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

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3 Identifying countries of return as obligatory destinations

3.1 Introduction

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

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

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

2 See 1.3.1.

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

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

3 See 1.3.3.

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

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

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

3.2 The country of origin as an obligatory destination

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

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

3.2.1 'Country of origin': a definition

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

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

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

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

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

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

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

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

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

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

16 Lutz 2010, p. 37.

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

18 See 7.2 on choice of destinations.

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

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

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

19 See 7.3 on *refoulement*.

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

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

22 See 4.3.

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

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

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

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

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23 See 4.3.3 and 6.3.

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

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

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

27 See 1.2.1.3.

28 TFEU Article 67(2).

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

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

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

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

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

3.3 A transit country as an obligatory destination

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

3.3.1 General requirements on transit countries being obligatory destinations

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

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

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

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

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

3.3.1.1 The existence of a transit situation and additional limitations

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

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

41 Lutz 2010, p. 37.

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

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

42 Coleman 2009, p. 95.

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

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

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

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

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

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

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

3.3.1.2 Further requirements regarding the content of agreements and arrangements

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

48 Coleman 2009, p. 95.

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

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

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

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

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

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

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

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

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

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

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

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

55 See 3.3.2 .

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

57 See 2.8.

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

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

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

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

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

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

3.4 Another third country

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

62 Lutz 2010, p. 37.

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

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

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

63 My emphasis.

64 See 2.10.1.4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

72 Lutz 2010, p. 38.

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

74 European Commission 2018, p. 5.

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

3.4.2 Admission to another third country

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

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

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

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

3.5 Conclusions

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

3.5.1 Implications for the third-country national's responsibility

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

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

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

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

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

3.5.2 Implications for the analysis

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

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