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

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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.

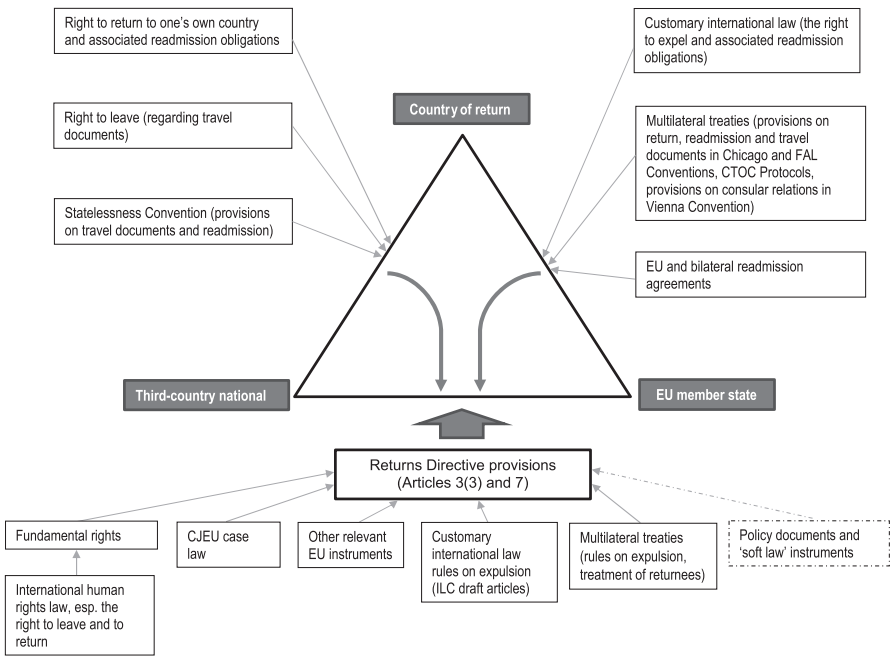

Figure 2: updated triangle model

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.