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

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

5.1 Introduction

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

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

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

5.2 Reasons for the ineffectiveness of inter-state readmission obligations of countries of origin

This section sets out several potential reasons why, from a normative perspective, inter-state readmission obligations may become ineffective. In the previous chapter, it was already noted that inter-state readmission obligations towards habitually resident stateless persons are far from all-encompassing, potentially leaving a considerable part of this group outside their scope. This, therefore, already identifies one situation in which the onus is on the right to return, which does not need further explanation here. However, although often considered unconditional, there may indeed be situations in which even the obligation to readmit nationals is inapplicable, or where countries of origin may at least see it as such. This section examines some of those situations. It will only focus on those situations that impact on the effectiveness of the norms themselves, basically putting them out of operation. While there are important other reasons why readmission may fail, such as failure to take the necessary steps by the third-country national, or the country of origin simply ignoring its international obligations, these are not discussed here.

5.2.1 Unlawfulness of expulsion

One scenario in which a country of origin's readmission obligations are potentially ineffective is when they are negated by the way expulsion is decided by the EU member state. As a general point, in line with the doctrine of territorial sovereignty and the right to control migration, it is up to the EU member state to decide which third-country nationals are allowed to enter and remain on its territory, and when such persons can be required to return. When a decision to expel a third-country national is made, this is not, as such, a matter for the country of origin, which simply has to ensure that the return can take place by fulfilling its obligation to readmit. However, the right of states to expel is not unfettered but is limited, inter alia, by its human rights obligations, as well as residual safeguards for the treatment of aliens under customary international law. In the case of EU member states, when the presence of a third-country national is governed by provisions of EU law, the decision to deny lawful stay must also meet EU rules. If these various standards are not observed in the expulsion process, this could potentially have an effect for the country of origin.[1] In particular, it may be argued that unlawful acts by the EU member state cannot trigger any legal obligations for the country of origin. From this perspective, an unlawful decision to expel a person could be seen to negate the latter's

1 Especially as regards nationals, over which it continues to exert personal sovereignty, including in relation to diplomatic protection.

readmission obligation, as a matter of inter-state rules.[2] In particular, it has been argued that, in case of unlawful expulsion:

> *"the State of residence would not have a valid claim to the sovereign right to expel. It would in that case seem arguable that the country of nationality would be relieved of the obligation to readmit its national, while refusing readmission would not violate the sovereignty of the State of residence."*[3]

However, this appears to be a matter that is not clearly settled. Nonetheless, countries of origin may indeed perceive such a link, and use non-readmission to protect their citizens' interests. However, the country of origin and the EU member state may well have differing views about the lawfulness of expulsion. After all, as the expulsion is proceeding, it must be assumed that the EU member state is considering that it is acting lawfully. Nevertheless, if this is not the view of the country of origin, it could undermine the effectiveness of the inter-state framework, since it is the latter that has the final decision about readmission.

5.2.2 Justifications for non-readmission

A second scenario can be found in a set of rules of customary international law through which countries of origin may be excused from bearing responsibility for an internationally wrongful act, such as non-compliance with their readmission obligations. This may be the case if readmission becomes impossible or particularly harmful to the country of origin. In such situations, states may sometimes be able to provide acceptable justifications for failing to meet their obligations. While this does not mean that non-readmission becomes lawful, such justifications would preclude the responsibility of the state for that wrongful act. Like the draft articles on expulsion, these rules have been the subject of a codification exercise by the ILC, leading to the Articles on the Responsibility of States for International Wrongful Acts, or ARSIWA.[4] These articles do not in themselves have the status of law, but they are often cited as an authoritative representation of customary law on this issue.[5] Articles 20-25 ARSIWA set out six situations precluding wrongfulness. These are: (1) the state affected by the wrongful act has consented

2 Goodwin-Gill 1978, p. 136.
3 Coleman 2009, pp. 30-31.
4 ILC 2001.
5 Bordin 2014 sets out a number of noteworthy examples of the use of specific provisions of ARSIWA by the ICJ, including its judgment in *Gabčíkovo-Nagymaros* [1997], paragraph 38 (when the Articles were not yet adopted), and its judgment on merits in *Bosnia Genocide* [2007], paragraph 385, 398, 420 and 431. Also see UN Secretary-General, Report on the responsibility of States for internationally wrongful acts: compilation of decisions of international courts, tribunals and other bodies, UN doc. A/74/83, 23 April 2019.

to it;[6] (2) the wrongful act is committed in self-defence;[7] (3) the wrongful act is a countermeasure to a prior breach of an obligation by another state;[8] (4) the wrongful act is the result of *force majeure*;[9] (5) the wrongful act resulted from a situation of distress;[10] and (6) the wrongful act was a necessity.[11] It would go too far to analyse the possible denial of readmission against these justifications in detail. However, a short discussion is nonetheless in order. It should be noted that not all of these will be relevant to expulsion situations. It is unlikely, for example, that an expelling state would consent to non-readmission by the state of origin. Furthermore, self-defence will only be an issue in case of acts of aggression or war, whilst situations of distress only arise in case an immediate loss of life must be prevented. The other three, however, could theoretically be applicable to expulsion situations. However, these would be extremely exceptional situations and the country of return would have to provide very specific, well-founded reasons to be able to rely on these justifications. In such a situation, the right to return may remain as a basis for readmission. As will be discussed below, if individuals indicate to the country of origin their willingness to return, this can be taken as a sign of their intent to exercise their right to return, which would trigger the country of origin's readmission obligations under the ICCPR and other applicable human rights instruments.

5.2.2.1 Countermeasures

Countermeasures can be a justification when a state acts in breach of an international norm in reaction to a prior breach by another state, with the express purpose of making the latter cease its unlawful conduct.[12] In theory, we could consider the situation of non-readmission in the face of an unlawful expulsion, as discussed above, as giving rise to countermeasures. However, as noted, the argument for non-readmission in such a situation would likely be that the readmission obligation would be nullified by the unlawful expulsion, so a further excuse would not be necessary to justify a breach. But there may be other circumstances triggering a response by the country of return not to readmit expelled persons. For example, in 2014, Morocco suspended its cooperation with the Netherlands in relation to readmission of its nationals as a reaction to stated intention by the Netherlands to withdraw from a social security treaty between the two states.[13] This could potentially be explained as a countermeasure to the Netherlands' intended unilateral withdrawal from the treaty. However, Morocco's non-

6 ARSIWA, Article 20.
7 ARSIWA, Article 21.
8 ARSIWA, Article 22.
9 ARSIWA, Article 23.
10 ARSIWA, Article 24.
11 ARSIWA, Article 25.
12 Crawford 2002, p. 292; Lesaffre 2010.
13 For an overview, see Besselsen 2015.

readmission was arguably not in response to a breach by the Netherlands, since withdrawal from the treaty is possible under its terms. Even if the intended withdrawal had been a breach, however, it may be doubted that non-readmission could be seen as a response that is sufficiently closely connected to that initial breach. Such a situation might exist, for example, if the expelling state itself was not meeting its readmission obligations, which might justify the other state in doing the same. At first glance, such a situation is not very likely to arise between EU member states and destination states, since the flow of expulsions (and thus the burden of readmission) usually flows from the EU to other states, and much more rarely in the opposite direction. However, the reluctance of EU member states to take back nationals who are, for example, suspected of having taken part in terrorist activities in such destination states could perhaps be a trigger for countermeasures by such states.

5.2.2.2 Force majeure

Non-readmission could also be the result of *force majeure*, that is, an irresistible force or event, beyond the control of the state, making it materially impossible to perform according to the obligation.[14] The irresistible force can be rooted in natural or in human factors, or a combination of both. In principle, natural disasters, the outbreak of war or other conflict, as well as large-scale economic disasters could all be part of a *force majeure*-based argument.[15] In the context of expulsion and readmission, this may be the case when fighting or a natural disaster makes re-entry into the country practically impossible. Such practical impossibilities may also have arisen with the shutting down of air traffic to many countries because of the COVID-19 pandemic. The collapse of state institutions could similarly provide an insurmountable obstacle to readmission, as no travel documents can be issued. In this respect, the situation in Somalia in the 1990s and 2000s, which will be discussed in Chapter 8, may point to such a circumstance. During this time, there was virtually no state structure that could facilitate readmission, and it could thus be imagined as a situation in which *force majeure* could be invoked.[16] Even in a post-conflict or post-disaster period, there may be material difficulties in ensuring readmission. For example, if archives of civil registries have been damaged or destroyed, this may seriously hamper the verification of the eligibility for readmission of an individual who cannot provide documentary proof of nationality.

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14 "Materially impossible" means more than just materially difficult. The breach cannot be a result of choice by the state, no matter how undesirable the outcome. See Crawford 2002, p. 298.

15 Crawford 2002, p. 295; Szurek 2010.

16 It should be noted, however, that a *force majeure* situation would normally prevent all types of readmission. If the state would be making a distinction between voluntary returnees, who are readmitted, and forced returnees, who are not, this would undermine the argument that it is materially impossible to facilitate readmission.

5.2.2.3 *Necessity*

A third justification may be invoked when readmission is (theoretically) possible, but extremely undesirable and with grave consequences for the readmitting state and/or its population. This is the excuse of necessity, which acts as a "safety valve" which aims "to relieve the inevitably untoward consequences of a concern adhering at all costs to the letter of the law."[17] Necessity may not be invoked unless two strict circumstances are met. First, the breach must be the only way for a state to safeguard an essential interest against a grave and imminent peril. Second, failure to meet the obligation should not seriously impair an essential interest of the state(s) towards which the obligation exists, or the international community as a whole.[18] Additionally, necessity cannot be invoked if the international obligation in question excludes the possibility of invoking necessity, or if the state invoking necessity has itself contributed to the situation.[19]

To my knowledge, necessity has never been explicitly invoked as a justification for non-compliance with readmission.[20] However, there may be examples of states at least hinting at such situations. For example, in November 2011. The Iraqi authorities were limiting the readmission of persons who had had their asylum statuses revoked in the Netherlands.[21] They would no longer provide replacement travel documents for those who would be forcibly removed, nor accept forced returns on the basis of an EU travel document.[22] Similar restrictions were put on returns from other EU and western countries.[23] During the negotiations that followed, the Iraqi government appeared to justify its policy on different grounds. These included the country being in a reconstruction phase, whilst already dealing with 1.5 million internally displaced persons and numerous refugees waiting to return in neighbouring countries. This would put immense pressure on Iraq's fragile economic and social system.[24] Iraq never appears to have made an explicit appeal to the exception of necessity, although its objections to return do point in this direction. It is easy to see how its concerns about internal stability and an overwhelming strain on public

17 ILC, Eight report on State responsibility by Mr. Roberto Ago, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility, doc. A/CN.4/318 and Add.1 to 4, Yearbook of the ILC 1979, vol II(1), paragraph 80.

18 ARSIWA, article 25(1)(a) and (b).

19 ARSIWA, article 25(2)(a) and (b).

20 Although Boed 2000 devotes specific attention to the potential use and abuse of necessity in relation to border closures by states faced with large-scale influxes of asylum seekers.

21 *Trouw* 2011.

22 Netherlands Parliament, parliamentary session 2011-2012, appendix; 2011-2012, report no. 29; and 2011-2012, appendix 1313.

23 Netherlands Parliament, parliamentary session 2012-2013, doc. 33400-VII-4; 2013-2014, doc. 19637-1758.

24 Netherlands Parliament, parliamentary session 2011-2012, reports 90-9; 2011-2012, doc. 19637-1553; 2011-2012 doc. 19637-1569; 2012-2013, reports 2911.

services in case of large-scale returns, which could put the well-being and perhaps even the lives of Iraqi citizens at risk, would relate to clear essential interests. Whether the numbers of returnees and the consequences would be sufficient to present a 'grave and imminent peril,' however, may be more difficult to assess. The Iraqi government would also have had to argue there was 'no other way' to prevent this grave and imminent peril than limiting readmission to those returning voluntarily. This would be complicated by the fact that expelling states, in this case the Netherlands, were willing to provide financial assistance to help ease the Iraqi state's burden. Even if all these elements could have been put forward convincingly by Iraq, the refusal to readmit expelled nationals would still have to be balanced against the Netherlands' essential interests to decide on entry and stay of aliens on its territory. Additionally, Iraq continued to readmit voluntary returnees, which cast some doubt about the necessity of non-readmission of others, although it could be argued this would significantly reduce Iraq's burden, especially since voluntary returnees may have been better prepared to fend for themselves, including through support of assisted voluntary return programmes.[25]

Without aiming to draw definitive conclusions about the legitimacy of a potential appeal to necessity in a case like that presented above, which appears to have been resolved in 2014, it does show that certain situations occur in which justifications become more realistic. There have been other cases of countries, especially dealing with ongoing internal conflict or other serious problems, calling on EU member states to halt returns. For example, over the years, Afghanistan has repeatedly called on EU member states not to carry out removals.[26] However, these have continued, and generally returnees have not been refused readmission when arriving at Kabul's international airport.

Another prominent example can be found in the COVID-19 pandemic, which resulted, especially during the first half of 2020, in international traffic partially or wholly grinding to a halt, and many states closing their borders. This also had significant impact on the ability of EU member state to return irregular migrants to their countries of origin.[27] At least initially, non-readmission may have been perceived by other states, including EU member states, as legitimate, either on the basis of *force majeure* (for example due to the lack of flights mentioned above) or necessity in light of the public health crisis faced in some countries.

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25 It should be noted that the Netherlands offered additional financial support, including for the reintegration of forced returnees, but this was, at least at the time of negotiations, reject by the Iraqi government.

26 On the impact of returns to Afghanistan, in a broader sense, also see *Ariana News* 2018.

27 See, for example, COM(2021) 56 final, 10 February 2021, paragraph 2: "The COVID-19 pandemic has added a new layer of complexity to the functioning of return and readmission operations." Also see ECRE 2020; EMN 2021.

5.2.2.4 *Justifications and the link with the right to return*

The various justifications come with very high thresholds, which are difficult to meet. It is therefore not surprising that there is little evidence that countries of origin, even when they deny or make readmission more difficult, specifically aim to justify such action in these terms. This may also be due to other factors, including that they have other means of preventing nationals from returning which do not require them to make explicit that they are actually refusing readmission as a general policy, such as delaying investigations or denying that a person is indeed one of their nationals. Furthermore, when countries of origin are more explicit about non-readmission, this may also be aimed at extracting political concessions from EU member states, which cannot be a legitimate ground for invoking any of the justifications discussed above. This discussion is therefore not aimed at arguing under which precise circumstances such justifications for non-readmission may be successful, which is a matter of both law and practice that would need much more detailed examination. However, it shows that the notion that inter-state readmission obligations, including those considered beyond dispute by EU member states, may in limited cases legitimately become ineffective. Furthermore, while they may not be explicit about such considerations, countries of origin may indeed use these implicitly.

If such justifications apply, it is a bit more difficult to see how the right to return can fill this gap. Perhaps the clearest link is with countermeasures. These are aimed at forcing the other country – in this case the EU member state – to meet its obligations. It would therefore not pertain to nationals seeking to exercise their right to return. If there would be a *force majeure* situation, this would presumably affect all returns, whether on the basis of individuals' own choice or as a result of expulsion. However, there may be situations in which it is materially impossible for the country of origin to facilitate, for example, the proper reception of persons being escorted back by EU member state officials, and for whom specific arrangements must be made for their orderly handover. In such situations, perhaps a distinction can be made between voluntary returns and removals. Similarly, if there is a necessity not to readmit nationals due to the situation in the country of origin, this would likely affect all returns. However, arguments about the distinction between persons willing and unwilling to return, and the specific problems they and society may face, such as discussed with regard to Iraq, could possibly be relevant. In relation to non-readmission due to the COVID-19 pandemic, the resulting role for the right to return may be more obvious. In many cases, states still tried to find ways to allow their nationals who wanted to come back to do so. Arguably they would be required to do so as a result of the right to return, since this is not subject to limitations in relation to public health or other reasons states may invoke. This would be the case at least until they would proclaim a public emergency which would threaten the life of the nation, in line with Article 4 of the ICCPR, which would allow for derogation of their duties in relation to Article 12(4) ICCPR.

5.2.3 Diverging views on the existence of a customary duty to readmit?

The paragraphs above have dealt with situations in which countries of origin may consider inter-state readmission obligations either inapplicable, or that failure to meet these obligations may be justified due to pressing circumstances. While both may influence the practical implementation of readmission, neither challenge the validity of the readmission obligations discussed in the previous chapter as such, especially the readmission of expelled nationals as a matter of customary international law. This does not mean that those obligations cannot and have not been questioned, regardless of the EU's frequent framing of such obligations as undisputed. While it would go too far to analyse each of the instances in which such questions have been raised in detail, it is useful to outline at least the main arguments, as some may be used, implicitly or explicitly, by countries of origin.

5.2.3.1 Issues of evidence of the existence of a customary rule

The existence of a rule of customary international law depends on evidence of both consistent state practice and *opinio juris*.[28] While the majority of authors who have addressed this rule have argued for its existence, this has often relied on doctrinal arguments. Studies truly closely examining state practice and *opinio juris* are much less frequent, with the notable exception of the work of Hailbronner, which has been discussed in the previous chapter. A critique of the existence of a customary norm, in particular in relation to Hailbronner's findings, has been put forward most prominently by Noll,[29] although others have added important elements to this.[30]

Noll has observed that the existence of a general duty to readmit expelled nationals is "surprisingly difficult to document."[31] As regards the requirement of sufficiently widespread and uniform state practice, Noll suggests that this would best be borne out by statistical information:

> *"The numbers of undocumented migrants returned globally would need to be broken down. The number of voluntary returns and returns based on readmission agreements must be subtracted, as treaty law can be invoked to support those returns. Of interest is how many persons are forcibly sent back and accepted in the absence of treaty law. How does the number of the latter category compare to the number of undocumented migrants who cannot be sent back due to action or omission on behalf of the country of origin?"*[32]

However, such global statistics are largely missing. In this respect, it is noteworthy that even at the EU level, where significant efforts have been

28 See the discussion in 2.6.
29 Noll 1999, and further developed in Noll 2003.
30 See, in particular, Coleman 2009, pp. 31-41.
31 Noll 2003, p. 63.
32 *Ibid.*, p. 64.

made to improve data collection on returns, considerable gaps and differences in various data sets remain.[33] If this is the case for a well-resourced region like the EU, this problem is no doubt even bigger for many countries of return, which may lack the administrative capacities to collect such data. Furthermore, since they simply readmit their nationals, they might not have a reason to gather data in this regard. Nor do they normally specify the basis for a decision to readmit or refuse readmission, which may leave expelling states in the dark. Countries of origin may refuse readmission on the basis that they were unable to establish that the person to be returned is a national. Whether they have indeed been unable to establish this, or whether they simply refuse to readmit the person in breach of their presumed international obligations, will often be impossible to establish objectively when the person could not provide conclusive proof of nationality. Countries of origin that do not want to readmit their nationals for political, social, economic or other reasons have myriad possibilities to obfuscate or delay in the case of insufficient hard evidence. As such, more than a decade and a half after Noll's suggestion that better data may help clarify state practice, such data is still not readily available, and it may be questioned whether this will ever be the case.

Whether the elements of Noll's proposed indicator for state practice are all equally valid may be a matter of contention. For example, the extent to which voluntary returns should be excluded would depend on the precise way that 'voluntariness' is defined.[34] The role of specific readmission agreements in relation to customary law has also been interpreted in different ways. They can be seen as simply codifying a customary rule. The conclusion of such agreements can also be seen as providing further evidence of state practice, which either provides evidence of the existence of a rule, or helps bring it into existence. But if states feel it necessary to conclude agreements because they do not think there is an adequate pre-existing normative basis, this may undermine the existence of a customary rule. Coleman, in considering this relationship, concludes that readmission agreements, especially the "explosive development of treaty law since the early nineties … arguably represents a practice which is in support of a customary norm."[35] However, he also notes the possibility that the way they are negotiated, which focuses more on a *quid pro quo* exchange, may be pushing practice away from an unqualified duty to readmit. While beyond the scope

33 See 2.2.2.

34 In the meaning of the Directive, these are simply different ways to effect expulsion, so readmissions on this basis would presumably have to be included. However, as discussed below, situations in which the individual is willing to return (which would involve exercise of the right to return, and thus to be excluded) may not always be distinguished clearly from situations of voluntary compliance with an obligation to return. In the end, this may be an issue that would be virtually impossible to capture properly in statistics.

35 Coleman 2009, p. 41; also see Noll 2003, p. 67 for the proliferation of "return-in-exchange-of-aid."

of this analysis, the priority of voluntary return, especially as this is often implemented in conjunction with return and reintegration assistance, could conceivably be pushing state practice even further in this direction.[36]

Such expectations may also be influencing *opinio juris* as regards the specific duty to be fulfilled. This is another point put forward by Noll: even when there have been relatively clear expressions in support of readmission of nationals, this is usually insufficiently precise in clarifying whether this means recognition of a duty to readmit all nationals expelled, or of an obligation to readmit persons exercising their right to return. In this respect, he points, for example, to the 1994 Cairo Programme of Action,[37] as well as UN General Assembly resolutions.[38] More recent examples may be added. For example, the 2016 New York Declaration for Refugees and Migrants, which created the basis for two Global Compacts,[39] recalls "that States must readmit their returning nationals and ensure that they are duly received without undue delay, following confirmation of their nationalities in accordance with national legislation."[40] While this could easily be read as a confirmation of a duty to readmit *expelled* nationals, this is not made explicit. The Declaration further commits to "close cooperation" on return and readmission more generally, and that existing readmission agreements should be fully implemented.[41] The Comprehensive Refugee Response Framework, which is annexed to the declaration, does mention the return and readmission "of those who do not qualify for refugee status," but then only commits states to "facilitate" return and readmission.[42]

Similarly, the Global Compact for Safe, Orderly and Regular Migration says that states "commit to ensure that our nationals are duly received and readmitted, in full respect for the human right to return to one's own

36 While such assistance is generally focused on the individual returning, it may have wider benefits for the returnee's community, and thus indirectly for the country of origin. As such, expectations that returns are accompanied by certain forms of financial or in-kind assistance may be rising. This, to some extent, is also true for forced returns, with EU member states increasingly also providing additional support to forced returnees, including more general support to countries of origin. In this regard, see the example of the Netherlands offering additional aid to Iraq in order to convince it to accept forced returns in 5.2.2 above.

37 Programme of Action, of the International Conference on Population and Development, Cairo, 5-13 September 1994, UN doc. A/CONF.171/13, paragraph 10.20: "Governments of countries of origin of undocumented migrants and persons whose asylum claims have been rejected have the responsibility to accept the return and reintegration of those persons, and should not penalize such persons on their return."

38 Noll 2003, p. 66.

39 In addition to the Global Compact on Migration, referenced below, this is the Global Compact for Refugees, UN General Assembly, Resolution 71/151 of 17 December 2019, doc. A/RES/73/151, published 10 January 2019.

40 UN General Assembly, Resolution 71/1 of 19 September 2016, doc. A/RES/71/1 published 3 October 2016, paragraph 42.

41 *Ibid*., paragraphs 41 and 58

42 *Ibid*., Annex I, paragraph 5(i).

country and the obligation of States to readmit their own nationals."[43] This, again, may be read in favour of a clear inter-state duty to readmit expelled nationals, but also just as a reassertion of the duty to readmit as a consequence of the right to return. Or indeed any kind of mix of the two. Where the Compact deals with "cases of persons who do not have the legal right to stay on another State's territory," it includes a commitment to "cooperate on identification of nationals and issuance of travel documents" and furthermore to ensure their safe and dignified return and readmission.[44]

Issues of interpretation may also result from other, often-quoted sources in support of a customary norm, such as the *Van Duyn* judgment by the ECJ referred to in Chapter 4. It may be noted that this judgment was delivered in the context of a person who *wanted* to be readmitted to the United Kingdom, and it also specifically refers to the denial of the *right* of residence or entry of nationals.[45] As such, these documents, which purportedly should provide clarity, leave considerable scope for ambiguity.

5.2.3.2 Challenges to the reciprocal nature of the readmission obligations and other doctrinal issues

Another key critique by Noll of the way that the customary obligation to readmit has been framed deals with doctrine, in particular the argument that the host country's right to expel must be made effective by the country of nationality by readmitting the expelled person. According to Noll, assertion of such a correlative duty, by way of inductive reasoning from the right to expel, is a key element, since, he suggests, there have been "no serious attempts to show the existence of an interstate obligation to readmit as a customary norm not using this inductive method."[46] He suggests that, if international law is to be consistent, either the logic of correlative duties is accepted in all cases, or it should be rejected. In the former case, this logic should not only be applied to states' right to expel, but also to individuals' right to leave. The logic of correlative duties would then impose on other states an obligation to admit such individuals, because they would otherwise frustrate the effective exercise of the right to leave.[47] This clearly is not the state of affairs as regard international movement in the world today.

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43 UN General Assembly, Resolution 73/195 of 19 December 2018, UN doc. A/RES/73/195, published 11 January 2019, paragraph 37.

44 *Ibid.*, paragraph 37(c) and (e).

45 It should be noted that judgments by international courts generally are not seen as direct evidence for the existence or content of customary rules, but rather function as subsidiary means for determining such rules, see ILC, Draft conclusions on identification of customary international law, with commentaries Yearbook of the International Law Commission 2018, vol. II, Part Two, conclusion 13(1). Furthermore, if a customary obligation might be seen as simply as a "European" custom (see 5.2.3.3. below), the judgment would also not have wider implications.

46 Noll 2003, p. 64.

47 *Ibid.*, p. 70.

However, if the logic of correlative duties is rejected for the individual right to leave, consistent application would mean that this would also be the case for the right of states to expel. In such a case, he argues, what is left at most is not an obligation to readmit, but a weak duty to refrain from interfering with other countries' admission policies.[48] As such, this would lead to an all-or-nothing outcome.[49] The implication of this would be that only those situations in which individuals are willing to return would impose a clear obligation of readmission, since the right to return is clearly laid down in international instruments, in contrast to the inter-state obligation which, as a presumed customary norm, may be subject to different conceptions as to its precise scope and implications. Interestingly, this has not only been suggested by Noll.[50] Coleman describes two intriguing instances in which this possibility was raised within the sphere of the EU. First, he cites an opinion by the Council Legal Service, put forward in 1999, which noted:

> *"It is doubtful whether, in the absence of a specific agreement [on readmission] between the States concerned, a general principle of international law exists which would oblige those States to readmit their own nationals if they do not wish to return to their country of origin."*[51]

Unfortunately, only this excerpt is in the public domain, and the further argumentation was never released.[52] Around the same time, positions in support of this were also put forward.[53] Notwithstanding such doubts, it is clear that the EU, at least outwardly, is fully supporting the existence of such a customary duty, which countries of nationality need to fulfil unconditionally.[54]

48 *Ibid.*, p. 71.
49 *Ibid.*, p. 70.
50 *Ibid.*, p. 67.
51 Council Legal Service Opinion, doc. 6658/99, paragraph 6, cited in Statewatch 2000.
52 Attempts were made by Professor Steve Peers to obtain this document, but this was denied, see General Secretariat of the Council of the EU, ref. 14781/01, INF 147 API 91 JUR 363, 30 November 2001, published 12 August 2009. It cites as the grounds for denial that the opinion is considered internal to the Council and that its disclosure "could undermine the protection of the public interest in legal certainty and the stability of the Community legal order, given the interest of the Council to draw on an internal and independent legal advice," pursuant to Article 4(1) of Decision 93/731/EC on public access to Council documents (OJ L 340/43, 31 December 1993).
53 A paper by the Nordic Joint Advisory Group on Refugee Policy, which was submitted to the Migration/Expulsion Working Group of the Council in 1999, noted that, in relation to the duty to readmit expelled nationals, there only seemed to be "consensus as to the presence of a 'moral' obligation in that respect." Council doc. 7707/99, p. 6, cited in Coleman 2009, p. 31.
54 See 4.2.1.

5.2.3.3 *A North-South divide?*

The above discussion remains somewhat indeterminate. Noll himself, as the author having most clearly elaborated a critique of the customary obligation to readmit expelled nationals, sets out a number of interesting questions, especially as regards inconsistencies in the international framework for readmission, but does not appear to come to definitive conclusions. And, as mentioned, the overwhelming position in legal scholarship has, to varying degrees of certainty, asserted the existence of such a rule. The EU, notwithstanding some potentially differing internal opinions, has outwardly clearly stated its full confidence in the existence of such a customary obligation, without which a key pillar of its return policy would crumble.

Nonetheless, the work by Noll provides a fascinating sneak peek into potentially diverging perspectives. In this respect, he has also particularly noted the possible existence of a 'North-South divide.'[55] The same can be said about Coleman's discussion of the potential role of a more transactional approach to readmission. Often, lack of cooperation of countries of origin on readmission is attributed to various non-legal interests, such as extracting concessions from EU member states, preserving remittances of nationals living abroad, or preventing persons from minority groups or associated with political opposition movements from returning, to name a few. While this will no doubt play an important factor, the discussion above hints at the possibility of relevant legal arguments being employed by countries of origin. Noll observes that the dominant focus on state sovereignty "begs the question why one state's personal self-determination should be more important than that of another state."[56] The question why their sovereignty should be made subordinate to that of expelling states may be one that chimes with countries of origin. The idea that EU member states, and other expelling states, cannot simply force the hand of countries of origin will no doubt be attractive to them, especially in their attempts to push back at largely asymmetrical relationships between them on the issue of migration.[57] The problem is that such a legal position, if indeed it would be held by non-European countries, is almost never put forward clearly. Rather, when confronted with the undesirability of readmission, they are more likely to choose a strategy of evasion, rather than of confrontation.[58]

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55 Noll 2003, p. 66, speaking about affirmations of responsibility to accept the return of nationals in UN General Assembly resolutions: "To the North, it could mean an obligation to readmit whomever states wish to return, while the South can read an obligation to readmit those wishing to return into it."

56 Noll 2003, p. 71.

57 Notwithstanding the EU's increasing use of the language of 'partnership,' it largely keeps a dominant role over the extent to which migration from non-western states to the EU is possible, issues of the control of irregular migration, the link between development and migration, and related matters. See, with regard to the asymmetry of the EU's partnerships with African countries, Tardis 2018.

58 Noll 2003, p. 64.

In the course of my research, I have only come across one striking example of a country explicitly rejecting the dominant logic of correlative duties underpinning the customary obligation to readmit. During a discussion of the ILC's ongoing work in the United Nations General Assembly's Sixth Committee, the representative of Iran stated:

> *"The decision by a Government to expel an alien, as a unilateral act of that State, should not be regarded as imposing any obligation or commitment whatsoever on any other State, including the State of nationality, to receive that alien."*[59]

Rather, he noted, such issues should be resolved by "mutual agreement."[60] It must be admitted that this leaves many questions as to how widely such a perception would be shared,[61] or even to what extent this would have implications for Iran's own legal obligations.[62] However, it may provide some indications as to the reasons for ambiguity of global statements, such as those discussed above.

It can further be noted that attempts to identify evidence of a customary duty to readmit may also raise questions as to their global validity. Although Hailbronner's evidence base stretches further, one of the key elements presented by him are readmission agreements. Notwithstanding questions about the relationship between such treaties and custom,[63] it is noteworthy that, of the approximately thirty agreements he identified, all were concluded between states on the European continent, with the exception of two treaties concluded between the United States and Panama, and the United States and Canada, respectively.[64] Although Coleman noted in 2009 that at that point some 220 readmission agreements had been concluded worldwide, he also found that many of these involved European states.[65] Western states at large, and the EU and its member states in particular, appear to continue to be the main driving force behind the proliferation of readmission agreements. And although these have been concluded with numerous countries worldwide, these seem mainly to result from those countries being asked or encouraged by the EU and its member

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59 UNGA, Sixth Committee, Summary record of the 11th meeting, held on 24 October 2005, doc. A/C.6/60/SR.11, published 23 November 2005, paragraph 85.

60 *Ibid*.

61 Even within the context of the discussions of the ILC's work on the expulsion of aliens there is not much evidence of explicit support for this position from other states.

62 Under the 'persistent objector' doctrine, states may sometimes be exempt from customary rules, but this would depend on a lot more than one official statement as above. To be considered a persistent objector, a state must have objected while the contested rule was in the process of formation, and also done so persistently subsequently. See, ILC 2018, conclusion 15.

63 On the relationship between treaties and customary law more generally, see, for example, Villiger 1997.

64 Hailbronner 1997.

65 Coleman 2009, p. 36.

states to engage in negotiations. Much less evidence exists of non-western states seeking to negotiate such agreements with other non-western states. If such readmission agreements would indeed serve as an important basis to support the existence of a customary duty, it may even be argued that this could be no more than what has been called regional custom.[66]

The discussion above may appear to be a bit gratuitous, because I will also have to leave it as a set of largely open questions, rather than providing a concrete view on the nature of the customary obligation to readmit. However, it serves to illustrate that, despite the purported absolute agreement over the existence and nature of such an obligation, this needs to be regarded much more cautiously. And, even if they are not explicit about this, countries of origin may tacitly hold quite different views of their legal obligations, which may in turn impact on their practices. This may be another factor in explaining why the right to return, rather than inter-state obligations, may play a central role in those countries' decisions on readmission. And, if this is indeed the case, this raises questions about the role the right to return plays in the specific relationship between the EU member state and the third-country national who, under the Directive, is under an obligation to return.

5.3 The compulsory exercise of the right to return

Having addressed situations in which inter-state readmission obligations may be ineffective, this section discusses what this might mean for the role of the right to return. It will first consider the key role of willingness to return as an indicator of the exercise of the right to return (5.3.1). Subsequently, it will look at whether the compulsory exercise of the right to return is a logical consequence of the obligation to return under the Directive (5.3.2). Various elements of such compulsory exercise will then be discussed, in particular how this relates to the purpose of rights (5.3.3) and what this means in light of the ECtHR's case law on so-called 'negative rights' (5.3.4). Finally, an assessment of the legitimacy of the compulsory exercise of the right to return is provided (5.3.5).

5.3.1 Willingness to return as a relevant factor?

In the previous chapter, it was argued that the willingness of the individual to return is normally not relevant for the country of origin's readmission obligations, since these arise out of the right to expel of the EU member state, which by definition involves coercion. However, it was also noted that, if this would be just a matter of human rights, readmission would

66 ILC 2018, conclusion 16 and commentary thereto.

"characteristically depend on the willingness of the individual to return."[67] In cases in which inter-state readmission obligations are not effective (such as where gaps exist in relation to stateless persons, in the scenarios addressed above, or if such obligations are simply not respected by countries of origin) the question of willingness to exercise the right to return comes to the fore. That this may be more than just a theoretical consideration is evident from the example of Iran's refusal to readmit nationals expelled by the Netherlands, unless they make a clear statement of willingness to return, which is outlined below.

It is a long-standing practice of Iran to limit the issuing of replacement travel documents for the purpose of the readmission of persons that are expelled by EU member states and other countries to situations in which those persons express a clear willingness to return. In the case of returns from the Netherlands, this has meant that Iranian nationals issued with a return decision, and who are not already in possession of valid travel documents, can set up a meeting with the Iranian consulate in The Hague, through IOM, where they can present relevant evidence. However, even if nationality and identity are not in doubt, replacement travel documents are only issued when the person concerned signs a declaration that they want to return to Iran. This practice raises specific questions about the reasons why Iran would demand such a declaration, to which the statement of the Iranian representative to the UN General Assembly's Sixth Committee quoted above might provide some clues. Whatever the case may be, it presents a factual obstacle to the return of undocumented Iranian nationals who refuse to sign such a statement, since they will not be readmitted.

Whether third-country nationals issued with a return decision by the Netherlands can be expected to sign such declarations became a matter of legal proceedings, which eventually ended up with the highest administrative court, the Council of State. In the key case on this matter, an Iranian national who had refused to sign a declaration that he was willing to return to Iran had been detained by the Dutch authorities. Although enforcement was not possible, the Dutch representatives before the Council of State argued that detention was justified by the fact that the individual had failed to do what was necessary to achieve his return, when he refused to sign the statement requested by the Iranian consulate. The Council of State found that the Dutch authorities had acted correctly, since:

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67 Hailbronner 1997, p. 4; also see Legomsky 2003, p. 617, who discusses the issue of rights and obligations in relation to the return of asylum seekers to a country of first asylum, which he argues can be equated to their 'own country': "the person *does not want* to be readmitted to the first country of asylum; indeed he or she wants to avoid return… Under those circumstances, to speak of the asylum seeker's 'right' to be readmitted to the first country of asylum is irrelevant. To put the point slightly differently, surely the obligation that the first country of asylum owes under Article 12.4 is an obligation that it owes to the individual, not to another state" (emphasis in the original).

> *"It has not been shown that the declaration of willingness to return voluntarily to Iran, which the alien is supposed to make to the consular representation of Iran during his presentation, is of such a nature that making this declaration goes beyond what can reasonably be required of him within the framework of the obligation incumbent upon him to leave the Netherlands of his own accord."*[68]

Making such a declaration was therefore, according to the Council of State, a matter of the individual's responsibility, and refusal to do so could therefore justify his detention. In the case of an unsuccessful return to Mongolia, where a similar practice of making readmission dependent on the signing of a statement of willingness to return, the Council of State expanded on this reference to individual responsibility by further noting that it could be expected of the third-country national that "she provided active and full cooperation to obtaining travel documents necessary to effect her removal and that she herself make the necessary, verifiable efforts to obtain those documents."[69] Although the first time the Council of State made such a finding, in the case concerning Iran, predates the adoption of the Directive, it has used this judgment as a point of reference repeatedly after the Directive's entry into force. At least until 2016, it referred to the principle set out in the Iran case in around a dozen judgments, covering, in addition to Iran and Mongolia, cases pertaining to Afghanistan, Ethiopia, Sierra Leone and Somalia.[70]

As noted in Chapter 1, the intention of this analysis is not to assess the validity of national practices as regards the implementation of the Returns Directive. However, approaches which suggest that third-country nationals must simply conform to any demands made by the country of nationality in relation to readmission, as seemingly endorsed by the Dutch Council of State, are problematic in light of the discussion above.[71] I have suggested that a proper reading of the obligation to return for third-country nationals seeking return to a country of nationality would only include steps necessary to establish nationality and identity.[72] It might be argued that the intention of Iran or the other countries mentioned may not have been to frustrate readmission, but merely to establish that the individual was returning voluntarily.[73] However, from the perspective of the Directive,

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68 Council of State, judgment 200805361/1 of 4 September 2008, ECLI:NL:RVS:2008:BF0502, paragraph 2.1.3 (my translation).

69 Council of State, judgment 200901771/1/V3 of 23 June 2009, ECLI:NL:RVS:2009:BI3894, paragraph 2.4.1 (my translation).

70 The last available reference to the Iran case on the website of the Council of State is judgment 201601204/1/V3 of 29 March 2016, ECLI:NL:RVS:2016:946.

71 For a more elaborate discussion of this judgment and its compatibility with Dutch and international law, see Mommers 2012.

72 See 4.2.5.2.

73 Which raises questions about the meaning of 'voluntary' for the states involved. Perhaps it refers to something different than in the Directive, rather aiming to assess the actual willingness of the person to return. However, this does not explain why it accepted returns facilitated by IOM, which were clearly only 'voluntary' in the sense of the Directive in that they provided an alternative form of implementing the expulsion.

and EU return policy more generally, such a distinction cannot be justified. After all, it presumes a general obligation on third countries to readmit their nationals in all cases of expulsion, regardless of whether this is given effect through voluntary return or removal. That the practice of several third countries is different cannot change this basic premise. When setting out the triangle model at the beginning of this dissertation, this was done on the basis that a proper understanding of individual responsibility to return also means locating responsibilities where they belong. In this case, if the country of return's practice is not in line with its international obligations (or at the very least, the EU's perception of what these obligations are), this is a matter between the EU member state and the country of return. Making the individual responsible for 'repairing' the failure of the country of return to meet its obligations, by setting additional requirements, cannot be reconciled with the fact that the application of the Directive's rules must be fair and transparent, nor with the general obligation in EU law to promote the observance of international law – not to mention the Directive's self-proclaimed consistency with such international law.[74] Beyond this, if the readmission process collapses on this basis, it may lead to wrongly holding third-country nationals responsible for non-return, and to potentially unlawful restrictions of their fundamental rights, for example, when they are deprived of their liberty as a result of this.[75]

Under normal circumstances, the request by Iran of a statement of willingness to return should be seen as an additional requirement within the meaning of the previous chapter, which is unconnected to the establishment of nationality and identity. Providing such a statement would be beyond the scope of what is necessary for readmission, and thus outside the individual's responsibility. To the extent that it was assumed by the Netherlands that Iran was under an obligation to readmit expelled nationals, the argument presented in the previous chapter on individual return obligations only being limited to what is strictly necessary to achieve readmission would thus suggest that the approach by the Council of State is erroneous. But it has also been indicated above that Iran may believe that the right to expel of other states does not trigger reciprocal obligations on the country of nationality. As such, for Iran, the extent to which the individual would want to exercise his or her right to return would arguably become determinative for the existence of any readmission obligation. In such a situation, the judg-

74 See TFEU Article 3(5): "the EU shall uphold and promote … the strict observance and the development of international law"; and Article 1 of the Directive: "This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in

75 Other objections to the EU requiring third-country nationals to sign statements of willingness to return, when they are not in fact willing, could include non-compliance with the right to freedom of thought or conscience (Article 11 of the Charter of Fundamental Rights and Article 10 of the ECHR), since this would in fact require individuals to lie about their convictions. On this point, see Cornelisse 2009.

ment by the Dutch Council of State obtains a different meaning: it would relate to the question whether the applicant should have exercised his right to return to ensure his return decision could be implemented effectively. In the following paragraphs, I will dig into this question in more detail.

Before doing so, however, it should be reiterated that there may be continuing confusion over the links between willingness to return and voluntary return. In the case of Iran above, as well as the other countries of origin which have been the subject of judgments of the Council of State in this regard, readmissions were limited to voluntary returns. While such voluntary returns would only be accepted in the case of a statement of willingness to return, it is easy to see how the two might be conflated. As noted in Chapter 2, notwithstanding its connotations, willingness to return is not an element of voluntary return in the Directive.[76] As such, the fact that a person is engaging in voluntary return is not necessarily an appropriate indicator of willingness, since it follows from legal compulsion. The same is true for an individual's return being facilitated through an assisted voluntary return programme.[77] For now, the discussion focuses specifically on willingness to return, or, more accurately, the willing exercise of the right to return.

5.3.2 The compulsory exercise of the right to return as a logical consequence of the return obligation?

From the perspective of EU member states, the ineffectiveness of interstate readmission obligations provides an obvious problem if this leads to non-return. However, the fact that the individual right to return may be able to fill some of these gaps could be seen as a happy coincidence. As suggested by Hailbronner, the two basically overlap in substance and, to the extent that there are any questions of willingness to return, the fact that the third-country national is expelled – and in this case has to take responsibility for his or her return – overrides any such concerns.[78] This seems to be the approach taken by the Dutch Council of State in concrete cases. On a more abstract level, this argument has been most clearly expressed by Van Krieken, who argues strongly that the individual right to return should indeed be put at the disposal of the return procedure to ensure its effective

76 Although an individual's unwillingness to return may well result in lack of action to take the appropriate step to return, which is part of the obligation to return voluntarily. Nevertheless, the two issues may diverge. See, in this regard, also the discussion about declarations of willingness to return and their lack of relevance for issues such as the risk of absconding in 10.4.3.2.

77 In most cases, it may actually be an indicator of compulsory return, since the majority of persons using such programmes are faced with return decisions. However, various AVR(R) programmes also allow for the support of persons who have not (yet) been issued with a return decision.

78 Hailbronner 1997, p. 4.

conclusion. Speaking about rejected asylum seekers, he posits, first of all, that departure from the member state is "solely the responsibility" of the individual. Furthermore, he connects the fact that the individual has made a claim for protection to an obligation to exercise the right to return if that claim fails. In particular, he suggests that such a person:

> *"…enjoys the right to return to his/her country, and the rejectee may be expected to make use of that right. He/she should even not be explicitly requested to do so; it is a logical consequence of migration law juncto human rights law. By submitting an application for asylum, the individual recognizes the existence of human rights, and subscribes to that system as a whole. In this respect, it has to be emphasized that there are no rights without duties, as indicated in the UDHR itself."*[79]

It is worth looking more closely at this argument for several reasons. First, because it goes to the heart of the relationship between individual responsibility and individual rights, which underpins much of the discussion of voluntary return in this book. Second, and connected to that, it deals with the relationship between the EU member state's interests and individual rights. In particular, it deals with the question whether the member state can force the individual to exercise his rights, if this is necessary to achieve the aims of the return procedure. And third, because this is not just an academic argument. It connects to the overarching view, as discussed at various points so far, that the individual can be expected to do whatever is necessary to return, even if this means putting individual rights at the disposal of state goals. In the specific case of the Netherlands, the argument developed by Van Krieken appears to have helped shaped the government's approach to this question,[80] and may have inspired, implicitly, the approach by the Council of State. As such, it is useful to examine it more closely.

5.3.3 Compulsory exercise of the right to return and the purpose of rights

The idea, as presented by Van Krieken, that individuals can be expected to exercise their right to return to facilitate the expulsion process, raises questions, first, from a conceptual perspective. From this perspective, it should be noted that the human rights system, on the whole, does not make the enjoyment of rights dependent on individuals 'subscribing' to it, as suggested by Van Krieken.[81] These rights are guaranteed to individuals as a human beings, and whilst restrictions can be made on the basis of certain

79 Van Krieken 2000, p. 29.

80 For example, it was repeated almost verbatim by a senior civil servant of the Dutch Ministry of Justice at a public event, which I attended in December 2012.

81 It should be noted that, even if such a 'subscription' argument could be accepted, Van Krieken connects this to the lodging of an asylum application. As such, the argument would leave aside the situation of irregular migrants who have never specifically made a claim to human rights protection.

behaviours, the starting point is that the individual has and can enjoy these rights without prior conditions attached. Furthermore, the idea that states can require individuals to exercise their rights appears to clash with their general purpose, which is, inter alia, to protect the individual from undue state interference. To instrumentalise an individual's rights for the purpose of achieving the state's goals runs directly counter to that principle.

This does not mean that individuals do not have duties. However, the pronouncement of this in the UDHR, as referenced above, is a general statement of this fact.[82] More specific duties have been posited as arising from this, such as the duty to obey the law.[83] However, in the case of the return obligation, the question is what the law on this point is precisely; in other words, what the scope of the obligation to return is. General duties may therefore be too wide and ambiguous for legal enforcement without clear, enabling legislation to give it effect.[84] The precise relationship between individual rights and duties owed to the community is one that has given rise to considerable debate.[85] For our purposes, it is sufficient to acknowledge that, as a matter of positive law, the de facto relationship between these duties and human rights is worked out in more detail in binding human rights treaties. These may contain specific exceptions to rights to allow for the duties of individuals. For example, while prohibiting forced labour, the ICCPR also sets out that this excludes work normally required in detention, military service or national service, or work or service which forms part of normal obligations.[86] The right to property in Article 1 of Protocol No.1 to the ECHR similarly holds expressly that the right to property does not prevent states from securing the payment of taxes or penalties. Beyond these specific qualifications, most human rights provisions contain more general limitation clauses permitting states to restrict the right under conditions, which allows them to ensure that various duties are met.[87] On the other hand, there are various rights which are protected to such an extent that they cannot be restricted in any way, even if it is to ensure a person meets his civic responsibilities. For example, a person cannot be tortured to ensure he pays his taxes. It should be kept in mind that the right to return under the ICCPR is virtually unrestricted. In the context of the ECHR, there is no restriction foreseen at all. The overall point, then, is that duties are accommodated in human rights law through the specific medium of the limitations explicitly set out in human rights treaties, not by a general, abstract idea that "there are no rights without duties." Furthermore, the protective functions of human rights instruments must be safeguarded.

82 And arguably mainly of moral significance, as discussed by Daes 1990, p. 17.
83 Hodgson 2003, pp. 165-167.
84 Hodgson 2003, pp. 238 and 246.
85 See, inter alia, Hodgson 2003; Devereux 1995; Steiner, Alston & Goodman 2008, pp. 496-516.
86 ICCPR, Article 8.
87 See 7.2.2.

Regarding the ICCPR, for example, Henkin observes that "it must never be forgotten that it is a human rights instrument, dedicated to the protection of the individual against governmental excesses," and furthermore that limitation clauses should be strictly and narrowly construed.[88]

5.3.4 The ECtHR on 'negative rights'

This brings us to a second, and more technical, issue. That is whether the right to return itself protects the individual from being compelled to exercise it, if this is against his or her own wishes. Could such compulsion be regarded as an unlawful restriction of the right? To my knowledge, this question has not come up before any international (quasi-)judicial body so far in the specific context of the right to return. However, the case law of the ECtHR provides some indication on the general question whether a right to do something might also entail an opposite right not to do that thing, or to be free of compulsion to do that thing. This, the Court has sometimes called a 'negative right.' It is instructive to look more closely at how the Court has dealt with this issue. This is particularly the case since, as discussed in Chapter 2, the role of the right to return within EU law flows from its inclusion in the ECHR, and via that medium, is a fundamental right as a general principle of EU law.[89]

Over the years, the ECtHR has dealt with several issues where the right to do something was pitted against the right not to do that same thing. Or conversely, where the right to be protected against something also meant that the individual was free to do the opposite. Perhaps the example that comes to mind first are its judgments and decisions dealing with the right to life, as protected by Article 2 ECHR, in relation to persons who wanted their lives to be ended. The Court does not recognise a general right to die as a consequence of the right to life.[90] However, a right to die may not be the exact mirror image of the right to life. This is particularly the case because the Court's judgments typically not only deal with the decision of an individual to end his or her life, but with the extent to which others (family members, doctors) can legitimately assist this wish. Similarly, the notion that the right to education for children, in Article 2 of the Protocol No. 1 to the ECHR, also entails the right not to participate in (certain aspects of) education, has been examined.[91] Again, the Court does not strictly deal

88 Henkin 1981, p. 44. Also see International Commission of Jurists 1984, I(A)(2) and (3), stating that any limitation clause of the ICCPR should not be interpreted as to jeopardise the essence of the right concerned, and that interpretation should be in favour of the right at issue. And a similar conclusion in Marcic 1968, p. 65, that "when examining the extent of a human right or freedom in the context of duties or limitations, one must begin by according a primary presumption of freedom."

89 See 2.5.3.

90 See in particular ECtHR *Pretty* [2002], paragraph 39.

91 For an overview, see ECtHR, Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights, 30 April 2017, Strasbourg: Council of Europe.

with the right not to be educated, but with the space that should be given to parental choice related to the content of education, or to provide education at home. Perhaps the best-known example of the obligatory exercise of a civic duty is compulsory voting. However, such issues are more likely to be resolved in relation to the question of freedom of thought and expression, rather than as a right not to vote directly following from the right to political participation.[92]

In one area, however, the ECtHR has explicitly dealt with negative rights. This is in relation to Article 11, which protects, inter alia, the right to join a trade union. The Court has delivered judgments in several cases in which the applicants were obligated to join a trade union or professional association as a condition for (continued) employment, so-called 'closed shop' agreements. This was challenged on the basis that the right to join a trade union also implies the right not to join a trade union or a professional association.[93] The Court has noted that the notion of a freedom "implies some measure of freedom of choice as to its exercise."[94] This also encompasses a right not to join an association. In this respect, individuals do not enjoy the right to freedom of association "if in reality the freedom of action or choice which remains available to him is either non-existent or so reduced as to be of no practical value."[95]

Compulsion might not always be contrary to the ECHR, but if a form of compulsion "strikes at the very substance" of the freedom of association, this constitutes at least an interference with the right.[96] Interestingly, then, the Court does not regard a deprivation of the choice whether or not to join an association as an interference as such, but relates this to the severity of the compulsion related to that deprivation. It furthermore notes that one of the purposes of the freedom of association is the protection of personal opinions under Article 9 and 10 ECHR. It notes that "the notion of personal autonomy is an important principle underlying the interpretation of the Convention guarantees," and that this is an essential corollary of the freedom of choice implicit in the freedom of association.[97] While recognising the role of choice, the Court does not definitively find that the positive right (to association) and the negative one (not to associate) are protected at the same level, although it also does not exclude this. This is not an issue it can decide in the abstract, it says.[98] In balancing collective interests against that of the individual, states generally have wide margin of appreciation,

92 See, for example, ECommHR, *X. v. Austria* [1972].
93 See, in particular, ECtHR *James, Young & Webster* [1981]; ECtHR *Sigurjónsson* [1993]; ECtHR *Sørensen and Rasmussen v. Denmark* [GC][2006].
94 ECtHR *Sørensen and Rasmussen v. Denmark* [GC][2006], paragraph 54.
95 ECtHR *Chassagnou* [GC][1999], paragraph 114; ECtHR *James, Young & Webster* [1981], paragraph 56.
96 ECtHR *James, Young & Webster* [1981], paragraph 55; ECtHR *Sørensen and Rasmussen v. Denmark* [GC][2006], paragraph 56; ECtHR *Sigurjónsson* [1993], paragraph 36.
97 ECtHR *Sørensen and Rasmussen v. Denmark* [GC][2006], paragraph 54.
98 *Ibid*., paragraphs 55-56.

although when domestic law permits compulsory closed-shop agreements, this margin is reduced.[99] In light of the compulsion and consequences involved (dismissal in case the person refused to join the trade union), the Court found that this was "serious and capable of striking at the very substance of the freedom of choice" inherent in Article 11 ECHR.[100] It also noted the fact that the applicants objected on political grounds to joining the trade union, which affected their personal views and opinions.[101] In this context, it found a violation.

Admittedly, it is not very easy to translate the Court's approach to 'negative rights' related to the freedom of association to the right to return. Some arguments would militate against a 'negative rights' approach to the right to return, whilst others speak in favour of this this. For one, the Court attaches importance to the fact that is formulated as a freedom for the individual. This is not the case for the right to return, which is formulated as a prohibition on the state to interfere with the entry to one's country of nationality.[102] At the same time, whilst not explicitly formulated as such, the right to return to one's own country is commonly understood as a key aspect of international freedom of movement.[103] Moreover, the right clearly provides for the possibility to return, but – parallel to the right to leave – would reasonably be interpreted as being protected regardless of a concrete intention to return. The notion of personal autonomy, as an important underlying principle for interpreting ECHR guarantees, would also point to an interpretation which allows a person a clear choice whether or not to return, under normal circumstances.[104]

This brings us to the second point. When faced with compulsory return, one might argue that the circumstances are not normal. It could be supposed that saying a right to return means a right not to return might effectively nullify the state's right to expel, which is implicitly accepted in provisions on the protection in case of expulsion in the ECHR and other human rights instruments. It is questionable, however, whether this argument is tenable. Whilst human rights treaties acknowledge the practice of expulsion, it is the not the purpose of human rights law to make expulsion work. Rather, its purpose is to provide certain protections if and when expulsion happens.

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99 *Ibid.*, paragraph 58.

100 *Ibid.*, paragraph 61.

101 *Ibid.*, paragraph 63.

102 Also compare the Court's consideration of a right to die, finding that Article 2 ECHR is framed in different terms than Article 11 and "cannot, without distortion of language, be interpreted as conferring the diametrically opposite right, namely the right to die." See ECtHR *Pretty* [2002], paragraph 39.

103 With regard to the right to leave, Whelan 1981 p. 638, footnote 8, also notes that it is more akin to a freedom.

104 In this respect, see, for example, Hannum 1987, p. 33, pointing to "the fundamental autonomy of the individual, of which the right to leave and return is one of the most striking expressions." Also see Dowty 1987, p. 1-19, discussing these rights in relation to the right to personal self-determination.

The framework for effective expulsion, as discussed in the previous and subsequent chapters, needs to be found, first and foremost, in domestic law, and on the international level in inter-state law. This inter-state framework clearly provides that the unwillingness of a person to return to his or her country is not determinative for whether he or she can be expelled and should be readmitted.[105] As such, it cannot be said that interpreting the right to return as implying a choice whether or not to return would be a fatal blow to the state's sovereign right to expel. This does not mean that assuming a negative right with regard to return would not have practical consequences, but there is no conceptual inconsistency in accepting this assumption whilst also upholding the state's sovereign right to expel.

A third and final point relates to freedom of opinion. In the Court's case law, the protection of this freedom is interwoven with considerations about the freedom of assembly. This has been a consistent element in finding violations of the right to freedom of assembly because of the obligation to join a trade union or professional association, although it is not entirely clear how much weight the Court attaches to this in relation to other elements.[106] The interconnection between the right to return and freedom of opinion is less evident than between assembly and opinion. Nevertheless, there are some links that can be made. International freedom of movement has sometimes been framed in terms of the protection of other rights. Former UN Special Rapporteur Inglés, for example, in setting out his Draft Principles on Freedom and Non-Discrimination in respect of the Right of Everyone to Leave Any Country, including His Own, and to Return to His Country, notes that these rights are "an indispensable condition for the full enjoyment by all of other civil, political, economic, social and cultural rights," something subsequently reiterated in other declarations.[107] This would also extend to individuals' possibilities to 'vote with their feet,' which is only possible when international freedom of movement is respected. The freedom of opinion element further comes into play when third-country nationals are required to make statements about their views on return, particularly whether they really want to return or not.[108]

While the Court's 'negative rights' doctrine as applied to freedom of assembly does not overlap neatly with the right to return, and differences persist, I believe that the main requirements for assuming a right not to be compelled to use one's right to return can be met in some circumstances. Despite the different language used, there is a reasonable basis for seeing

105 Although it may have some influence on *how* this happens.

106 ECtHR *James, Young & Webster* [1981], paragraph 57; ECtHR *Sørensen and Rasmussen v. Denmark* [GC][2006], paragraph 54; ECtHR *Sigurjónsson* [1993], paragraph 37.

107 Inglés 1963, pp. 64-67, preamble; Uppsala Declaration on the Right to Leave and the Right to Return, adopted by the Uppsala colloquium, 21 June 1972, preamble (reproduced in Hannum 1987, Appendix E); Strasbourg Declaration on the Right to Leave and Return, adopted on 26 November 1986 (reproduced in Hannum 1987, Appendix F).

108 See the point made in Cornelisse 2009 in footnote 75 above in relation to third-country nationals being forced to express an opinion that they do not hold.

the right to return not only as prohibiting undue interference, but also as a freedom and as closely tied to personal autonomy. A right not to invoke one's right to return also does not clash, in principle, with the sovereign right of states to expel. In such cases, an obligation to return may infringe on this right. All this should particularly be viewed, in my opinion, in the light of the general function of rights as an instrument to protect the interests of the individual, and not as an instrument to help states pursue their interests.

The fact that third-country nationals may have some degree of choice whether or not to invoke or exercise their right to return is only part of the puzzle. Subsequently, we need to examine whether the degree of compulsion to force a person to invoke this right to enable expulsion, and the consequences of non-compliance, would strike at the substance of the right. In the case of the freedom of assembly, the dismissal of applicants from their jobs was seen as a sufficiently serious consequence to find this struck at the substance of the right. In the case of return, the consequences are arguably even greater. Persons who fail to return within the voluntary departure period, due to an unwillingness to invoke their right to return, can be subjected to coercive measures including the deprivation of their liberty and the use of physical force to remove them. Furthermore, an entry ban will automatically be applied. This, in my view, satisfies the level of compulsion that would be needed to assume it struck at the substance of the right. Furthermore, also already noted, whereas the freedom of assembly allows for certain restrictions, the right to return under the ECHR is absolute. Even under the ICCPR, which theoretically allows for 'non-arbitrary' interferences with the right, in practice it provides virtually absolute protection against interferences. As a result, requiring a third-country national to invoke his or her right to return, with refusal resulting in 'punishment' of deprivation of liberty and other measures, has to be regarded as violating the freedom of choice that is part of the guarantee provided by that right.

5.3.5 Re-assessing the individual right to return and the obligation to return to a country of origin

From the above it should be clear that the right to return cannot simply be seen as yet another instrument in the toolbox of member states to ensure that third-country nationals take responsibility for their own return. The ownership of the right to return lies firmly with the third-country national, and it cannot be instrumentalised by the member state. In other words, the interests of the state in controlling migration, as given effect through the obligation to return, cannot imply that third-country nationals must invoke or exercise their individual right to return against their will, even if this would theoretically help to ensure effective return under the Directive. The legitimate obligations that can be imposed on third-country nationals are determined not only by the objective of effective return in the Directive, but limited by the requirement that fundamental rights are protected during the

return process, which is also a key objective of the Directive. In most cases, a middle ground between the two can be found. However, it is doubtful that this can be the case when the question of compulsory exercise of the right to return is on the table. Here, something will have to give. In this respect, I conclude that the compulsory exercise of the right to return would amount to an unlawful interference with a fundamental right, which must override the interest of the state in controlling migration that finds expression in secondary EU legislation. This is clearly an unsatisfactory outcome for member states, who might then be confronted with a situation that third-country nationals do not return, even if it would be in their power to do so. However, it should also be remembered that the initial problem creating this situation, the ineffectiveness of the inter-state framework, without which the question of compulsory exercise of the right would not arise, is a matter between the EU member state and the country of return. And requiring individuals, at the cost of their own fundamental rights, to resolve issues of responsibility of states would considerably overstretch the notion of legitimate individual responsibility.[109]

It should be emphasised that I do not understand this as meaning that third-country nationals can simply frustrate their expulsion with a claim to their right not to return and face no further consequences. The point is more subtle. A distinction must be made between the obligation to return, on the one hand, and the obligation to put one's right to return at the service of the return process on the other. Clearly, the right to return cannot, as such, prohibit an EU member state from taking measures if third-country nationals fail to leave within the voluntary departure period. However, it should be kept sharply in view that this is a function of their failure to comply with an obligation under the Returns Directive, not a function of their unwillingness to invoke their right to return. Although the distinction seems academic, there is a clear qualitative difference between attaching legal consequences to a failure to meet a legal obligation and the failure to exercise one's rights, even though they cover the same issue.

5.4 Conclusions

This chapter has discussed the possibility that inter-state readmission duties become ineffective, and what this would mean for third-country nationals' right to return, especially in the face of a clear obligation to return under the Directive. As regards the first point, a number of possible situations were discussed in which inter-state frameworks might be ineffective, in addition to gaps occurring for stateless persons (discussed in Chapter 4) and issues

109 This could be considered to fall within the scope of what Goodwin-Gill has called an abusive exercise of state rights of control over the movement of persons, which "will be violated if certain limits are exceeded in the course of their exercise." See Goodwin-Gill 1996, p. 99.

of straightforward non-compliance by countries of origin with their international obligations. It was suggested that such situations might occur, first of all, if the country of origin considered the expulsion of one of its nationals by an EU member state unlawful. This would arguably result in their own readmission obligations becoming null and void. Second, they may be able to put forward justifications which would preclude their responsibility for the wrongfulness of non-compliance with the duty to readmit. This may arise in different circumstances: non-readmission could be a countermeasure to a prior breach of obligations by the EU member state; it could be the result of *force majeure*, or it could result from a necessity, if non-readmission would be the only way to safeguard an essential interest of the country of origin against a grave and imminent peril. Each of these would be highly exceptional circumstances. However, I have suggested that, depending on the circumstances, these might be invoked effectively.

A third situation is related to the possible diverging positions that countries of origin and EU member states might have as to the existence and content of the customary obligation to readmit. Although it has been suggested that the existence of an unqualified obligation to readmit expelled nationals is beyond dispute, the discussion above shows that a number of counterpoints to this can be made. These relate both to the evidence of the existence of the customary norm, as well as to the doctrine that is generally put forward as underpinning this norm. While such objections may not be sufficient to call the customary norm into doubt completely, it shows that, from the perspective of countries of origin, challenges could definitely be put forward. I noted that such diverging views may also be at the foundation of origin countries' reluctance to readmit, although they are then more likely to avoid a direct conflict over this. However, there may well be a 'North-South divide' over the issue of readmission, although this would require further, in-depth exploration.

Most of the situations outlined above would make the inter-state readmission obligation ineffective, whilst, depending on the circumstances, leaving the obligation to readmit persons exercising their right to return intact. In such cases, EU member states may expect third-country nationals to declare their willingness to return to their countries of origin. This, then, would be taken as a sign of their intent to exercise their right to return, which would act as a trigger for readmission. Since third-country nationals are required, under the Directive, to return, EU member states may well expect third-country nationals to make such a declaration of willingness. As discussed, the approach that this would simply be part of the obligation to return has been endorsed by the highest administrative court in at least one member state. Furthermore, it has been suggested, at a more conceptual level, that the compulsory exercise of their right to return is a logical outcome of their arrival in an EU member state and claim to human rights provisions, since there are no rights without duties.

Upon closer examination, however, the logic behind the assumption that third-country nationals can be compelled to exercise their right to return

falls apart, both conceptually and as a matter of positive law. Conceptually, human rights are held by the individual as a safeguard to state overreach; they are not a tool to meet the state's interests. It is certainly not the job of human rights to make return policy effective. The international framework for expulsion gives that role to inter-state rules. If these are not respected by states, or somehow become ineffective in the relationship between states, this cannot shift the burden to the individual. This would overstretch the limits of individual responsibility and fundamentally clash with the principles of fairness and transparency to which the Directive must conform.

While an answer to the question of compulsory exercise of rights cannot readily be drawn as a matter of positive law, the approach of the ECtHR towards 'negative rights,' providing individuals with protection against being forced to do something that is in fact a freedom allocated to them, is informative. In particular, this entailed consideration of the Court's approach to several cases involving coercion to join trade unions, in light of the right to freedom of assembly. From this it was concluded that such coercion can indeed amount to an unlawful interference with a right, if it strikes at its essence, which is to be determined, inter alia, by the consequences of non-compliance. While this case law covers a very different area than the right to return, sufficient parallels can be found, especially in relation to the personal autonomy the right to return is meant to protect, and its connection to specific freedoms, in this case the international freedom of movement. The consequences of non-compliance with an obligation to exercise the right to return would also clearly be far-reaching. As a result, it must be concluded that EU member states are likely precluded from requiring that third-country nationals exercise their right to return against their will, such as by making a declaration to the consular authorities of their countries of origin, as this would amount to a violation of their rights. Therefore, they cannot be held responsible for not exercising their right as part of the return procedure. Unsatisfactory as this may be for member states, who want (and are normally required to) ensure effective returns, this cannot come at the expense of the third-country national's fundamental rights.