non-western states. If such readmission agreements would indeed serve as an important basis to support the existence of a customary duty, it may even be argued that this could be no more than what has been called regional custom.[66]

The discussion above may appear to be a bit gratuitous, because I will also have to leave it as a set of largely open questions, rather than providing a concrete view on the nature of the customary obligation to readmit. However, it serves to illustrate that, despite the purported absolute agreement over the existence and nature of such an obligation, this needs to be regarded much more cautiously. And, even if they are not explicit about this, countries of origin may tacitly hold quite different views of their legal obligations, which may in turn impact on their practices. This may be another factor in explaining why the right to return, rather than inter-state obligations, may play a central role in those countries' decisions on readmission. And, if this is indeed the case, this raises questions about the role the right to return plays in the specific relationship between the EU member state and the third-country national who, under the Directive, is under an obligation to return.

5.3 The compulsory exercise of the right to return

Having addressed situations in which inter-state readmission obligations may be ineffective, this section discusses what this might mean for the role of the right to return. It will first consider the key role of willingness to return as an indicator of the exercise of the right to return (5.3.1). Subsequently, it will look at whether the compulsory exercise of the right to return is a logical consequence of the obligation to return under the Directive (5.3.2). Various elements of such compulsory exercise will then be discussed, in particular how this relates to the purpose of rights (5.3.3) and what this means in light of the ECtHR's case law on so-called 'negative rights' (5.3.4). Finally, an assessment of the legitimacy of the compulsory exercise of the right to return is provided (5.3.5).

5.3.1 Willingness to return as a relevant factor?

In the previous chapter, it was argued that the willingness of the individual to return is normally not relevant for the country of origin's readmission obligations, since these arise out of the right to expel of the EU member state, which by definition involves coercion. However, it was also noted that, if this would be just a matter of human rights, readmission would

66 ILC 2018, conclusion 16 and commentary thereto.

"characteristically depend on the willingness of the individual to return."[67] In cases in which inter-state readmission obligations are not effective (such as where gaps exist in relation to stateless persons, in the scenarios addressed above, or if such obligations are simply not respected by countries of origin) the question of willingness to exercise the right to return comes to the fore. That this may be more than just a theoretical consideration is evident from the example of Iran's refusal to readmit nationals expelled by the Netherlands, unless they make a clear statement of willingness to return, which is outlined below.

It is a long-standing practice of Iran to limit the issuing of replacement travel documents for the purpose of the readmission of persons that are expelled by EU member states and other countries to situations in which those persons express a clear willingness to return. In the case of returns from the Netherlands, this has meant that Iranian nationals issued with a return decision, and who are not already in possession of valid travel documents, can set up a meeting with the Iranian consulate in The Hague, through IOM, where they can present relevant evidence. However, even if nationality and identity are not in doubt, replacement travel documents are only issued when the person concerned signs a declaration that they want to return to Iran. This practice raises specific questions about the reasons why Iran would demand such a declaration, to which the statement of the Iranian representative to the UN General Assembly's Sixth Committee quoted above might provide some clues. Whatever the case may be, it presents a factual obstacle to the return of undocumented Iranian nationals who refuse to sign such a statement, since they will not be readmitted.

Whether third-country nationals issued with a return decision by the Netherlands can be expected to sign such declarations became a matter of legal proceedings, which eventually ended up with the highest administrative court, the Council of State. In the key case on this matter, an Iranian national who had refused to sign a declaration that he was willing to return to Iran had been detained by the Dutch authorities. Although enforcement was not possible, the Dutch representatives before the Council of State argued that detention was justified by the fact that the individual had failed to do what was necessary to achieve his return, when he refused to sign the statement requested by the Iranian consulate. The Council of State found that the Dutch authorities had acted correctly, since:

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67 Hailbronner 1997, p. 4; also see Legomsky 2003, p. 617, who discusses the issue of rights and obligations in relation to the return of asylum seekers to a country of first asylum, which he argues can be equated to their 'own country': "the person *does not want* to be readmitted to the first country of asylum; indeed he or she wants to avoid return… Under those circumstances, to speak of the asylum seeker's 'right' to be readmitted to the first country of asylum is irrelevant. To put the point slightly differently, surely the obligation that the first country of asylum owes under Article 12.4 is an obligation that it owes to the individual, not to another state" (emphasis in the original).

> *"It has not been shown that the declaration of willingness to return voluntarily to Iran, which the alien is supposed to make to the consular representation of Iran during his presentation, is of such a nature that making this declaration goes beyond what can reasonably be required of him within the framework of the obligation incumbent upon him to leave the Netherlands of his own accord."*[68]

Making such a declaration was therefore, according to the Council of State, a matter of the individual's responsibility, and refusal to do so could therefore justify his detention. In the case of an unsuccessful return to Mongolia, where a similar practice of making readmission dependent on the signing of a statement of willingness to return, the Council of State expanded on this reference to individual responsibility by further noting that it could be expected of the third-country national that "she provided active and full cooperation to obtaining travel documents necessary to effect her removal and that she herself make the necessary, verifiable efforts to obtain those documents."[69] Although the first time the Council of State made such a finding, in the case concerning Iran, predates the adoption of the Directive, it has used this judgment as a point of reference repeatedly after the Directive's entry into force. At least until 2016, it referred to the principle set out in the Iran case in around a dozen judgments, covering, in addition to Iran and Mongolia, cases pertaining to Afghanistan, Ethiopia, Sierra Leone and Somalia.[70]

As noted in Chapter 1, the intention of this analysis is not to assess the validity of national practices as regards the implementation of the Returns Directive. However, approaches which suggest that third-country nationals must simply conform to any demands made by the country of nationality in relation to readmission, as seemingly endorsed by the Dutch Council of State, are problematic in light of the discussion above.[71] I have suggested that a proper reading of the obligation to return for third-country nationals seeking return to a country of nationality would only include steps necessary to establish nationality and identity.[72] It might be argued that the intention of Iran or the other countries mentioned may not have been to frustrate readmission, but merely to establish that the individual was returning voluntarily.[73] However, from the perspective of the Directive,

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68 Council of State, judgment 200805361/1 of 4 September 2008, ECLI:NL:RVS:2008:BF0502, paragraph 2.1.3 (my translation).

69 Council of State, judgment 200901771/1/V3 of 23 June 2009, ECLI:NL:RVS:2009:BI3894, paragraph 2.4.1 (my translation).

70 The last available reference to the Iran case on the website of the Council of State is judgment 201601204/1/V3 of 29 March 2016, ECLI:NL:RVS:2016:946.

71 For a more elaborate discussion of this judgment and its compatibility with Dutch and international law, see Mommers 2012.

72 See 4.2.5.2.

73 Which raises questions about the meaning of 'voluntary' for the states involved. Perhaps it refers to something different than in the Directive, rather aiming to assess the actual willingness of the person to return. However, this does not explain why it accepted returns facilitated by IOM, which were clearly only 'voluntary' in the sense of the Directive in that they provided an alternative form of implementing the expulsion.

and EU return policy more generally, such a distinction cannot be justified. After all, it presumes a general obligation on third countries to readmit their nationals in all cases of expulsion, regardless of whether this is given effect through voluntary return or removal. That the practice of several third countries is different cannot change this basic premise. When setting out the triangle model at the beginning of this dissertation, this was done on the basis that a proper understanding of individual responsibility to return also means locating responsibilities where they belong. In this case, if the country of return's practice is not in line with its international obligations (or at the very least, the EU's perception of what these obligations are), this is a matter between the EU member state and the country of return. Making the individual responsible for 'repairing' the failure of the country of return to meet its obligations, by setting additional requirements, cannot be reconciled with the fact that the application of the Directive's rules must be fair and transparent, nor with the general obligation in EU law to promote the observance of international law – not to mention the Directive's self-proclaimed consistency with such international law.[74] Beyond this, if the readmission process collapses on this basis, it may lead to wrongly holding third-country nationals responsible for non-return, and to potentially unlawful restrictions of their fundamental rights, for example, when they are deprived of their liberty as a result of this.[75]

Under normal circumstances, the request by Iran of a statement of willingness to return should be seen as an additional requirement within the meaning of the previous chapter, which is unconnected to the establishment of nationality and identity. Providing such a statement would be beyond the scope of what is necessary for readmission, and thus outside the individual's responsibility. To the extent that it was assumed by the Netherlands that Iran was under an obligation to readmit expelled nationals, the argument presented in the previous chapter on individual return obligations only being limited to what is strictly necessary to achieve readmission would thus suggest that the approach by the Council of State is erroneous. But it has also been indicated above that Iran may believe that the right to expel of other states does not trigger reciprocal obligations on the country of nationality. As such, for Iran, the extent to which the individual would want to exercise his or her right to return would arguably become determinative for the existence of any readmission obligation. In such a situation, the judg-

74 See TFEU Article 3(5): "the EU shall uphold and promote … the strict observance and the development of international law"; and Article 1 of the Directive: "This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in

75 Other objections to the EU requiring third-country nationals to sign statements of willingness to return, when they are not in fact willing, could include non-compliance with the right to freedom of thought or conscience (Article 11 of the Charter of Fundamental Rights and Article 10 of the ECHR), since this would in fact require individuals to lie about their convictions. On this point, see Cornelisse 2009.

ment by the Dutch Council of State obtains a different meaning: it would relate to the question whether the applicant should have exercised his right to return to ensure his return decision could be implemented effectively. In the following paragraphs, I will dig into this question in more detail.

Before doing so, however, it should be reiterated that there may be continuing confusion over the links between willingness to return and voluntary return. In the case of Iran above, as well as the other countries of origin which have been the subject of judgments of the Council of State in this regard, readmissions were limited to voluntary returns. While such voluntary returns would only be accepted in the case of a statement of willingness to return, it is easy to see how the two might be conflated. As noted in Chapter 2, notwithstanding its connotations, willingness to return is not an element of voluntary return in the Directive.[76] As such, the fact that a person is engaging in voluntary return is not necessarily an appropriate indicator of willingness, since it follows from legal compulsion. The same is true for an individual's return being facilitated through an assisted voluntary return programme.[77] For now, the discussion focuses specifically on willingness to return, or, more accurately, the willing exercise of the right to return.

5.3.2 The compulsory exercise of the right to return as a logical consequence of the return obligation?

From the perspective of EU member states, the ineffectiveness of interstate readmission obligations provides an obvious problem if this leads to non-return. However, the fact that the individual right to return may be able to fill some of these gaps could be seen as a happy coincidence. As suggested by Hailbronner, the two basically overlap in substance and, to the extent that there are any questions of willingness to return, the fact that the third-country national is expelled – and in this case has to take responsibility for his or her return – overrides any such concerns.[78] This seems to be the approach taken by the Dutch Council of State in concrete cases. On a more abstract level, this argument has been most clearly expressed by Van Krieken, who argues strongly that the individual right to return should indeed be put at the disposal of the return procedure to ensure its effective

76 Although an individual's unwillingness to return may well result in lack of action to take the appropriate step to return, which is part of the obligation to return voluntarily. Nevertheless, the two issues may diverge. See, in this regard, also the discussion about declarations of willingness to return and their lack of relevance for issues such as the risk of absconding in 10.4.3.2.

77 In most cases, it may actually be an indicator of compulsory return, since the majority of persons using such programmes are faced with return decisions. However, various AVR(R) programmes also allow for the support of persons who have not (yet) been issued with a return decision.

78 Hailbronner 1997, p. 4.

conclusion. Speaking about rejected asylum seekers, he posits, first of all, that departure from the member state is "solely the responsibility" of the individual. Furthermore, he connects the fact that the individual has made a claim for protection to an obligation to exercise the right to return if that claim fails. In particular, he suggests that such a person:

> *"…enjoys the right to return to his/her country, and the rejectee may be expected to make use of that right. He/she should even not be explicitly requested to do so; it is a logical consequence of migration law juncto human rights law. By submitting an application for asylum, the individual recognizes the existence of human rights, and subscribes to that system as a whole. In this respect, it has to be emphasized that there are no rights without duties, as indicated in the UDHR itself."*[79]

It is worth looking more closely at this argument for several reasons. First, because it goes to the heart of the relationship between individual responsibility and individual rights, which underpins much of the discussion of voluntary return in this book. Second, and connected to that, it deals with the relationship between the EU member state's interests and individual rights. In particular, it deals with the question whether the member state can force the individual to exercise his rights, if this is necessary to achieve the aims of the return procedure. And third, because this is not just an academic argument. It connects to the overarching view, as discussed at various points so far, that the individual can be expected to do whatever is necessary to return, even if this means putting individual rights at the disposal of state goals. In the specific case of the Netherlands, the argument developed by Van Krieken appears to have helped shaped the government's approach to this question,[80] and may have inspired, implicitly, the approach by the Council of State. As such, it is useful to examine it more closely.

5.3.3 Compulsory exercise of the right to return and the purpose of rights

The idea, as presented by Van Krieken, that individuals can be expected to exercise their right to return to facilitate the expulsion process, raises questions, first, from a conceptual perspective. From this perspective, it should be noted that the human rights system, on the whole, does not make the enjoyment of rights dependent on individuals 'subscribing' to it, as suggested by Van Krieken.[81] These rights are guaranteed to individuals as a human beings, and whilst restrictions can be made on the basis of certain

79 Van Krieken 2000, p. 29.

80 For example, it was repeated almost verbatim by a senior civil servant of the Dutch Ministry of Justice at a public event, which I attended in December 2012.

81 It should be noted that, even if such a 'subscription' argument could be accepted, Van Krieken connects this to the lodging of an asylum application. As such, the argument would leave aside the situation of irregular migrants who have never specifically made a claim to human rights protection.

behaviours, the starting point is that the individual has and can enjoy these rights without prior conditions attached. Furthermore, the idea that states can require individuals to exercise their rights appears to clash with their general purpose, which is, inter alia, to protect the individual from undue state interference. To instrumentalise an individual's rights for the purpose of achieving the state's goals runs directly counter to that principle.

This does not mean that individuals do not have duties. However, the pronouncement of this in the UDHR, as referenced above, is a general statement of this fact.[82] More specific duties have been posited as arising from this, such as the duty to obey the law.[83] However, in the case of the return obligation, the question is what the law on this point is precisely; in other words, what the scope of the obligation to return is. General duties may therefore be too wide and ambiguous for legal enforcement without clear, enabling legislation to give it effect.[84] The precise relationship between individual rights and duties owed to the community is one that has given rise to considerable debate.[85] For our purposes, it is sufficient to acknowledge that, as a matter of positive law, the de facto relationship between these duties and human rights is worked out in more detail in binding human rights treaties. These may contain specific exceptions to rights to allow for the duties of individuals. For example, while prohibiting forced labour, the ICCPR also sets out that this excludes work normally required in detention, military service or national service, or work or service which forms part of normal obligations.[86] The right to property in Article 1 of Protocol No.1 to the ECHR similarly holds expressly that the right to property does not prevent states from securing the payment of taxes or penalties. Beyond these specific qualifications, most human rights provisions contain more general limitation clauses permitting states to restrict the right under conditions, which allows them to ensure that various duties are met.[87] On the other hand, there are various rights which are protected to such an extent that they cannot be restricted in any way, even if it is to ensure a person meets his civic responsibilities. For example, a person cannot be tortured to ensure he pays his taxes. It should be kept in mind that the right to return under the ICCPR is virtually unrestricted. In the context of the ECHR, there is no restriction foreseen at all. The overall point, then, is that duties are accommodated in human rights law through the specific medium of the limitations explicitly set out in human rights treaties, not by a general, abstract idea that "there are no rights without duties." Furthermore, the protective functions of human rights instruments must be safeguarded.

82 And arguably mainly of moral significance, as discussed by Daes 1990, p. 17.
83 Hodgson 2003, pp. 165-167.
84 Hodgson 2003, pp. 238 and 246.
85 See, inter alia, Hodgson 2003; Devereux 1995; Steiner, Alston & Goodman 2008, pp. 496-516.
86 ICCPR, Article 8.
87 See 7.2.2.

Regarding the ICCPR, for example, Henkin observes that "it must never be forgotten that it is a human rights instrument, dedicated to the protection of the individual against governmental excesses," and furthermore that limitation clauses should be strictly and narrowly construed.[88]

5.3.4 The ECtHR on 'negative rights'

This brings us to a second, and more technical, issue. That is whether the right to return itself protects the individual from being compelled to exercise it, if this is against his or her own wishes. Could such compulsion be regarded as an unlawful restriction of the right? To my knowledge, this question has not come up before any international (quasi-)judicial body so far in the specific context of the right to return. However, the case law of the ECtHR provides some indication on the general question whether a right to do something might also entail an opposite right not to do that thing, or to be free of compulsion to do that thing. This, the Court has sometimes called a 'negative right.' It is instructive to look more closely at how the Court has dealt with this issue. This is particularly the case since, as discussed in Chapter 2, the role of the right to return within EU law flows from its inclusion in the ECHR, and via that medium, is a fundamental right as a general principle of EU law.[89]

Over the years, the ECtHR has dealt with several issues where the right to do something was pitted against the right not to do that same thing. Or conversely, where the right to be protected against something also meant that the individual was free to do the opposite. Perhaps the example that comes to mind first are its judgments and decisions dealing with the right to life, as protected by Article 2 ECHR, in relation to persons who wanted their lives to be ended. The Court does not recognise a general right to die as a consequence of the right to life.[90] However, a right to die may not be the exact mirror image of the right to life. This is particularly the case because the Court's judgments typically not only deal with the decision of an individual to end his or her life, but with the extent to which others (family members, doctors) can legitimately assist this wish. Similarly, the notion that the right to education for children, in Article 2 of the Protocol No. 1 to the ECHR, also entails the right not to participate in (certain aspects of) education, has been examined.[91] Again, the Court does not strictly deal

88 Henkin 1981, p. 44. Also see International Commission of Jurists 1984, I(A)(2) and (3), stating that any limitation clause of the ICCPR should not be interpreted as to jeopardise the essence of the right concerned, and that interpretation should be in favour of the right at issue. And a similar conclusion in Marcic 1968, p. 65, that "when examining the extent of a human right or freedom in the context of duties or limitations, one must begin by according a primary presumption of freedom."

89 See 2.5.3.

90 See in particular ECtHR *Pretty* [2002], paragraph 39.

91 For an overview, see ECtHR, Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights, 30 April 2017, Strasbourg: Council of Europe.

with the right not to be educated, but with the space that should be given to parental choice related to the content of education, or to provide education at home. Perhaps the best-known example of the obligatory exercise of a civic duty is compulsory voting. However, such issues are more likely to be resolved in relation to the question of freedom of thought and expression, rather than as a right not to vote directly following from the right to political participation.[92]

In one area, however, the ECtHR has explicitly dealt with negative rights. This is in relation to Article 11, which protects, inter alia, the right to join a trade union. The Court has delivered judgments in several cases in which the applicants were obligated to join a trade union or professional association as a condition for (continued) employment, so-called 'closed shop' agreements. This was challenged on the basis that the right to join a trade union also implies the right not to join a trade union or a professional association.[93] The Court has noted that the notion of a freedom "implies some measure of freedom of choice as to its exercise."[94] This also encompasses a right not to join an association. In this respect, individuals do not enjoy the right to freedom of association "if in reality the freedom of action or choice which remains available to him is either non-existent or so reduced as to be of no practical value."[95]

Compulsion might not always be contrary to the ECHR, but if a form of compulsion "strikes at the very substance" of the freedom of association, this constitutes at least an interference with the right.[96] Interestingly, then, the Court does not regard a deprivation of the choice whether or not to join an association as an interference as such, but relates this to the severity of the compulsion related to that deprivation. It furthermore notes that one of the purposes of the freedom of association is the protection of personal opinions under Article 9 and 10 ECHR. It notes that "the notion of personal autonomy is an important principle underlying the interpretation of the Convention guarantees," and that this is an essential corollary of the freedom of choice implicit in the freedom of association.[97] While recognising the role of choice, the Court does not definitively find that the positive right (to association) and the negative one (not to associate) are protected at the same level, although it also does not exclude this. This is not an issue it can decide in the abstract, it says.[98] In balancing collective interests against that of the individual, states generally have wide margin of appreciation,

92 See, for example, ECommHR, *X. v. Austria* [1972].
93 See, in particular, ECtHR *James, Young & Webster* [1981]; ECtHR *Sigurjónsson* [1993]; ECtHR *Sørensen and Rasmussen v. Denmark* [GC][2006].
94 ECtHR *Sørensen and Rasmussen v. Denmark* [GC][2006], paragraph 54.
95 ECtHR *Chassagnou* [GC][1999], paragraph 114; ECtHR *James, Young & Webster* [1981], paragraph 56.
96 ECtHR *James, Young & Webster* [1981], paragraph 55; ECtHR *Sørensen and Rasmussen v. Denmark* [GC][2006], paragraph 56; ECtHR *Sigurjónsson* [1993], paragraph 36.
97 ECtHR *Sørensen and Rasmussen v. Denmark* [GC][2006], paragraph 54.
98 *Ibid*., paragraphs 55-56.

although when domestic law permits compulsory closed-shop agreements, this margin is reduced.[99] In light of the compulsion and consequences involved (dismissal in case the person refused to join the trade union), the Court found that this was "serious and capable of striking at the very substance of the freedom of choice" inherent in Article 11 ECHR.[100] It also noted the fact that the applicants objected on political grounds to joining the trade union, which affected their personal views and opinions.[101] In this context, it found a violation.

Admittedly, it is not very easy to translate the Court's approach to 'negative rights' related to the freedom of association to the right to return. Some arguments would militate against a 'negative rights' approach to the right to return, whilst others speak in favour of this this. For one, the Court attaches importance to the fact that is formulated as a freedom for the individual. This is not the case for the right to return, which is formulated as a prohibition on the state to interfere with the entry to one's country of nationality.[102] At the same time, whilst not explicitly formulated as such, the right to return to one's own country is commonly understood as a key aspect of international freedom of movement.[103] Moreover, the right clearly provides for the possibility to return, but – parallel to the right to leave – would reasonably be interpreted as being protected regardless of a concrete intention to return. The notion of personal autonomy, as an important underlying principle for interpreting ECHR guarantees, would also point to an interpretation which allows a person a clear choice whether or not to return, under normal circumstances.[104]

This brings us to the second point. When faced with compulsory return, one might argue that the circumstances are not normal. It could be supposed that saying a right to return means a right not to return might effectively nullify the state's right to expel, which is implicitly accepted in provisions on the protection in case of expulsion in the ECHR and other human rights instruments. It is questionable, however, whether this argument is tenable. Whilst human rights treaties acknowledge the practice of expulsion, it is the not the purpose of human rights law to make expulsion work. Rather, its purpose is to provide certain protections if and when expulsion happens.

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99 *Ibid.*, paragraph 58.

100 *Ibid.*, paragraph 61.

101 *Ibid.*, paragraph 63.

102 Also compare the Court's consideration of a right to die, finding that Article 2 ECHR is framed in different terms than Article 11 and "cannot, without distortion of language, be interpreted as conferring the diametrically opposite right, namely the right to die." See ECtHR *Pretty* [2002], paragraph 39.

103 With regard to the right to leave, Whelan 1981 p. 638, footnote 8, also notes that it is more akin to a freedom.

104 In this respect, see, for example, Hannum 1987, p. 33, pointing to "the fundamental autonomy of the individual, of which the right to leave and return is one of the most striking expressions." Also see Dowty 1987, p. 1-19, discussing these rights in relation to the right to personal self-determination.

The framework for effective expulsion, as discussed in the previous and subsequent chapters, needs to be found, first and foremost, in domestic law, and on the international level in inter-state law. This inter-state framework clearly provides that the unwillingness of a person to return to his or her country is not determinative for whether he or she can be expelled and should be readmitted.[105] As such, it cannot be said that interpreting the right to return as implying a choice whether or not to return would be a fatal blow to the state's sovereign right to expel. This does not mean that assuming a negative right with regard to return would not have practical consequences, but there is no conceptual inconsistency in accepting this assumption whilst also upholding the state's sovereign right to expel.

A third and final point relates to freedom of opinion. In the Court's case law, the protection of this freedom is interwoven with considerations about the freedom of assembly. This has been a consistent element in finding violations of the right to freedom of assembly because of the obligation to join a trade union or professional association, although it is not entirely clear how much weight the Court attaches to this in relation to other elements.[106] The interconnection between the right to return and freedom of opinion is less evident than between assembly and opinion. Nevertheless, there are some links that can be made. International freedom of movement has sometimes been framed in terms of the protection of other rights. Former UN Special Rapporteur Inglés, for example, in setting out his Draft Principles on Freedom and Non-Discrimination in respect of the Right of Everyone to Leave Any Country, including His Own, and to Return to His Country, notes that these rights are "an indispensable condition for the full enjoyment by all of other civil, political, economic, social and cultural rights," something subsequently reiterated in other declarations.[107] This would also extend to individuals' possibilities to 'vote with their feet,' which is only possible when international freedom of movement is respected. The freedom of opinion element further comes into play when third-country nationals are required to make statements about their views on return, particularly whether they really want to return or not.[108]

While the Court's 'negative rights' doctrine as applied to freedom of assembly does not overlap neatly with the right to return, and differences persist, I believe that the main requirements for assuming a right not to be compelled to use one's right to return can be met in some circumstances. Despite the different language used, there is a reasonable basis for seeing

105 Although it may have some influence on *how* this happens.

106 ECtHR *James, Young & Webster* [1981], paragraph 57; ECtHR *Sørensen and Rasmussen v. Denmark* [GC][2006], paragraph 54; ECtHR *Sigurjónsson* [1993], paragraph 37.

107 Inglés 1963, pp. 64-67, preamble; Uppsala Declaration on the Right to Leave and the Right to Return, adopted by the Uppsala colloquium, 21 June 1972, preamble (reproduced in Hannum 1987, Appendix E); Strasbourg Declaration on the Right to Leave and Return, adopted on 26 November 1986 (reproduced in Hannum 1987, Appendix F).

108 See the point made in Cornelisse 2009 in footnote 75 above in relation to third-country nationals being forced to express an opinion that they do not hold.

the right to return not only as prohibiting undue interference, but also as a freedom and as closely tied to personal autonomy. A right not to invoke one's right to return also does not clash, in principle, with the sovereign right of states to expel. In such cases, an obligation to return may infringe on this right. All this should particularly be viewed, in my opinion, in the light of the general function of rights as an instrument to protect the interests of the individual, and not as an instrument to help states pursue their interests.

The fact that third-country nationals may have some degree of choice whether or not to invoke or exercise their right to return is only part of the puzzle. Subsequently, we need to examine whether the degree of compulsion to force a person to invoke this right to enable expulsion, and the consequences of non-compliance, would strike at the substance of the right. In the case of the freedom of assembly, the dismissal of applicants from their jobs was seen as a sufficiently serious consequence to find this struck at the substance of the right. In the case of return, the consequences are arguably even greater. Persons who fail to return within the voluntary departure period, due to an unwillingness to invoke their right to return, can be subjected to coercive measures including the deprivation of their liberty and the use of physical force to remove them. Furthermore, an entry ban will automatically be applied. This, in my view, satisfies the level of compulsion that would be needed to assume it struck at the substance of the right. Furthermore, also already noted, whereas the freedom of assembly allows for certain restrictions, the right to return under the ECHR is absolute. Even under the ICCPR, which theoretically allows for 'non-arbitrary' interferences with the right, in practice it provides virtually absolute protection against interferences. As a result, requiring a third-country national to invoke his or her right to return, with refusal resulting in 'punishment' of deprivation of liberty and other measures, has to be regarded as violating the freedom of choice that is part of the guarantee provided by that right.

5.3.5 Re-assessing the individual right to return and the obligation to return to a country of origin

From the above it should be clear that the right to return cannot simply be seen as yet another instrument in the toolbox of member states to ensure that third-country nationals take responsibility for their own return. The ownership of the right to return lies firmly with the third-country national, and it cannot be instrumentalised by the member state. In other words, the interests of the state in controlling migration, as given effect through the obligation to return, cannot imply that third-country nationals must invoke or exercise their individual right to return against their will, even if this would theoretically help to ensure effective return under the Directive. The legitimate obligations that can be imposed on third-country nationals are determined not only by the objective of effective return in the Directive, but limited by the requirement that fundamental rights are protected during the

return process, which is also a key objective of the Directive. In most cases, a middle ground between the two can be found. However, it is doubtful that this can be the case when the question of compulsory exercise of the right to return is on the table. Here, something will have to give. In this respect, I conclude that the compulsory exercise of the right to return would amount to an unlawful interference with a fundamental right, which must override the interest of the state in controlling migration that finds expression in secondary EU legislation. This is clearly an unsatisfactory outcome for member states, who might then be confronted with a situation that third-country nationals do not return, even if it would be in their power to do so. However, it should also be remembered that the initial problem creating this situation, the ineffectiveness of the inter-state framework, without which the question of compulsory exercise of the right would not arise, is a matter between the EU member state and the country of return. And requiring individuals, at the cost of their own fundamental rights, to resolve issues of responsibility of states would considerably overstretch the notion of legitimate individual responsibility.[109]

It should be emphasised that I do not understand this as meaning that third-country nationals can simply frustrate their expulsion with a claim to their right not to return and face no further consequences. The point is more subtle. A distinction must be made between the obligation to return, on the one hand, and the obligation to put one's right to return at the service of the return process on the other. Clearly, the right to return cannot, as such, prohibit an EU member state from taking measures if third-country nationals fail to leave within the voluntary departure period. However, it should be kept sharply in view that this is a function of their failure to comply with an obligation under the Returns Directive, not a function of their unwillingness to invoke their right to return. Although the distinction seems academic, there is a clear qualitative difference between attaching legal consequences to a failure to meet a legal obligation and the failure to exercise one's rights, even though they cover the same issue.

5.4 Conclusions

This chapter has discussed the possibility that inter-state readmission duties become ineffective, and what this would mean for third-country nationals' right to return, especially in the face of a clear obligation to return under the Directive. As regards the first point, a number of possible situations were discussed in which inter-state frameworks might be ineffective, in addition to gaps occurring for stateless persons (discussed in Chapter 4) and issues

109 This could be considered to fall within the scope of what Goodwin-Gill has called an abusive exercise of state rights of control over the movement of persons, which "will be violated if certain limits are exceeded in the course of their exercise." See Goodwin-Gill 1996, p. 99.

of straightforward non-compliance by countries of origin with their international obligations. It was suggested that such situations might occur, first of all, if the country of origin considered the expulsion of one of its nationals by an EU member state unlawful. This would arguably result in their own readmission obligations becoming null and void. Second, they may be able to put forward justifications which would preclude their responsibility for the wrongfulness of non-compliance with the duty to readmit. This may arise in different circumstances: non-readmission could be a countermeasure to a prior breach of obligations by the EU member state; it could be the result of *force majeure*, or it could result from a necessity, if non-readmission would be the only way to safeguard an essential interest of the country of origin against a grave and imminent peril. Each of these would be highly exceptional circumstances. However, I have suggested that, depending on the circumstances, these might be invoked effectively.

A third situation is related to the possible diverging positions that countries of origin and EU member states might have as to the existence and content of the customary obligation to readmit. Although it has been suggested that the existence of an unqualified obligation to readmit expelled nationals is beyond dispute, the discussion above shows that a number of counterpoints to this can be made. These relate both to the evidence of the existence of the customary norm, as well as to the doctrine that is generally put forward as underpinning this norm. While such objections may not be sufficient to call the customary norm into doubt completely, it shows that, from the perspective of countries of origin, challenges could definitely be put forward. I noted that such diverging views may also be at the foundation of origin countries' reluctance to readmit, although they are then more likely to avoid a direct conflict over this. However, there may well be a 'North-South divide' over the issue of readmission, although this would require further, in-depth exploration.

Most of the situations outlined above would make the inter-state readmission obligation ineffective, whilst, depending on the circumstances, leaving the obligation to readmit persons exercising their right to return intact. In such cases, EU member states may expect third-country nationals to declare their willingness to return to their countries of origin. This, then, would be taken as a sign of their intent to exercise their right to return, which would act as a trigger for readmission. Since third-country nationals are required, under the Directive, to return, EU member states may well expect third-country nationals to make such a declaration of willingness. As discussed, the approach that this would simply be part of the obligation to return has been endorsed by the highest administrative court in at least one member state. Furthermore, it has been suggested, at a more conceptual level, that the compulsory exercise of their right to return is a logical outcome of their arrival in an EU member state and claim to human rights provisions, since there are no rights without duties.

Upon closer examination, however, the logic behind the assumption that third-country nationals can be compelled to exercise their right to return

falls apart, both conceptually and as a matter of positive law. Conceptually, human rights are held by the individual as a safeguard to state overreach; they are not a tool to meet the state's interests. It is certainly not the job of human rights to make return policy effective. The international framework for expulsion gives that role to inter-state rules. If these are not respected by states, or somehow become ineffective in the relationship between states, this cannot shift the burden to the individual. This would overstretch the limits of individual responsibility and fundamentally clash with the principles of fairness and transparency to which the Directive must conform.

While an answer to the question of compulsory exercise of rights cannot readily be drawn as a matter of positive law, the approach of the ECtHR towards 'negative rights,' providing individuals with protection against being forced to do something that is in fact a freedom allocated to them, is informative. In particular, this entailed consideration of the Court's approach to several cases involving coercion to join trade unions, in light of the right to freedom of assembly. From this it was concluded that such coercion can indeed amount to an unlawful interference with a right, if it strikes at its essence, which is to be determined, inter alia, by the consequences of non-compliance. While this case law covers a very different area than the right to return, sufficient parallels can be found, especially in relation to the personal autonomy the right to return is meant to protect, and its connection to specific freedoms, in this case the international freedom of movement. The consequences of non-compliance with an obligation to exercise the right to return would also clearly be far-reaching. As a result, it must be concluded that EU member states are likely precluded from requiring that third-country nationals exercise their right to return against their will, such as by making a declaration to the consular authorities of their countries of origin, as this would amount to a violation of their rights. Therefore, they cannot be held responsible for not exercising their right as part of the return procedure. Unsatisfactory as this may be for member states, who want (and are normally required to) ensure effective returns, this cannot come at the expense of the third-country national's fundamental rights.

6 Readmission to transit countries

6.1 Introduction

This chapter continues the examination of readmission to destination countries, as the first of the three key elements that together shed light on the actions that individuals can and cannot be expected to take as part of their obligation to return (research questions 1a and 1b). In the previous two chapters specific actions and limitations with regard to seeking readmission to the country of origin were discussed. This chapter will turn its attention to the other obligatory destination, transit countries. This covers only those situations identified in Chapter 3 as giving rise to an obligation to return. This means, first, that third-country nationals must have passed through that country on their way to the EU member state, and where relevant directly, and not having done so in a way specifically excluded by applicable agreements or arrangements. And second, that those agreements and arrangements must be in place, specifically relate to the readmission of persons who are not nationals of the transit country, and provide for clear frameworks for such readmission.

On this basis, I will not discuss customary international law or human rights law since neither would be agreements and arrangements relevant to transit countries within the meaning of the Directive. Even if this was not a specific requirement of the Directive, it would otherwise still be highly doubtful that those frameworks would have much relevance to the readmission by transit countries of non-nationals. Hailbronner has discussed the interesting notion that states might carry responsibility to readmit persons who irregularly entered another state from their territory, especially if they acted in a 'reproachable' manner to allow, or even encourage, such irregular migration.[1] He discusses this in relation to the principle of good neighbourliness, as well as the responsibility of states for cross-border harm.[2]

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1 Hailbronner 1997.

2 Hailbronner 1997, pp. 31-37. A contemporary example of such a situation arising might be found in the border conflict between Greece and Turkey in late February and early March 2020, when Turkey allegedly wilfully encouraged irregular migration to Greece and even provided transportation to the Greek land and sea borders. See, for example, Guiraudon 2020; Council of Europe Commissioner for Human Rights 2020. Greenhill 2010 sets out further historical examples in which states have used (the threat of) cross-border population movements in pursuit of foreign policy goals. The topic of state responsibility for causing refugee flows, including a possible duty to compensate the receiving state, has been explored by various authors in the 1980s and 1990s. See, for example, Coles 1981; Hofmann 1985; Lee 1986; Garry 1998.

However, he concludes there is a lack of sufficient evidence of such a norm and idea is also rejected by others.[3] The human right to return to a transit country would only apply in the exceptional circumstances that non-nationals have such close links to that country, so that it can be considered their 'own country,' which is very unlikely to occur if they only pass through it. To the extent that human rights-based claims to readmission to a transit country might exist, these would more likely be based on family connections in the country, although the bar for this would be very high. However, discussing this further would just be a diversion from the main point, because this falls outside the scope of obligatory return under the Directive.

Instead, attention will turn to the three categories of agreements and arrangements that were identified in Chapter 3 as being able to make a transit country an obligatory destination. These include, first of all, specific EU or bilateral readmission agreements. Such agreements and their implications for third-country nationals during the voluntary return procedure will be the main focus of this chapter. Section 6.2 will explore these implications, specifically what procedural steps are necessary to make such agreements work for voluntary return situations. It also addresses issues of evidence that arise when seeking readmission on the basis of these agreements, both in substance and who needs to supply this. It will particularly show that this is, by and large, not something third-country nationals can do by themselves, but for which close cooperation between them and the EU member state is necessary.

The second set of agreements identified as potentially qualifying as relevant instruments under Article 3(3) of the Directive comprises the various multilateral treaties dealing with international air and maritime transport, and the situation of smuggled persons or victims of trafficking. The implications of these for non-nationals seeking to return to transit countries on the basis of such treaties, and the clear limitations involved, will be discussed in section 6.3.

Section 6.4 will discuss the possibility that return to a transit country takes place on the basis of other arrangements. Although non-binding arrangements often do not appear to include provisions on the readmission of non-nationals, some conclusions about their potential role are discussed, including the relevance of the fact that such arrangements do not lead to legally binding readmission obligations on the part of the transit country. The conclusions to this chapter are set out in section 6.5.

3 Coleman 2009; Giuffré 2015; EP 2010, p. 13, and further references therein.

6.2 Return to transit countries under EU readmission agreements

This section focuses on the role of readmission agreements in facilitating return to transit countries. In particular, it will assess under what substantive and practical conditions they can provide a basis for readmission to a transit country, and what the implications of this are for the position of third-country nationals under the Directive.

6.2.1 Initial comments on readmission agreements and their relevance to returns to transit countries

As already noted in Chapter 2, the term 'readmission agreement' is potentially wide-ranging. When it comes to agreements specifically focused on readmission, these can either be EU agreements or bilateral agreements concluded by individual member states (or groups of them) with a third country. The prevalence, and arguably the importance, of such bilateral arrangements is much greater than EU readmission agreements.[4] This is also true for further bilateral agreements, such as implementing protocols, that are used to make certain elements of EU readmission agreements operational.[5] However, in Chapter 2 I have explained why – to enable somewhat coherent conclusions – this analysis will mainly focus on EU readmission agreements, largely leaving bilateral readmission agreements outside its scope. Nevertheless, it must be reiterated that conclusions based on EU readmission agreements may at times only be a very imperfect proxy for conclusions that could be drawn about bilateral agreements, because of their diversity in scope and content.

Furthermore, it was noted in Chapter 2 that a range of formal agreements which do not have readmission as their key focus, but that contain clauses on readmission ('agreements related to readmission') could be seen as 'readmission agreements' within the meaning of Article 3(3) of the Directive, at least in the abstract. However, in Chapter 4, I explained that such agreements generally do not provide for the readmission of non-nationals, or only commit to further negotiations on this, so they cannot be a basis for obligatory return to a transit country. These are therefore also excluded from the discussion.

Even when addressing only EU readmission agreements in a narrow sense, considerable questions remain about their real-life relevance to returns to transit countries, and even more specifically, voluntary returns. Carrera has noted that there are considerable gaps in information as regards the actual use of readmission agreements. This is particularly true for readmissions of non-nationals. He cites a study that noted that almost 100 per cent of readmissions based on EU agreements (to the extent avail-

4 See, for example, Billet 2010.
5 Carrera 2016, pp. 41-42.

able) concerned nationals of that country.[6] Furthermore, an evaluation of EU readmission agreements, published in 2011, concluded that, while data did not distinguish between voluntary and forced returns, such agreements were "very rarely used for voluntary returns."[7] This would indicate that voluntary returns of non-nationals under such agreements would be extremely rare in practice.

Theoretically, however, such agreements, although clearly being concluded with forced returns in mind, do not completely exclude voluntary returns, and some agreements even mention the priority of voluntary return specifically. Both the EU agreements with Armenia and with Azerbaijan, for example, set out among their fundamental principles that "[t]he Requesting State should give preference to voluntary return over forced return where there are no reasons to believe that this would undermine the return of a person to the Requested State."[8] As such, in the light of the emphasis of the EU on such agreements and on the priority of voluntary return, it is a matter that should be considered. Furthermore, since Carrera's observations there have been some developments tentatively indicating a role for readmission agreements also in relation to voluntary return. For example, since the conclusion of the EU-Turkey statement of March 2016, the implementation of voluntary returns from Greece to Turkey have been reported,[9] although there have been concerns over the conditions under which third-country nationals have acquiesced to such returns.[10] The exact legal basis used for these returns also remains somewhat vague. Formally, the implementation of the return and readmission part of the statement relies on both a bilateral readmission agreement between Greece and Turkey and the EU-Turkey readmission agreement.[11] However, there have been issues with the implementation of both.[12] Nevertheless, the above indicates at least the possibility of voluntary returns involving non-nationals being carried out under readmission agreements.

6 Carrera 2016, p. 16.

7 COM(2011) 76 final, 23 February 2011, p. 3; Carrera 2016, p 41.

8 See, for example, Agreement between the European Union and the Republic of Armenia on the readmission of persons residing without authorisation, OJ L 289, 31 October 2013, pp. 13-29, Article 2; Agreement between the European Union and the Republic of Azerbaijan on the readmission of persons residing with authorisation, OJ L 128, 30 April 2014, pp. 17-42, Article 2. However, similar clauses have not been included in the agreements with Tukey, Cape Verde and Belarus, although these entered into force after the ones with Armenia and Azerbaijan.

9 Wallis 2020.

10 HRW 2017.

11 A European Commission factsheet, published in March 2016, notes: "The legal framework for these returns is the bilateral readmission agreement between Greece and Turkey. From 1 June 2016, this will be succeeded by the EU-Turkey Readmission Agreement following the entry into force of the provisions on readmission of third country nationals of this agreement." European Commission 2016.

12 For an overview, see Heinrich Böll Stiftung 2019.

When discussing the potential use of EU readmission agreements for the purpose of voluntary returns to transit countries in practice, issues of procedure and evidence quickly become entangled. Procedurally, the most important aspect is that readmission under such agreements usually requires a formal readmission request, or at least prior notification, by the EU member state. This request must include the evidence of an individual's eligibility for readmission under the terms of the relevant agreement. The conditions for this are discussed in the following paragraphs.

6.2.2 Conditions for readmission

Transit countries' obligations to readmit under agreements concluded with the EU arise when two cumulative conditions are met. First, that the person to be returned irregularly entered, or was irregularly staying in, an EU member state. And second, that a relevant link between that person and the transit country exists. Both issues are discussed below.

6.2.2.1 Irregular entry or stay in the EU member state

Readmission obligations only pertain to third-country nationals who have been found to have entered or have been staying irregularly in the EU member state. The obligation to readmit such persons may in some cases be time-limited. For example, such obligations may lapse if, after a certain period following the detection of the irregular migrant in the EU, no readmission application has been made. A typical clause on this would state:

> *"The unlawfulness of entry, presence or residence shall be established by means of the travel documents of the person concerned in which the necessary visa or other residence authorisation for the territory of the requesting State are missing. A statement by the requesting state that the person concerned has been found not having the necessary travel documents, visa or residence authorisation shall likewise provide prima facie evidence of the unlawful entry, presence or residence."*[13]

Although irregular entry, presence or residence in the EU member state is a core element of the readmission obligation, Coleman has noted that the evidentiary requirements are quite simple to meet in most cases, since they technically do not need evidence of unlawful border crossing or stay as such, but the absence of evidence of lawful stay.[14] The irregular entry or stay of the individual is a necessary condition for readmission obligations to apply, but not a sufficient one. In addition, one of two conditions as regards the link between the individual and the transit country must be established.

13 EU-Albania Agreement, Article 9(3). Similar clauses can be found in each of the other agreements incorporated in this study.

14 Coleman 2009, pp. 95 and 100.

6.2.2.2 Link to the transit country

The first situation in which a transit country would be required to readmit non-nationals irregularly staying in an EU member state is if they hold a valid visa or residence permit in that transit country. This has already been discussed briefly in relation to the making of a readmission application above, as well as the situation of habitually resident third-country nationals in Chapter 5. However, habitual residence, which would be necessary to define a country as the country of origin, is not required for obligatory returns to transit countries. The readmission obligation relates to any non-nationals, including stateless persons, who hold a residence permit or visa for the transit country. Agreements differ on the moment at which such a permit or visa must still be valid. Generally, this is either the moment the third-country national entered the EU member state or the moment of the submission of the readmission application.[15]

The second element relates to a combination of the circumstances of entry into the EU member state and the prior presence of the individual in the member state. Some agreements formulate this quite broadly. For example, Albania is under an obligation to readmit non-nationals who "entered the territory of [EU] Member States after having stayed on, or transited through, the territory of Albania."[16] This would then cover non-nationals found to be irregularly staying in the EU member state, even if they initially entered lawfully, provided that evidence is available of prior stay in, or transit through, Albania. However, most other agreements are stricter in two ways. First, they limit the obligation to readmit to situations in which non-nationals entered the EU member state *unlawfully*.[17] It would thus exclude visa overstayers or persons who enjoy visa-free travel and stayed in the member state beyond the period allowed.[18] Second, such unlawful entry must generally have been *directly* following their transit through or stay on the territory of the transit country.[19] While there are various ways of providing evidence of prior stay in the transit country, the requirement of unlawful direct entry may raise more issues, especially

15 The agreements with Albania (Article 3(1)(a)), Serbia (Article 3(1)(a) and Ukraine (Article 3(1)(a) and (b)) require that the permit or visa was valid at the time the third-country national entered the EU member state, whilst those with Pakistan (Article 3(1)(a)), Russia (Article 4(1)(a) and (b)) and Turkey, at least where it concerns visas (Article 4(1)(a)) require these to be valid at the moment of the readmission application.

16 EU-Albania Agreement, Article 3(1)(b).

17 Coleman 2009, p. 94; EU-Pakistan Agreement, Article 3(1)(b); EU-Russia Agreement, Article 3(1)(c); EU-Serbia Agreement, Article 3(1)(b); EU-Turkey Agreement, Article 4(1)(c); EU-Ukraine Agreement, Article 3(1)(a).

18 Coleman 2009, p. 95-96.

19 As discussed in 3.1.1.1.

for non-neighbouring countries.[20] This, therefore, provides the basis for the exclusion of non-direct transit situations under many agreements as discussed in Chapter 3.

6.2.2.3 Exceptions

Some of the conditions for readmission already have some inherent limitations, such as regards the requirements of direct and unlawful entry into the EU member state. However, the various agreements also set out specific exception clauses, which would negate the readmission obligation, despite both the requirements of irregular stay in the EU member state and a relevant link with the transit country being established. First, as discussed in Chapter 3, each of the agreements exclude situations in which the non-national has only had an airside transit via an international airport of the transit country. Second, if the EU member state issued the individual a visa or residence permit, either before their entry or afterwards, this would also exempt the transit country from its readmission obligation.[21] This exception, however, is itself subject to exceptions. The readmission obligation comes back into play if the transit country had also issued a visa or a residence permit to the non-national, and the validity of such documents is longer than those issued by the EU member state.[22] This is also the case if the visa or residence permit issued by the EU was obtained through forged or falsified documents.[23] Third, as already noted, some agreements exempt transit countries from readmission if it concerns persons who enjoyed visa-free travel to the EU member state.[24] This could potentially exclude large numbers of irregular migrants in the EU from falling within the scope of readmission agreements.

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20 Carrera 2016, p. 3. But also see Cassarino 2007, p. 183, on neighbouring countries, referring to frequent disputes between Spain and Morocco, in relation to their bilateral agreement, over the question whether irregular migrants actually transited through Morocco, with the latter often arguing such persons may have transited through Algeria.

21 EU-Albania Agreement, Article 3(1)(a); EU-Pakistan Agreement, Article 3(1)(a); EU-Russia Agreement, Article 3(1)(a) and (b); EU-Serbia Agreement, Article 3(1)(a); EU-Turkey Agreement, Article 3(1)(a); EU-Ukraine Agreement, Article 3(1)(b) and (c).

22 EU-Albania Agreement, Article 3(2)(b); EU-Pakistan Agreement, Article 3(2)(b); EU-Russia Agreement, Article 3(2)(b); EU-Serbia Agreement, Article 3(2)(b); EU-Turkey Agreement, Article 3(2)(b); EU-Ukraine Agreement, Article 3(2)(b).

23 EU-Albania Agreement, Article 3(2)(b); EU-Pakistan Agreement, Article 7(1); EU-Russia Agreement, Article 10(3); EU-Serbia Agreement, Article 3(2)(b); EU-Turkey Agreement, Article 10(1) and (2).

24 EU-Russia Agreement, Article 3(2)(c) ; EU-Turkey Agreement, Article 4(2)(c); EU-Ukraine Agreement, Article 3(2)(c).

6.2.3 Means of evidence

The burden of proof that a transit state should readmit a non-national lies with the state requesting readmission. For establishing the link between the non-national and the transit country, the various agreements contain annexes with specific lists of evidence that can be accepted. These lists play a key role in the readmission procedure and it has been suggested that "[e]stablishing these lists represents one of the primary aims of the agreement."[25] In general, the lists set out two levels of evidence: proof and prima facie evidence. However, the terminology differs, with the EU-Russia agreement, for example, distinguishing proof and 'indirect evidence.'[26] And some others do not really clearly attach these labels, but just set out what consequences certain evidence has. Normally, when evidence that is considered proof is provided, this should trigger an obligation on the transit country to readmit without further investigation. Prima facie evidence, instead, only provides for a rebuttable presumption of an obligation to readmit, allowing the transit country to provide counter-evidence why it should not readmit.[27] However, this is not uniform across the different agreements. In some cases, prima facie evidence only triggers an obligation to further investigate the readmission claim.[28] In general, the annexes to the agreements allow for a wide range of evidence. This includes official (travel) documents and residence permits, visas or entry and exit stamps attached to these, but also other papers, such as hotel bills, credit card receipts, car rental agreements, air, sea, train and coach tickets, or other evidence showing that a third-country national was in the transit country. Furthermore, official statements by the member state's authorities such as border guards are often accepted. Various agreements also include as evidence statements made by third-country nationals themselves in administrative or judicial proceedings, and witness statements or declarations from family members or travelling companions. In some cases, information provided by international organisations, such as UNHCR, are also listed.

However, there is no uniformity in how a specific document or piece of evidence is classified across the different agreements. For example, under the agreements with Albania, Serbia and Turkey, a hotel bill showing that an individual previously stayed in the transit country is accepted as proof which requires readmission without further investigation.[29] Such same hotel bills, in the case of Pakistan, Ukraine and Russia, would only trigger

25 Coleman 2009, p. 99.
26 EU-Russia Agreement, Article 10(2).
27 EU-Albania Agreement, Article 9(2) and Annex 4; EU-Russia Agreement, Article 10(2) and Annex 5A; EU-Serbia Agreement, Article 9(2) and Annex 4; EU-Turkey Agreement, Article 10(2) and Annex 4.
28 EU-Pakistan Agreement, Article 7(2) and Annex IV; EU-Russia Agreement, Article 10(2) and Annex 5B; EU-Ukraine Agreement, Article 7(3)(b) and Annex 4b.
29 EU-Albania Agreement, Annex 3; EU-Serbia Agreement, Annex 3; EU-Turkey Agreement, Annex 3.

an obligation of further investigation or verification.[30] When it comes to air, train, boat or coach tickets, as well as passenger lists, Pakistan and Russia again recognise these as a basis for investigation,[31] but Ukraine, together with Albania, Serbia and Turkey, accepts these as proof that conditions for readmission are met. Differences can further be found, inter alia, as to the role played by statements made by EU member state officials or the non-nationals themselves. As such, the precise evidence to be provided, and the 'strength' of that evidence as a means to show conditions for readmission are met, will have to be determined in relation to each readmission agreement separately.

Generally, readmission agreements do not provide for annexes setting out lists of acceptable evidence on the irregular stay of individuals on the territory of the EU member state, confirming that this element is much more easily satisfied. Most of the agreements also provide that false documents cannot be used as evidence of eligibility for readmission.[32]

6.2.4 Readmission applications

In most cases, the procedure for readmission requires the requesting state (the EU member state) to submit a formal application to the competent authorities of the transit country.[33] This is a procedural step clearly set out in the agreements which must be followed by the parties. As such, when the readmission procedure requires this, there is no readmission obligation on the transit country without an application by the EU member state.

Beyond the readmission application's function of notifying the transit country of the request for readmission, several things must be submitted as part of it. First, the particulars of the person to be returned, which may include, depending on the agreement, a combination of name, surname, place and date of birth, gender and physical description, nationality and language, aliases, or civil status. Second, it should include the evidence underpinning the claim for readmission, in line with the discussion above. Third, information about the need for care or assistance, in particular in relation to the person's help, during the transfer, may have to be provided. And fourth, information about specific security issues related, such as the individual being a "dangerous person," may be required.[34] Readmission agreements provide for a standard form to be used to make an application

30 EU-Pakistan Agreement, Annex IV; EU-Russia Agreement, Annex 5B; EU-Ukraine Agreement, Annex 3B.

31 EU-Pakistan Agreement, Annex IV; EU-Russia Agreement, Annex 5B.

32 Although in some cases entry or exit stamps, even if found in a false document, can be considered evidence, see, for example, EU-Turkey Agreement, Annex 3.

33 Coleman 2009, p. 96-97; EU-Albania Agreement, Article 6(1); EU-Pakistan Agreement, Article 4(1) ; EU-Russia Agreement, Article 6(1) ; EU-Serbia Agreement, Article 6(1); EU-Turkey Agreement, Article 7(2); EU-Ukraine Agreement, Article 5(1).

34 Coleman 2009, p. 96.

and transmit this information, which should be signed and stamped by the EU member state.[35]

If the third-country national involved holds a valid visa or residence permit for the transit country, and also holds a valid passport, travel document or identity card – depending on the particular provisions of the agreement – there is no need for a readmission application.[36] If the person holds a valid visa or residence permit, but not such a travel or identity document, some agreements provide that a written notification by the EU member state that the individual is returning to the transit country on the basis of that agreement is sufficient. This would eliminate the need to provide all the information as above, but still entails a prior action by the EU member state to ensure the readmission obligation of the transit country is triggered.

6.2.5 Implications for third-country nationals and EU member states

Having set out some of the key substantive and procedural requirements of EU readmission agreements, attention now turns to the implications for third-country nationals. However, given the specific nature of readmission agreements, which provide for procedures between states, and not an instrument that (in most cases) can be invoked directly by the individual, this is better framed as a question of implications for third-country nationals and EU member states jointly. Two key issues in this respect are discussed below. First, whether member states can trigger readmission obligations of the transit country without the individual's consent. And second, what can be expected of the individual in terms of providing evidence for eligibility for readmission to the member state, so it can submit this to the transit country. Some short comments on situations in which prior action by the EU member state is not necessary are also made.

6.2.5.1 Triggering of readmission obligations: is the individual's consent needed?

While there are situations in which no prior action by the EU member state is necessary, in the majority of cases a readmission application (or a written notification) is necessary to enable readmission. The agreements make clear that this is something that must be done by the EU member state. The requirement of prior action by the EU member state is an odd fit with the notion of voluntary compliance, which depends, first and foremost, on individuals taking the necessary steps to return of their own accord without

35 EU-Albania Agreement, Annex 5; EU-Pakistan Agreement, Annex V; EU-Russia Agreement, Annex 1; EU-Serbia Agreement, Annex 6; EU-Turkey Agreement, Annex 5; EU-Ukraine Agreement, Annex 5.

36 The EU-Russia Agreement, Article 6(2), requires the person to be in possession of a valid national passport. The EU-Serbia Agreement, Article 6(2) refers to possession of "a valid travel document." Both the EU-Turkey Agreement (Article 7(3)) and the EU-Ukraine Agreement (Article 5(2)) refer to "a valid travel document or identity card."

further intervention by the EU member state. This raises the question, in particular, to what extent EU member states can make an application for readmission to a transit country during the voluntary departure period, even if this is not the third-country national's preferred option.

At first glance, the logic of voluntary return would appear to resist the idea of the member state taking action without the individual's consent. After all, at this stage it is generally up to third-country nationals to decide which destination they pursue in order to meet their obligation.[37] At the same time, an EU member state may prefer to submit a readmission request to a transit country to keep all options for return open, also with a view to swift removal of third-country nationals if their own voluntary return efforts do not pay off. Even in the case of voluntary return, I suggest, neither the Directive nor the wider international law framework for expulsion prohibits the EU member state from doing so.

As regards the Directive, EU readmission agreements were clearly foremost in the minds of the co-legislators when deciding on the formulation of the second limb of the definition of 'return' regarding transit countries. It has already been established that, under the conditions discussed in Chapter 3, return to a transit country is obligatory for third-country nationals, and they can thus be expected to pursue this option. This does not mean that they must return to a transit country in all circumstances; during the voluntary departure period they are free to pursue return to the country of origin or another third country too. This would not preclude the EU member state from ensuring, if it has this possibility, that other options are available. This is because, in contrast to the reference to 'another third country,' the third-country national's willingness to return to a transit country is not a factor. This is the case as long as it does not prematurely – that is, before the end of the voluntary departure period – coerce third-country nationals to use this option. As a matter of international law, the international expulsion regime prioritises return to countries under obligation to readmit, including under a readmission agreement, over return to countries where such obligations do not exist.[38] As such, the international expulsion regime also does not prevent an EU member state taking such steps in general, and, as discussed at several points, does not necessarily distinguish between voluntary and forced implementation of expulsion. This would be subject, of course, to the return to the transit country being in conformity with the EU member states' fundamental rights obligations. Normally, these should have been assessed before a return decision, but to the extent that this is not the case, the viability of return to a transit country is discussed in Chapter 7.[39]

37 See 7.2.

38 Article 22(1) ILC draft articles. Furthermore, it allows expulsion to a place of embarkation, i.e. a country from which the alien has directly entered the expelling state, see Article 22(2).

39 See 7.3.

The flipside of all this is that, if the EU member does *not* submit a readmission application or written confirmation in those cases that readmission agreements proscribe this, there is no readmission obligation on the part of the transit country. This preceeds any questions of evidence being assessed. If this would be due to a lack of cooperation by the third-country national, this would of course not absolve him or her from being held responsible. However, there may be reasons outside of the sphere of the third-country national's cooperation that may lead to a readmission application not being submitted. If member states truly want to benefit from the fact that voluntary returns are less administratively burdensome than removals,[40] they may choose not to engage in this process, especially if they feel that the third-country nationals' own efforts to return to their country of origin or another third country may well be successful.[41] Whatever the reason for non-submission, whether out of convenience or in error, as long as this is not directly due to the third-country national having put clear obstacles in the member state's way to doing so, this cannot lead to individual responsibility for non-return to the transit country. After all, in such a situation returning to a transit country cannot be considered obligatory under the Directive.

It may also be the case that it is not in the interest of the EU member state to ensure return to a transit country, but in the interest of third-country nationals themselves. For various reasons, they may prefer to return to a transit country, rather than their country of origin. If the EU member state then fails to submit a readmission application, this becomes a barrier for the individual to return to his or her preferred destination. This represents another side of the coin, which does not relate immediately to the scope of third-country nationals' obligations, but to the extent to which they can have the freedom to choose destinations. This is the subject of Chapter 7, which also includes a short discussion of this matter related to the return to transit countries under readmission agreements.

The discussion in this paragraph clearly excludes those situations, mentioned earlier, in which no prior action by the member state, either a readmission application or a written notification, is necessary. Since this involves situations in which third-country nationals are both properly documented for travel and can show a right of residence or a visa to the transit country's border authorities, they should be able to return without any other steps to be taken. In this situation, they would also normally not encounter any issues boarding transport for which they have made the appropriate arrangements. Such situations are clearly covered by the various readmission agreements and would thus meet the requirement of being "in accordance with Community or bilateral readmission agreements or arrangements," under Article 3(3) of the Directive.

40 See 2.2.1.

41 Although it may be wondered whether such inaction can be justified from the perspective of member states' obligation under the Directive of ensuring effective return, as discussed in more detail in 8.4.1,

6.2.5.2 Obligations to provide relevant information and evidence

If the member state is entitled to submit a readmission application regardless of third-country nationals' preferences, this must also entail a measure of cooperation by those individuals to enable the member state to do this. It could be argued that the obligation on individuals to cooperate in this regard could be broadly formulated as providing any personal information, as well as allowing pictures to be taken, as elements to be filled in on the readmission application form. The same would go for any evidence demanded by the member state. However, this may be nuanced both by the way the requirements of readmission agreements are formulated, and the principle, discussed in Chapter 5, that third-country nationals can be expected to provide what is necessary to ensure readmission. In that chapter, it was noted that this may mean something different than simply an obligation to provide whatever is asked.

It should be noted that the various agreements only require the member state to provide certain information or evidence "to the extent possible." For example, all agreements require information about specific care and any protection or security measures only to the extent possible.[42] While the provisions are written with removals in mind, the extent to which information on the need for special assistance or security issues is relevant may differ in voluntary return situations. Such information appears to be included for the purpose of allowing the transit country to make the appropriate arrangements when persons are removed, including the handover by the member state's escorts to the authorities of the transit country. If the return is instead voluntary, the concerned persons would normally travel, as much as possible, as any other international traveller. However, some communication on, for example, special medical arrangements may still be necessary, although this does not necessarily have to come from the EU member state's authorities, but could also be arranged through providers of assisted voluntary return services. Issues related to 'dangerous persons' may still be relevant, although it should be noted that none of the readmission agreements provide for the refusal of readmission of a non-national for reasons of security.[43]

Some agreements say that the particulars of the person to be returned, and even details of the evidence that conditions for readmission are met, only have to be provided to the extent possible.[44] While it is difficult to foresee how readmission can take place without appropriate evidence, this

42 Or in the case of the EU-Ukraine Agreement, "where necessary."

43 Although it may be a reason for the other contracting party to refuse to act as a place of transit for non-nationals on their way to their final destinations. See, for example, EU-Albania Agreement, Article 13(3)(c). But such a situation is not part of this analysis.

44 EU-Albania Agreement, Article 7; EU-Serbia Agreement, Article 7; EU-Turkey Agreement, Article 8. The EU-Russia Agreement, by contrast, only attaches this condition to certain information, such as the place of birth and place of last residence, see Article 7(1)(a).

should at least give flexibility as to the particulars. It would suggest that, even if personal information is not provided fully, readmission may still occur, on the condition that at least the necessary evidence of eligibility for readmission is available. So even in cases in which a third-country national does not fully share all details that should normally be filled in on the readmission application form, this is not necessarily fatal to the readmission process. Indeed, Coleman suggests that readmission agreements may be very flexible in this matter, and would "allow the readmission of a Mr or Mrs 'X,' provided there is sufficient evidence of nationality, c.q. stay or transit."[45]

At any rate, if we look at the issue from the perspective of what is necessary for readmission, the first question that comes up is which information or evidence is already in possession of the member state. In most cases, it may be presumed that the EU member state already has the personal information required for the purposes of the readmission application, for example from the various databases on which it can draw.[46] Since it can use this without the consent of the individual, unless there is a need for verification by the individual, further cooperation on this matter is not necessary. As such, the failure of third-country nationals to provide information that is already at the disposal of the member state may be seen as non-cooperation by the member state, but cannot be a factor in assessing whether they have complied with their obligation to return. The difference is of crucial importance to a fair and transparent use of the notion of individual responsibility in voluntary return procedures. This would be different if the member state does not possess information which is crucial to the readmission process, in which case the third-country national can be expected to provide this.

As noted, the most crucial element of the success of a readmission procedure is the provision of relevant evidence showing the conditions set out in the agreement are met. Here again, the third-country national can be required to provide information necessary for readmission not already in possession of the member state. However, what is 'necessary' is a bit less straightforward than for nationals. This is due, first of all, to the diversity of the lists of evidence. As such, what is necessary to ensure readmission will need to be assessed in the light of the relevant agreement. A further complication is that not all evidence has the same outcomes. It may lead to readmission without further investigation, but also a rebuttable presumption of readmission, or even just an obligation to investigate the readmission claim. Clearly, not all these outcomes provide the same level of certainty whether readmission will actually take place. Third-country nationals can thus be expected to provide to the member state such evidence that would trigger the strongest obligations on the part of the transit country, at least to

45 Coleman 2009, p. 97.

46 See, in this respect, also the proposal to expand the use of the Eurodac system (Regulation 603/2013, OJ L 180, 29 June 2013) to the identification of third-country nationals for the purpose of return, COM(2016) 272 final, 4 May 2016, and further proposed amendments in COM(2020) 614 final, 23 September 2020.

the extent that they can be reasonably be expected to have such evidence or to have the means to obtain it.

What third-country nationals, in their specific situation, could be reasonably be expected to obtain and provide in terms of the strongest possible evidence, is a matter that can only be determined on a case-by-case basis. It will require some kind of assessment by the member state of the likelihood that the individual indeed has such evidence (for example documents that they have kept at home). Or whether they could obtain these through others, such as family members or friends. This is a question of fact and cannot be answered in the abstract here. However, most agreements provide for such wide-ranging options that, even if proof is not available, the majority of third-country nationals may be presumed to at least be able to provide some form of prima facie evidence. In some cases, their own statements as to their prior presence in the transit country may act as prima facie evidence. Such statements are statements of fact, directly relevant to the question of readmission and therefore very different in nature from statements of willingness to return discussed in the previous chapter. Readmission based on these agreements is not dependent on the willingness of the individual, as evidenced by the fact that they can be used for, and are primarily focused on facilitating, removals. Indeed, with regard to the readmission of nationals, some of the agreements explicitly provide that travel documents for the purpose of return and readmission shall be issued irrespective of the will of the individual.[47] The fact that this is not repeated for non-nationals does not affect this.[48]

As a general point, if third-country nationals have provided evidence that falls into a certain category, there should be no more need for any evidence in 'lower' categories, and this would then fall outside their obligation. For example, if a person to be returned to Albania provides hotel bills or tickets, which constitute proof, he or she should not be expected to also make a specific statement on prior presence in Albania, or ask for a confirmation from family members or travel companions, which constitutes prima facie evidence. It should be noted that statements from the individual during administrative or judicial proceedings and official statements by the authorities of the EU member state are listed as means of evidence in various agreements. As such, while it is first and foremost up to the individual to provide relevant evidence, if the member state assesses that this will be very difficult or impossible to provide, other options to continue the readmission procedure are generally available, at least in theory. Again, the extent to which the non-provision of specific evidence has actually

47 EU-Russia Agreement, Article 2(2); EU-Turkey Agreement, Article 3(4) ; EU-Ukraine Agreement, Article 2(2).

48 The reason for this phrase being absent in provisions on non-nationals may be more related to the fact that their return does not raise questions of the interplay between inter-state and human rights-based obligations, discussed in the previous chapter. However, there is no reason to assume the same principle would not apply to them.

impacted on the readmission procedure should be a relevant factor in any assessment of non-compliance with the obligation to return, rather than the fact that such information was not provided in the abstract.

6.3 Return to transit countries under multilateral treaties

In Chapter 3 it was suggested that multilateral treaties containing provisions on readmission could arguably fall within the scope of Article 3(3), in the sense that, if relevant to the situation of a third-country national, they would make return to a transit country obligatory. In relation to transit countries, two situations related to such treaties may be relevant. The first is when they would require readmission of persons with a residence right, or at least accepting them for examination. This situation has been discussed with regard to habitually resident stateless persons and their return to countries of origin. However, since such treaties do not make specific distinctions between various categories of non-nationals, and only relate to specific residence rights and not necessarily habitual residence, the same points apply here. That is, of course, on the condition that the country where a third-country national holds such a residence right can be considered a country of transit, meaning that it must have been part of the migration journey to the EU at the very least.

However, treaties related to international air and maritime traffic may also contain readmission obligations that relate to the place of embarkation of a person subsequently found to be staying irregularly in an EU member state. This situation is briefly discussed here. After all, unless the place of embarkation is a third-country national's country of origin, it can be considered a transit country within the meaning of the Directive. Furthermore, the various treaties do not, like most readmission agreements, contain specific provisions that would exclude certain types of transit, such as airside transit at an international airport. Rather, the place of embarkation should be read as the place where the third-country national boarded the means of transport that brought him or her to the EU member state, which can therefore include international zones such as airports and seaports.

At least in theory, such multilateral treaties would considerably expand the scope of transit countries that could be obligatory destinations under the Directive, since they are widely ratified and are not subject to stringent conditions like readmission agreements. Furthermore, the Chicago and FAL Conventions cover two types of international traffic often used by migrants to the EU, and may thus cover a large number of persons eventually found to be in an irregular situation there. However, this is subject to some limitations. In particular, the provisions on readmission to a country of embarkation only pertain to situations when arriving third-country nationals are inadmissible to the EU member state. As such, they do not cover the situation of those that have already entered the territory of the EU member state and are subsequently ordered to return.

Under the Chicago Convention, an 'inadmissible person' is "[a] person who is or will be refused admission to a State by its authorities."[49] This relates to the lack of permission granted by the public authorities of a state in which the person arrives, in accordance with its national laws, to enter that state. The main provisions in relation to inadmissible persons do not relate either to the individual or to the country of destination. Rather, they focus on the 'operator,' that is, the airline which transported the person to the state where he or she was found inadmissible. The operator can be served with a 'removal order,' which is a "written order served by a State on the operator on whose flight an inadmissible person travelled into that State." The removal order directs the operator to remove such persons from its territory.[50] When faced with a removal order, the aircraft operator must subsequently take inadmissible persons to the point where they commenced their journey; or to any other place where they are admissible.[51] The latter may refer to the place where such persons have a right of entry, such as on the basis of a visa, or residence permit. In this way, the provisions of the Chicago Convention largely mirror EU rules on carrier liability, especially Article 26 of the Schengen Convention,[52] and the supplementing provisions of Directive 2001/51 on carrier sanctions.[53] However, the Chicago Convention also addresses the country of embarkation, something that the above-mentioned EU instruments obviously cannot do. In particular, the Convention requires that country to "accept for examination" the inadmissible person.[54] The FAL Convention contains a set of rules that is very similar for those who travel by sea. It also recognises as a specific category 'inadmissible persons,' although the FAL Convention does not define them. Again, when a person is found to be inadmissible, it is the shipowner that is held responsible for his or her return. The state can transfer the inadmissible person back to the custody of the shipowner, in which case the latter must effect his removal to the country of embarkation or any other place where the person is admissible.[55] If removal takes place to the country of embarkation, that country is bound to accept the returned person for examination. This obligation also applies when the person to be returned is a stowaway and was found inadmissible in the EU member state, and "it has been established to their satisfaction that stowaways have embarked a ship in a port of their State."[56]

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49 Chicago Convention, Annex 9, fifteenth edition Chapter 1, Section A (definitions).
50 Chicago Convention, Annex 9, fifteenth edition, Chapter 1, Section A (definitions).
51 Chicago Convention, Annex 9, fifteenth edition, standard 5.11.
52 Convention implementing the Schengen Agreement, OJ L 239, 22 September 2000, pp. 19-62.
53 OJ L 187, 10 July 2001, pp. 45-46.
54 Chicago Convention, Annex 9, fifteenth edition, standard 5.12.
55 FAL Convention, Annex, Section 3, Part A, Standard 3.3.6.
56 FAL Convention, Annex, Section 4, Part E, Standard 4.12.1.

As noted in Chapter 2, the Chicago and FAL Conventions do not exclude voluntary returns. Although the term 'removal order' is used in the former, this is a different kind of removal than meant in the Directive, where it relates to the enforcement of the return decision. In the case of the Chicago Convention, it refers to an obligation on the carrier to transport an inadmissible person, and there appears to be no reason to assume that this could not apply to persons that are given an opportunity to return voluntarily. In such a case, the transport out of the EU member state would already be guaranteed by way of the removal order imposed on the airline.

The extent to which third-country nationals could independently trigger the obligations of a transit country, and how they would apply for readmission, raises some questions. An intervention by the EU member state is necessary to secure the operator's obligation to transport inadmissible persons back to the country of embarkation. In principle, however, the obligation to accept for examination inadmissible persons is self-standing and would apply to any person transported back on this basis. If, therefore, individuals can show that they were inadmissible, for example by showing the return decision issued by the EU member state, this obligation should be in play. A key issue here arises out of the way in which the obligation on the country of embarkation is formulated. Accepting such persons for examination is much weaker than the clear readmission obligations contained in other instruments, or even in the Chicago and FAL Conventions themselves as regards other categories of international travellers. In a vacuum, a person could be transported back to the country of embarkation, where the process of examination would then begin. And if the country of embarkation would find it was not responsible, the person could be transported back to the EU member state again.[57]

A further question arises whether the requirement to accept inadmissible persons for examination is sufficient to make a country of embarkation through which third-country nationals have transited an obligatory destination under the Directive. After all, it does not provide for a clear guarantee that readmission will take place "in accordance" with a relevant agreement.[58] However, the Conventions do provide for an international law basis for at least examination, and on this basis it may be presumed that third-country nationals would at least turn to the relevant transit country to seek readmission.

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57 However, note that the Interpretative Notes to the CTOC Smuggling Protocol (paragraph 113) emphasise that a return shall not be undertaken before the nationality or right of permanent residence of the person whose return is sough has been duly verified. In the context of voluntary return, when it is up to the third-country national to decide on the appropriate steps, this would particularly appear to be of relevance.

58 To this the point might also be added that these are not 'obligations' in the same sense as other agreements, since they represent standards, from which states may diverge when having duly notified this.. However, it was also noted that, given the key role in providing an overall framework for international travel, the discussion would proceed on the basis that states will generally consider themselves to be bound by these standards.

Perhaps the biggest barrier to the application of the Conventions does not arise out of their own provisions, but out of the Directive itself. In particular, the possibility of member states not to apply the Directive, with the exception of some core protections, to persons apprehended or intercepted in connection with the irregular crossing of an external border and they have not subsequently obtained authorisation to stay.[59] This circumstance may well overlap with situations in which persons are found inadmissible, for example when they are trying to enter the member state by air or sea without appropriate documents. In such cases, the provisions on voluntary return may not apply. While member states have freedom in this matter, in practice this exception is applied widely across the EU.[60]

As a result, it can be concluded that multilateral treaties may theoretically play a role in returns to transit countries as places of embarkation, and third-country nationals may therefore be required to explore this option when relevant. However, the limits on the readmission obligation, the scope of persons included, as well as the exceptions provided for in the Directive clearly show that their practical added value for voluntary return procedures may be very limited.

6.4 Return to transit countries under non-binding arrangements

So far, the discussion about return to transit countries has focused on the existence of obligations on those countries, under international law, to readmit specific categories of third-country nationals returning voluntarily. Here, attention turns briefly to arrangements which do not impose legal obligations. As has been discussed in Chapter 3, and as will become evident below, such arrangements, at least as concluded at the EU level, will often have little practical relevance for voluntary return situations. However, such 'other arrangements' are an integral part of the definition of return in Article 3(3) of the Directive, which, in turn, provides the basis for the obligation that third-country nationals must meet during the voluntary departure period. For the sake of covering all the different elements of the obligation to return, it is at least necessary to address the matter of such 'other arrangements' briefly. This is also the case because the inclusion of such arrangements in Article 3(3) of the Directive was meant to cover a broad range of documents or other ways in which provisions for readmission are made with transit countries.[61] Various authors have noted the increasing turn towards 'informalising' readmission, with increased reliance on non-binding arrangements.[62] As such, their relevance to voluntary return situations may increase in the future.

59 RD Article 2(2)(a).
60 See Chapter 1, footnote 28.
61 Lutz 2010, p. 37.
62 Cassarino 2007; Carrera 2016, p. 19.

In Chapter 3, it was argued that such arrangements, to be at least theoretically applicable to voluntary return situations, must provide clarity about the conditions under which readmission can take place and how these should be fulfilled. Furthermore, unwritten or secret arrangements, I have argued, cannot provide a sufficient basis for compulsory return under the Directive, even if they would make return and readmission practically possible.[63] It has been noted that the turn towards informalising readmission has also come with concerns over the transparency and accessibility of such arrangements.[64] Any return under such an arrangement must be subjected to the same fundamental rights safeguards as returns on other bases, as a logical corollary of EU member states' fundamental rights obligations.

At least at the EU level, returns to transit countries under such arrangements appear, at the moment, a moot point. So far, in addition to formal readmission agreements, the EU has been able to agree on non-binding arrangements with six countries: Afghanistan, Bangladesh, Ethiopia, Gambia, Guinea, and Ivory Coast.[65] These have taken different forms, such as the Joint Way Forward with Afghanistan, or Standard Operating Procedures with Bangladesh. In other cases, they have been formulated as 'good practices' for return. However, in all these cases, the documents in question only refer to the return and readmission of nationals of the countries with which the EU has agreed them. Similarly, the EU has tried to enhance cooperation on migration, including sometimes return, with other countries, especially in Africa and Asia, such as through its Migration Partnership Framework.[66] However, the fifth progress report on the Partnership Framework, when discussing issues of readmission, also only covers nationals of the countries targeted.[67] Arguably, the EU-Turkey statement of March 2016 could also be considered as an EU arrangement, which would cover the return of third-country nationals, in addition to Turkish nationals. However, the General Court of the EU found it did not have jurisdiction since it is not an instrument between the EU and Turkey as such, but rather between member states and Turkey.[68] Furthermore, readmission, although clearly supported by this political agreement, must formally be based on the EU-Turkey readmission agreement or the bilateral readmission agreement between Greece and Turkey, as discussed above.

To the extent that 'readmission arrangements' with transit countries exist and would be relevant, these will have been concluded bilaterally. A database developed by Cassarino, with information about formal agree-

63 See 3.3.2.
64 Cassarino 2007, pp. 189-190; EP 2010, pp. 23 and 27; Carrera 2016, pp. 41-42.
65 Standard Operating Procedures were drafted for Mali and Ghana respectively, but have so far these have not been agreed.
66 COM(2016) 385 final, 7 June 2016.
67 COM(2017) 471 final, 6 September 2017.
68 General Court T-192/16, T-193/16 and T-257/16, *N.F., N.G. and N.M. v. European Council*, order of 28 February 2017.

ments of different sorts,[69] but also other arrangements, such as memoranda of understanding, exchanges of letters or administrative arrangements, concluded by the EU and member states, provides some useful insight into this. It particularly shows that the use of such non-binding arrangements by member states varies considerably.[70] Italy, for example, which seems to be the most active in making such arrangements, is listed as having around two dozen memoranda of understanding, administrative arrangements, or exchanges of letters with third countries, although this includes several countries with which different (possibly sometimes superseding) arrangements have been concluded.[71] By contrast, only five such arrangements are listed for France, and none for Germany.[72] Switzerland, which cannot benefit from EU agreements and arrangements, nevertheless mainly focuses on concluding formal agreements, with only three non-binding arrangements listed. Again, it is not clear to what extent such arrangements would deal with the return of third-country nationals, but likely the majority would only deal with nationals.

For reasons discussed in Chapter 2, bilateral readmission agreements are not specifically included in the analysis, and the same is true for such non-binding, bilateral arrangements. It may be presumed that many of these will be used primarily to facilitate removals, rather than voluntary returns, and may furthermore complement legally binding instruments already in place with such transit countries. To the extent that such arrangements provide for readmission of non-nationals and could be applicable to voluntary return situations, however, some general comments can be made. First of all, international law does not, in principle, resist expulsion of aliens to countries that are not under a clear legal obligation to readmit them. However, there should then be consent from the readmitting country. However, the absence of such a legal obligation may make it difficult to implement such arrangements in a predictable manner in practice, because they are dependent primarily on the political will of the transit country. It may well be argued that this is the case for all readmissions, regardless of the legal basis.[73] However, although they do not exclude non-cooperation by the transit country, agreements containing international legal obligations cement this commitment, and provide a clearer basis for addressing non-compliance. If international readmission obligations have meaning, therefore, the same must be true for the absence of such obligations. This,

69 Among which I also count police cooperation agreements, Political Cooperation Agreements, and Association Agreements, which are formally concluded between member states to create legal obligations, although in some cases the function may be more political than legal, see 2.8.

70 Also see EP 2010, p. 30, suggesting that Italy, Greece, France, Spain and the United Kingdom have particularly focused on ensuring more flexible readmission arrangements.

71 Cassarino n.d.

72 Cassarino n.d., dataset on France; dataset on Germany.

73 See, for example, Coleman 2009, p. 100, mentioning the role of goodwill of states to ensure proper implementation of readmission agreements.

I suggest, should particularly be evident from the basic presumptions about the readmission process. Where this is based on clear international obligations, there should be a presumption that, as long as relevant conditions are met, readmission will happen. This does not exclude factual information arising that would show the contrary, but the principle of good faith in international relations would at least provide for such a presumption. When such international obligations do not exist, the reverse may be true: the effectiveness of such arrangements cannot be presumed. Rather, it will have to be shown that they are capable of being effective. And this, initially, will be for the member state to establish. In particular, it will have to show that the rules set for readmission are sufficiently transparent and fair for third-country nationals, including that they provide for a safe return to the transit country.

The latter requirement follows logically from the general fundamental rights obligations of EU member states' in all cases of expulsion. However, informal arrangements may provide for specific risks, including because they may lead, even more so than formal readmission agreements, to an uncertain status of the returnee once readmitted. Informal arrangements also increase the risk of scrutiny being evaded, whether by the judiciary, monitoring bodies, parliamentarians, or others. Furthermore, although clearly imperfect in practice, formal readmission obligations should also be seen as entailing an acceptance by countries of return that they take formal responsibility for returnees.[74]

In the absence of international obligations regulating readmission, the conditions to be fulfilled could theoretically be whatever the transit country decides or informally agrees with the EU member state. This is a matter of state sovereignty in relation to the admission of aliens. However, this does not mean that such conditions are completely beyond the scope of regulation by international or EU law. For example, the EU member state cannot expect third-country nationals to meet conditions that are clearly discriminatory. Furthermore, additional demands by countries of return that would fall beyond the scope of individual responsibility, and which are applicable to all destinations, are discussed in Chapter 8.

Overall, the discussion of the role and possibilities of readmission inherent in other 'arrangements,' without detailed analysis of such individual arrangements, will necessarily have to stay somewhat general and inconclusive. Whether the requirements above are sufficiently met to require third-country nationals to pursue readmission to a transit country on the basis of such arrangements, and what legitimate expectations are in this respect, can only be properly assessed on a case-by-case basis. However, both practically and normatively, including from a fundamental rights perspective, the general role of such arrangements raises a lot of

74 For example, the EU readmission agreements discussed above contain so-called 'non-affectation clauses,' which reiterate the need for compliance with international human rights standards and the 1951 Refugee Convention.

questions. In my view, these cannot lead, as formal agreements do, to a situation in which third-country nationals can generally be expected to use the opportunities of return they provide. Rather, it puts a strong burden on the EU member state to show that such arrangements form an appropriate basis for obligatory and safe return of third-country nationals.

6.5 Conclusions

This chapter has examined the particular requirements that third-country nationals need to meet to gain readmission to transit countries, as one of the obligatory destinations under the Directive. It has set out the readmission obligations incumbent on transit countries and the implications that this may have for third-country nationals under the Directive. Since there are no generally applicable international obligations regarding the readmission of non-nationals, the specific implications will depend on the particular agreement in place. At the EU level, despite the repeated emphasis on their importance, specific readmission agreements have considerable limits in terms of their added value for return procedures, due to the small number of countries with which such agreements exist. Furthermore, even when these exist, they may exclude considerable numbers of third-country nationals found to be irregularly staying in EU member states, such as those enjoying visa-free travel or visa overstayers. Finally, the actual use of clauses covering non-nationals in EU readmission agreements may be limited, although this may be changing slowly.

When readmission agreements would be used for voluntary returns, there are various implications for third-country nationals and EU member states jointly, since the latter is usually required to take the appropriate steps. Especially the requirement that the EU member state should make a readmission application provides an odd fit with the notion of voluntary return. However, the fact that a third-country national has been granted a voluntary departure period does not preclude the member state from making a readmission application, thus ensuring that return can take place to a transit country. However, it cannot enforce a return to a transit country as long as the voluntary departure period is ongoing. If the member state does not make such an application, no readmission obligation on the transit country exists and voluntary return can thus not be effected to that country at any rate. Whether this falls within the individual responsibility of third-country nationals depends on an assessment whether the non-submission of the application is attributable to them. Non-submission by the member state, out of convenience or error, cannot be held against the individual. When no readmission application or prior notification by the EU member state is necessary, the third-country national can be expected to use this opportunity independently.

To enable the EU member state to submit a readmission application, the third-country national can be expected to provide relevant information and

evidence as necessary for this purpose. However, since various agreements are quite flexible as to the information they require, especially personal data, it will not easily be the case that a submission of a readmission application should be considered as impossible due to non-cooperation by the third-country national. When assessing whether omissions by third-country nationals in providing information can be considered non-compliance with the obligation to return must be assessed in relation to the impact on the possibilities of return, rather than just on non-cooperation. This also requires taking into account what information was already at the disposal of the member state which would have enabled it to make a readmission application.

Similar considerations relate to the provision of evidence that conditions for readmission are met. Again, the individual can be expected to provide the necessary evidence, but what is necessary is defined very differently in the various agreements. However, individuals can be expected, in principle, to obtain and provide evidence which will trigger the strongest obligation on the transit country. That is, they should aim to provide proof, rather than prima facie evidence. But what can reasonably be expected to be in their power to obtain and provide can only be assessed on a case-by-case basis. However, since readmission agreements provide for a very wide range of means of evidence, there can be a strong presumption that the individual can at least provide sufficient evidence to trigger some kind of obligation on the transit country, even if it is just to start a further investigation. In this respect, it is also significant that many readmission agreements accept as evidence statements from the individual on prior residence. In contrast to the discussion about statements of willingness to return in Chapter 5, these concern statements of fact, which third-country nationals can be expected to make.

Multilateral treaties on air and maritime traffic provide for certain obligations of readmission which may be applicable to transit countries, and could thus trigger an obligation to return there for third-country nationals. In addition to residence rights, this can be based on the transit country being a place of embarkation. However, while this could theoretically greatly expand the scope of readmission obligations on transit countries, their practical added value may be somewhat limited. For example, they only relate to persons who are inadmissible, who are often excluded from the scope of the Directive by member states. Furthermore, the obligations on transit countries as regards inadmissible persons (or stowaways) under the Chicago and FAL Conventions are limited to accepting such persons for examination. Nevertheless, since this obligation exists, this does provide a basis for member states to expect third-country nationals to try and seek readmission in countries of embarkation as part of the return procedure, even if the chances of success may be limited.

Other (non-binding) arrangements are also considered an appropriate basis for imposing on third-country nationals an obligation to return to a transit country under the Directive, if they at least meet the requirements

of accessibility and legal certainty already set out in Chapter 3. In practice, especially at the EU level, there do not appear to be arrangements covering non-nationals, but they may exist bilaterally. International law does not, in principle, resist returns to a country that does not have an obligation, under that international law, to readmit non-nationals, provided that the arrangements show a clear consent on the part of that country. However, basic presumptions about the effectiveness of readmission, as well as the extent to which the transit country takes formal responsibility for returnees, as under readmission agreements, must be reversed for such informal arrangements. This is particularly the case because such informal arrangements increase risks for the individual upon return and are more likely to evade judicial, democratic, and public scrutiny. For these reasons, I suggest, it would be appropriate to require the member state, first and foremost, to show that such arrangements conform to all necessary safeguards before they can give rise to an obligation to return for third-country nationals under the Directive. If this is the case, the conditions to be fulfilled for readmission, and thus the steps to be taken by the individual, are in principle up to the transit country, with some exceptions. For example, EU member states cannot expect third-country nationals to meet conditions that are clearly discriminatory, nor to acquiesce to other illegitimate requirements described elsewhere, especially in Chapter 8.

7 Identifying appropriate countries of return in the individual case: destination choice and safe return

7.1 Introduction

This chapter will conclude the discussion of third-country nationals' obligations in relation to seeking readmission to destination states, as the first key element of the obligation to return. Whereas Chapters 4 to 6 zoomed in on specific destinations – the country of origin and transit countries – this chapter will again take a step back and look at more overarching issues that may arise in relation to countries of return. This focuses on two particular issues: destination choice and ensuring safe return.

On the first point, there may be situations in which return to both a country of origin or a transit country may be possible in an individual case. Additionally, the option of returning to another third country may exist. While voluntary return aims to provide third-country nationals a measure of autonomy in making decisions about return, such decisions may also impact on the interests of the member state. This may particularly be the case in relation to the choices third-country nationals make as regards the destination countries to which they pursue return. States may want to enjoy the benefits of voluntary return on their part, in particular reduced costs and administrative burdens, as much as possible. Furthermore, they may be concerned with the timeliness of return. These benefits may not be the same for all destinations, since gaining readmission to some may take longer, would make assisted voluntary return more expensive, or – as discussed in the previous chapter regarding transit countries – may require the member state to take certain administrative steps itself.

Seen from this perspective, the member state may have specific ideas about which return destination is the most appropriate for the third-country national to pursue. For example, it may see return to a country of origin as the quickest and easiest way to ensure voluntary departure, and as relieving the member state from any administrative burden associated with triggering readmission agreements with transit countries on behalf of the individual. Conversely, the member state may know from experience that the third-country national's country of origin is slow or reluctant to cooperate in returns, and may therefore prefer to see him or her return to a transit country. Third-country nationals may have their own reasons to want to return to one country and not another. This may be related to the presence or absence of family or other social links, the socio-economic situ-

ation in the various destination countries, or concerns about their personal safety or more general security situation there.[1]

If the preferences of third-country nationals and EU member states do not match, this may give rise to questions about the extent to which the former are free to choose their destinations. Or, put conversely, whether member states can direct individuals to pursue return to a specific destination. This issue has two sides. First of all, the extent to which the individual's possibility to choose between multiple possible destinations, free from interference by the member state, is guaranteed during the voluntary departure period. This issue will be discussed in section 7.2, which will look at various foundations on which freedom of choice might be based: customary international law, particularly as captured by the ILC draft articles, the right to leave any country, and the right to return to one's own country. Furthermore, it will discuss the situation in which the individual prefers return to a transit country under readmission agreements, in the context of the fact that such return is not possible without the EU member state's action, which it may be unwilling to take if it sees return to the country of origin as more appropriate.

The second point relates to safety of return, and more specifically whether the prohibition of *refoulement*, which is reiterated in the Directive, has a role to play during the voluntary return stage. As noted, third-country nationals may wish to avoid certain destinations because of security concerns. In principle, the Directive would exclude returns to places where security concerns – whether related to the individual situation of the third-country national or the general situation in the country of return – reach the threshold of *refoulement*. However, although the prohibition of *refoulement* is explicitly incorporated in the Directive, its role is not immediately evident. Persons falling within its scope have already received a decision that they must return, which would normally also include a consideration of any barriers to return in relation to *refoulement*, especially within the context of asylum procedures. This would make the Directive's reference to the prohibition of *refoulement* largely rhetorical. This may be even more the case when it comes to voluntary return. The fact that the individual takes steps towards return to a specific destination may be taken by the member state as a sign that he or she shares its assessment that return can take place safely. Or, even more, that if the return entails risks, the third-country national has consciously accepted these risks and assumes responsibility for any adverse outcomes. With this in mind, section 7.3 will discuss in more detail the interconnections and tensions between the prohibition of *refoulement* and the concept of voluntary return in the Directive. It will particularly look at whether this prohibition can be anything more than a symbolic inclusion, whether the voluntariness of return negates member states' responsibilities

1 Even if their asylum claims have been assessed and rejected, this does not mean that, on a personal level, such security concerns disappear. Indeed, this may remain one of their main concerns, and therefore a key element of the decision to return. Also see 7.3.

in this regard, and whether voluntary return can be seen as a waiver of any risks involved in return by the individual. On the basis of this discussion, some ways in which the protection against *refoulement* can be made meaningful during the voluntary return stage of the Directive's procedure are presented. Conclusions to this chapter are provided in section 7.4.

7.2 Choice of destinations

The logic of voluntary return would dictate that third-country nationals, at least during the voluntary departure period, have the freedom to make their own choices as to their preferred destination of return. While this will normally be unproblematic, it was suggested above that this may sometimes clash with the member state's interests. This section will look at several possible legal foundations for freedom of choice of destinations, and the extent to which limits on that freedom might be imposed.

7.2.1 Expulsion and destination choice in (the preparation of) the ILC draft articles

The question whether a person faced with expulsion has the freedom to choose his or her destination has been touched upon briefly in the preparation of the ILC draft articles and, although the final articles do not specifically address this, some mention is made in the commentary to the articles. Most of the discussion below, as with the majority of academic work on expulsions, focuses on removal situations. Nevertheless, some of the conclusions may be translated to the specific setting of voluntary returns.

In 2006, the ILC's secretariat published an extensive memorandum in preparation for the discussions about the expulsion of aliens. The memorandum outlines some of the international legal scholarship on the question of choice of destinations. It mainly shows that this scholarship has remained divided. Nowak, for example, has noted that a state's sovereignty to expel aliens does not necessarily include a right to decide where an individual is deported, which he considers a decision that is "primarily the province of the deportee himself, as well as other States that grant him entry."[2] By contrast, Gaja suggests that expulsion is by its nature a negation of choice, since forced return is by definition against the individual's wishes.[3] He acknowledges, however, that from a human rights perspective, it could be argued that it is up to the individual to choose and "that the expelling State's interest is satisfied once the alien is removed from its territory," presumably regardless of where that is.[4] However, in line with my comments in 7.1, he also finds that "considerations of expediency and

2 Nowak 1993, p. 228.
3 Gaja 1999, p. 293.
4 *Ibid.*, p. 294.

costs may prompt the expelling State to disregard the individual's wishes."[5] Doehring also notes that "[a] duty of the expelling state to give the individual the possibility of choosing a receiving country is not recognized although this opportunity may be, and often is, granted."[6] This is hardly a clear endorsement of an obligation on the state to accept any choice made by the individual. In this respect it has also been noted that "[i]t would be difficult to hold that in principle the expelling State is under an obligation to accept the choice made by the individual."[7]

Analysing various sources, the memorandum concludes that the right of an alien to choose his destination in expulsion procedures remains "unclear as a matter of international law."[8] Similarly, it finds "a lack of uniformity in the jurisprudence of national courts of different States in terms of the discretion of the expelling State to determine the State of destination of an alien who is subject to expulsion," but also the right of an alien to choose his destination, and even the limitations on the right to make such a choice.[9] The memorandum concludes, however, that the notion that the expelling state should allow an individual to choose his country of return "may be particularly true in cases in which the alien agrees to or is given the opportunity to leave the territory voluntarily."[10]

The eventually agreed draft articles mention destinations only in relation to those to which states may legitimately expel aliens, and not the expellee's choices. However, the commentary to draft Article 22 that deals with this subject does note that the various permissible destinations listed do not necessarily result in an order of priority as to the destination of expulsion. While this gives the state flexibility in deciding where to expel an alien, it should also "take into consideration, as far as possible, the preferences expressed by the expelled alien for the purposes of determining the State of destination," in which the expelling state retains a margin of appreciation.[11] As such, the commentary goes on, Article 22(1) acknowledges that an alien subject to expulsion may express a preference as to the State of destination, and thus permits him or her "to make known the State with which he or she has the closest links, such as the State of prior residence, the State of birth or the State with which the alien has particular family or financial links."[12] But at the same, this provision gives the expelling state "the right to assess such factors in order to preserve its own interests as well as those of the alien subject to expulsion."[13] In contrast to the secretariat's

5 *Ibid*., p. 294.
6 Doehring 1992, p. 111.
7 Gaja 1999, p. 298.
8 ILC 2006, paragraph 493.
9 ILC 2006, paragraph 497.
10 ILC 2006, paragraph 489.
11 Commentary to Article 22, paragraph (1), p. 33.
12 Commentary to Article 22, paragraph (2), p. 33.
13 *Ibid*.

memorandum, the commentary to the draft articles does not comment on how this principle would apply specifically to voluntary return situations. However, given the logic of voluntary return, it could be assumed that the individual's preference for a destination would normally be accepted, unless the state, after balancing its own interests and that of the individual, would have weighty objections to the preferred destination. But that it would otherwise not seek to impose, initially, a particular destination on the individual.

Interestingly, in suggesting in the commentary that states should take into consideration the preferences expressed by the alien, the ILC refers to two specific human rights instruments. First, it makes a reference to the Convention on Migrant Workers (CMW), which in Article 22(7) provides that "without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than is or her State of origin." It also cites Article 32(3) of the 1951 Refugee Convention, which says that states should allow a refugee subject to expulsion "a reasonable period within which to seek legal admission into another country."[14] This suggests that the ILC sees the need to consider the preference of the alien more as a result of human rights obligations than of general (customary) rules of international law. The two instruments above are used to interpret the scope of draft Article 22, but do not appear to provide sufficient grounds to regard taking into account an alien's preferred destination as a self-standing rule or principle, as evidenced by the fact that it is not included in the draft articles. From the perspective of the Returns Directive, their application also remains doubtful. As noted, the CMW does not have any effect in EU law.[15] And while the Refugee Convention can clearly inspire fundamental rights as general principles of EU law, this specific provision covers those who are refugees (or perhaps in a wider reading recipients of international protection). Although the requirement of Article 32(3) may well apply in situations in which a member state has withdrawn protection, it would be difficult to justify using this as a general rule for all third-country nationals faced with a return decision. However, the reference to these instruments does open up the possibility that a choice of destination could indeed be protected by human rights law. As I suggest below, however, this protection may be more usefully found in the right to leave and (to a more limited extent) in the right to return.

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14 Although Grahl-Madsen has argued that this would not apply in cases in which another country of refuge has a duty to readmit the person, "in which case he may be returned to that country without delay." See Grahl-Madsen 1997, commentary on Article 32, paragraph 11.

15 Although arguably the CMW does not create new rights, but rather restates existing rights, , in the specific context of the protection of migrant workers and their families, see UNESCO 2005, p. 7. This may then include those that do have effect in EU law.

7.2.2 The right to leave as a right to choose one's own destination?

In Chapter 2, it was noted that the right to leave any country, including one's own, as protected by the ECHR and ICCPR, should be regarded as a fundamental right under EU law. And furthermore, that this right continues to have relevance in situations in which the departure of a third-country national from an EU member state is compulsory, as in the case of the Directive. An important implication of the right to leave is that it touches upon the right to choose a destination. This is evident, for example, from the HRC's General Comment No. 27, which notes that, whilst there is no unrestricted right to travel to any country as one sees fit,[16] "the right of the individual to determine the State of destination is part of the legal guarantee" provided by Article 12(2) ICCPR.[17] Given that persons in expulsion proceedings are also entitled to enjoyment of their right to leave, "an alien being legally expelled from the country is likewise entitled to elect the State of destination, subject to the agreement of that State."[18] Similarly, the ECtHR has found that the right to leave, as guaranteed by Article 2(2) of Protocol 4 ECHR, "implies a right to leave for such country of the person's choice to which he may be admitted."[19] While the right to leave is not absolute, any restrictions of this right must be in accordance with law and necessary to protect national security, public order, public safety, public health or morals, the prevention of crime, or the protection of the rights and freedoms of others.[20] However, any restrictions to achieve such aims should also be proportionate. It will be up to the member state to justify any action that would lead to interferences with third-country nationals' pursuit of return to their preferred destination. In this respect, it should be noted that interferences with the right to leave can be both direct and indirect.[21]

16 See, for example, HRC *Lichtensztejn* [1983], paragraph 8.3; HRC *Varela Nunez* [1983], paragraph 9.3.

17 HRC General Comment No. 27, paragraph 8.

18 HRC General Comment 27, paragraph 8. Also see General Comment 15, paragraph 9: "Normally an alien who is expelled must be allowed to leave for any country that agrees to take him."

19 ECtHR *Baumann* [2001] paragraph 61; ECtHR *Napijalo* [2003], paragraph 68. It should be noted that in both judgments, the situation was not one of expulsion, but one in which the applicant was prevented from leaving a country (by confiscation of their passports) due to ongoing criminal proceedings. However, the Court clearly states that Article 2(2) of Protocol 4 intends to secure protection of the right to leave "to any person." Also see my comments on this in 2.3.1.2. Also see Council of Europe Commissioner for Human Rights 2013, p. 6: "States are not entitled to place obstacles in the way of foreigners leaving their countries irrespective of where the foreigners seek to go."

20 Article 2(3) of the Fourth Protocol to the ECHR, and Article 12(3) ICCPR set out permissible restrictions in largely similar terms. For a discussion of such restrictions, see, for example, Commissioner for Human Rights 2013; Harvey & Barnidge 2005.

21 Inglés 1963, pp. 36-55.

Perhaps the most likely scenario in which an EU member state exercises control over the destination of voluntary returnees is when their travel documents have been confiscated, a matter that has already come up earlier, and will be discussed later as well.[22] The issue of confiscated travel documents not being handed back to third-country nationals to make return to their preferred destination possible has come up in several ways in the Netherlands. A previous version of the Aliens Act Implementation Guidelines (*Vreemdelingencirculaire*), provided that travel documents would only be handed back to third-country nationals aiming to return to another third country if they could show evidence of having made arrangements to return (in the form of a ticket) and of holding a residence authorisation that would be valid for at least one year. Although this provision was later removed, there have been several reports of similar practices continuing. In 2015, for example, it was reported that a group of Syrian asylum seekers had decided to return voluntarily before any decision on their asylum application had been made, including due to concerns over the situation and health of family members left behind. But they had been unable to get their travel documents back in order to apply for a visa for Turkey or Jordan.[23] Another illustrative case arose in 2019, when a rejected asylum seeker from Bahrain was arrested, convicted to a life sentence, and allegedly tortured, after being removed by the Netherlands. The person in question had asked to return to Iran, but his passport had not been handed back to him to obtain the necessary visa, on the assumption that he would not be admitted to Iran anyway. A subsequent investigation by the Inspectorate for Security and Justice found that this was not the case, and that he may have been admitted by Iran, and thus have avoided return to Bahrain.[24]

Confiscation of travel documents, in and of itself, is an interference with the right to leave, since travel documents are a *sine qua non* for international travel.[25] In this specific context, confiscation can become a tool to push a third-country national towards returning to a particular destination, or preventing return to another destination. This is the case if these documents are only returned, for example, when third-country nationals agree to present themselves to the consular representation of their country of origin,[26] or if they can show they have purchased tickets to the member state's preferred destination. The confiscation of documents may

22 See 8.4.1.

23 Winters 2015.

24 Van Laarhoven 2019; NOS 2019. It should be noted that this concerned a person eventually detained in the Netherlands for the purpose of removal, but this appears to have been after already having attempted to make an appointment with IOM for the facilitation of his voluntary return to Iran. It should further be noted that this incident clearly also raises questions about the extent to which the assessment of the person's asylum claim was adequate, but this is another matter.

25 Inglés 1963, p. 13; Turack 1972; Hannum 1987, p. 20; Torpey 1999; Boeles et al 2014, p. 120.

26 On contacts with consular representations and restrictions, see Chapter 8.

particularly happen in the context of the imposition of measures to prevent absconding under Article 7(3) of the Directive. This would ostensibly give such action a legal basis. Furthermore, the prevention of absconding may well be accepted as a legitimate aim, since both the HRC and the ECtHR have recognised a broad range of state interests as being capable of fulfilling this requirement.[27]

However, while the confiscation of documents may be necessary to prevent absconding in general, it would be much more difficult to justify that this objective could only be pursued if third-country nationals return to the member state's preferred destination. In such a situation, at a minimum, the member state would have to show that a third-country national's pursuit of a different destination would in fact just be a way to circumvent return obligations and be used to abscond. The fact that return to third-country nationals' preferred destinations would be slower or more bureaucratically cumbersome would not, in my view, be sufficient reason to interfere with their choice in this way. After all, this would fall within the scope of autonomous action which voluntary return allows. In this way, other interferences, including issuing direct instructions to third-country nationals to pursue return to a specific destination country (possibly with sanctions for non-compliance) would also be difficult to justify as necessary if these are only based on considerations of speed or convenience of the return.

7.2.3 The right to return to one's own country and interferences with choice

The above shows that the choice of destination, as a general principle, enjoys protection, although it may be open to interferences by the member state if sufficiently justified. However, to this must be added that the right to choose some destinations may enjoy special protection. This, I suggest, is the case for the choice of third-country nationals to return to their own country. As discussed in Chapter 4, return to one's country of origin, which largely (but not fully) overlaps with an individual's own country under human rights law, is normally the primary option. As such, if third-country nationals want to return to their own country, this should not normally lead to conflict with the interests of the member state. However, as also mentioned above, this may be different if the member state has doubts that return to that country will materialise in time, and sees better possibilities for effective return to a transit country, for example on the basis of a readmission agreement. The particular protection of return to the one's own country is noted, to some extent, in the ILC secretariat's memorandum:

> *"The right to enter or return to the State of nationality or one's own country may be of special significance to aliens who are subject to expulsion from the territory of a State.*

27 See, for example, ECtHR *Stamose* [2012], in which the Court appears willing to accept broad-ranging migration control considerations as a legitimate aim.

> *Even if the expelled aliens do not have a general right of choice with respect to destination under international or national law, aliens who are subject to expulsion (in contrast to extradition) may have the right to return to their State of nationality or their own State rather than being sent to a third State. This right may be recognized in the national laws and constitutions of States."*[28]

The finding that the right "may be" recognised, however, is far too careful, in my view. After all, this right is clearly established in international instruments which are broadly ratified, and, in the context of the EU, bind all member states. Furthermore, to the extent that individuals are nationals of the preferred destination country, this right is protected by the ECHR and should be considered as applicable to EU law as a general principle.[29] The right to return provides protection of the right to choose in addition to and above the right to leave. It is not qualified by a limitation clause, and considered, at least in the ICCPR, as virtually absolute. In my view, this means, at the very least, that any coercive means used by a member state to prevent a third-country national from pursuing readmission to one's own country would be unlawful in all but the most exceptional cases.[30] This is not the same as the member state informing third-country nationals about what it sees, on the basis of its experience, as appropriate return options. For example, a member state may inform third-country nationals that attempts to gain admission to another third country to which they want to return are rarely successful. And that, if they choose to pursue this option to the exclusion of others, there is a high likelihood of failing to meet their obligation to return within the voluntary departure period, which may lead to the use of coercive measures to enforce the return decision. However, this cannot be accompanied by undue pressure to follow the member state's preferred option.[31]

It should be noted that the issue of preference is not only a matter of the right to leave or return. It may also interact with other rights. For example, in *Ozdil and Others v. the Republic of Moldova*, the ECtHR considered the legitimacy of deprivation of liberty for the purpose of removal under Article 5(1)(f) ECHR of applicants who had expressed fear of returning to their country of origin, which was Turkey. One consideration, albeit arguably a minor

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28 ILC 2006, paragraph 503 and footnote 1197 with relevant references.

29 See 2.5.3.

30 On this point, also see the individual opinion of HRC members Chanet, Aguilar Urbina, Ando and Wennergren in HRC *Giry* [1990]. The case concerns a French national who had been arrested in the Dominican Republic and forced to take a flight to the United States, rather than his intended destination, Saint-Barthélemy. In this respect, the members note that "preventing him from travelling to another country of his choice and since he was obliged, against his will, to take a flight other than the one which he would have taken, the arrest in question also constitutes, in our opinion, a violation of article 12 of the Covenant." The members do not specifically refer to the right to leave or to return, which are both part of Article 12 ICCPR, but may have had the latter in mind as well, since Saint-Barthélemy is part of France.

31 On the issue of undue pressure, see 7.3.

one, in its finding that there had been a violation included the fact that "the Moldovan authorities not only failed to give the applicants the choice of jurisdiction to be expelled to, but deliberately transferred them directly to the Turkish authorities."[32] It is not entirely clear how the Court weighs this circumstance, although it may be considered evidence that deprivation of liberty was not necessary since the applicants could have left for another country. However, in the context of voluntary return the connection to deprivation of liberty would not be a relevant issue, since this would relate only to the enforcement stage.

7.2.4 A transit country as the third-country national's preferred destination

In Chapter 6, return to transit countries under EU readmission agreements was discussed. There, it was noted that this raises questions about the interaction between third-country nationals and the EU member state, since return under such instruments is only possible, in most cases, if the latter makes a readmission application or provides the transit country with a written confirmation. This was discussed from the perspective of the member state's ability to do so without the individual's consent. But we may also approach the question of the member state's and third-country national's respective responsibilities from the other side. That is, whether third-country nationals can require member states to trigger transit countries' readmission obligations on their behalf, even if the member state does not want to do so. After all, if a transit country is a third-country national's preferred destination, lack of action by the EU member state would deny him or her the possibility to act on this preference.

At first glance, in the light of the discussion in Chapter 6, it would appear that triggering a readmission agreement is a matter of discretion for the EU member state. It is simply one of the instruments available to EU member states to ensure return takes place. But it will generally be left up to that member state which instruments to use and when to do so. However, readmission agreements are specifically referenced in the Directive. Its preamble, for example, acknowledges the importance of readmission agreements "to facilitate the return process."[33] Furthermore, member states are under obligation to ensure the effective implementation of the Directive. The CJEU has found, for example, that the member state should "act with diligence" to take a position "without delay" on the legality of a third-country national detected.[34] Similarly, it should issue a return decision as soon as it is found the third-country national is unlawfully in the member state.[35] Moreover, once this becomes relevant, their removal should

32 ECtHR *Ozdil* [2019], paragraph 54.
33 RD Recital 7.
34 CJEU C-329/11 *Achughbabian* [2011], paragraph 31.
35 CJEU C-61/11 PPU *El Dridi* [2011], paragraph 35; CJEU C-329/11 *Achughbabian* [2011], paragraph 31; CJEU C-38/14 *Zaizoune* [2015], paragraphs 31-32. Also see Boeles 2011, p. 42.

be carried out as soon as possible.[36] All this is in the service of the effective fulfilment of the objectives of the Directive, for which member states are responsible. From that perspective, member states can be expected to utilise readmission agreements to the extent that this is necessary for the successful conclusion of a return procedure. Arguably, therefore, a member state would be acting in violation of EU law if it would fail to trigger a readmission agreement with a transit country if other options, such as direct return to a country of origin, would be ineffective. This should apply regardless of whether the procedure is in the voluntary or the forced return stage.

This does not answer, however, whether third-country nationals can lay a claim on an EU member state to put readmission agreements into play, if the question is not whether return can be effective, but rather, if this means that they can return to their preferred destination. The Directive's preamble, however, also reiterates the priority of voluntary return and that "Member States should provide for enhanced return assistance."[37] Although such assistance will normally be seen as assisted voluntary return services,[38] and the recital is not part of the operative part of the Directive, one could read in it a general principle that member states should facilitate voluntary return to the extent possible. Given the acknowledged importance of readmission agreements, it could be argued that member states use these as possibilities to facilitate voluntary departure. Moreover, next to effective return, a key objective of the Directive is to preserve fundamental rights. Voluntary return plays a crucial part in this.[39] As such, member states can be expected to give due effect to the priority of voluntary return, as a key principle of the Directive. I would thus venture that if it is reasonably within the powers of the member state to trigger a readmission agreement if the third-country national so requests, it can be required to do so. This would also be a specific expression of an arguably wider requirement on member states to cooperate constructively with third-country nationals to enable them to enjoy the opportunity to return voluntarily. This could be seen as a counterpart to implied obligations of cooperation by the individual, which are necessary to make return effective. Indeed, the recast of the Directive particularly emphasises the need to strengthen cooperation, although mainly as one-way traffic, implying duties incumbent on the individual, rather than on the member state. However, other EU legislation, such as the recast Qualification Directive, sets out more specific reciprocal cooperation obligations, when this is necessary for the effective achievement of its objec-

36 CJEU C-430/11 *Sagor* [2012], paragraph 43; CJEU C-38/14 *Zaizoune* [2015], paragraph 34.
37 RD Recital 10.
38 See 9.3.
39 See 1.2.1.2 and the discussion of voluntary return as a proportionality mechanism in relation to fundamental rights in 10.2.3.

tives.[40] As suggested above, a similar necessity might arise in the context of the Returns Directive, especially since allowing third-country nationals to enjoy voluntary return will also bring the other objective of the Directive, effective return, closer.

While they may thus generally be expected to do so on the request of individuals, at a minimum, the onus would be on member states to put forward substantial reasons why they will not trigger a readmission agreement on behalf of the third-country national. One reason could be that the readmission procedure set out in the agreement cannot be completed within the voluntary departure period, and therefore cannot lead to timely compliance with the obligation to return. However, this will be difficult to establish on the basis of the agreements themselves, because these usually set maximum time frames for replies and readmission, but procedures could be completed sooner. Furthermore, it may also require the member state to justify why, in the specific circumstances of the case, it will not extend the voluntary departure period so that the third-country national can return to the preferred destination.[41]

7.3 Avoiding unsafe returns: voluntary return, non-*refoulement* and questions of responsibility

This section turns attention to the question of safe returns to destination countries. The lack of a possibility of safe return may make a destination that is otherwise obligatory – according to the criteria set out in Chapter 3 – a place to which return cannot take place. Although the Directive does not refer to safety of return as such, the development of its text, as well as the wider consideration of the need for priority for voluntary return, has often been framed in terms of ensuring return "in safety and dignity."[42] More concretely, a requirement of safe return could be surmised from the general requirement that the implementation of the Directive is in accordance with fundamental rights as general principles of EU law, and international law, including refugee protection and human rights,[43] and particularly the explicit requirement to respect the principle of non-*refoulement*.[44] This principle can be summarised broadly as the obligation not to return individuals

40 Directive 2011/95, Article 4(1) provides that, in addition to the duty of applicants to provide all elements needed to substantiate an application for international protection, "*[i]n cooperation with the applicant*, it is the duty of the Member State to assess the relevant elements of the application" (my emphasis).

41 See 11.3.2.

42 See, for example, the Council of Europe's Twenty Guidelines for Forced Return, which, as mentioned, provided an important source of inspiration during the Directive's negotiations (see 2.9), commentary, background, paragraph 1. Also see the Global Compact for Safe, Orderly and Regular Migration, UNGA resolution A/RES/73/195, Objective 21.

43 RD, Article 1.

44 RD, Article 5.

to any place where they would face serious violations of their fundamental rights. This covers situations in which they would be subjected to a real risk of persecution on the grounds set out in the 1951 Refugee Convention,[45] but also exposure to a real risk to their right to life, including the death penalty, or to torture or inhuman or degrading treatment.[46] Other fundamental rights may also sometimes trigger non-*refoulement* obligations, but this is much more rarely the case. While the principle of non-*refoulement* is beyond dispute more generally, it is not immediately obvious how it relates to the situation of third-country nationals that are of interest in this dissertation, for which member states have already determined that they can be returned safely in line with relevant EU law.[47] The fact that they may return voluntarily, and therefore themselves take action to go to a specific country, may further raise doubt over the relevance of non-*refoulement* obligations of the member state in this respect, because it would be individuals who are exposing themselves to such risks, rather than the member state. On the other hand, the prohibition of *refoulement* in the Charter is set out quite broadly, prohibiting that anyone is "removed, expelled or extradited" to a serious risk of such treatment.[48] The Refugee Convention, furthermore, prohibits expulsion or return to persecution "in any manner whatsoever."[49]

In line with the discussion in Chapter 2, in which voluntary return was considered a form of expulsion, this would appear to indicate that this prohibition applies to all situations in which third-country nationals are compelled to return. In this section, I will discuss the interconnection between the principle of non-*refoulement* and voluntary return, and ultimately, what this means for third-country nationals' and member states' respective responsibilities to ensure safe return. Below, the relevance of non-*refoulement* in the Directive is first addressed generally. This is followed by a longer discussion of the specific link between voluntary return and responsibility. And finally, by a consideration of the implications for third-country nationals who are reluctant to return to specific destinations. Paragraph 7.3.1 will look at the way *refoulement* is embedded in the Directive, while 7.3.2 discusses whether the voluntariness of return might negate member states' obligations in relation to *refoulement*. The implications of the findings in that paragraph are discussed in 7.3.3, while 7.3.4 looks at ways in which the protection against *refoulement* can be given meaning in the context of voluntary return.

45 Refugee Convention, Article 33(1).
46 CFR Article 19(2); ECHR Articles 2 and 3; ICCPR Articles 6 and 7.
47 Directive 2011/95 (the recast Qualification Directive).
48 CFR Article 19(2).
49 1951 Refugee Convention, Article 33(1). Such persecution may involve other human rights violations than those covered in CFR Article 19(2). For a non-exhaustive overview of acts that could qualify as persecution, see Directive 2011/95/EU (the recast Qualification Directive), Article 9(2).

It should be noted that looking at safety of return through the lens of *refoulement* is necessarily somewhat limited. Even for those whose claims to non-return on the basis of *refoulement* have been thoroughly assessed and rejected by the member state, individuals may continue to worry about the safety of return. Indeed, this may be a key element in their decision whether or not to (cooperate in) return.[50] It is difficult to account for such personal perceptions of insecurity in this context. However, as will be noted below, there may be situations in which such concerns have not been adequately addressed before a return decision was issued. Furthermore, the discussion in section 7.4 will address, to some extent, this matter.

7.3.1 Non-*refoulement* in the Directive: a symbolic inclusion or real function?

The Directive makes multiple references to the prohibition of *refoulement*.[51] Nevertheless, it is not immediately obvious what role this prohibition can truly play once a third-country national comes within the Directive's scope. After all, the Directive itself neither deals with questions of admission (whether third-country nationals can stay in a member state) nor with decisions on expulsion (whether they can be required to leave). Rather, it just sets the framework for ensuring the return of those for whom member states have decided that expulsion is legitimate. Questions of the possible risk of *refoulement* will usually have to be addressed in relation to substantive decisions on admission and expulsion. Third-country nationals can make an appeal on member states to grant them a right to stay, particularly through asylum procedures, if they fear serious violations of their rights upon return. Such risks may also emerge when individuals are found to be irregularly staying in an EU member state, in which case the legitimacy of the expulsion must be assessed. Often, the two will overlap. If third-country nationals cannot be expelled to their country of origin due to fundamental rights reasons, this will often also trigger a right to asylum or other right of stay. This overlap is not complete, however. If expulsion is not possible, for example, to a transit country for fundamental rights-related reasons, return to the country of origin may still be required. Similarly, individuals' concerns about risks in their country of origin may be left aside when the member state considers they can be denied asylum because they could return to a safe third country.[52] In addition to rejection of asylum on non-substantive grounds, such as admissibility,[53] certain third-country nationals may also be excluded from protection.[54] Such persons can then be faced

50 See, for example, Van Wijk 2008; Goodman et al 2015.
51 RD Recital 8 and Articles 4(4)(b), 5(c) and 9(1)(a).
52 Directive 2013/32 (recast Asylum Procedures Directive), Article 38.
53 Directive 2013/32, Article 33.
54 Directive 2011/95, Article 12, mirroring the exclusion clauses in the 1951 Refugee Convention.

with a return decision and come within the scope of the Directive, even when they may not be returned to their countries of origin for fundamental rights reasons.[55] In the Netherlands, for example, the question of return of so-called '1F' cases – referring to those excluded as undeserving of protection in line with Article 1F of the Refugee Convention – is a long-standing dilemma, especially as regards Afghan nationals. Many of these had been excluded because of their links to the former security and intelligence services in Afghanistan, and the associated assumption that, due to this link, they had been complicit in the commission of serious human rights violations. While being unable, due to risks of retaliation and thus the risk of *refoulement*, to return to Afghanistan, these 1F cases, as so-called 'undesirable aliens'[56] remain under obligation to leave the Netherlands.[57]

Beyond such situations, there may be practical reasons why *refoulement* risks are not caught and addressed in all cases of persons eventually issued a return decision. In an ideal world, the best way to catch *refoulement* risks is through an asylum procedure, provided that it is fair and effective. However, the Directive does not make a distinction between persons who have been through an asylum procedure (and subsequently rejected) and other persons who do not, or no longer, have a right to stay in the member state. After receiving a return decision, they are all under the same obligation to return. This means that for at least a (substantial) group of third-country nationals faced with a return decision, no such assessment has been made. It could be argued that, in principle, it is possible for every person, also those considered 'normal' irregular migrants, to put forward an asylum claim to have *refoulement* risks assessed by the authorities. A person who does not, it would follow, has no *refoulement*-related concerns and can be returned without problem. This might be true in an ideal world but may run into problems in practice. First of all, asylum systems in several EU member states have proven to be very dysfunctional, with even gaining access to procedures hugely problematic.[58] Furthermore, increasingly restrictive asylum policies may push people who do have legitimate concerns underground. As Gibney has noted, there may be a growing group of third-country nationals who, not trusting that they will get protection, will prefer to seek "informal asylum." They may try to avoid any contact with the authorities to ensure that they can stay in the EU member state

55 Majcher 2020, pp. 105-106, 114.

56 A category that may also include persons denied a right of residence due, for example, criminal acts in the Netherlands.

57 For a detailed discussion, see Bolhuis, Battjes & Van Wijk 2017; Van Wijk & Bolhuis 2019. In view of the discussion in Chapter 3, such an obligation to return can only extend to transit countries, once the country of origin is excluded as a viable option, since other third countries cannot be considered obligatory destinations under the Directive.

58 See, for example, ECtHR *M.S.S.* [GC][2011]. On delays in registering for asylum more generally, see ECRE 2016a, p. 3.

irregularly, thus avoiding return to their countries where they might face human rights violations.[59]

As such, there are multiple scenarios in which persons that may have legitimate concerns about persecution or lack of security upon return are not recognised as such through an asylum or other admissions procedure. In such cases, the safeguards against *refoulement* in the Directive should act as "the last safety net."[60] Whether it can do so effectively, however, has been a matter of contention, with various commentators arguing that the Directive's procedure would still create risks that persons would be returned despite facing *refoulement*-related risks.[61] Majcher, in particular, has provided an in-depth analysis of the safeguards against *refoulement* in the Directive, noting that it "contains flaws in terms of the actual implementation of this principle in practice."[62] She finds, for example, that it lacks an explicit prohibition to issue a return decision when a return would violate the prohibition of non-*refoulement*, making the return, in principle, enforceable.[63] Additionally, she finds the Directive lacks mandatory safeguards ensuring that persons who cannot be expelled because of *refoulement*-related risks do not enter the return procedure, and that safeguards only kick in at the enforcement stage.[64] Such safeguards particularly comprise the requirement that removal is postponed when this would violate the prohibition of *refoulement*,[65] but they are not accompanied by an automatic pre-removal risk assessment.[66] At any rate, Majcher notes, there is no requirement to withdraw the return decision in such cases, creating the risk that persons whose removal has been postponed are left in legal limbo indefinitely.[67]

While such gaps in the safeguards to prevent *refoulement* are troubling in the overall scheme of the Directive, they may be particularly acute in relation to voluntary return. In this respect, Majcher's observation that "[i]t is only at the enforcement stage of return proceedings that the Directive intervenes" is especially significant.[68] This implies that for those who return voluntarily, such an already limited safety net might not exist. Ironically,

59 Gibney 2009, p. 25.

60 Majcher 2020, p. 107. She also notes that the Directive does not provide any limitation on its protection against *refoulement*, therefore also extending to people who have been excluded from protection under the recast Qualification Directive still enjoying the absolute protection against return to a serious risk of being subjected to the death penalty or to torture or inhuman or degrading treatment or punishment, in line with Article 19(2) of the CFR.

61 Baldaccini 2009; Cavinato 2011, pp. 48-49.

62 Majcher 2020, p. 112.

63 *Ibid*., p. 113. Although she also notes this may be mitigated to some extent by the fact that Article 6(4) RD allows member states not to issue a return decision for compassionate, humanitarian or other reasons, but that this is discretionary and perhaps not an appropriate way to frame *refoulement* risks, see Majcher 2020, p. 114.

64 *Ibid*., p. 115.

65 RD Article 9(1).

66 Majcher 2020, p. 115.

67 *Ibid*.

68 *Ibid*.

then, for some irregular migrants forced removal may provide more extensive safeguards against *refoulement* than its 'human rights-friendly' counterpart voluntary return. It is in this context that further examination of the relationship between voluntary return and the prohibition of *refoulement* is necessary.

7.3.2 Does voluntary return negate member states' responsibility for *refoulement*?

When member states enforce a return decision, this provides a clear trigger for their non-*refoulement* obligations. However, during the voluntary return stage, it is the individual who is taking steps towards return. In this paragraph, therefore, the question is addressed how such a situation, in which the third-country national is primarily responsible for return, relates to the obligations of the member state to prevent *refoulement*. This is done, first of all, by examining whether the fact that the third-country national returns voluntarily can be considered as a general indication that return is safe. And second, even if this is not necessarily the case, whether the voluntariness of the return would constitute a waiver by the individual of his or her right to be protected against *refoulement*, and therefore releasing the member state of its obligations in this respect.

7.3.2.1 Voluntary return as a sign of safe return?

Given that voluntary return allows for a certain degree of autonomy for third-country nationals as regards their return, it may be presumed that they would seek to avoid returning to any situation where they would fear facing serious violations of their fundamental rights.[69] From this perspective, the fact that a person engages in voluntary return could be considered a guarantee of safe return in and of itself. However, it is highly questionable that such reasoning would hold in all cases. First of all, it presumes a clear choice, not just in the abstract, but also in practice, between different destinations. Such a choice might not always exist because multiple viable destinations cannot always be identified. Or when they can, there may be problems in ensuring readmission. Furthermore, even if it is technically possible to choose between destinations, there may be important reasons for individuals to return to the riskier destination nonetheless. For example, they may feel unable to return to a transit country due to the lack of links

69 In some cases, the voluntary return of other persons to the same destination may even be used as an indicator of safety. In some cases, for example, the ECtHR has taken the fact that former refugees had been returning voluntarily to a country as one of the factors in considering whether an applicant might be at risk of treatment contrary to Article 3 ECHR upon return. However, it only ever appears to have used this as an element in a wider consideration of such risks, and never as the only, or even deciding, factor. See, for example, ECtHR *Cruz Varas* [1999], paragraph 80.

there, which may cause considerable problems in surviving. From a legal perspective such problems must be extremely severe to take a destination out of play for the purposes of the Directive. But for individuals themselves, even if this standard is not met, the problems faced may be of such nature that they feel unable to return to a particular destination.

But other reasons to return to a place where they face risks might also exist, such as the situation of family members. The example provided in 7.2.2 above about the group of Syrian asylum seekers having trouble getting their travel documents back from the Dutch authorities is telling in this respect. One of those interviewed recounts the situation of his wife, who stayed behind in Syria. While moving to Lebanon by car with her parents, he says, they had an accident, which killed the parents, but his wife survived. He states: "My wife is not well. She is depressed. I have to go to her." Another person interviewed says he needs to return because his wife, also left behind, was diagnosed with cancer and she has no money for medicines.[70] Furthermore, while still in the member state, persons faced with a return decision may face a number of difficulties due to their irregular status, which may create push factors to opt for return,[71] despite possible security concerns. This may result, for example, from the lack of access to accommodation or other basic services, limits on access to health care, difficulties of finding employment and providing for oneself, or the general uncertainty of irregular life, as well as the prospect of eventually being detained and removed. In the individual case, a large variety of factors may thus lead to action by individuals to return, even if security concerns persist. In some cases, voluntary return may even be taken up as a coping mechanism to deal with such concerns, for example, because such a return may attract less attention by the authorities of the country of return than (escorted) removal[72]. As such, it must be concluded that, at least in the abstract, the fact that third-country nationals take up voluntary return does not necessarily indicate that they do not have legitimate concerns about their safety.

7.3.2.2 Voluntary return as a waiver for protection against refoulement?

This then leads to a second issue. Even if it can be assumed that voluntary return does not provide evidence of the absence of harm upon return, the exposure to any harm is still the result of the third-country national's own steps to return. How does this relate to member states' responsibilities and the obligatory nature of return? It has been posited that, if the return of an

70 Winters 2015.

71 Van Wijk 2008, pp. 23-24, rather identifies these as 'deter' factors, which encourage third-country nationals in an irregular situation to leave.

72 This may be the case, for example, to avoid punishment in case of return to Eritrea, as discussed in 4.2.5.2. In the ECtHR case of *N.A. v. Finland*, discussed below, this was also provided as one of the reasons for opting for voluntary return.

alien to a situation of danger is his or her own choice, this would relieve the state from its obligations to protect him or her from *refoulement*.[73] It could be argued that by returning voluntarily, *refoulement* is 'self-inflicted' by the third-country national, and thus not within the scope of the member state's responsibility. However, it has also been noted that voluntary return is simply one of the ways to effect expulsion by the member state and that "the individual would not leave were it not for the expulsion."[74]

Perhaps the most elaborate consideration of the issue of 'self-inflicted' harm in relation to states' human rights obligations can be found in the case law of the ECtHR. In particular, it has considered, in relation to various rights, whether individuals could waive these rights, and thus states' responsibility for the consequences. In *Scoppola v. Italy (Nº. 2)*, for example, the Court dealt with an applicant who had explicitly waived certain fair trial rights, guaranteed by Article 6 ECHR, but subsequently argued he had not done so voluntarily. The ECtHR found that Article 6 did not prevent a person waiving rights of their free will, either expressly or tacitly, but that such a waiver must be established "in an unequivocal manner" and attended by "minimum safeguards commensurate with its importance."[75] This has subsequently acted as an important reference for questions regarding the possibility to waive other rights, including the prohibition of torture or inhuman or degrading treatment (Article 3 ECHR) in expulsion proceedings. In particular, in various cases, the ECtHR had to consider whether an individual agreeing to return voluntarily would constitute such a waiver, surrounded by sufficient safeguards.

In 2012, it considered this in the case of *M.S. v. Belgium*.[76] The case concerned an Iraqi national who had sought asylum in Belgium but who had been rejected, including due to posing a national security threat on account of his alleged links to terrorist groups. He had been detained repeatedly and for prolonged periods while the Belgian authorities had tried to secure his removal, as well as exploring options for removal to a third country. Eventually, the applicant acquiesced to return to Iraq with help from IOM, despite knowing he would be arrested there, if Belgium would provide him with a sum of money that was supposed to help him deal with legal proceedings and take care of his family. Upon return, he was indeed arrested and detained. In his complaint, he objected that he had only agreed to return 'voluntarily' because of the prospect of indefinite detention in Belgium, that this was the only way to be closer to his family left behind in Iraq, and that he had "lost hope."[77] The ECtHR found that, in his situation, the applicant was faced with several choices: stay in Belgium

73 Coleman 2009, p. 248, also referring to Goodwin-Gill 1978. Neither provide more discussion of the grounds for such an assumption, however.
74 Gaja 1999, p. 289.
75 ECtHR *Scoppola (No. 2)*[2009], paragraph 135.
76 ECtHR *M.S. v. Belgium* [2012].
77 *Ibid*., paragraph 107.

without any hope of obtaining legal stay and without a concrete perspective of living in liberty; return to Iraq despite the risks faced; or to go to a third country, which did not turn out to be an option that the Belgian government could realise. In this light, the applicant could not be considered to have properly waived his right to protection under Article 3, and the return should therefore be considered as a forced return, being able to trigger Belgium's responsibility.[78]

The *M.S.* case may not be the best benchmark for the question of voluntary return as a waiver of the protection of Article 3 ECHR, at least in relation to the Directive. After all, the applicant made this decision when already detained. Although there is an increasing practice of so-called 'assisted voluntary return from detention,'[79] it is doubtful this can be considered voluntary return within the meaning of the Directive, since detention only becomes viable during the enforcement stage.[80] A more relevant judgment was delivered in 2019, in the case of *N.A. v. Finland*, which considers the issue of voluntary return as a waiver of both Article 2 (the right to life) and Article 3 ECHR at some length.[81] The case concerns an Iraqi national who had sought asylum in Finland, and who had participated in an assisted voluntary return to Iraq after his asylum request was rejected. Shortly after his return to Iraq, he was allegedly killed. A complaint was lodged with the ECtHR by N.A., his daughter.

A significant part of the case deals with the question whether the Finnish authorities had adequately assessed the risks faced by N.A.'s father during his asylum procedure and subsequent appeals. This part of the case has become particularly controversial, as following its delivery doubts were raised whether documents establishing N.A.'s father's death in Iraq were forged.[82] Indeed, in February 2021, N.A. and her former husband were convicted in Finland for aggravated fraud and forgery, with the Helsinki District Court finding that the complaints were "entirely false."[83] The Finnish government applied to the ECtHR to have the judgment overturned,[84] which the Court accepted. In July 2021, it subsequently delivered a revised judgment declaring the complaint of N.A. inadmissible.[85] Notwithstanding the specific circumstances and controversies of this case, and the eventual revision of the judgment, there is reason to believe that the Court's findings in relation to the notion of the voluntariness of return, and how this relates to state responsibility, represent a more gener-

78 *Ibid*., paragraphs 124-125.
79 See, for example, PACE 2010, explanatory memorandum, paragraphs 43-46; Kox 2011.
80 Also see 1.2.2.4.
81 ECtHR *N.A. v. Finland* [2019].
82 Yle.fi 2020.
83 AFP 2021.
84 *Ibid*.
85 ECtHR *N.A. v. Finland* [2021].

ally applicable approach, especially since it is consistent with that taken in earlier judgments, such as those discussed above. As such, certain elements of the ECtHR's initial judgment in this case may still be of relevance to this analysis, despite the above-mentioned controversy.

In this regard, of particular relevance is the way the ECtHR dealt with the Finnish government's preliminary objection that the complaint under Article 3 was incompatible *ratione loci* with the ECHR, which is not so much connected to the (reportedly faked) circumstances in Iraq, but with the conditions under which N.A.'s father left Finland, despite continuing to claim this would expose him to *refoulement*. In particular, the Finnish government argued that N.A.'s father had submitted an application for assisted voluntary return to Iraq before lodging an appeal with the Supreme Administrative Court and requesting a stay of execution of the removal order which was issued to him with the rejection of his asylum application (and which had been upheld by the Helsinki Administrative Court). He had subsequently returned voluntarily to Iraq and his 'death' (as it was still presumed to have happened at that point) had taken place there. It argued that the Finnish authorities had not exposed him to a risk of ill-treatment. There was no causal connection between the removal order and the risk faced in Iraq, where he had *chosen* to return.[86] The government argued that responsibility under Articles 2 and 3 ECHR could arise only at the time when a measure was taken to remove an individual from its territory. Furthermore, the applicant had, when applying for return assistance, signed a declaration stating that "any agency or government participating in the voluntary return could not in any way be held liable or responsible."[87]

The applicant maintained that her father had not returned voluntarily to Iraq, but left as a result of the expulsion order. As such, his return was not genuinely voluntary but part of the process of the execution of that order. He opted for voluntary return over forced return to avoid detention, to attract less attention from the Iraqi authorities upon return and in order to avoid an entry ban of two years to the Schengen area. As such, the Finnish government should indeed be considered responsible for violations of Articles 2 and 3 ECHR as a result of its expulsion of the applicant's father.

In its consideration, the Court first noted that it had already dealt with the question of voluntary departure from a Contracting State and whether any subsequent incidents would satisfy the jurisdictional requirements of the ECHR. In *Abdul Wahab Khan v. the United Kingdom*, it had held that there was:

> *"no principled reason to distinguish between, on the one hand, someone who was in the jurisdiction of a Contracting State but voluntarily left that jurisdiction and, on the other hand, someone who was never in the jurisdiction of that State."*[88]

86 My emphasis.
87 ECtHR *N.A. v. Finland* [2019], paragraph 19.
88 *Ibid*., paragraph 54; ECtHR, *Abdul Wahab Khan* [2014], paragraph 26.

So, as a general starting point, someone who voluntarily removes himself from the jurisdiction of a contracting state cannot subsequently hold that state responsible for what happens to him or her outside that state's territory. However, the Court noted, the applicant had submitted that her father "had not left Finland voluntarily." The Court found that the removal order, notwithstanding the appeal with the Supreme Administrative Court (which at any rate was denied later) was enforceable.[89] Furthermore, the Court saw "no reason to doubt that he [the applicant's father] would not have returned there under the scheme of 'assisted voluntary return' had it not been for the enforceable removal order issued against him."[90] As a result, "his departure was not 'voluntary' in terms of his free choice." This situation thus differed from that cited above regarding jurisdiction, and the Court found that it could not hold that the facts of the case were incapable of engaging Finland's jurisdiction.

The Court also disagreed with the Finnish government that the applicant had waived his rights when he signed the declaration that the state could not be held responsible with regard to his voluntary return. It noted that Article 3, together with Article 2 ECHR, "must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe." It is cast in absolute terms, with exceptions and without possibility of derogation. Although the Court did not want to take a stand *in abstracto* whether the protections of Article 2 and 3 ECHR can be waived, it referred to its case law, and especially the general principles set out in *Scoppola (Nº. 2)*. It concluded, on this point:

> *"In the present case, the applicant's father had to face the choice between either staying in Finland without any hope of obtaining a legal residence permit, being detained to facilitate his return by force, and handed a two-year entry ban to the Schengen area, as well as attracting the attention of the Iraqi authorities upon return; or agreeing to leave Finland voluntarily and take the risk of continued ill-treatment upon return. In these circumstances the Court considers that the applicant's father did not have a genuinely free choice between these options, which renders his supposed waiver invalid."*[91]

In this light, the Court considered the applicant's father's return to Iraq as "a forced return engaging the responsibility of the Finnish State."[92] In comparison to the *M.S.* case, therefore, the situation in which a third-country

89 The appeal did not have suspensive effect.
90 ECtHR *N.A. v. Finland* [2019], paragraph 57.
91 *Ibid*., paragraph 60.
92 *Ibid.*

national has been issued a return decision,[93] but this is not yet being enforced by the member state, including by the use of detention, also cannot automatically lead to a presumption that the state is not responsible for human rights violations upon return.

Without necessarily doing so explicitly, the Court engaged with the distinction between the ordinary meaning of voluntariness, or 'truly voluntary' return, and its meaning in the Directive.[94] The judgment confirms the view that the existence of a return decision should be sufficient, in principle, to trigger a state's responsibilities as regards expulsion and its associated safeguards, since this does not leave a genuinely free choice between staying or returning. In this way, voluntary return does not mean that any consequences faced by the third-country national can be considered self-inflicted, and thus beyond the scope of a member state's responsibility. This is also clearly the case when the voluntary return is not assisted, and no documents that could be misunderstood as a 'waiver' are signed.

7.3.3 The scope of non-*refoulement* obligations during the voluntary departure period

On the basis of the previous paragraphs, it can be concluded that the non-*refoulement* obligations of the member state remain intact even if the third-country national decides to return voluntarily. Member states cannot expect third-country nationals to take steps that would lead to their return to a destination where they would face a real risk of fundamental rights violations similar to those explicitly prohibited in relation to *refoulement* in Article 19(2) the Charter of Fundamental Rights, which must, at a minimum, provide protection equivalent to that under the ECHR. This prohibition also applies to persons who are excluded from asylum, but who would still face *refoulement* risks. The source of such risks, as such, is not particularly important. Situations reaching a level of severity covered by Articles 2 or 4 of the Charter would fall within the prohibition of 'voluntary *refoulement*' too. This may also arise, for example, in relation to the returnee's medical conditions, especially if access to treatment or social networks are not available.[95] This may raise specific issues about the (im)possibilities of return of particularly vulnerable individuals, which may be further increased if

93 There may be some confusion over the use of 'removal order' in the judgment, as this may suggest there is still a difference between a situation in which a third-country national is told he should leave, and one where he is notified his removal is authorised. However, it should be noted that the Directive clearly allows member states to adopt a single decision encompassing the ending of a legal stay, a return decision, a removal decision and an entry ban in a single administrative or judicial act. And the joining of such decisions is not only possible, but recommended, see C(2017) 6505 final, 16 November 2017, Annex (Return Handbook), paragraph 12.2.

94 In this case, as transposed to Finnish law.

95 See, for example, ECtHR *Paposhvili* [GC][2016].

the return would take place to a transit country. An element in this consideration may also be whether specific return assistance may play a role in reducing the risks faced upon return. While this is a matter outside of the scope of this analysis, it should be noted that, while there may be some possibilities to do so, such assistance generally cannot adequately address structural problems that impact on the destination country, which may be at the heart of the problems faced by the returnee.[96] When return assistance is put at the service of the compulsory return of specific vulnerable groups, this may also raise further ethical issues.[97]

This does not mean that the obligation to return is immediately negated when *refoulement*-related risks exist. If multiple destinations are obligatory, third-country nationals may still be expected, if the circumstances discussed above do not create a right to protection in the EU member state, to pursue other, safe destinations. However, if this is not the case, the fact that return may be 'voluntary' cannot override the member state's non-*refoulement* obligations, and in limited scenarios it might thus negate the obligation to return altogether. Second, although as a matter of admission, *refoulement* is normally discussed in relation to the country of origin, the prohibitions of exposing individuals to such risks relate to all destinations. As such, if such risks arise in relation to transit countries, the same also applies. This includes protecting against chain *refoulement* by the transit country – meaning that the individual would be returned onward by the transit country to a next destination where *refoulement* risks exist – which may particularly be a concern if return would take place on the basis of informal agreements. Because of the broad-ranging nature of the prohibition of *refoulement*, this must also be assumed to apply to the safety of routes that must be taken to get to the destination, even if the destination itself is safe. This issue may come up, for example, if third-country nationals would have to travel through a dangerous country or area to get to their final destinations. Similarly, the protection accorded to third-country nationals discussed above may also have to extend to situations in which they would be required to use unsafe modes of transport, such as blacklisted airlines or unseaworthy boats, to enable their return.

7.3.4 Closing the protection gap during the voluntary departure period

While the prohibition of *refoulement* thus provides for relatively unambiguous protections, also applicable during the voluntary departure period, it is less evident how these can be made effective during that period. After all, as discussed, procedural safeguards against *refoulement* mainly exist in the stage before a return decision is issued, or at the enforcement stage as a last safety net, leaving a gap during the voluntary return stage. While

96 See, for example, Mommers et al 2009.
97 See, for example, Lemberg-Pedersen & Chatty 2015 on ERPUM.

third-country nationals may be expected to make any *refoulement*-related concerns known to member states, so these can be assessed properly, this will mostly take the form of submitting a (renewed) request for asylum or for postponement of return on other grounds. However, this may result in a Catch-22 situation: if the member state believes there were legitimate reasons to issue a return decision, such a request – unless based on new circumstances – would simply deliver the same result, with the obligation to return remaining in place. This leaves a considerable protection gap in the Directive, especially for those faced with voluntary return. Although this is a structural gap in the Directive's architecture,[98] some elements to close this gap somewhat in the voluntary return stage may be proposed.

One way to ensure more adequate protection against returning to unsafe destinations has already been discussed in section 7.2 in relation to choice. As noted above, if multiple destinations are available, this may provide individuals with alternative options for safe destinations that could be used by third-country nationals. As discussed, interferences by member states with destination choices by individuals should generally be limited, and need to be appropriately justified, with some destinations largely exempt from any such interferences. Additionally, third-country nationals can lay a claim on member states to facilitate their return to transit countries if this is their preferred destination. If there are multiple viable destinations, therefore, ensuring that third-country nationals can freely choose their preferred destination can be one way to help them avoid exposing themselves to danger. In particular, I suggest that, even if there would be legitimate grounds for member states to restrict such choice, substantiated objections by individuals that this would expose them to unsafe situations would have to weigh heavily in favour of the interests of the individual. If such objections point to a situation in which the lack of choice would expose them to a destination with a serious risk of *refoulement*, this would of course override the member state's interests altogether. Although this is perhaps not the most satisfactory solution from a principled perspective, since it still puts the onus on individuals to avoid unsafe situations, rather than being actively protected from having to return to such a situation, it may provide a pragmatic solution in those cases in which multiple destinations are available, and only one of these gives rise to security concerns.

However, this presumes that viable alternative options indeed exist. Whether this is the case will depend on the individual circumstances, in connection with the more general requirements for obligatory destinations set out in Chapter 3. If, for example, the country of origin is not safe, this would entail the identification of either other countries of nationality, or of transit countries meeting all the conditions set out in Chapters 3 and 6. While, again, the choice of destinations is primarily up to the third-country national, I would suggest that a fair approach to preventing *refoulement*

98 See 7.3.1 and particularly the references to Majcher's analysis therein.

requires that the individual and the member state come to a common understanding about the destinations that are viable in this situation. If this is not clarified, no assessment of whether sufficient alternatives for an unsafe destination exist can be made. As such, cooperation on this point between the third-country national and the member state would be necessary. This would imply, on the part of the third-country national, providing in good faith information that would lead to the identification of the country of origin or specific transit countries. But, provided this is done, would also imply that the member state recognises which destinations are indeed reasonable targets for the individual's return efforts.[99] With this, I mean that, provided the individual cooperates in this, the member state may have to communicate to the individual, and for the record, which destinations it believes he or she can pursue. Again, this would simply set those options out, leaving the choice up to the individual. However, it would provide a clear frame of reference for later assessment of compliance with the obligation to return, since the individual and the member state can 'tick off' the efforts made towards each destination commonly understood to be viable. This is particularly important for those member states that have transposed the obligation to *return* as an obligation to *leave* in their domestic laws.[100] The latter defines success of the return procedure not as the individual going to a specific destination state, but as departure from their own territories. This could thus lead to an expectation that third-country nationals go "anywhere but here." Although member states would still be required to stick with the Directive's definition of which destinations are obligatory, in practice it may make the question of where a third-country national should return, and whether efforts have been made towards all relevant destinations, much murkier.

By contrast, jointly identifying a closed list of relevant destinations would limit uncertainty, and would be in line with the ILC's (non-binding) comments that the expulsion process should be seen as being "*negotiated* between the expelling State and the alien subject to the expulsion order."[101]

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99 In CJEU C-924/19 PPU and C-925/19 PPU *FMS* [2020] , which deals, in part, with member states changing the destination of return in the return decision, the CJEU's reasoning strongly implies that the destination to which a third-country national is expected to return is explicitly mentioned in the return decision in the first place, even though the text of the Directive does not include such a requirement. It notes, for example, "an obligation to return being inconceivable … unless a destination, which must be one of the countries referred to in paragraph 3 [of Article 3] is identified" (paragraph 115). It also notes that the observance of the principle of non-refoulement "must be assessed by reference to the country to which it is envisaged that the person concerned will be ordered to be returned" (paragraph 119). While this could theoretically be done in practice, without mentioning the prospective destination country in the return decision, this may be problematic from the perspective of remedies, including in view of the CJEU's finding that any change to the obligatory destination by the member state should also be subject to remedies as set out in Article 13 of the Directive (paragraph 135).

100 See 9.4

101 ILC 2014, footnote 131 (my emphasis).

Of course, this will create further issues when third-country nationals do not provide all relevant information or do not sufficiently cooperate to identify all relevant destinations. However, whenever possible, such a 'negotiated' position on relevant destinations can be an important point of reference both for the assessment of compliance with the obligation to return more generally, and for any issues in relation to *refoulement*. On the latter point in particular, it would help the individual and the member state in identifying whether there are indeed alternative destinations. Furthermore, it may require the member state to engage with possible *refoulement* concerns in relation to *all* viable destinations. This is important because, as discussed, asylum procedures will generally focus only on one destination (usually the country of origin), or fail to engage with such issues in a substantive manner when the case can be dismissed on admissibility grounds or when exclusion clauses are in play. However, the Directive's *refoulement* prohibition also applies to destinations which have not been substantively assessed during the asylum procedure.[102]

A similar engagement could be expected when it comes to questions of safe return routes, rather than destinations themselves. An example of such an issue arose in 2012, when the Dutch government adopted the decision that various part of South and East Somalia, which were no longer controlled by terrorist group Al-Shabaab, could be considered as safe for return in individual cases. Subsequently, it would not provide prima facie protection to persons from that area anymore, and this opened the possibility, on a case-by-case basis, that persons from those areas would be faced with an obligation to return. The problem was, however, that the Somali capital Mogadishu, and particularly the area around the airport, were not safe due to continued Al-Shabaab activity there. This made removal of persons from South and East Somalia impossible for the Dutch government. Rather than providing these persons with some form of protection,[103] the government insisted that they still had an obligation to leave of their own accord. When asked how returnees could ensure they would be safe *en route* to their places of origin in Somalia if the government could not, the only answer was that this was their own responsibility. When pressed further, the minister for immigration affairs told Parliament that he had heard it might be possible to travel overland from Kenya to the safe areas of Somalia, but that he saw no role for the government in exploring in more detail what safe options existed for voluntary returnees.[104] In view of the discussion in the previous paragraphs, such a hands-off approach, leaving the question of

102 Majcher 2020, pp. 111-112: "The protection from *refoulement* under the Directive should be of the widest scope because it constitutes the last safety net for people not protected from *refoulement* under other protection schemes under EU law (the SBC, Qualification Directive, and Asylum Procedure Directive)."

103 As put forward by Spijkerboer 2013 as a logical and appropriate solution in this situation.

104 The situation was eventually resolved because Mogadishu and the airport became – in the view of the government – safe, so that returns could be enforced.

safe return routes to individuals, cannot be considered legitimate. Indeed, already before the Dutch government took the above-mentioned position, the ECtHR had found that while states may, under certain circumstances, deny international protection if only part of their country of origin is safe, such as in the case of Somalia, this is also subject to them being able to travel there safely.[105]

A particularly clear protection gap arises when there are no alternative destinations or safe travel routes available, and there is only one obligatory destination under the Directive, but the return decision is in place. The safeguard in the Directive in such a context is then formed by the possibility of postponement of removal.[106] Notwithstanding the practical difficulties of third-country nationals to get the member state to decide to implement such a postponement, this again raises questions about the situation of those still within the voluntary departure period. It might be presumed that the situation giving rise to a postponement of removal may also give rise to an extension of the voluntary departure period. However, the circumstances that may lead to a person nonetheless taking up voluntary return, discussed above, remain in place. Importantly, in this respect, the ILC noted that the facilitation by states of voluntary return "cannot be interpreted as authorizing the expelling State to exert undue pressure on the alien opt for voluntary departure rather than forcible implementation of an expulsion decision."[107] In other words, member states should leave sufficient space for third-country nationals to decide not to return voluntarily, which is (as discussed in 10.2) to be regarded as a right of the individual. This would not negate their obligation to return, but would put the ball back in the member state's court. In view of the discussion above, this would also make the state's non-*refoulement* obligations more visible and, perhaps, easier to trigger procedurally. As such, this could be conceived of as a 'right to be removed.'[108] What such a right would concretely entail is something that cannot be discussed here in detail. However, it would require consideration of the extent to which a range of measures taken by member states to

105 ECtHR *Sufi and Elmi* [2011], paragraph 277. Also see CTOC Smuggling Protocol, Article 18(5): "Each State Party involved with the return of a person who has been the object of [smuggling] shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person."

106 RD Article 9(1)(a).

107 ILC 2014, commentary to draft Article 21(1).

108 In addition to its relation to *refoulement* obligations, it could also more generally interact with the subjective element of a 'humane and dignified' return, as discussed in 10.4.3.2 in regard of persons who may consider removal a more dignified outcome of the return process than voluntary return. At the same time, this would further amplify dilemmas experienced by member states when countries of return refuse to cooperate in removals, leaving voluntary return as the only option to ensure the return decision is implemented.

encourage return would amount to "undue pressure."[109] While the legitimacy of such measures to encourage return in relation to the repatriation of refugees has been considered quite extensively,[110] this is much less the case for irregular migrants. Under the terms of the Directive, this would at least preclude member states from denying third-country nationals access to emergency health care and essential treatment, or depriving children from access to basic education.[111] However, such a consideration may also have to cover, for example, at what point threats of detention, which are normally part of the Directive's procedure, become illegitimate.[112] Undue pressure would arguably also be applied in case families are purposefully separated to push them towards return,[113] or when member states use deception to make third-country nationals take up voluntary return, such as by misinforming them about the situation in the country of return, tricking them into signing documents agreeing to return, or by making false promises of (financial) assistance.[114] A particular area that would need further attention in this respect is whether limiting third-country nationals' access to, or actively depriving them of, basic amenities such as shelter and food, would be unlawful as a means to 'encourage' return. European human rights bodies have dealt with the interrelation between such socio-economic rights

109 In this regard, Majcher 2020, p. 548, mentions the role of both incentives and disincentives to comply with the obligation to return. For a discussion of the practical application of such measures in the Netherlands, see, for example , Olde Monnikhof & De Vreede 2004, in particular pp. 58-59, where they distinguish between 'positive' and 'negative' measures in relation to return. For an application of this to voluntary return situations, see Mommers & Velthuis 2010.

110 See, inter alia, UNHCR 1996; Vedsted-Hansen 1997; Zieck 2004; Crisp & Long 2016.

111 RD Article 14(1)(b) and (c).

112 This could involve suggestions by member state officials that a third-country national will definitely be detained in case he or she does not return voluntarily, even if this has not yet been established in the individual case. It may also involve threats or use of detention in cases where there is no reasonable prospect of removal, and when this is just used in a punitive way, rather than as an enforcement measure.

113 Arguably, this would violate the principle that, during the return procedure, due account should be had of family life, RD Article 5(b). Also see ECtHR *Mengesha Kimfe* [2010]. The Court found a violation of Article 8 ECHR in relation to a married couple, of which both members were in removal proceedings, were forced to live in different cantons. However, the fact that they were unremovable due to non-cooperation by the country of origin may have played a role in this finding, which would have prevented them from resuming family life upon return within a reasonable time.

114 ILC 2006, p. 156, suggesting that the principle of good faith would prohibit such deception in expulsion proceedings. Such a prohibition may also flow from a human rights obligation, such as in the *Čonka* case, in which the ECtHR found that misleading an alien to make his detention easier was contrary to the right to liberty enshrined in article 5 ECHR, see ECtHR *Čonka* [2002], paragraph 42. For a discussion of deception in relation to the return of refugees, see Gerver 2018, Chapter 3.

and voluntary return in different ways.[115] However, it has been argued that such minimum economic and social rights should be protected also when persons are faced with a return decision, which would also suggest that withdrawing these as an 'incentive' for voluntary return would not be compatible with the Directive.[116]

None of the measures above are infallible ways to deal with the gap that the Directive leaves in relation to effective protection against *refoulement*, since this gap appears to be embedded in its architecture. However, the protection of the individual's freedom of choice of destinations, and joint efforts to identify appropriate destinations and safe routes, may close this gap somewhat, especially in voluntary return situations. In the absence of alternatives, limits on member states' possibilities to pressure third-country nationals to take up voluntary return should be in place. However, these would need much more extensive elaboration and consideration than has been possible above.

7.4 Conclusions

This chapter has discussed issues of choice of destinations, and of preventing that third-country nationals are put in unsafe situations as part of the voluntary return process. Both issues arise in relation to the issue of identifying appropriate destinations where third-country nationals should seek readmission, as part of the obligation to return.

The question of choice arises when there are multiple possible destinations available to third-country nationals to meet their obligation to return. There are different perspectives in legal scholarship on whether persons faced with expulsion can choose their destination and whether expelling states have an obligation to act upon the preference of individuals. As a matter of customary international law, at most a weak obligation to allow individuals to put forward their preference may be surmised, but expelling states appear to retain a lot of discretion whether to accommodate this. However, the right to choose is enshrined in several fundamental rights.

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115 The European Committee of Social Rights (ECSR), for example, when examining a complaint in this regard in relation to the European Social Charter (ESC), found that access to food water, shelter and clothing were essential to preserve human dignity, and furthermore, that "the provision of emergency assistance cannot be made conditional upon the willingness of the persons concerned to cooperate in the organisation of their own expulsion." ECSR *CEC v. the Netherlands* [2014], paragraphs 74 and 117. The ECtHR, dealing with a similar issue, but in relation to Article 3 ECHR, found that the government on the Netherlands had not fallen short of its obligations, including due to the lack of the cooperation of the applicant in the return process, see ECtHR *Hunde* [2016].

116 See, for example, Rodrigues 2016; Majcher 2020, pp. 198-228. Also see CJEU C-562/13 *Abdida* [2014] on the extension of such rights to non-removable persons. For an overview of the ECtHR's case law on the matter of making irregular migrants destitute and the applicability of Article 3 ECHR, see Slingenberg 2019.

First, the right to leave encompasses, in general, a right to choose one's destination, which is also relevant in situations in which individuals are faced with an obligation to return. This right is not absolute, but interferences with this right, such as through direct instructions by the member state or withholding confiscated documents until the third-country national agrees to return to the 'right' destination, must be duly justified. While wide reasons of migration control might be accepted as legitimate aims, it will not be easy for member states to justify why controlling an individual's destination is necessary, unless this clearly cannot lead to effective return, or this can be connected to the risk of absconding. Second, the right to return provides special protection to the choice of returning to one's own country, which imposes on the EU member state an obligation of non-interference. Given the almost absolute nature of the right in relation to one's 'own county' under the ICCPR, and the unqualified right to return to one's country of nationality under the ECHR, member states should normally refrain from any interference with third-country nationals' attempts to return to this particular destination under all circumstances.

The situation in which third-country nationals prefer to return to a transit country, if the EU member state has not yet submitted a readmission application, raises specific questions. As a corollary of member states' obligation to ensure the *effet utile* of the Directive, which in this case relates both to the objective of effective return and the priority of voluntary return, member states can be expected to submit such an application on behalf of the individual, unless they can provide specific motivation why this is not possible or in the interest of the return procedure.

As a general principle, meeting the obligation to return must be accomplished in a manner that ensures the safety and dignity of the individual involved. However, ensuring this, especially in the light of the prohibition of *refoulement*, raises specific questions when it is the third-country national, rather than the member state, that carries the primary responsibility for return. While individuals can be expected not to expose themselves willingly to danger, it was noted that several situations may occur when they do not receive protection from the member state, and find themselves in a situation in which they feel compelled to return voluntarily to unsafe destination countries or via an unsafe route. However, it was noted that member states cannot ignore their obligations of non-*refoulement* simply because return is taking place 'voluntarily.' Voluntary return cannot be seen as a guarantee that the situation in the destination country is safe. And neither does the decision of the third-country national to take up voluntary return present a waiver of his or her right to be protected against *refoulement*, since this decision is still the result of an expulsion action by the member state, triggering its obligations. While it was established that the prohibition of *refoulement* must be observed by member states also when dealing with third-country nationals in the voluntary departure stage of the Directive's procedure, it is not immediately obvious, beyond general awareness of this fact, what should be done to make such protection effective. This, it was

noted, is due to overall gaps in the architecture of the Directive, which may be amplified in relation to voluntary return.

As a general point, member states should refrain from requiring of third-country nationals that they put themselves in a situation which would violate the prohibition of *refoulement*. In lieu of a decision to grant the individual a right to stay, this can be achieved in part by ensuring that the freedom to seek return to his or her preferred destination is fully observed, and any concerns about the lack of safety of particular destinations are taken into account in this respect. Furthermore, it was suggested that – in order to avoid that third-country nationals being confronted with an obligation to go "anywhere but here" – a list of viable destinations is established between them and the member state. Such a negotiated list would provide a better basis for assessing risks associated with each destination and thus provide a reference point for ensuring the individual is not exposed to 'voluntary *refoulement*.' Member states' active engagement with return options would also be necessary in case that common return routes were found to be unsafe, putting an obligation of due diligence on the member state to work with third-country nationals to find appropriate alternatives, rather than leaving this simply up to them. Finally, as a more general safeguard, member states could be expected to refrain from putting undue pressure on third-country nationals to take up voluntary return. While some limits on action to encourage voluntary return can be deduced from the Directive directly (such as denying emergency health care or separating families), considerable further work would be necessary to specifically define them – an exercise that falls outside the scope of this analysis. However, it would likely require consideration of the link between voluntary return and the threat of detention, of actions that may be aimed at deceiving the individual into returning voluntarily, or of the extent to which denying access to basic services, such as shelter and food, is incompatible with the Directive and EU fundamental rights.

8 Obtaining travel documents

8.1 Introduction

This chapter is still part of the examination of the actions to be taken by third-country nationals, and limits thereon, in fulfilling their obligation to return, as set out in the first research question. However, whereas the previous chapters have focused on the matter of seeking readmission to specific destinations, this chapter will focus on the second element that was considered a necessary part of the return process, and thus of the obligation to return: obtaining travel documents. As noted in the introductory chapter, obtaining travel documents will normally be a necessary precondition for the fulfilment of the obligation to return by any third-country national who is not already in possession of such documents, or whose travel documents are no longer valid. Such a valid travel document will generally be required for the departure through regular channels from the EU member state, the boarding of transportation to take third-country nationals to their destination, and the entry into that destination; possibly in combination with further proof that they should be admitted there, like a visa.

Whilst an integral part of the process of returning, the current Directive does not include any clear provisions on this issue in relation to voluntary departure. Obtaining the "necessary documentation" from third countries is, however, addressed in relation to the possible extension of the period of detention beyond the normal maximum period of six months when a third-country national is removed.[1] The European Commission's proposal for a recast Directive makes the obligation to obtain travel documents more explicit, as part of a new article imposing certain cooperation obligations on third-country nationals. These include "the duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document."[2] In my view, this can best be considered as a codification of a duty already implied within the broader obligation to return in the current

1 RD Article 15(6)(b).

2 COM(2018) 634 final, Article 7(1)(d). To this, the Council suggests adding the phrase "and to provide all information and statements necessary to obtain such a document and to cooperate with these authorities," Council partial general approach, doc. 12099/18, 23 May 2019, p. 49, amendment to Article 7(1)(d).

Directive.[3] As regards the third-country national's obligations to obtain travel documents, therefore, some general actions that can be expected of them may already be acknowledged. This includes, first, identifying the competent authorities in a position to issue a valid travel document, and to make an application with them. Second, as part of that application, to provide documentary evidence and other information that may be necessary to assess whether a travel document can be issued, including doing so in person if so required.[4] And third, although not mentioned in the proposals above, to fulfil any other administrative requirements necessary for the issuance of a travel document, such as the payment of fees, since this will normally be part of the process of obtaining travel documents.

The analysis of this particular element of the obligation to return will proceed as follows. First, 8.2 will look at situations in which there may be no need to obtain travel documents, which would be the case if the third-country national already has valid travel documents, but also in certain situations in which return would be possible even in the absence of such documents. Subsequently, section 8.3 will look at the specific obligations of countries of return to issue travel documents, and what implications these have for the third-country national's obligations. In section 8.4, attention will turn to specific issues and limits regarding the third-country national's interactions with the consular authorities responsible for issuing travel documents, including in relation to access to such authorities, the evidence to be provided by the third-country national, the payment of fees, but also the prevention of corruption and of the use of fraudulent travel documents. When it comes to access to such authorities, this may imply specific obligations of facilitation on the EU member state. Section 8.5 will furthermore discuss the possibility that the EU member state can act as the competent authority to issue travel documents, and under which conditions the third-country national can be expected to make use of this possibility. Conclusions to this chapter are presented in section 8.6.

3 Provided this can be done without violating the safeguards set in Directive 2013/32 (the recast Asylum Procedures Directive), Article 30, prohibiting information exchanges with countries of origin that could compromise the safety of the applicant or family members during asylum procedures, which would also apply if the third-country national has been issued a return decision but is still awaiting a decision on appeal of his or her asylum request.

4 This may particularly be related to the prevention of the circulation of 'blank' travel documents. The CTOC Smuggling Protocol, Article 10(1)(a), for example, requires states parties to cooperate, by sharing information, in addressing the potential misuse of such blank documents.

8.2 Situations in which there is no need to obtain travel documents

Below, two specific situations in which no action to obtain travel documents may be necessary, but which may still raise issues, are discussed: if third-country nationals already have valid travel documents, but these have been confiscated (8.2.1), and when travel to the destination country is possible without such documents (8.2.2).

8.2.1 Third-country nationals already in possession of valid travel documents and confiscation by the EU member state

It should go without saying that the obligation to obtain travel documents is not relevant to those who already have such valid documents. The situation of third-country nationals who already have valid travel documents could be completely ignored in this chapter, were it not for the specific situation in which those documents are not directly in their possession. This may happen at different points. For example, Article 13(b) of Directive 2013/32 (the recast Asylum Procedures Directive) allows member states to require asylum seekers "to hand over documents in their possession relevant to the examination of the application, such as their passports." While this is tied to the asylum procedure, it appears that, as a matter of practice, not all member states return such documents to the individual when an asylum application is rejected; rather, asylum authorities may keep them or hand them over to the authorities in charge of return procedures.[5] Furthermore, as discussed, member states may impose measures to prevent absconding during the voluntary departure period, which includes the submission of documents.[6]

As regards the first situation, it may be logical for the member state to retain the travel documents of a rejected asylum seeker if a return decision is issued simultaneously with the rejection, and if the member state will proceed immediately with the enforcement of that decision. That is, if no voluntary departure period is granted. However, questions may arise when the third-country national is entitled to a voluntary departure period, especially in terms of the legal basis for retaining documents. Under the recast Asylum Procedures Directive, submitting documents is clearly connected to the examination of the application, which will have ended at the point of rejection and therefore cannot justify keeping those documents anymore.[7]

5 See EMN 2016 with specific examples from member states.

6 RD Article 7(3) and see discussion in 7.2.2.

7 Unless these are fraudulent and they would be obliged to take them out of circulation, see 8.4.3 below.

And under the Returns Directive, the only basis for keeping third-country nationals' travel documents during the voluntary departure period would be to prevent them from absconding. Notwithstanding the fact that several member states report that they foresee this possibility in national law, when there is no risk of absconding, there appears to be a clear gap in the legal basis at the EU level for this.[8] This could amount to less favourable treatment of the third-country national than the Directive foresees. This is particularly problematic from the perspective of the right to leave which, as discussed below, is closely tied up with the individuals having travel documents at their disposal.[9] Although this right can be limited, it is difficult to see to which legitimate aim the interference of depriving a person of his or her travel documents can be connected. While quite a broad interpretation of migration control reasons can be accepted as a legitimate aim, especially in relation to public order,[10] it is not obvious how this aim is affected by the return of travel documents in this situation. After all, we are speaking about third-country nationals who are under obligation to return and have been accorded an opportunity to do this of their own accord, and for whom the member state has not found there is a risk of absconding that would undermine the objective of effective return.[11] As such, there appears to be no reason to fear that the state's aim of migration control is negatively affected.

It could be argued, however, that member states can arrange at any time to make confiscated travel documents available when these are needed, thus negating any potential negative effects for the third-country national being prevented from taking possession of such documents.[12] Whilst this may solve practical issues, it does not address the lack of a clear legal basis in EU law, and the fact that the right to obtain travel documents, as a corollary of the right to leave, should be respected even in the absence of a clear intention of the individual to travel.[13] The situation may be different, of course, when member states do consider there is a risk of absconding. In such cases, the Directive does provide a clear legal underpinning for keeping documents, although again this would imply that the asylum and return procedures seamlessly connect.[14]

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8 EMN 2016.

9 See 8.3.3.

10 See, for example, ECtHR *Stamose* [2012], in which the Court, in principle appears to take a fairly flexible approach as to which migration control considerations could be connected to the legitimate aim of public order.

11 For more on this, see 10.4.

12 See, for example, the approach of the Netherlands in EMN 2016, with the Repatriation and Departure Service making such documents available to consulates for the return procedure, but otherwise "[t]he documents will not be returned as they are still necessary for the return procedure."

13 See 8.3.3.

14 While efforts are being made to better connect EU asylum and return rules (see, for example, Slominski & Trauner 2020), in many member states this may still not be the case, leaving a potential legal gap.

8.2.2 Return without travel documents?

The obligation to obtain travel documents may also not be relevant when third-country nationals, even when they do not have such documents, can still return. These circumstances are mostly exceptional, and may come with further practical problems, but they cannot be completely excluded. Various international agreements provide for regimes for return without official travel documents. Under the Chicago Convention, air carriers must transport inadmissible persons on the basis of a removal order.[15] It is somewhat unclear whether return of inadmissible persons under Chicago Convention could happen without travel documents. On the one hand, the carrier is obligated to return an inadmissible person to the state of embarkation on the basis of a removal order. And the state of embarkation is required to accept him or her "for examination." However, the Convention also sets out rules for cooperation on the procurement of travel documents if needed to return an inadmissible person. When it comes to inadmissible persons arriving by sea, including stowaways, the FAL Convention appears to provide more flexibility in returning persons without travel documents.[16]

Possibilities to travel without valid travel documents may also be formalised in EU readmission agreements. In the EU's agreement with Ukraine, for example, a situation is foreseen in which third-country nationals travel with expired travel documents. This, however, is only the case when Ukraine has earlier provided a travel document, but the return has been delayed, and Ukraine has not extended the document in time. In lieu of a valid travel document, then, the expired document is accepted.[17] The EU's agreement with Turkey goes a step further. Under the normal procedure, once Turkey notifies that it is ready to accept the third-country national back, it should provide a travel document within three days, although this period is extendable. However, if there is no consular office to issue a travel document, or a travel document is not provided within three days, the reply to the readmission request will be considered as the necessary document for return.[18] Both situations still imply that the relevant carrier (if any is used) agrees to transport the third-country national on the basis of an expired document, although such cooperation is more likely to be forthcoming when this is a clearly established practice under an international agreement and the readmission of the third-country national is guaranteed.

On the whole, however, third-country nationals who do not possess valid travel documents will need these to effect their return, and they can be expected to take the relevant steps to obtain such documents as part of

15 Chicago Convention, Annex 9, fifteenth edition, standard 5.5.
16 FAL Convention, Annex, Section 4, Part E, Recommended Practice 4.1.4.1.
17 EU-Ukraine readmission agreement, Article 2(2).
18 EU-Turkey readmission agreement, Article 3(4).

their obligation to return. The remainder of this chapter will therefore focus on the frameworks for obtaining documents and their implications for the third-country national.

8.3 Third countries' obligations to issue travel documents

As with the question of readmission discussed in the previous chapters, the third-country national's obligation to obtain travel documents is one that exceeds the confines of the legal relationship between the individual and the member state. Since, in the vast majority of cases, it will be a third country issuing such documents,[19] the external dimension of the triangle model presented in Chapter 1 will again come into view and play a decisive role in shaping the individual's obligations. Again, the specific obligations of third countries to issue travel documents will to a large extent determine what conditions third-country nationals must fulfil to obtain these. And thus what EU member states can and cannot expect of third-country nationals in this respect.

This section will therefore focus on the specific obligations that countries of origin, transit countries, and potentially other third countries have to issue travel documents to third-country nationals engaged in voluntary return proceedings. It will first discuss such obligations arising out of customary international law and inter-state agreements, which connect the requirement to issue travel documents to obligations to readmit expelled persons (8.3.1). It will subsequently look at human rights-based obligations to issue travel documents, which may be applicable also in situations in which there is no expulsion. This will include a brief look at the effect of the right to return on the issuance of travel documents (8.3.2). Subsequently, the obligation to issue such documents as a means to safeguard the right to leave, including by issuing a passport rather than single-use documents, is discussed in more detail (8.3.3). Finally, obligations of states of habitual residence to issue travel documents to stateless persons are examined (8.3.4).

8.3.1 The link between readmission obligations and the issuance of travel documents in inter-state instruments

As noted in the introductory chapter, the issues of gaining readmission and obtaining travel documents often overlap, even if they are discussed in this dissertation as two separate analytical issues. Several of the sources and instruments discussed in the previous chapters provide that, if the country of return is obligated to readmit the individual, it should also provide replacement travel documents if this is necessary to complete the readmission process. For example, the obligation to issue replacement travel

19 Although see the possibilities of EU member states to do this themselves in 8.5.

documents if this is necessary for return is considered a corollary of the obligation to readmit expelled nationals under customary international law, although the conditions under which this is done remain a matter for the state in question.[20]

The link between readmission obligations and the obligation to issue travel documents is also made in EU readmission agreements, in which the issuance of travel documents is one of the key steps of the procedure agreed between the parties. In a number of these agreements, the responsibility for issuing such documents does not only relate to returning nationals, but also to non-nationals who have transited through the country on their way to the EU.[21] As discussed in Chapter 6, all this requires the active intervention of the EU member state to trigger the procedure that would result in the issuance of travel documents. Since the request for readmission can be made without the consent of the third-country national, this also implies that states of return should issue travel documents regardless of whether the third-country national wants to return or not.[22]

Various multilateral agreements also link readmission obligations to the duty to issue travel documents. This is the case, for example, in the UN Smuggling and Trafficking Protocols. As discussed, these Protocols require the readmission of smuggled persons and of victims of trafficking by the state of nationality. Furthermore, a right of permanent residence, which, in the case of a victim of trafficking may have expired, also triggers a readmission obligation. In such cases, the state in question should also agree, in order to facilitate return, to issue "valid travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory."[23] The Chicago Convention similarly provides that states should provide travel documents to facilitate the return of their nationals, when so requested.[24]

In all the cases above, the 'competent authority' to which third-country nationals should turn to obtain travel documents is the country where they are seeking readmission. However, if third-country nationals' right to choose their destination is to be effective,[25] they must be able to obtain travel documents to return to their intended destination, including another third country. Such a country will normally not issue the travel documents

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20 Hailbronner 1997, p. 15.

21 However, it should be noted that not all EU readmission agreements put the responsibility of issuing replacement travel documents with the country under duty to readmit. In some cases, readmission may even occur without valid documents being issued.

22 See, for example, EU-Russia readmission agreement, Article 2(2): ."..the competent diplomatic mission or consular office of the Russian Federation shall *irrespective of the will of the person to be readmitted*, as necessary and without delay, issue a travel document for the return of the person to be readmitted...," and similar clauses in other readmission agreements (my emphasis).

23 CTOC Smuggling Protocol, Article 8(4); CTOC Trafficking Protocol, Article 8(4).

24 Chicago Convention, Annex 9, fifteenth edition, Standard 5.26.

25 See 7.2.

necessary for return, and third-country nationals will mainly depend on their country of nationality for this. Furthermore, countries of return can meet any obligations related to readmission by issuing single-use documents, such as emergency travel documents or *laissez-passers*, since this is sufficient to allow the individual to return and be readmitted.

Obligations to provide documents for departure to other countries, which should then be valid more widely than emergency travel documents or *laissez-passers*, to the extent they can be said to exist, mainly seem to relate to ensuring that procedures to obtain travel documents are transparent and accessible. But they do not provide for a substantive obligation to issue such documents in situations other than if the person returns to that state specifically. For example, the Chicago Convention requires contracting states to "establish transparent application procedures for the issuance, renewal or replacement of passports and shall make information describing their requirements available to prospective applicants upon request."[26] The wording used would arguably also apply if these contracting states are not themselves the intended destination of return.

8.3.2 The right to return and the right to travel documents

While the right to return provides a strong claim to readmission,[27] case law suggests that the obligation on states to issue travel documents on the basis of this right may be surprisingly limited. In particular, this seems to arise from the fact that a claim to the right to return can be satisfied by ensuring the de facto ability to return. This does not necessarily translate into a self-standing right to travel documents, nor one that would ensure a travel document given the widest possibilities for international travel. As we have seen in the *Nystrom* case, respect for the right to return under the ICCPR may require a person's own country to "materially facilitate" his or her re-entry.[28] This material facilitation, in my view, can be understood to include the issuing of travel documents if this is necessary. However, the extent of this obligation to issue travel documents on the basis of the right to return may be more context specific. In *Nystrom*, the HRC's finding came in the context of an unlawful expulsion of Mr Nystrom by his own country, with the material facilitation of his return necessary to undo this. It is less clear that the right to return encompasses the right to travel documents if individuals are expelled from another country because of their irregular stay.

The Strasbourg institutions, in the limited cases in which they have dealt with the right to return and travel documents, appear to have taken a fairly restrictive approach. For example, in *Marangos v. Cyprus*, the European Commission for Human Rights dealt with a Cypriot citizen who was

26 Chicago Convention, Annex 9, fifteenth edition, Standard 3.15.

27 Although this is not a right that EU member states can require an individual to invoke, see 5.3.5.

28 See 4.2.4.

living abroad and who had been denied a passport because of his refusal to perform his military service. Nevertheless, he did secure re-entry to Cyprus, which led the Commission to conclude that he had not substantiated that the denial of the passport had deprived him of his right to enter.[29] Similarly, In *Momčilović v. Croatia*, the Court found a complaint of a violation of the right to return inadmissible because the applicant had in fact been able to enter the country.[30] Interestingly, the applicant argued that, whilst this was true, he had had to re-enter in an irregular manner, since the Croatian authorities had never issued him with documents. The Court noted that, despite the claim of irregular entry, the applicant was never prosecuted for this, and he was issued identity documents and a passport without further delay after returning to Croatia.[31] It should be noted that neither case dealt with expulsion of the applicant. However, they both indicate that the main consideration in finding a violation of the right to return by the country of nationality lies not in the refusal to issue a travel document, but in the de facto impossibility of returning. This does not rule out that a refusal to issue travel documents could lead to a violation. However, this would depend on a clear link between this refusal and the actual impossibility of re-entry, rather than the refusal itself. Furthermore, even if this link could be established, the case law above would suggest that any obligations on the part of the state could be met effectively by issuing a single-use document only valid for return. In this way, the right to return distinguishes itself from the right to leave, which encompasses a much clearer claim to travel documents.

8.3.3 The right to leave and the right to travel documents with the broadest possible validity

In contrast to the right to return, the right to leave provides a clear basis for a right to travel documents. Additionally, it provides for a right to documents that are valid for travelling to other countries than the country of origin. The HRC has devoted significant attention to the question of persons seeking to obtain travel documents from their countries of nationality, including when staying elsewhere.[32] The HRC has found that a passport in

29 ECommHR *Marangos* [1997].

30 ECtHR *Momčilović* [2002].

31 *Ibid*. The decision in *Momčilović* could be read as implying that this is even the case if the person has to circumvent the state's migration controls to do so. In my view, this would be very unreasonable, and it is unlikely that, despite appearances, the Court would have considered that illegal entry is a credible way to exercise one's right to return. Rather, its finding on the illegal entry should likely be read in light of the fact that documents were issued immediately after Mr Momčilović's return to Croatia, showing that the state had not been unwilling to allow him to enter.

32 The ECtHR, by contrast, has only dealt with the negative obligations on the state in which a person is present at that moment. However, as noted before, the ECHR is of limited significance to the obligations of countries of origin anyway, with the exception of those within the Council of Europe area.

particular is a means of enabling individuals to exercise their right to leave any country,[33] which should be facilitated by the country of nationality, normally the only party authorised to issue a passport.[34] The HRC has held that the fact that a person is outside the state of nationality does not in any way affect this obligation, because even abroad a person remains subject to the jurisdiction of the state of nationality for the purpose of issuing a passport.[35] What is more, the right to obtain a passport as a result of the right to leave has been found to be applicable regardless of the intended destination of the individual, or even regardless of whether the individual has the intention to travel at all. [36] The obligation to fulfil this right remains incumbent on the state of nationality, even if another state presents the individual with a travel document. In *Lichtensztejn*, a Uruguayan national living in Mexico argued that a travel document provided by Mexico, which had various limitations, was not an adequate substitute for a Uruguayan passport.[37] This was apparently accepted by the HRC, as it proceeded to examine the Uruguayan government's failure to issue a passport.[38]

The obligation to issue a passport is not absolute, but restrictions must meet the conditions set out in the limitation clause applicable to the right to leave.[39] In this regard, the HRC found the withholding of a passport to a citizen abroad because he had failed to meet his military service was justified.[40] However, in the majority of the cases, the HRC found a violation of the right to leave because no adequate justification was presented. Additionally, the length of time it takes for a state to respond to a request for a travel document may be a violation of the right to leave. Although no clear deadline is set by the HRC, not replying in due time, or keeping an application "under consideration" for an indeterminate period of time, clashes with the state's positive obligations.[41] This is important as the unclear length of time of proceedings to obtain a travel document may be one of the main sources of tension between a voluntary returnee and the EU member state.

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33 HRC *Lichtensztejn* [1983], paragraph 8.3.

34 But see Torpey 1999, p. 161, who refers to the exclusive competence of states to issue passports to those with close links, which may be broader than just citizens.

35 HRC *Vidal Martins* [1982], paragraph 7; HRC *Lichtensztejn* [1983], paragraph 8.3.

36 HRC *Lichtensztejn* [1983]; ECtHR *Baumann* [2001]; Hannum p. 6: "The right to leave cannot be made to depend on the ability to exercise the right immediately or even in the foreseeable future."; Strasbourg Declaration, Article 10(c).

37 HRC *Lichtensztejn* [1983], paragraph 5.5.

38 *Ibid*., paragraph 8.2.

39 ICCPR Article 12(3): "The above-mentioned rights shall not be subject to any restriction except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

40 HRC *Peltonen* [1994], paragraph 8.4.

41 HRC *El Ghar* [2004]. Also see Strasbourg Declaration, Article 10(d); Uppsala Declaration, Articles 15(b) and 16.

The above indicates that third-country nationals do not only have an individual right to travel documents, which they hold vis-à-vis their countries of nationality, but a right to a travel document which would allow them to travel to the widest possible range of destinations, meaning in practice a passport. This is relevant to our situation since other obligations to issue travel documents, discussed above, are much more limited and could be fulfilled with a one-off travel document, valid only for a single trip to the country of readmission. From the perspective of third-country nationals, however, obtaining a *laissez-passer* may be undesirable. As noted, it would limit their freedom to choose their destinations, since it would only allow them to return to the issuing state, which would either be the country of origin or the transit country. Furthermore, particularly when returning to a transit country, obtaining a passport may be much more preferable. Third-country nationals returning to a transit country on a one-off travel document may find themselves in a similar position as in the EU member state: with an uncertain or irregular status and in need of documents to travel onwards. Passports also hold important value as proof of the holder's nationality, which may impact on such issues as his or her ability to enjoy diplomatic protection.[42]

As part of the voluntary return process, therefore, third-country nationals may turn to their country of nationality not only with a general request for a travel document, but they have the right to make a specific claim to obtain a passport, or to have their expired passport renewed. However, practical issues may intervene. As a general rule, issuing or renewing a passport will likely take more time than issuing an emergency travel document. For example, passports may have to be sent from the issuing countries' capitals, which will inevitably prolong the processing time. By contrast, consular authorities are likely to have direct disposal over emergency travel documents, and whilst they may have to seek authorisation from their capitals to issue these, the process will often be quicker. Furthermore, an application for a passport may be costlier for the third-country national than applying for an emergency travel document.[43] Apart from impacting on the specific travel document third-country nationals can obtain, and thus the scope of possible destinations to which they can travel, these factors are important because they can have specific implications for the relationship between third-country national and the EU member state.

42 Hagedorn 2008.

43 For example, Armenians aiming to return would have to pay € 116 for a replacement passport, while a Certificate of Return (a *laissez-passer*) would be issued for either € 18 or for free, depending on the circumstances of the case, see Armenian Ministry of Foreign Affairs 2021. Similarly, Ghanaian nationals returning from Ireland would pay between € 120 and € 180 for a renewed passport (32 or 48 pages respectively), or € 140 to € 200 for a lost passport, while the fee for an Emergency Travel Certificate is listed at GBP 65. Furthermore, the processing time of the former is indicated as two to three weeks, while the latter is issued in five working days, see Ghana High Commission in the UK 2021a and 2021b.

While they can be considered to be under obligation not to interfere with third-country nationals' attempts to obtain a passport, member states' positive obligations in this regard are not clear. For example, while return assistance programmes financed by member states usually foresee the coverage of costs for travel documents, member states may want to limit this to the cheapest option.[44] Furthermore, if the process for issuing a passport takes longer than the initial voluntary departure period, the practical possibility of obtaining this document may depend on whether the member state can be expected to extend this period.[45] As such, the actual enjoyment of the right to a passport is contingent on a number of other issues in relation to voluntary return.

8.3.4 The obligation to issue travel documents under the 1954 Statelessness Convention

The frameworks for assigning obligations to issue travel documents, which mainly pertain to the country of nationality, leave an important gap for stateless persons. While the country of habitual residence of stateless persons is considered their country of origin within the meaning of the Directive, the country of habitual residence cannot be seen as simply equivalent to a country of nationality for the purpose of issuing travel documents. In particular, the readmission obligations of countries of nationality and countries of habitual residence differ significantly.[46] The existence of a readmission agreement may fill this gap. After all, these typically do not only cover the return of nationals, but also of third-country nationals, which would include stateless persons. Again, this would only pertain to documents sufficient to enable return. This would also be the case if stateless persons can lay a successful claim to return to their 'own country' within the meaning of the ICCPR, which may also trigger an obligation to materially facilitate this return when necessary, but not necessarily to issue a passport.

Since the right to leave, and the connected right to travel documents allowing for the widest possible range of destinations, is held by everyone, including stateless persons, it must be wondered whether the country of habitual residence can still be expected to ensure the fulfilment of this right. Some support for the position that the state of habitual residence of a stateless person takes over the functions the administrative functions normally exercised by a state of nationality can be found in the 1954 Statelessness Convention. The Convention makes certain provisions for such administrative functions, including with regard to travel documents. In this context, the first sentence of Article 28 of the Convention is of particular interest:

44 For further discussion of the role of assistance in the voluntary return procedure, see 9.3.
45 On the extension of a voluntary departure period, see 11.3.
46 See 4.3.

> *"The Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents."*

This provision raises a number of issues, however. Van Waas, for example, notes that it may facilitate the international movement of stateless persons like it would for nationals, but only to "a greatly limited extent."[47] Firstly, it is clearly limited to stateless persons "lawfully staying in their territory." Whilst 'habitual residence' in the meaning of the Directive could conceivably also encompass long-term stay in a country without the appropriate legal status,[48] the lack of such a legal status would negate that state's obligation to issue travel documents under the Convention. For any other stateless person, not meeting the 'lawfully staying' criterion, the second sentence of Article 28 only provides that states "may issue" a travel document. Furthermore, they shall "in particular give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence."[49] Beyond the question whether a stateless person is lawfully staying, a state of habitual residence could also potentially deflect any obligation to issue travel documents by arguing that a stateless person who is applying for them while in an EU member state is not, at that point, on its territory, and therefore does not fall within the scope of Article 28. This, however, would be a very reductive reading, and would be difficult to reconcile with the obvious intention of the Convention to ensure that stateless persons have some authority to turn to for essential administrative matters, including travel documents. A more flexible reading would thus consider "lawfully staying in the territory" as meaning that the stateless person still has an active right of residence there, even if he is not physically present at the moment. This would be consistent with the fact that the Convention clearly foresees the possibility of stateless persons, like others, being able to travel internationally, which should not immediately affect their residence right or the right to return.[50]

A more flexible reading is also supported by the fact that the Schedule attached to the Convention clearly foresees the possibility of issuing travel documents to stateless persons staying abroad. Paragraph 6(2) specifically notes that "[d]iplomatic or consular authorities may be authorized to extend, for a period not exceeding six months, the validity of travel documents issued by their Governments." It should be noted, however, that this is specifically connected to the renewal or extension of documents already

47 Van Waas 2008, p. 252.
48 See 3.2.3.
49 1954 Statelessness Convention, Article 28, third sentence; also see Van Waas 2008, p. 373.
50 See 4.3.4.1 on the obligation of the state to readmit a stateless person within a certain period of validity set out in the document.

issued by that state.[51] This could arguably exclude stateless persons who are abroad and are only then applying for a travel document for the first time, rather than seeking renewal or extension of a pre-existing travel document.

When the state of habitual residence is required to issue travel documents, the Convention sets out certain requirements. It should indicate that the holder is a stateless person under the Convention.[52] The validity of travel documents should normally be "not less than three months and not more than two years,"[53] with the above-mentioned possibility of extension by a maximum of six months. Importantly, the travel document should "be made valid for the largest possible number of countries," except in special or exceptional circumstances.[54] Furthermore, any fees charged for the issue of the document "shall not exceed the lowest scale of charges for national passports."[55] It should be noted that, whilst the 1954 Convention arguably does fill some gaps with regard to travel documents left by the absence of a country of nationality, the Convention is far from universally ratified. At the time of writing, 91 states are party to the Convention, leaving a majority of potential destination states that have not ratified it.

8.4 Interactions with the competent authorities: requirements and limitations

When an appropriate competent authority is identified to which third-country nationals should apply for travel documents, other questions may arise about their interaction with such an authority. In this section, three specific issues are discussed. First, this is the matter of having effective access to such authorities, which should normally be unproblematic, but in some cases may require specific action by the EU member state (8.4.1). Second, the question of the payment of fees for documents (8.4.2). And third, ensuring that the process does not lead to the issuance of documents that could be considered fraudulent, or are otherwise improperly issued (8.4.3).

8.4.1 Access to consular authorities

As a practical matter, the application for travel documents – whether or not in combination with a readmission request- will often require that third-country national present themselves physically at the consular authorities

51 1954 Statelessness Convention, Schedule, paragraph 6(1): "The *renewal or extension* of the validity of the document is a matter for the authority which issued it, so long as the holder has not established lawful residence in another territory and resides lawfully in the territory of the said authority. The issue of a new document is, under the same conditions, a matter for the authority which issued the former document." (my emphasis).

52 1954 Statelessness Convention, Schedule, paragraph 1(1).

53 1954 Statelessness Convention, Schedule, paragraph 5.

54 1954 Statelessness Convention, Schedule, paragraph 4.

55 1954 Statelessness Convention, Schedule, paragraph 3.

of the state that should provide these.[56] The work of consular authorities is regulated in particular by the 1963 Vienna Convention on Consular Relations, which, to a considerable extent, codifies pre-existing rules of customary international law. Under the Convention, consular functions include "issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State."[57] The 'sending state,' in the parlance of the Convention, is the state which has established a diplomatic mission or consular post in another state. The Convention provides that consular functions are undertaken by consular posts, which are any consulate-general, vice-consulate or consular agency.[58] Consular functions may also be undertaken by diplomatic posts, such as embassies, acting in accordance with the provisions of the Convention.[59] Consular functions are, in principle, exercised only within a designated 'consular district,' which is the particular area assigned to a consular post for the exercise of its functions.[60] This is typically one state, meaning one particular consular post is responsible for carrying out consular functions in one other country. However, the Convention leaves open the possibility that a consular post services several countries at the same time.[61] Consular functions can also be exercised on behalf of another state, if it properly notifies the receiving state and if that state does not object.[62]

A basic principle of the Convention is that nationals should have effective access to their consular authorities in order to make use of consular services.[63] This may also include obligations that are incumbent on the EU member state, as the host of a foreign consular representation. These encompass guaranteeing the inviolability of consular premises, and the protection of the freedom of communication of the consular post for all official purposes. Importantly, consular officers must be free to communicate with their nationals. Those nationals have the same freedom to communicate with and to have access to consular officers of their state of nationality.[64]

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56 In this respect, the Council also suggests adding to the Commission's proposed explicit duty to apply for travel documents in the recast proposal a further obligation "to appear in person, if and where required for this purpose, before the competent national and third country authorities." See Council doc. 12099/18, 23 May 2019.

57 Vienna Convention, Article 5(d).

58 Vienna Convention, Article 3; Article 1(1)(a).

59 Vienna Convention, Article 3; Article 70. In many cases, embassies will also have a consular section to perform consular, rather than diplomatic, functions.

60 Vienna Convention, Article 1(1)(b).

61 Vienna Convention, Article 7.

62 Vienna Convention, Article 8.

63 This can also be considered a function of the right to leave. See, for example, Inglés 1963, draft principle III(d): "No foreigner shall be prevented from seeking the diplomatic assistance of his own country in order to ensure the enjoyment of his right to leave the country of his sojourn." Also see Strasbourg Declaration, Article 10(b) on access to consulates.

64 Vienna Convention, Article 36(1)(a).

Consular posts must also be notified of nationals in prison and be free to access them (and vice versa).[65] Such obligations should be read, first and foremost, as obligations of non-interference. However, I suggest, they also imply positive obligations on the EU member state. This is evident, for example, from the requirement that consular authorities should have access to their nationals in prison, which would not be possible without positive action by the EU member state. Whilst such situations would not arise with regard to voluntary departure situations, there may be situations in which the EU member state should take concrete steps to facilitate access.

Above, I discussed the impact of certain measures to prevent absconding, such as the confiscation of documents.[66] That discussion dealt with valid travel documents. However, the EU member state may have also taken other documents, such as identity documents or expired documents, which could be relevant evidence when the third-country national applies for replacement travel documents. As noted, this may raise questions how to balance the need to allow third-country nationals to take the appropriate steps to arrange their return, whilst continuing to prevent absconding. Temporary return of documents to third-country nationals, at least for the duration of their interaction with the consular authorities, may be one way to solve this. The approach sketched above, in which the authorities directly share confiscated documents with the consular authorities of the relevant country of return, may also be a way to deal with this problem.[67] In either case, the need to ensure the effective achievement of the Directive's objectives would require the EU member state to take positive action to ensure that necessary documents can be presented, with a failure to do so in a timely manner having an obvious impact on third-country nationals' ability to meet their obligation to return within the voluntary departure period. Such circumstances should be taken into consideration when assessing compliance with this obligation. Other measures to prevent absconding may also have a practical impact on third-country nationals' access to consular authorities, for example when they are subject to reporting duties or restrictions of movement. Here, the right to leave and the requirement to ensure the *effet utile* of the Directive both point to the need for EU member states to strike an appropriate balance between such restrictions and enabling access to consular authorities. This may include the temporary lifting of restrictions on movement or allowing the third-country national to report at a later time or with a longer interval. Alternatively, this may be done by ensuring that consular officials have access to third-country nationals wherever they are staying. Similar obligations would arise, in my view, from the Vienna Convention.

65 Vienna Convention, Article 36(1)(a)-(b) and (2).

66 See 8.2.1.

67 Although this would limit the possibility of autonomous action by the third-country national and put more administrative burdens on the member state.

In some cases, positive obligations on the EU member state may go further. For example, when there is no consular representation of the country of return in the EU member state. As noted, it is possible for states to exercise consular functions in different countries through the same post. Indeed, many states operate consular posts that serve multiple countries at the same time. For example, in the Netherlands, the consular functions of no fewer than 54 states are exercised from Brussels, rather than a consular post within the Netherlands itself.[68] This includes many African countries and small states, which often do not have the resources to establish a consular post in all EU member states. In special circumstances, a consular officer may also exercise functions outside his designated consular district, subject to consent of the receiving state.[69] If face-to-face contact with consular officials is necessary to obtain travel documents, the absence of a consular post in the EU member state where third-country nationals are staying raises particular issues when they are faced with a return decision. Such third-country nationals cannot travel independently to another EU member state without prior arrangements. After all, they would be considered illegally staying within the meaning of the Directive there as well. In such situations, the EU member state that issued the return decision may thus have to become actively involved. This could either be by making arrangements with the EU member state where the third-country national's consular authorities are located, to enable him or her to go there for the purpose of applying for travel documents. Alternatively, it may require enabling consular officials to visit the third-country national on its territory, if they are willing and able to do so.

8.4.2 Dealing with fees for travel documents and other demands

When applying for travel documents at consular authorities, third-country nationals will not only have to provide the required evidence that they are entitled to such documents, but they may also face other demands. In particular, they may be required to pay administrative fees. Paying such fees is an integral part of the administrative process of obtaining documents and can thus be considered as an obligation to be met by third-country nationals under the terms of the Directive. The question of levying fees for issuing documents is regulated, to some extent, by various international norms. Hailbronner, for example, suggests that customary international law in relation to readmission requires states to only charge reasonable fees.[70] What is reasonable, of course, is not always clear. Although only formulated as a recommended practice, Annex 9 to the Chicago Convention

68 See DT&V 2021. Another three states exercise their consular functions covering the Netherlands from London or Paris.

69 Vienna Convention, Article 6.

70 Hailbronner 1997, p. 15.

provides some guidance by stating that fees charged for the issuance of a passport should not exceed the cost of the operation required for it.[71] By analogy, I would suggest, the same holds for emergency travel documents. This still leaves wiggle room for states of origin, but at least provides some benchmark for establishing when fees are clearly disproportionate. An important safeguard can also be found in the Vienna Convention on Consular Relations, which provides that states may levy fees for consular acts, including the issuing of travel documents, but that these must be set out in the laws and regulations of the state.[72] This then prohibits the state of nationality not only from demanding fees not directly connected to the administrative process of issuing travel documents, but also from doing so in the absence of clear regulations. Various documents on the right to leave and return have also concluded that the effective exercise of those rights would require replacement travel documents to be provided free of charge or only for nominal fees.[73] The need for states to ensure adequate access to information regarding the administrative requirements for obtaining such documents has also been emphasised.[74]

While the frameworks above address the countries responsible for issuing travel documents, there are further international rules which particularly pertain to the EU member state. As noted, the EU and all its member states are a party to the UN Convention against Transnational Organised Crime (CTOC or the Palermo Convention). I have mentioned CTOC so far in relation to the two Protocols on trafficking and smuggling, which may have a bearing on the issue of voluntary return when the third-country national is a victim of trafficking or has been smuggled. However, the main Convention is also relevant in this respect, regardless of the specific status of the third-country national. Article 8 of CTOC requires states to criminalise corruption, when committed intentionally, of its own public officials and to consider doing the same for corruption by foreign public officials or international civil servants.[75] Similarly, the participation in corruption as an accomplice should be tackled.[76] Furthermore, Article 9 requires action to promote integrity and prevent corruption. The concept of corruption covers, inter alia, "[t]he solicitation or acceptance by a public official, directly or indirectly, of an undue advantage … in order that the official act or refrain from acting in the exercise of his or her official duties."[77] This would clearly also cover situations in which a third-country national is asked to pay money to a consular official over and above the normal fee for replacement

71 Chicago Convention, Annex 9, fifteenth edition, Recommended Practice 3.15.1.
72 Vienna Convention, Article 39(1).
73 Inglés 1963, draft principle IV; Strasbourg Declaration, Article 9; Uppsala Declaration, Article 13. Also see Hofmann 1988, p. 312, noting that fees may not be of such character as to impede the exercise of the individual's rights.
74 Uppsala Declaration, Article 14; Hannum 1987, p. 12.
75 CTOC Article 8(1) and (2).
76 CTOC Article 8(3).
77 CTOC Article 8(1)(b).

travel documents, or is asked for other favours in exchange for the travel document.[78]

Not much has been written about corruption in return procedures, although the last few years some research on this issue has emerged, particularly in relation to the reintegration of returnees.[79] However, the risk of corruption in return procedures should be considered real. Of the countries whose nationals were most ordered to leave the EU in 2018 and 2019 according to Eurostat (Ukraine, Morocco, Albania, Afghanistan and Algeria) or issued the most return decisions according to Frontex (Ukraine, Morocco, Afghanistan, Albania and Pakistan),[80] only Morocco ranks lower than 100th in the Corruption Perceptions Index 2020 of the anti-corruption watchdog Transparency International.[81] Several organisations and researchers have also pointed to concerns about bribery at the moment of arrival in the country of return.[82] It is not easy to connect general corruption practices and even post-return risks to the process of obtaining travel documents in preparation of return.[83] However, there are some such indications. For example, a 2013 Country Guidance report on Guinea, published by the Dutch Ministry of Foreign Affairs, is instructive. Concerning the process of obtaining travel documents in Guinea, it noted that that "[b]ecause of the high level of corruption, fraud with documents occurs frequently." And that: "In general, not only can documents be obtained and procedures circumvented by paying money, but due to corruption more needs to be paid than the lawfully set fees."[84]

It should be noted, first of all, that the difference between high fees, which can be part of official policy, and corruption may not always be clear-cut. Furthermore, there will be considerable barriers for a third-country national to show that a consular official is making demands which would come within the scope of corruption. And even if such evidence exists, it may not be easy for EU member states to take action towards consular representations or individual officials, due to reasons of diplomatic immunity or the preservation of good international relations. However, what member states quite clearly cannot do is ignore credible allegations

78 The fact that the Convention deals with transnational crime should not be a barrier here, as it relates to officials of states operating on the territory of parties to the Convention.

79 See, for example, Paasche 2016; Paasche 2018.

80 Frontex 2021, Annex table 11.

81 Transparency International 2021. Albania and Algeria rank joint 104th, Ukraine 117th, Pakistan 124th and Afghanistan 165th (out of a total of 179 countries included) in the Index.

82 Amnesty International Netherlands 2017, p. 44-47; LOS Foundation 2017; Alpes & Sorensen 2016.

83 A study by LandInfo, and independent country of origin information analysis body within the Norwegian Immigration Authorities, for example, noted that the general corruption in Iraq "does not necessarily mean that there is much room for bribing public servants at the passport offices", although "[t]here may be room for bribery in the last link of the chain." LandInfo, 2015, p. 15.

84 Dutch Ministry of Foreign Affairs 2013, p. 18.

of corruption in the process of obtaining travel documents as part of their relationship with third-country nationals. For an EU member state to do so would clash with its obligations under, and the spirit of, CTOC.[85] An EU member state can neither expect, nor accept, that a third-country national becomes a participant in corruption simply to meet his or her obligation to return. It should be noted that this does not only relate to monetary demands by consular authorities, but could also stretch to other issues, such as sexual favours. It should go without saying that, even aside from the question of corruption, tacitly accepting that such favours should be given to consular authorities in order to ensure return would also be clearly incompatible with the fact that the return procedure should be humane and dignified in all its aspects.[86]

But even in those cases that the levying of disproportionate fees does not amount to a clear case of corruption, it may have implications for the EU member state. While the requirements under the Vienna Convention and other instruments address the country issuing documents, they show that disproportionate fees are outside the scope of what is necessary and legitimate within the process of obtaining such documents. Here, the same logic would apply as has been put forward with regard to conditions for readmission. A consistent interpretation of the obligations of third-country nationals under the Directive, in conformity with international law, cannot support the notion that individuals take any action that is unnecessary to fulfil the obligation to return, and states are prohibited from expecting this on the basis of international rules. Again, it is not up to the third-country national to clean the mess left by countries of return failing to act in line with their own legal obligations. The responsibility for such failures are squarely on the shoulders of those states, and cannot be transferred to the individual. As such, individuals cannot be held responsible for non-return if this is the result of their refusal to meet illegitimate demands in relation to obtaining travel documents. This would also be consistent with the findings of the CJEU that member states' own actions in levying fees should not undermine the effectiveness of rights conferred by EU instruments to individuals.[87]

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85 And no doubt with provisions of national law.

86 On the links between corruption and human rights, see RWI 2018. Additionally, accepting that individuals engage in corruption would arguably run counter to the collective responsibility of all states to uphold the integrity of the international system of consular relations in its entirety, regardless of individual cases.

87 CJEU C-508/10 *Commission v. Netherlands* [2012]. The judgment deals with the compatibility of high fees for family reunification under Directive 2003/109 concerning the states of third-country nationals who are long-term residents. Paragraph 73 of the judgment reads: "It follows that, in so far as the high amount of the charges levied on third-country nationals by the Kingdom of the Netherlands is liable to create an obstacle to the exercise of the rights conferred by Directive 2003/109 [the Long-term Residents Directive], the Netherlands legislation undermines the objective pursued by that directive and deprives it of its effectiveness."

8.4.3 The prevention of the procurement and use of fraudulent travel documents

A different, although connected, issue relates to the validity of the travel documents to be obtained. Several international instruments impose obligations on states to prevent the issuance and use of fraudulent travel documents. The Smuggling Protocol, for example, specifically seeks to combat the use of fraudulent travel documents, and includes obligations on states to ensure that international migrants are in possession of valid documents. Fraudulent documents, for this purpose, do not only include those "falsely made or altered by anyone other than those lawfully authorized to make or issue such a document on behalf of a State," but also documents that have been "improperly issued or obtained through misrepresentation, corruption or duress or any other unlawful manner," or used by any person other than the rightful holder.[88] The use or production of such documents should be criminalised and states should take measures to detect them. Similar obligations to detect and take out of circulation fraudulent travel documents also arise out of the Chicago Convention.[89]

Despite these clear obligations, member states' interests in ensuring effective returns, especially for groups that are difficult to remove, may become important incentives to use all options possible. A particularly extreme example of this occurred in the Netherlands in the late 1990s and early 2000s, in relation to Somalis who had to return.[90] Due to the long-term conflict in the country, there were no government structures in Somalia able to issue travel documents. It subsequently emerged that the Dutch government had used mediators to obtain documents nonetheless, including those stamped by the 'Somali embassy in Paris,' which was in fact not operational at the time. Official documents from the Dutch government on return possibilities further indicated that "Somali passports are for sale in Somalia and neighbouring countries in markets."[91] In a reaction to news reports, officials were quoted as saying that "when [returnees] are able to travel to Somalia with the passport, this is fine with us."[92]

This example predates both the adoption of the Directive and CTOC, but shows how the pressure to ensure effective return, even if this would require the use of travel documents obtained in a highly irregular manner, may lead member states to turn a blind eye to concerns over the validity of documents. It is also instructive of the way in which the notion of the individual responsibility of the third-country national can be used, or perhaps more accurately, abused by member states. In particular, the example above is not only noteworthy for accepting that the responsibility of the individual

88 CTOC Smuggling Protocol, Article 3(c)(i)-(iii).
89 Chicago Convention, Annex 9, fifteenth edition, Standard 3.34.1.
90 Trommelen 1997; De Ochtenden 2007.
91 Dutch Ministry of Foreign Affairs 2002, paragraph 3.3.4.
92 Trommelen 1997.

would also encompass participation in unlawful practices, but also for the way that any responsibility of the member state is excluded. While it is highly questionable that, even at the time of the incident described, this would have been legitimate, this is certainly not the case under the clear obligations currently incumbent on EU member states to prevent the use and spread of fraudulent documents. The concrete obligations and general spirit of CTOC and the Smuggling Protocol, as well as the Chicago Convention, resist EU member states directly or indirectly assisting in the use of documents which are clearly false or at least of questionable prominence. Similarly, as the member state is under an obligation to prevent the use of falsified documents, it must at a minimum refrain from suggesting, or requiring (as in the Somalian case) that the third-country national try and obtain travel documents through unofficial channels or through other procedures which bring the validity and legitimacy of documents in doubt. Even if return with documents of questionable provenance is the only way to ensure the third-country national returns, the EU member state cannot accept this, much less promote it. As such, these actions would clearly fall outside the scope of the obligation incumbent on the third-country national under the Directive.

8.5 The EU member state as an issuing authority?

So far, the discussion has focused on situations in which third-country nationals seek to obtain travel documents from countries of return. However, in relation to their obligation to turn to the competent authorities, the potential, if limited, role of the EU member state as an issuing authority should not be ignored. The issuance of travel documents is primarily a matter of domestic discretion. From this perspective, EU member states could be said to always be able to issue such documents. However, the extent to which they could be relevant to return would depend on the international recognition of such documents by other states as valid in general, and the willingness of destination countries to allow returning third-country nationals entry on the basis of such documents (whether or not in combination with a relevant visa or other authorisation) specifically.[93] Many EU member states have regulations allowing them to issue so-called 'aliens passports,' which can be provided to non-nationals in their territories to allow them to travel.[94] In general, however, EU member states are unlikely to issue such documents to irregularly staying third-country nationals. Under domestic rules, these are often reserved for lawfully staying aliens,

93 As well as, of course, the willingness of carriers providing transport to the destination country to allow individuals carrying such documents to board.

94 Note that in various member states, such aliens' passports cover different categories of aliens, including stateless persons and refugees.

and they may furthermore have to show that they are unable to obtain travel documents from their own authorities.[95] These provisions may also exclude travel to the third-country national's country of origin.

A more solid basis, at least in international law, for EU member states to issue travel documents to third-country nationals may be found in the 1954 Statelessness Convention, which has been discussed in detail above in relation to the role of the country of habitual residence. However, its provisions may also be applicable to EU member states. As noted, whilst the Convention requires states to issue travel documents to stateless persons lawfully staying in their territories, it also provides that states may issue such documents to 'other' stateless persons. Read in conjunction with the first sentence requiring the issuance of travel documents to lawfully resident persons, this clearly implies that states are authorised to issue documents on the basis of the Convention to unlawfully staying stateless persons. Although this is not a hard obligation, this means that Convention travel documents issued by EU member states to stateless persons with an obligation to return should be recognised at least by those destination states that are parties to the Convention. Furthermore, if a third-country national can show he or she is unable to obtain a travel document from his country of lawful residence, the Convention would require the EU member state to "give sympathetic consideration" to issuing a travel document.[96] This would imply, in my view, at least offering the third-country national a possibility to make an application, and to give reasoned arguments if it decides not to issue such a document.

The 1954 Convention provides for much lower barriers when it comes to the issuance of identity, rather than travel, documents. Article 27 provides that states party to the Convention "shall issue identity papers to any stateless person in their territory who does not possess a valid travel document." This wording suggests that the lawfulness of the presence of the stateless person is not an issue. As such, EU member states could be expected to at least issue identity documents to undocumented stateless persons. In some cases, such as under certain readmission agreements, such identity documents may be an important basis for readmission. In other cases, at the very least, it would be an intermediate step towards obtaining travel documents.

Another possibility, which could be applicable to all categories of third-country nationals, would be the issuance of a so-called 'European travel document' or 'standard travel document' for the specific purpose of return. This document has its basis in the Council Recommendation of 30 November 1994 concerning the adoption of a standard travel document for the expulsion of third-country nationals. The Recommendation notes the difficulties faced by member states in the expulsion of third-country

95 For an overview of national legislation, see, for example, ECRE 2016b.

96 1954 Statelessness Convention, Article 28, third sentence. Also repeated in Schedule, Paragraph 6(3).

nationals who possess no travel documents. It provided for a specific document – basically a form with a photo, details about the third-country national and a stamp by the member state – to be "used as appropriate by all Member States in the case of third-country nationals being expelled from the territory of the Union."[97]

The nature and legal basis for the EU travel document has sometimes been questioned. In October 2016, the European Parliament and the Council adopted Regulation 2016/1953 on the establishment of a European travel document, which repealed the Council Recommendation.[98] Although it does not explicitly acknowledge doubts about the legal basis for the travel document in the Recommendation, this is clearly one of the reasons for the adoption of the Regulation. The official reason for the adoption of the Regulation is the fact that the EU travel document was "not widely accepted by authorities of third countries, for reasons including its inadequate security standards."[99] It therefore seeks to establish a "more secure and uniform" document, with the explicit aim of facilitating returns in the context of readmission agreements or other arrangements, "as well as in the context of return-related cooperation with third countries not covered by formal agreements."[100]

The possibility to return on the basis of an EU travel document is set out in a number of agreements with third countries, as well as more informal arrangements. Various EU readmission agreements, for example, foresee this possibility. As noted, the EU readmission agreement with Albania provides for the use of an EU travel document if the Albanian authorities fail to issue, extend or renew a travel document within a specified period. [101] This is also the case for Turkey, which also undertakes to accept returns on the basis of an EU travel document "if there is no consular office of Turkey in a Member State."[102] In other readmission agreements, the use of an EU travel document is not only a fall-back option for nationals, but the main option when it comes to the return of non-nationals. The EU's readmission agreements with the Russian Federation, Serbia, and Ukraine all provide that, once readmission has been accepted, it is the EU member state that issues a travel document for the purpose of the return of a non-national.[103]

97 OJ C 274/18, 19 September 1994.
98 OJ L 311, 17 November 2016, pp. 13-19.
99 Regulation 2016/1953, Recital 4.
100 *Ibid*., Recital 6.
101 EU-Albania readmission agreement, Article 2(2).
102 EU-Turkey readmission agreement, Article 4(3).
103 EU-Russia readmission agreement, Article 3(3): "After the Russian Federation has given a positive reply to the readmission application, the requesting Member State issues to the person concerned a travel document recognised by the Russian Federation (EU standard travel document for expulsion purposes in line with the form set out in EU Council recommendation of 30 November 1994)." Also see EU-Serbia readmission agreement, Article 3(4); EU-Ukraine readmission agreement, Article 3(4).

EU travel documents have also been used within the framework of more informal arrangements, such as in the Joint Way Forward with Afghanistan.[104]

The above means that, rather than turning to a country of return, third-country nationals may sometimes be in a position to request documents from the EU member state itself. The EU member state has a clear obligation to safeguard the effectiveness of the return procedure. If this effectiveness can be safeguarded by the EU member state issuing travel documents under the Statelessness Convention, an EU travel document, or even under domestic competences with regard to aliens' passports, it should arguably do so. However, this should be done on the clear understanding that the issuance of a travel document by the expelling state is fundamentally different than the same action being taken by the country of origin or, in certain circumstances, transit countries. In those situations, the issuance of travel document naturally implies that those countries accept those documents as valid, and normally simultaneously provide evidence of that country's willingness to admit the individual. This is not the case for documents issued by the EU member state itself and specific guarantees, especially through formal agreements or conventions, are necessary to ensure that the issued document will indeed be accepted. If clear recognition of such documents is guaranteed, and return on the basis of such documents would have no other adverse effects,[105] the third-country national could legitimately be expected to make use of this option. Because of the somewhat obscure nature of these possibilities, including the issuance of an EU travel document, member states can, in my view, be expected to provide third-country nationals with adequate information about the existence of these options, and to ensure they have access to procedures for obtaining them.

8.6 Conclusions

This chapter has focused on the relevant international and EU law provisions in relation to travel documents, and their relation to third-country nationals' obligations under the Directive, as the second set of actions

104 Joint Way Forward, Part II, paragraph 1: " To facilitate the return process, the EU side will ensure that every Afghan returning to Afghanistan on a voluntary or non-voluntary basis in line with the EU and international laws is in possession of a recognised valid travel document, such as an Afghan passport, an Afghan travel document *or the EU standard travel document for return*" (my emphasis). The draft Standard Operating Procedures with Mali contain a commitment to discuss the possibility of using an EU standard travel document if time limits for the issuance of documents by Mali are not respected, see Council doc. 15050/16, 6 December 2016, Annex, Part 7.

105 In this respect it should be kept in mind that the EU standard travel document is not an identity document, so there may be questions as to what position third-country nationals might find themselves in especially when returning to a transit country. In that case, there may also be problems regarding onward travel, which may leave them in legal limbo.

necessary to return voluntarily. It found that, for those who do not already possess valid travel documents, when there is no way to return without them, the obligation to return under the Directive also implies an obligation to turn to the relevant competent authorities to request such documents, provided this does not clash with ongoing asylum procedures. Without such action to apply for travel documents, the return procedure cannot be concluded effectively, and failure to do so without a reasonable excuse would thus constitute prima facie non-compliance with this obligation. The responsibility of third-country nationals implies that they turn not just to any authority, but one that is competent under (domestic or international) law to issue travel documents that would be sufficient to fulfil their obligation to return. The logic of voluntary return would dictate that it is, in principle, up to third-country nationals to identify that competent authority. This will normally be the country where they seek to be admitted, unless they aim to return to another third country. Under normal circumstances, the country of nationality of the individual should be competent to issue travel documents, including when it is not the intended destination of return. However, the EU member state may have positive obligations to enable access to consular authorities, both under the Vienna Convention and as a way to ensure the effective achievement of the Directive's objectives. This may particularly be the case if the member state has imposed measures to prevent absconding that interfere with the individual's access to a consular authority, such as limits on freedom of movement or reporting duties. When consular authorities can only be accessed on the territory of another member state, coordination efforts can be expected to ensure the third-country national can lodge an application for travel documents.

When the requests for readmission and travel documents coincide, for example in case of return to the country of nationality or to a transit country under an EU readmission agreement, there can be no other obligation than to provide evidence of eligibility for readmission, beyond meeting basic administrative requirements, such as providing (as necessary) a photo for the document and the payment of fees. This question of eligibility for readmission has been discussed in detail in Chapters 4 and 6. As in the case of readmission, third-country nationals can be expected to provide evidence and information to the best of their abilities, in good faith and truthfully. As regards the administrative requirements, there are clear limits to what may be asked of individuals by consular authorities, and therefore what may be expected of them by EU member states during the voluntary return process. In particular, third-country nationals cannot be expected to pay fees beyond what is reasonably connected to the administrative process undertaken by the consular authorities, or those not set out in national rules or regulations. Member states must further protect third-country nationals from having to pay bribes, issue favours, or meeting other demands by consular authorities that would qualify as corruption or abuse of power. No action that can be qualified as such can be part of the legitimate obligation to return under the Directive, and the fact that it is the individual's responsibility to

return cannot be invoked by member states in this respect. Similarly, EU member states cannot allow third-country nationals to leave their territories with travel documents that may be falsified or fraudulent. At no point can member states require or encourage, explicitly or tacitly, that third-country nationals obtain travel documents through processes or channels that risk producing false or fraudulent documents, even if this would be the only way to ensure voluntary return.

Third-country nationals are, in principle, free to decide what kind of travel document to apply for, provided it is suitable for their return. Normally, the EU member state should not interfere with this choice, in particular when the third-country national opts to apply for a passport instead of an emergency travel document, unless it can be duly justified, for example in relation to the risk of absconding. EU member states should particularly not interfere with attempts by third-country nationals to return to their country of nationality, or their 'own country' under the ICCPR. While the EU member state has clear duties of non-interference, positive obligations in facilitating third-country nationals' actions to obtain the travel document of their choice are less clear. Considerations of costs and timing, including the extent to which a voluntary departure period can and should be extended, will impact on this possibility. If they apply for a passport specifically, some other requirements may come into play. Since – in contrast to the obligation to provide documents specifically for readmission – a country of nationality may under certain circumstances refrain from issuing a passport, third-country nationals can be expected to cooperate with the authorities and provide additional evidence.[106]

For stateless persons, the identification of a competent authority may be more problematic. If a state where they have lawful residence has earlier issued travel documents, and these have only expired recently, there is a clear basis for expecting them to turn to that state to renew such documents. However, a state of habitual residence does not have a clear obligation to issue such documents in all cases. This is different if it is a stateless person's 'own country' under the ICCPR, but this returns the discussion to the matter of the forced exercise of one's right to return in Chapter 6. As a result, when assessing compliance with the obligation to obtain travel documents, member states should take account of the extremely limited obligations of countries of habitual residence to issue travel documents to stateless persons.

For stateless persons, but also for other third-country nationals, the option of obtaining travel documents from the EU member state may be open, especially if no other authority can or will issue documents. When such possibilities exist, EU member states can be expected to inform third-country nationals about this. Return on such documents, such as an EU

106 This may include, as in the example of *Peltonen* above, evidence that he has fulfilled military service, if this is indeed a requirement in the country of nationality, although this should not prevent the individual from returning to the country of nationality.

travel document, can only be expected of third-country nationals if there are sufficient guarantees that this will lead to readmission by the transit country and that no adverse effects, in relation to the fundamental rights situation upon return, will occur.

9 Practical arrangements and departure from the EU member state

9.1 Introduction

This chapter concludes the discussion of the first set of research questions, covering the scope and limits of the actions that third-country nationals can be expected to take as part of their obligation to return. It does so by looking at the third and final of the categories of actions that were identified as being necessary to successfully complete 'the process of going back': making practical arrangements for departure and, eventually, leaving the EU member state. In this chapter, I will discuss several aspects of this. First, section 9.2 will briefly look at some of the requirements that third-country nationals may have to fulfil before being allowed to leave an EU member state. Whilst member states would not normally be inclined to stop third-country nationals who have been issued a return decision from leaving, some formalities must be observed. These relate to the crossing of external borders, but also to possible outstanding obligations that third-country nationals may have towards the host state or individuals.

Second, the question of return assistance will be discussed. Although I specifically noted the importance of not confusing voluntary return as a legal concept and return assistance or AVR(R),[1] the two do have important interconnections. In particular, AVR(R) programmes may provide the necessary help to individuals to ensure that they can meet their obligation to return within the voluntary departure period. The issue of interest here is not the practical efficacy of such programmes, but their legal significance in relation to the Directive. Section 9.3 will deal with two aspects of the interlinkage between the obligation to return and return assistance. On the one hand, this is the question whether, under the Directive, third-country nationals can claim access to assistance programmes set up by member states, or whether those states have full discretion in deciding who gets to benefit from them. On the other hand, it will discuss whether failure to apply for assistance, when available, is a factor that should be taken into account when assessing if third-country nationals have made all necessary efforts to return.

So far, when the obligation to return has been discussed, it has focused on the efforts that individuals could be expected to make to return. However, the obligation to return also means that those efforts should normally lead to the desired result. While this result appears to be clearly

1 See 2.10.1.3.

defined ('returning'), section 9.4 will show that the benchmark by which member states establish that third-country nationals have indeed successfully returned may not be so unambiguous, either conceptually or practically. This is particularly the case because both 'returning' and 'leaving' are used for this in the Directive, which may create confusion. In this respect, the section will also discuss whether the return decision has a sufficient 'European effect' to provide a framework to prevent third-country nationals from meeting their obligations by simply moving irregularly to another member state. Conclusions are presented in 9.5.

9.2 Fulfilling obligations for exiting the member state

The key objective of the Directive is to end irregular stay in EU member states, by ensuring that third-country nationals leave their territories and return to an appropriate destination. This interest in seeing third-country nationals return does not mean that the process of leaving the member state itself is without legal constraints. While it may seem somewhat counter-intuitive from this perspective, there may be reasons why member states want to restrict third-country nationals' freedom in exiting their territory. Furthermore, member states themselves have certain obligations under EU law to not let third-country nationals leave in any manner that they see fit. This section outlines some of these issues related to exit, to complement the picture of possible constraints in relation to return and readmission in the previous chapters.

9.2.1 Fulfilment of specific conditions in the individual case

In general, third-country nationals will rarely be prevented from leaving.[2] However, there may be reasons why states "before allowing persons to leave, make every effort to determine they are not seeking to depart for the purpose of evading legal obligations either towards the State or individuals."[3] Preventing a third-country national from leaving, in whatever form, would amount to an interference with the right to leave. However, a range of legitimate aims in making such interferences have been recognised.[4] For example, states may restrict departure to ensure individuals are not absconding from criminal procedures in progress against them, or from penalties that have not yet been paid or sentences that still need to be executed. Furthermore, member states may want to ensure third-country nationals do not leave before paying relevant taxes.[5] In addi-

2 Hannum 1987, p. 5; Hailbronner 1994, p. 109.
3 Cassesse 1983, p. 221.
4 See 7.2.2.
5 Hofmann 1988, p. 98.

tion to obligations towards the member state at large, relevant reasons to restrict departure may also include obligations towards other individuals. For example, restrictions on the right to leave to prevent a parent taking children abroad without the consent of the other parent can be a legitimate interference. This may also be the case if restricting departure is necessary to ensure financial obligations to third parties are met.

It would go too far to discuss these various grounds for preventing departure in detail, but it must be assumed that such same factors may lead to the denial of departure in the context of voluntary return. In that context, it will be incumbent on third-country nationals to fulfil any obligations for departure, to ensure that this is not unnecessarily delayed. In principle, they can be held responsible for their failure to remove legal barriers to departure, if this leads to non-return within the voluntary departure period. However, this must, in my view, have been reasonably possible, in at least two ways. First, it must relate to factors over which they have control. This may be the case, for example, for the payment of taxes or settling of financial obligations, as well as ensuring that proper arrangements with the other parent are in place in case third-country nationals seek to return with children. By contrast, other factors, such as the continuation of criminal proceedings, may be outside their control.[6] Furthermore, even if removing barriers to departure is within third-country nationals' possibilities, there may have to be considerations about the reasonableness of the expectation that they can do so within the voluntary departure period granted. This relates both to the length of the initial period and the possibility of extending it. The issue of the length of the voluntary departure period and how it relates to steps to be taken by third-country nationals, including dealing with issues such as discussed here, will be considered in detail in Chapter 11. More generally, cooperation between individuals and member states can be expected here, particularly so that a person seeking to leave is not affected by "manifold legal and bureaucratic barriers."[7] States must therefore ensure that procedures that may be necessary to leave the country are sufficiently accessible and expeditious.

9.2.2 General conditions for exiting external borders

In addition to such specific issues that may arise in individual cases, there are more general conditions that all persons exiting EU member states through their external borders must fulfil, which also apply to third-country nationals leaving voluntarily. In this respect, it should be

6 An argument could be made that this still falls within third-country nationals' responsibility, as these follow from their own conduct. But this, I would argue, is a matter outside the scope of the Directive, and thus the responsibility to return as such. Furthermore, in the case of criminal investigations, the exact conduct of individuals may still be in question.

7 HRC General Comment 27, paragraph 17.

recalled that the Directive and the Schengen acquis are interwoven.[8] Two key terms in the Directive, 'third-country national' and 'illegal stay,' are defined in the Directive in direct reference to the Schengen Borders Code.[9] These definitions relate to the conditions for entry into, and stay in, the Schengen area. However, the Schengen acquis has a broader relevance to the issue of voluntary return, as it also sets rules on exiting the Schengen area. As already noted, 'leaving' is a core part of voluntary return and the Schengen acquis, in particular the SBC, sets rules on how and where persons should leave the Schengen area. The SBC, for example, provides that external borders may only be crossed (both by persons entering and exiting the Schengen area) at official border crossing points during fixed opening hours.[10] It also requires member states to conduct border checks on outgoing persons, including thorough checks on third-country nationals.[11] Such thorough checks comprise certain elements, including verification that a third-country national is in possession of a document valid for crossing a border and verification of such a document for signs of falsification or counterfeiting.[12]

Whilst the requirement to leave the Schengen area only through an official border crossing point and the fact that third-country nationals will be subjected to certain checks does not seem to be very intrusive and, indeed, a logical requirement, it may have consequences on how individuals engage with voluntary return. For example, in Chapter 8 the possibility was discussed that third-country nationals, in limited situations, could return to their countries of origin without travel documents, for example when they share a border with the expelling EU member state. Although an overland crossing may be possible, the member state should ensure that this is only done at official border points. Furthermore, the possibility of doing so without valid travel documents may be limited by the member state's obligation to verify that the crossing occurs only with such documents. While it is for the member state to enforce such rules, third-country nationals can be expected to ensure that the appropriate conditions for exit are met. Conversely, and in line with the discussion on returning with fraudulent or otherwise questionable documents in the previous chapter, member states cannot expect that third-country nationals circumvent such rules just to achieve effective return in the quickest or most convenient way.

8 RD Recitals 25-30.
9 RD Article 3(1) and 3(2).
10 SBC Article 4.
11 SBC Article 7. On thorough checks, see Article 7(3).
12 SBC Article 7(3)(b).

9.3 Return assistance and the obligation to return

In the introductory chapter, I discussed that confusion often arises over voluntary return as a legal concept enshrined in the Directive, on the one hand, and return assistance, such as through assisted voluntary return (and reintegration) programmes (AVRR), on the other. Clearly, the two are closely related in many cases, but one cannot be equated with the other. It is perfectly possible for third-country nationals to return voluntarily, without resorting to return assistance. Conversely, return assistance programmes may have a wider scope and also cater to persons who have not (yet) been issued a return decision. Nevertheless, the two may also interact. Some examples of where the question of return assistance may come into play have already been provided in previous chapters, such as regarding the extent to which individuals' choices about the type of travel documents they prefer to obtain can and should be supported financially. Furthermore, return assistance can play a role in shaping individuals' decision to opt for voluntary return, rather than to wait for enforcement of the return decision.[13]

There is an expanding literature on the role of AVR(R), including about how assistance impacts on decisions about return, and about the reintegration prospects of persons who return to their destination countries.[14] While these are important issues for return policy more broadly, I will limit the discussion below to those issues where return assistance interacts with elements of the obligation to return under the Directive. Following a more general introduction of the role of return assistance (9.3.1), this will focus on two issues. First, whether third-country nationals have a right to receive return assistance under EU law, including those normally excluded from AVR(R) programmes (9.3.2). And second, the opposite question, namely whether seeking return assistance is part of third-country nationals' obligation to return, and whether failure to solicit such assistance could thus be considered non-compliance with that obligation (9.3.3).

9.3.1 Return assistance and voluntary return: general comments

Return assistance programmes are offered in virtually all member states. The content and scope of assistance programmes may vary, and even within member states different types of assistance may be available to different groups of third-country nationals. However, broadly speaking, a few elements commonly form part of such programmes. First, informa-

13 Although how much the availability of assistance actually is a deciding factor in return decisions may not always be clear. For a discussion of this, see, for example, Brekke 2015; Leerkes, Van Os & Boersema 2016; and an overview in Kuschminder 2018, pp. 266-267.

14 See, among others, Black et al 2004; Strand et al 2008; Ruben, Van Houte & Davids 2009; EMN 2011; Black, Collyer & Somerville 2011; Leerkes et al 2014; Brekke 2015; Strand et al 2016; Kuschminder 2017.

tion provision to potential returnees about the possibilities of assistance, including, in many cases, individual counselling. Such counselling looks more closely at the individual case, identifies potential barriers to return and explores ways to overcome them. Another element may be mediation with the competent authorities to help the third-country national obtain travel documents. A key element of virtually all assistance programmes is that they facilitate the transport of voluntary returnees, for example by providing (or reimbursing) air tickets to the third-country national's country of return, as well as covering costs associated with his or her travel from the point of arrival to the final destination in that country. Many programmes also include a financial assistance component, which may either be framed as covering some additional costs, or as creating an incentive for the third-country national to take up the option of voluntary return. Further assistance may be available to support the reintegration of the third-country national after returning. This component has been further developed over the years, with a shift from providing monetary grants to in-kind assistance or other support, for example to help the returnee achieve self-reliance after return. Some return programmes, especially for vulnerable individuals, may also provide assistance in relation to the socio-economic situation of third-country nationals while they are still in the EU member state preparing return, which may include providing temporary accommodation.

It is not easy to say, when dealing with the specific group of third-country nationals faced with a return decision, how many benefit from return assistance. The Frontex data presented in Chapter 2 also provides information on the number of voluntary returns that have been assisted, although significant gaps remain. The clearest figures are presented in the category of voluntary returns 'without assistance.' In 2018, these amount to 46 per cent, while in 2019 they make up 51per cent of the voluntary returns reported by Frontex. However, especially given the substantial numbers in the 'not available' column, the clearest conclusion that can be drawn is that about half of the reported voluntary returns are unassisted *at a minimum*, but that this figure may be significantly higher.[15]

It may also be difficult to draw conclusions from other data, although some tentatively support this estimate. IOM, for example, provides aggregated data about the number of returns it has facilitated. In 2018, it reports having done this in approximately 34,000 cases from Europe, while in 2019 over 28,000 persons were assisted.[16] However, this includes the whole

15 For 2018, for 27,556 voluntary return cases (out of 72,773 in total) information about whether these were assisted was not available (38 per cent). For 2019, this information was missing for 22,223 out of 67,656 total cases (33 per cent). Frontex 2020a, Annex Table 13.

16 IOM 2019, p. 29; IOM 2020, p. 16. The figures also show the prominence of assisted voluntary returns from Europe in IOM's global caseload, amounting to 54 per cent of all IOM-assisted returns worldwide in 2018, and 43.5 per cent in 2019.

European region rather than just the EU/EEA area. Furthermore, while IOM has played a key role in developing and providing return assistance across the EU for decades, and continues to do so in many cases, its almost-monopoly on such services has disappeared over the last few years, with others, including governments themselves, providing (parts of) assistance. As noted in Chapter 1, Frontex is likely to play an increasing role in this area as well. As such, IOM figures alone may only provide part of the story. The 34,000 cases in 2018, if we would assume these are mainly returns from EU member states and Schengen-associated states, would make up about half of the almost 73,000 voluntary returns that Frontex reports for that year. As such, while return assistance is far from being a feature in each case of voluntary return, it plays a role in a significant number of such cases,[17] which should prompt further scrutiny of its relation to the obligation to return under the Directive.

9.3.2 A right to return assistance under the Directive?

As noted, the notion of voluntary return in the Directive and return assistance are not the same. However, there are links, arguably not just in practice, but also legally. In a way, the first 'harmonisation' attempts in relation to return, in the sense of trying to have better coordination between member states but also to give more focus at the EU level to the priority of voluntary return came in relation to assistance programmes.[18] Nevertheless, when the Directive was eventually adopted, return assistance was not part of the substantive provisions setting out common standards and conditions for return procedures. Still, Recital 10 of the Directive acknowledges the interconnection, by stating that:

> *"[i]n order to promote voluntary return, Member States should provide for enhanced return assistance and counselling and make best use of the relevant funding possibilities offered under the European Return Fund."*

Since then, a range of Council conclusions and Commission recommendations have emphasised the links between the Directive's objective of giving preference to voluntary return, and the provision of return assistance. In May 2016, the Council adopted a set of non-binding standards on return assistance.[19] These relate, for example, to the active promotion of voluntary return possibilities, ensuring broad access to assistance schemes, setting up broad and worldwide coverage, enhancing cooperation and coordination, and the use of EU funds. It also sets out key elements of AVR(R) packages

17 Also taking into account that government agencies and non-governmental organisations may also be providing assistance, which is not necessarily captured in these figures, unless this was done in cooperation with IOM.

18 See 2.2.1.

19 Council doc. 8829/16, 11 May 2016, Annex.

that member states should ideally offer, including many of the elements discussed above. As part of the New EU Pact on Migration and Asylum, a Voluntary Return and Reintegration Strategy has also been developed.[20] The Commission's recast proposal, if adopted, would constitute an important step towards cementing the legal links between the Directive's return procedure and return assistance. In the explanatory memorandum, the Commission notes the need to establish a framework for the granting of financial, material, and in-kind assistance to voluntarily returning third-country nationals. In particular, it proposes a new provision stating that member states:

> *"shall establish programmes for providing logistical, financial and other material or in-kind assistance, in accordance with national legislation, for the purpose of supporting the return of illegally staying third-country nationals…"*[21]

This obligation would be limited, however, to nationals of countries that do not enjoy visa-free travel to the EU. The assistance offered may include support for reintegration in the country of return. The granting of assistance "shall be subject to the cooperation of the third-country national concerned with the competent authorities of the Member States…"[22] In terms of the establishment of programmes, the new provision, if accepted by the Parliament and Council, would likely not have too much practical impact, since virtually all member states already provide some return assistance, although the basis on which this is done may differ. However, it would explicitly tie the achievement of the Directive's objectives to the existence of such programmes.

The fact that there are as yet no explicit substantive provisions on return assistance in the Directive does not mean that there are no legal links. Actions or omissions by member states that are not specifically within the scope of the Directive may still imply obligations on their part. This is evident, for example, from the CJEU's case law on the use of criminal sanctions for irregular stay. In a range of cases, the CJEU has clarified that, although such sanctions are not part of the Directive, member states must refrain from imposing these if they would interfere with the effective achievement of the Directive's objectives. For example, if such sanctions involve imprisonment or house arrest that would delay removal, member states' obligations under the Directive dictate that they should not impose these.[23] In those cases, the obligation on member states is a negative one. However, it might be wondered whether positive obligations, such as the

20 COM(2021) 120 final, 27 April 2021.
21 COM(2018) 634 final, 12 September 2018, Article 14(3).
22 *Ibid*.
23 See, for example, CJEU C-61/11 PPU *El Dridi* [2011]; CJEU C-329/11 *Achughbabian* [2011]; CJEU C-146/14 PPU *Mahdi* [2014]; also see Vavoula 2016; Progin-Theuerkauf 2019b, pp. 37-38.

provision of assistance, may also arise. In Chapter 6, I discussed the situation in which member states could be required to trigger a readmission agreement on behalf of third-country nationals, so that they could effectively enjoy their possibility to return voluntarily to transit countries. The explicit acknowledgement of the importance of readmission agreements in the Directive provided an important foothold for this. The same link can be seen in Recital 10, cited above, as regards return assistance. If member states can be expected to give effect to voluntary return by triggering readmission agreements, the same should be considered to apply to return assistance.

However, I suggest this would only be the case under specific conditions. First of all, the priority for voluntary return must be in play. That is, it must deal with situations in which member states do not have legitimate grounds to deny a period for voluntary departure, as will be discussed in Chapter 10. Furthermore, since the trigger for a right to assistance would be the effectiveness of the priority of voluntary return, it must first be clear that voluntary return would not be possible, in the individual case, without return assistance. This means that only certain elements of return assistance would fall within the scope of a right to assistance on this basis. As noted above, AVR(R) programmes usually consist of multiple elements, which may impact on stimulating the willingness of individuals to return, or improving their reintegration prospects. Arguably, only those elements that are directly related to the practical possibility of returning can be captured by a right to assistance. This would then be fairly limited. For example, it may apply to persons who do not have the means to pay for their own transport to have this facilitated through state-sponsored return assistance programmes. After all, without the physical possibility of moving from the member state to the destination country, no voluntary return is possible. For other forms of assistance which may be of benefit to individuals, but which do not determine whether they can return in practice, it will be much more difficult to establish an individual right.

The effectiveness of the priority of voluntary return may only provide one reason why member states may be required to provide assistance. It has been suggested that AVR(R) programmes have an important role to play in ensuring more 'humane and dignified' returns.[24] As noted in Chapter 7, issues of fundamental rights compliance may arise in relation to the social and economic conditions after return. To the extent that return programmes can mitigate those problems, it may be argued, both from a fundamental rights perspective and because this would allow for effective return, that member states can be required to provide it.

Apart from the situation described above, there may be groups of returnees towards whom member states have particular obligations to provide assistance. Under the Trafficking Protocol, state parties should consider implementing measures to provide for the physical, psychological

24 See the discussion in 2.2.1; also see PACE 2010.

and social recovery of victims of trafficking, which could include medical, psychological and material assistance, as well as assistance with appropriate housing, employment, educational and training opportunities.[25] Although this provision is not explicitly aimed at return situations, it does not necessarily exclude those either. The obligation, however, that they "should consider" such measures is weak, and the Protocol also does not establish whether it is the expelling state or the state of return that should then provide assistance. However, it does open the door for expectations of broader assistance, also in helping victims of trafficking reintegrate in their countries of return. Under the Council of Europe Convention Against Trafficking in Human Beings, however, member states *must* adopt measures as may be necessary to assist victims of trafficking in their physical, psychological and social recovery.[26] The Convention also specifically requires states to make their best effort "to favour the reintegration of victims into the society of the State of return," including in relation to education, labour market reintegration and the improvement of professional skills.[27] As such, EU member states which are party to the Council of Europe Convention may be required to provide enhanced assistance, including support for reintegration, to returnees, which must be assumed to also cover voluntary returnees, since voluntary return should be preferred.[28]

Beyond potential general requirements to offer assistance to those that would not be able to return otherwise, or groups for which specific treaty obligations exist, member states should normally have considerable discretion to decide on eligibility criteria and the type of assistance offered. In the Netherlands, for example, eligibility for specific forms of assistance, and sometimes for access to any kind of assistance at all, have frequently changed. From 2010 onwards, in response to concerns that this acted as a 'pull factor' or was otherwise abused, nationals of several countries were

25 CTOC Trafficking Protocol, Article 6(3).
26 CoE Trafficking Convention, Article 12(1).
27 CoE Trafficking Convention, Article 16(5).
28 CoE Trafficking Convention, Article 16(2). Although not particularly central to this analysis, which does not go into detail on the position of victims of trafficking, an argument is to be made that this would have effects as a matter of EU law as well. While the CJEU has not explicitly clarified the role that the CoE Trafficking Convention might have within EU law, AG Szpunar referred to member states' obligations arising of it, see CJEU, Opinion AG, C-340/14 and C341/14 *Trijber* [2015], paragraph 77. Also noted by Szpunar (footnotes 46 and 48), the CoE Trafficking Convention is referred to in the preamble of Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15 April 2011, pp. -11, Recital 9. And that trafficking, as defined in the CoE Trafficking Convention, falls within the scope of the prohibition of slavery and forced labour in Article 4 ECHR (see ECtHR *Rantsev* [2010]), which is mirrored in Article 5 CFR, and which must thus give at least equivalent protection. Finally, it should be noted that all EU member states (as well as the EEA/EFTA states implementing the Returns Directive) have ratified the CoE Trafficking Convention, which further opens the door to using it as a means of interpretation on EU law issues related to trafficking.

excluded from reintegration assistance. This exclusion from this part of the assistance package was first applied to nationals of Georgia, and subsequently expanded to Northern Macedonia the same year, Belarus in 2011, Kosovo and Mongolia[29] in 2015, and Ukraine in 2016. In 2016, access to the basic assistance programme for voluntary returns in the Netherlands (the Return and Emigration of Aliens from the Netherlands (REAN) scheme), run by IOM, was cancelled for persons from the Western Balkans, who from then on were only eligible for an air ticket provided by the Repatriation and Departure Service, while persons from Morocco and Algeria were still allowed access to the core components of REAN programme, mediation in obtaining travel documents and air tickets, but without having access to any financial or in-kind assistance. From 2017, this was expanded to nationals of all countries in "the ring around Europe." Finally, in that same year, all forms of assistance were cancelled for third-country nationals able to enjoy visa-free travel.[30] Although these changes were quite far-reaching, the Netherlands is by no means unique in taking measures to exclude certain groups of third-country nationals from assistance, or specific elements of it.[31] In the Netherlands, many of these measures, including as regards persons enjoying visa-free travel, have since been reversed. This follows indications that the measures led to less effective return in some cases – including by making it more difficult for those that wanted to return to do so –, shifted the workload from IOM to government authorities, and impacted on IOM's ability to communicate to third-country nationals that it could be approached for return assistance.[32]

As noted, the discretion of member states to provide return assistance would be reduced by the Commission's recast proposal, albeit only in relation to those that do not benefit from visa-free travel to the Schengen area. As in the example of the Netherlands above, this limitation seems to be fuelled by concerns that they may 'abuse' the assistance on offer. They are able to enter the Schengen area easily, and could use return assistance as a 'free ride' back to their country of origin when the purpose of their stay in the EU has ended. The recast proposal itself, in the wording suggested by the Commission, would not necessarily exclude the possibility of providing assistance to nationals of countries enjoying visa-free access, but would

29 Although in the case of Mongolia, this only applied to those for whom a claim was made to transfer them to another EU member state under the Dublin system.

30 ACVZ 2018, p. 43.

31 Szytniewski, Buysse & Van Soomeren 2018, p. 76, looking specifically at third-country nationals from 'safe countries,' note that access to assistance is reduced or denied to some such in Belgium (where rejected asylum seekers from safe countries only receive a ticket), Austria (where rejected asylum seekers from the Western Balkans are excluded from certain financial assistance), and Germany (where (financial) assistance to persons from the Western Balkans is reduced).

32 Letter from the Dutch Minister of Migration Affairs to the Lower House, parliamentary year 2017-2018, doc. 19 637 no. 134, 8 June 2018. Also see Szytniewski, Buysse & Van Soomeren 2018, pp. 77-79.

apparently leave this at member states' discretion and outside the scope of the Directive. However, this discretion to exclude certain nationalities from assistance, including those from countries enjoying visa-free travel, may actually be limited, in the light of the discussion above. Arguably, as long as programmes exist, member states can be expected to use them in those cases that voluntary return would be impossible, as a result of the combination of ensure the *effet utile* of both the objective of effective return and of prioritising voluntary return. Further questions may also arise from a non-discrimination standpoint, and whether the blanket exclusion purely on the basis of nationality, even when there are concerns over abuse by some who hold the same nationality, can be objectively justified and would be proportionate.

9.3.3 An obligation to seek assistance?

As with many other issues related to voluntary return, the issue of assistance has two sides. The question about the obligation on member states to provide assistance and the right of third-country nationals to access it, is mirrored by the question whether they must seek it. In other words, if assistance to facilitate voluntary return is available, are third-country nationals required, as part of their obligation to return, to seek such assistance?

There may be situations in which seeking return assistance may be considered by member states as obligatory. This is evident, for example, by Dutch rules on non-departure and regularisation. Under Dutch law, if third-country nationals who are otherwise obligated to return cannot do so, and they have done everything in their power to return, they may exceptionally be granted a so-called 'no fault' permit.[33] This is subject to a number of conditions, including that the individual has sought the assistance of the Return and Repatriation Service in enabling his or her return. This is particularly focused on the Service's mediation with consular authorities of countries of return to provide travel documents. Until 2013, the criteria also included that the individual should have sought assistance from IOM, and that IOM had subsequently declared it was unable to facilitate the return. The requirement of such a declaration by IOM was subsequently scrapped on the recommendation of the Advisory Committee on Migration Affairs, although the individual's request for assistance to IOM could still be part of the overall assessment whether he or she had met the obligation to return.[34] Whether a third-country national applied for return assistance (with the authorities or IOM) was also taken into account in some other

33 Such permits, however, are rarely issued. Based on available figures, it appears that only ten or fewer of such permits are issued each year. See, for example, ACVZ 2017; Answers to parliamentary questions, ref. 2019Z17264, answers of 6 November 2019. The latter only relate to applications made by stateless asylum seekers, showing that fewer than 40 permits were issued between 2016 and August 2019.

34 ACVZ 2017.

cases, such as the issuing of a permit to an undocumented child who has become integrated in Dutch society.[35] From the fact that a third-country national's refusal to seek assistance is considered evidence of him or her not doing everything in his or her power to return, we can surmise that seeking such assistance was considered part of the obligation to return at least in these cases.[36] But could a general principle, within the context of the Directive, that a third-country national is obliged during the voluntary departure period to seek assistance be established?

As a general rule, this does not seem to be tenable. Third-country nationals are responsible for their own return, which also means they should themselves take the steps to obtain travel documents, get permission to access the state of return and make practical arrangements for their departure, including transport. Although most assistance programmes provide quite broad-ranging access to third-country nationals, I have argued that, from a legal point of view, access becomes an issue only when this is strictly necessary to achieve return. This also means that an obligation to seek assistance would only become an issue if this is essential to the third-country national achieving return. In this respect, I believe it is useful to differentiate between different types of assistance, namely assistance with the practical aspects of return, especially transport, on the one hand, and assistance in obtaining travel documents, on the other. Seeking the first type of assistance could be considered an obligatory step if third-country nationals do not have the means to pay for their own transport. If they are eligible for assistance in this area, and this is the only barrier to return, they can be expected to make use of the opportunities provided.

The second type, seeking assistance in obtaining travel documents – as in the example above – I find much more problematic. Although in practice there may be benefits to member state authorities or others, like IOM, assisting in the application for travel documents, from the perspective of the triangular model of rights and obligations, this should not matter. Where the country of return has an obligation to readmit, it should do so regardless of whether it is the third-country national him or herself, the member state authorities or another actor making the readmission request. This is particularly the case when the country of return is the third-country national's country of nationality, as it will be in the majority of cases. A country of nationality that provides travel documents and admission only, or more easily, in those cases that the EU member state's authorities or others intervene on behalf of the third-country national, is not meeting its obligations under international law, at least not in the way as EU policy

35 Vegter & Van Werven 2017.

36 However, in a change in policy, aimed at wrapping up the so-called 'children's amnesty' the criterion that they should have cooperated in return (evidenced, inter alia, by turning to the authorities or IOM for assistance) was replaced by the criterion that they should have remained 'available' for return. See Netherlands Official Journal 2019, 8116, 11 February 2019, Article I.

believes it exists.[37] And, as I have argued, this failure of the state of return should not and cannot be put on the shoulders of the third-country national. This is also the case if the country of nationality makes distinctions between voluntary and forced returns, since the intervention of IOM, for example, cannot be the sole indication that the third-country national is truly returning voluntarily.[38] As such, when return should take place to the country of nationality, the third-country national's failure to seek mediation of the member state's authorities or others to obtain travel documents or admission cannot be seen as non-compliance with the obligation to return. This may be different, however, in other cases. In particular, this would be the case when return should take place to a transit country based on a readmission agreement which needs to be triggered by the EU member state. In such cases, the failure to seek or accept mediation by the authorities could indeed play a role in finding non-compliance with the obligation to return.

9.4 When have third-country nationals successfully 'returned'?

As noted in Chapter 1, the obligation to return can be seen as both involving an obligation of effort (as encompassed by 'the process of going back') and of result. This section reflects on the result, and in particular how and when member states may establish that the appropriate result has been achieved. It appears that the Directive provides for a clear answer to this: return is completed when the person has gone back to one of the destinations set out in Article 3(3). While perhaps a clear benchmark, it also raises questions over ensuring that this is adequately verified. This is discussed in paragraph 9.4.1. To make matters more complicated, however, various member states have not transposed the obligation to return in precisely those terms. Rather, they may refer to the obligation to leave instead. Paragraph 9.4.2 discusses what the implications of this may be, including whether the return decision has a European effect, and as such provides a clear framework for obligatory departure from *all* EU member states.

9.4.1 Proof of arrival in the destination state: an unsettled matter?

Much of the previous chapters have been an attempt to provide some more clarity about the inherently vague concept of 'return' in the Directive. This is true for the steps to be taken by third-country nationals, but in a way also for the end result. Given the Directive's emphasis on ensuring effective return, it is somewhat surprising that no clear mechanism is included in its provisions for establishing that successful return has taken place, if

37 See 4.2.

38 From this perspective, Iran's insistence that only those whose return is facilitated by IOM, as discussed in 5.3.1, appears to be misguided if the aim is to establish willingness to return, rather than just voluntary compliance.

understood as arrival in the destination country,. This is despite the fact that consideration was given to this before the Directive was adopted. The 2002 Green Paper on a Community Return Policy, for example, contains a section on verification of return. It notes that member states have possibilities to verify that a third-country national has left its territory (although with limitations, see below), "but not that he or she has reached the country of supposed destination."[39] It is easy to see how this would be the case for removals. But it is not immediately clear how such verification can be shaped in a way that it captures all, or at least the majority, of voluntary returns. If a member state would not want to rely solely on the third-country national, it could imagine striking agreements with destination countries about the exchange of information on arrivals. However, given the complexity of international cooperation in the area of return and readmission, it is unclear why destination states would want to take on this additional administrative burden, and whether EU member states would be able to set up a fully functioning network and would be able to manage the information flow. Practically, whereas third-country nationals who are removed are easily identifiable by destination states, voluntary returnees will often be indistinguishable from other international travellers. Finally, such information exchange may run into issues of privacy protection.[40]

Another option would be to rely on information from organisations providing assistance to voluntary returnees. IOM, for example, often has a presence on both sides (the EU member state from which third-country nationals leave and the state of arrival). The member state may rely on the data of such organisations to verify the third-country national has arrived,[41] although this again raises questions about the consent of individuals to have this information shared. Furthermore, while this provides an option for verification, it is far from airtight. First, not all forms of assistance will lead to further contacts between providers and returnees, for example when only tickets and basic financial assistance are provided. More elaborate assistance activities, including reintegration support, are more likely to lead to contacts between third-country nationals and service providers in the country of return, and thus to possibilities of verification. But second, as discussed above, not all returnees benefit from assistance, so this option would not be applicable to all third-country nationals.

A further option is related to self-reporting by third-country nationals, either to service providers, to consular representations of the EU member state in the country of return, or perhaps directly to the authorities responsible for overseeing returns in the EU member state by means of remote verification. However, the question arises what reason, beyond the receipt

39 COM(2002) 175 final, 10 April 2002, paragraph 3.1.6.

40 Including under Regulation 2016/679 (the General Data Protection Regulation), OJ L 119, 4 May 2016, pp. 1-88.

41 See, for example, EMN 2014a.

of further assistance, third-country nationals would have to cooperate in this. The Directive only provides for one and that is the possibility of having an entry ban lifted or its duration shortened. Article 11(3) provides that member states:

> *"shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban … can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision."*

The Return Handbook also notes that, in this process, reporting back to a member state's embassy may be a way of verifying this.[42] Whether this is a sufficiently strong incentive for most third-country nationals to indeed report back remains unclear. Clearly, for those who seek to travel to an EU member state at some point in the near future, this will likely be the case, since an entry ban will prevent them from doing so. But for those who do not have such intentions, reporting back may be more trouble than it is worth. It also increases the burdens on member states' embassies and consulates if this option would be used regularly. At any rate, the incentive of reporting back might be diminished by the fact that the lifting of an entry ban remains optional for member states, even if they have duly verified that third-country nationals have returned.

Overall, therefore, considerable questions remain about the viability of an effective system for verifying that third-country nationals have actually returned. And the question arises whether this is what the drafters or member states had in mind. It has already been noted that the way that the Directive uses 'return' and 'departure' may not be very consistent,[43] and the provision on the lifting of entry bans, quoted above, shows that too. In particular, it says that third-country nationals must show their full compliance with their obligation to *return*, but which is apparently satisfied when they have "left the territory of the Member State."[44] It could be argued that the difference is just semantic, because when third-country nationals leave a member state, they may be presumed to be on their way to their destination country.[45] Indeed, the legislation of a number of member states refers to an

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42 C(2017) 6505 final, 16 November 2017, Annex (Return Handbook), paragraph 11.6.

43 See 2.10.1.1.

44 A similar contradiction can be found in the Directive's definition of 'removal,' relating to the enforcement of the obligation to *return*, but doing so through "the physical transportation *out of the Member State*" of third-country nationals, rather than them being brought to a destination state, RD Article 3(5) (my emphasis).

45 Although strictly speaking this may not be the case in practice. For one, unless the EU member state and the destination country share a common border, the third-country national will be *en route* (for example by air or sea) in between and, as discussed in 7.3.3, this is not necessarily outside the responsibility of the member state. In that process, third-country nationals may also have to pass through other countries to reach their destination, which further shows that departure and arrival in the destination country are not the same.

obligation to leave, rather than to return,[46] although this obligation would still have to be read in the light of the destinations of return set out in Article 3(3) of the Directive. From this perspective, perhaps a clearer distinction between the obligation of effort and the obligation of result in Article 3(3) must be made. The former requires third-country nationals to take steps to return to the country of origin or a transit country (and only those), while the latter is satisfied if the third-country national leaves the member state. But even if this is the case, this raises new questions over the moment when third-country nationals can be considered to have 'left,' as discussed below.

9.4.2 Departure from the member state and the lack of a European effect

Problems of verification of return are clearly much easier to overcome if this only relates to departure from the member state. Both the Green Paper and the Return Handbook mention this as a key option. The Green Paper talks about the issuing of a certificate of departure by member states,[47] while the Handbook notes the existence of an exit stamp or evidence of exit in border data systems as verification possibilities.[48] However, if the final outcome of the obligation to return should be departure from the member state, rather than arrival in the country of destination, this may create other issues related to the overall role of the Directive in ensuring a truly European return procedure.

Possibilities of exit checks would depend, primarily, on third-country nationals leaving through external (Schengen) borders. And, as discussed in 9.2, third-country nationals can be expected to comply with Schengen rules when doing so, including using only official border crossing points and submitting themselves to checks. Under Regulation 2018/1860 on the use of the Schengen Information System (SIS) for the return of illegally staying third-country nationals,[49] member states are also generally required to enter alerts into the SIS on return decisions with the explicit objective of verifying compliance with such a decision.[50] However, what if departure does not happen through an external border? In theory, departure via an

46 See, among others, Austrian Federal Law concerning Entry, Residence and Settlement (1997 Aliens Act), Article 40(1) ("the alien must depart without delay"); Belgian Aliens Act 1980, Article 7 ("give the order to leave the territory before a specific date"); French *Code de l'entrée et du séjour des étrangers et du droit d'asile*, Article L251-1 ("*obligation de quitter le territoire français*"); German *Aufenthaltgesetz*, paragraph 50 ("*Ausreisepflicht*"); Netherlands Aliens Act 2000, Article 61 ("leave the Netherlands of their own accord").

47 COM(2002) 175 final, 10 April 2002, paragraph 3.1.6.

48 C(2017) 6505 final, 16 November 2017, Annex, paragraph 11.6. For member states' practices, also see EMN 2014a.

49 OJ L 312, 7 December 2018, pp. 1-13.

50 Regulation 2018/1860, Article 3(1). Although the Regulation refers specifically to the Returns Directive in this regard and thus incorporates the ambiguity about leaving and returning.

internal border, with third-country nationals moving from one member state to another, would also mean that they are no longer on the territory of the member state that has issued the return decision, and which would meet the requirement of leaving.

This may even include irregular (secondary) movements between member states. Indeed, what we might call irregular or informal voluntary departure may be one of the main ways in which 'return' is achieved in member states. In the Netherlands, for example, official figures on returns included a specific category of persons who "left with unknown destination," until several years ago.[51] These are people who disappeared off the radar and would thus be considered as having absconded within the meaning of the Directive. In many cases, it is impossible to verify what has happened to such persons, unless they are found later. This can be after they are apprehended in the Netherlands, having continued to stay irregularly, or when they are found in another member state after having moved there. But since they are administratively considered as having 'left,' the impression might be given that this is part of successful return. Between 47 and 54 per cent all registered 'departures' from the Netherlands between 2008-2010 consisted of such persons having 'left' with an unknown destination.[52] The group was later re-categorised, but now as having "left without supervision." In 2019, the Dutch government reported 25,600 'departures' from the Netherlands, but more than half of these (13,940) had left without supervision.[53] Although this is of course not official policy, such categorisations suggest that the disappearance of third-country nationals, including by moving irregularly to another EU member state, is at the very least accepted as a fact of life contributing to the 'success' of return policy, and it may actually be the main way in which 'return' is achieved. And, with the absence of internal border checks, such departure would not be verified.

It is evident that the notion that the objectives of the Directive could be achieved by third-country nationals simply moving irregularly from one EU member state to the next is not the intention of an instrument that specifically aims to combat irregular stay in EU member states. But it brings into focus the extent to which a European effect of the Directive is truly safeguarded. That it was always the intention to have a proper EU-wide regime for this is not in doubt. The Green Paper, for example, noted that:

> *"The legal obligation to leave might not be deemed to have been met by persons entering into another Member State, when the entry and residence is not permitted there. Member States should ensure that measures terminating illegal residence are applicable throughout the whole EU."*[54]

51 In Dutch: "*met onbekende bestemming vertrokken*" or MOB.
52 Ministry of Security and Justice 2011, p. 34.
53 Ministry of Justice and Security 2020, table 6.1.
54 COM(2002) 175 final, 10 April 2002, at paragraph 3.1.2.

This intention was also highlighted in the impact assessment accompanying the Commission's initial proposal of the Returns Directive, when it noted:

> *"A return should be judged successful only if the illegal resident concerned has left the territory of the EU rather than of a particular Member State, providing that no other Member State has granted legal residence. The mere fact that a third country national illegally staying in a Member State may comply with his/her obligation to leave by moving to another Member State leads to uncontrolled secondary movement among Member States and may lead to further illegal presence in another Member State."*[55]

Despite this clear intention, it is difficult to see how this European effect is actually grounded in law. As discussed in Chapter 1, the Directive does not cover all EU member states, but does apply in several Schengen-associated countries.[56] Perhaps it is more appropriate, therefore, to speak of an obligation to leave the Schengen area? After all, in its preamble, the Directive is presented as a development of the Schengen acquis.[57] But there are some mismatches here as well, since, at the time of writing four EU member states that are bound by the Returns Directive are not part of Schengen. In those countries, cross-border movement is still a matter of national law. However, in anticipation of Schengen accession, these countries have made significant steps to harmonise national rules with the Schengen acquis. Furthermore, Schengen accession of all four countries is foreseen in reasonable time, so this discrepancy may be resolved soon.

But the problem of simply seeing Schengen as 'forbidden' (that is, the place where third-country nationals issued a return decision may no longer stay) runs deeper. On the one hand, the Directive bases its definition of illegal stay, inter alia, on Article 5 of the Schengen Borders Code. Whilst the SBC provides for a common regime for external borders of the entire Schengen area, it does leave the possibility for member states to issue a visa that is only valid for their own territories. As such, it is possible for a third-country national to be unlawfully present on the territory of one member state, while his or her stay in another member state would not be irregular. The Directive explicitly takes this into account by providing that a third-country national who is irregularly present on the territory of one member state, but holds a "valid residence permit or other authorisation offering a right to stay issued by another Member State," should immediately go to the latter member state.[58] This is, however, an exception to the normal regime of the Directive; the obligation to go to another member state where one is legally present does not flow from a return decision. Rather, only if

55 SEC(2005) 1057, 1 September 2005. Also see Lutz 2010, p. 44.
56 See 1.2.1.3.
57 RD Recitals 25-30.
58 RD Article 6(2).

third-country nationals fail to move immediately to the member state where their stay is legal, a return decision shall be issued.[59]

The Directive does not make any provisions for member states to 'take over' a return decision already issued by another member state. A mutual recognition system of return decisions, which would also cover voluntary returns, was proposed by the European Commission, but never made it into the final version. At any rate, the mutual recognition proposed was also facultative and not automatic.[60] This problem could theoretically be solved through an earlier piece of legislation, Directive 2001/40/EC on the mutual recognition of expulsion decisions.[61] However, this Directive only created the option of mutual recognition, not an automatic and binding mechanism. Rather its purpose is "to *make possible* the recognition of an expulsion decision issued … in one Member State … against a third-country national present within the territory of another Member State."[62]As such, from the perspective of third-country nationals, moving from a Schengen state where they are under obligation to return to another would not automatically make them subject to an obligation to return in the latter, unless it takes specific action to make this happen.

It would appear that, to the extent that we can speak of a 'European' or 'Schengen effect' of the Directive, this lies in the provisions on entry bans.[63] Recital 14 of the Returns Directive explicitly acknowledges this.[64] An entry ban, once imposed, in combination with the third-country national's signalling in SIS,[65] would prevent him from traveling to any Schengen state. However, this only takes effect *after* the third-country national has left.[66] Also, member states are only obligated to impose entry bans in case no period for voluntary departure is provided, or if the obligation to return is

59 "In the event of non-compliance by the third-country national concerned with this requirement ... paragraph 1 [of Article 6] shall apply." Article 6(1) subsequently provides for the mandatory issuing of a return decision, containing an obligation to return.

60 Lutz 2010, p. 15.

61 OJ L 149, 2 June 2001, pp. 34-36.

62 *Ibid*., Article 1(1) (my emphasis).

63 As noted in Chapter 1, the issue of the entry ban as such is outside the scope of this analysis, as it is not part of the obligation to return or the voluntary departure period itself. However, for detailed discussions of the entry ban, see Boeles 2011; Majcher 2020, part 3, in particular, as regards the European effect of the entry ban, pp. 256-267.

64 RD Recital 14: "The effects of national return measures should be given a European dimension by establishing an entry ban prohibiting entry into and stay on the territory of all the Member States." Also see C(2017) 6505 final, 16 November 2017, Annex (Return Handbook), paragraph 11.1.

65 Boeles 2011, p. 44: "the Returns Directive does not contain any operational provision giving the Entry Ban the effect that it pretends to have. Only in combination with a SIS-alert will an Entry Ban effectively bar entry and residence in the territory of other Member States."

66 CJEU C-225/16 *Ouhrami* [2017].

not complied with within the voluntary departure period.[67] The extent to which this form of 'European effect' will thus be applicable to third-country nationals still within the voluntary departure period, is questionable and will depend on individual member states' practices. In terms of the obligations of third-country nationals, this presents a gap, and leaves space for a reading that would make moving irregularly from one member state to the next a legitimate indicator of compliance.

9.4.3 A gap in the Directive?

Considering the discussion above, neither 'returning' nor 'leaving' seem to provide perfect indicators for member states to verify compliance. The Directive leaves an unintentional gap in its formulation: either the final result should be the arrival of third-country nationals in one of the destination countries set out in Article 3(3), but then the act of departure itself may not be sufficient to verify this. Or departure from the member state is sufficient, but then the lack of a European effect provides no clear guarantee that third-country nationals have left the area where the Directive is applied. Article 11(3), quoted in 9.4.1 above, might even suggest that a combination of both is necessary: departure from the territory of a member state in full compliance with the obligation to return to one of the obligatory destinations of Article 3(3). But then it may be presumed that member states are also required to verify this, to ensure effectiveness of the return procedure. So that would mean that they verify both the departure of third-country nationals and their arrival in the destination country, which may too burdensome and at any rate not always practically possible. From this perspective, return seems to be the most airtight indicator conceptually, but problematic to implement in practice, whilst departure is the most realistic, but as regards verification it is conceptually unsatisfactory in various ways.

It should be noted that this is a question of verification of return, and not, as such, of the scope of third-country nationals' obligations. Read in conjunction with Article 3(3), the obligation to return still imposes on them the requirement to take the necessary steps in relation to the country of origin or the transit country, within the limits set out in the previous chapters. It should also be those steps, rather than the mere fact whether persons are still in an EU member state, which provide the basis for assessing whether they have fully complied with their obligations, as will be discussed later.[68]

67 RD, Article 11(1), although the Commission's recast proposal seeks to make entry bans obligatory also in case of voluntary departure, which would arguably undermine the role of entry bans as incentives for voluntary return.

68 See 11.3.1.

9.5 Conclusions

This chapter has looked at various elements of the practicalities of preparing the departure from EU member states, as the final necessary element of successful return, and thus of the analysis of the actions third-country nationals can and cannot be expected to take in fulfilling their obligation to return (research questions 1a and 1b in relation to return element (iii)). First, it examined whether third-country nationals must meet specific requirements or obligations before being able to leave the member state. It was found that third-country nationals can be held responsible for meeting all necessary exit requirements, including as they arise from the Schengen Borders Code. Third-country nationals cannot circumvent these, for example by crossing external borders outside of official borders posts or without undergoing checks. But it also means that EU member states must ensure that these requirements are not circumvented, even if this would cause delays in departure. Furthermore, third-country nationals should, as part of their preparation of return, ensure they meet all their outstanding obligations towards other individuals, or towards the member state. In some cases, however, they may not be able to do so during the voluntary departure period. This may be the case for making the appropriate legal arrangements for taking children with them when they have separated from the other parent. But it may also include remaining available for investigations or proceedings related to crimes of which they are suspected. In such cases, these circumstances should become part of the consideration of the prolongation of the voluntary departure period.

The second issue related to return assistance. It was found that, in principle, there is no unambiguous right to such assistance arising out of the Directive. However, there may be circumstances in which third-country nationals cannot be excluded from existing programmes. This is particularly the case when voluntary return would otherwise be impossible. This follows from the obligations of member states to secure not only effective return, but effective return that is preferably voluntary. Any right to assistance on this basis, however, would be limited to what is strictly necessary to make return possible, and not wider assistance, such as reintegration support. This would only be different if the lack of reintegration support would be a decisive factor in the non-returnability of individuals on fundamental rights grounds. Although the ability of such assistance to reshape the prospects of third-country nationals upon return is likely to be limited, where it can mitigate such barriers to return, member states can be expected to make it available.

If return has not materialised by the end of the voluntary departure period, the fact that a third-country national has not asked for return assistance cannot, in general, be considered part of their responsibility. This would be different if it can be established that return was only possible with such assistance. However, even here distinctions should be made. It is quite possible that the lack of means to pay to transport creates a barrier to return,

which could have easily been overcome by asking for assistance. However, if the lack of return is related to the denial by the country of return of travel documents, this may be different. As discussed in previous chapters, questions of readmission and travel documents should not normally depend on the voluntariness of return, and it should also not depend on whether IOM, the member state or any other actor is mediating. If readmission is not granted in violation of the country of return's legal obligations, the fact that it would have agreed to readmission only if a third party had mediated cannot be part of the third-country national's responsibility.

The third issue that was addressed related to the question when a third-country national had actually 'returned' within the meaning of the Directive. It was noted that both arrival in the country of return and departure from the EU member state had been used as indicators, but that these were not necessarily the same. The former may be more correct in light of the Directive, but there are considerable practical difficulties in establishing this. The latter provides an easier benchmark, but also raises questions whether any type of departure from a member state's territory is sufficient. In this respect, the question was raised whether the provisions in the Directive sufficiently guarantee a European effect that would prohibit third-country nationals from meeting their obligation to return by irregularly moving to another member state. It was found that this is a gap in the Directive, which is only partially filled by the European effect of the entry ban, which only comes into effect after the individual leaves, and not at the moment the return decision is issued. As such, the questions of establishing that third-country nationals have effectively returned, and the European effect associated with it, remain somewhat unsettled in terms of the specific provisions of the Directive.

10 The priority of voluntary return and the third-country national's entitlement to a voluntary departure period

10.1 Introduction

Having discussed all the key elements of the obligation to return in the previous chapters, attention now turns to the second set of questions about the responsibility associated with voluntary return. This relates to the application of the voluntary departure period. As discussed in the introductory chapter, the issue of the scope of the obligation to return and the application of the Directive's provisions on the voluntary departure period are closely connected. While the former sets out what third-country nationals can be expected to do to return voluntarily, the latter determines whether they have an effective possibility to do so in practice. This is the topic of the current and the next chapter. In this chapter, the focus will be on the nature and extent of the entitlement of third-country nationals to a voluntary departure period, in light of the priority of voluntary return, but also the grounds for exceptions to being granted such a period, as set out in the Directive (research question 2a).

As noted, the Directive defines voluntary departure as "compliance with the obligation to return within the time-limit fixed for that purpose in the return decision."[1] If no such time limit is given, this takes away third-country nationals' possibility to comply with any obligation voluntarily, and the issue of which actions they should take – discussed in the previous chapters – becomes a moot point. The time limit is regulated specifically by Article 7 of the Directive. Its first paragraph requires member states, when issuing a return decision, to "provide for an appropriate period for voluntary departure between seven and thirty days," which, in accordance with paragraph 2, should be extended where necessary. However, this requirement to provide for a voluntary departure period is subject to exceptions, which are covered in the fourth paragraph of Article 7. This paragraph provides that member states may refrain from granting a voluntary departure period, or grant one shorter than seven days, in three circumstances. These are: (1) if there is a risk of absconding; (2) if an application for legal stay has been dismissed as manifestly unfounded or fraudulent; or (3) if the person concerned poses a risk to public policy, public security or national security. Other provisions deal with measures that member states may take to prevent absconding.[2]

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1 RD Article 3(8).

2 See Article 7(3) and the discussion in 10.4.6 below.

Although the Directive aims to make the granting of a voluntary departure a priority, the way these exceptions are formulated are potentially wide-ranging. As such, they determine the extent to which a third-country national is in fact entitled to an opportunity of voluntary return or, put conversely, the extent of member states' discretion in denying such an opportunity.[3] As a result, it makes sense to first look more closely at the entitlement to a voluntary departure period. In contrast to other issues discussed in this dissertation, the question of the entitlement to a voluntary departure period is one that is shaped exclusively by the relationship between the third-country national and the EU member state. As a result, there is no need here to look at the other two, external, relationships in the triangle. It should be noted that the discussion in this chapter only focuses on whether third-country nationals would be entitled to a voluntary departure period as a general point. Questions about the appropriate length of such a period, which has a close link with the issue of readmission and the efforts third-country nationals must make, are dealt with in Chapter 11.[4] This separation between the granting of a voluntary departure period and its length is admittedly somewhat artificial, since they are part of the same decision by the member state.[5] However, analytically there is added value in discussing these separately, as it allows for a more detailed examination of each of the issues.

This chapter will proceed as follows. Section 10.2 will discuss the general principles governing the priority of voluntary return, looking specifically at how this priority is formulated in the Directive, and at the implications of the role of voluntary return as a way to safeguard fundamental rights. Section 10.3 will start the discussion of the specific exceptions outlined in Article 7(4) of the Directive, how these should be interpreted, and what limits exist to the member state's invocation of these possibilities to deny a voluntary departure period. For reasons to be explained below, this discussion starts with the denial of such a period for reasons of public policy, public security, and national security. Section 10.4 considers the denial of voluntary departure because there is a risk of absconding, in particular the extent to which certain indicators can legitimately be used to deduce such a risk. It will also briefly discuss the role of measures to prevent absconding, as outlined in Article 7(3). In section 10.5, the remaining ground for denial, namely that the third-country national's application for stay was dismissed as manifestly unfounded or fraudulent, is discussed.

3 If such an opportunity is denied, this obviously makes the question of responsibility to return voluntarily a moot point. This does not mean that the third-country national does not have certain residual obligations, but these are outside the scope of this analysis.

4 With the exception of the matter of providing periods shorter than seven days, which – for reasons explained there, is addressed in 10.6 below.

5 After all, according to Article 7(1) of the Directive, member states should normally provide for a period of between seven and thirty days in the return decision, implying that a decision to grant a voluntary departure period simultaneously implies an obligation to set out how long it should be.

While the discussion generally focuses on the possibility of denying a voluntary departure period, Article 7(4) also provides for the possibility of granting a period shorter than seven days. Section 10.6 addresses this possibility. Section 10.7 looks at whether certain provisions on the denial of a voluntary departure, in the current Directive but also particularly in the Commission's recast proposal, have to be considered prima facie incompatible with primary EU law, as they undermine the role of voluntary return as a mechanism to ensure proportionality and protect fundamental rights. Section 10.8 presents the conclusions for this chapter.

10.2 General principles governing the priority of voluntary return

This section discusses which general principles govern the priority of voluntary departure in the Directive. It will look at the way this priority is formulated in the Directive as a general principle and a right under EU law (10.2.1). It will also address the way in which fundamental rights impact on this priority (10.2.2).

10.2.1 Formulation of the priority for voluntary return in the Directive

As discussed in Chapter 1, the Directive sets out the general approach for the priority of voluntary return by stating the following:

> *"Where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted."*[6]

Additionally, the operative part of the Directive sets out, in Article 7(1), that third-country nationals should be accorded a period for voluntary departure in the return decision, although this is without prejudice to the exceptions set out in Article 7(4) allowing for the shortening and denial of such a period.

10.2.1.1 A right under EU secondary law

The way Article 7(1) is formulated makes clear that the granting of a voluntary departure period is not just a competence of the member state. Rather, it is formulated in a compulsory way ("shall provide"). Member states may have some discretion in applying the grounds for denial of a voluntary departure period. But where such grounds – which are exhaustively listed in Article 7(4) – do not apply, they must provide third-country nationals with an opportunity to meet their obligation to return voluntarily. The way in which this provision is formulated also means that it creates an entitle-

6 RD Recital 10.

ment for the individual. In her opinion in the *Zh. and O.* case, Advocate General Sharpston also identifies an opportunity for voluntary departure as a right conferred by EU law.[7] While the CJEU does not discuss this in detail, it appears to take this as a given.[8] Since voluntary departure is not a favour bestowed on the third-country national by the member state, but a clearly set out right in EU law, any exception to the general rule that a voluntary departure period is provided must be construed in a strict manner.[9] The fact that the third-country national is not lawfully staying in the EU member state does not change that.[10]

10.2.1.2 Undermining of a return procedure: a relevant factor?

While the opportunity to leave voluntarily is a right of individuals, it is a highly qualified one. The qualification is governed both by a general principle and by specific provisions in Article 7(4). As noted above, the general qualification can be found in the fact that the preamble notes that priority should be given to voluntary return unless this would "undermine the purpose of a return procedure." While the specific grounds for exceptions are discussed in more detail later in the chapter, it is worth considering what role this general statement of the priority of voluntary return might play, since it appears to set the overall framework for making exceptions. This requires, first of all, discussing what exactly is the 'purpose of a return procedure,' which might be undermined by the granting of a voluntary departure period. In addition to providing a measure of protection to the individual, discussed in detail below, the Directive mentions the need for "an effective removal and repatriation policy" or an "effective return policy" in the preamble.[11] An effective return procedure would appear to mean, first and foremost, one that leads to third-country nationals actually returning. From this perspective, if the granting of a voluntary departure period would somehow result in non-return, this would evidently undermine the purpose of the Directive's return procedure. Based on this conception of the purpose of a return procedure, several possible scenarios for the interplay between the general principle set out in the preamble, and the specific provisions in Article 7(4), can be imagined.

First, the principle that a voluntary departure period should be granted unless this would undermine the purpose of a return procedure could be seen as an additional element for states to take into account, on top of the specific grounds set out in Article 7(4). In other words, this would mean

7 CJEU, Opinion AG, C-554/13 *Zh. and O.* [2015], including in paragraphs 58-59 and 79.

8 It applies, for example, the same standard that any derogation of rights or principles set out in EU law must be interpreted restrictively. See CJEU C-554/13 *Zh. and O.* [2015], paragraphs 42 and 48.

9 *Ibid*.

10 Also see 10.2.2.4 below on the extent to which irregular third-country nationals' fundamental rights should be protected under the Directive.

11 RD Recitals 2 and 4. This also follows from the requirements of Article 79(2) TFEU.

that a voluntary departure period could only be denied if one of the three grounds is applicable *and* there is also reason to assume that the return procedure would be undermined. While theoretically this is defensible purely based on the text of the Directive, this approach would potentially have far-reaching consequences for the application of the three grounds in Article 7(4). The connection between the undermining of a return procedure and the risk of absconding, as a ground to deny a voluntary departure period, seems unproblematic. Notwithstanding the many reservations that can be put forward regarding the application of this ground,[12] if a risk of absconding is indeed established, and it may be presumed that the third-country national would escape from view of the authorities to circumvent his or her obligation to return, this would clearly amount to the undermining of the return procedure. The connection between the undermining of a return procedure and the other grounds listed in Article 7(4) is, in my opinion, much more debatable.[13] The fact that third-country nationals pose a risk to public policy, public security or national security, first of all, can of course be a legitimate concern for the member state.[14] It may even be the reason why third-country nationals lost their right to stay in the member state and are now under obligation to return. But this situation, in and of itself, does not say anything about whether the return procedure can and will be concluded successfully. Similarly, the rejection of an application as manifestly unfounded or fraudulent may give concern to a member state, but again, does not relate directly to the effectiveness of return. Of course, arguments can be made that certain 'bad behaviour' also indicates that the third-country national may not meet his or her return obligations, but this is not made explicit in these provisions. Furthermore, such factors are already considered with regard to the risk that the third-country national might abscond, which is a separate ground for denial of voluntary departure.[15]

Therefore, if Recital 10 would be read as implying that a voluntary departure period can only be denied if this is necessary to prevent the undermining of a return procedure, this would seriously call into question the extent to which member states could rely on at least two of the three concrete grounds for denial in Article 7(4). At most, when the criterion of undermining a return procedure would not be met, member states could still use the relevant provisions of Article 7(4) to provide a period shorter than seven days. After all, this would not clash, at least technically speaking, with the principle that a period for voluntary departure should be given.[16]

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12 See 10.4.

13 Also see Majcher 2020, p. 558, who notes that the connection between the reasoning in case of the other two grounds in relation to ensuring effective return is "less clear."

14 See, for example, my comments on the security concerns related to the granting of a voluntary departure period in Chapter 1, footnote 112.

15 See 10.4.

16 But see Chapter 11: if a voluntary departure period is too short, this may de facto deprive a third-country national from the opportunity to meet the obligation to return voluntarily.

The counterargument to this would be that it would lead to a situation that would be too restrictive for member states. An alternative scenario would be to focus on the fact that the co-legislators have included explicit provisions on the denial of a voluntary departure period in the operative part of the Directive, which would otherwise be deprived of their effect. In this respect, it is also noteworthy that neither the CJEU nor the Advocate General engage with Recital 10 in any substantive way when coming to their conclusions about the scope of (part of) Article 7(4) in *Zh. and O*. A way to reconcile the gap between Recital 10 and Article 7(4) would then be to simply regard the latter as the concrete operationalisation of the former. In other words, the three grounds in Article 7(4) are concrete expressions of situations in which a return procedure would be undermined, and they can thus be used by member states without having to justify this further in terms of undermining. It is not the prettiest solution from the perspective of giving effect to the text of Recital 10, but it is the one that is arguably closest to the overall purpose and context of the Directive. This appears to be the approach taken in *Zh. and O.* and previous cases. There, the CJEU refers not to the undermining of a return procedure, but simply infers from Recital 10 that "priority is to be given, *except otherwise provided for*, to voluntary compliance with the obligation resulting from that return decision."[17]

A third option could be formulated, which would not replace, but could be complementary, to the approach above. In the current version of the Directive, the denial of a voluntary departure period is an option for member states ("member states may refrain").[18] However, Recital 10 could be read as a principle that would make denial of a voluntary departure period obligatory in certain cases, namely if this would undermine the purpose of a return procedure. This would make sense, since the Directive contains several clear obligations on member states to ensure that return eventually takes place. A member state that would grant a voluntary departure period to third-country nationals in the knowledge that this will lead to their non-return, would be acting in contradiction not just with the principle elaborated in Recital 10, but with the effectiveness of the Directive as a whole. However, such a situation is not black and white and would be moderated by other requirements, including those discussed as regards fundamental rights.[19] In practice, however, this scenario does not appear to have too much relevance. As noted below, there is already a tendency to regard (and use) the exceptions to the general rule expansively. It is unlikely, for example, that a member state that considers that there is a risk of absconding in an individual case, would not seek to make use of the ground for denial in Article 7(4).

17 CJEU C-554/13 *Zh. And O*. [2015], paragraph 44; also see CJEU C-61/11 PPU *El Dridi* [2011], paragraph 36 (my emphasis).

18 Although the Commission's recast proposal seeks to make this mandatory, see 10.7.

19 It is also important to note that a clear distinction needs to be made between the failure of the third-country national to return voluntarily within the time limit provided to him and not returning *at all*, see 10.4.3.2.

10.2.2 The priority of voluntary return and fundamental rights

Another avenue to explore is that of the link between the priority of voluntary return and fundamental rights. This link may arise in two ways. First, it may be wondered whether being granted an opportunity to return voluntarily is an integral part of a specific fundamental right. Second, we may conceive of the voluntary departure period as a mechanism to protect fundamental rights more generally.

10.2.2.1 The right to leave as a right to voluntary return?

As regards the first point, allusions to being granted time to leave when no longer permitted to stay in the host state can be found in certain human rights documents, although these cover very specific groups. Article 32(3) of the 1951 Refugee Convention, for example, requires contracting states to "allow such refugees [subject to expulsion after lawful stay] a reasonable period within which to seek legal admission into another country."[20] A more generally applicable entitlement to return voluntarily in case of expulsion could be read into the right to leave any country. As noted in Chapter 2, the right to leave needs to be given meaning in expulsion cases too. Furthermore, beyond requiring states to refrain from unduly interfering with the departure of an individual, the right to leave also contains additional guarantees, for example in relation to the choice of destination.[21] In this way, the right to leave can be construed as also guaranteeing a certain measure of autonomy as regards the manner in which third-country nationals arrange and implement their departure. It could be argued that a way to give effect to this would be to provide persons faced with expulsion, at least in principle, an opportunity to leave of their own accord, rather than immediately resorting to removal. Such a reading of the right to leave would, however, not necessarily expand the substantive scope of the right to voluntary return. After all, the right to leave may be subject to legitimate interferences, which would have to be in line with the provisions of the ECHR and ICCPR. The incorporation of the exceptions in Article 7(4) would satisfy the legality of such interferences, while the objective of the interference – ensuring effective return – has been repeatedly accepted as being in pursuit of legitimate aims. However, it would create clearer focus on the need to respect the principles of necessity and proportionality. Despite the possibility of the right to leave encompassing a right to voluntary return, this remains theoretical, and no acknowledgement of this in relevant case law can be found. This does not mean there is not an important connection between the priority of voluntary return and fundamental rights. However,

20 Refugee Convention, Article 32(3), first sentence.
21 See 7.2.2.

this connection lies in the way voluntary return can protect fundamental rights more generally, rather than necessarily being part of a specific fundamental right itself, as explained below.

10.2.2.2 Voluntary departure as a mechanism to safeguard fundamental rights

In addition to the pursuit of effective return, the Directive seeks to guarantee effective protection of the interests of individuals.[22] This particularly includes ensuring that third-country nationals are treated in a humane and dignified manner during its procedure by safeguarding fundamental rights. The priority for voluntary return is an important instrument to balance effectiveness with the protection of fundamental rights. This is clear, for example, from the discussion about the role of voluntary return in the run-up to the adoption of the Directive.[23] Despite this history, the Directive itself is not very explicit about this link. It makes repeated references to the importance of protecting fundamental rights during the return procedure, but this generally covers the whole procedure and does not single out voluntary departure as a key means to do so.[24] The preamble, however, does refer to the Council of Europe Twenty Guidelines on Forced Return, which were considered a "golden bridge" for reaching agreement during the negotiations on the Directive.[25] The first of these Guidelines also emphasises that voluntary return should be preferred over forced return. The commentary to this Guideline stresses that this is the case because voluntary return "presents far fewer risks with respect to human rights."[26]

This is also recognised by the CJEU, particularly in the *Zh. and O.* case that will be discussed in more detail in section 10.3 below. The CJEU emphasises that the granting of voluntary departure is designed, "inter alia, to ensure that the fundamental rights of those nationals are observed in the implementation of a return decision," and to ensure third-country nationals are returned in a humane manner and with full respect for their fundamental rights and dignity.[27] The CJEU does not make explicit which rights are at stake, but according to Peers it takes account of the "dramatic impact of forced removal on individual migrants."[28] Presumably it primarily had the right to liberty (Article 6 of the Charter for Fundamental Rights) in mind, which would be affected by a decision to detain

22 RD Recital 11.
23 See 2.2.1.
24 RD Recitals 2, 17 and 24, and Article 1.
25 RD Recital 3; Lutz 2010, p. 28.
26 Council of Europe 2005, Guideline 1 and the commentary thereto. The risks involved in forced returns are also emphasised the report of the UN Special Rapporteur on the human rights of migrants, Felipe González Morales, Human Rights Council, thirty-eighth session, 18 June-6 July 2018, A/HRC/38/41, 4 May 2018.
27 CJEU C-554/13 *Zh. And O.* [2015], paragraph 47.
28 Peers 2015.

the individuals. Furthermore, the right to dignity (Article 1), to integrity of the person (Article 3), the freedom from inhuman or degrading treatment (Article 4), and even the right to life (Article 2), could all be affected by coercive measures applied in the context of the enforcement of the return decision. As suggested in Chapter 1, voluntary departure can thus act as a mechanism to ensure that coercive measures, and any associated interferences with fundamental rights, are applied, as much as possible, as a last resort. As such, voluntary return acts as a proportionality mechanism with regard to any interferences associated with enforcement. But for it to have this function, the exceptions outlined in Article 7(4) will themselves have to be applied in a proportionate manner. This would add another layer of restrictiveness to the application of these exceptions, since the consideration of denial of a voluntary departure period by a member state should then go beyond merely finding that the situation of a third-country national fits one of the grounds provided for in Article 7(4).

The Directive itself contains several elements to ensure proportionality. It requires, for example, that any decisions taken should be adopted on a case-by-case basis, based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay.[29] This is an important element that comes into play when applying specific grounds for making exceptions to the priority of voluntary return. It would also require, generally, that the seriousness of the reasons for denying a voluntary departure period would be weighed against the impact on the individual. In this respect, member states must further take account of specific issues, such as the best interests of the child, family life, or the health of third-country nationals.[30]

10.3 Denying a voluntary departure period for reasons of public policy, public security or national security

Having discussed the priority of voluntary return and the third-country national's entitlement to a voluntary departure period in more general terms, this section starts the closer inspection of each of the specific grounds for denial (and shortening) of a voluntary departure period listed in Article 7(4). Although the possibility to deny a period for voluntary departure for reasons of public policy, public security or national security is only the third ground listed in Article 7(4), it will be the first discussed here. This is because the limited case law of the CJEU has mainly dealt with this reason for denial. Although focusing on the issue of public policy specifically, it has broader implications for the interpretation of Article 7(4) and the scope of

29 RD Recital 6.

30 RD Article 5. Although other issues may also be relevant when making decisions on voluntary departure periods, see 11.3.2.

the discretion of member states in applying it. This section, therefore, will start with an overview of this case, *Zh. and O.* (10.3.1). This is followed by a discussion of the scope of the concepts of public policy, public security and national security in the Court's case law (10.3.2), and, crucially, how member states should assess a risk to such interests in relation to the denial of a voluntary departure period (10.3.3).

10.3.1 The *Zh. and O.* case: the CJEU's first engagement with the voluntary departure period

In June 2015, the CJEU delivered its first, and so far only, judgment dealing directly with the interpretation of the Directive's provisions related to the voluntary departure period.[31] The case has already been referred to above, but is introduced here in more detail. In the *Zh. and O.* case, the Court deals with different aspects of the refusal of a period for voluntary departure on the grounds of public policy. It concerns the refusal of such a period in two separate cases of Mr Zh. and Mr O. by the Netherlands. In particular, the referral sought to get more clarity on the practice in the Netherlands that any person suspected or convicted in respect of an act punishable as a criminal offence under national law is automatically deemed to pose a risk to public policy, and could thus be refused a voluntary departure period on that basis.[32]

Mr Zh. had been arrested at the international airport while trying to make his way to Canada, because he was travelling with a false travel document. He was subsequently given a custodial sentence of two months for the possession of a travel document he knew to be false. At the end of his sentence, he was ordered to leave the Netherlands and a period for voluntary departure was denied. When Mr Zh. appealed this decision, the District Court in The Hague found that the Dutch government had been justified in considering Mr Zh. a risk to public policy, since he had been found to be residing illegally in the Netherlands, had no ties with any citizen of the EU and, in addition, had been given a custodial sentence. Based on this, a risk to public policy within the meaning of Article 7(4) of the Directive could legitimately be presumed.[33]

Mr O. was in the Netherlands on a short-term visa but was arrested and detained on the ground that he was suspected of domestic abuse. He was ordered to leave the Netherlands and was refused a period for voluntary departure because he posed a risk to public policy.[34] This decision was annulled by the District Court, inter alia, because there were no policy guidelines on shortening the period for voluntary departure in the

31 CJEU C-554/13 *Zh. And O.* [2015]
32 *Ibid.*, paragraph 17. It is noted that, in case of a suspicion (rather than a conviction) this must be capable of being confirmed by the chief of police.
33 *Ibid.*, paragraph 20.
34 *Ibid.*, paragraph 24.

interest of public policy[35] and because the government had failed to provide adequate reasons for its decision. A report which stated that Mr O. had been detained on suspicion of domestic abuse was found to be inadequate, taking into account that there was no documentation substantiating the alleged abuse. Both cases went to the Council of State, the Netherlands' highest administrative court. The Council of State decided to refer preliminary questions to the CJEU on the refusal of a period for voluntary return under Article 7(4) of the Directive.

10.3.2 *Zh. and O.* and the denial of a voluntary departure period due to a risk to public policy

The *Zh. and O.* judgment covers various issues related to the denial of a voluntary departure period on public policy grounds. This includes setting the framework for when a risk to public policy can be assumed to exist, the specific circumstances that should be taken into account, and the matter of whether such a risk needs to be re-examined at the moment a decision of denial of a voluntary departure period is made. The Court's findings in relation to each of these issues are outlined below.

10.3.2.1 Requirements for considering a risk to public policy

The referring court asks, first of all, about the circumstances under which a member state can consider a third-country national a risk to public policy within the meaning of Article 7(4).[36] In particular, whether this can be found merely on the basis of persons being suspected of having committed a criminal offence under national law, or that it is necessary that they were actually convicted. And if so, whether such a conviction should have become final and absolute. The CJEU frames this question mainly as whether Article 7(4) would preclude a national practice that would deny a voluntary departure period on the sole ground that the third-country national is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law. In this respect, the CJEU first observes that the 'risk to public policy' is not defined in the Directive and must, according to settled case law, be determined by considering its meaning in everyday language, taking into account the context and the purpose of the rules of which it is part. In particular, when an undefined term appears in a provision which

35 The policy that a suspicion or conviction of a criminal offence automatically gave rise to a presumption that the person posed a risk to public policy, described above, was only laid down in policy guidelines after Mr O. had already been removed from the Netherlands. However, the (unwritten) practice had been in place before, as evidenced from the Dutch submission, *ibid.*, paragraph 40.

36 It should be noted that, in her Opinion, Advocate General Sharpston devoted considerable attention to the question whether 'public policy' in the English language version should be considered similar to 'ordre public' in the French and other versions, see CJEU, Opinion AG, C-554/13 *Zh. And O.* [2015].

constitutes a derogation from a principle, it must be interpreted strictly. The preamble of the Directive may also shed light, in particular the fact that it sets out a general priority of voluntary return.[37] The Court also notes that Article 7(4) only provides for particular circumstances, such as a risk to public policy, that allow denying or shortening a voluntary departure procedure. And to rely on such a provision, the member state must be able to prove that the person concerned constitutes such a risk.[38] Importantly, as noted in 10.3.1 above, it also reiterates that the provisions on voluntary departure seek to ensure the protection of the fundamental rights of third-country nationals.[39]

The Court further observes that member states essentially retain the freedom to determine the requirements of public policy in accordance with national needs, which may vary. However, there is nonetheless a need for strict interpretation, so that the scope of these requirements cannot be determined unilaterally by each member state without any control by the EU institutions.[40] In this respect, it also reiterates the need for fair and transparent procedures, which involve decisions being adopted on a case-by-case basis, on objective criteria, going beyond the mere fact of illegal stay.[41] Drawing on its judgment in *El Dridi*, the CJEU reiterates the fact that the principle of proportionality must be observed throughout all stages of the return procedure, including in relation to Article 7. This implies that member states must assess a risk to public policy on a case-by-case basis, to ascertain whether the personal conduct of the individual poses a genuine and present risk to public policy. Relying on any assumption in order to determine such a risk, without properly taking into account the individual's personal conduct, fails to observe the principle of proportionality. The mere existence of a suspicion of or conviction for a criminal offence is thus not sufficient to satisfy these requirements of Article 7(4).

This does not mean, however, that the public policy exception in Article 7(4) can only be applied when a conviction becomes final and absolute. Such a requirement does not follow from the Directive's wording and would run counter to the purpose of Article 7. As such, a mere suspicion of a criminal offence may be sufficient, provided this is taken with other relevant factors relating to the case that indicate a risk to public policy. While this is further to be determined by the national court, the CJEU does clearly find that a practice of denying a voluntary departure period on the sole basis of the existence of a suspicion or conviction for a criminal offence to be incompatible with the Directive.

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37 CJEU C-554/13, *Zh. And O.* [2015], paragraphs 41-42.

38 *Ibid.*, paragraph 46, also see CJEU, Opinion AG, C-554/13 *Zh. And O.* [2015], point 43, and CJEU C-61/11 PPU *El Dridi* [2011], paragraph 37.

39 CJEU C-554/13 *Zh. And O.* [2015], paragraph 47; CJEU C-146/14 PPU *Mahdi* [2014], paragraph 38.

40 CJEU C-554/13 *Zh. And O.* [2015], paragraphs 48; CJEU C-430/10 *Gaydarov* [2011], paragraph 32 and case law cited.

41 CJEU C-146/14 PPU *Mahdi* [2014], paragraph 38.

It should be noted that, in the lead up to its question, the referring court also devotes significant attention to the fact that the risk to public policy is also used in other EU migration legislation relating to legally staying EU citizens or third-country nationals. In this respect, it suggests that the bar for finding a sufficient risk in the case of the Directive may be lower than in other such cases, since individuals would be irregularly staying in the member state and the consequences would only be the denial of a voluntary departure period and not, as in other situations, the discontinuation of their legal presence in the member state. The CJEU does not engage with this issue as such. However, Advocate General Sharpston, in her opinion, makes a strong and convincing argument against this. She notes the "unfortunate connotations" of making distinctions on the basis of legal status, as this would create a hierarchy of protection, with irregularly staying third-country nationals at the bottom.[42] She concludes that "[t]he fundamental rights guaranteed by EU law that do apply to third-country nationals should be observed with equal rigour to those applying to EU citizens."[43] Although not pronouncing itself specifically on this issue, the CJEU's clear recognition of the protective function of voluntary return would appear to be in support of this approach, also in view of its previous findings that the protection of the fundamental interests of a member state may not vary depending on the legal status of the person concerned.[44]

10.3.2.2 Circumstances to be taken into account

In its second question, the referring court asked what other facts or circumstances of the case, in addition to a suspicion or a conviction, such as the severity or type of offence, the time elapsed since the offence, and the intention of the person concerned, should be taken into account. In this respect, the CJEU first observes that the factors relevant to determining a risk to public policy are not materially the same as those related to the risk of absconding, on which it pronounced itself in *Mahdi*.[45] Additionally, it re-emphases its point above that such a risk requires a case-by-case assessment of the personal conduct, which must lead to a genuine and present risk to public policy. Finding that various language versions of the Directive use both 'risk' and 'danger' in this respect, the context of this rule requires this to be understood in the sense of a 'threat.'[46] In this light, the appraisal that needs to be made of the interests in protecting public policy does not necessarily coincide with elements that form the basis of a criminal conviction.

42 CJEU, Opinion AG, C-554/13 *Zh. And O.* [2015], point 58.
43 *Ibid.*, point 59.
44 CJEU C-373/13 *H.T.* [2015], paragraph 77. Also see Terlouw 2016, p. 136.
45 CJEU C-146/14 PPU *Mahdi* [2014], and further see 10.4 below.
46 CJEU C-554/13 *Zh. And O.* [2015], paragraph 58.

Rather, such a risk must presuppose, "in addition to the perturbation of the social order which any infringement of the law involves" also a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society."[47] Any factual or legal matter regarding the that can shed light on whether the personal conduct of the third-country national indeed poses such a threat can be considered relevant. In the case of a suspicion of a criminal offence, such factors include (but are not necessarily limited to) the nature and seriousness of the act, and the time that has since elapsed.[48]

The Court also notes, in relation to Mr Zh., that he was in the process of leaving the Netherlands. While it is for the national court to determine how this should be applied to the case, it is under obligation to assess all the facts and evaluate the weight attributed to that circumstance.[49] As regards Mr O., the Court also notes the lack of documentation substantiating the accusation of abuse, which is also relevant because it relates to the credibility of the suspicion, which in turn may clarify whether his personal conduct poses a risk to public policy. As such, other factors beyond the suspicion or conviction of a criminal offence are relevant in applying this ground for denying a voluntary departure period, including all the ones discussed above.[50]

10.3.2.3 Automatic application of Article 7(4), denial and the need for a fresh examination

In relation to the third question, the CJEU considers whether the application of Article 7(4) requires a fresh examination of the matters which have already been examined to establish the existence of a risk to public policy in the first place. In this context, the CJEU, drawing on *Boudjlida*, reiterates that the right to be heard before the adoption of a return decision implies an obligation on member states "to enable the person concerned to express his point of view on the detailed arrangements for his return, such as the period allowed for departure, and whether return is to be voluntary or coerced."[51] And that, according to general principles of EU law and as reiterated in the preamble of the Directive, decisions taken must be adopted on a case-by-case basis, taking properly into account the person's fundamental rights. Automatically denying, in law or practice, a voluntary departure period is not compatible with that, although the Directive clearly leaves space, if required in light of all the relevant circumstances, to member states to protect their public policy interests. If a member state, taking into account

47 *Ibid.*, paragraph 60; CJEU C-430/10 *Gaydarov* [2011], paragraph 33 and case law cited.
48 CJEU C-554/13, *Zh. And O.* [2015] paragraphs 61-62.
49 *Ibid.*, paragraph 63.
50 *Ibid.*, paragraphs 64-65.
51 *Ibid.*, paragraph 69; CJEU C-249/13 *Boudjlida* [2014], paragraph 51.

all safeguards mentioned above, considers that an individual indeed poses a risk to public policy, it is not required to conduct a fresh examination of matters that were found to be relevant in establishing that risk.[52]

In its third question, the referring court had also specifically asked about the freedom of member states to choose between denying a voluntary departure period, or granting one that is shorter than seven days, in case of a risk to public policy. As this pertains to the application of Article 7(4) more generally, I will come back to this issue in 10.6.

10.3.3 Implications of the judgment beyond the risk to public policy

The judgment has important implications for the other elements set out in this limb of Article 7(4), namely the risk to public security and to national security, as well as for the other grounds for denial of a voluntary departure period.

10.3.3.1 Risks to public security and national security

The judgment focuses only on the denial of a voluntary departure period as regards the risk to public policy. However, the risk to public security and the risk to national security are grouped together with public policy within the same limb of Article 7(4). In this light, it must be assumed that the CJEU's findings are equally relevant for these other elements. Just as with public policy, while not leaving this entirely to member states, the CJEU would likely leave considerable space to member states to ascertain when these essential interests are impact by a third-country national's conduct. In this respect, the CJEU has only set out broad parameters for some of these concepts too.[53] At any rate, the borders of the three concepts public policy, public security and national security remain amorphous.[54] However, since they are grouped together, the requirements for considering such a risk sufficient to deny a voluntary departure period must at any rate be considered the same. It may, however, be possible to discern a difference in the severity of the risk posed in each case, where risks to national security would arguably have to be weighed more heavily than those to public policy, but this also depends, as noted below, on the specific risk involved.

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52 The judgment remains somewhat vague on this point. Presumably it means there is no need for the authority deciding on a voluntary departure period to itself re-examine substantive elements leading to the suspicion or convicting of a criminal offence, but only that it needs to weigh this suspicion or convicting in an appropriate manner as set out above.

53 See, for example, CJEU, C-145/09 *Tsakouridis* [2010] and case law cited.

54 Koutrakos 2016, for example, speaks of the "marginalisation of the distinction between public policy and public security," which he considers "troubling and by no means conducive to the clarification of these elusive concepts." Similarly, Peers 1996, has noted that "national security derogations inevitably form part of or overlap with *public* security … exceptions" (emphasis in original).

The exceptions to each of these grounds must be interpreted strictly and in relation to their autonomous meaning in EU law, rather than merely on the basis of national provisions. They must be forward-looking in that they constitute a "genuine and present threat." They must further conform to the more general requirements that should considered applicable to Article 7(4) in its entirety, as discussed below.

10.3.3.2 Implications for the application of Article 7(4) generally

The judgment reiterates, and in some cases sets out, important general principles related to the balancing of the interests of the member state and those of individuals, especially their fundamental rights. In this respect, they should be considered applicable in all cases in which member states seek to make exceptions to the general rule that a voluntary departure period between seven to thirty days should be granted. In particular, this implies that such a step must be assessed by taking an individualised approach (a case-by-case basis), as well as fully contextualised, taking into account "any factual or legal matter related to the situation of the third-country national."[55]

The principle of proportionality further requires this to be weighed against the interests of the individual, including (but not necessarily limited to) those of which member states must take account under Article 5 of the Directive (the best interests of the child, family life and the state of health of the individual). In this regard, the judgment also reiterates the importance of the right to be heard, as a means to ensure third-country nationals can put forward all elements relevant to making such a decision. All this is particularly connected to the clear recognition of ensuring that third-country nationals' fundamental rights are protected regardless of their irregular status in the member state, and, importantly, that granting a voluntary departure period is a key mechanism for the adequate protection of those rights. Furthermore, the CJEU's findings are important in reiterating the fact that the burden of proof that it is necessary and proportionate to deny a voluntary departure period lies firmly with the member state, which, after all, is the one that is opting to deprive the third-country national of this opportunity. Automatic application of the denial of voluntary departure as a 'check-the-box' exercise is clearly not compatible with the Directive.[56]

In this way, the *Zh. and O.* judgment is particularly important for a proper understanding of the way in which the grounds for denial (or shortening) of a voluntary departure period should be operationalised. It sets important parameters for the way member states should consider such a step, even if the substantive grounds for denial under the other limbs of Article 7(4) are different. More specifically, this requires an approach that is forward-looking and not just considering past actions, individualised and

55 CJEU C-554/13 *Zh. And O.* [2015], paragraph 61.
56 Also see Majcher 2020, p. 566.

not automatic, and contextualised, taking into account all relevant facts, whilst ensuring these are weighed against the interests of the individual.

10.4 Denying a voluntary departure period and the risk of absconding

As noted in 10.2.1, the fact that member states would be able to deny or shorten a voluntary departure period if there is a risk of absconding seems to flow logically from the overall goals of the Directive, and arguably gives the purest meaning to the notion that voluntary return should be preferred unless this would undermine the purpose of a return procedure. Nevertheless, this ground for denial raises a multitude of questions regarding its scope and application. These are particularly important as, of the three grounds set out in Article 7(4), the risk of absconding, if not further clarified, leaves the widest possibilities for denying a voluntary departure period. In this respect, Baldaccini has argued, in relation to the priority of voluntary return, that "[i]t is clear that the implementation of this principle can entirely be frustrated by a wide application of the 'risk of absconding' exception."[57] In the next paragraphs, therefore, the focus will be on potential limits to this exception, focusing on general principles to be applied (10.4.1), the setting of objective criteria defined by law (10.4.2), the meaning of absconding in relation to non-cooperation and non-return (10.4.3), the avoidance of criteria that replicate the mere fact of illegal stay (10.4.4), criminal proceedings and absconding (10.4.5), and the relationship with measures to prevent absconding under Article 7(3) (10.4.6).

10.4.1 General principles to be applied to the risk of absconding

The risk of absconding serves a dual role in the Directive. It acts both as a ground to deny or shorten a voluntary departure period, and as one of the reasons why a member state may detain a third-country national during the enforcement stage.[58] In the original proposal for the current Directive, the existence of a risk of absconding was the only ground for denial or shortening of the voluntary departure period mentioned.[59] In contrast to the other derogation grounds, the risk of absconding is the only one explicitly defined in the Directive. Article 3(7) defines a risk of absconding

57 Baldaccini 2009, p. 8. Also see PICUM 2015, p. 15. Similar concerns were raised by the LIBE Rapporteur on the recast proposal, EP doc. PE648.370v01-00, justification of amendment 46.

58 RD Article 15(1)(a).

59 COM(2005) 391 final, 1 September 2005, Article 6(2). The fact that the other grounds were added later in the process may also explain the above-mentioned discrepancies between the reference to the undermining of a return procedure and the possibility to deny a voluntary departure period due to a risk to public policy, public security or national security, or on the basis of a fraudulent or manifestly unfounded application.

as "the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond." This definition is somewhat cyclical: a risk of absconding exists because there are reasons to believe a person may abscond. Importantly, this does not clarify what the term 'absconding' actually means.[60] Rather, the definition focuses on the establishment of objective criteria defined in law, which should provide indicators for it. As noted above, the denial of a voluntary departure period on the basis that there is a risk of absconding would need to conform to the same general principles as identified in relation to the risk of public policy, public security or national security.

As a general point, the CJEU has established the need to ensure that the principle of proportionality is applied at all stages of the return procedure.[61] The need for an individual examination is further reiterated in several CJEU judgments.[62] The Return Handbook also warns against the automatic denial of a voluntary departure period due to the applicability of one of the objective criteria set out in national law.[63] Although the CJEU has clarified that the concept of 'risk' in the risk of absconding is distinct from that in relation to the risk of public policy,[64] the requirement that member states employ a forward-looking approach would appear to be relevant to the former as well. Particularly in the case of a risk of absconding, the member state must make an assessment of a future possibility. While past conduct may be relevant in that respect, a forward-looking approach would require justification why that past behaviour is likely to have effect in the future, such as the possibility that the third-country national will abscond.

10.4.2 'Objective criteria defined by law'

As noted, the main element of the definition of a risk of absconding in the Directive is that such a risk must be found on the basis of objective criteria defined by law. The requirement that member states set such objective criteria has not yet been subject to the CJEU's case law in relation to the Directive. However, it has dealt with this in relation to a similar provision in Regulation 604/2013 (the Dublin III Regulation), in the *Al Chodor* case.[65] That case dealt with the detention of an asylum seeker for the purpose of implementing a Dublin transfer by the Czech Republic. However, the Czech Republic had never explicitly set out in its immigration laws any objective criteria of a risk of absconding that would justify such detention.

60 See 10.4.3 below.
61 CJEU C-554/13 *Zh. And O.* [2015], paragraph 49; CJEU C-61/11 PPU *El Dridi* [2011], paragraph 41.
62 CJEU C-146/14 PPU *Mahdi* [2014], paragraph 70; CJEU C-430/11 *Sagor* [2012], paragraph 41.
63 C(2017) 6505 final, 16 November 2017, Annex, paragraph 1.6.
64 *Ibid.*, section 6.3, at p. 37.
65 CJEU C-528/15 *Al Chodor* [2017].

Rather, the Czech government argued, these objective criteria had been set out in the case law of domestic courts, which confirmed a consistent administrative practice. The CJEU considered this insufficient. It found that any deprivation of liberty, within the meaning of Article 6 of the Charter of Fundamental Rights, should be accessible, precise, and foreseeable. This, the CJEU found, could only be achieved by adopting a binding provision of general application. [66] Lacking this, a decision – in this case to detain – could not be lawful.

Whilst dealing with detention under the Dublin III Regulation, this finding by the CJEU should also apply to the question of denying or shortening a voluntary departure period under the Directive as well. First of all, the definition of the risk of absconding in the Dublin III Regulation is materially the same and pursues a similar objective, that is, to ensure that the third-country national is available for a transfer or removal, making it translatable to the Returns Directive. Furthermore, the issue of deprivation of liberty applies in both cases. In the case of voluntary departure, as noted, this is particularly an instrument to prevent undue deprivation of liberty during the removal stage.[67] Furthermore, the Directive's definition of a risk of absconding in regard of voluntary return applies in the same way to detention decisions under the Directive. As a result, any denial or shortening of a voluntary departure period on the basis of the risk of absconding, in the absence of a binding provision of general application in the domestic law of the member state setting out objective criteria, should be considered as non-compliant with the Directive.[68]

Although this clarifies at least what member states must do to set out objective criteria defined by law, it says nothing about the content of those criteria. The Directive does not set any explicit substantive requirements for such criteria.[69] Indeed, it reiterates that the elaboration of those criteria is a matter for national law.[70] It has been noted that this has led to "diverse approaches to the type and number of objective criteria" set by member states, with some using single criteria as sufficient for finding a risk of absconding and others having "significantly expanded the scope of the risk of absconding, by including a long list encompassing all possible objective criteria."[71] A list of frequently used criteria in national law is provided in the Return Handbook. This list clearly acted as inspiration for the Commis-

66 *Ibid.*, paragraph 43.
67 CJEU C-554/13 *Zh. And O.* [2015]. Also see 10.2.2.2.
68 A 2017 study suggests that, in regard of defining objective criteria in law, member states' practices, at least at that time, varied considerably. This included, in additions to member states clearly transposing the relevant provisions of the Directive, some member states that did not have a domestic legal definition of a risk of absconding at all, some that provided such a definition in administrative acts, and others where objective criteria were additionally developed by jurisprudence. See Moraru 2017, p. 30-31.
69 Baldaccini 2009, p. 8.
70 CJEU C-528/15 *Al Chodor* [2017], paragraph 28.
71 Moraru 2017, p. 32.

sion's 2020 recast proposal, which, faced with the diversity of criteria used in member states, seeks to provide some uniformity. The recast proposal suggests including a list of no fewer than 16 criteria, which member states should "at least" incorporate into their national laws.[72] These criteria are:

> *"(a) lack of documentation proving the identity;*
> *(b) lack of residence, fixed abode or reliable address;*
> *(c) lack of financial resources;*
> *(d) illegal entry into the territory of the Member States;*
> *(e) unauthorised movement to the territory of another Member State;*
> *(f) explicit expression of intent of non-compliance with return-related measures applied by virtue of this Directive;*
> *(g) being subject of a return decision issued by another Member State;*
> *(h) non-compliance with a return decision, including with an obligation to return within the period for voluntary departure;*
> *(i) non-compliance with the requirement of Article 8(2)*[73] *to go immediately to the territory of another Member State that granted a valid residence permit or other authorisation offering a right to stay;*
> *(j) not fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures, referred to in Article 7;*[74]
> *(k) existence of conviction for a criminal offence, including for a serious criminal offence in another Member State;*
> *(l) ongoing criminal investigations and proceedings;*
> *(m) using false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints as required by Union or national law;*
> *(n) opposing violently or fraudulently the return procedures;*
> *(o) not complying with a measure aimed at preventing the risk of absconding referred to in Article 9(3);*[75]
> *(p) not complying with an existing entry ban."* [76]

The Return Handbook acknowledges that "[f]requently it will be a combination of several of the above listed criteria that will provide a basis for legitimately assuming a risk of absconding,'" and that automatically assuming such a risk on the basis of one of such criteria, such as illegal entry, must be avoided. In this respect, the Commission's recast proposal also sets out an approach that gives differential weight to some criteria. If one of the final four criteria applies, there should be a presumption that there is a risk of absconding, "unless proven otherwise."[77] These criteria would thus result in a reversal of the burden of proof. At any rate, "[t]he existence of a risk of absconding shall be determined on the basis of an overall assessment of the specific circumstances of the individual case, taking into account the

72 COM(2018) 634 final, 12 September 2018, Article 6(1).
73 This mirrors the same requirement in Article 6(2) of the current Directive.
74 Proposed Article 7 introduces a new obligation on third-country nationals to cooperate with the member state's authorities. See 1.2.3.
75 This mirrors Article 7(3) in the current Directive.
76 COM(2018) 634 final, 12 September 2018, Article 6(2).
77 *Ibid.*

objective criteria," which is clearly a codification of standing case law of the CJEU.

Although these criteria remain, for the moment, just proposals that will be subject to further negotiation, they are useful since they indeed mirror many member states' current practices. Whilst being aware that the new proposal would also allow member states to set additional criteria, the list proposed by the Commission is a useful starting point for further reflection, since it captures many currently used criteria in member states (and thus helps draw conclusions about the current Directive), and may be part of any new Directive. Whilst incorporating this list in national laws would satisfy the requirement that objective criteria to indicate a risk of absconding are defined in law, the big question remains whether this means that member states can use any criterion they consider appropriate. This, I argue, is not the case. In the following paragraphs, some substantive limitations to those criteria are discussed.

10.4.3 The meaning of absconding and its relation to non-cooperation and non-return

The definition of a risk of absconding in the Directive leaves considerable freedom for member states to define criteria on which a risk of absconding is assumed. Nevertheless, this cannot mean that the notion of a risk of absconding is just an empty vessel in which member states can pour any issue they want. This would fundamentally undermine the protection of the right to voluntary departure that the Directive is supposed to offer. As a general point, member states should set out objective criteria in good faith, with the genuine intention of assessing a risk of absconding in individual cases, rather than giving themselves the tools to deny a voluntary departure period to large numbers of third-country nationals. This is exactly the danger if the substance and use of the objective criteria is not further circumscribed. One way to circumscribe the scope of appropriate criteria is by looking at the meaning of 'absconding' itself.

10.4.3.1 Towards a definition of 'absconding'

Since the Directive itself provides only a self-referential explanation, it is no wonder that there has been criticism of this definition being "vague"[78] and "surrounded by confusion."[79] However, unless otherwise defined (see the use of 'voluntary'), terms in EU legislation should be interpreted in line with their usual meaning in everyday language.[80] In this ordinary meaning, absconding is most commonly used for escaping a certain place and hiding to try to evade capture or arrest. Indeed, in other language

78 PICUM n.d.
79 Moraru 2017.
80 CJEU C-554/13 *Zh. And O.* [2015], paragraph 29.

versions of the Directive, this is more explicit. In French, for example, the Directive mentions a "*risque de fuite*," that is, a risk of flight. Similarly, the German version speaks of "*Fluchtgefahr*," which would be the case if there is a risk that the third-country national would flee in order to evade or elude ("*sich entzieh*en"). In the Dutch version the phrase "*risico op onderduiken*" would roughly translate as "going underground," whilst this risk relates to the fact that the third-country national will try to evade the supervision of the state ("*zich onttrekken aan het toezicht*"). In its normal meaning, which finds support in different language versions of the Directive, therefore, absconding should be interpreted as having to do with the third-country national staying on the member state's radar, so that he can be removed when the time comes. This also makes sense from the structure of the Directive's return procedure, in which removal is a safeguard to ensure that effective return is realised, regardless of whether the third-country national opts to return voluntarily. Although the CJEU has not specifically confirmed this in relation to the Directive, there are indications that it would accept such an interpretation. In *Mahdi*, for example, mention is made of Bulgarian law considering a risk of absconding to be established if, for a person who is the subject of a coercive administrative measure, there is reason to believe they "will attempt to circumvent the implementation of the measure ordered."[81] The CJEU does not engage with that provision of domestic law specifically, but appears content to proceed its consideration on this basis.

A similar conclusion can be drawn by looking at other EU instruments related to asylum and migration. Under the Dublin III Regulation, this may be a ground for detention, although, in contrast to the Returns Directive, this would require the existence of a *significant* risk of absconding.[82] But the notion of absconding also has a bearing, for example, on the extension of the time limit within which Dublin transfers must take place. Normally, if such a transfer does not take place within six months, the member state where the third-country national is staying at that point becomes responsible for his or her case. However, if the transfer cannot be effected because the person concern absconds, this time limit can be extended by another 18 months.[83] The CJEU's judgment in *Jawo* deals specifically with the meaning of absconding in this regard.[84] This provision was in question in relation to the situation of Mr Jawo, whose transfer had been cancelled because he had left his allocated accommodation without informing the authorities. This led to the consideration by the CJEU of the precise meaning of absconding within the context of the Regulation, especially whether this implied a deliberate intent to evade transfer, or whether his disappearance from the allocated accommodation was sufficient to count as absconding. The CJEU noted that the Dublin III Regulation did not define 'absconding'

81 CJEU C-146/14 PPU *Mahdi* [2014], paragraph 70.
82 Regulation 604/2013, Article 28(2).
83 *Ibid.*, Article 29(2).
84 CJEU C-163/17 *Jawo* [2019].

and that none of its provisions expressly specified this meaning. However, the concept should be given autonomous and uniform meaning throughout the EU. It noted that the ordinary meaning of the term implied "the intent of the person to escape from someone or evade something, namely, in the present context, the reach of the competent authorities and, accordingly, his transfer."[85] While, in principle, this would imply deliberately evading the reach of the authorities,[86] the CJEU also found that member states would be justified in assuming this is the case where the transfer could not be carried out because the person had left the allocated accommodation without informing the competent authorities, provided he had been informed of his obligations in this regard.[87] The context of the specific provision of the Dublin III Regulation is clearly different from the situation in relation to the denial of a voluntary departure period in the Returns Directive. However, the approach of a person evading the reach of the authorities, which in the case of the Dublin III Regulation prevents their transfer and in the case of the Directive may prevent their removal, seems similarly relevant.

Finally, the risk of absconding is also used in Directive 2013/33 (the recast Reception Conditions Directive), as an element of the possibility of detention.[88] The latter Directive does not provide a specific definition, although the 2016 Commission proposal for a revised Directive, which is still under negotiation, incorporates the same definition as the Returns Directive.[89] That proposal for a revision also provides an explicit definition of 'absconding' as "the action by which an applicant, in order to avoid asylum procedures, either leaves the territory where he or she is obliged to be present [in accordance with Dublin rules] or does not remain available to the competent authorities or to the court or tribunal."[90] While not (yet) in force, it further strengthens the general reading of the specific meaning of absconding as disappearing from view of the authorities, so that they cannot take the actions provided for in an EU instrument.

In view of the discussion above, it should be assumed that a risk of absconding within the meaning of Article 7(4) of the Directive must imply that there are reasons to believe that third-country nationals involved would disappear from view of the authorities, making the enforcement of the return decision issued to them impossible. This also means that the objective indicators used should be related specifically to identifying a risk that such disappearing from view might happen. As a result, criteria that do not specifically relate to this cannot be considered as meeting the

85 *Ibid.*, paragraphs 54-56.
86 *Ibid.*, paragraph 56.
87 *Ibid.*, paragraph 70.
88 Directive 2013/33, Article 8(3)(b).
89 COM(2016) 465 final, 13 July 2016, Article 2(11).
90 *Ibid.*, Article 2(10).

requirements of the Directive. Despite this, several criteria commonly used by member states, and proposed by the Commission, raise serious doubt whether they actually perform this function, as discussed below.

10.4.3.2 The conflation of absconding with non-cooperation or non-return

Despite the meaning of absconding elaborated above, there is a tendency to conflate absconding with other concepts. For example, criteria that relate to a third-country national's non-cooperation with return procedures are commonly part of national frameworks.[91] Similarly, the possibility that the third-country national does not return within the voluntary departure period has been used as a criterion to surmise a risk of absconding. The Return Handbook's overview of frequently used criteria mentions, for example, includes "refusing to cooperate in the identification process" and the "explicit expression of intent of non-compliance with return-related measures."[92] The Commission's recast proposal also includes elements of both. For example, it suggests "not fulfilling the obligation to cooperate with the competent authorities of the Member State at all stages of the return procedures" as an indicator of absconding.[93] So is an "explicit expression of intent of non-compliance with return-related measures."[94] From the perspective of the member state, this makes sense. After all, why should a voluntary departure period be granted to someone who is unwilling to cooperate and to comply with his or her obligation to return? However, making a direct link between non-cooperation and/or non-return on the one hand, and absconding on the other, in my view is deeply problematic.

The possibilities for member states to withhold a voluntary departure period are exhaustively set out in the Directive and only cover the three sets of grounds discussed in this chapter. Non-cooperation or non-return are not formulated as such grounds. Indeed, looking at the scheme set out by the Directive, ensuring that the third-country national will return is the subject of other provisions, namely those dealing with the enforcement of the return decision. It is noteworthy that the Directive deals explicitly with the third-country national's efforts to make return possible only in the context of detention. In Article 15(1)(b), the Directive authorises detention if the third-country national "avoids or hampers the preparation of return or the removal process." Similarly, Article 15(6) sets out that such detention may not be extended beyond six months unless for specific reasons, one of them being that there is "a lack of cooperation by the third-country national concerned." Interfering with the return process or not giving cooperation to it can thus lead to consequences for the third-country national during

91 Moraru 2017.
92 C(2017) 6505 final, 16 November 2017, Annex, paragraph 1.6. The former criterion is suggested as creating a rebuttable presumption of the existence of a risk of absconding.
93 COM(2018) 634 final, 12 September 2018, Article 6(1)(j).
94 *Ibid.*, Article 6(1)(f).

the *enforcement stage*. However, such grounds are not part of the exhaustive list of reasons to deny or shorten a period for voluntary departure.[95]

This again strengthens the notion that absconding is connected to availability for removal in the future, and should be distinguished, when it comes to questions of granting a voluntary departure period, from the concepts of non-cooperation or unwillingness of the third-country national to return voluntarily. Whilst absconding invariably also has the effect that the third-country national makes the enforcement of his or her return impossible, the reverse is not necessarily true. It would be perfectly possible for a third-country national to avoid taking any action to return, or refuse to cooperate with the authorities in relation to return, without disappearing from view. For example, if third-country nationals refuse to file an application with the consular authorities of their country of origin to replace missing travel documents, this could be seen as non-cooperation with the return procedure. However, such third-country nationals may still be staying in an asylum centre or other government-run facility and thus be on the authorities' radar, or otherwise continue to comply with reporting or other obligations. In such a situation the fact that third-country nationals have failed to take steps towards their return does not seem to indicate, in any objective manner, that they will not be available for eventual removal.

Similarly, it is far from evident that a simple statement by third-country nationals that they do not *want* to return is sufficient to assume they will abscond. For example, third-country nationals may in certain circumstances prefer being removed over voluntarily returning, such as in relation to avoiding 'voluntary *refoulement*,' discussed in 7.3. But such a preference may also be inspired by a felt need to show resistance to return up until the last moment, for example, as a way of showing communities back home (which may have invested heavily in the individual's migration) that they did not give up without a fight. This may be important to deal with the stigma of an unsuccessful migration attempt to Europe, and removal could therefore, perhaps paradoxically, be seen by individuals as a more dignified option than voluntary return.[96] Again, such persons may nevertheless be willing to stay in view of the authorities, including when they are dependent on the authorities for shelter, health care or other essential services. There may

95 The new cooperation duties in the recast proposal are part of a separate provision.

96 The issue of stigma and return has been addressed in migration research (see, for example, Schuster & Majidi 2015), although in relation to voluntary return this has often focused on whether this can help reduce stigma, especially through assistance (for example, Van Wijk 2008, p. 35). However, Brekke 2015, p. 79, notes that recourse to such assistance may also be a stigmatising factor for: "Being motivated to give up the dream of asylum because of a cash incentive may appear stigmatizing to some." The point here is not to draw any general conclusion on such a complex phenomenon of return and stigma, and how it is experienced by individuals. Rather, this is just to illustrate that there may be logical reasons, from the perspective of the individual, to prefer removal over return, and that it can thus not always be assumed that the former will be chosen over the latter.

be many variations on this, and in each individual case the member state will have to see whether there is a specific risk of the third-country national disappearing from view if a voluntary departure period were to be granted, even in the face of clear evidence that the third-country national does not want to return or is demonstrably not taking action to make return happen. A criterion, such as under point (f) in 10.4.2 above ("explicit expression of intent of non-compliance with return-related measures applied by virtue of this Directive") fails to consider this nuance, and therefore cannot act as an appropriate, self-standing indicator for a risk of absconding.

This may seem unsatisfactory for member states, which may then have to accord a voluntary departure period despite knowing in advance that this cannot bring any of the advantages (fewer administrative efforts, cheaper) associated with this. This dilemma could be addressed from a pragmatic perspective, as well as from a principled one. From a pragmatic perspective, it might be wondered whether the fact that the third-country national will clearly not take advantage of this protective function does not negate the need to provide a voluntary departure period. However, it may be difficult to establish at the outset that a third-country national, even one who is explicitly defiant of returning, will not eventually return voluntarily. The threat of removal appears to be one of the key underlying presumptions for the effectiveness of voluntary return.[97] Therefore, it cannot be ruled out that a defiant third-country national, the closer the deadline for potential removal comes into view, will still opt to return voluntarily. The Return Handbook also notes the possibility of member states to change their assessment of the risk of absconding at any time, for example because "a previously non-cooperating returnee may change his/her attitude and accept an offer for assisted voluntary return." This, it suggests, may even lead to the granting of a voluntary departure period later on, after such a period was initially denied due to the existence of a risk of absconding.[98] As such, it must be acknowledged that a third-country national's attitude to voluntary return is not static.

From a principled perspective, it must be recalled, as discussed earlier, that the CJEU has taken a clear rights-based approach to voluntary departure, with specific limitations on the derogation from this right. A rights-based approach may suggest that the fact that third-country nationals opt not to take advantage is not a matter for the state, at least not during the voluntary departure period.[99] Of course, this would mean that effective return is delayed somewhat, because the member state cannot enforce the decision until the end of the voluntary departure period. This would

97 Van Wijk 2008, p. 28, notes that "[f]ear to be detained or living in detention sometimes constitutes a serious push-factor" for irregular migrants faced with the prospect of return.

98 C(2017) 6505 final, 16 November 2017,,paragraph 6.3.

99 See, by analogy, the discussion on the forced exercise of the right to return in 5.3 as well as the 'right to be removed' in 7.3.4.

appear to clash with the other core objective of the Directive, ensuring effective return. Indeed, in several judgments, the CJEU has stated that member states should not allow measures that would undermine the effectiveness of the Directive, including by delaying or impede return measures.[100] However, it made these findings in relation to measures taken under domestic law that are not specifically provided for in the Directive, in particular criminal law measures, such as imprisonment or home detention for the offence of irregular entry or stay. By contrast, the procedure set out in this Directive clearly takes into account that some delays in the return of third-country nationals may be inevitable for the sake of balancing effectiveness with protection. It does so by setting the priority for voluntary return. But the procedure is also clearly based on the presumption that not everyone who is given a chance to return voluntarily will actually do so, and that the member state may eventually have to intervene. As such, granting a period for voluntary departure always entails a risk of delay for member states. However, this risk may be inevitable to ensure that the protective function of voluntary return is fully realised. From that perspective as well, the expectation that third-country nationals might not use the opportunity afforded to them through the voluntary departure period cannot be equated to a risk of absconding, since the latter is only concerned with the possibility of enforcement if it indeed turns out that this opportunity has been left unused.

In light of the above, I also do not consider the fact that third-country nationals might not return or refuse cooperation, in and of itself, as an objective indicator to adduce a risk of absconding, even if they themselves are very clear about their intentions. At most, when using, for example, expressions of intent by third-country nationals, member states should clearly distinguish between statements that indicate that they may want to disappear from view (such as saying they will leave for another EU member state), and those that simply express a lack of willingness to return more generally. Although it may not always be easy to make this distinction, the onus is on the member state to show that it is justified to derogate from the rule that a voluntary departure period should be granted. And the member state must thus be able to explain why a third-country national's statements or conduct related to non-cooperation and non-return can reasonably be understood as indicating that they will evade enforcement of the return decision.

10.4.4 Absconding and the 'mere fact' of illegal stay

The meaning of absconding provides an implicit limitation on the scope of the criteria that member states can use to identify that a third-country national is at risk of absconding, and thus to justify a denial of a voluntary

100 CJEU C-61/11 PPU *El Dridi* [2011], paragraph 55; CJEU C-329/11 *Achughbabian* [GC] [2011], paragraph 39; C-430/11 *Sagor* [2012], paragraphs 32 and 35.

departure period. But the Directive also includes an explicit limitation. As noted, Recital 6 of the Directive's preamble tells us that any decisions in relation to the return procedure should be taken "on a case-by-case basis and based on objective criteria, implying that *consideration should go beyond the mere fact of an illegal stay*."[101] This has also been emphasised by the CJEU.[102]

The requirement to go beyond the 'mere fact' of illegal stay flows logically from the scheme of the Directive. After all, the illegal stay of third-country nationals in a member state is a necessary precondition to bring them within the scope of the Directive. If there would be no illegal stay, there would be no question of a third-country national being subject to its return procedure and thus to any issues concerning the denial of a voluntary departure period due to the risk of absconding. Considering illegal stay as indicating a risk of absconding would mean that this would theoretically be met *in all cases* coming withing the scope of the Directive. If member states could make decisions on the granting or denial of a voluntary departure period on this basis, they could do so for every third-country national to which a return decision is issued. On this point, the Return Handbook emphasises that:

> *"[i]t is not possible to exclude in general all illegal entrants from the possibility of obtaining a period of voluntary departure. Such generalising would be contrary to the definition of risk of absconding, the principle of proportionality and the obligation to carry out a case by case assessment and it would undermine the 'effet utile' of Article 7."*[103]

Despite this clearly not being allowed under the Directive (nor the proposed recast), many of the criteria currently used in member states, and some proposed by the Commission, skirt uncomfortably close to the 'mere fact of illegal stay.'[104] This is most obviously the case when the fact that a third-country national has irregularly entered the member state is considered as an indication of a risk of absconding. Irregular entry, after all, is one of the immediate causes of illegal stay within the meaning of the Directive and thus the reason why the third-country national is faced with an obligation to return.[105] In my view, this cannot be taken as a reason, in and of itself, that the third-country national may abscond, as it conflicts with the 'mere fact' requirement. Of course, the counterargument would be that third-country nationals who have irregularly entered a member state have shown that they are willing to circumvent the rules, and could therefore also be

101 My emphasis.
102 CJEU C-430/11 *Sagor* [2012], paragraph 41. CJEU C-146/14 PPU *Mahdi* [2014], paragraph 40; CJEU C-554/13 *Zh. And O.* [2015], paragraph 49.
103 C(2017) 6505 final, 16 November 2017, Annex, paragraph 6.3.
104 Moraru 2017, p. 33; COM(2018) 634 final, 12 September 2018, Article 6(2)(d).
105 See CJEU C-47/15 *Affum* [2016], paragraph 60: "in the context of Directive 2008/115 the concepts of 'illegal stay' and 'illegal entry' are closely linked, as such entry is one of the factual circumstances that may result in the third-country national's stay on the territory of the Member State concerned being illegal."

expected to do so in relation to absconding. However, again, the return decision is already the response to the circumvention of immigration rules. Furthermore, it is not immediately obvious why such a situation would have to be distinguished, for example, from that of someone who has been found to be irregularly staying after failing to renew a visa or other authorisation of stay. This would also be a circumvention of immigration rules. At best, there may be specific circumstances in the way that the third-country national gained unlawful entry into the member state.[106] Again, it would be for the member state to specify this, and simply referring to the fact that entry was irregular is insufficient. It would, at the very least, require a much more sophisticated application of the criterion than relying on the mere fact that the third-country national entered irregularly. The same would obviously go for criteria based solely on irregular stay, rather than entry. While such criteria are not proposed by the Commission, they are applied in several member states.[107]

Other criteria may similarly need to be applied in such a way that they do not just replicate the reason for finding that a third-country national is staying illegally in a member state. I suggest this is the case, for example, for a lack of identity documents. Third-country nationals who cannot produce identity documents, including any indication that they are authorised to stay in the member state, will be considered staying illegally. Furthermore, obtaining the necessary documents is an inherent part of the obligation to return under the current Directive. The proposed recast only makes this obligation more explicit.[108] It is in this context that the lack of documents should be addressed, rather than taking it as a prima facie indicator of a risk of absconding. It would be for the member state to show that the particular circumstances which led to the lack of documents would indicate a risk of absconding.[109] This is particularly relevant since a large number of third-country nationals engaged in return procedures may be undocumented. As such, a broad application of this criterion would undermine the exceptional nature of the derogation from the general rule that a voluntary departure period should be granted. This is not to say that criteria as discussed above could never be applied. However, they cannot be used as a blunt instrument. Rather, there must be a clear justification that they are used in

106 For example, the Grand Chamber of the ECtHR took specific circumstances of irregular entry, such as a mass attempt at scaling a fence and the alleged use of force, into account in deciding whether the prohibition of collective expulsion under the ECHR was violated. See ECtHR *N.D. and N.T* [GC][2020], paragraph 231; ECtHR *M.K. and Others v. Poland* [2020], paragraph 200.

107 Moraru 2017, p. 33

108 COM(2018) 634 final, Article 7(1)(d).

109 In this context, it should be noted that the Commission's proposal already includes a separate criterion dealing with the destruction of documents, see COM(2018) 634 final, 12 September 2018, Article 6(2)(m). This is also identified as a frequently used criterion in the Return Handbook, section 1.6.

a manner that distinguishes them clearly from just replicating the finding that the third-country national is irregularly present in the member state.

10.4.5 Criminal law issues and the risk of absconding

Other criteria may also raise questions as to their suitability to indicate a risk of absconding. This includes the existence of criminal proceedings or convictions. The interplay between irregular entry or stay, return procedures under the Directive, and national criminal law provisions has frequently been addressed by the CJEU. This issue has been dealt with in detail elsewhere.[110] However, for the specific purpose of clarifying the scope of the possibility to deny a voluntary departure period due to a risk of absconding, the following should be observed in my view. If member states use the existence of criminal proceedings or convictions as a prima facie indicator of a risk of absconding, this could act as a backdoor option for member states when they cannot fulfil the (arguably more stringent) conditions of a risk to public policy, public security or national security to deny a voluntary departure period. As discussed in detail above, the CJEU has made clear that the suspicion or conviction for a criminal offense, in and of itself, is not sufficient to deny a voluntary departure period on the grounds of public policy.[111] It would be inconsistent if the same act would allow for a derogation of the priority of voluntary departure, simply by reclassifying it as an indicator of a risk of absconding. The member state would have to show that the fact that criminal investigations or proceedings are ongoing translate to a genuine risk of absconding. It could be imagined, for example, that such investigations or proceedings uncover a flight risk in relation to a third-country national, which could then also be a possible indication of a risk of absconding within the meaning of the Directive. In this light, a particular issue that needs to be mentioned here is the criminalisation of irregular entry or stay. If using irregular entry or stay as an indicator for absconding contradicts the 'mere fact' principle, the same goes for using a criminal proceeding exclusively on the basis of irregular entry or stay as a reason to assume the third-country national will abscond. Otherwise, the use of such a criterion would simply be a barely concealed proxy for an indicator that is clearly in in contradiction with the 'mere fact' principle.[112]

110 See, for example, Vavoula 2016.

111 See 10.3.

112 The confluence of irregular entry or stay and criminal procedures is evident, for example, from the frequency in which this plays a role in the CJEU's judgments, such as in *El Dridi*, *Achughbabian* and *Mahdi* discussed above. Also see Vavoula 2016.

10.4.6 Measures to prevent absconding and the right to a voluntary departure period

In addition to setting the risk of absconding as a ground for the denial of a voluntary departure period, Article 7 of the Directive also deals with steps that member states can take to prevent such absconding from happening. Specifically, Article 7(3) says that:

> *"Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure."*

This provision sits between the first two paragraphs of Article 7 on the granting and extending of a voluntary departure period, and its fourth paragraph, outlining the exceptions to the general rule that a voluntary departure period should be granted. Although not made specific in the Directive, this implies that Article 7(3) does not simply authorise member states to impose certain measures, but must be read in relation to the other elements of Article 7. The obvious connection here is with the ground for denial or shortening of a voluntary departure period in Article 7(4), and it is this connection that is explored here.

Although Article 7(3) states that certain obligations "may be imposed" on third-country nationals to prevent absconding, I would suggest this is not a matter that is entirely left to member states' discretion. On the one hand, it could be argued that, if there is a risk of absconding, this may trigger obligations on the member state to prevent this. This would follow from the general obligation to ensure the effective implementation of the Directive, which cannot happen if the third-country national absconds.[113] Furthermore, if such absconding might lead to the third-country national irregularly moving to another member state, there might arguably be an additional reason, rooted in the principles of sincere cooperation and mutual trust, that the member state should impose measures to prevent this.

In terms of giving *effet utile* to the provisions of the Directive, this does not only extend to the possibility of enforcement, but also to the priority of voluntary return. While exceptions to this can be made, including on the basis of the existence of a risk of absconding, these must be applied only when necessary, as discussed above. A member state that has indications of a risk of absconding, but which can eliminate or significantly reduce this risk by imposing measures such as outlined in Article 7(3), can therefore be expected to do this, in an effort to safeguard the priority of voluntary return. This reading is supported by the opinion of the Advocate General in the *Zh. and O.* case, who notes that "Article 7(3) provides that where measures

113 CJEU C-61/11 PPU *El Dridi* [2011], paragraph 55; CJEU C-329/11 *Achughbabian* [GC] [2011], paragraph 39; C-430/11 *Sagor* [2012], paragraphs 32 and 35

such as reporting restrictions, can be applied to avoid the *risk* of absconding, the preference should still be for a period for voluntary departure."[114] Although in the judgment itself, the CJEU does not engage with this, the strong reasons to protect the entitlement to a voluntary departure period, both as a right in the Directive and as a means to ensure the third-country national's fundamental rights are protected, suggest that this approach by the Advocate General is correct. This does not mean that member states cannot apply the measures in Article 7(3) in other situations, but it means that they *must* do so if they would otherwise seek to deny a voluntary departure period on the ground that there is a risk of absconding, and these measures adequately address this risk. In this respect, the member state, in my opinion, is entitled to make an assessment of the likelihood that the third-country national will indeed comply with these measures, although much that has been discussed above about ensuring that such an assessment truly focuses on the risk of absconding, rather than other issues, is relevant in this situation as well.[115]

10.5 Denying a voluntary departure period in case of manifestly unfounded or fraudulent applications

The final ground for shortening or denying a voluntary departure period is when "an application for a legal stay has been dismissed as manifestly unfounded or fraudulent." The question of manifestly unfounded or fraudulent applications is addressed in several EU instruments. For asylum seekers, Directive 2013/32 (the recast Asylum Procedures Directive) provides for a number of reasons in which a member state can declare an application manifestly unfounded, provided it has defined these as such in its national legislation.[116] The recast Asylum Procedures Directive also makes provision for declaring applications just unfounded (rather than manifestly unfounded) or inadmissible, but both would fall outside the scope of the ground for derogation in Article 7(4) of the Returns Directive.

114 CJEU, Opinion AG, C-554/13 *Zh. And O.* [2015], point 39 (emphasis in original).

115 It should be noted that the imposition of such measures has further consequences as well. See, for example, its potential impact on the third-country national's ability to approach consular representations in 8.4.1.

116 Directive 2013/32, Article 32(2). These circumstances are set out in Article 31(8) and comprise: (a) he has only put forward irrelevant to the question of international protection; (b) he is from a safe country of origin; (c) he has misled the authorities by presenting false information or documents or by withholding it with respect to his identity or nationality; (d) he has, in bad faith, destroyed or disposed of an identity or travel document; (e) he has made clearly inconsistent and contradictory, false or obviously improbable representations; (f) he has made an inadmissible subsequent application; (g) he is making an application merely in order to delay or frustrate the enforcement of his removal; or (h) he entered the member state unlawfully or prolonged his stay unlawfully and, without good reason, has not presented himself to the authorities or has not made an application for international protection as soon as possible.

It should be noted that, while declaring an application to be manifestly unfounded is currently optional, a Commission proposal for a new Asylum Procedures Regulation would introduce a number of situations in which declaring an application to be manifestly unfounded becomes mandatory.[117]

Several other EU instruments deal with the rejection of applications in case of fraud. Directive 2003/86 on the right to family reunification (the Family Reunification Directive),[118] for example, allows member states to reject an application for entry and residence for the purpose of family reunification when it is shown that false or misleading information was provided, false or falsified documents were used, fraud was otherwise committed or other unlawful means were used.[119] Similarly, Directive 2014/36 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (the Seasonal Workers Directive)[120] foresees the possibility of rejecting an application for either a short or long-term authorisation for seasonal work when documents presented as proof for eligibility were fraudulently acquired, falsified or tampered with.[121] And similar provisions for refusal or non-renewal can be found in Directive 2009/50 on conditions of entry and residence of third-country nationals for the purposes of highly qualified employments (the Blue Card Directive).[122] None of these instruments establish a separate category of 'fraudulent applications'; they simply provide for the rejection of applications in case of fraud as one of several grounds for rejection. However, to the extent that the rejection makes clear that fraud was the reason for rejection, this should satisfy the requirement of Article 7(4).

In some cases, a question may also be how strictly 'application,' as used in Article 7(4) of the Directive, should be read. Regulation 810/2009 establishing a Community Code on Visas (the Visa Code),[123] for example, foresees in the annulment or revocation of a visa if the conditions for issuing it are no longer met, in particular if there are serious grounds for believing that the visa was fraudulently obtained.[124] Strictly speaking, this does not concern the denial of an application itself, but rather its later revocation. However, it might be argued that this is in effect a retrospective correction of a previously wrongly accepted application. The formulation in Article 7(4) does not specify whether any particular type of application is meant, and it would appear that it is meant to be as broad as possible, encompassing any claim to entry or stay in the member state's territory.

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117 COM(2016) 467 final, 13 July 2016, Article 37(3). This is not further affected by the amendments to the proposal put forward by the Commission in 2020, see COM(2020) 611 final, 23 September 2020.

118 OJ L 251, 3 October 2003, pp. 12-18.

119 Directive 2003/86, Article 16(2) and under (a).

120 OJ L 94, 28 March 2014, pp. 375-390.

121 Directive 2014/36, Article 8(1) and under (b).

122 OJ L 155, 18 June 2009, pp. 17-29, Articles 8(1) and 9(1) and under (a).

123 OJ L 243, 15 September 2009, pp. 1-58.

124 Regulation 810/2009, Article 34(1).

The Directive also does not expressly limit the applicability of this limb of Article 7(4) to cases in which applications were rejected as manifestly unfounded or fraudulent on the basis of EU legal instruments. As such, national law provisions that would result in rejected applications being characterised as manifestly unfounded or fraudulent would, in principle, also be sufficient to consider this condition for denying a voluntary departure period met.

A key question in dealing with these various situations of manifestly unfounded or fraudulent claims discussed above is whether this presents a sufficient condition to deny a voluntary departure period. In other words, can a voluntary departure period be denied on the sole basis that a third-country national's application has been dismissed in this way? In the previous sections, I have repeatedly discussed the principles that should be applied to decisions to deny a voluntary departure period. However, it may also be said that this particular ground for denying a voluntary departure period is qualitatively different from both the risk of absconding and the risk to public policy, public security, and national security grounds. Both of those, in different ways, deal with an assessment of an issue that is somewhat unknown. Whether a third-country national represents a genuine and present threat to key interests of society requires an assessment which member states must make. Similarly, whether there is a risk of absconding requires the member state to assess what is likely to happen in the future. By contrast, the dismissal of an application for stay as manifestly unfounded or fraudulent is an established fact, over which, in principle, no dispute is possible.[125] As such, there seems to be no place, for example, for a forward-looking approach. It also calls into question whether the seriousness of the facts of the case can play much of a role in the assessment by the member state (although member states would possibly consider making a fraudulent application as a stronger transgression than making a manifestly unfounded one).

However, this cannot mean that member states can disregard the principle of proportionality, which has been affirmed by the CJEU as applicable throughout the return procedure, on this basis. In this respect, a particularly prominent role must be accorded to weighing up of the interests of the member state in denying a voluntary departure period, on the one hand, and the impact of the denial of such a period on the individual, including in the light of the obligation to take into account the best interests of the child,[126]

125 The third-country national might challenge whether it was legitimate for the application to be dismissed in this way, but this is something outside the scope of the Directive. The 'input,' as it were, for the Directive is simply that fact that such a dismissal took place.

126 The obligation to take into account the best interests of the child may also come into play when the third-country national him or herself is an adult, but the return will impact on children not specifically addressed by the return decision. See CJEU *M.A.* [2021], paragraph 43.

family life and the health of the third-country national under Article 5 of the Directive.

But this only serves to emphasise how awkwardly the inclusion of the manifestly unfounded and fraudulent applications ground sits with the other grounds outlined in Article 7(4). The burden would remain on the member state to justify why the fact that the third-country national's earlier application was dismissed as manifestly unfounded or fraudulent necessitates the withholding of a voluntary departure period, taking into account all relevant aspects of the situation. But it is not easy, in my view, to imagine such justifications which are only rooted in the fact that an application was dismissed as manifestly unfounded or fraudulent. It could be argued that the fact that such dismissal may lead to the denial of a voluntary departure period would help deter third-country nationals from making manifestly unfounded or fraudulent applications. But prevention of such applications as a general objective is not the function of Article 7(4), which only relates to ensuring the effectiveness of the return procedure in each individual case.

Other justifications that might be imagined quickly veer into the areas covered by the other two grounds for denial. For example, the reason why committing fraud in an application necessitates the withholding of a voluntary departure period might be found in the fact that, through this action, the third-country national has committed a criminal offence. While not sufficient in and of itself, this constitutes a potential element in finding that the third-country national constitutes a risk to public policy or public security. Similarly, by showing willingness to 'abuse' the system for authorisation of legal stay (by submitting a manifestly unfounded or fraudulent application), it may be assumed that third-country nationals may try to avoid their other obligations, including by evading return.[127] In this regard, Majcher distinguishes between different grounds for declaring an application unfounded under the recast Asylum Procedures Directive, noting that dismissal on some procedural grounds "can hardly justify the refusal of voluntary return," while others relate more clearly to "dishonest conduct" showing "clear bad faith."[128] But if these are indications of an intention by the individual to evade return, this would amount to a risk of

127 In this respect, the Return Handbook, paragraph 6.3, seems to introduce an additional category of "third-country nationals who submitted abusive applications," which "involve a higher degree of reprehensible behaviour than manifestly unfounded applications," and should also be covered by Article 7(4). Also see Majcher 2020, p. 563, referring to the 2015 edition of the Handbook. The questionable characterisation of third-country nationals' conduct as "reprehensible" aside, the Directive's provisions do not include such a category of abusive applications, and they therefore cannot be a self-standing ground for denial of a voluntary departure period, unless they are specifically subsumed within the categories of manifestly unfounded or fraudulent applications.

128 Majcher 2020, pp. 562-564. Regarding the latter, she mentions, among others, misleading the asylum authorities by presenting false information or documents, withholding information with respect to identity and nationality, or having destroyed documents.

absconding.[129] As discussed extensively, decisions on these grounds should be subject to specific restrictions and safeguards. If justifications are in fact rooted in those other grounds, then the requirements associated with them, discussed in sections 10.3 and 10.4, must also be met. Otherwise, the manifestly unfounded or fraudulent applications limb of Article 7(4) would simply serve to circumvent those requirements.[130]

Overall, therefore, it may be difficult to provide self-standing justifications for a denial of a voluntary departure period on the ground that an application was dismissed as manifestly unfounded or fraudulent. In an ideal world, then, the possibility of denying a voluntary departure period because the third-country national's prior application for stay had been dismissed as manifestly unfounded or fraudulent would not have been part of Article 7(4) at all. And as will be discussed in 10.7, it may be wondered whether the possibility of denying a voluntary departure period only on the basis that an individual's application for stay being rejected as manifestly unfounded or fraudulent can still be considered compatible with primary EU law. Arguably, there may still be a role for this provision in the decision to provide a voluntary departure period shorter than seven days, since, at least, this would not negate the individual's right to such a period altogether. This issue, in relation to all three grounds, is discussed below.

10.6 Considering a voluntary departure period shorter than seven days: a necessary step to ensure proportionality?

Although Article 7(4) has been discussed in relation to the possibility of denying a voluntary departure period altogether, it also provides for the possibility of granting a period shorter than the minimum of seven days normally required by Article 7(1). In principle, the safeguards to be observed in deciding to provide a shorter period are the same as deciding to deny such a period, since these pertain to the same provision. However, the two options clearly do not have the same impact, which raises further questions about their interrelation. In its preliminary questions in the *Zh. and O.* case, the referring court actually asked about this. In particular, it asked whether, in relation to the risk to public policy, the same factors should be taken into account when providing a period shorter than seven days as when deciding not to provide such a period at all. Additionally, in the proceedings, the Netherlands had submitted that it was basically free to choose between shortening and denying a voluntary departure period, and that it was in line with Article 7(4) that, when a risk to public policy existed, it would always deny such a period altogether, rather than consid-

129 Which, it must be re-emphasised, needs to be distinguished from issues of non-cooperation and non-return, see 10.4.3 above.

130 See, by analogy, the discussion of the use of criminal proceedings as a criterion for the risk of absconding in 10.4.5 above.

ering granting a period of between one and six days. This, it argued, avoids uncertainty and ensures that there are no unreasonable administrative burdens on the state to consider both the denial and a shorter period. Other member states making observations in the case also argued that the choice between denial or the granting of a period of one to six days is a matter of discretion for the relevant national authorities. This gave the CJEU an opportunity to provide clarity on the matter of shorter voluntary departure periods than Article 7(1) normally foresees. However, in rephrasing the question in the way discussed in 10.3.2.3 above, the Court fails to address this point.[131] In her Opinion, Advocate General Sharpston does devote significant attention to this issue, and it is worth looking at her reasoning on this matter.

The Advocate General first acknowledges that the aim of Article 7(4) is to ensure speedy return where member states' interests (in this case public policy) so require. In this way, the factors relevant to determining a threat to public policy are also relevant when deciding to grant a period of less than seven days.[132] However, she disagreed with the Dutch government that Article 7(4) would allow, in the case of such a threat, the automatic denial of a voluntary departure period. Rather, she noted, a case-by-case assessment should also be made in this instance as to whether such denial is appropriate or a period from one to six days should be granted instead.[133] This more nuanced approach is supported by the wording of the Directive, including the preference for voluntary return over forced return. The Advocate General also notes that the denial of a voluntary departure period entails the issuing of an entry ban, which has important consequences for the individual, and that crucial safeguards, such as family unity and health care, may be jeopardised.[134] She notes that member states have an obligation to exercise their discretion in compliance with the general principles of EU law, including the principle of proportionality.[135] Within the context of the Directive, this means that restricting the right to voluntary departure must be done through the least restrictive measure, according to the circumstances of the case.[136] In contrast to the referring court, which considered denial of a voluntary departure period the least restrictive measure, the Advocate General suggests that a member state that automatically resorts to denial, rather than shortening, in fact fails to apply the least restrictive measure, since all cases are then subject to the same rule and there is no process of individual assessment.[137] She adds that she does not accept the argument that automatically resorting to denial of a voluntary departure

131 See, for example, Cornelisse 2014, who considers the CJEU avoiding this question "disappointing."
132 CJEU, AG Opinion C-554/13 *Zh. And O.* [2015], point 86.
133 *Ibid.*, points 87-88.
134 *Ibid.*, points 89-91.
135 Referring specifically to CJEU C-402/13 *Cypra* [2014], paragraph 26.
136 CJEU, Opinion AG, C-554/13 *Zh. And O.* [2015], point 91.
137 *Ibid.*, point 92.

period avoids burdens on executive and judicial bodies. In this context, she states that "[s]eeking to minimise administrative inconvenience is not a valid reason for avoiding assessing cases in accordance with the more nuanced system required under the directive."[138] As a result, she concludes that automatically denying a voluntary departure period in each case where a risk to public policy exists, even if a period of between one and six days might be appropriate in the circumstances of the individual case, is not compatible with the Directive.[139]

As said, the CJEU does not really engage with this issue, although its judgment provides the slightest of hints that it could have accepted the Advocate General's argumentation. In finding that member states do not have to carry out a fresh examination of the circumstances leading to the finding of a risk to public policy when deciding on the application of Article 7(4),[140] the CJEU also adds the following:

> *"That said, it is open to the Member State concerned to take account of those matters, which may in particular be relevant when that Member State evaluates whether it is appropriate to grant a period for voluntary departure shorter than seven days."*[141]

While it remains non-committal on this point, the CJEU acknowledges that the assessment of the appropriateness of providing a shorter period, rather than denying a voluntary departure period altogether, may be a relevant element of Article 7(4). This rather unsatisfactory engagement by the CJEU notwithstanding, it is hard to find fault in the Advocate General's conclusions, which should extend not only to public policy but to the other grounds in Article 7(4) as well. While, at face value, Article 7(4) leaves the member state the option of choosing between full denial of a voluntary departure period and providing a period of one to six days, the latter option must be considered to be included in the Directive for a reason. And since, as discussed, the voluntary departure period acts as a proportionality mechanism to ensure that the fundamental rights of the individual are protected during the return procedure, this mechanism should be used to the maximum extent possible in the individual case, as long as it still ensures effective return. It is obvious that providing a six-day period, from this perspective, is a less restrictive measure than denying an opportunity to return voluntarily altogether and proceeding immedi-

138 *Ibid.*, point 93. Also see footnote 93 of the Opinion, where the Advocate General recalls the CJEU's settled case law that a member state may not plead practical or administrative difficulties to justify failure to implement a directive, referring, by analogy, to CJEU C-277/13 *Commission* v. *Portugal* [2014], paragraph 59 and the case-law cited.

139 CJEU, Opinion AG, C-554/13 *Zh. And O.* [2015], point 93, also referring by analogy to CJEU C-277/13 *Commission v. Portugal* [2014], paragraph 59 and the case law cited there, confirming that a member state may not plead practical or administrative difficulties in order to justify a failure to comply with its obligations to implement a Directive.

140 See 10.3.2.3 above.

141 CJEU C-554/13 *Zh. And O.* [2015], paragraph 74.

ately with enforcement. While such very short periods may raise further questions,[142] the CJEU has made it clear that member states must, when implementing the return procedure, use a gradation of measures, where each time the least intrusive but effective, measure should be applied.[143] In this respect, Majcher notes that the CJEU says, on the basis of Article 7(4), that member states may propose a period shorter than seven days or "even" refuse it, suggesting that the latter is a last resort, and the former should be considered first.[144] As such, the proportionality requirements inherent in the Directive must also extend to considering whether in spite of the grounds in Article 7(4) being applicable, the right to a voluntary departure period can be safeguarded at least to some degree by granting a period shorter than seven days. And when this is the case, which period between one to six days is appropriate. Only if the interests of the state cannot be sufficiently safeguarded even with such a short voluntary departure period can such a period be denied altogether. It should be noted that such an interpretation may be far removed from member states' current practices. Indeed, concerns that their obligation to consider the option of shortening a voluntary departure period may at some point be formally confirmed by the CJEU, may have led to the elimination of the lower limit of seven days in the Commission's recast proposal.[145]

10.7 The limits of provisions denying voluntary departure as compatible with fundamental rights

In sections 10.3 to 10.6, I have discussed the extent to which the provisions of the Directive on the denial of a voluntary departure period can and should be read compatibly with the priority of voluntary return, and the related principle of proportionality, to ensure that voluntary return can play its assigned role in protecting the fundamental rights of the third-country national. While such possibilities exist in most cases, there are certain provisions that raise particular concerns. As discussed in 10.5, this appears to be the case for the possibility of denying a voluntary departure period because a third-country national has previously submitted a manifestly unfounded or fraudulent application for stay. It was noted that it is difficult to see how this can act as a self-standing justification for denial, given that the mere fact that such an application has been dismissed as manifestly unfounded or fraudulent appears to provide an insufficient guarantee of proportionality, and thus for securing voluntary return as a mechanism to protect fundamental rights. From this perspective, the inclusion of this ground in the

142 See the discussion of very short voluntary departure periods and the effectiveness of the right to voluntary return in 11.2.4.
143 CJEU C-61/11 PPU *El Dridi* [2011], paragraphs 37-41.
144 *Ibid*., and comments thereon by Majcher 2020, p. 558.
145 See 1.2.3.

Directive could be regarded as teetering on the edge of being prima facie incompatible with fundamental rights and therefore invalid as a matter of EU primary law. Perhaps the saving grace of this provision, if it could be called that, is the fact that denial of a voluntary departure period on this ground is optional, and could (and, as discussed, should) prompt member states to avoid using this option generally, or to use it only as a ground to shorten a voluntary departure period to fewer than seven days – and then only exceptionally.

Looking forward, the spectre of prima facie incompatibility with primary EU law, due to the inherent lack of proportionality, is especially raised by the European Commission's recast proposal which seeks to change the optional use of the grounds for denial of a voluntary departure period to a mandatory one ("Member States *shall not* grant a period for voluntary departure …").[146] In combination with the other proposed changes (an expansive list of indicators of a risk of absconding and the lack of a minimum period for voluntary departure) this could significantly increase the number of cases in which voluntary departure periods are denied.[147] While this analysis focuses on the current Directive, this potential move towards mandatory denial of a voluntary departure period, considering the discussion above, deserves some further attention.

From the perspective of secondary EU law, the change from an optional to a mandatory denial of a voluntary departure period will simply be a change of procedure to be followed by member states. This could be seen as further clarification of when it is not in the interest of the purpose of a return procedure to grant a voluntary departure period, and as a way to ensure uniformity in application. Furthermore, in relation to the public policy, public security and national security and the absconding grounds, member states would still need to establish such risks on an individualised, contextualised, and forward-looking basis. However, once such a risk is established, other than in the current Directive, the proposal would require member states to deny a voluntary departure period. This thus removes the consideration of whether the risk identified, balanced against the overall circumstances of the case and the individual's interest in a voluntary departure period as a way to protect his or her rights, is proportionate. Arguably, it would furthermore remove any kind of individualised consideration in cases in which an individual's application for stay has been dismissed as manifestly unfounded or fraudulent.

It is difficult to see how such provisions could be reconciled with the CJEU's recognition that voluntary return is not only a right granted by the Directive as secondary EU law, but that it is a mechanism that protects fundamental rights. No matter what formulation is used in secondary legislation, this cannot circumvent safeguards to protect fundamental rights, especially the application of the principle of proportionality to any potential

146 COM(2018) 634 final, 12 September 2018, Article 9(4) (my emphasis).
147 Peers 2018.

interference with such rights. This is especially the case given the long history of EU institutions asserting that giving priority to voluntary return is indeed necessary to adequately protected fundamental rights. Since the CJEU has already asserted that this precludes any automatic applications of derogations to the general rule that a period for voluntary departure should be provided, this would also be the case in the new formulation, if eventually adopted. This would either require reading into the provision an obligation, regardless of its formulation, that member states would still need to justify that denial of a voluntary departure period is proportionate in the individual case, notwithstanding the fact that one of the grounds set out in the new Directive applies. However, this would clearly also create tension with the explicit formulation ("shall not grant") in the Commission's proposal. The other prospect, therefore, would be for the CJEU, when being called upon to examine this provision, to declare it invalid, in the light of its incompatibility with primary law. As such, it can be said that, now that the genie of the priority of voluntary is out of the bottle, it is not easy to put it back, especially not by simply reformulating the provisions on the exceptions to granting a voluntary departure period.

It may also be wondered whether such far-reaching restrictions on the granting of a voluntary departure period – especially in combination with the extensive list of criteria for a risk of absconding – can be reconciled with the Directive's overall objective of ensuring effective return. In this respect, Majcher has noted that this would "result in voluntary departure being systematically refused," and that this "risks reversing the order between the rule and exceptions thereto."[148] While the proposed changes are clearly inspired by the fact that quicker enforcement would ensure greater effectiveness of return, the likely effect is also that far fewer third-country nationals are able to enjoy the opportunity to return voluntarily. As noted, voluntary returns currently make up an important proportion of overall effective returns.[149] It is not at all evident that replacing voluntary return opportunities with immediate enforcement will indeed lead to more effective returns, given that voluntary return may play a specific role in fostering more constructive cooperation by third-country nationals and countries of return alike, which may be undermined when member states rely more heavily on enforcement, as discussed in Chapter 2.[150]

From these perspectives, the Commission's proposal is worrying. Although it is far from clear that the mandatory denial of voluntary return will make it into the recast Directive's final text,[151] the fact that it has

148 Majcher 2020, pp. 565-566.

149 See 2.2.2.

150 In this respect, it is useful to highlight again that quite a number of countries of origin already cooperate poorly, or not at all, in the return and readmission of nationals who are removed, as various examples in this dissertation have shown.

151 See 1.2.3, noting that the proposal is not supported by the LIBE rapporteur and that even the Council seems to leave the door open to optional denial in some cases.

been put forward seems to further enhance the idea (already perceptible in member states) that voluntary return is an inconvenience, interfering with effective return, rather than an essential component of an effective and fundamental rights-compliant procedure. Furthermore, so far member states' judiciaries have not been very forthcoming in referring prejudicial questions on voluntary return matters to the CJEU. This may change if the final text of the recast indeed includes far-reaching restrictions on the right to voluntary return, but it also shows that the voluntary departure stage remains a matter of somewhat limited scrutiny, which means it could be some time before an emergency brake on such problematic provisions might be pulled by the CJEU.

10.8 Conclusions

Third-country nationals have a clear right to be accorded a voluntary departure period, which is doubly protected: as a right under secondary EU law and as a mechanism to ensure their fundamental rights are not disproportionately affected during the return procedure. This right is not unlimited, but any interference must be based on objective criteria, which furthermore should meet certain requirements mentioned below, that one of the grounds in Article 7(4) is applicable. This is subject to a consideration of the proportionality of a denial of an opportunity for voluntary return in the light of the specific circumstances of the individual case, including the best interests of the child, family life or the health of persons involved, but any other relevant factors should also be taken into account. Furthermore, an integral part of the proportionality assessment is the consideration whether a period shorter than seven days, rather than complete denial of the voluntary departure period, would be appropriate. Automatic denials, simply on the basis that one of the grounds in Article 7(4) has been found to apply, do not meet these requirements.

When a denial of a voluntary departure period because of a risk to public policy, public security, or national security is concerned, this cannot only be based on the past conduct of third-country nationals, such as the fact that they were suspected or convicted of a criminal offence. Rather, this should be done on the basis of an individualised, contextualised and forward-looking approach to establish there is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Any factual or legal matter that can shed light on the existence of such a threat, including the seriousness of past conduct, the elapse of time since it, and intentions of leaving the country, must be taken into account. General presumptions, in law or practice, that specific past acts are sufficient to indicate a threat that is sufficient to justify a denial of a voluntary departure period must not be applied by member states.

As regards the risk of absconding, denial of a voluntary departure period cannot take place when objective criteria are not set out in law.

Any criteria set out in law must furthermore truly be able to indicate a risk of absconding. This should be understood as a risk that third-country nationals disappear from view of the authorities, which would make enforcement of the return decision impossible. Within this meaning, non-cooperation or unwillingness to return, as such, do not indicate a risk of absconding, since they do not deprive the member state of the possibility to enforce the return decision after the voluntary departure period has ended. Such criteria should also not simply mirror the mere fact of illegal stay. In this respect, I have noted that this generally makes criteria such as irregular entry, overstaying of visas or residence permits, or the lack of documents as unsuitable indicators of a risk of absconding. This may only be different if member states can show specific circumstances in the individual case, for example in the way that a person irregularly entered, that would give rise to a risk of absconding. I have also suggested that criteria should not replicate other grounds of Article 7(4), such as those related to criminal proceedings or convictions, especially in such instances when irregular stay or entry are criminalised in the member state. This would lead to circumvention of the arguably higher bar for denial of a voluntary departure period on the ground of public policy. When a risk of absconding is found to exist, denial or shortening of a voluntary departure period should only be decided by a member state if it has considered the possibility of imposing measures, as provided for in Article 7(3), to prevent such a risk. Only if these are not adequate can denial or shortening on this ground take place.

In relation to denial of a voluntary departure period because of the dismissal of an application for legal stay as manifestly unfounded or fraudulent, automaticity must also be avoided, and proportionality safeguards must fully be observed, even though the ground for denial is an objective fact. However, I have suggested that justifications for denial must be related specifically to this ground, and not to the others, which will be difficult to do. When member states justify denial more in relation to, for example, public policy or a risk of absconding, all the requirements set out above should be observed. The denial of a voluntary departure period purely on the basis of the dismissal of an application as manifestly unfounded or fraudulent may therefore be difficult to reconcile with the principle of proportionality, except perhaps when only used to provide for a shorter period than seven days. At any rate, that same principle requires member states to consider the possibility of providing such a shorter period in all cases, and grant such a period if this avoids an outright denial of the enjoyment of a voluntary departure period, because this would be a less coercive measure.

Both the current possibility to deny a voluntary departure period on the ground that an application has been dismissed as manifestly unfounded or fraudulent, and – particularly – the Commission's proposal to make denial of a voluntary departure period mandatory on all three grounds in the recast Directive, raise acute questions of their compatibility with primary EU law. As suggested, it is difficult to see how the latter specifically can

be reconciled with the CJEU's case law. Regressing on this point just by changing secondary legislation does not appear to be a viable option, since a change in the Directive does not affect the core principle of proportionality and voluntary return's role in safeguarding fundamental rights.

11 The length of the voluntary departure period

11.1 Introduction

This chapter engages with research question 2b, which relates to the application of the Directive's provisions on the initial length, extension and shortening of the voluntary departure period. In contrast to the question whether a voluntary departure period should be granted in the first place, discussed in Chapter 10, the question of the appropriate length cannot be understood only by reference to the internal dimension of the Directive. The question of the length of this period is closely linked to the actions that third-country nationals should take to meet their obligation to return, which was discussed in Chapters 3 to 9. After all, whether third-country nationals can comply in a timely manner will depend, to a considerable extent, on the time they are provided for this. And, as the previous chapters show, timely compliance is also intertwined with the role of the prospective country of return, especially as regards readmission and obtaining travel documents. There is a clear obligation on third-country nationals to provide – within the limits of what can legitimately be expected of him – the necessary evidence to the country of return.[1] And their action or inaction in this respect may play a key role in the timely realisation of return. But even when third-country nationals comply fully with their obligations, the actions or omissions of the country of return will be determinative of both the success and the timing of return. And these actions and omissions are almost fully beyond the control of either the third-country national or the EU member state. Furthermore, the obligations on third-country nationals in this respect are not unlimited, as discussed at various points in the previous chapters. As such, they may be faced with demands from the state of return that, if met, would likely result in a quick return. But if they legitimately refuse to acquiesce to such demands, the return process may be delayed significantly. Finally, timely compliance with the obligation to return may not just depend on third-country nationals and the country of return, but in some cases also on the EU member state itself, such as in relation to triggering readmission agreements or issuing travel documents. Beyond this, there are other factors that may play a role. For example, organisations providing return assistance may have their own procedures and timelines, which may affect how long it takes before a voluntary return is completed.

1 Where relevant, using the EU member state as mediator, such as when return will take place to a transit country under an EU readmission agreement.

Now that these various issues have been clarified in the previous chapters, a better foundation exists to discuss the length of the voluntary departure period. This involves examining two particular provisions of the Directive, which are interconnected. First of all, Article 7(1) states that a "return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days", unless exceptions as discussed in Chapter 10 apply. The meaning of an appropriate period will be discussed in section 11.2. Second, Article 7(2) provides that member states "shall, where necessary, extend the period for voluntary departure by an appropriate period." In doing so, they should take "into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links." Issues of extension are discussed in section 11.3. In addition to the length of the initial period granted, and the extending of such a period, I will also briefly look, in section 11.4, at the issue of cutting short a voluntary departure that has already been granted. On the basis of Article 8(2) this is possible if "a risk as referred to in Article 7(4) arises during that period." Conclusions to this chapter are presented in 11.5.

11.2 Establishing an appropriate voluntary departure period

As mentioned above, Article 7(1) requires member states to grant, as part of the return decision, an appropriate period for voluntary departure ranging between seven and thirty days. A shorter period may only be provided on the basis of Article 7(4), which has been discussed in detail in Chapter 10 regarding denial. The provision leaves considerable leeway to member states in deciding on the length of a voluntary departure period and the way that this is done. Evaluations of the Directive show that all member states provide voluntary departure periods within the range of seven and thirty days, as required by Article 7(1), and that many of them actually provide, as a general rule, a period of thirty days or close to it.[2] However, there are also member states that provide for shorter periods. Furthermore, some member states have defined a particular one-size-fits-all period, which they apply to all third-country nationals who are issued a return decision. Others distinguish between different categories of illegally staying third-country nationals, such as rejected asylum seekers and those who never applied for asylum, who receive voluntary departure periods of different lengths.[3] Yet other member states may decide on the length of a voluntary departure period on a case-by-case basis.

In its 2017 Recommendation on making returns more effective when implementing the Directive, the Commission addresses the length of the

2 European Commission 2013, pp. 82-83.
3 See 11.2.5.

voluntary departure period.[4] In particular, it recommends to member states to provide "for the shortest possible period for voluntary departure needed to organise and proceed with the return, taking into account the individual circumstances of the case."[5] This should involve assessing, in particular, "the prospects of return and the willingness of the illegally staying third-country national to cooperate with competent authorities in view of return."[6] It further seems to imply that a period of seven days is the most appropriate, and that a longer period "should only be granted when the illegally staying third-country national actively cooperate [sic] in view of return."[7] A number of these recommendations are reiterated in the revised Return Handbook.[8]

The 2018 recast proposal of the Directive does not incorporate all these recommendations. However, it proposed to change the provision on the length of a voluntary departure period from its current formulation of a period of "between seven and thirty days" to a period of "up to thirty days."[9] This would eliminate the lower limit of seven days and open the door to member states providing periods of six days or fewer even in the absence of the specific exceptional circumstances discussed in Chapter 10.[10] The proposal does add that the length of a period "shall be determined with due regard to the specific circumstances of the individual case, taking into account in particular the prospect of return."[11]

Below, the question of what an appropriate period is will be discussed in detail, including the recommendations and proposals of the Commission. It will specifically focus on the initial voluntary departure period, with the question of extension discussed separately later. In 11.2.1, the focus will be on the notion of 'appropriateness' in the light of the possibility of third-country nationals to effectively enjoy their right to a voluntary return period. 11.2.2 will look at the individual circumstances to be taken into account when deciding on an appropriate period, especially whether member states' concerns about non-cooperation or non-return by the individual should be a factor. The issue of how member states can and should make an assessment of what voluntary departure period is realistic is discussed in 11.2.3. This is followed by consideration of minimum periods that should be granted in 11.2.4, while the question whether member states can assign a voluntary departure period of a specific length based on third-country nationals' prior legal status is briefly addressed in 11.2.5.

4 C(2017) 1600 final, 7 March 2017.
5 *Ibid*, paragraph 18.
6 *Ibid*., paragraph 19.
7 *Ibid*., paragraph 20.
8 C(2017) 6505 final, 16 November 2017, Annex, paragraph 6.
9 COM(2018) 634 final, 12 September 2018, new Article 9(1).
10 Majcher 2020, p. 565, notes that the Commission does not explain why it proposes to depart from the current rule that a voluntary departure period should be at least seven days.
11 *Ibid*.

11.2.1 The 'appropriate' length of the voluntary departure period and effective enjoyment of the right to voluntary return

In addition to a voluntary departure period being granted in the first place, the length of such a period is a crucial element in ensuring the effective achievement of the Directive's objectives. As noted above, only a period that is long enough to allow third-country nationals to effectively meet their obligation to return will be able to ensure that the priority of voluntary return, as a key mechanism to protect the fundamental rights of third-country nationals, fulfils its function. Additionally, it has been noted that voluntary returns play an important role in the overall achievement of the objective of effective return,[12] and in some cases may be the only way in which return can be achieved at all.[13] More generally, a period that is too short to allow third-country nationals a real opportunity to meet their obligation to return would deprive both the individual and the EU member state of the benefits associated with voluntary return.[14] While attention in Article 7(1) is naturally drawn to the specific range of seven to thirty days, it may be more useful to first consider the significance of the fact that any period accorded should be 'appropriate.' The inclusion of this word must be assumed to have specific meaning and adds an additional requirement to the period accorded being within the above-mentioned range. After all, if the purpose was simply to ensure that member states do not provide periods shorter than seven days (unless grounds for shortening can be applied) and no longer than thirty days, this could have been conveyed just as effectively by omitting the word 'appropriate.' In this context, it can be viewed as implying that the period, which is at any rate between seven and thirty days, must *also* be appropriate in relation to something. That something must logically be the objectives of the Directive. And, as discussed, these are twofold: securing effective return and ensuring the protection of fundamental rights during the return procedure.

As regards the first objective, securing effective return is an issue that is already part of the assessment whether a voluntary departure period should be provided in the first place. If the granting of a voluntary departure period would undermine that objective, member states should not grant it.[15] But once it is established that a voluntary departure period can be granted without undermining effective return, there seems little place for using it as an indicator to establish the length of that period. In this respect,

12 See 2.2.2 on the contribution of voluntary returns to the overall number of effective returns.

13 See 5.2.2.3 and 5.3.1 for examples of countries that refused to cooperate in removals and only allowed voluntary returns.

14 See 2.2.1, discussing, inter alia, the perceived 'humane and dignified' nature of such returns, the reduced administrative burdens and costs associated with it, as well as its role in domestic and international politics.

15 RD Recital 10.

it is important to reiterate that the voluntary departure period provides an opportunity for autonomous compliance with the obligation to return, but that the guarantee of effective return lies in the possibility of enforcement.[16] And granting a voluntary departure period only delays that possibility somewhat, a matter which I will also discuss below.

This leaves the second objective, the protection of fundamental rights. In Chapter 10, I have discussed extensively the key role that the granting of an opportunity for voluntary return plays in meeting this objective. I concluded that there is a strong basis for the protection of a right to voluntary return. This objective is not only relevant for the granting of a period, but also for its length. As discussed briefly above, whether a third-country national can indeed enjoy this opportunity is not only a matter of whether he or she is granted a voluntary departure period, but whether this period is long enough to take all the necessary steps, also taking into account the roles of the country of return and of the EU member state. The question of the length of the voluntary departure period is thus intrinsically tied up with the enjoyment of the right to return voluntarily. And if it has already been established that the right to return voluntarily should not be limited by denying a voluntary departure period, the exercise of this right must logically also be effective. This means, at a minimum, that member states should not use their decision on the length of the voluntary departure period to undermine the right to voluntary return. Providing a period that is not sufficient to actually return voluntarily would make this right, and thus the achievement of one of the key objectives of the Directive, illusory. From this perspective, only a period that is sufficiently long to ensure that the third-country national has a realistic opportunity to return voluntarily effectively upholds this objective. What is realistic depends on individual circumstances, and that assessment is discussed further below (11.2.3). The main point here is that, considering the discussion above, Article 7(1) should be read not only as requiring member states to provide any period of between seven and thirty days, but a period within that range that is appropriate to secure for the third-country national a realistic opportunity to return voluntarily.

This also means, in my view, that a voluntary departure period of fewer than thirty days would need to be duly justified as appropriate in the individual case. This would not be the case if the member state automatically accords a period of thirty days.[17] This is not to say that thirty days will automatically be sufficient for the effective exercise of voluntary return. Indeed, there may be situations in which even a thirty-day period is too short to allow a third-country national who is acting with due diligence to return voluntarily.[18] However, since the initial period to be accorded

16 RD Article 8(1).

17 Although this may raise issues over whether member states are allowed to be more generous, see 11.2.4 below.

18 Also see Majcher 2020, p. 554.

is normally capped at thirty days, such situations would then have to be resolved through the application of the provision on the extension of the period, which is discussed in 11.3.[19]

11.2.2 Individual circumstances: a role for concerns about non-compliance and non-cooperation?

As regards the time needed to return, in addition to factors beyond the third-country national's control, there are also clearly factors that depend on his or her own action or inaction. The above-mentioned requirement to provide a period that is sufficient to return voluntarily can therefore be based on the scenario that the third-country national takes all necessary steps towards return with due diligence. In other words, member states should make a realistic assessment of the period necessary if the third-country national would do all that can legitimately be expected of him or her in a timely manner. This is something different, however, than what is suggested in the Commission Recommendation and the Return Handbook.[20] These seem to tie the length of the period to expectations of the extent to which third-country nationals will comply with their obligation to return and whether they will otherwise cooperate during the return process. Before going into the assessment of the circumstances which should help decide the length of the voluntary departure period, it is useful to address the extent to which such expectations about compliance and cooperation are suitable elements of such an assessment.

It should be noted that the requirement to take into account such subjective elements when deciding the length of the voluntary departure period is not part of the Directive itself.[21] From the perspective of member states, it may however make sense to tie the length of the voluntary departure period to willingness to return and to cooperate. As discussed in Chapter 10, both member states currently, and the Commission in its recast proposal, seek to tie indicators of this – such as statements by the third-country national that he or she does not want to return – to a risk of absconding, which in turn would allow them to deny a voluntary departure period. However, such indicators may conflate different elements of the Directive.[22] Furthermore,

19 The Return Handbook, paragraph 6, at p. 31, for example, suggests that granting a longer period, such as 60 days, as a general rule, would be incompatible with harmonisation and common discipline provided for by the Directive, but, in paragraph 6.1, at p. 32, states that if conditions for extension in Article 7(2) are fulfilled, a longer period can be granted from the outset. Also see 11.3.3 on the links between the initial voluntary departure period and extension.

20 C(2017) 1600 final, 7 March 2017, paragraph 18; C(2017) 6505 final, 16 November 2021, Annex (Return Handbook), paragraph 6.

21 Although there is a general requirement to take into account all circumstances of the case, the only limitation on Article 7(1) are the situations set out in Article 7(4) that would allow denial or shortening.

22 See 10.4.3.2.

lacking specific statements by the third-country national, it may be difficult for member states to show sufficiently clearly that the third-country national does not intend to return voluntarily. If a voluntary departure period must be granted despite concerns from the member state about the non-compliance or non-cooperation of the third-country national, they may want to make sure such a period remains short, so that the enforcement of return is not delayed too much.

While connecting the length of the voluntary departure to expectations of compliance makes intuitive sense, there are several reasons why it would be problematic in view of the role of voluntary return in the Directive. First, as noted above, the role of a voluntary departure period is to provide the third-country national an *opportunity* to return of his or her own accord. If this leads to effective return, this is clearly the most preferrable option. But the voluntary departure period does not *guarantee* effective return. The role of safeguarding effective return is clearly allocated to the enforcement stage. The Directive takes into account that when third-country nationals are provided with an opportunity to return voluntarily, they may not make use of it. But giving that opportunity, and thus a level of autonomy, is in itself part of the objective of safeguarding fundamental rights and dignity during the entire return procedure.

It should also be emphasised that effective return is not necessarily the equivalent of the quickest return. The Directive is in fact quite permissive of delays, as long as eventual return is still guaranteed. This is evident from the fact that, as a general point, the Directive would see a delay in enforcement of thirty days, the upper limit of a voluntary departure period in Article 7(1), as acceptable. While it also provides that this "shall not exclude the possibility for the third-country nationals to leave earlier," this formulation can hardly be seen as a clear rule that the voluntary return should be as quick as possible. Furthermore, Article 7(2) provides for possible further extension, which is not time-limited.[23] The Return Handbook even suggests that to account for children attending school, prolongations of a voluntary departure period of up to a school year could be acceptable.[24] As such, the fact that effective return may take slightly longer is not, in and of itself, a reason to limit the voluntary departure period.

The question of compliance and cooperation is also highly unpredictable. This unpredictability is intrinsically tied up with the autonomy accorded to the third-country national to make decisions about the return process. The third-country national's views about return, even when he or she has made statements indicating a reluctance to return, may not be determinative of the outcome of the voluntary departure period. In this respect it should be recalled that the threat of enforcement has also been regarded as a way to 'encourage' third-country nationals to take up voluntary return. As a result of this, as well as other personal factors, persons initially unwilling

23 See 11.3.2.

24 C(2017) 6505 final, 16 November 2017, Annex, paragraph 6.1.

to return voluntarily may change their minds as the moment of enforcement, possibly including detention, draws closer.[25] It is true that uncertainty over the future is something member states have to deal with in other areas of the Directive too, and that this does not preclude them from making decisions on the basis of their best assessment of the risk involved. The clearest example in relation to voluntary return is the risk of absconding. However, the effect of that uncertainty on the return procedure is very different. If there is a risk of absconding, this infringes on the key issue of whether effective return remains possible. As discussed above, the question of compliance and cooperation during the voluntary departure period is fundamentally different, since neither unambiguously affect the eventual possibility to ensure effective return through enforcement. When this key objective of effective return is not immediately at risk, it would make sense for member states to be more cautious in drawing conclusions on the basis of expectations, especially if it has already been established that such risks are not so serious that they would warrant denying an opportunity for voluntary return altogether.

In the light of this, the urge to limit the voluntary departure period in case of doubts that the third-country national will seriously engage with the return process is understandable, but a basis for such limitation is lacking both in the substantive provisions of the Directive and its overarching principles. To the extent that such concerns are part of the member state's decision-making process, they need to be based on objective criteria, but furthermore cannot override the requirement to provide for a fair opportunity to return voluntarily in those cases that there has been no ground to shorten or deny a voluntary departure period in the first place. At most, it is imaginable that such considerations play a part in the assessment of whether a more generous voluntary departure period should be granted than what might be strictly necessary for return. Say, for example, that a member state has established – in line with 11.2.3 below – that a two-week period would provide a realistic opportunity for voluntary return. It may then be feasible to draw upon its concerns, if sufficiently substantiated, that the third-country national might not cooperate in his or her return, and therefore decide to limit the period to those two weeks, rather than granting a four-week period as it may have done in other cases. However, as a general point, such issues of potential non-compliance or non-cooperation should not be primary considerations about the length of the voluntary departure period, which must focus on what is necessary to secure a realistic opportunity for voluntary return.

25 As noted in 10.4.3.2.

11.2.3 Decision-making about the voluntary departure period: a joint effort?

Even when there is a clear obligation on member states to ensure the voluntary departure period provides for a realistic opportunity for voluntary return, assessing appropriateness is by no means an easy exercise.[26] How long it might take to return voluntarily will depend on several factors, which may be on the side of the third-country national, the country of return, the EU member state, as well as external actors, such as those providing return assistance. However, the process of making such an assessment primarily triggers obligations of the third-country national and of the EU member state, respectively. Here, attention will turn to the process of decision-making about the voluntary departure period and the obligations of individuals and member states in this respect. In particular, it will look at the efforts that both can be expected to make to ensure all relevant elements to make an informed decision are available. While this discussion focuses on the question of the length of the voluntary departure period, it has already been noted that, in practice, the return decision will encompass different elements simultaneously, such as whether a voluntary departure period should be granted in the first place, its appropriate length, or whether any measures to prevent absconding need to be imposed. As such, this discussion also has relevance to such decisions described in other chapters.

11.2.3.1 Cooperation obligations of third-country nationals: providing relevant information about their 'starting position'

A first crucial information point for the assessment of whether a voluntary departure period should be granted and what length would be appropriate, is what could be called the starting position of third-country nationals. By this, I mean, for example, whether their country of nationality or habitual residence is known, if they have transited through other countries and, importantly, what kind of evidence they already have at their disposal to show their eligibility for readmission or obtaining new travel documents. Furthermore, their ability to act autonomously, such as the financial means at their disposal, but also any specific circumstances, such as their health, age, dependence on others, and – in relation to this – their need for return assistance, will be part of this. In addition to this factual information about their situation, intentions as regards the destinations that third-country nationals intend to pursue may also be relevant to this assessment, since this may particularly affect the time frame necessary for achieving return.[27]

This implies that third-country nationals can be expected to share such information with EU member states' authorities charged with making decisions about voluntary return. This would speak in favour of a general

26 See, for example, EMN 2014b.
27 See 11.3.

obligation to cooperate with the authorities in this regard.[28] While this makes sense, such a general obligation to cooperate also raises questions as to the consequences of not providing information. I have already discussed how relatively broad notions of 'cooperation' are easily misconstrued as non-compliance with the obligation to return. However, in this case the provision of such information does not impact, as such, on the possibility of return, but rather on the member state's ability to make an assessment of what is an appropriate voluntary departure period. As such, the consequence of 'non-cooperation' should therefore only be related to this element. Simply put, if the third-country national fails to provide necessary information to make such an assessment, member states may be justified – taking into account all other considerations in the next paragraphs – in providing only the shortest period. Such a period may then not provide, in practice, a proper opportunity for the individual to enjoy the opportunity for voluntary return. Given the role of the voluntary departure period as a mechanism to protect fundamental rights, the non-provision of such information may be one of the factors to be taken into account in decision-making about the length of the voluntary departure period, but it cannot be the only decisive factor as all relevant circumstances would have to be weighed to ensure the decision meets the requirement of proportionality. However, non-provision of such information would undermine any later objections that the length of the voluntary departure period was not appropriate to a considerable extent.

The other side of this is that the EU member state should ensure an opportunity to provide such information is accorded. This follows from the right to be heard,[29] which is not specifically addressed in the Directive and as such represents "[a]n important lacuna,"[30] but has been recognised by the CJEU as applicable to return procedures. [31] While this may not always entitle third-country nationals a separate hearing specifically on return, if the return decision is taken simultaneously with the dismissal of residence, it requires member states "to enable the person concerned to express his point of view on the detailed arrangements for his return, such as the period allowed for departure, and whether return is to be voluntary or coerced."[32] This may necessitate, therefore, organising specific moments of contact between the EU member state and the third-country national, during which relevant information can be presented. Not agreeing to having such a contact moment, such as failing to show up for an interview with

28 As foreseen in the Commission's recast proposal, see 1.2.3.
29 CFR Article 42(2)(a), setting out "the right of every person to be heard, before any individual measure which would affect him or her negatively is taken."
30 Progin-Theuerkauf 2019, p. 41.
31 CJEU C-383/13 PPU, *G. & R.* [2013]; C-166/13 *Mukarubega* [2013]; C-429/13 *Boudjlida* [2014].
32 CJEU C-249/13 *Boudjlida* [2014], paragraph 51.

the authorities in charge of return, without justification, may thus have the same consequences as set out above.

11.2.3.2 Due diligence obligations of the member state?

However, it must be wondered whether decision-making about voluntary return can be done effectively only based on obligations of the individual. As has been highlighted at various points in this dissertation, while the concept of voluntary return allocates primary responsibility to the individual, this does not mean that the member state can stay entirely passive. Although member states can generally be expected to help move the return process forward, since this is in their own interest, becoming actively involved in this, in specific aspects, is not a matter of goodwill or discretion. Rather, the effective implementation of the Directive's objectives will sometimes require member states to act. This has been discussed, for example, in the context of the triggering of readmission agreements to make voluntary return possible, and in relation to facilitating access to consular authorities to allow the third-country national to obtain travel documents.

Since the member state is ultimately responsible for ensuring that it provides an effective opportunity for voluntary return, this would imply that it has, to the extent possible, a clear picture of how long it will take for a country of return to meet its obligations regarding readmission and, where necessary, issuance of travel documents, given the specific situation of the third-country national. Even if the third-country national fully cooperates in this respect, this may not be sufficient for such an assessment. As a result, I suggest that the fact that member states must guarantee a fair possibility for voluntary return also implies they can be expected to act with due diligence to gather relevant information themselves, in addition to receiving information from the third-country national about his or her situation. Member states will generally have extensive possibilities to draw on their relevant agencies' and authorities' own experiences with return procedures, as well as any data collected on this. While statistics on the time it takes to organise a voluntary return are not generally published, it can be reasonably assumed that member states collect information about return procedures and practices, including with regard to specific destination countries. Similarly, organisations providing assistance to voluntary returnees may collect such information. For example, online information about IOM-assisted returns in several member states gives rough indications of time frames. For example, the Finnish government website providing information to third-country nationals suggests that "[o]rganising a voluntary return takes an average of two weeks from the application."[33] The Latvian information site notes that, for migrants who have all necessary documents, "travel arrangements will only take a few days, but if a person does not have any identity

33 Voluntaryreturn.fi 2020.

documents, their order and coordination can take a few weeks (depending on the diplomatic missions)."[34] In Hungary, this process "can take up to one month,"[35] whereas in Greece, "you could wait from 2 weeks to several months to go home."[36] IOM in the Netherlands suggests "a flight back to your country can be arranged within 4 weeks after applying for IOM's assistance," although this may take longer, including if the person still needs to obtain a travel document.[37] Since such assisted voluntary return programmes are funded by member states, and they take place within the context of return procedures as governed by the Directive, it must be assumed that member states have access to such information.

Since it is the member state's responsibility under the Directive to issue an 'appropriate' voluntary departure period, it can be expected to use information available to it to make an assessment of such appropriateness. Furthermore, I would suggest that the member state should exert due diligence in collecting information on typical return times. This due diligence may be limited to those cases in which it is reasonable to do so. For example, it may be more difficult to collect accurate information about returns to destinations that are far less frequent. However, the more (voluntary) returns take place to a certain destination country, the wider the experience a member state may be able to draw on. In this respect, it is noteworthy that the Commission's recast proposal would require member states to set up so-called return management systems, which would likely yield further data on barriers and possibilities to return to specific destination countries, as well as relevant time frames.[38]

Another way to inform assessments of what would be appropriate voluntary departure periods may be to draw on legal frameworks governing returns. This would be the case, for example, if a third-country national would return to his or her country of origin or a transit country on the basis of a readmission agreement. After all, these do not only set out specific procedures for readmission, but also specific times in which the country of return must reply to a readmission request and provide travel documents. Although these provide for maximum response times, which in some cases can still be extended, they give at least a rough indication of the time needed to complete the procedure. For example, the fact that the EU-Pakistan agreement provides for a response time of thirty calendar days (extendable to sixty days),[39] would indicate that a voluntary departure period at the short end of the range of seven to thirty days is unlikely to be sufficient. While the Pakistan agreement provides for the longest time

34 IOM Latvia 2020.
35 IOM Hungary 2020.
36 Refugee.info 2020.
37 IOM Netherlands 2020.
38 COM(2018) 634 final, 12 September 2018, Article 14.
39 EU-Pakistan readmission agreement, Article 8(2), although a shorter period is provided for accelerated procedures.

frames of the six agreements used in this dissertation, the agreement with Serbia provides for the shortest. It requires the requested country to reply to a request within a maximum of ten calendar days,[40] which can be extended by another six days in case of legal or factual obstacles.[41] Once a request is accepted, Serbia has a further three working days to issue the necessary travel documents.[42] Without extension or an accelerated procedure being applied, the overall time limit is therefore 13 days before a return could take place. This does not mean, however, that a 13-day voluntary departure period is necessarily sufficient. This will also depend, for example, on the EU member state making a readmission request on the first day (which may in turn depend on the third-country national providing all necessary information). Also, it assumes that departure can take place as soon as travel documents are issued.[43] Furthermore, such time frames on paper must be cross-checked against actual experience, in particular whether the destination state normally meets these deadlines in practice, or whether it routinely requires longer to complete the necessary formalities.

Such information about return procedures must furthermore be connected to the specific situation of the third-country national. This may include, in addition to technical information such as the availability of evidence of eligibility for readmission and travel documents, other circumstances, including any vulnerabilities of the individual, which may require special measures that would further delay the return.[44] The aim here is not to provide specific answers to this, as this would contradict the notion that each assessment of the appropriate length of a voluntary departure period requires member states to draw on available information, and that they can be expected to make reasonable efforts to collate such information. In this way, especially for common countries of return, the member state should be able to justify why a certain voluntary departure period is accorded, especially if this is shorter than thirty days. The more obscure a return destination is, the more difficult this may become. In order to secure a fair chance of returning voluntarily, in such cases the member state may be required to err on the side of caution and issue a period in the upper range of the period provided in Article 7(1).

As such, decision-making about voluntary departure periods can be seen as more than just requiring action from the third-country national. It requires bringing together both information provided by the individual and that acquired by the EU member state. In the interaction between these sources, the best decision can be made. This is thus another area in which

40 EU-Serbia readmission agreement, Article 10(2).
41 *Ibid*., Article 10(3).
42 *Ibid*., Article 2(3).
43 In practice, carriers may refuse to issue tickets until a valid travel document can be shown.
44 See, for example, Rodenburg & Bloemen 2014, pp. 16-18, on specific issues that may arise in relation to third-country nationals with health problems.

the modalities of return may be considered to be 'negotiated' between the third-country national and the EU member state.[45] Furthermore, this process can be seen as reciprocal: the more useful information the third-country national can supply, the more relevant supplementary information member states are likely to be able to use in their decision-making process. Similarly, fewer efforts by the third-country national to provide such information may shift the decision-making process towards the shorter end of the scale, while lack of due diligence of the member state may have to mean the opposite, implying that a longer period may be necessary to safely assume that it will provide an appropriate period for voluntary return.

11.2.4 Minimum voluntary departure periods

In this paragraph, attention shifts back from the process of decision-making to certain substantive requirements on an appropriate voluntary departure period. Specifically, in view of the discussion above, it looks at the legitimacy of particularly short voluntary departure periods, such as those of seven days or close to it, as well as the recommendation to provide a period that is as short as possible. The issue of how short such a period can be has always been one of the contentious issues of the Directive and, as discussed, member states may be inclined to try and minimise this period.[46] But there may be limits on the extent that they can do so.

11.2.4.1 Extremely short voluntary departure periods

Article 7(1) does not, at first glance, distinguish a situation of granting a short period, such as seven days, from a situation in which a much longer period is provided.[47] However, the previous chapters have discussed the complexity of the process of ensuring voluntary return, with many elements outside the immediate control of the third-country national. The various steps to be taken, and barriers encountered – both legal and practical – by certain groups of third-country nationals, such as stateless persons, already indicate that quick return is not always feasible.[48] Furthermore, the various time frames provided by IOM above, for example, all exceed the period of seven days, often considerably. This does not mean that returns cannot take place quicker, but in most cases this is unlikely. Similarly, the time frames provided in readmission agreements strongly point towards the fact that seven days are unlikely to be sufficient, especially when the response times allowed to countries of return are significantly longer than that.

45 See the characterisation of expulsion processes as 'negotiated' in 7.3.4.

46 Acosta 2019a, p. 39, notes, for example, that several member states, such as the Czech Republic, France and Hungary, pushed for a shorter minimum voluntary departure period than the proposed seven days during the negotiations on the current Directive.

47 It simply provides that such a period must be between seven and thirty days.

48 See 4.3 in relation to readmission and 8.3.4 regarding travel documents.

It must be emphasised that such short periods are not prima facie incompatible with the Directive. It explicitly provides for them and, in a general sense, there may indeed be situations in which a period of seven days (or slightly more), would be enough to allow a realistic opportunity of voluntary return. However, the counterpoint to that is that this would likely only be the case in the most advantageous situations, such as when the third-country national is already in possession of valid travel documents and transport can be arranged at short notice. As such, given the many counter-indications, member states would be advised to at least work on the basis of a strong assumption that a seven-day period would be insufficient to meet the requirement of an effective opportunity of voluntary return. Additionally, it may be assumed that the shorter the period provided, the stronger the justification must be from the side of the member state that this is appropriate, in keeping with the principle of proportionality, which is key to the provisions on the voluntary departure period.[49] As such, the member state must have very strong reasons to believe, in the specific case, that return can duly take place within seven days.

The problem of short periods would only be compounded if the Commission's proposal to provide periods of "up to" thirty days were to be adopted. In that case, voluntary departure periods of six days or fewer could be provided without the need to justify this in relation to the grounds for exceptions. However, in line with the above, the presumption of incompatibility of such a period with the objectives of the Directive, and thus the need to provide factual justification for this, would need to be applied even more strongly.

11.2.4.2 The shortest period possible?

As already noted, while I agree with the Commission that a measure of flexibility should be observed in according voluntary departure periods, I disagree that this should be based on ensuring the voluntary departure period is as short as possible. Rather, it must be based on effective enjoyment of the opportunity of voluntary return. This is a difference in outlook, which may be relevant in the way that member states deal with voluntary return. However, at least theoretically, the two approaches would be compatible. This would be the case if the member state would make an assessment of what period is necessary to secure that enjoyment, but then to limit the time frame strictly to that period, and not more. However, this does not mean that a member state would not be implementing the Directive effectively if it would nevertheless provide for a more generous period. After all, the Directive allows for more favourable treatment of third-country nationals.[50] Also, while Article 7(1) says that the provision of a voluntary departure "shall not exclude the possibility for the third-

49 See 10.2.3.2.
50 RD Article 4(3).

country nationals concerned to leave earlier," this formulation can hardly be seen as implying a clear obligation to do so. As discussed, the provision of a voluntary departure period secures for the individual a possibility, within limits, to make autonomous choices about how, where and when to leave, to ensure that this is most compatible with his or her fundamental rights and dignity. Although this cannot be used to avoid eventual return, the return of a person on the thirtieth day of the voluntary departure period is no less legitimate than on any earlier day, even if he or she was already in possession of authorisation of admission, travel documents and transport in the days before. In this respect, the discussion above about the permissiveness of the Directives of reasonable delays should also be recalled. As such, the Directive can be seen as prioritising voluntary return with some delay over the quickest possible return if such a return would be less able to safeguards fundamental rights and dignity – provided this does not undermine effective return.

From this perspective, the Commission's recommendation can only remain that: a call on member states to limit the duration of the voluntary departure period, but without a clear legal basis in the Directive to expect this. From my discussion of expectations of compliance and cooperation in 11.2.2, it should also be evident that the recommendation not to provide periods longer than seven days unless the third-country national actively cooperates is particularly problematic, and would, in my view, lead to clear incompatibility with the Directive in all but those cases in which it can established that this period still provides for a realistic opportunity for voluntary return.[51]

11.2.5 Assigning voluntary departure periods on the basis of the third-country national's (prior) legal status

Although this practice does not seem to be widespread, a short note may be in order about member states providing specific voluntary departure periods on the basis of the third-country national's prior legal status. For example, an evaluation of the implementation of the Directive in 2013 showed that Denmark provided pre-set voluntary departure periods of 15 days to rejected asylum seekers and of seven days to other third-country nationals.[52] This is a slightly more sophisticated approach to the provision of a 'one-size-fits-all' voluntary departure period mentioned in the introduction to this chapter. Whilst a person's prior residence may have to be taken into account in establishing the length of the voluntary departure period, it is doubtful that setting specific voluntary departure periods only

51 For a similar conclusion, see Majcher 2020, p. 555.

52 European Commission 2013, p. 83. Denmark also provides for a 100-day period for victims of trafficking. Switzerland is identified as another state that makes distinctions based on prior status.

based on prior legal status is compatible with both the criterion of appropriateness and of an individualised approach.

In this context, it is important to note that the Directive only recognises one legal category, being 'illegally staying third-country nationals.'[53] This covers a range of situations, such as persons who lost their earlier right of stay or residence, visa-overstayers, persons who had their asylum applications rejected, as well as those who entered irregularly and never attempted to apply for a right of residence at all. However diverse these backgrounds may be, the fact that they are currently 'illegally staying' within the meaning of the Directive is determinative, and any action from member states and individual responsibilities must be based on this. This is not to say that all their situations are the same in relation to return. For example, those who had prior residence rights in an EU member states may have engagements and obligations there, which need to be dealt with before departure, that perhaps irregular migrants do not. Rejected asylum seekers, even if their claims have been rejected, may face certain constraints in ensuring safe return, for example if the rejection was based on a so-called internal flight or relocation alternative. At the same time, it cannot be said in the abstract that irregular migrants would never face such constraints.

This is why the requirement that decisions on return, which include the setting of the voluntary departure period, must be done on the basis of individual circumstances, to ensure that such a period is appropriate and does not undermine the effective enjoyment of an opportunity to comply voluntarily with the obligation to return. There may indeed be reasons for a member state to apply different voluntary departure periods to different cases. However, in my view, the Directive does not leave space for treating certain categories of illegally staying third-country nationals less advantageously than others, solely on the basis of their legal status prior to the return decision.

11.3 Extending a voluntary departure period

According to Article 7(2), member states

> *"shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links."*

Two questions are thus central to the extension of a voluntary departure period. First, when it should be considered "necessary" to extend a voluntary departure period (11.3.1). And second, how and when the specific circumstances of the individual case should be "taken into account" to decide on the extension of the voluntary departure period and the appro-

53 RD Article 2(1).

priate length of such an extension (11.3.2). Attention will also be paid to the links between the initial period and the extension (11.3.3).

11.3.1 The extension of a voluntary departure period 'where necessary'

In relation to the necessity of an extension of a voluntary departure period, the Return Handbook suggests the following:

> *"The term 'where necessary' refers to circumstances both in the sphere of the returnee and in the sphere of the returning State. Member States enjoy discretion relating to the substance and the regulatory depth of their national implementing legislation on this issue."*[54]

However, this neither indicates more clearly what 'necessity' means in the context of voluntary return, nor how an assessment of the above-mentioned circumstances should take place. As regards the first issue, the logical reference point for defining necessity is again to look at the objectives of the Directive: ensuring effective return and safeguarding fundamental rights, with the priority of voluntary return being a key mechanism for the latter. And, as discussed in 11.2.1 above, if this priority is to have practical meaning, the voluntary departure period must ensure that its length provides for an effective opportunity for the third-country national to comply with the obligation to return, without being subjected to enforcement measures. When the initial voluntary departure period ends, member states are at a crossroads: they must decide either to continue giving the third-country national an opportunity to meet the obligation to return voluntarily, by extending the voluntary departure period, or they must move ahead with enforcement. [55] The scheme of the Directive only leaves these two options as long as the return decision remains in force.[56] As such, at its most basic, the necessity of extension arises when the interests of the individual in having an opportunity to meet the obligation to return voluntarily (in particular the protection of his or her fundamental rights), continues to outweigh the interest of the member state in enforcing the return decision.

An initial clue how to weigh these elements against each other – the second issue in relation to the quotation from the Return Handbook above – may be found in Article 8(1) of the Directive, which deals with enforcement. According to Article 8(1) member states "shall take all necessary measures to enforce the return decision if … the obligation to return has

54 C(2017) 6505 final, 16 November 2017, Annex, paragraph 6.1.

55 RD Article 8(1).While the Directive provides for circumstances in which removal may be postponed under Article 9, this does not affect, strictly speaking, the fact that the procedure moves on to the enforcement stage.

56 Which will be the case unless they decide to grant the third-country national an autonomous residence permit or other authorisation offering a right to stay after all, see RD Article 6(4).

not been complied with within the period for voluntary departure granted in accordance with Article 7." As such, the question of compliance is a key issue here. In this way, the question of extension is fundamentally different from that of the granting of the initial period. Regarding the latter, I have suggested, the member state's expectations of compliance should not play a central role.[57] At that point, no concrete information exists about the third-country national's compliance with the return obligation, as a matter of fact and not just as a matter of expectation. This is different once the initial voluntary departure period has ended and the third-country national has had an opportunity to take the steps to meet this obligation. In that situation, the member state does not only have a factual basis for assessing compliance but, in view of Article 8(1), should make such an assessment to determine whether enforcement is required.

This also implies the reverse: if, at the end of the initial voluntary departure period, the member state does not find that the third-country national has failed to comply with their obligations, there is no legal basis for enforcement. In this respect it is important to emphasise again that the continued presence of the third-country national in the member state is not, in and of itself, a sufficient indicator of a failure to meet the obligation to return. As discussed, this obligation combines both the desired end result (departure) but also the process of going back.[58] It is quite possible, both practically and legally, that the third-country national takes all necessary steps, but that the desired result is not achieved by the end of the voluntary departure period. Although member states should make a best estimate of the time necessary to achieve return, an element of uncertainty always remains, and there may be a range of factors affecting the actual time frame for each action. For example, the arrival of documents needed in support of a readmission application may be delayed, the third-country national's appointment with the consular authorities may be postponed, he or she may fall ill, or a plethora of other factors may cause the voluntary departure period to be insufficient to complete all steps. A key question, therefore, will be whether such delays are the result of actions or omission by the third-country national, in which case they could be qualified as non-compliance with the obligation to return.[59] However, if this is not the case, and the third-country national can reasonably be seen as having acted with due diligence, and within their possibilities, this cannot be qualified as non-compliance.

This important distinction between non-return and non-compliance notwithstanding, there may of course be cases where there are reasons on

57 See 11.2.2.

58 See 1.3.1.

59 See, by analogy, CJEU C-146/14 PPU *Mahdi* [2014], in which it was found that the fact that a third-country national had not received travel documents could not, in and of itself, be considered sufficient evidence of not having cooperated. See in particular paragraph 80, in which the CJEU makes clear that this may be the case if such a lack of documents can be "attributed solely" to the actions of the individual.

the side of third-country nationals that have contributed to non-return. For example, they may not have submitted evidence for readmission or documents, or failed to make an appointment with consular authorities with due diligence. They may have delayed reaching out to assistance providers even though such assistance would be essential to achieve return. In such a case, non-return can – at least in part – be linked to the failure of the third-country national to take the necessary steps to return with due diligence. Does that then mean that the voluntary departure period should not be extended, and that enforcement should take place automatically? This, in my view, is not always the case. First, Article 7(2) is formulated as imposing a clear obligation on member states to extend the voluntary departure period where necessary. However, this does not mean member states could not decide to extend a period in the absence of a necessity which is grounded in the fact that the third-country national has fully complied. This would be more favourable treatment of the third-country national that is allowed under the Directive, provided it still in line with its objectives.[60] Furthermore, this is not only a question of necessity, but of proportionality. This means that, if member states are faced with the question of extension of the voluntary departure period of a person who has not fully complied with his obligation, certain factors need to be taken into account, on a case-by-case basis. In particular, the member state will have to consider whether the extension would harm the prospect of effective return. This would necessitate considering whether extension would still lead to voluntary return within a reasonable time period. If this is the case, this may still give reason to extend, as this would preserve the priority of voluntary return as well as the objective of effective return.[61] Here, however, there is a clear role for assessing whether a person who has not taken all necessary steps in a timely manner can be expected to do so in the near future. In contrast to previous discussions, there seems to be considerable space here for member states to take account of the third-country national's past behaviour, as well as any statements about intention of non-compliance.

11.3.2 Specific circumstances of the case to be taken into account

As noted above, Article 7(2) does not only require member states to provide an extension with an appropriate where necessary, but they must also to take into account the specific circumstances of the case. In this way, Article 7(2) reinforces the general principle, relevant throughout the Directive's procedure, that all decisions should be taken on a case-by-case basis. However, it lists, non-exhaustively, some specific circumstances that member states should, at a minimum, take into account: the length of stay, the existence of children attending school and the existence of other family

60 RD Article 4.

61 Again, see the tolerance of Directive of reasonable delay if this allows for voluntary return.

and social links. This invites further consideration, first, of what it means to take such circumstances 'into account' and secondly, whether there are other circumstances that are relevant other than those listed in Article 7(2).

11.3.2.1 What does it mean to take circumstances 'into account'?

According to the Return Handbook, "[m]ember states enjoy a wide margin of discretion in determining whether the extension of the period for voluntary departure would be 'appropriate.'"[62] This discretion would seem to bear out in the fact that member states are only required to 'take into account' certain individual circumstances. However, despite that requirement not being very strong, it must be given specific meaning within the context of EU law and cannot simply be left up to states to fill in. One way to approach this is to look a bit deeper than just the circumstances listed. These do not simply represent practical matters with which third-country nationals and member states are faced in return procedures. They can be said to be further elements of ensuring a return in line with fundamental rights and dignity. As noted in Chapter 10, the CJEU, in *Zh. and O.*, acknowledges the important role of voluntary return in this respect, but does not outline explicitly which fundamental rights might be at stake.[63] From the process set out in the Directive, it can be surmised that this relates, first and foremost, to the protection of personal integrity, the prohibition of inhuman or degrading treatment, and the protection of the right to liberty, which may all be affected when enforcement takes place. However, it is possible to take a wider view. This could include the perspective that giving the third-country national and their family time to get their affairs in order in different aspects of their lives, so as to minimally disrupt it, is itself a way to contribute to a humane and dignified return.[64]

Another perspective on this is that the circumstances mentioned in Article 7(2) are not only practical issues or specific interests of the third-country national, but rather that they can be framed in fundamental rights

62 C(2017) 6505 final, 16 November 2017, Annex, paragraph 6.1. It should be noted that this formulation is already problematic, since it suggests that member states should grant an extension where appropriate. Rather, Article 7(2) clearly requires this "where necessary", which – as discussed above – provides for clear obligations. The appropriateness, in the formulation of Article 7(2) relates to the length of an extension, when granted. Although the two issues (granting and length) are interconnected, the formulation in the Return Handbook may be cause for confusion in this respect.

63 See 10.2.3.

64 See, for example, Iran-US claims tribunal, *Yeager* [1987], paragraph 49, finding that "[o]ne of the procedural requirements almost unanimously recognized [in relation to expulsion] is that a State must give the foreigner to be expelled "sufficient time to wind up his affairs" (referring to Pellonpää 1984, p. 420). In the specific case, it found that the expulsion "was carried out with unnecessary haste and in violation of minimum procedural standards under customary international law" (paragraph 50). While this finding was mainly related to leaving behind assets due to the sudden nature of a (wrongful) expulsion, it may have wider relevance.

terms themselves. The issue of school-going children, for example, can easily be reframed as a question of the extent to which the member states must mitigate any negative impact on the right to education, as guaranteed by the Charter of Fundamental Rights.[65] And as a matter of ensuring that the best interest of the child of the child are a primary consideration in any action by the member state.[66] Similarly, the references to the length of stay and family and social links are all issues that have been subject of questions related to the protection of private and family life under the Charter or the ECHR.[67] Negative impacts on these rights cannot be assumed to be sufficient to negate the obligation to return as such – otherwise a return decision should not have been issued in the first place. But states should consider whether such negative impacts can be mitigated by providing a longer period for voluntary return, and how this balances out against possible further delay of enforcement. From this perspective, the question of extension, in the light of these circumstances, requires more than just taking them into account. It comes back, again, to the need to make a proper proportionality assessment of the impact of such a decision.

In this way, it can be surmised that the role of the circumstances listed in Article 7(2) can both affect the question of the necessity of the extension and the appropriate length of such an extension. Even in the absence of circumstances above in relation to compliance with the obligation to return, the need to avoid disproportionate harm to certain rights may still necessitate extension. On top of this, these circumstances may provide for a guide to the appropriate length of that extension. For example, if the disruption of a child's education due to imminent return would be of such nature that it would make an extension of the return necessary, this extension must be long enough to mitigate this impact. As noted, this may lead to quite long extensions, such as suggested in the Return Handbook, which considers a school year as appropriate in certain situations.[68] Similarly, an extension may be necessary to ensure family unity is not disproportionately affected, for example, in cases where the third-country national has already received a return decision, but a family member's claim to legal stay has not been finally assessed. This would most likely mean an extension by a period sufficient for the family member's claim to be finally assessed should be considered appropriate within the meaning of the Directive. How such assessments will work out in each individual case is impossible to say in the abstract. However, when fundamental rights are at stake, it is important that member states give due consideration to them as rights, which gives particular weight to the requirement to take certain individual circumstances into account. This may therefore not be as discretionary as the Handbook suggests.

65 CFR Article 14.
66 CFR Article 24(2).
67 CFR Article 7; ECHR Article 8.
68 C(2017) 6505 final, 16 November 2017, paragraph 6.1.

11.3.2.2 Financial interests and property rights as circumstances to be taken into account?

Article 7(2) of the Directive does not exhaustively list the circumstances to be taken into account with regard to extending a voluntary departure period. Member states can thus add more circumstances to this list, but not remove any. This raises the question whether there are any other circumstances which member states can be expected to take into account, even though they are not expressly mentioned in the Directive. In the light of the discussion of the connection between those circumstances and fundamental rights, as well as the interplay with other EU legislation, at least one other specific example can be offered. This relates to the financial and property interests of the third-country national.[69] These interests may be affected by the obligation on the third-country national to return. For example, it may take a certain amount of time to transfer assets or dispose of them in the EU member state. This might particularly be the case if the third-country national has a business or owns real estate in the EU member state. In this respect, it should be noted that the right to own, use, dispose of and bequeath lawfully acquired possessions is specifically protected by the Charter of Fundamental Rights.[70] And that an appropriate voluntary departure period may have to be provided to safeguard that right. Additionally, the Iran-US Claims Tribunal's finding that, as a matter of customary international law, persons expelled should normally be provided with time to wrap up their affairs in the host state, is also of relevance here.[71] In the particular case, the Tribunal made this finding specifically in relation to the fact that the individual had property in Iran, which he had not been able to ship out or dispose of properly, since the expulsion had been so sudden.

While the Charter only refers to "lawfully acquired" possessions,[72] and the Tribunal's finding also came in relation to an alien who had, up to that point, been lawfully resident, this does not mean that financial or property interests of third-country nationals who have always been irregularly staying in a member state could not also play a role in relation to the voluntary departure period. It could be argued, for example, that the right to leave also encompasses an element to do so without losing one's possessions. More concretely, the CMW sets out the principle that "[i]n case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities."[73] The CMW does not

69 Strasbourg Declaration, Article 5; Inglés 1963, draft principle I(h) ; Uppsala Declaration, Article 5.

70 Article 17(1).

71 Iran-US claims tribunal, *Yeager* [1987], paragraphs 49-50.

72 Also see Hofmann 1988, p. 313, although talking about the departure of persons from their own countries: "Every emigrant should be entitled to take along, as a minimum, all the goods which the legal order of his or her country considers as personal property."

73 CMW, Article 22(6).

differentiate between lawfully and unlawfully staying migrant workers in this regard. While the CMW has no effect in EU law, and has therefore been left out of this analysis, a similar principle could be read into Directive 2009/52 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (the Sanctions Directive).[74] It imposes obligations on member states to ensure that any outstanding renumeration to an illegally employed third-country national is paid.[75] While the Sanctions Directive in principle requires member states to ensure any claims for back payment can also be made after return, if any steps need to be taken in the EU member state beforehand, the effective implementation of that Directive could require that the voluntary departure period is extended, at least up to such a point that effective claims to back payments can be made.

Other circumstances may be relevant as well. In Chapter 7, for example, I discussed the issue of choice of destinations, which may impact on the timing of the return. Member states should thus also take such a situation into account as part of the whole set of circumstances to consider, to see for how long a voluntary departure period should be extended. Similarly, the possibility that third-country nationals may prefer to apply for a passport, rather than a single-use travel document, discussed in Chapter 8, may also play a role. Neither would appear to be sufficient, in and of itself, to require the extension of a voluntary departure period, but if the question of extension arises, these may also have to be taken into account.

11.3.3 The links between the initial voluntary departure period and extension

While there are some clear differences between the provisions on the initial voluntary departure period and its extension, including on what basis member states' obligations are triggered, the two may also interact. This may particularly be the case as regards the initial length of the period and the need for extension. If the member state has issued a voluntary departure period that takes a minimalist approach – only assigning such a time frame as would likely be strictly necessary to achieve return – it may have to be more cautious in concluding that non-return should be attributable to failure of the third-country national to meet his or her obligations. If the initial period was more generous, however, there may be a larger burden on the third-country national to provide reasonable justifications why return has been delayed. In this way, the initial voluntary departure period and the extension should be seen to act as communicating vessels. In this context, it can also be assumed that, if the member state has failed to make an assess-

74 OJ L 168/24, 30 June 2009, pp. 24-32.
75 Directive 2009/52, Article 6.

ment of which initial voluntary departure period is 'appropriate' within the meaning of Article 7(1), and has provided only a short period, it must have particularly weighty and substantiated reasons for considering that non-return equals non-compliance on the part of the third-country national.

It may furthermore be wondered whether member states could already take circumstances enumerated in Article 7(2) into account when deciding on the length of the initial period. There seems no reason in the Directive for this not to be possible as a general principle. However, the initial voluntary departure period is limited to thirty days by Article 7(1). As such, individual circumstances may lead a member state to provide for a longer voluntary departure period than strictly necessary to fulfil the obligation to return. But if those circumstances require longer than thirty days, the question of extension will again become relevant. The Return Handbook suggest that, in certain cases, however, the decision on the initial period and the extension can be taken together. It notes that "[a]n extension beyond 30 days can be granted from the outset … if justified by the individual assessment of the circumstances of the case," and that this is not subject to a requirement to first issue a thirty-day period and then to extend it.[76] Indeed, strictly speaking, Article 7(2) only speaks about extending the period for voluntary departure in a general manner, and does not indicate that this can only be done after the initial period has lapsed.[77] This would mean, I suggest, that questions of compliance and cooperation, which normally will come into the picture at the time of the extension decision, will have to be put aside, as in the case of any decision on the initial period.[78] It is less clear how the Handbook came to the conclusion that the period (initial plus extension) should then necessarily be within the range of thirty to sixty days, since the extension is not limited to thirty days and can indeed be much longer.[79] If Article 7(1) and Article 7(2) are applied at the same time, this also means that an immediate extension cannot be capped at a maximum period that is not firmly rooted in the necessity of the extension and/or the specific circumstances of the case.

11.4 Cutting short a voluntary departure period already granted

Once a voluntary departure period of a certain length is provided, whether initially or including extension, it does not mean that member states have no more possibilities to intervene until the end of that period. Article 8(2) of the Directive states that a member state may only enforce a return decision after the voluntary departure period has expired "unless a risk as referred

76 C(2017) 6505 final, 16 November 2017, Annex, paragraph 6.1.
77 Although normally the logic of the procedure would dictate this.
78 See 11.2.2.
79 C(2017) 6505 final, 16 November 2017, Annex, paragraph 6.1.

to in Article 7(4) arises during that period." This implies that member states have a possibility to cut short a voluntary departure period already granted. However, this must be connected to grounds which have been discussed at length in Chapter 10: a risk of absconding, the dismissal of an application as manifestly unfounded or fraudulent, or a risk to public policy, public security or national security. Not all of these, however, seem applicable. This goes particularly for the dismissal of an application as manifestly unfounded or fraudulent. First, such dismissal is not a "risk" and the text of Article 8(2) suggests that it only applies grounds for denial of a voluntary departure period that constitute risks. Second, the question of whether an application was manifestly unfounded or fraudulent needs to be addressed at the moment when the return decision is issued.[80] Even though new information might emerge that the third-country national acted in a fraudulent manner during his or her application, Article 7(4) sets out that it can be applied only if the *application* was dismissed for this reason. This is therefore a point of fact when the return decision is issued and not subject to change. As such, the past dismissal of an application as manifestly unfounded or fraudulent cannot form a basis for cutting short a voluntary departure period already granted.

In contrast, the question of whether a third-country national can be considered to pose a risk to public policy, public security or national security may be subject to change. New information might emerge, or circumstances might change. Typically, this would be the case if the third-country national is found to have committed (or being suspected of) a criminal offence during the voluntary departure period. Although there is no case law from the CJEU on this, I would venture that the Court could find, depending on the severity of the threat, that the state's interests in protecting public policy, public security or national security could outweigh the third-country national's interest not only in having a voluntary departure period, but also the right to legal certainty that might be affected by that period suddenly being rescinded. In addition to the threat having to reach a certain level of severity, it should also be reiterated that this threat should be sufficiently real and continue into the future.[81] The mere fact that the third-country national has committed or is suspected of a criminal offence, if this is unlikely to be repeated, and depending on the severity of the offence, may not be sufficient.

Perhaps the most likely scenario in which the rescinding of a voluntary departure period might arise is in relation to the risk of absconding. Again, this is a situation that might change after the return decision has been issued. If there is a sufficiently real risk of absconding, this would legitimise the revocation of a voluntary departure period. After all, absconding fundamentally jeopardises the achievement of the Directive's main objec-

80 See 10.5.

81 CJEU, C554/13 *Zh. and O.* [2015] and the discussion thereof in 10.3.

tive of ensuring effective return. It would be odd if member states would be allowed to deny a period for voluntary departure at the time of issuing the return decision to safeguard this objective, but not later on if the circumstances so demand. However, the strict requirements for denying a period for voluntary departure need to be observed in this situation as well. Of particular importance in this situation is that the circumstances must relate clearly to the risk that the third-country national will disappear from the member state's view. The mere fact that he or she is not doing enough to return voluntarily, even if they say they have no intention of returning, is not sufficient.[82] After all, the possibility that the third-country national will not return voluntarily is part of the procedure set out in the Directive, with its enforcement stage following the voluntary departure stage. As such, the possibility to revoke the voluntary departure period cannot be abused to pressure the third-country national into taking certain steps in the return procedure or to have him or her 'cooperate' with that procedure.[83]

Perhaps the clearest situation in which the prospect of cutting short the voluntary departure period would arise is when third-country nationals fail to meet the obligations imposed to prevent them from absconding, such as regular reporting or staying in a certain place. These directly connect to safeguarding the possibility of enforcement. As with other issues, this must be regarded in the context of the circumstances of the case. This would mean, at a minimum, that the third-country national is allowed to put forward reasons for not complying, such as illness or other facts making compliance impossible. Furthermore, the principle of proportionality may require the member state to exhibit some flexibility. For example, if the third-country national fails to report to the authorities once, or once violates the obligation to stay in a certain place, this may not be enough reason to rescind the voluntary departure period, unless there are other objective indications that the third-country national will likely abscond.

In cases where no measures to prevent a risk of absconding have already been imposed, the possibility of cutting short the voluntary departure period must also lead to a consideration if such measures could still be imposed effectively. While the decision on the imposition of such measures would normally be made at the moment of the initial granting of the voluntary departure period, Article 7(3) allows such measures to be imposed "for the duration of the period for voluntary departure." This, in my view, does not exclude the possibility of imposing them later if the third-country national's situation changes. This would also be consistent with the obligation on member states to prevent absconding more generally, as well as the preservation of the priority of voluntary return if this can be done without undermining effective return.

82 See 10.4.2.2.

83 On the matter of undue pressure, see 7.3.4.

11.5 Conclusions

This chapter has focused on the various elements of the length of the voluntary departure period, both the one initially granted and questions of extension or cutting short that period. With regard to the initial period, it was found that it should be long enough to provide third-country nationals with an effective opportunity to return voluntarily. From this perspective, not every period of between seven and thirty days is 'appropriate' in the sense of the Directive. If member states choose to provide an initial period shorter than the upper limit of thirty days set out in Article 7(1), they can be expected to justify this choice on the basis of an assessment of what would realistically enable individuals to take all necessary steps, although this may be based on the assumption that they take all these steps with due diligence. Making such an assessment requires joint and reciprocal efforts from third-country nationals and member states. Third-country nationals should provide relevant information on, for example, evidence for readmission, travel documents, financial constraints, the need for assistance and personal characteristics and vulnerabilities. If such information is not provided, member states may more easily justify granting shorter periods. However, they can also be expected to exercise their own due diligence as regards the likely return times, including using their own insights, information from service providers, and the contents of agreements or arrangements on which the return will be based. The fewer the efforts made by member states in enacting this due diligence, the more they should incline towards a voluntary departure period of thirty days, taking into account all other relevant circumstances too. Member states should act on the presumption that a period of only seven days, or close to it, will normally be insufficient to meet the requirements of an 'appropriate' period. Decisions on the length of a voluntary departure period can also not be made purely on the basis of the prior legal status of the individual.

As regards extension, at a minimum this should be granted when this must be considered necessary, which is the case if the interests of the individual to have an opportunity to meet the obligation return voluntarily continues to outweigh the member state's interest in enforcing the return decision. Such necessity arises, first of all, when there is no evidence that the fact that return has not yet materialised at the end of the initial period is due to acts or omissions of the individual. If there is evidence of lack of due diligence, member states could still be expected to extend the voluntary departure period if they believe that voluntary return could be achieved within a reasonable period and the individual will still take the necessary steps. Furthermore, if enforcement of the return decision would disproportionately harm the rights of the person involved or family members, such as in respect of education of children, maintenance of family life, health issues or financial or business interests, an extension may still be necessary. In addition to taking account of what is realistically necessary for voluntary return, the length of the extension should also be based on the circum-

stances mentioned above, including those specifically listed in Article 7(2). Other elements, such as ensuring third-country nationals can leave to their preferred destination,[84] or the facilitation of the possibility of applying for a travel document with the widest possible scope,[85] should also be taken into account where relevant.

When a voluntary departure period has been granted, either initially or after an extension, this may only be cut short if there is a change of circumstances creating a risk to public policy, public security or national security, or a risk of absconding. In assessing this, all requirements set out in Chapter 10 should be observed. The mere fact that third-country nationals are not exercising due diligence or are uncooperative do not fall within the scope of Article 8(2) of the Directive and can therefore not be grounds for cutting short a voluntary departure period, unless there are specific circumstances related to such non-cooperation that would indicate a risk of absconding, such as non-compliance with measures to prevent this. However, cutting short a voluntary departure period must be proportionate and therefore not every instance of non-compliance, especially if it is unlikely to be repeated, can be sufficient to take this step. If a risk of absconding arises during the voluntary departure period, and no measures to prevent absconding have yet been imposed, member states must consider the efficacy of doing this before they can decide to cut short the period.[86]

84 See 7.2.
85 See 8.3.3.
86 In line with 10.4.6.

12 Conclusions

12.1 Introduction

This dissertation started by identifying the concept of voluntary return as a central but poorly understood element of the procedure for returning illegally staying third-country nationals from EU member states, as set out in Directive 2008/115 (the Returns Directive). According to the Directive, member states should give preference to voluntary return over removal and the use of coercive measures, to the extent that this does not undermine the purpose of the return procedure. The role of voluntary return is mainly to allocate responsibility for the successful conclusion of the return procedure to the individual, who is then required to take action to ensure his or her irregular stay is ended. It was noted that the formulation of the two component parts of voluntary return in the Directive, the obligation to return and the provisions on the granting, shortening or denying of a voluntary departure period, requires clarification on many points, and risks making the responsibility of the individual almost entirely open-ended. This further risks leaving the individual at fault for any situation in which return has not materialised and more generally could undermine the Directive's ability to provide for fair and transparent rules for return procedures.

On this basis, this dissertation set out to clarify the boundaries of the responsibility allocated to third-country nationals, as encompassed by the concept of voluntary return in the Directive. It specifically did so by breaking down the two above-mentioned component parts separately. This meant, first, in regard of the obligation to return, clarifying which actions third-country nationals can be expected to take to ensure they meet this obligation (*research question 1a*). And, conversely, whether there are any actions that third-country nationals cannot be expected to take, even if such actions would theoretically contribute to effective return. And if so, which actions this would comprise (*research question 1b*). Doing so further required focusing on certain types of (sometimes overlapping) actions that could be considered as crucial to the process of return: seeking readmission to another country (*return element (i)*); obtaining travel documents to enable return (*return element (ii)*); and making practical arrangements for return and leaving the EU member state (*return element (iii)*).

Second, this meant, in respect of the application of the voluntary departure period, clarifying the nature and extent of third-country nationals' entitlement to a voluntary departure period, in view of the priority of voluntary return and the specific exceptions to the granting of such a period

in the Directive (*research question 2a*). And additionally, clarifying how the provisions in the Directive regarding the initial length, extension and shortening of the voluntary departure period should be interpreted so that they give effect to the Directive's objectives (*research question 2b*).

I have argued that a proper understanding of the responsibility of third-country nationals can best be achieved by looking at it not only from the perspective of the relationship between these individuals and the EU member state that has issued the return decision. Rather, it requires bringing into the picture the key role of the country of return, without which no voluntary return can be achieved. I have framed this as a triangle of relationships, encompassing rights and obligations between the individual and the EU member state, the individual and the country of return, and the country of return and the EU member state. This brings into view not only the 'internal' dimension of the responsibility to return – the relationship between the individual and the member state – but also the 'external' dimension, through the other two relationships, which will impact on the achievement of voluntary return. As such, I have contended, the best understanding of responsibility for voluntary return is gained by ensuring the provisions of the Directive are read, as much as possible, consistently with that external dimension. The relevant rights and obligations, emerging out of EU law, customary law, international human rights law, and, to a lesser extent, multilateral treaties and readmission agreements (with a supporting role for 'soft law instruments) were discussed in Chapter 2, providing the legal foundations for the further analysis.

On this basis, the remaining chapters focused on the specific research questions. Their key findings are discussed below. This will start, in section 12.2, with a presentation of the conclusions in relation to research questions 1a and 1b on the scope of the obligation to return, and the three return elements considered crucial in this respect. In line with the extensive attention devoted to this in the preceding chapters, this will take up most of the rest of this chapter. This is followed, in section 12.3, by a shorter presentation of the findings in regard of research questions 2a and 2b, dealing with the entitlement to a voluntary departure period, and its appropriate length, respectively. Section 12.4, subsequently, presents some overall conclusions on the question of the boundaries of individual responsibility in the Directive. Combined, these conclusions provide the basis for 25 suggested guidelines, aimed at helping member states interpret this responsibility in a straightforward and accessible manner.

12.2 Conclusions on the obligation to return *(research questions 1a and 1b)*

The elaboration of the scope of the obligation to return has taken up the majority of the chapters in this dissertation. This is both due to its centrality to the understanding of the return procedure, but also because, despite

this importance, this obligation is hardly elaborated at all in the Directive. Rather, Article 3(3) simply refers to return as "the process of going back" in relation to three destinations: the country of origin, transit countries, and other third countries. While the attempt to clarify the scope of the obligation to return in principle encompasses two different issues – the actions that third-country nationals should take and those actions that they cannot be expected to take – these were discussed in tandem. The sources drawn upon in this analysis often contain rules that help elaborate both obligatory actions and limits upon them. Furthermore, when dealing with a nebulous concept like the obligation to return, it is particularly in the interaction between obligatory actions and their limitations that it can be given more solid form. As a result, they will be discussed together in the conclusions presented below. The conclusions will cover the three categories of action (or: return elements) which were identified as providing a minimum core for achieving successful return. First, seeking readmission to destination countries, which comprises a number of important issues to understanding the obligation to return (12.2.1). Second, obtaining travel documents (12.2.2), which may in many ways, such as in regard to contacting consular authorities, but also in relation to conditions to be fulfilled by the individual, overlap with the question of readmission. Nevertheless, it was suggested that, for analytical purposes, it would be useful to discuss them separately. And third, making practical arrangements for return and leaving the EU member state (12.2.3). In each case, the main findings as to the do's and don'ts for individuals are set out, as well as how these follow from the different relationships in the triangle model.

12.2.1 The obligation to seek readmission to destination countries *(return element (i))*

Of the three return elements identified, the obligation to seek readmission to destination countries has received the most extensive attention. This is because this element is foundational of the obligation to return and brings to light a number of issues crucial to the understanding of that obligation, and, ultimately, to the way in which individual responsibility for voluntary return should be regarded. First, this requires looking at the destinations set out in the Directive, since they will determine where third-country nationals should focus their efforts to return, including applying for readmission. Second, this raises the question whether there are specific obligations that third-country nationals must fulfil towards those destinations, since conditions for readmission may differ according to the relationship between the individual and each destination country. This, in turn, requires dealing with fulfilling readmission conditions vis-à-vis both countries of origin and transit countries.[1] And finally, this raises questions as to the way third-

1 But not other third countries, as discussed below.

country nationals can be expected to conduct themselves towards obligatory destinations, especially as regards destination choice and the avoidance of unsafe returns.

12.2.1.1 Obligatory destinations

As noted in Chapter 3, since the obligation to return is specifically defined in relation to three categories of destinations countries, any elaboration of this obligation must start with clarifying the meaning and status of each of these. In particular, it requires considering under which conditions third-country nationals can be expected to return to such destination countries or, in other words, when a particular destination is obligatory. This is, first and foremost, a question of the internal dimension of the return procedure, although it has important implications for the external dimension as well.

Purely based on the fact that the Directive defines return in relation to certain categories of destinations, and does so exhaustively, initial conclusions about the scope of obligatory destinations can be drawn. In particular, the principle of legal certainty requires that the obligation of third-country nationals to return can only encompass making efforts to return to, and seeking readmission in, countries that fit within one of these three categories in their individual case.[2] At first glance, this seems a purely theoretical constraint, since the three categories might be considered to cover all situations: if a specific country is neither a country of origin, nor of transit, it would still be 'another third country.' However, clarifications of the terms used, including the qualifications attached to the second and third categories, show that the scope of obligatory destinations is in fact surprisingly narrow.

The first destination, the country of origin, is not qualified. It might therefore be assumed that each third-country national has a country of origin, and thus at least one option for return. The Directive does not define this term, but it has been argued that a reading compatible with other legislative instruments in the area of asylum and migration is necessary, in particular the recast Qualification Directive, which defines it as any country of nationality or, for stateless persons, their country of habitual residence.[3] This means that third-country nationals can be required to return to any country where they hold nationality. However, the definition is mutually exclusive. Either a person has a nationality, and then the country of nationality is the 'country of origin' within the meaning of the Directive. Or the person is stateless, and then the 'country of origin' is the country of habitual residence. On this basis, a country of habitual residence of persons who hold nationality in another country is not part of the definition of 'country of origin' in the Directive. An obligation to return to such a country

2 See 3.1.
3 See 3.2.1.

of habitual residence can thus only arise if it falls within one of the other categories of obligatory destinations.[4]

This is different for stateless persons, for whom their country of habitual residence is indeed an obligatory destination. What constitutes 'habitual residence' in such a situation will have to be determined on an individual basis, taking into account the specific links of the individual with such a country. Short-term stay in such a country would clearly be insufficient to consider it a country of habitual residence, but neither will it be necessary that the individual lived in that country his or her whole life. In theory, even long-term residence without an official status could meet the requirement of habitual residence, although it was noted that in such cases gaining readmission may be even more complicated than it already is for stateless persons.[5]

While the clarification of 'country of origin' is purely a matter of EU law, it implicitly brings into view the external dimension. After all, while third-country nationals are expected to focus their return efforts on such a country, including seeking readmission there, the extent to which they can meet their obligations will crucially depend on whether that country will take them back. Therefore, this requires further consideration of the basis for readmission to such countries of origin. This is relevant in two ways. First, to establish any mismatches between the identification of a country as a 'country of origin' (and thus an obligatory destination in an individual's case) and any obligations to readmit incumbent on that country. Without readmission by the country of origin, meeting the obligation to return to such a destination would become practically impossible. And, it was suggested, the obligation to return can only encompass such obligations that third-country nationals, who act with due diligence and in good faith, can actually meet. Otherwise such an obligation would neither be able to contribute to the Directive's objective of effective return, nor would it be in line with the protection of fundamental rights.[6] And second, if such readmission obligations indeed exist for the country of origin, it is crucial to establish which conditions the individual should meet to trigger these obligations, as these will determine what can and cannot reasonably be expected of him or her.

The connection between the internal and external dimension is particularly clear when dealing with the second category of destinations defined in the Directive: transit countries. The obligation to return to such a country is qualified by the fact that this must be in accordance with EU or bilateral readmission agreements or arrangements. Without the existence of such agreements or arrangements – concluded between the EU or its member states and the country in question – no obligation to return can thus arise

4 See 3.2.2.

5 See 3.2.3.

6 In particular, third-country nationals could then be exposed to enforcement measures on the basis of a situation over which they did not have any control. Also see 1.3.1.

for third-country nationals under the Directive.[7] Furthermore, even when such agreements or arrangements are in place, their content may put further limits on the obligatory nature of this destination. While 'transit' should generally be considered to comprise any situation when a third-country national passed through a country, whether briefly or after a longer stay, the applicable agreements or arrangements may limit the scope of this concept. In most cases, EU readmission agreements only relate to situations of transit when third-country nationals have directly entered an EU member state from the country with which they have been concluded. Similarly, many exclude from their scope of application situations in which individuals have only transited through an international airport. As such, situations falling outside the scope of the applicable agreements cannot lead to obligations on third-country nationals to seek readmission to such transit countries.[8]

Additionally, further issues arise out of such agreements and arrangements. First, these have generally not been concluded with voluntary return situations in mind. However, at least theoretically, a number of such agreements (this is less clear for non-legally binding arrangements) could also be used in voluntary return situations, although this would require a specific intervention by the EU member state before any obligations on the individual are applicable.[9] Furthermore, not all agreements and arrangements may be substantively able to make return to a transit country obligatory. This depends on their ability to either bind that country under international law, or at least contain accessible rules on readmission that provide sufficient certainty for individuals as to the conditions to meet and the way to meet them. This would exclude, prima facie, agreements that only contain broad references to cooperation on readmission, those that do not specifically provide for readmission of non-nationals by the transit country, and secret arrangements.[10]

The third and last of the categories of destinations set out in the Directive, 'another third country,' raises the most questions in relation to its obligatory nature. It is qualified in two ways. First, by the requirement that the individual must be accepted there, which in itself seems to indicate any kind of consent to admit the person, and from that perspective is not a particularly onerous condition.[11] Second, however, the Directive states that it is necessary that the third-country national 'voluntarily decides' to return to such another third country. On the basis of the wording used in various language versions of the Directive, the drafting history of this provision, and other sources, such as the Return Handbook, it can be established that the phrase 'voluntarily decides' must be understood as making return to another third country an option for individuals, which member

7 See 3.3.1.2.
8 See 3.3.1.1.
9 Also see 12.2.1.3 below.
10 See 3.3.2.
11 See 3.4.2.

states should respect. But that it is not an obligatory destination.[12] As such, it must be distinguished from the other two categories, in that failure of third-country nationals to seek readmission to any country that does not fall within the scope of either a country of origin or a transit country cannot be considered non-compliance with the obligation to return. For this reason, specific conditions for readmission to other third countries were not further examined in the analysis.

In view of the analysis of the destinations set out in the Directive, it can thus be concluded that there is a clear obligation on third-country nationals to seek return to their country of nationality, to a country of habitual residence for stateless persons (but only for them), or, for all third-country nationals, regardless whether they are stateless, to any transit country meeting the conditions set out above. As such, the range of countries to which third-country nationals can be expected to seek readmission is indeed quite limited. This should prevent member states from expecting individuals to go 'embassy shopping,' and approach any country that could theoretically take them. Rather, it requires targeted efforts towards only a few destinations, which may sometimes be as few as one,[13] but would only exceptionally be more than two.[14] Nevertheless, when more than one obligatory destination exists, third-country nationals can be held responsible in relation to each of these.[15]

12.2.1.2 Specific obligations with regard to readmission to countries of origin

The matter of readmission to countries of origin was the subject of Chapters 4 and 5. In addition to establishing when a country of origin is an obligatory destination, clarification of the obligation to seek readmission requires establishing which conditions third-country nationals should meet to be taken back. This is a matter that is not at all clarified in the Directive, which could easily be assumed by member states to mean that third-country nationals can be expected to do "whatever it takes." However, the external dimension, in particular the obligations under international law of the country of origin, play a decisive role here. While states in theory have a large measure of discretion over whom to readmit, international law sets

12 See 3.4.1.

13 If no appropriate transit country can be identified, this would only be the country of origin.

14 A larger number might occur if the individual has more than one nationality and a transit country has been identified or, particularly exceptionally, if more than one transit country is obligatory, because for one of them the requirement of direct entry into the EU member state is not part of the relevant readmission agreement or arrangement.

15 This is without prejudice to the fact that, in principle, they can choose to pursue return to their preferred destination, see 12.2.1.4 below. A person who does not manage to return, despite his or her best efforts, to a transit country, if this is the preferred destination, can still be held responsible for not having made simultaneous efforts to return to the country of origin.

clear obligations on them to take back certain categories of persons expelled by other states. Working from the assumption that few states would agree to readmit persons when they are not required to do so under international law, this thus provides an important frame of reference for individuals' obligations under the Directive. Their obligation to return particularly translates into an obligation to trigger the country of return's international readmission obligations, so as to facilitate their de facto return. From the perspective of the country where readmission is sought, the fact that it is considered a 'country of origin' under the Directive may not mean much, as its readmission obligations are not defined in such terms. In line with the discussion above, consideration of these obligations must make a distinction between readmission requests from persons who hold nationality of the country, and those who are stateless but were habitually resident there.

As regards nationals, it is a central tenet of EU return policy that states have clear obligations under customary international law to readmit their nationals when they are expelled by another state. These obligations are considered, first of all, as a function of the sovereignty of states to control the entry and presence of foreigners. When these are expelled, responsibility thus falls on the country where they have the link of nationality. Such an obligation may be further buttressed by specific readmission agreements or multilateral treaties, which may clarify in particular the procedures and modalities for readmission, but it remains in force even when such instruments are not applicable to the country in question. Furthermore, the obligation of states to readmit nationals is often related to the individual right to return, as a matter of international human rights law. While questions may arise over how the inter-state (especially customary) readmission obligation and the readmission obligation under human rights law interact, generally this is a moot point, since the inter-state duty will have to be fulfilled regardless.[16]

In relation to this readmission duty, the most important point is that it is triggered as soon as sufficient evidence of the nationality and identity of the person expelled by the EU member state is provided. Translated to the obligation to return of third-country nationals under the Directive, this means that they are required to present to their country of nationality, accurately and in good faith, any relevant evidence of nationality and identity. Not all evidence will create equal duties on the presumptive country of nationality. Some forms will require immediate readmission, while others may only trigger a duty to investigate the readmission request further, if necessary through a personal interview. As such, third-country nationals can be expected to present the strongest evidence reasonably available to them, including by making efforts to obtain this, such as via family or other contacts, if this can be done without endangering the safety of the individual or such third parties. The obligation incumbent on third-country

16 See 4.2.1-4.2.4.

nationals also encompasses participating in an interview with the authorities of the country where readmission should be sought, if this is necessary for the successful completion of the readmission process.[17]

However, the fact that states' readmission duties can be triggered by evidence of nationality and identity also provides for a natural limit to the obligations of the individual. Such evidence is not only necessary but also sufficient to trigger the readmission duty. As such, during the readmission process there is no basis for countries of nationality to make any further demands that are not necessary for, or reasonably connected with, the establishment of the individual's nationality or identity. This would include payment of specific sums of money,[18] making statements about the reasons for going to the EU member state, or making declarations or apologies towards the country of return. Since this would fall outside the legitimate scope of demands by the country of nationality, an interpretation of the Directive consistent with the international law frameworks within which return must take place also prevents EU member states from requiring third-country nationals to meet such demands. Refusal of third-country nationals to acquiesce to such demands by the country of nationality, therefore, can thus not be regarded as non-compliance with the obligation to return.[19]

Conclusions about the readmission duties of states towards stateless persons who were habitually resident there are much harder to draw. This results from the lack of a clear rule in customary international law that states should readmit stateless persons based on their habitual residence. The absence of the all-important link of nationality plays a major role in this. While there may be a basis for readmission obligations in relation to former nationals who have subsequently become stateless, even this is not beyond dispute and might at any rate only apply to certain categories of former nationals, such as those purposefully deprived of their nationality.[20] This gap in the international readmission framework may be filled somewhat by specific readmission agreements, when applicable. In some cases, these may provide for readmission duties regarding former nationals, while in other cases stateless persons would be subsumed in the wider category of third-country nationals who, according to the specific conditions, may be readmitted on the basis of a residence right, a previously issued visa, or simply on the basis of their irregular entry into an EU member state.[21] However, in this respect it needs to be emphasised that such agreements hardly cover all countries of return. The Smuggling and Trafficking Protocols, the Chicago Convention and the FAL Convention may further provide for readmission obligations covering habitually resident stateless persons,

17 See 4.2.5.1.
18 Beyond relevant administrative fees for the issuance of documents, as discussed below.
19 See 4.2.5.2.
20 See 4.3.1.
21 See 4.3.2.

in particular those who still have an active residence right in the country, or for whom it can be established that they embarked on international transportation from that country. However, the extent to which these involve clear obligations of readmission, or rather only an obligation to give consideration to this, differs.[22] Readmission of stateless persons by their country of habitual residence may also be covered, to a very limited extent, by the 1954 Statelessness Convention, but this applies only to persons holding a travel document issued by that country that is still valid.[23]

As a result, it cannot be presumed automatically that the fact that a stateless person's country of habitual residence is identified as an obligatory destination under the Directive is matched by a clear readmission duty on the part of that country, at least in respect of the sources and instruments mentioned above. To the extent that applicable readmission frameworks can be identified in the individual case, however, stateless persons faced with a return decision can be expected to provide relevant evidence to the country of origin, in particular pertaining to former nationality, the links with the country in question, or (active or expired) residence rights. This may include the provision of documentary evidence, but EU member state should bear in mind the specific situation of stateless persons in this regard, who may never have been able to obtain documents like birth certificates, identity documents, military service booklets or other evidence because of their lack of nationality in the country of origin. As a general principle, in line with the obligations of third-country nationals when seeking readmission to their country of nationality, stateless persons should provide the strongest evidence reasonably available to them, but only demands necessary to satisfy the triggering of readmission obligations have to be met. Meeting demands that are not necessary to trigger the country of origin's readmission duties thus falls outside the obligation to return imposed by the Directive.[24]

The gaps in readmission duties vis-à-vis stateless persons bring into view the above-mentioned possibility of the individual right to return, particularly as guaranteed by the ICCPR, as a means to ensure readmission to the country of origin. According to the case law of the HRC, the right to return, and thus the associated duty of states to readmit, extends beyond just persons who hold the nationality of a state. Rather, it pertains to all situations in which a country can be considered as an individual's 'own country.' The latter involves an assessment of the specific links with that country, including long-standing residence, close personal and family ties and intentions to remain, as well as the absence of such links elsewhere.

22 See 4.3.3.

23 See 4.3.4.1. Furthermore, since the 1954 Statelessness Convention can be considered a human rights instruments, questions may arise as to the extent that third-country nationals can be compelled to make a claim to readmission on this basis, as discussed below.

24 See 4.3.5.

When a country is the person's 'own' in this way, strong readmission duties result for that country. These have been considered "virtually absolute" and a person seeking to return to his or her own country would thus have to be granted readmission, except in the most exceptional circumstances, which may have to amount to a situation in which the country has to derogate from its duties under the ICCPR altogether.[25]

The right to return also clearly pertains to persons who hold the nationality of a country.[26] As noted above, normally the human rights-based obligation to readmit of countries of nationality is not particularly important, because strong inter-state frameworks for readmission exist. Nevertheless, there may be circumstances in which these inter-state frameworks are not effective. In addition to cases where countries of origin simply ignore their international obligations, certain exceptional situations were identified in which this ineffectiveness may arise. It was suggested that this may be the case, for example, when the country of nationality considers the EU member state's decision to expel a person unlawful.[27] It could also arise when countries of nationality can present justifications that would preclude their responsibility for the wrongful act of not meeting their readmission obligations. This could be relevant when non-readmission results from *force majeure*, when this is done as a countermeasure against a wrongful act by the EU member state, or when a state of necessity arises. While these situations in relation to readmission are mostly theoretical, it was suggested that *force majeure* or necessity could arise, for example, in cases of natural disasters, conflict or post-conflict situations, or when faced with major health crises, such as the COVID-19 pandemic.[28] Furthermore, in relation to the duty to readmit under customary international law, its unwritten nature, and some remaining unclarity about its precise scope, may also lead to diverging views between the EU member state and the country of nationality as regards the extent of latter's legal obligations.[29]

If this is the case, the individual right to return may be able to fill the gap left by ineffective inter-state obligations. The triangle model shows, however, that the obligations arising out of human rights and inter-state frameworks are not the same, since the former are owed by the country of origin to the individual, while the latter are owed by the country of origin to the EU member state. In case of the right to return, this right is thus held by the individual, and not by the EU member state.[30] However, it has sometimes been suggested that, because they are under a legal obligation to return, third-country nationals can be expected to make an appeal to their individual right to return if this would facilitate their readmission,

25 See 4.3.4.2.
26 See 4.2.4.1.
27 See 5.2.1.
28 See 5.2.2.
29 See 5.2.3.
30 See 4.2.4.2.

and thus aid the fulfilment of their obligation to return under the Directive.[31] Such situations may particularly arise when countries of origin ask third-country nationals for a declaration that they are willing to return and refuse to cooperate in return without such a declaration. Such a declaration could be seen as acknowledgement that the individual is seeking to exercise his or her right to return.[32] However, it was argued that neither the purpose of human rights,[33] nor positive law – especially the case law of the ECtHR[34] – support the idea that EU member states can legitimately compel individuals to exercise their right to return against their will, even if this would result in the fulfilment of the obligation to return. Such a forced exercise of the right to return would amount to an unlawful interference with the individual's fundamental rights. As a result, EU member states are precluded from considering the refusal of third-country nationals to make such declarations, and to invoke their right to return, as non-compliance with their obligations under the Directive.[35]

This outcome has implications for the effectiveness of return, especially in those cases where countries of origin only facilitate returns on the basis of the declared willingness of the individual to return, and do not cooperate in removals. However, the requirement of effective return is subject to the respect for the third-country national's fundamental rights in the return procedure. Furthermore, the relevant question, from the perspective of the triangle model, is not necessarily whether individuals can be compelled to exercise their rights, but whether countries of origin are justified in limiting readmission to cases in which the individual declares to be willing to return. This would arguably undermine the international system of expulsion, which by definition deals with situations in which individuals are compelled to leave a state against their will. As such, this question is more appropriately regarded as one of the country of origin's responsibilities vis-à-vis the EU member state, and thus needs (political) solutions between them. Asking a third-country national to use his or her right to return to ensure effective expulsion would ignore, and potentially weaken, the responsibility of the country of return. And in the process it may undermine the idea that it is not just the individual who carries responsibility, but that each actor does so – and that a fair and transparent return process locates each of these responsibilities where they belong, rather than making the individual responsible for the acts of others.

31 See 5.3.2.
32 See 5.3.1.
33 See 5.3.3.
34 See 5.3.4.
35 See 5.3.5.

12.2.1.3 Specific obligations in relation to transit countries

Besides the country of origin, transit countries may constitute obligatory destinations under the conditions set out earlier. Readmission to such countries was discussed in Chapter 6. From the perspective of the transit country, readmission obligations may differ according to the specific legal frameworks in place. This also means that the individual's obligations under the Directive will differ, since these are bound up with the fulfilment of conditions for readmission set out in those frameworks. Furthermore, those frameworks impact on the Directive in two ways. First, when it comes to EU readmission agreements and some multilateral treaties, such as the Smuggling and Trafficking Protocols, they have an effect on the interpretation of the Directive because they have been concluded or ratified by the EU, and are thus binding in EU law. But secondly, because, as discussed above, such agreements and arrangements, regardless of their binding nature in EU law, are an integral part of the definition of the destinations of return. In this case, even more so than with returns to countries of origin, the external dimension can directly be translated to the internal dimension of the Directive.

Given the diversity of possible frameworks, the discussion in Chapter 6 primarily focused on EU readmission agreements. While there are questions about the extent to which they are used in practice to enable voluntary returns, such use is not excluded by the provisions of the Directive.[36] However, this would depend, at a minimum, on the EU member state making a specific request or notification to the transit country. Third-country nationals themselves cannot independently make an appeal for readmission on the basis of such agreements.[37] Successfully triggering readmission obligations of transit countries based on EU readmission agreements generally depends on the provision of evidence in relation to two issues. First, evidence that the third-country national irregularly entered or stayed in the EU member state, which is most easily satisfied by evidence of absence of legal stay.[38] And second, evidence of an appropriate link to the transit country, which may be in relation to the individual holding a visa or residence permit in the transit country, or due to having used the transit country as a route to enter irregularly into the EU member state.[39] EU readmission agreements provide for extensive lists of evidence that should be supplied to show the conditions for readmission are met. These lists may differ considerably from one agreement to another, and so it is necessary to establish in each individual case what means of evidence will be accepted. Furthermore, not each form of evidence listed will trigger the same obligations on the transit country. Some types of evidence trigger

36 See 6.2.1.
37 See 6.2.4.
38 See 6.2.2.1.
39 See 6.2.2.2. Although further exceptions might apply, see 6.2.2.3.

an obligation to readmit without further investigation, while others may trigger a rebuttable presumption of readmission, or even only an obligation to investigate further.[40]

While the primary responsibility for return lies with the third-country national, EU member states may submit to transit countries readmission requests or notifications that set the readmission process in motion without needing the individual's consent.[41] This also implies that the member state can expect cooperation from the third-country national in ensuring the appropriate evidence for eligibility for readmission can be presented to the transit country. Third-country nationals can be expected to provide, in principle, whichever evidence reasonably available to them that would trigger the strongest readmission obligations on the transit country. But this again is limited to what is necessary for readmission. Due to the diffuse nature of the means of evidence and the concomitant readmission obligations in EU readmission agreements, this requires a case-by-case assessment. This is particularly the case because, according to various agreements, readmission obligations may even be triggered when not all relevant information is submitted. As such, when assessing whether third-country nationals have met their obligation to provide evidence or information for readmission, EU member states must take into account the extent that non-provision of certain information has indeed impacted negatively on the outcome of the readmission process.[42] Furthermore, since readmission can only be triggered by the EU member state, its failure to do so negates the individual's obligations as regards this destination – unless this is due to the third-country national neglecting to provide sufficient evidence.

Under multilateral instruments, readmission obligations may also exist when third-country nationals hold residence rights in transit countries, or if they embarked there. In the latter case, however, this would normally apply to persons considered inadmissible in the EU member state, which may lead to them being excluded from the scope of the Directive.[43] Furthermore, neither the UN Smuggling and Trafficking Protocols nor the Chicago or FAL Conventions provide for clear procedures to be followed, and questions as to the ability of third-country nationals to invoke them directly may arise. However, to the extent that readmission under any of these instruments would be possible in practice in the individual case, making an application, or cooperating with the EU member state to submit such an application on their behalf, could fall within the scope of third-country nationals' obligations.[44]

40 See 6.2.3.

41 See 6.2.5.1. Whether the individual eventually chooses to use this option or rather return to his or her country of origin is another matter, see below.

42 See 6.2.5.2. While not analysed here in detail, to the extent that bilateral readmission agreements contain similar provisions to EU readmission agreements, the same principles as discussed above would apply.

43 RD Article 2(2)(a) and see discussion in 1.2.1.3.

44 See 6.3.

Finally, while the Directive considers non-binding arrangements as an appropriate basis for an obligation to return, their applicability to voluntary return situations – both in the abstract and in practice – may not be immediately obvious. This would depend, at a minimum, on those arrangements providing for clear procedures and guarantees for readmission of non-nationals, which are accessible and provide sufficient certainty about the status of the individual once readmitted. It was noted that such arrangements at the EU level usually already fail to meet the basic requirement that they cover persons who are not nationals of the country with which they have been concluded, although this could be different for bilateral arrangements, which were not analysed. Considering the uncertainties involved, it was considered appropriate to reverse basic assumptions about the effectiveness of readmission and the responsibility taken for returnees by the transit country, which are normally implied in legally binding agreements. This is especially the case because non-binding, more informal arrangements are less likely to be subject to judicial, democratic and public scrutiny. As such, it was suggested that EU member states should show the existence of appropriate safeguards connected to such arrangements before any obligation on third-country nationals to seek readmission on this basis can be imposed. If such conditions are in place, third-country nationals can be expected to make efforts to meet the conditions for readmission, which may be more widely defined than in formal agreements, although this should still be subject to the condition that these do not result in illegitimate requests (as discussed in relation to travel documents) and that they are not discriminatory.[45]

12.2.1.4 Choice of destinations and avoiding unsafe returns

After having identified obligatory destinations, and setting out specific obligations of third-country nationals in seeking readmission to them, one more set of issues remains. This relates to questions of choice between, and safety of, those destinations where third-country nationals should seek readmission, a matter discussed in Chapter 7.

The first point, choice of destinations, may arise not only when there are multiple obligatory destinations, but also if there would be viable possibilities to return to another third country, which must be preserved as an option for third-country nationals. While this option cannot be enforced, it should generally be open to individuals as a means to meet the obligation to return. The possibility to choose between different destinations follows logically from the fact that the third-country national is made primarily responsible for return, which would also imply freedom in this respect. However, for reasons of administrative convenience, speed of the return process, or concerns that effective return to the individual's preferred desti-

45 See 6.5.

nation may not materialise, member states may have their own preferences. And they may thus attempt to issue instructions or impose restrictions on third-country nationals in this respect, including by withholding certain confiscated documents that individuals need to pursue return to their preferred destination.[46]

Beyond the general idea of the autonomy implied in voluntary return, there are no clear provisions regulating destination choice in the Directive. The extent to which freedom of choice is legally guaranteed in expulsion proceedings under customary international law is a matter of debate in the literature. Perhaps the clearest outcome of this is a weak duty on EU member states to allow individuals to put forward their preferences, but with a lot of discretion for those states to decide whether to follow this preference.[47] However, further protections of the right to choose a destination arise out of human rights instruments, especially the right of everyone to leave any country, including his or her own, enshrined in the ECHR and ICCPR. The choice of destination is part of the legal guarantee provided by this right, which needs to be respected by member states even when a return decision has been issued. This means that any interference with the right to choose a destination, including through the withholding of documents, must be set out in law, justified as necessary to protect national security, public order, public safety, public health or morals, the prevention of crime or the protection of the rights and freedoms of others, and furthermore be proportionate. It was argued that, provided that return can still take place within the voluntary departure period, considerations of speed and convenience on the part of member states cannot provide sufficient justification in this respect.[48] Additional and increased protection of destination choice is in place when the third-country national prefers to return to his or her own country. Given the above-mentioned strong protection of this right, member states are generally precluded from preventing third-country nationals from trying to return to such a country, or from otherwise interfering with their attempts in this regard.[49]

If third-country nationals prefer to return to a transit country, the fact that triggering readmission procedures normally requires an intervention by the member state raises specific questions about the cooperation between the individual and the EU member state. Whereas the member state can trigger such obligations without the consent of the third-country national, the reverse situation may also be relevant: when the EU member state does not take action to submit a readmission request but the third-country national prefers to return to a transit country. In such a case, the duty on the member state to ensure effective implementation of the Directive's objectives results in an obligation to take action to facilitate the voluntary

46 See 7.1.
47 See 7.2.1.
48 See 7.2.2.
49 See 7.2.3.

return to a transit country by submitting a readmission request, as long as the third-country national provides the appropriate evidence for this.[50]

As regards the second point, safety of return, this can be considered an additional requirement to make a destination obligatory. As a general principle, returns under the Directive must be achieved in a manner that respects the safety and dignity of the individual, which is particularly grounded in the principle of non-*refoulement*. At first glance, it is not immediately clear what added value the reference to non-*refoulement* in the Directive has. In theory, any risks related to return should have been assessed during the admission or expulsion procedures leading to the return decision, which then sets the stage for the Directive's further steps. However, the additional safety net of *refoulement* in the Directive may be relevant when persons are excluded from protection or rejected on admissibility grounds during the asylum procedure, if access to asylum procedures is not effective, or if persons otherwise avoid such procedures.[51]

This raises further questions about the relationship between the EU member state and the individual with regard to safe returns and preventing *refoulement*. When the member state removes an individual, this clearly triggers its non-*refoulement* obligations. But during voluntary return procedures, it is the individual who takes steps towards return, which may also involve subjecting him or herself to unsafe situations. Is this then the responsibility of the individual, who makes this choice, or the member state, which is the addressee of the prohibition of *refoulement*? In this respect, it must first be noted that the fact that individuals take up voluntary return to a specific destination is not, in and of itself, a guarantee that they consider this a safe return. Both circumstances in the country of return, such as in respect of family members, and problems faced in the member state due their irregular status, may give rise to individuals accepting voluntary return even when clear risks in the destination country exist.[52] Second, the case law of the ECtHR acknowledges that voluntary return in the sense of the Directive cannot constitute a waiver of the right to be protected against treatment in violation of Article 3 ECHR, because the legal obligation to return and subsequent threat of enforcement do not provide for a context in which such a waiver would be given of the individual's free will, unequivocally and with safeguards commensurate with the importance of this right.[53] As such, member states, which must provide protection at least equivalent to that enshrined in Article 3 ECHR when implementing the Directive, can only be released from their obligation to protect third-country nationals from *refoulement* when return is truly voluntary in the common sense of the word, and not if this is simply the result of compliance with an obligation to return as under the Directive. The obligation of the member state to

50 See 7.2.4.
51 See 7.3.1.
52 See 7.3.2.1.
53 See 7.3.2.2.

prevent *refoulement* thus remains intact even in voluntary return situations, and as a result they cannot expect third-country nationals to take steps that would lead to their return to situations where they would face a real risk as covered by the principle of non-*refoulement*. This is in line with the overall nature of voluntary return as a form of expulsion.

When multiple obligatory destinations are available in the individual case, the fact that one of these is unsafe does not necessarily negate the obligation to return completely. However, when only one obligatory destination can be identified, and return, even voluntary, would violate the prohibition of *refoulement*, this would overrule the obligation to return. The obligation to prevent such 'voluntary *refoulement*' also applies to risks of so-called chain *refoulement* from transit countries, or in case the destination itself is safe, but no safe travel routes to get to that destination exist.[54]

Despite the clear applicability of the prohibition of *refoulement* to voluntary return situations, putting this into practice in the context of the Directive may not always be easy, given that it does not concern itself with the substantive reasons why a person should return, and because its procedural safeguards against *refoulement* are limited, mainly focusing on postponement of enforcement. This represents a structural gap in the Directive's architecture. However, some ways to ensure more adequate protection during the voluntary departure period have been suggested. This includes ensuring that the freedom to choose between destinations is fully protected and that *refoulement*-related concerns override any other considerations by the member state to justify interference with this choice. Additionally, a 'negotiated' expulsion, in which the EU member state and the individual come to a common understand of which destinations are viable in the specific case, can provide clarity by ensuring that all those destinations are assessed in view of the principle of non-*refoulement*. It also avoids leaving the third-country national with an obligation to go "anywhere but here." Similarly, member states should actively engage with third-country nationals' concerns about unsafe travel routes, and work with them to see if viable alternatives exist, rather than leaving this up to the individual alone. Finally, member states should avoid putting undue pressure on third-country nationals during the voluntary departure period. This is true in general, but also specifically applies to ensuring that third-country nationals do not subject themselves to unsafe situations, and to member states having to take responsibility for the postponement of removal. This may, in effect, create a 'right to be removed.' While the notion of 'undue pressure' would need to be further elaborated, the Directive's text appears to specifically preclude member states from preventing access to emergency health care or essential treatment, or depriving children from access to basic education, as means to pressure third-country nationals into returning voluntarily. Similarly, enforced family separation or measures amounting

54 See 7.3.3.

to deception (including misinformation or false promises of support) would almost certainly fall into this category of undue pressure. Further consideration would be necessary of the extent to which threats of detention, and particularly the deprivation from, or limiting access to, basic services such as shelter and food, would be unlawful ways to 'encourage' voluntary return.[55]

12.2.2 The obligation to obtain travel documents *(return element (ii))*

While most attention was paid to the question of destinations and readmission, a second category of actions was identified as crucial to compliance with the obligation to return: obtaining travel documents. This was the focus of Chapter 8. The need to obtain travel documents obviously does not apply to cases in which third-country nationals already have such documents. In such cases, questions may however arise when travel documents have been taken into custody by the EU member state. While possibilities to do so during the asylum procedure are included in EU law, such powers of confiscation as part of the return procedure are largely lacking in the Directive, apart from when this can be justified as a necessary measure to prevent absconding. As such, in other cases, it is questionable that member states can justify keeping a third-country national's travel documents, the possession of which is protected by the right to leave. Although national rules may foresee in this possibility, this would arguably amount to less favourable treatment than the Directive allows.

The other instance in which obtaining travel documents is outside the obligation to return is if such return is possible without them. This would only be so in exceptional circumstances, especially since possibilities for international travel are very limited when no appropriate documents can be presented. However, certain EU readmission agreements and the Chicago and FAL Conventions make some provisions on travel without official travel documents, in the context of return and readmission.[56]

If the above-mentioned situations do not apply, the obligation on third-country nationals to obtain travel documents must be considered as implied in the overall obligation to return. This includes making an application for renewal or replacement of travel documents with an authority competent to issue them. This, however, must be compatible with EU rules on asylum, especially the prohibition of exchanging information with authorities of the country of origin while an asylum request has not yet been finally decided. In most cases, the application for travel documents will overlap with the application for readmission. Countries of nationality, under customary international law, and transit countries, under EU readmission agreements, both have obligations to issue travel documents to make readmission

55 7.3.4.
56 See 8.2.

possible. In such cases, the conditions to be fulfilled to obtain travel documents cannot be broader than those relevant to readmission, with the exception of administrative necessities – such as the provision of a photograph for the document – and, where applicable, the payment of fees. In line with the discussion about readmission, meeting any demands not directly connected to this cannot be part of the obligation to return imposed by the Directive.[57]

However, the third-country national may also decide to turn to the authorities of the country of nationality when this is not the intended destination. This follows from the fact that the right to leave also guarantees a right to travel documents giving the broadest possibility of international travel, normally a passport, regardless of the intended destination or even a particular intention on the part of the individual to travel. Obtaining such a document may be crucial for third-country nationals to act on their possibility to return to another third country, which may not be authorised to issue travel documents itself. It may also put the third-country national in a more advantageous position when returning to a transit country. Countries of nationality can only refuse to issue passports in exceptional circumstances.[58] EU member states must not normally interfere with the attempts of third-country nationals to obtain a passport, rather than a one-off travel document for the destination state (such as a *laissez-passer* or emergency travel document) unless they can justify this sufficiently.[59] However, their positive obligations to facilitate the third-country national's attempts to obtain a passport may be more limited. Such limits may relate, for example, to the extent to which return assistance programmes cover costs of travel documents beyond the least costly option (which will normally be a *laissez-passer* or emergency travel document). When obtaining a passport takes longer, the right to apply for it may also be a factor to take into consideration by member states when deciding about the length and extension of a voluntary departure period, which will have to be weighed against other relevant circumstances.[60]

For stateless persons it might be assumed that the country of habitual residence acts as a surrogate in the absence of a country of nationality that can issue travel documents. However, obligations to issue or renew travel documents under the 1954 Statelessness Convention are very limited. They mainly encompass situations where the stateless person still has an active residence right in that country. If the country of return is a transit country, and the relevant agreements in place connect readmission to the issuance

57 See 8.3.1.

58 The example of failure to perform military service was mentioned. However, in such cases, they should still facilitate any request to be readmitted to the country of nationality itself, though such readmission can be effected on the basis of a one-off travel document only valid for return.

59 On the same grounds as already discussed above in relation to other interferences with the right to leave.

60 See 8.3.3.

of travel documents, this will also apply to stateless persons, since they are part of the general category of non-nationals covered by such agreements.[61]

Effective access to the consular authorities of a state competent to issue travel documents is a key issue in obtaining these documents. Without such access, third-country nationals will often be unable to fulfil this part of their obligation to return. Flowing from the provisions of the Vienna Convention on Consular Relations, EU member states are prohibited from preventing such access. In the context of return procedures, the Vienna Convention, the right to leave and the obligation on the member state to ensure the *effet utile* of the Directive all coincide to require specific action by member states to make access possible in certain situations. This is particularly the case when third-country nationals are subject to measures to prevent absconding during the voluntary departure period. EU member states are then under obligation to make their best efforts to help third-country nationals overcome barriers to contact with consular authorities, for example through the temporary lifting of measures or facilitating visits by consular authorities to the third-country national where he or she is staying. Further facilitating action by the member state may be necessary if the consular functions of the state competent to issue travel documents are exercised from the territory of another EU member state, and no alternatives for direct contact are available. This may again require ensuring such authorities can reach the third-country nationals in the member state where he or she is staying. Or making arrangements with the member state where the consular premises are located, so that the third-country national can temporarily travel there without falling foul of EU rules on irregular stay.[62]

When a personal interview with the consular authorities is necessary for the issuance of travel documents, participating in such an interview, as well as providing truthful and accurate information, is part of the third-country national's obligations.[63] Furthermore, as mentioned above, third-country nationals can be expected to meet administrative requirements necessary for that purpose.[64] However, this is limited, first and foremost, to requirements that the competent authorities can legitimately impose based on their own international obligations. In this respect, the question of fees is a particular point of attention. Customary international law limits the scope of demands for fees to those that are reasonable, while other instruments, such as the Chicago Convention, provide that these fees should not normally exceed

61 See 8.3.4.

62 See 8.4.1.

63 While the obligation to obtain travel documents cannot be effective without also implying an obligation on the individual to provide truthful and accurate information, this does not mean that compliance with this element will be easy to assess for member states. See, in this regard, the characterisation of interactions between the individual and the consular authorities of the country of return, as seen from the perspective of the EU member state, as a black box in 12.4.2 and footnote 111.

64 Although in some areas, such as the payment of fees, they may be able to rely on assistance, see below.

the cost of the operation required for it. Additionally, the Vienna Convention provides than any fees levied for consular acts, which includes the issuance of travel documents, must be set out in the laws and regulations of the state. This implies that any demands for fees not explicitly regulated, not reasonably connected to the process of issuing them or otherwise unreasonably high would be prohibited. Here again, the matter of ensuring that responsibilities of one actor (in this case the country of return) are not unduly shifted to another (the third-country national) comes into play. A consistent application of the Directive with international frameworks would prohibit member states from requiring third-country nationals to pay fees which are in violation of the country of return's obligations. As such, when confronted with clearly unreasonable or unregulated fees for travel documents, the refusal of third-country nationals to pay these cannot be considered by the EU member state as non-compliance with the obligation to return.[65]

Limits on such expectations also arise directly out of the EU member state's own obligations under international law, in particular CTOC. CTOC requires EU member states to act to prevent and combat corruption, which involves any situation of solicitation or acceptance by a public official, directly or indirectly, of an undue advantage so that that official acts or refrains from acting in the exercise of his or her official duties.[66] While not much is known about corruption in the process of readmission or the issuance of travel documents in expulsion proceedings, there are certain indications that the risks may be quite high, especially in relation to certain countries of return. A consistent approach to member states' obligations to combat corruption would also encompass that they do not contribute to this in the course of return procedures. As such, member states cannot consider the refusal of third-country nationals to meet demands that would amount to corruption as a failure to comply with the obligation to return. Turning a blind eye to signals that corruption is part of the process of obtaining travel documents, and worse still, implicitly or explicitly expecting third-country nationals to accommodate corruption, would clearly be in violation of the spirit and letter of EU member states' obligations, not to mention the dignity of the individual.[67]

A related issue is the prevention of procurement and use of fraudulent travel documents. Again, this involves the obligations of EU member states, both under the Smuggling Protocol and the Chicago Convention, to prevent the spread and use of such documents. Despite the need to ensure effective return, member states cannot allow third-country nationals to meet their obligation to return by leaving their territories using documents known to be falsified or fraudulently obtained. Similarly, member states cannot

65 See 8.4.2.

66 CTOC Article 8(1)(b).

67 See 8.4.2. Apart from monetary demands this would also cover the solicitation of "undue advantage," including, for example, sexual favours.

require or encourage third-country nationals, explicitly or tacitly, to try and obtain travel documents through processes or channels that risk producing false or fraudulent documents, even if this is the only way to achieve voluntary return.[68]

Finally, in relation to the obligation to obtain travel documents, third-country nationals may be expected to turn to the EU member state to obtain travel documents in certain circumstances. This, however, will require active cooperation from the EU member state, for example by informing stateless persons about any applicable possibilities to issue a travel document under the 1954 Statelessness Convention. The use of a so-called EU travel document is also recognised as a basis for return and readmission in certain EU readmission agreements and has been incorporated in certain non-binding arrangements on return. However, while it may facilitate return in practice, such an EU travel document is not an internationally recognised travel document, and questions may thus arise about the position of third-country nationals returning on this basis, especially if they do not return to their country of origin. In this respect, EU member states should ensure that appropriate guarantees of readmission and of the treatment of those returning based on these EU travel documents are in place before expecting third-country nationals to use them for voluntary returns.[69]

12.2.3 The obligation to make arrangements for departure *(return element (iii))*

The third and final category of actions to fulfil the obligation to return, discussed in Chapter 9, is making practical arrangements for such return and, eventually, leaving the EU member state. In this regard, third-country nationals may first have to meet exit requirements when leaving. While EU member states have a clear interest in seeing third-country nationals leave, they must also observe other requirements, such as in relation to the protection of the rights of others as well as EU rules on the control of external borders. In relation to the former, barriers to departure can include remaining available for pending criminal proceedings, the payment of outstanding taxes, the fulfilment of financial obligations to others, or preventing a parent from taking children out of the country without consent of the other parent. These were not discussed in detail but it was noted that each of these has been recognised by international (quasi-)judicial bodies as potentially legitimate interferences with the right to leave. To the extent that third-country nationals have control over such situations, they can be expected to make efforts to settle any matters preventing their legitimate departure. Where necessary, this requires positive cooperation by the EU member state, including in considering the extension of the voluntary departure period if such matters cannot reasonably be resolved within

68 See 8.4.3.
69 See 8.5.

the initial period granted.[70] Another set of exit requirements relate to the crossing of external borders. These may further limit the choices of third-country nationals about how they leave the EU member state. On the basis of the SBC, member states must ensure, for example, that external borders are only crossed at official crossings during fixed opening times, and that third-country nationals leaving are subjected to thorough checks, which include the verification of travel documents. While these do not seem particularly onerous requirements, and will normally be met by third-country nationals returning voluntarily easily, they may limit the possibilities, for example, for third-country nationals' discretion to determine how to leave, especially when returning over land. Considering the Directive's role as a development of the Schengen acquis, the obligation to return also implies that third-country nationals do not meet their obligation to return in violation of any of these exit requirements.[71]

A second issue of note is the interaction between the obligation to return and the availability of return assistance. Virtually all EU member states provide access to AVR(R) programmes to facilitate voluntary return in a variety of ways. Such programmes could have a positive effect in stimulating third-country nationals returning voluntarily, and in some cases may be crucial to make this possible, especially when third-country nationals do not have sufficient means to organise travel documents or transport themselves. While there is a clear interest of member states in promoting the use of AVR(R) programmes, there may also be reasons, whether budgetary or for fear of abuse, to limit access to such programmes. From this perspective, the question arises whether the existence of such programmes, in combination with the fact that third-country nationals are under a legal obligation to return, results in a right to receive return assistance. The current Directive does not provide for such a right explicitly,[72] but it acknowledges the role of such assistance in ensuring effective return. The CJEU's case law on ensuring the effective implementation of the Directive can also be interpreted as requiring EU member states to provide some forms of facilitation, both to ensure effective return and to uphold the priority of voluntary return. From this perspective, a right to receive return assistance may arise, but only in those circumstances that assistance programmes already exist, and assistance is necessary to ensure a successful return. From this perspective, this right would encompass assistance in areas essential for de facto return, such as travel documents and transport, if third-country nationals cannot cover this. However, a concomitant right to other assistance, especially post-return reintegration assistance, cannot be deduced on this basis. Nevertheless, to the extent that this is strictly necessary to ensure that they can return voluntarily and effectively, such a right should also extend to individuals normally excluded from AVR(R) programmes, such as may be

70 See 9.2.1.
71 See 9.2.2.
72 Although in the recast proposal this appears to change.

the case for persons having enjoyed visa-free travel to EU member states. At the very least, any refusal of assistance in such a situation would have to be objectively justified – for example in relation to the risk of abuse – and be proportionate.[73]

The question of return assistance must also be considered from the other side. If a third-country national has not returned within the voluntary departure period, can his or her failure to seek assistance be taken as non-compliance with the obligation to return? As a general point, this is not the case, since individuals are free to arrange their departure of their own accord, with assistance being optional. However, in individual cases it may be established that the lack of seeking assistance was a deciding factor in the non-return. In line with the discussion above, such a situation potentially arises if the third-country national does not have the means to pay for transport and AVR(R) programmes provide for this. Then, the third-country national could be considered to not have made the necessary efforts to achieve voluntary return. However, this issue is more problematic when dealing, for example, with the mediation services that the EU member states' authorities in charge of return, or organisations such as IOM, offer in obtaining travel documents. If such organisations are involved, consular authorities of countries of return may be more willing to issue documents, including on the presumption that this signifies that the individual is willing to return.[74] However, since the obligations of countries of return to readmit and issue travel documents for this purpose do not depend on the willingness of the individual to return, there may be questions whether such countries are justified in only providing documents when such mediation is involved. As discussed above, any non-cooperation with returns because these are not based on the willingness of the person involved is a matter, first and foremost, of the legal relationship between the country of return and the EU member state. For this reason, it may be more difficult to justify that not asking for mediation should be considered as non-compliance by third-country nationals with their obligation to return.[75]

A final point in relation to departure from the member state is the question when exactly the third-country national has actually met the obligation to return. Is this when he or she has left the territory of the EU member state or upon return in the destination state? The definition of return in the Directive suggests the latter, but other provisions tentatively point to the former. Using the arrival of the third-country national in the destination state as an indicator of compliance is most compatible with the obligation to return

73 See 9.3.2. It was also noted that the exclusion of certain nationalities from return assistance may raise questions of compliance with non-discrimination standards, but this falls outside the scope of the analysis undertaken in this dissertation.

74 But see the discussion in 12.2.1.2 above on issues of willingness.

75 See 9.3.3. But also see the discussion of readmission to transit countries, where mediation by the EU member state is a necessary condition, so in such cases refusal to cooperate preventing such mediation may amount to non-compliance.

under the Directive, but there may be a number of practical difficulties for member states to ensure that this result has been achieved, especially if third-country nationals return without assistance. Neither self-reporting schemes nor the possibility of applying for the lifting of an entry ban are fool-proof ways of doing this.[76] Member states may have better ways to verify departure at their external borders. But if the criterion is leaving the territory of the EU member state, this would leave open the possibility of third-country nationals meeting the obligation imposed by the return decision by moving irregularly to another member state, which was clearly not intended by the co-legislators. In this respect, the way the return decision is formulated in the Directive does not guarantee it has a European or Schengen-wide effect. Such an effect only comes into force with the imposition of an entry ban. While this does not affect the scope of the actions third-country nationals can and cannot be expected to take in complying with their obligation to return, it does amount to a gap in the Directive's ability to provide for a truly European return system.[77]

12.3 The application of the voluntary departure period *(research questions 2a and 2b)*

This section discusses the findings in relation to the second set of research questions, dealing with the application of the voluntary departure period. Like the obligation to return, the voluntary departure period forms a crucial part of the overall notion of responsibility inherent in voluntary return. It is only by virtue of giving third-country nationals the time to meet the obligation to return themselves that the allocation of individual responsibility makes sense. As such, the extent to which the voluntary departure period truly provides a sufficient opportunity to meet this obligation determines whether responsibility has concrete meaning or is just an empty phrase. If a voluntary departure period is too easily denied, or if the time provided to return is too short, the notion of voluntary return becomes a paper tiger.

In comparison to the issue of the obligation to return, the analysis of the voluntary departure period has the advantage of being set out more elaborately in the Directive. Additionally, the issue of the voluntary departure period is much more clearly located within the relationship between the EU member state and the third-country national, and thus mostly stays within the internal dimension of the triangle model. However, the external dimension has, or should have, an impact on decision-making in regard to the length of the voluntary departure period in particular.

The findings on research question 2a, dealing with the scope of the entitlement of third-country nationals to a voluntary departure period, and the possibilities of EU member states to deny such a period, will be presented in

76 See 9.4.1.
77 See 9.4.2 and 9.4.3.

12.3.1. This covers the general principles governing the priority of voluntary departure period, the scope of application of each of the three grounds for denying such a period, the issue of granting a period shorter than seven days, and the question when denial becomes prima facie incompatible with EU law, despite it being provided for in the Directive. The findings on research question 2b, regarding the appropriate length of the voluntary departure period so as to ensure an effective possibility for voluntary return, are discussed in 12.3.2. This includes findings on the establishment of the length of the initial period, its extension, and the cutting short of a period already provided.

12.3.1 The entitlement to a voluntary departure period and possibilities of denial *(research question 2a)*

The priority of voluntary return, the entitlement of the individual to a voluntary departure period and possibilities for denial were covered in Chapter 10. The priority of voluntary return is embedded, first of all, in Recital 10 of the Directive, which provides that "[w]here there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted." Second, it takes shape in Article 7(1) which requires member states, when issuing a return decision, to "provide for an appropriate period for voluntary departure between seven and thirty days." This, however, is subject to the possibility to make exceptions in three cases, provided for in Article 7(4), namely if there is a risk of absconding, if an application for legal stay has been dismissed as manifestly unfounded, or if the person concerned poses a risk to public policy, public security or national security.

12.3.1.1 The general principles governing the priority of voluntary return

Article 7(1) of the Directive, as confirmed by the CJEU, sets out a right to a voluntary departure period conferred by EU law. This requires any exceptions to the provision of such a period to be construed in a strict manner. The right, however, is highly qualified, both by Recital 10 and the specific grounds for exceptions.[78] As regards the general point of undermining the return procedure, it was found that its relation to the priority of voluntary return is ambiguous. It could be seen as an additional requirement to be met, on top of the existence of a situation as listed in Article 7(4), before a voluntary departure period could be denied. However, this would raise questions about the applicability of at least two of the grounds in Article 7(4): the dismissal of an application as manifestly unfounded or fraudulent,

78 See 10.2.1.1.

and the risk to public policy, public security or national security. Neither relate directly to the possibility of enforcing the return decision, and their existence would, in this sense, not undermine the return procedure. Since the co-legislators explicitly provide for these grounds for denial, they are thus more appropriately considered as specific expressions of the more general principle set out in Recital 10.[79]

A particularly important element in regard of the priority of voluntary return is its connection to fundamental rights. The opportunity to return voluntarily could be read into the guarantees provided by the right to leave any country under the ECHR and ICCPR.[80] More concretely the priority of voluntary return is recognised as a mechanism to protect the fundamental rights of third-country nationals in the return procedure more broadly, by providing them with an opportunity to avoid enforcement, but also by ensuring that any recourse to enforcement is proportionate. This is the way in which the CJEU, in the *Zh. and O.* case, construes the role of voluntary return in the Directive. The role of voluntary return as such a proportionality mechanism is an important element in the interpretation of specific exceptions to the rule that a voluntary departure period should be granted.[81]

12.3.1.2 Denial of a voluntary departure period for reasons of public policy, public security or national security

The denial of a voluntary departure period for reasons of public policy is the only part of the Directive's provisions on voluntary return with which the CJEU has engaged in detail, in the above-mentioned *Zh. and O.* case. However, its findings in this regard have wider implications, not just to cases where a risk to public security or national security arises, but also to the application of the other grounds for denial of a voluntary departure period. In relation to public policy, the CJEU finds, inter alia, that member states essentially retain freedom to determine the requirements of public policy in accordance with national needs, and that these may vary. But that this cannot be determined unilaterally by each member state. In particular, it points to the Directive's principles that decisions must be adopted on a case-by-case basis, on objective criteria, and going beyond the mere fact of illegal stay, as ways to safeguard the proportionality of such decisions. On the circumstances that could lead to a risk to public policy, it finds that this may include suspicions of or convictions for criminal offences, but that this must be taken in connection to other circumstances.[82] Such other circumstances include the severity of or type of offence, the time elapsed since the offence and the intention of the person concerned. This must

79 See 10.2.1.2.
80 See 10.2.2.1.
81 See 10.2.2.2.
82 See 10.3.2.1.

furthermore amount to a genuine, present and sufficiently serious threat to one of the fundamental interests of society, before it can justify denial of a voluntary departure period. But the denial of a voluntary departure period cannot be automatic when such a threat exists. It requires an individualised assessment of the appropriateness in the individual case, including from the perspective of the impact on the individual's fundamental rights.[83] The notion of such a threat particularly implies a forward-looking approach, and past behaviour, while being relevant, cannot simply be extrapolated to the future. Similar principles apply to a risk to public security and national security as well, especially the need to establish that the individual poses a genuine and present threat in relation to those interests.[84]

This implies, more broadly, that any decision on the denial of a voluntary departure period (based on any of the grounds in Article 7(4)) should be individualised, fully contextualised – taking into account any factual or legal matter related to the situation of the individual – and thus properly weighed against the third-country nationals interests, including but not limited to the best interests of children involved, family life and the state of health of the person involved.[85]

12.3.1.3 Denial of a voluntary departure period because of a risk of absconding

Of the three grounds for denial, the risk of absconding could particularly be subject to wide-ranging interpretations by member states, which makes circumscribing its use all the more important. This is despite the fact that it is the only element of Article 7(4) that is further defined, namely as "the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject to return procedures may abscond."[86] Each of the component parts of this definition was examined further.

As regards the objective criteria defined by law, CJEU case law in relation to the Dublin III Regulation, which includes the same concept, must lead to the conclusion that, in the absence of binding provisions of general application in domestic law setting out such criteria, the ground of a risk of absconding may not be used to deny a period for voluntary departure. This, however, still leaves member states with significant leeway to set out such criteria. Usually, a combination of criteria would have to be applied to justify the existence of a risk of absconding, which at any rate needs to be determined on the basis of an overall assessment of the specific circumstances of the individual case. The possibility of incorporating wide-

83 See 10.3.2.2.
84 See 10.3.3.1.
85 See 10.3.3.2.
86 RD Article 3(7).

ranging criteria in national law notwithstanding, the definition of the risk of absconding in the Directive nonetheless implies certain limitations on their legitimacy and use.[87]

Perhaps the most important limitation in this respect is that these criteria must indeed be able to indicate a risk of absconding. This raises questions, since this risk absconding is only defined in the Directive in a cyclical manner: a risk of absconding exists because there are reasons to believe a person may abscond. Absconding is appropriately understood in line with its usual meaning in everyday language. And such a usual meaning would indicate an attempt to evade capture or otherwise circumvent control by the authorities, which is also confirmed in different language versions of the Directive. This interpretation is further bolstered by the CJEU's case law in relation to the risk of absconding in the Dublin III Regulation, which plays a similar role as in the Directive. The CJEU interpreted it as the intent to escape or evade the reach of the competent authorities. Similarly, the proposal for a recast of the Reception Conditions Directive relates absconding to a person not remaining available to the competent authorities. All this points to a meaning of absconding in the Returns Directive as involving third-country nationals disappearing from the view of the authorities and making enforcement of the return decision impossible.[88]

In view of such a definition of absconding, certain criteria applied by member states are particularly problematic. This is especially the case for criteria focused on the (expected) non-cooperation in the return procedure and eventual non-return of third-country nationals. Neither non-cooperation nor non-return are listed in the Directive's as grounds for denial of a voluntary departure period, and the matter of cooperation is only mentioned in the provisions relevant to the enforcement stage. This is in line with the fact that a risk of absconding relates to remaining available for removal when the third-country national does not comply with the obligation to return him or herself. However, unwillingness to cooperate with the return procedure, or not taking action to return during the voluntary departure period, does not inevitably mean that such removal will be impossible. Even in such circumstances, third-country nationals may remain on the radar of member states. Statements by third-country nationals that they do not intend to return likewise cannot indicate, in isolation, that the person will abscond. Even when unwilling to return, there may be reasons why they do not abscond, for example as to continue to have access to certain services, including government-provided accommodation. Additionally, the attitudes of third-country nationals as regards compliance with the obligation to return may not be static. As the likelihood of enforcement increases, they may still be spurred into action to return voluntarily. While a person

87 See 10.4.2.
88 See 10.4.3.1.

who indicates that he or she does not intend to return or to cooperate in efforts to effect that return may also have an intention to abscond, this is not a necessary correlation, and therefore such criteria cannot be self-standing indicators of a risk of absconding. Rather, member states would have to show specific circumstances related to such (presumed) intentions of the third-country national that lead them to believe that the person may try to evade the enforcement of the return decision. While this may leave member states with a measure of uncertainty over whether the granting of a voluntary departure period actually results in effective return, this uncertainty is part and parcel of the procedure set out in the Directive.[89]

Another important limitation of the criteria for absconding is that these, according to the definition provided in the Directive, should go beyond the mere fact of illegal stay. This is a logical consequence of the Directive's architecture since illegal stay is a determinative factor whether a third-country national comes within its scope. If the fact of illegal stay could indicate a risk of absconding, and thus provide a basis for denying a voluntary departure period, this exception could be applied in all cases. And it would thus cease to be exceptional. Despite this, many criteria used by member states, and proposed by the Commission, skirt uncomfortably close to the mere fact of illegal stay. Perhaps the most obvious case in this respect is when irregular entry into the member state is used as an indicator for absconding. Such irregular entry is in fact a reason for a third-country national's illegal stay, and as such, part of the 'mere fact' condition excluded from the scope of legitimate criteria. While specific circumstances of the irregular entry could theoretically provide some indication of a risk of absconding, it would be for the member state to put such circumstances forward and justify them, which should go beyond just the establishment of irregular entry or stay. Other criteria also overlap with, or largely replicate, the mere fact of illegal stay. The lack of documents, for example, is often constitutive of illegal stay, and therefore this lack alone is insufficient as an indicator of a risk of absconding. Again, a nuanced approach to the way in which such circumstances could indeed indicate that a person could reasonably be expected to disappear from view and evade enforcement is needed. Overall, to truly ensure that several commonly used criteria do not just replicate the mere fact of illegal stay, a fundamental reconsideration of their application would be required.[90]

Finally, as regards these criteria, others, particularly those related to ongoing criminal procedures or convictions, also raise questions as to their suitability. Specifically, the inclusion of such criteria could lead to the circumvention of the conditions for denial of a voluntary departure period on the grounds of a risk to public policy, public security or national security. Such issues become even more pressing when member states apply criminal

89 See 10.4.3.2.
90 See 10.4.4.

sanctions for irregular entry or stay, since the criminal fact relied upon by member states as a criterion for absconding would arise out of the mere fact of illegal stay.[91]

A last issue in relation to the denial of a voluntary departure period because of a risk of absconding is the role of measures to prevent absconding, provided for by Article 7(3). It lists (non-exhaustively) regular reporting to the authorities, the deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place as measures that third-country nationals could be subjected to for the duration of the period for voluntary departure. The imposition of such measures is not simply a matter of discretion for member states. On the one hand, many of these measures constitute interferences with fundamental rights, and must therefore be justified as necessary and proportionate in the individual case. However, as a matter of their obligations under the Directive, member states can also be considered to be compelled to impose such measures if this is the only way to prevent absconding and thus the undermining of the possibility of eventual enforcement of the return decision. On the other hand, the same obligation to ensure the effectiveness of the Directive also extends to safeguarding the priority of voluntary return. As such, if member states have substantiated concerns about the risk of absconding in the individual case, but these risks can be sufficiently mitigated by the imposition of measures under Article 7(3), member states must use these measures to ensure that the third-country national can still enjoy his or her right to a voluntary departure period.[92]

12.3.1.4 Denial of a voluntary departure period in case of manifestly unfounded or fraudulent applications

The third and final ground for denial of a voluntary departure period is when an application for legal stay is dismissed as manifestly unfounded or fraudulent. The possibility for dismissing applications as manifestly unfounded, as well as rejecting them in case of fraud, are provided for in several EU directives. However, dismissals in such terms on the basis of national law would also be sufficient to be applicable to this ground for denial. Furthermore, annulment or revocation of a residence permit or visa would arguably be so too. This third ground for denying a voluntary departure period is different in nature from the other two, since it does not require an assessment of a future threat, but merely the establishment of a historical fact. This also raises questions about the consideration member states must make. Either an application has been dismissed as manifestly unfounded or it has not, and this does not seem to give much opportunity for further consideration of individual circumstances. From this perspective, the inclusion of this ground for denial in the Directive sits

91 See 10.4.5.
92 See 10.4.6.

particularly awkwardly with the principle of proportionality. To ensure that this principle is observed, further justification of the need to deny a voluntary departure period, beyond the fact of the dismissal of the application, remains necessary. However, such justifications may be difficult to put forward without veering into the territory of the other grounds for denial, especially the risk of absconding. This would then require justification in view of the conditions discussed in relation to *that* particular ground, rather than only because the application was dismissed as manifestly unfounded or fraudulent. Because it is so difficult to consider self-standing justifications which do not rely on the other grounds, it is very questionable that denial on the ground of a manifestly unfounded or fraudulent application holds up in view of the general principles of EU law, and, by extension, the appropriate application of the priority of voluntary departure as a means to safeguard fundamental rights. At most, this ground could potentially play a role in decisions to provide a voluntary departure period shorter than seven days, which – at least in the abstract – would leave the opportunity to return voluntarily intact.[93]

12.3.1.5 Considering a voluntary departure period shorter than seven days

When using the possibility contained in Article 7(4) to provide a voluntary departure period shorter than seven days, the principles to be applied to such a decision are generally the same as those discussed in relation to denial, since they pertain to the same provision. As such, a shortened period should only be provided in exceptional circumstances, on the basis of the grounds enumerated in Article 7(4), and when proportionate. The main question in this regard is whether member states, when they consider there are sufficient reasons to apply Article 7(4), should first consider providing a shorter period, rather than denying that period outright immediately. Given that member states should resort in each case to the least restrictive measure available, and in view of the role of the voluntary departure period as a proportionality mechanism to safeguard fundamental rights, this should indeed be the case.[94]

12.3.1.6 Incompatibility of certain provisions and proposals with fundamental rights

Some elements of the denial of a voluntary departure period, both currently in the Directive and part of the recast proposal, raise issues as to their compatibility with primary EU law. In this respect, the denial of a voluntary departure period purely on the basis of an application having been dismissed as manifestly unfounded or fraudulent can be

93 See 10.5.

94 Which may often not be the case because such short periods will be unlikely to provide for an effective opportunity to return voluntarily, see 12.3.2.1 below.

characterised as teetering on the brink of prima facie incompatibility, for the reasons discussed above. This prospect of incompatibility, in view of the lack of proportionality, must also be considered for the Commission's proposal to make denial of a voluntary departure mandatory in regard of all three grounds set out in Article 7(4), especially in combination with other proposed changes, such as the wide-ranging criteria for a risk of absconding, which could require member states to deny a voluntary departure in the vast majority of cases. The recognition by the CJEU of the priority of voluntary return as a mechanism to safeguard fundamental rights ties it to EU primary law rather than just the provisions laid down in the Directive. This makes it quite possible that a finding of incompatibility with primary law, as well as the Directive's own objectives, would eventually have to be made if the Commission's proposal were to be adopted.[95]

12.3.2 The appropriate length of the voluntary departure period *(research question 2b)*

As noted above, the length of the voluntary departure period is an important determinant whether the right to voluntary return can be enjoyed effectively. Several issues in this respect were examined in Chapter 11, namely the appropriate length of the initial voluntary departure period, including how to establish this; the extension of this period, including when this is necessary and on what basis this needs to be assessed; and the possibilities for cutting short a period already granted.

12.3.2.1 The initial voluntary departure period

When no grounds for denial of a voluntary departure period exist, such a period should be granted, with its length between seven and thirty days. However, this does not leave member states complete discretion to decide on this length. Rather, such a length must be 'appropriate.' The reference to an appropriate period in Article 7(1) must be given specific meaning, which would be related to the achievement of the Directive's objectives, particularly the safeguarding of fundamental rights by ensuring the priority of voluntary return is upheld. This means that not just any period falling within the range of seven to thirty days is legitimate. Rather, only a period that, in the individual case, gives a realistic opportunity to return voluntarily can be considered appropriate within the meaning of the Directive. Member states thus have to justify as appropriate any period shorter than the maximum of thirty days provided for in Article 7(1).[96]

This raises the additional question which circumstances should be considered in deciding on the appropriate length of a voluntary departure period. In this respect, one important factor in whether voluntary return

95 See 10.7.
96 See 11.2.1.

can be achieved within the period relates to the individual's actions and inactions. From this perspective, decisions can be made on the basis that the time accorded to third-country nationals needs to be sufficient to return if they act with due diligence. However, this general starting point does not mean that member states can simply use their expectations of the extent to which third-country nationals, in the individual case, might cooperate with the return process and comply with the obligation to return. The voluntary departure period is aimed at providing third-country nationals with an opportunity to comply voluntarily, but it is part and parcel of the return procedure that they might not use this opportunity, which is clear from the inclusion of an enforcement stage. Furthermore, while the Directive aims to ensure effective return, its structure suggests that this does not always have to be the quickest return. The priority of voluntary return implies that some delay in return is acceptable to ensure better protection of fundamental rights. Furthermore, whether the expectations of non-return or non-compliance play out as member states expect is highly unpredictable, since individuals may change their attitudes and intentions during the voluntary departure period.[97]

In contrast to expectations about cooperation, a large range of factors do play a role in establishing what period would provide for a realistic opportunity to return voluntarily. These factors may be on the side of the individual, the country of return or the member state. To assess these various factors properly, it is first necessary for third-country nationals to provide relevant information about, for example, any evidence they have for readmission or obtaining travel documents, means at their disposal to organise return, but also other relevant issues such as those relating to their health, age, specific needs or any other matters that may intervene in the return process. Not providing such information, or doing so only partially, will impact on the ability of member states to make a good assessment of the appropriate length of the voluntary departure period. This may justify granting a relatively short period, but this must be weighed against all the circumstances of the case. Member states, for their part, must enable third-country nationals to put forward such information.[98]

Beyond this, given it is their responsibility to ensure a voluntary departure period is appropriate, member states must also act with due diligence to gather other relevant information, beyond that made available by the individual, that would help them make a decision about the length of that period. They can be expected to draw upon their own experiences of the length of return procedures with specific countries of origin, including taking account of time frames set out in the applicable legal frameworks such as readmission agreements, provided these are observed in practice. They can also draw on experiences of return assistance providers, such as IOM, about typical times needed to organise returns to certain countries, in

97 See 11.2.2.
98 See 11.2.3.1.

specific situations. While incorporating such information does not provide certainty that the length of the voluntary departure period will be sufficient for return, since many factors intervene, member states should make their best efforts to conduct a well-informed assessment. In this way, ensuring that the voluntary departure period is indeed appropriate requires joint efforts by the third-country national and the EU member state.[99] Furthermore, these efforts will in many instances mainly be focused on making assessments of the external dimension, namely how long it may take for the country of return to decide on readmission or issue travel documents. In this respect, further interaction with that country of return, if this is necessary to obtain information on such time frames, may also be necessary, both by the EU member state and the individual.

While the Directive in principle allows for voluntary departure periods of only seven days, or close to it, this raises questions of compatibility with the appropriateness criterion, and thus with the *effet utile* of the priority of voluntary return. While not prima facie incompatible with the text of the Directive, the analysis found many indications that such short periods, in most cases, will be insufficient to allow a realistic period for voluntary return, and that member states should act on a strong assumption that seven-day periods are not appropriate. The shorter the period they grant, the stronger their justification that this is still appropriate must be. From this perspective, the Commission's proposal to scrap the lower limit of seven days, allowing member states to provide shorter periods even in the absence of grounds set out in Article 7(4) raises particular concerns about compatibility with the priority of voluntary return.[100] Similarly, any suggestion that member states should aim, as much as possible, to provide short periods, and to tie any longer periods to the cooperation of the individual, would be incompatible with the Directive.[101] The practice of making distinctions as to the length of the voluntary departure period only on the basis past legal status of third-country nationals, such as whether they had previously applied for asylum, does not find support in the Directive. Its rules apply to all third-country nationals who are found to be irregularly staying, and they must thus, as a general starting point, be subject to the same rules and the same opportunity to return voluntarily.[102]

12.3.2.2 Extension of the voluntary departure period

Article 7(2) of the Directive provides that a period for voluntary departure should be extended "where necessary," again for an appropriate period, and taking into account the specific circumstances in the individual case, such as the length of stay, the existence of children attending school, or family

99 See 11.2.3.2.
100 See 11.2.4.1.
101 See 11.2.4.2.
102 See 11.2.5.

or social links. The necessity of extension arises whenever the interests of the individual in having an opportunity to return voluntarily continue to outweigh the interests of the member state to enforce the return decision. Prima facie, this is the case if no finding can be made by the member state, at the end of the initial voluntary departure period, that the third-country national failed to take the appropriate steps to achieve return in a timely manner. This cannot be based on the simple assertion that he or she is still in the member state. After all, even when all required actions are taken by the individual, return also depends on the external dimension. As such, the necessity of extension requires assessing compliance with the obligation to return in line with the scope and limits discussed in section 12.2 above. However, even if a finding can be made that the third-country national did not take all action necessary for return with due diligence, the principle of proportionality still requires further consideration, including in relation to the individual circumstances, particularly also whether he or she can still be expected to take such necessary steps in the near future. In this respect, extension may still be required, even if there have been indications of non-compliance during the initial voluntary departure period.[103]

As regards the requirement that decisions on extension of a voluntary departure period take into account individual circumstances, the interests listed in the Directive may indicate a wider obligation to consider the impact of non-extension on the fundamental rights of third-country nationals. This includes the right to education and, as acknowledged explicitly in the Directive, the best interests of the child, as well as the right to private or family life. Additional circumstances could also include the financial interests of third-country nationals such as disposing of possessions, wrapping up business interests, or collecting outstanding wages. Such circumstances should be given consideration both in relation to the question whether it is necessary to extend the voluntary departure period, and in relation to the length of that extension. The latter would again have to be in line with the elements of appropriateness already discussed in regard of the initial period.[104] At any rate, decision-making about the initial period and extension should be seen as communicating vessels: a less well-informed and accurate assessment of the appropriate length of the initial voluntary departure period will strengthen the presumption that extension is necessary, and vice versa. Although this does not flow clearly from the text of the Directive, the provisions on extension could sometimes be used to provide for an initial period longer than the maximum of thirty days set out in Article 7(1).[105]

103 See 11.3.1.
104 See 11.3.2.
105 See 11.3.3.

12.3.2.3 Cutting short a voluntary departure period

A final element in relation to the length of the voluntary departure period is cutting such a period short (in effect, rescinding it) after it was already granted. Such a possibility arises out of Article 8(2) of the Directive, which allows enforcement of the return decision only after the voluntary departure period lapses, unless a risk as referred to in Article 7(4) arises. The previous dismissal of an application as manifestly unfounded or fraudulent will normally no longer be relevant, and cutting short can thus only happen on the basis of a risk to public policy, public security or national security that has arisen during the voluntary departure period, or if new indications of a risk of absconding have emerged. However, to cut short a period for voluntary departure already granted on these grounds requires full observance of the limits and safeguards identified in relation to research question 2a. The fact that the third-country national has not been active enough during the voluntary departure period to achieve return cannot be a basis for rescinding that period. However, non-compliance with measures to prevent absconding, if reasonable excuses for this cannot be forward by the individual, may provide a basis for cutting short a voluntary departure period if objective indications of a risk of absconding persist, taking into account the overall proportionality of such a decision.[106]

12.4 Responsibility for voluntary return: towards a more nuanced understanding and application

Having set out the detailed findings in regard of the specific research questions, this final section zooms out a bit by looking at the overarching notion of responsibility inherent in voluntary return, and its role in the Directive more generally. This dissertation started with the recognition that the notion of voluntary return, and the responsibility allocated to third-country nationals, lacked clarity. While not exclusively, this is due to a very significant part to the fact that the obligation to return is only vaguely defined, making it a particularly nebulous concept. And this leaves what third-country nationals can be held responsible for potentially open-ended. Furthermore, the provisions on the voluntary departure period in the Directive, if not clarified further, would give member states considerable leeway in denying or limiting the voluntary departure period. This would then risk leaving third-country nationals in a double bind: on the one hand, they could be held responsible for non-return in almost all circumstances, even if they were not actually to blame for this. And on the other, they might not be provided a fair opportunity to meet this responsibility in the first place.

106 See 11.4.

However, the discussion in the previous chapters, as summarised above, shows that this cannot be the case. Rather, the notion of individual responsibility is constrained on multiple sides. These constraints arise out of different factors, including the text and objectives of the Directive itself, including as interpreted by the CJEU, further interpretations in line with international instruments that have effect in EU law, and, especially, the fundamental rights of the individual, which are particularly affected by open-ended notions of responsibility. But these constraints also arise out of the fact that return depends not only on the individual, but on all actors in this process, especially the country of return. The following paragraphs provide some further reflections on these relationships. First, as regards the importance of the external dimension (12.4.1). And second, in view of the specific interaction between the individual and the member state during the voluntary departure stage (12.4.2).

12.4.1 The importance of the external dimension

The triangle model proposed in Chapter 1 aimed to make the crucial role of the country of return more visible, while at the same time providing a basis for ensuring that the provisions of the Directive would be applied in a manner consistent with the external dimension.[107] While EU rules can in principle be defined in isolation, consistency is necessary, first of all, as a touchstone for the actions which third-country nationals can and cannot be expected to take, as well as for what is a realistic voluntary departure period. From the perspective of the return procedure, bringing the role of the country of return into focus also helps identify potential mismatches between the internal rules of the Directive and the external dimension. Such mismatches may occur, for example, in the definition of obligatory destinations on the one hand, and their readmission obligations of destination countries on the other. Especially as regards stateless persons, it is easy to say that they should seek to return to their country of origin, but if that country has no, or only very limited, obligations to readmit such persons, this leaves a gap in the implementation of the Directive. Recognising these and other restrictions arising out of the external dimension is important to ensure that individual responsibility is not translated into an assumption that non-return at the end of the voluntary departure period is automatically the fault of the third-country national.

Keeping the responsibilities of the country of return firmly in view may also play an essential part in ensuring the overall fairness of the voluntary return procedure and the demands placed on third-country nationals by the EU member state. The return procedure is full of dilemmas, several of which have been sketched in the preceding chapters. While these dilemmas may result from the actions and omissions of the individual, the role of the

107 See figure 1 on p. 27.

country of return must not be discounted. As noted, this role may include outright failures to meet obligations, but also more subtle ways of intervening, such as obfuscation in decision-making about readmission or the issuance of travel documents. Furthermore, countries of return may make illegitimate demands of third-country nationals. When the return process runs into difficulties, the possibilities of EU member states to ensure that countries of return act in line with their international obligations may be limited. While increasing attention is paid to the use of carrots and sticks in the cooperation with countries of return, this is a slow, uncertain, and often diplomatically sensitive process. As such, the temptation to transform this from a problem of the country of return's responsibility to one of the third-country national's responsibility may be too great. Again, several examples of this were provided, which appear to result from a one-dimensional view of the obligation of the individual to do "whatever it takes" to return. Instead, the triangle model helps locate responsibilities where they belong, including by ensuring that third-country nationals are not required to repair failures by countries of origin to comply with their obligations. This ensures that the responsibility of the individual is not overstretched, to the detriment of his or her fundamental rights, and that the EU member state itself does not impose demands that would bring it into conflict with its own obligations.

While the actions of countries of return are outside the immediate control of EU member states, a more consistent and fair application of the notion of individual responsibility, and ensuring realistic opportunities for voluntary return, may well have a positive impact on cooperation with such countries. As noted in Chapter 2, voluntary return plays a potentially important, and arguably increasingly prominent, role in managing the relationship between the EU and destination countries. Perhaps the most extreme example of this is found when countries of return refuse to cooperate in removals, and only allow voluntary returns. Furthermore, the fact that EU law specifically gives priority to voluntary return may also impact on expectations of countries of return, including that their citizens are indeed provided a fair chance to enjoy this possibility, which may further influence their attitudes towards readmission cooperation.[108] While this was not the focus of this analysis, a more clearly circumscribed notion of responsibility, leading to a better mutual understanding and certainty, may have a positive influence on the efforts of the EU and member states in regard of the external dimension of return policy.

108 Although this goes beyond the scope of this analysis, it may even be wondered whether, in the long term, expectations of countries of return that EU member states give their citizens a fair chance at returning voluntarily may also impact on their views on the applicability of their customary obligation to readmit persons who are removed without having had such an opportunity. Furthermore, it has been suggested that the provision of return assistance may be leading to a more quid pro quo approach to return and readmission may eventually reshape state practice and *opinio juris*. See, in this respect, 5.2.3.

12.4.2 The individual and the member state: voluntary return as shared responsibility

While the external dimension played an important role in the analysis, the results outlined above specifically pertain to the relationship between the individual and the EU member state. After all, it is this relationship that is governed by the Directive, as transposed to member states' domestic laws. In regard of this relationship, it should first be emphasised that, while limits on the responsibility of the individual have been established, the discussion above should leave no doubt that such limits must be seen in view of the fact that the third-country national *must* return. In other words, such limits do not justify, in principle, an interpretation that would allow third-country nationals to evade the obligation to return. This also reiterates the essentially compulsory nature of voluntary return: there is no free choice whether or not to return, and the obligation to return thus requires third-country nationals to exercise their autonomy within these constraints.[109] This obligation is only overridden when there are insurmountable obstacles of a legal (such as the prohibition of *refoulement*) or practical nature (such as non-readmission by the country of return).

This does not mean that it will be easy to assess when third-country nationals have indeed met their responsibility. While the question of how to assess compliance is outside the scope of this analysis, it is clear that member states may be faced with considerable difficulties in this respect. Even a basic requirement for establishing compliance, such as assessing what information or evidence the individual may be reasonably expected to present, may be more a matter of informed opinion than of certainty. Difficulties in establishing compliance by the third-country national in regard of his or her actions towards the country of return may be even greater.[110] The actual interaction between the authorities of the country of return and the third-country national, and the decision-making that follows on readmission or the issuance of travel documents, may particularly be a black

109 See Cleton & Chauvin 2019, p. 299, in their analysis of the way voluntary return is presented in the Netherlands, note that individuals thus have to "forcibly perform" their autonomy. While this term is used by them from a socio-political, rather than a legal perspective, it does provide an insightful way of characterising the difficult balance between coercion and choice, that was identified as a tension inherent in the concept of voluntary return in 2.10.1.4.

110 For example, even the relatively straightforward question whether a third-country national has made an application for readmission or travel documents with the authorities of a country of return may result in dilemmas. For example, in 2013, the Dutch State Secretary for Justice and Security noted he had received signals that third-country nationals sometimes showed evidence of having sent readmission requests to embassies by registered mail, but that embassies subsequently complained about having received empty envelopes. Parliamentary year 2013-2014, document 19 637-1747.

box from the perspective of the member state.[111] Nevertheless, clarification of the scope and limits of the obligation to return is a necessary precondition for a fair assessment of compliance, and as such the findings above represent at least one step towards closing this important gap in return procedures.

While the responsibility of the individual has been the central focus, to understand a complex concept like voluntary return the role of the member state's responsibilities must not be obscured. Notwithstanding that voluntary return allocates primary responsibility to the individual, the responsibility of member states is not residual, but remains in force simultaneously. And, as discussed at various point in this analysis, these responsibilities will often interact. In this respect, further attention should be devoted to the use of so-called 'cooperation obligations,' which are frequently relied upon by member states, despite not being explicitly provided for in the Directive's voluntary return provisions.[112] While framed in terms of 'cooperation,' these are in fact mainly unilateral obligations imposed on the individual. At various points in the analysis, it has indeed been suggested that such obligations need to be read into the overall obligation to return to make it effective. However, this has been done in order to make those specific obligations visible and more concrete. By contrast, broad references to an obligation to 'cooperate' may simply add another level of vagueness, as the concept is often used in a way that is just as open-ended as the notion of responsibility. This is particularly important when vague notions of 'non-cooperation' lead to sanctions or other adverse consequences which are not strictly connected to non-compliance with the obligation to return.[113] So while third-country nationals have certain obligations to provide information to the authorities of EU member states, to reach out to consular authorities of the country of return, or comply with certain measures to prevent absconding, using broad and largely undefined notions of 'cooperation' in the context of return procedures may not be particularly helpful.

The notion of cooperation as a set of unilateral obligations on third-country nationals also misses the point that cooperation is normally better understood not simply as following instructions, but as jointly achieving objectives. This is shown, first of all, in the fact that the effective implementation of the provisions of the Directive will often require member states to take an active role and exercise their own due diligence. Furthermore,

111 See, for example, ACVZ 2013, pp. 27-28, describing the lengths to which the Dutch Repatriation and Departure Service goes to accompany third-country nationals to interviews with consular authorities to ascertain that they cooperate. But also highlighting the multiple barriers that nevertheless remain, which prevent the Service from having full certainty in all situations that accurate and truthful information was provided by the individual.

112 Although the Commission seeks to introduce these in its recast proposal, see 1.2.3 and 10.4.3.2.

113 For critiques of the incorporation of a broad duty to cooperate in the Commission's recast proposal, see Amnesty EIO 2018, p. 3; ECRE 2018, pp. 9-10; FRA 2019, pp. 33-35.

various ways in which the modalities of voluntary return should be 'negotiated' between the individual and the member state, such as in identifying viable return destinations and in coming to a realistic period for voluntary departure, have been highlighted. Such issues of cooperation were also discussed in the context of using readmission agreements for voluntary returns. While both the need for due diligence of the member state and of proper, reciprocal cooperation between the individual and member state implicitly flow from the Directive's notion of voluntary return, the fact that these are not explicitly acknowledged, even at the level of general principles, presents an important missing link in the Directive.

Making such reciprocal cooperation possible also requires a measure of trust between these two actors. This issue of trust has not been part of the analysis, since it brings us outside the realm of legal provisions in a strict sense. However, it is worth noting that the existence of trust, or lack thereof, may have an important impact on the interactions between the individual and the member state, and thus on the effective operation of the obligation to return in practice. In return procedures, such mutual trust may be highly elusive. It is difficult, for example, for third-country nationals to put their trust in a member state which, in their view, may have decided wrongfully that they should return, and at any rate can use far-reaching coercive measures to enforce this. In this way, there cannot be a relationship of equals, which also shows in the fact that non-observance of the rules in the Directive has immediate and clear impact on the individual, including interferences with his or her fundamental rights, while member states may at most be faced with a judicial slap on the wrist. Conversely, from the perspective of the member state, it is also difficult to put trust in third-country nationals who may have an interest in subverting and avoiding the obligation to return. This also shows the limits of the law in some respects, which does not lend itself very well to guaranteeing trust. However, vaguely defined provisions, which undermine legal certainty and lead to perceptions of unfairness, may well be particularly damaging for the establishment of at least the minimum necessary level of trust, and thus for the effective achievement of the Directive's objectives. As such, while it is not possible to legislate for trust, the transparency and fairness of legal provisions on return do have an important role in providing at least the basic preconditions to allow such trust to exist, and if lacking, may have serious negative effects on it.

The importance of transparency and fairness in the rules on voluntary return also particularly extends to the protection of fundamental rights and ensuring that returns under the Directive are humane and dignified. As noted in the introductory chapter and in later chapters, whatever other benefits it may bring, *this* is the key role of voluntary return in the Directive. However, voluntary return and the allocation of responsibility to the individual are not a magic bullet. Neither the fact that the individual gets to make certain decisions about his or her return, nor the provision of assistance in that respect, make voluntary return prima facie a 'humane

and dignified' option. In fact, several examples were presented in which the notion of responsibility inherent in voluntary return was used in such a way by member states that they could circumvent fundamental rights safeguards. Again, to act as an appropriate safeguard, the responsibility allocated to the individual must be subjected to clear boundaries, as set out in this analysis. While dignified return may to some extent still be a subjective matter, on which each individual has different perspectives,[114] the elaboration of a clear scope of both the obligation to return and the entitlement and length of the voluntary departure period act as essential preconditions for voluntary return to exercise its function as a fundamental rights protection mechanism.

12.4.3 A fair and transparent application of responsibility for voluntary return: proposed guidelines

The discussion above about the external and internal dimensions of voluntary return highlights not only the importance of a better understanding of the boundaries of individual responsibility in voluntary return proceedings, but also of the practical implementation, in a fair and transparent manner, of the Directive's provisions on the obligation to return and the voluntary departure period. As the closing part of this dissertation, therefore, the next pages propose a set of 25 guidelines which aim to assist this implementation. They mirror the findings discussed in sections 12.2 and 12.3 above, but try to set these out in a more accessible and practically usable manner for the purpose of further legislation, the drafting of policy documents, decision-making in individual cases, and judicial scrutiny of such decisions or of the general compatibility of member states' legal provisions with EU law.[115]

In respect of the research questions, it should be noted that Parts I-VI correspond to the issue of the actions that third-country nationals can and cannot be expected to take when returning voluntarily (*research questions 1a and 1b*). More specifically, Parts I-IV deal with various issues arising in relation to the obligation to seek readmission to appropriate destinations (*return element (i)*); Part V deals with the obligation to obtain travel documents (*return element (ii)*); and Part VI deals with the obligation to making practical arrangements and leaving the EU member state (*return element (iii)*). Parts VII and VIII deal with the application of the voluntary departure period, with the former focusing on the entitlement to a voluntary departure period

114 See, for example, the discussion of situations where third-country nationals might consider it more dignified to be removed than to take up voluntary return in 10.4.3.2.

115 In this respect, it should also be noted that, as described in the various chapters, other attempts to provide such guidance, such as in the Return Handbook, have often been too limited or even contradictory in regard of voluntary return. The approach also takes inspiration from the fact that a need for such voluntary return-specific guidelines has been acknowledged in the past, for example as a companion to the Council of Europe's Twenty Guidelines on Forced Return, but were in the end not elaborated.

(*research question 2a*) and the latter with the appropriate length of such a period (*research question 2b*).

While grey areas will undoubtedly remain in relation to the meaning and application of individual responsibility, these guidelines will hopefully help move it from an open-ended concept, with all the associated risks, to one that is more strictly circumscribed. And this should provide member states and third-country nationals alike with a clearer understanding of their mutual rights and obligations when faced with the complex questions arising in the context of voluntary return.

Proposed guidelines on individual responsibility for voluntary return in the context of the EU Returns Directive

Preamble

The notion of voluntary return in EU Directive 2008/115 (the Returns Directive), through the imposition of an obligation to return and the issuing of a voluntary departure period, allocates primary responsibility for the return process to third-country nationals found to be illegally staying in EU member states.

The guidelines below serve to assist EU member states in implementing the Directive's provisions in relation to the obligation to return and the voluntary departure period in a fair and transparent manner, as resulting from the text and objectives of the Directives, the case law of the CJEU, EU fundamental rights and the requirement of consistency with international law provisions governing the external dimension of return and readmission.

This implementation is premised, inter alia, on the following general principles:

a) Voluntary return has elements of international movement more generally, but must also be recognised as a form of expulsion, meaning that the legal obligations of the EU member state, including in regard of the prohibition of *refoulement*, remain fully in force despite the 'voluntary' nature of return;

b) No obligations may be imposed on third-country nationals that would entail the violation of the obligations of the EU member state or the country of return, and responsibility for such violations may not be shifted to the individual;

c) Actions required of third-country nationals to ensure return must be limited to those that are necessary for the return process and compatible with their fundamental rights;

d) Provisions on the voluntary departure period must be interpreted in such a way that they are able, in law and practice, to give effect to the priority of voluntary return as established in the Directive;

e) While both third-country nationals and EU member states have obligations in the return process, reciprocal cooperation between these two

actors should be stimulated and should be seen as an essential precondition for the fair and effective achievement of voluntary return;

f) In line with the general principles of EU law, and as confirmed in the Directive, EU member states' decisions in relation to all parts of the return procedure, including voluntary return, must be proportionate, including by ensuring such decisions are taken on a case-by-case basis, taking into account all relevant circumstances, which should go beyond the mere fact of illegal stay.

Definitions

In relation to the following terms, which are used in the Directive but not defined, the following interpretations should be applied:

a) *Country of origin* – the country or countries of nationality of a third-country national or, for stateless persons, the country of former habitual residence;

b) *Transit country* – a country through which a third-country national has travelled on his or her way to the EU member state where he or she is eventually found to be illegally staying, subject to any limitations on specific types of transit set out in the applicable agreements or arrangements on which return would be based;

c) *Absconding* – the act of disappearing from the control of the member states' authorities responsible for return procedures, making the enforcement of the return decision impossible;

d) *Appropriate* (in the context of the length of the voluntary departure period) – sufficient to provide, in the individual case, a realistic opportunity to meet the obligation to return voluntarilyto for third-country nationals acting with due diligence;

e) *Necessary* (in the context of the extension of the voluntary departure period) – the situation in which the third-country national's interest in an opportunity for voluntary return continues to outweigh the member state's interest in enforcing the return decision.

Additionally, the guidelines below will use the term *obligatory destinations*, which is not part of the Directive itself, to denote those countries to which, under the definition of return provided in the Directive, third-country nationals can be required to make efforts to return, and against which efforts (or lack thereof) their compliance with the obligation to return can be assessed.

Part I – Obligatory destinations of return

1 – General principles on obligatory destinations

Third-country nationals can only be expected to seek to return to countries that can be considered obligatory under the Directive. When this is the case, member states may hold third-country nationals responsible for their efforts to return to such countries (or lack thereof).

2 – The country of origin as an obligatory destination

a. The country of nationality of third-country nationals is an obligatory destination as it constitutes a country of origin within the meaning of the Directive. In case of multiple countries of nationality, third-country nationals can be held responsible for their return efforts (or lack thereof) in relation to each of these countries.
b. A country of habitual residence is an obligatory destination for stateless persons, and they can be held responsible for their return efforts (or lack thereof) in relation to such a country, subject to the limitations of applicable readmission frameworks. When third-country nationals have a country of nationality, countries of habitual residence do not constitute a country of origin within the meaning of the Directive and are thus obligatory only if they can be considered a transit country.

3 – Transit countries as obligatory destinations

a. Only countries through which third-country nationals have passed as part of their migration journey to the EU member state, with which specific agreements or arrangements regulating return and readmission are in place, and which meet the requirements below, can be considered obligatory destinations.
b. For agreements or arrangements to be able to make a transit country an obligatory destination, they should not exclude the way third-country nationals transited such countries, and ensure accessibility and legal certainty, including by:
   – setting out clear provisions on the conditions for readmission and procedures to be followed;
   – indicating clear consent on the part of the transit country to readmit non-nationals in case this is not already covered by legally binding provisions;
   – being set out in writing and publicly available. This excludes arrangements only based on practice, as well as agreements and arrangements that remain secret.

4 – Return to another third country

a. Other third countries are not obligatory destinations and third-country nationals' return efforts (or lack thereof) in relation to such countries fall outside the scope of their responsibility.
b. Member states should ensure that third-country nationals have the option of seeking return to other third countries, provided they are accepted there. Member states are precluded from imposing too stringent conditions, such as in relation to the duration of residence rights in the prospective destination country, before allowing third-country nationals to depart to such a country.

Part II – Return and readmission to a country of origin

5 – Obligations in relation to readmission to the country of nationality

a. When making readmission applications to their country of nationality, member states may require third-country nationals to provide, accurately and in good faith, documentary evidence and other information in relation to nationality and identity, and to assist the country of origin in investigations to establish eligibility for readmission.
b. The responsibility of third-country nationals when providing evidence of eligibility of readmission only extends to those elements necessary to trigger the country of origin's readmission obligations. In the case of countries of nationality, this excludes meeting any demands not directly connected to establishing nationality and identity, or to necessary administrative procedures, such as apologies or payment of sums of money not connected to readmission.

6 – Obligations in relation to readmission to stateless persons' countries of habitual residence

a. Member states may expect stateless persons to provide to their country of habitual residence, accurately and in good faith, documentary evidence or other information relating to their former nationality of, or (expired or current) residence rights in, that country. Where necessary to meet the requirements for readmission, EU member states should provide additional information or declarations as to the status of individuals on their territories.
b. In determining whether stateless persons have met their responsibilities in relation to countries of habitual residence, member states should take into account the inherent limitations in the readmission duties of such countries, as well specific difficulties that stateless persons might experience in obtaining and presenting documentary evidence of former nationality, (prior) residence rights, or other elements necessary for readmission.

7 – Ineffective inter-state frameworks and the individual's right to return

When inter-state readmission frameworks are ineffective, member states cannot require third-country nationals to put their individual right to return at the service of the member state's objective of effective return, including by making declarations of willingness to return, as this constitutes an unlawful interference with their fundamental rights.

Part III – Return and readmission to a transit country

8 – Readmission to a transit country under a readmission agreement

a. When readmission agreements with transit countries exist, and they are effective without further intervention by the EU member state, third-country nationals can be expected to make use of these.
b. When action by an EU member state is necessary to make readmission based on such an agreement possible, it may take such action without the consent of the third-country national concerned. When member states do not take such action, and this is not due to non-cooperation by the individual concerned, no responsibility arises for third-country nationals in relation to return to a transit country.
c. Member states can expect third-country nationals to facilitate readmission requests by providing the necessary information and evidence to the EU member state for this purpose. However, whether failure to provide such information or evidence can be considered non-compliance with the obligation to return will depend, among others, on the elements already at the disposal of the member state and how fatal such non-provision of information and evidence is for the prospect of readmission.

9 – Readmission based on multilateral treaties or non-binding arrangements

a. When the situation of third-country nationals comes within the scope of relevant multilateral treaties, member states can expect third-country nationals to apply for readmission with transit countries where they have, or had, a right of residence, or where they embarked transport to the EU member state.
b. Member states can expect third-country nationals to seek readmission to transit countries with which non-binding arrangements exist only after the member state can show that such an arrangement meets the requirements of guideline 3 above. Third-country nationals can in principle be expected to make efforts to meet specific requirements for readmission, but these cannot be discriminatory or in contradiction with other limits set out elsewhere in these guidelines.

Part IV – Choice and refusal of obligatory destinations

10 – Freedom of choice of destinations and implications for member states

a. Third-country nationals are in principle free to choose to which destination they seek to return. Member states should refrain from interfering with this choice unless they can adequately justify this, in particular in relation to the fact that attempts to return to the individual's preferred destination cannot lead to timely, effective return.
b. No interferences should be made with attempts of third-country nationals to return to any country that could be considered their 'own' within the meaning of Article 12(4) ICCPR, including their country of nationality.
c. When third-country nationals prefer to return to a transit country, and this can only be realised by the submission of an application by the EU member state, the latter can be expected to make such a submission, unless it can duly justify not doing so as not being in the interest of the return procedure.
d. The freedom to pursue return to their preferred destination does not negate the fact that third-country nationals, at the end of the voluntary departure period, can be held responsible in relation to *all* destinations that are obligatory in their specific case.

11 – Prevention of return to unsafe destinations or via unsafe travel routes

a. Third-country nationals cannot be required to pursue return to any country where they would face the risk of persecution, torture or inhuman or degrading treatment, or to their lives, regardless of the specific origin of such a risk. The fact that third-country nationals are responsible for their own (voluntary) return does not negate the responsibility of the member state to ensure that its expulsion decision does not expose individuals to such risks.
b. In order to prevent returns to unsafe destinations or via unsafe travel routes, in violation of the principle of non-*refoulement*, member states should work constructively with third-country nationals in the avoidance of unsafe returns, including by:
   - actively engaging with the third-country national and jointly identifying all relevant destinations and routes in the individual case;
   - assessing each of these destinations and routes in light of the prohibition of *refoulement*;
   - verifying whether third-country nationals can effectively use alternative, safe destinations and routes;
   - avoiding exerting undue pressure on third-country nationals to return voluntarily.

Part V – Obtaining travel documents

12 – The obligation to request replacement travel documents

a. The obligation to apply for replacement travel documents with authorities competent to issue them is an integral part of the obligation to return for all third-country nationals who do not already possess such documents, or for whom clear possibilities to return without them do not exist. Failure to make such an application constitutes prima facie non-compliance with the obligation to return. Which authorities are competent will differ according to the circumstances of the case, but for persons with who are not stateless this will at least encompass the consular authorities of their country of nationality.
b. These obligations are subject to third-country nationals being able to exercise them without risk of persecution or serious harm to themselves or others, such as family members, as provided for in EU asylum legislation. They should not imply any obligation to engage in contacts with the authorities of the country where the individual fears persecution or serious harm if this is not yet the subject of a final decision on his or her asylum application in this regard.

13 – Access to consular authorities

Third-country nationals' efforts to access consular authorities should be free from interference by the member state. When this is necessary to ensure effective access, third-country nationals may expect member states to take positive action, which may include the temporary lifting of measures to prevent absconding, facilitating interviews with consular authorities in the place where third-country nationals are staying, or – in case consular authorities are located on the territory of another member state – to cooperate with that member state to make arrangements for access.

14 – Type of documents to obtain

Third-country nationals are free to choose which document they seek to obtain, as long as it can be used for return. Member states should not normally interfere with efforts of third-country nationals to obtain a passport or other travel document providing the widest possibilities for travel. However, this does not negate third-country nationals' obligations to ensure timely departure if this could have been done more quickly on the basis of a *laissez-passer*. Member states may set limits on the extent to which they facilitate obtaining a passport through financial support or the extension of the voluntary departure period.

15 – Limits on meeting demands by the consular authorities

a. The obligation to obtain travel documents includes the payment of fees and meeting administrative requirements. However, it excludes the payment of fees disproportionate to the costs of the administrative process and those not set out in law.
b. Under no circumstance may the responsibility of third-country nationals be interpreted as requiring them to acquiesce to the payment of bribes, or other favours that could be qualified as corruption or abuse of power.
c. Under no circumstance may the responsibility of third-country nationals be interpreted as requiring them to obtain travel documents through processes or channels that risk producing false or fraudulent documents. Member states cannot encourage third-country nationals, explicitly or tacitly, to fulfil their obligation to return through the use of such documents.

Part VI – Arrangements for leaving the EU member state

16 – Meeting exit requirements and other obligations for departure

a. Third-country nationals are responsible for meeting all necessary exit requirements, including under the Schengen Borders Code, and cannot circumvent these, or be expected to do so, to meet their obligation to return.
b. Third-country nationals are responsible for meeting any outstanding obligations, to the EU member state or other persons, that would prevent their lawful departure before the end of the voluntary departure period. However, the (im)possibilities of doing this in a timely manner should be a consideration regarding the extension of the voluntary departure period.

17 – Return assistance

a. Third-country nationals do not have an unambiguous right to return assistance under the Directive. However, where such programmes exist, they must be accessible in a non-discriminatory manner, with exclusion of certain categories of third-country nationals being objectively justified.
b. When return is otherwise effectively impossible, member states should provide return assistance also to third-country nationals who are normally excluded from this. However, this may be limited to only to those types of assistance that are clearly connected to the facilitation of de facto return, in particular the facilitation of transport to the country of return.
c. In cases of non-return, third-country nationals cannot be held responsible for their failure or refusal to seek return assistance, unless it can be established that effective return could only be achieved with such assistance.

Part VII – The entitlement to a voluntary departure period and possibilities for denial

18 – General principles on the voluntary departure period

a. Third-country nationals have a clear right under the Directive to be accorded a voluntary departure period. As a limitation of that right, denial of a voluntary departure period may only take place if:
   - on the basis of objective criteria, which must go beyond the mere fact of illegal stay and otherwise meet the requirements set out in guidelines 19 to 21, it is established that one of the grounds enumerated in Article 7(4) is applicable; and
   - such a denial would be considered proportionate in the specific circumstances of the individual case, in view of factors including but not limited to the best interests of the child, family life or the health of the persons involved;
   - the appropriateness of issuing a voluntary departure period shorter than seven days instead of outright denial has been considered and rejected with due justification.

b. No denial may take place automatically only on the basis that one of the grounds in Article 7(4) applies in an individual case.

19 – Denial of a voluntary departure period because of a risk to public policy, public security or national security

a. Denial of a voluntary departure period because of a risk to public policy, public security or national security must not merely be based on past conduct of third-country nationals, but requires an individualised, contextualised and forward-looking approach which shows the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

b. Any factual or legal matter that can shed light on the existence of such a threat, including the seriousness of past conduct, the elapse of time since the conduct, and intentions of leaving the country, must be taken into account.

c. Member states may not use general presumptions, in law or practice, that specific past acts are sufficient to indicate a threat that justifies, in and of itself, a denial of a voluntary departure period.

20 – Denial of a voluntary departure period because of a risk of absconding

a. No denial of a voluntary departure period because of a risk of absconding may take place without the specific criteria for such denial having been clearly set out in law. Such criteria must further:
   - be truly able to indicate a risk of absconding, meaning a risk that third-country nationals disappear from view of the authorities, thus making enforcement of the return decision impossible. Within this meaning, non-cooperation or unwillingness to return, as such, do not indicate a risk of absconding, since they

do not deprive the member state of the possibility to enforce the return decision after the voluntary departure period has ended;
- respect the principle that indicators should not mirror the mere fact of illegal stay. As such, irregular entry, overstaying, or the lack of documents should not be used as general indicators of absconding, unless there are specific circumstances related to such facts that give rise to such a risk;
- not replicate other grounds of Article 7(4), such as those related to criminal proceedings or convictions, especially in such instances where irregular stay or entry are criminalised in the member state.

b. Denial or shortening of a voluntary departure period may furthermore only take place if the member state has considered the possibility of imposing measures in line with Article 7(3) and has found that these cannot sufficiently mitigate the risk of absconding in the individual case.

21 – Denial of a voluntary departure period because of the dismissal of an application for legal stay as manifestly unfounded or fraudulent

a. Denial of a voluntary departure period on the basis that the application of a third-country nationals was dismissed as manifestly unfounded or fraudulent should normally be avoided. Where member states nevertheless resort to denial on this ground, this must be on the basis of self-standing justifications only related to this fact, respecting the prohibition of automaticity, and fully meeting the requirements of proportionality set out in guideline 18.
b. Justifications for denial of a voluntary departure period on this ground cannot be based on considerations that actually form part of one of the other two grounds in Article 7(4), unless the specific requirements for each of these, set out in guidelines 19 and 20 above, are fully met.

Part VIII – The length of the voluntary departure period

22 – The appropriate length of the initial voluntary departure period

a. The initial voluntary departure period granted must be long enough to provide an effective opportunity to return voluntarily. When member states provide a period shorter than thirty days, this must be duly justified following an assessment of the period that would realistically enable third-country nationals to take all steps necessary to return, provided they act with due diligence. Such an assessment must be based, inter alia:
   - on the individual circumstances of third-country nationals, including the possession of evidence for readmission, travel documents, financial constraints, the need for assistance, health, age and dependence on others, to the extent that they have duly

provided this information after having been given an effective opportunity to do so by the member state;
- information collected with due diligence by the member states from relevant actors and sources to establish a picture of how long it may realistically take to return;
- an assumption that periods close to the minimum of seven days are generally insufficient unless this can be rebutted in the light of the specific circumstances of the individual.

b. Decisions on the length of the voluntary departure period must not be based merely on the prior legal status of the third-country national in the member state.

23 – The necessity of extending a voluntary departure period

An extension of the initial voluntary departure period should be granted when the interests of the third-country national in having an opportunity to return voluntarily continue to outweigh the interests of the member state in enforcing the return decision, which is the case at least when:
- there is no evidence that non-return is due to the failure of the third-country national to take all steps to achieve return during that initial period in line with parts I-VI above;
- there is evidence that the third-country national has not fully complied with the obligation to take these steps, but voluntary return could still be achieved within a reasonable period, and the individual's past behaviour indicates that it is likely that he or she will take the remaining steps with due diligence;
- there is evidence that the third-country national has not fully complied with the obligation to take these steps, but enforcement would disproportionately harm the fundamental rights of the individual or family members, for example in relation to the education of children, the maintenance of family life, the health of the individual or financial or business interests.

24 – Decisions on the appropriate length of the extension of a voluntary departure period

a. When an extension of the voluntary departure period is necessary, the length of that extension should be decided on the basis of:
   - the principles set out in guideline 22, and additionally
   - other circumstances in the individual case which are not specifically related to the achievement of return, including the length of stay, the existence of children attending school and the existence of other family and social links.

b. Other elements, such as ensuring third-country nationals can leave to their preferred destination, in line with guideline 10, or the facilitation of the possibility of applying for a travel document with the widest possible scope, in line with guideline 14, should also be taken into account where appropriate.

25 – Cutting short a voluntary departure period already granted

a. Member states may only cut short a voluntary departure period already granted if new information emerges or circumstances change in a way that indicates, in full observance of guidelines 19 and 20, that a risk of absconding or a risk to public policy, public security or national security has emerged.
b. The lack of due diligence of, or cooperation by, third-country nationals to achieve return during the voluntary departure period is not a valid reason for cutting short a voluntary departure period, and the threat of this may not be used to compel them to cooperate with the authorities, unless this is in relation to measures to prevent absconding, provided this is proportionate.
c. When concerns arise about a risk of absconding during the voluntary departure period, and measures to prevent this have not yet been imposed, the member state should first consider whether such measures can be applied effectively before deciding to cut short the voluntary departure period.

Samenvatting (Summary in Dutch)

Vrijwillige terugkeer en de grenzen aan eigen verantwoordelijkheid in de EU-Terugkeerrichtlijn

1 Inleiding

Het concept 'vrijwillige terugkeer' is een cruciaal maar vaak slecht begrepen onderdeel van de procedure voor de terugkeer van onrechtmatig verblijvende onderdanen van derde landen (hieronder: vreemdelingen) vanuit EU-lidstaten in Richtlijn 2008/115 (de Terugkeerrichtlijn). Op basis van deze richtlijn dienen lidstaten de voorkeur te geven aan vrijwillige terugkeer boven verwijdering, voor zover er geen redenen zijn om aan te nemen dat dit de terugkeerprocedure ondermijnt. Zoals wordt beschreven in hoofdstuk 1 kan de rol van vrijwillige terugkeer vooral gezien worden als het toebedelen aan het individu van de verantwoordelijkheid voor het succesvol afsluiten van de terugkeerprocedure. Het individu is dan verplicht bepaalde handelingen te verrichten om te zorgen dat zijn of haar onrechtmatig verblijft wordt beëindigd. Het niet verrichten ervan brengt consequenties met zich mee. Vrijwillige terugkeer is in de richtlijn opgebouwd uit twee sleutelonderdelen: de terugkeerverplichting en de vrijwillige vertrektermijn. De manier waarop deze in de richtlijn worden geformuleerd vraagt op vele punten om verduidelijking. Gebrek aan helderheid brengt het risico met zich mee dat de eigen verantwoordelijkheid van de vreemdeling door EU-lidstaten als vrijwel onbegrensd wordt gezien. Hiermee zou de vreemdeling vrijwel altijd de schuld toebedeeld kunnen krijgen van het feit dat terugkeer niet is bewerkstelligd aan het eind van de vrijwillige vertrekperiode. Verder beoogt de richtlijn regels voor terugkeer te bieden die duidelijk, transparante en billijk zijn en bovendien de grondrechten en waardigheid van de vreemdeling eerbiedigen. Maar dit zou door een te brede lezing van eigen verantwoordelijkheid kunnen worden ondermijnd.

Hierom is de doelstelling van dit proefschrift om de grenzen van de eigen verantwoordelijkheid die aan vreemdelingen wordt toebedeeld, door middel van het concept vrijwillige terugkeer in de richtlijn, te verduidelijken. Dit wordt gedaan door de twee bovengenoemde sleutelonderdelen van vrijwillige terugkeer verder te ontrafelen. Ten eerste gaat het hier om het vaststellen welke handelingen van vreemdelingen verwacht mogen worden zodat ze aan hun terugkeerplicht voldoen (*onderzoeksvraag 1a*). Maar ook of er bepaalde handelingen zijn waarvan juist niet verwacht mag worden dat ze die verrichten, zelfs als deze in theorie tot terugkeer zouden kunnen leiden (*onderzoeksvraag 1b*). Dit wordt gedaan door specifiek te kijken naar bepaalde categorieën van (soms overlappende) handelingen

die van cruciaal belang zijn voor het terugkeerproces: het verzoeken van terugname bij een bestemmingsland (*terugkeerelement (i)*); het verkrijgen van vervangende reisdocumenten om terugkeer mogelijk te maken (*terugkeerelement (ii)*); en het praktisch voorbereiden van het uiteindelijke vertrek uit de EU-lidstaat (*terugkeerelement (iii)*).

Ten tweede gaat het om de toepassing van de bepalingen met betrekking tot de vrijwillige vertrektermijn. Enerzijds betreft dit het verduidelijken van de aard en reikwijdte van het recht van vreemdelingen op een vrijwillige vertrektermijn, in de context van zowel de voorkeur voor vrijwillige terugkeer alsook de specifieke uitzonderingen op het toekennen van zo'n termijn in de richtlijn (*onderzoeksvraag 2a*). En anderzijds het verduidelijken van de bepalingen in de richtlijn ten aanzien van de aanvankelijke lengte, verlenging of verkorting van de vrijwillige vertrektermijn en de manier waarop deze geïnterpreteerd zouden moeten worden om de doelen van de richtlijn effectief te waarborgen (*onderzoeksvraag 2b*).

Uitgangspunt hierbij is dat een goed begrip van de eigen verantwoordelijkheid van vreemdelingen het best kan worden verkregen als dit niet alleen wordt bekeken vanuit het oogpunt van de juridische relatie tussen de vreemdeling en de EU-lidstaat. Het vereist ook dat de rol van het land van terugkeer in beeld wordt gebracht. Zonder dat land kan vrijwillige terugkeer immers niet worden bewerkstelligd. Het invoegen van de rol van het terugkeerland leidt tot een driehoek aan juridische relaties, bestaand uit de wederzijdse rechten en plichten tussen de vreemdeling en de EU-lidstaat, de vreemdeling en het terugkeerland, en het terugkeerland en de EU-lidstaat.[1] Dit maakt niet alleen de 'interne' dimensie van de verantwoordelijkheid terug te keren (de relatie tussen individu en EU-lidstaat) zichtbaar, maar ook de 'externe' dimensie, bestaand uit de andere twee relaties die de uitkomst van het vrijwillige terugkeerproces beïnvloeden. Zodoende noopt een goed begrip van de reikwijdte van eigen verantwoordelijkheid voor vrijwillige terugkeer tot het zoveel mogelijk interpreteren van de bepalingen in de richtlijn op een manier die consistent is met de externe dimensie.

In hoofdstuk 2 wordt besproken hoe dit driehoeksmodel kan worden 'gevuld' met specifieke rechten en plichten van de drie actoren. Dit wordt gedaan op basis van de aanname dat vrijwillig vertrek zowel elementen omvat van internationale migratie in algemene zin (*international movement*), maar dat het ook een specifieke vorm van uitwijzing (*expulsion*) is.[2] Op basis hiervan wordt gekeken welke relevante normen invloed kunnen hebben op de bepalingen van de richtlijn, zowel door direct op deze bepalingen

1 Zie figuur 1 op p. 27.

2 *Expulsion* wordt in het Nederlands vaak vertaald als 'verwijdering' of 'uitzetting,' maar het gebruik van zulke terminologie, die in de richtlijn en in dagelijks gebruik gaan over het fysiek ter hand nemen van de terugkeer door de lidstaat, zou juist het punt dat ook vrijwillige terugkeer een vorm van *expulsion* is ondermijnen.

door te werken, of omdat het niet respecteren van deze normen effectieve terugkeer in de weg zou kunnen staan. De relevante rechten en plichten volgen allereerst uit het EU-recht zelf, waaronder de tekst van de richtlijn, relevante jurisprudentie van het Hof van Justitie van de EU (HvJEU), relevante bepalingen uit andere, gerelateerde EU-wetgeving, grondrechten en algemene beginselen van EU-recht. Maar hiernaast zijn verschillende internationale rechtsnormen te identificeren die direct of indirect raken aan de reikwijdte van de eigen verantwoordelijkheid. Belangrijke normen zijn in het bijzonder te vinden in internationale mensenrechtenverdragen zoals het Europees Verdrag voor de Rechten van de Mens (EVRM) en het Internationaal Verdrag inzake Burgerlijke en Politieke Rechten (IVBPR), met daarbij een sleutelrol voor het recht om een land te verlaten en het recht van eenieder om naar zijn of haar eigen land terug te keren. Andere cruciale regels komen uit het internationaal gewoonterecht en zien op de *expulsion* van vreemdelingen en de terugname van zulke vreemdelingen door hun herkomstlanden. Hiernaast kunnen andere instrumenten ook een rol spelen bij het interpreteren van de relevante bepalingen van de richtlijn, zoals multilaterale verdragen over lucht- en maritiem verkeer, het tegengaan van mensensmokkel en -handel, of consulaire betrekkingen. De richtlijn noemt verder specifiek de rol van terugnameovereenkomsten of -regelingen gesloten door de EU of individuele lidstaten met terugkeerlanden als relevant voor het vraagstuk van terugkeer. Beleidsdocumenten en andere 'soft law' instrumenten kunnen bovendien een aanvullende rol spelen.[3]

In hoofdstuk 2 wordt naast het juridisch kader ook verdere achtergrondinformatie over vrijwillige terugkeer gegeven, waaronder de aangenomen voordelen van het prioriteit geven aan deze vorm van terugkeer en de bijdrage hiervan aan de Europese terugkeerpraktijk. Ook wordt aandacht besteedt aan het verhelderen van enkele begrippen die te maken hebben met vrijwillige terugkeer, hieraan gelieerd zijn, of juist verwarring kunnen oproepen in dit verband.

De analyse die op basis van de bovengenoemde uitgangspunten en het juridisch kader volgt richt zich op de huidige Terugkeerrichtlijn. Echter, op het moment van schrijven is een proces van herziening hiervan gaande, waarbij de Europese Commissie een voorstel heeft gedaan voor een nieuwe richtlijn, inclusief enkele veranderingen ten aanzien van sleutelelementen van het begrip vrijwillige terugkeer. Op verschillende momenten wordt derhalve in de analyse ook gekeken naar de verhouding tussen het bovengenoemde juridisch kader en de voorstellen voor de herziening van de richtlijn.

3 Het 'gevulde' driehoeksmodel wordt weergegeven in figuur 2 op p. 81.

2 De reikwijdte van de terugkeerplicht *(onderzoeksvragen 1a en 1b)*

Het grootste deel van de analyse richt zich op de terugkeerplicht, aangezien de richtlijn hierover de meeste onduidelijkheid laat. Het uiteenzetten van welke handelingen wel en niet van vreemdelingen mogen worden verwacht in het kader van deze terugkeerplicht gebeurt in hoofdstukken 3 tot en met 9. Omdat de stappen die vreemdelingen moeten en juist niet hoeven te zetten vaak twee kanten van dezelfde medaille zijn, worden deze tegelijkertijd besproken.

2.1 Verplichtingen ten aanzien van het verzoeken van terugname door bestemmingslanden *(terugkeerelement (i))*

Binnen de analyse van de terugkeerplicht wordt op zijn beurt de meeste aandacht geschonken aan het eerste terugkeerelement: het verzoeken van terugname bij bestemmingslanden. Dit is uitgesplitst in verschillende punten, die achtereenvolgens in hoofdstukken 3 tot en met 7 worden besproken.

2.1.1 Het identificeren van terugkeerlanden als verplichte bestemmingen

Om vast te stellen welke verplichtingen vreemdelingen hebben ten aanzien van het verzoeken van terugname moet eerst worden vastgesteld op welke landen zij zich hierbij zouden moeten richten. Hoofdstuk 3 bekijkt derhalve onder welke voorwaarden de bestemmingen die genoemd worden in artikel 3, derde lid, van de richtlijn (het land van herkomst, een doorreisland of een ander derde land) daadwerkelijk terugkeerverplichtingen voor de vreemdeling met zich meebrengen.

In het algemeen wordt vastgesteld dat de bestemmingen waar vreemdelingen zich op dienen te richten een stuk beperkter zijn dan in eerste instantie zou kunnen worden aangenomen. Ten eerste geldt de plicht om terug te keren naar het land van herkomst slechts voor vreemdelingen die de nationaliteit van dat land bezitten, of als het het land van vroeger gewoonlijk verblijf van een staatloze persoon is. Echter, als de vreemdeling niet staatloos is maar wel een land van vroeger gewoonlijk verblijf heeft (naast een land van nationaliteit), valt dit niet binnen de definitie van 'land van herkomst' in de richtlijn.

Het verplichte karakter van terugkeer naar een doorreisland is ook beperkt door een aantal factoren. Ten eerste moet er een situatie van doorreis zijn, hetgeen op zijn minst impliceert dat de vreemdeling door het land is gereisd als onderdeel van de migratieroute die hem of haar uiteindelijk naar de EU-lidstaat bracht. In sommige gevallen is dit verder beperkt tot slechts die landen van waaruit vreemdelingen direct de EU-lidstaat zijn binnengetreden, maar in hoeverre dit zo is hangt af van de inhoud van de overeenkomst of regeling op basis waarvan terugkeer en terugname

plaatsvindt. Dit geldt ook voor de mogelijkheid dat sommige vormen van doorreis, zoals doorreis via een internationale luchthaven, geen verplichting tot terugkeer met zich meebrengen als dit zo bepaald is in de relevante overeenkomst of regeling. Ten tweede kan er, gezien de sleutelrol van overeenkomsten en regelingen in de definitie van doorreislanden, geen individuele verantwoordelijkheid ontstaan als zulke overeenkomsten of regelingen niet van toepassing zijn. Ten derde moeten dergelijke overeenkomsten en regelingen voldoen aan bepaalde inhoudelijke voorwaarden. Zij dienen bijvoorbeeld expliciete regels te bevatten over de terugkeer van personen die niet de nationaliteit bezitten van het doorreisland, waaronder ook staatlozen vallen. Verder moeten zij een bindende verplichting voor dat land omvatten om zulke niet-onderdanen terug te nemen of, bij gebrek hieraan, in ieder geval heldere en algemene toestemming van dat land geven om zulke niet-onderdanen terug te nemen. In het bijzonder in het laatste geval, als er geen sprake is van duidelijke internationaalrechtelijke terugnameverplichtingen, dienen overeenkomsten en regelingen heldere procedures voor terugname te bevatten, welke toegankelijk zijn voor vreemdelingen zodat zij weten welke stappen zij dienen te ondernemen om terugname te bewerkstelligen en aan welke voorwaarden hiervoor moet worden voldaan. Zodoende kan het bestaan van ongeschreven of geheime overeenkomsten niet leiden tot een verplichting van het individu om terug te keren naar een doorreisland.

Terugkeer naar een ander derde land hangt af van het vrijwillige besluit van de vreemdeling om daar naartoe terug te keren, en is zodoende niet verplicht. In plaats hiervan is het een mogelijkheid die lidstaten moeten laten aan vreemdelingen die terugkeer naar een ander land verkiezen boven terugkeer naar het land van herkomst of een doorreisland. Het facultatieve karakter van terugkeer naar een ander derde land geldt zelfs als er een duidelijk zicht is op terugname door zo'n land, bijvoorbeeld op basis van een verblijfsrecht aldaar. Omdat terugkeer naar een ander derde land optioneel is en daarmee van een fundamenteel andere aard dan de andere twee bestemmingen genoemd in de richtlijn, richt de verdere analyse zich voornamelijk op de andere twee bestemmingen die wel verplicht zijn.

2.1.2 Terugnameverplichtingen van landen van herkomst en consequenties voor de eigen verantwoordelijkheid van het individu

Hoofdstuk 4 kijkt vervolgens specifiek naar terugname door het land van herkomst. Het gaat in op de internationaalrechtelijke terugnameverplichtingen van dergelijke landen en wat deze betekenen voor de verantwoordelijkheid van de vreemdeling. Er lijkt een impliciet uitgangspunt te zijn dat iedere vreemdeling een land van herkomst heeft waarnaar hij of zij terug kan keren, hetgeen (ten minste in theorie) garandeert dat er altijd een manier is om aan de terugkeerplicht te voldoen. Voor zover dit personen betreft die de nationaliteit van het land van herkomst hebben lijkt dit uitgangspunt grotendeels houdbaar, aangezien er breed erkende terugnameverplichtingen als onderdeel van het internationaal gewoonterecht bestaan,

die verder worden gestut door specifieke internationale overeenkomsten. Hoewel verschillende vraagtekens kunnen worden gezet bij de aanname dat landen hun onderdanen altijd en zonder voorwaarden moeten terugnemen, is dit desondanks een van de conceptuele steunpilaren van het EU-terugkeerbeleid. Deze internationaalrechtelijke terugnameverplichtingen houden in dat vreemdelingen bewijs van nationaliteit en identiteit moeten leveren om terugname af te dwingen. Hiernaast stellen deze terugnameverplichtingen duidelijke grenzen aan wat niet van vreemdelingen verwacht mag worden in het terugnameproces. Hierbij gaat het in het bijzonder om eisen van het land van herkomst die niet direct gerelateerd zijn aan het vaststellen van nationaliteit en identiteit, die zodoende niet vallen binnen de handelingen die van de vreemdeling verwacht mogen worden als onderdeel van de terugkeerplicht in de richtlijn.

De situatie van staatlozen met vroeger gewoonlijk verblijf in een herkomstland is veel minder helder. Terugnameverplichtingen, ten minste op interstatelijk niveau, hebben duidelijke tekortkomingen waar het gaat om het garanderen dat staatloze personen door het land van vroeger gewoonlijk verblijf worden teruggenomen. Hoewel wel gesteld wordt dat zulke terugnameverplichtingen bestaan voor voormalige onderdanen zouden deze sowieso slechts onder specifieke voorwaarden gelden. Ze omvatten zeker niet alle staatlozen die vroeger gewoonlijk verblijf hadden in een bepaald land. Voor de eventuele terugname van staatlozen in brede zin speelt vooral verblijfsrecht een belangrijke rol in terugnameovereenkomsten en verschillende multilaterale verdragen. De toepasbaarheid van deze bepalingen is echter verder afhankelijk van enerzijds hun werking tussen een bepaalde EU-lidstaat en het land van herkomst en anderzijds van de vraag of de vreemdeling behoort tot de specifieke categorie personen die binnen het kader van zulke verdragen vallen. Zodoende blijven er aanzienlijke gaten in het interstatelijk kader voor terugname van staatlozen met vroeger gewoonlijk verblijf bestaan.

Hierom is de rol van mensenrechtelijke bepalingen, vooral onder het IVBPR, van cruciaal belang, aangezien deze voorzien in erg sterke terugnameverplichtingen ten aanzien van personen (waaronder staatlozen) voor wie het herkomstland hun 'eigen' land is. Dit brengt een belangrijk verschil tussen interstatelijke en mensenrechtelijke terugnameverplichtingen in beeld. De verplichtingen van het land van herkomst zijn gerelateerd aan verschillende actoren, namelijk de EU-lidstaat enerzijds en de vreemdeling anderzijds. Zolang interstatelijke kaders voor terugname effectief zijn is dit niet noodzakelijk een probleem, omdat terugkeer dan op deze basis kan plaatsvinden. Als dit niet zo is, speelt echter de vraag op of van vreemdelingen verwacht mag worden dat zij een beroep doen op hun individuele recht op terugkeer om terugkeer te bewerkstelligen, en dit recht zodoende in dienst stellen van het bereiken van de doelstellingen van de EU-lidstaat.

2.1.3 Niet-effectieve interstatelijke terugnameverplichtingen en het verplicht uitoefenen van het recht op terugkeer

Dit dilemma wordt nader besproken in hoofdstuk 5. Het identificeert allereerst bepaalde scenario's waarin interstatelijke terugnameverplichtingen niet effectief zijn, naast de al genoemde gaten in terugnameverplichtingen jegens staatlozen en eventuele situaties waarin terugkeerlanden simpelweg hun internationaalrechtelijke verplichtingen schenden. Hierbij gaat het onder meer om de mogelijkheid dat de interstatelijke terugnameverplichting nietig wordt als de EU-lidstaat op onrechtmatige wijze besluit dat de vreemdeling moet terugkeren. Ook kunnen landen van herkomst in (hoogst) uitzonderlijke gevallen het niet voldoen aan terugnameverplichtingen rechtvaardigen. Bijvoorbeeld als dit een tegenmaatregel tegen onrechtmatig handelen van de EU-lidstaat is, als er sprake is van overmacht (*force majeure*), of als niet-terugname noodzakelijk is om een essentieel belang van de staat te beschermen tegen een ernstig en onmiddellijk gevaar. Verder wordt ook besproken hoe standpunten over het bestaan en de inhoud van de ongeschreven regels van het gewoonterecht uiteen kunnen lopen tussen EU-lidstaten en herkomstlanden, hetgeen ook de effectiviteit van deze regels kan aantasten.

In zulke situaties is het mogelijk dat EU-lidstaten van vreemdelingen verwachten dat zij hun bereidheid om terug te keren aan het land van herkomst kenbaar maken, in het bijzonder door het afleggen van een verklaring hierover. De rest van het hoofdstuk richt zich op de legitimiteit van deze verwachting. Die legitimiteit is allereest twijfelachtig vanuit het conceptuele oogpunt dat mensenrechten rechten van het individu zijn, in het bijzonder om hem of haar te beschermen tegen te verregaand ingrijpen door de staat. Ze zijn geen instrumenten voor staten om hun eigen beleidsdoelstellingen te bereiken en hebben niet als taak om terugkeerbeleid effectief te maken. Hierom is het van belang dat helder in het oog wordt gehouden dat de niet-effectieve implementatie van interstatelijke regels in eerste instantie een kwestie is tussen het herkomstland en de EU-lidstaat, en dat het afwentelen hiervan op de van de vreemdeling de grenzen van zijn of haar verantwoordelijkheid te ver zou oprekken en zou leiden tot een fundamenteel conflict met de principes van billijkheid en transparantie waaraan de richtlijn dient te voldoen.

Vanuit rechtspositief oogpunt moeten ook grote vraagtekens gezet worden bij het idee van een gedwongen uitoefening van het recht op terugkeer. Hiertoe wordt gekeken naar hoe het Europees Hof voor de Rechten van de Mens (EHRM) omgaat met 'negatieve rechten' (waarbij individuen beschermd worden tegen dwang om iets te doen wat feitelijk een vrijheid is die zij op grond van het EVRM hebben). Hieruit blijkt dat het afdwingen van een beroep op het recht op terugkeer zou leiden tot een ongeoorloofde inmenging met dat recht. Op grond hiervan moet worden geconcludeerd dat EU-lidstaten zich vrijwel zeker zouden moeten onthouden van het dwingen van vreemdelingen om hun recht op terugkeer tegen hun wil

uit te oefenen of te claimen, zoals door middel van het afleggen van een verklaring van bereidheid tot terugkeren bij de consulaire vertegenwoordig van hun herkomstland.

2.1.4 Terugkeer naar en terugname door doorreislanden

Hoofdstuk 6 behandelt de terugnameverplichtingen van doorreisland en de implicaties hiervan voor de plichten van vreemdelingen. Aangezien er geen algemeen geldende internationaalrechtelijke verplichtingen bestaan ten aanzien van de terugname van niet-onderdanen hangen de handelingen van zulke vreemdelingen om terugkeer te bewerkstelligen af van de overeenkomsten die met een bepaald doorreisland zijn aangegaan. Hoewel deze voornamelijk zijn afgesloten met het zicht op verwijdering, kunnen ze in ieder geval theoretisch ook van toepassing zijn op vrijwillige terugkeersituaties. Om terugkeer mogelijk te maken zullen EU-lidstaten normaal gesproken een verzoek tot terugname bij het doorreisland moet indienen. Het feit dat aan de vreemdeling een vrijwillige vertrektermijn is toegekend sluit niet uit dat de lidstaat zonder toestemming van de vreemdeling een terugnameverzoek doet, hoewel het kan niet overgaan tot verwijdering naar het doorreisland zo lang deze termijn nog niet is verstreken. Om het voor de EU-lidstaat mogelijk te maken een terugnameverzoek te doen, mag van de vreemdeling verwacht worden dat hij of zij relevante informatie en bewijsstukken die hiervoor nodig zijn aandraagt. Hierbij mag verwacht worden dat hij of zij het bewijs deelt waarover redelijkerwijs wordt beschikt en dat de sterkste terugnameplicht voor het doorreisland in werking stelt. Maar wat noodzakelijk is in dit geval sterk kan variëren, en ook bij gebrek aan bepaalde informatie – waarover de lidstaat soms zelf beschikt – is terugname vaak nog mogelijk. Hierom moet de daadwerkelijke onmogelijkheid om terugname te verzoeken centraal staan in de beoordeling van het hebben voldaan aan dit deel van de terugkeerplicht, niet slechts het feit dat de vreemdeling niet meewerkt met dit proces.

Multilaterale verdragen over lucht- en maritiem verkeer omvatten verscheidene terugnameverplichtingen die ook van toepassing kunnen zijn op doorreislanden en zodoende een terugkeerplicht voor vreemdelingen kunnen inhouden. In aanvulling op verblijfsrechten kan dit ook gebaseerd zijn op het feit dat de vreemdeling in het doorreisland aan boord is gegaan van een transportmiddel (inscheping), hoewel deze regels in de praktijk slechts zien op een beperkte groep vreemdelingen die binnen het kader van de richtlijn vallen. Bovendien zijn de verplichtingen van doorreislanden ten aanzien van personen aan wie toegang wordt geweigerd (of verstekelingen) onder het Verdrag van Chicago en het FAL-verdrag beperkt tot het instellen van nader onderzoek. Desondanks bestaan deze verplichtingen en daarom kunnen deze op zijn minst een grond vormen om van vreemdelingen te verwachten pogingen te ondernemen terug te keren naar het land waar zij zijn ingescheept.

Andere (niet juridisch bindende) regelingen worden in de richtlijn ook gezien als een relevante basis om vreemdelingen te verplichten terug te keren naar een doorreisland, ten minste als deze aan bepaalde voorwaarden voldoen, zoals toegankelijkheid en rechtszekerheid. Hierbij is het van belang te onderkennen dat informele regelingen hogere risico's voor het terugkerende individu met zich meebrengen en dat deze regelingen zich eerder onttrekken aan rechterlijk, democratisch en openbaar toezicht. Hierom zou de EU-lidstaat eerst moeten laten zien dat zulke regelingen voldoen aan alle noodzakelijke waarborgen, voordat hier terugkeerverplichtingen voor vreemdelingen uit kunnen voortvloeien. Als deze waarborgen er zijn is het in principe verder aan het doorreisland om voorwaarden te stellen voor terugname. De vreemdeling zal hieraan moeten voldoen, maar met enkele uitzonderingen. Zo kunnen EU-lidstaten bijvoorbeeld niet van vreemdelingen eisen dat zij voldoen aan voorwaarden die evident discriminerend zijn. Ook hoeven vreemdelingen niet te voldoen aan andere illegitieme of onrechtmatige vereisten, zoals in verband met het verkrijgen van reisdocumenten (zie 2.2 hieronder).

2.1.5 Het vaststellen van relevante terugkeerlanden in het individuele geval: bestemmingskeuze en veilige terugkeer

Hoofdstuk 7 bespreekt een laatste punt dat opkomt in verband met het verzoeken van terugname bij een terugkeerland. Dit is of de vreemdeling volledig zelf mag kiezen tussen verschillende bestemmingen en of hij of zij bepaalde bestemmingen die volgens de richtlijn verplicht zijn toch kan weigeren.

In de literatuur zijn verschillende perspectieven te vinden op de vraag of personen die geconfronteerd worden met *expulsion* hun bestemmingsland zelf mogen kiezen en of de EU-lidstaat een verplichting heeft de voorkeur van de vreemdeling te volgen. Op grond van het internationaal gewoonterecht is er mogelijk een verplichting om vreemdelingen de kans te geven hun voorkeur kenbaar te maken, maar staten lijken veel flexibiliteit te behouden of zij gevolg geven aan deze voorkeur. Het recht om een land te verlaten omvat echter in principe ook een recht om de bestemming hierbij te bepalen, hetgeen ook geldt als er sprake is van verplicht of gedwongen vertrek. Dit recht is niet absoluut, maar iedere inmenging met dit recht – zoals rechtstreeks door het uitvaardigen van instructies door de lidstaat of indirect door het onthouden van ingenomen documenten totdat de vreemdeling zich schikt in het terugkeren naar de 'juiste' bestemming – moet door de lidstaat gerechtvaardigd worden. Het recht op terugkeer biedt speciale bescherming van de keuze om naar het eigen land terug te gaan en lidstaten zullen zich normaal gesproken moeten onthouden van iedere inmenging met de pogingen van vreemdelingen om naar deze specifieke bestemming terug te keren.

De situatie waarin een vreemdeling de voorkeur geeft aan terugkeer naar een doorreisland terwijl de EU-lidstaat (nog) geen terugnameverzoek

heeft ingediend roept specifieke vragen op. Als uitvloeisel van de plicht van lidstaten om het *effet utile* van de richtlijn te garanderen – waarbij het hierbij zowel gaat om het doel van effectieve terugkeer en de voorkeur voor vrijwillige terugkeer – kan van hen verwacht worden dat ze zo'n verzoek indienen namens de vreemdeling, tenzij ze specifieke redenen kunnen aandragen waarom dit onmogelijk of niet in het belang van de terugkeerprocedure is.

De vraag over het eventueel weigeren van een verplichte bestemming wordt besproken in het kader van het waarborgen van de veiligheid en waardigheid van het individu in het terugkeerproces, en met name het verbod of *refoulement*. Dit verbod roept vragen over verantwoordelijkheid op, omdat het de lidstaat is die bescherming dient te bieden tegen *refoulement*, maar de vreemdeling verplicht is terug te keren en hiertoe zelf stappen te ondernemen, hetgeen ertoe kan leiden dat hij of zij vrijwillig terugkeert naar een onveilig land of via een onveilige reisroute. Vastgesteld wordt dat vrijwillige terugkeer niet gezien kan worden als een garantie dat een bestemmingsland veilig is. Ook mag het feit dat de vreemdeling heeft besloten vrijwillig terug te keren niet worden gezien als bewijs dat hij of zij afstand heeft gedaan van het recht beschermd te worden tegen *refoulement*, aangezien zo'n beslissing nog steeds het resultaat is van een handeling door de lidstaat om het individu te verplichten terug te keren.

De richtlijn kent echter bepaalde gaten in bescherming tegen *refoulement* als al een terugkeerbesluit is uitgevaardigd, die in het bijzonder opspelen tijdens de vrijwillige terugkeerfase. Als niet wordt besloten de vreemdeling een verblijfsrecht te geven kan *refoulement* deels worden voorkomen door een aantal maatregelen, zoals het garanderen van de keuzevrijheid naar een andere bestemming te vertrekken en het gezamenlijk opstellen van een lijst van bestemmingen waar redelijkerwijs naartoe teruggekeerd kan worden. Als de meest gebruikte reisroutes naar een bestemmingsland onveilig blijken brengt dit inspanningsverplichtingen voor de lidstaat met zich mee, waarbij deze dient samen te werken met de vreemdeling om gepaste alternatieven te vinden. Lidstaten dienen zich ook te onthouden van het zetten van ongeoorloofde druk op de vreemdeling om te kiezen voor vrijwillige terugkeer, waarbij enkele grenzen hieraan uit de richtlijn afgeleid kunnen worden en andere nader onderzoek behoeven.

2.2 Het verkrijgen van reisdocumenten *(terugkeerelement (ii))*

Het tweede terugkeerelement dat als essentieel werd beschouwd voor vrijwillige terugkeer is het verkrijgen van reisdocumenten. In hoofdstuk 8 wordt gekeken naar de relevante bepalingen in het internationaal en EU-recht ten aanzien van reisdocumenten, en hun relatie met de verplichtingen van vreemdelingen onder de richtlijn.

Vreemdelingen die niet al in het bezit zijn van geldige reisdocumenten of geen mogelijkheden hebben om zonder zulke documenten terug te keren dienen zich te wenden tot de autoriteiten die bevoegd zijn reisdocumenten

af te geven, zolang dit geen conflict oplevert met lopende asielprocedures. De eigen verantwoordelijkheid van de vreemdeling impliceert dat het in principe aan hem of haar is om deze autoriteit te identificeren. De EU-lidstaat heeft echter ook positieve verplichtingen om toegang tot consulaire vertegenwoordigingen mogelijk te maken. Dit is in het bijzonder het geval als de lidstaat aan de vreemdeling verplichtingen heeft opgelegd om het risico op onderduiken te beperken die toegang tot consulaire autoriteiten bemoeilijken, zoals meldplichten of de verplichting om op een bepaalde plaats te verblijven. Als de relevante consulaire autoriteiten zich bevinden op het grondgebied van een andere EU-lidstaat, mag verwacht worden dat coördinerende maatregelen worden genomen zodat de vreemdeling desondanks een aanvraag voor vervangende reisdocumenten kan indienen.

Als de aanvraag voor reisdocumenten samenloopt met het verzoek te worden teruggenomen kunnen aan de vreemdeling geen andere eisen worden gesteld dan die noodzakelijk zijn voor terugname, behalve de benodige stappen voor het administratief proces zoals het overleggen van een foto voor het document en het betalen van leges. Er zijn echter duidelijke grenzen aan de administratieve eisen die consulaire autoriteiten mogen stellen. Van vreemdelingen mag in het bijzonder niet worden verwacht dat zij leges betalen die hoger zijn dan wat redelijkerwijs verbonden is aan het administratieve proces, of leges die niet in nationale wet- of regelgeving zijn vastgelegd. EU-lidstaten dienen vreemdelingen verder ook te beschermen tegen het moeten betalen van steekpenningen, het verlenen van gunsten, of het doen van handelingen die anderszins gekwalificeerd zouden kunnen worden als corruptie of machtsmisbruik. EU-lidstaten kunnen evenmin toestaan dat vreemdelingen hun grondgebied verlaten op basis van reisdocumenten die zijn vervalst of op frauduleuze wijze zijn verkregen. Zij mogen van vreemdelingen niet verwachten, noch hen hiertoe aansporen, om reisdocumenten te verkrijgen op enige manier die het risico met zich meebrengt dat dit leidt tot uitgave van vervalste of frauduleuze documenten, zelfs als dit de enige manier zou zijn om vrijwillige terugkeer te bewerkstelligen.

In principe hebben vreemdelingen de vrijheid te kiezen welk soort reisdocument zij aanvragen, zolang op basis hiervan kan worden teruggekeerd. Normaal gesproken zouden EU-lidstaten zich niet moeten inmengen met deze keuze, in het bijzonder als de vreemdeling ervoor kiest om een paspoort aan te vragen in plaats van een *laissez-passer*, tenzij dit kan worden gerechtvaardigd (bijvoorbeeld als een noodzakelijke stap om onderduiken te voorkomen). Dit betekent niet dat EU-lidstaten duidelijke verplichtingen hebben om de voorkeur van de vreemdeling voor een bepaald soort reisdocument actief te faciliteren. Of dit het geval is zal afhangen van overwegingen ten aanzien van kosten of tijdsverloop, waaronder de mate waarin de vrijwillige vertrektermijn zou moeten worden verlengd.

Voor staatlozen kan het identificeren van een bevoegde autoriteit problematisch zijn. Landen van vroeger gewoonlijk verblijft hebben lang

niet in alle gevallen een verplichting om reisdocumenten uit te geven aan staatloze personen. Zodoende dient de bij beoordeling van het hebben voldaan aan de plicht reisdocumenten te verkrijgen in acht te worden genomen dat de verplichtingen van landen van vroeger gewoonlijk verblijf om zulke documenten aan staatlozen uit te vaardigen zeer beperkt zijn.

Voor staatlozen, maar ook voor andere vreemdelingen, kan er een mogelijkheid zijn reisdocumenten te verkrijgen via de EU-lidstaat zelf, vooral als er geen andere autoriteit is die deze kan of wil uitvaardigen. Als zulke mogelijkheden bestaan kan van EU-lidstaten verwacht worden vreemdelingen hierover te informeren. Terugkeer op basis van een EU-reisdocument kan slechts verplicht worden gesteld als voldoende garanties zijn gegeven dat dit daadwerkelijk tot terugname door het bestemmingsland leidt en dat er geen negatieve neveneffecten ten aanzien van de bescherming van mensenrechten na terugkeer te verwachten zijn.

2.3 Praktische voorbereiding van vertrek uit de EU-lidstaat *(terugkeerelement (iii))*

Hoofdstuk 9 behandelt het derde en laatste terugkeerelement: de praktische voorbereiding van het uiteindelijke vertrek uit de EU-lidstaat. Eerst wordt hierbij gekeken in hoeverre vreemdelingen moeten voldoen aan specifieke voorwaarden voordat zij een EU-lidstaat kunnen verlaten. In dit verband kunnen vreemdelingen verantwoordelijk worden gehouden voor het voldoen aan alle noodzakelijke uitreisvoorwaarden om EU-buitengrenzen over te steken, waaronder in het kader van de Schengengrenscode, zoals het gebruik van officiële grensposten en het ondergaan van de noodzakelijke uitreiscontroles, zelfs als dit tot vertraging van daadwerkelijk vertrek leidt. Hiernaast dienen vreemdelingen te zorgen dat eventuele nog openstaande verplichtingen jegens andere personen of jegens de lidstaat zijn voldaan, zoals het nemen van de noodzakelijke juridische stappen om kinderen mee terug te nemen als de andere ouder niet terugkeert, of het beschikbaar blijven voor strafrechtelijke onderzoeken of procedures. In zulke gevallen zullen de specifieke omstandigheden van het individu onderdeel moeten vormen van de afweging of verlenging van de vrijwillige vertrektermijn nodig is.

Een tweede issue is gerelateerd aan terugkeerassistentie. In principe omvatten de bepalingen in de richtlijn geen ondubbelzinnig recht voor de vreemdeling om terugkeerassistentie te ontvangen. Er kunnen echter omstandigheden zijn waarin een vreemdeling niet zonder meer mag worden uitgesloten van bestaande terugkeerondersteuningsprogramma's. Dit is met name het geval als vrijwillig terugkeer zonder zulke ondersteuning onmogelijk is. Zelfs in zo'n geval zou het recht op assistentie echter beperkt kunnen worden tot de vormen van ondersteuning die strikt noodzakelijk zijn om terugkeer mogelijk te maken, waar bijvoorbeeld herintegratieondersteuning buiten kan vallen. Het vragen om terugkeerassistentie is ook geen onderdeel van de terugkeerplicht, tenzij vastgesteld kan worden

dat terugkeer uitsluitend met zulke assistentie mogelijk was. Ook hier moet onderscheid gemaakt worden, waarbij bijvoorbeeld hulp bij het regelen van transport waarschijnlijk wel, maar bemiddeling bij de aanvraag van reisdocumenten niet als noodzakelijk kan worden beschouwd. Dit laatste omdat de internationaalrechtelijke verplichting van het terugkeerland om reisdocumenten uit te geven niet afhankelijk is van het feit dat een derde partij bemiddelt bij het aanvragen van zulke documenten.

Een derde punt is de vraag wanneer een vreemdeling nu eigenlijk daadwerkelijk is 'teruggekeerd' in de zin van de richtlijn. De richtlijn zelf is hierover ambigu, en zowel terugkeer als vertrek uit de lidstaat worden gebruikt als indicatoren voor het voldoen door de vreemdeling aan zijn of haar verplichtingen, hoewel deze niet noodzakelijk hetzelfde zijn. De indicator terugkeer in een bestemmingsland is correcter gezien de bewoording en context van de richtlijn, maar er zijn aanzienlijke praktische moeilijkheden om vast te stellen dat dit daadwerkelijk is gebeurd. Vertrek uit de lidstaat biedt een praktisch makkelijker hanteerbaar criterium, maar roept vragen op of iedere vorm van vertrek uit het grondgebied van de EU-lidstaat voldoende is. De richtlijn bevat op dit punt een hiaat met betrekking tot het Europees effect van het terugkeerbesluit, dat niet als zodanig vaststelt dat een vreemdeling niet aan de terugkeerplicht zou kunnen voldoen door zich op irreguliere wijze naar een andere EU-lidstaat te verplaatsen. Dit wordt slechts deels ondervangen door het inreisverbod.

3 Toepassing van de bepalingen omtrent de vrijwillige vertrektermijn

In hoofdstukken 10 en 11 wordt de aandacht verlegd naar de tweede set onderzoeksvragen met betrekking tot de toepassing van de bepalingen in de richtlijn omtrent de vrijwillige vertrektermijn. Zoals gezegd zijn deze vragen in het bijzonder relevant voor het overkoepelende vraagstuk van de reikwijdte van de eigen verantwoordelijkheid van de vreemdeling, omdat deze bepalen in hoeverre hij of zij daadwerkelijk een kans krijgt om uit eigen beweging aan de terugkeerplicht te voldoen.

3.1 De voorkeur voor vrijwillige terugkeer en de aanspraak van derdelanders op een vrijwillige vertrektermijn *(onderzoeksvraag 2a)*

Hoofdstuk 10 behandelt de aard en reikwijdte van de aanspraak die vreemdelingen kunnen maken op een vrijwillige vertrektermijn, in het kader van zowel de voorkeur voor vrijwillige terugkeer alsook de specifieke uitzonderingen op het toekennen van zo'n termijn in de richtlijn. Vreemdelingen hebben een duidelijk recht op een vrijwillige vertrektermijn dat tweevoudig is beschermd: als een recht op grond van de richtlijn en als een mechanisme om te waarborgen dat de grondrechten van het individu niet disproportioneel geraakt worden tijdens de terugkeerprocedure. Dit recht is

niet absoluut, maar inmenging hierin moet berusten op objectieve criteria, die bovendien aan bepaalde hieronder genoemde voorwaarden dienen te voldoen. Sowieso kan inmenging alleen plaatsvinden wanneer een van de uitzonderingsgronden genoemd in artikel 7, vierde lid, van de richtlijn van toepassing is. Dit is verder onderhavig aan een beoordeling van de proportionaliteit van het onthouden van een mogelijkheid om vrijwillig terug te keren in de context van de specifieke omstandigheden van het individuele geval. Bovendien moet de vraag of een vertrektermijn korter dan zeven dagen kan worden gegeven, in plaats van het volledig onthouden van zo'n termijn, een integraal onderdeel zijn van de proportionaliteitstoets.

Wanneer lidstaten willen afzien van een vrijwillige vertrektermijn vanwege een gevaar voor de openbare orde, openbare veiligheid of nationale veiligheid, kan dit niet slechts gebaseerd zijn op het eerdere gedrag van vreemdelingen, zoals het feit dat zij verdacht waren van of veroordeeld voor een strafbaar feit. In plaats hiervan moet dit op een geïndividualiseerde, gecontextualiseerde en toekomstgerichte manier worden afgewogen, waarbij de vraag centraal staat of er een daadwerkelijk, actueel en voldoende ernstige bedreiging is van een fundamenteel belang van de samenleving. Alle feitelijke of juridische gegevens die dit kunnen verduidelijken dienen hierbij te worden beoordeeld. Lidstaten dienen zich niet te baseren op algemene aannames, vastgelegd in wetgeving of gebruikt in de praktijk, dat specifieke gedragingen in het verleden voldoende zijn om een gevaar voor de openbare orde, openbare veiligheid of nationale veiligheid te vormen die het onthouden van een vrijwillige vertrektermijn rechtvaardigen.

Een lidstaat kan niet afzien van het toekennen van een vrijwillige vertrektermijn omdat er een risico op onderduiken bestaat als objectieve criteria hiervoor niet in wetgeving zijn vastgelegd. Zulke criteria moeten bovendien daadwerkelijk een risico op onderduiken kunnen aantonen, waarbij het specifiek gaat om het risico dat een vreemdeling zich onttrekt aan het toezicht van de autoriteiten waardoor het gedwongen uitvoeren van het terugkeerbesluit onmogelijk wordt. In dit verband kunnen gebrek aan medewerking of aan bereidheid om terug te keren als zodanig geen aanwijzing vormen dat de vreemdeling zal onderduiken, aangezien deze elementen er niet toe leiden dat de lidstaat later geen mogelijkheid heeft het terugkeerbesluit met dwang uit te voeren. Zulke criteria mogen ook niet simpelweg een afgeleide zijn van het loutere feit van onrechtmatig verblijf, hetgeen het geval kan zijn als onrechtmatige inreis, het verblijven nadat een visum of verblijfsstatus is verlopen, of het niet beschikken over documenten als indicatoren voor het risico op onderduiken worden gebruikt. Tenslotte mogen de gebruikte criteria niet slechts andere uitzonderingsgronden reproduceren, zoals het geval kan zijn als strafrechtelijke procedures of veroordelingen worden gebruikt als indicator voor een risico op onderduiken. Dit zou de hogere eisen voor onthouding van een vertrektermijn op grond van openbare orde kunnen omzeilen. Als wordt vastgesteld dat er een risico op onderduiken bestaat kan desondanks pas worden besloten

volledig af te zien van het toekennen van een vrijwillige vertrektermijn als de mogelijkheid om bepaalde verplichtingen aan de vreemdeling op te leggen om het risico op onderduiken te beperken voldoende is afgewogen.

Onthouden van een vertrektermijn omdat een verblijfsaanvraag als kennelijk ongegrond of frauduleus is afgewezen mag geen automatisme zijn. Proportionaliteitseisen moeten ook hier volledig worden gerespecteerd. In dit verband kan worden gesteld dat het erg moeilijk zal zijn voor lidstaten om een rechtvaardiging voor het onthouden van een vertrektermijn te verschaffen die specifiek aan deze uitzonderingsgrond is gerelateerd, en niet aan een van de andere twee die hierboven zijn behandeld. Als dit wel het geval is, dan dienen alle waarborgen die samenhangen met die andere uitzonderingsgronden in acht te worden genomen. Het afzien van het toekennen van een vrijwillige vertrektermijn puur en alleen op grond van het feit dat een verblijfsaanvraag is afgewezen als kennelijk ongegrond of frauduleus is daarom moeilijk verenigbaar met het proportionaliteitsbeginsel, met de mogelijke uitzondering van het gebruik van deze grond om een termijn van korter dan zeven dagen te geven.

Zowel de huidige mogelijkheid om een vrijwillige vertrektermijn te weigeren op grond van het feit dat een verblijfsaanvraag als kennelijk ongegrond of frauduleus is afgewezen, en in het bijzonder het voorstel van de Commissie om het onthouden van zo'n termijn verplicht te stellen wanneer een van de drie uitzonderingsgronden van toepassing is, roepen vragen op over hun verenigbaarheid hiervan met de jurisprudentie van het HvJEU, dat inmiddels de rol van vrijwillige terugkeer bij het beschermen van grondrechten heeft verankerd.

3.2 De lengte van de vrijwillige vertrektermijn *(onderzoeksvraag 2b)*

Als laatste onderdeel van het verduidelijken van de reikwijdte van de eigen verantwoordelijk wordt in hoofdstuk 11 de lengte van de vrijwillige vertrektermijn behandeld. Geconcludeerd wordt dat de aanvankelijke termijn lang genoeg moet zijn om vreemdelingen een effectieve mogelijkheid tot vrijwillige terugkeer te bieden. Hoewel artikel 7, eerste lid, van de richtlijn bepaalt dat een vertrektermijn tussen de zeven en dertig dagen dient te zijn, betekent dit niet iedere lengte in dit spectrum ook 'passend' is. Het toekennen van een termijn korter dan dertig dagen dient te worden gerechtvaardigd op grond van een beoordeling van welke tijdsduur realistisch gezien nodig zou zijn om de vreemdeling alle benodigde handelingen voor terugkeer te laten uitvoeren, mits hij of zij dit voldoende voortvarend doet. Zo'n beoordeling noopt tot een gezamenlijke en wederkerige inspanning van vreemdelingen en EU-lidstaten. Vreemdelingen dienen relevante informatie die raakt aan hun terugkeermogelijkheden ter beschikking te stellen. Als zulke informatie door de vreemdeling niet wordt gegeven is het makkelijker voor lidstaten om het geven van een korte vertrektermijn te rechtvaardigen. Desondanks kan ook van lidstaten verwacht worden dat zij zelf inspanningen verrichten om een goede inschatting van een redelijke

tijdspanne voor terugkeer te maken, waarbij ze zich ook dienen te baseren op hun eigen inzichten en ervaringen, informatie van andere actoren die terugkeer begeleiden of ondersteunen, en de inhoud van overeenkomsten of regeling op grond waarvan terugkeer zal plaatsvinden. Lidstaten zouden er in eerste instantie vanuit moeten gaan dat een termijn van slechts zeven dagen, of anderszins aan de korte kant van het spectrum dat in de richtlijn wordt bepaald, te kort zal zijn om de termijn passend te maken. Hiernaast mag een besluit over de lengte van een vrijwillige vertrektermijn niet uitsluitend op basis van de eerdere verblijfsstatus van een vreemdeling worden genomen.

Een vrijwillige vertrektermijn dient te worden verlengd als dit noodzakelijk is omdat het belang van de vreemdeling om een mogelijkheid te krijgen uit eigen beweging terug te keren zwaarder weegt dan het belang van de EU-lidstaat om de uitvoering van het terugkeerbesluit af te dwingen. Zulke noodzakelijkheid tot verlenging ontstaat allereerst als er geen bewijs is dat het feit dat terugkeer nog niet heeft plaatsgevonden aan het eind van de aanvankelijke vertrekperiode het gevolg is van handelingen of verzuim van de vreemdeling. Als er wel bewijs is dat de vreemdeling niet alle benodigde inspanningen heeft geleverd zullen lidstaten nog steeds genoopt zijn om de vertrekperiode te verlengen als zij menen dat vrijwillige terugkeer alsnog kan plaatsvinden in een redelijk tijdsbestek en verwacht mag worden dat de vreemdeling tot nog de benodigde stappen onderneemt. Een verlenging kan bovendien noodzakelijk zijn als verwijdering van de vreemdeling een disproportionele impact zou hebben op de grondrechten van de vreemdeling of zijn of haar gezinsleden.

Als een vrijwillige vertrektermijn is toegekend mag deze alleen voortijdig beëindigd worden als er een verandering in de omstandigheden van het individu is die leidt tot een gevaar voor de openbare orde, publieke veiligheid of nationale veiligheid, of tot een risico op onderduiken. Of voortijdig beëindiging geoorloofd is moet worden beoordeeld met inachtneming van alle voorwaarden en waarborgen die al behandeld zijn in verband met het onthouden van een vertrektermijn. Het enkele feit dat een vreemdeling niet de benodigde terugkeerinspanningen levert of zich niet coöperatief opstelt ten aanzien van de autoriteiten van de lidstaat is hiervoor niet voldoende. Dit zou wel het geval kunnen zijn als de vreemdeling zich niet houdt aan verplichtingen om het risico op onderduiken te verminderen, maar ook dan moet dit proportioneel zijn, waarbij bijvoorbeeld gekeken moet worden of het waarschijnlijk is dat dit een eenmalig incident blijft of herhaaldelijk zal gebeuren.

4 Overkoepelende conclusies

In hoofdstuk 12 worden de bevindingen van de voorgaande hoofdstukken samengebracht. Hierbij wordt onder meer vastgesteld dat de conclusies in de eerdere hoofdstukken dwingen tot een veel beperktere lezing van

de eigen verantwoordelijkheid voor vrijwillige terugkeer dan in eerste instantie op basis van de tekst van de richtlijn zouden kunnen worden aangenomen. Voor een goed begrip van deze beperkingen is een aanpak die consistent is met de externe dimensie van wezenlijk belang. Deze externe dimensie helpt niet alleen de contouren van wat wel en niet verwacht mag worden van de vreemdeling in beeld te brengen, maar maakt het ook mogelijk te identificeren waar de regels in de richtlijn niet matchen met internationaalrechtelijke verplichtingen van landen van terugkeer. Als dit het geval is moet dit leiden tot een herinterpretatie van deze regels om te voorkomen dat er gaten vallen in de implementatie van de richtlijn. De interne en externe dimensie lopen bijvoorbeeld in het bijzonder uiteen waar het gaat om de definitie van bestemmingslanden in de richtlijn enerzijds, en de terugnameverplichtingen van die landen anderzijds, vooral ook waar het staatloze personen betreft, met gevolgen voor de uitvoering van de terugkeerprocedure en de beoordeling of de vreemdeling aan zijn of haar verplichting heeft voldaan.

Daarnaast is het voor een eerlijke en transparante lezing van de regels omtrent vrijwillige terugkeer van belang dat de verantwoordelijkheden van het land van terugkeer goed in het oog worden gehouden. Terugkeerprocedures staan namelijk bol van de dilemma's, en de neiging van EU-lidstaten is al snel om deze dilemma's te proberen op te lossen met een beroep op de eigen verantwoordelijkheid van de vreemdeling, ook als dit niet gepast is en dit zelfs kan leiden tot een fundamenteel conflict met de grondrechten van het individu. Hiernaast kan gespeculeerd worden dat een meer extern consistent begrip van vrijwillige terugkeer ook de samenwerking met herkomstlanden versterkt.

Verder volgt uit de bespreking van de onderzoeksvragen in de verschillende hoofdstukken dat vrijwillige terugkeer, ook als dit de primaire verantwoordelijkheid van de vreemdeling is, uiteindelijk niet los kan worden gezien van de verantwoordelijkheden van de lidstaat, die tegelijkertijd blijven bestaan. En dat de uitvoering van een complex proces als vrijwillige terugkeer in veel gevallen roept om samenwerking op basis van reciprociteit tussen de vreemdeling en de EU-lidstaat, zoals bij het vaststellen van redelijke bestemmingen waarop de vreemdeling zich moet richten, terugkeer naar doorreislanden op basis van terugnameovereenkomsten, en het vaststellen van een passende vertrektermijn. Het feit dat een meer op reciprociteit gebaseerd begrip van samenwerking niet expliciet in de richtlijn is verwerkt kan gezien worden als een belangrijk hiaat, waarvan het vullen zou kunnen bijdragen aan het creëren van een zekere mate van onderling vertrouwen dat als een randvoorwaarde voor effectieve vrijwillige terugkeerprocedures kan fungeren.

Maar een betere afbakening van de vrijwillige terugkeerregels in de richtlijn moet bovenal leiden tot betere bescherming van de grondrechten van vreemdeling. Dit is uiteindelijk de belangrijkste rol van vrijwillige terugkeer in de richtlijn. Het enkele feit dat een terugkeer 'vrijwillig' is garandeert echter de bescherming van de grondrechten van het individu

niet noodzakelijkerwijs. Maar als de in dit proefschrift geïdentificeerde grenzen aan de individuele verantwoordelijkheid in acht worden genomen dan verhoogt dit in ieder geval de kans dat vrijwillige terugkeer deze beschermende rol daadwerkelijk speelt aanzienlijk. Hierom sluit het proefschrift af met de formulering van 25 richtsnoeren, die beogen een handzame en toegankelijke leidraad te vormen voor het bewaken van deze grenzen in beslissingen in individuele zaken en in EU- of nationale wetgeving, beleidsvorming en rechtspraak.

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Curriculum vitae

Christian Mommers was born in Harmelen, the Netherlands, in 1979. In 2005, he obtained the Dutch equivalent of a masters in Culture, Organisation and Management at the Free University (*Vrije Universiteit*) Amsterdam. In 2009, he started his research on the issue at hand in this dissertation as an external PhD candidate at the Institute of Immigration Law of the Leiden Law School, which has since been incorporated in the Europa Institute. Both before and during his PhD research, he worked in the field of migration, asylum and human rights in various capacities. After initially volunteering for the Dutch Refugee Council at the Schiphol Airport Application Centre, he worked there and in other centres as a supervisor in 2001 and 2002, before leaving this position to resume his academic studies, which included a period of research in Uganda in 2003. In 2004, he provided legal assistance to refugees with the NGO Africa and Middle East Refugee Assistance (AMERA) in Egypt. This was followed by a period working as an immigration officer at the Dutch Immigration and Naturalisation Service in 2005. From 2006 to early 2010 he was as a project officer and research manager at the mission of the International Organisation for Migration (IOM) in The Hague, specifically dealing with issues of voluntary return and assisted voluntary return (AVR) programmes. In 2010 and 2011, he worked on his dissertation while also acting as a part-time, pro bono advisor at the Refugee Rights Clinic of the Buchmann Faculty of Law of Tel Aviv University in Israel. Following a period as an independent consultant (carrying out evaluations of AVR programmes and return laws and policies) based out of Slovakia, he acted as senior political affairs officer for the Dutch section of Amnesty International from 2012 to 2016. In October 2016, he took up his current position as advisor to the Commissioner for Human Rights of the Council of Europe, based in Strasbourg.

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