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

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6 Readmission to transit countries

6.1 Introduction

This chapter continues the examination of readmission to destination countries, as the first of the three key elements that together shed light on the actions that individuals can and cannot be expected to take as part of their obligation to return (research questions 1a and 1b). In the previous two chapters specific actions and limitations with regard to seeking readmission to the country of origin were discussed. This chapter will turn its attention to the other obligatory destination, transit countries. This covers only those situations identified in Chapter 3 as giving rise to an obligation to return. This means, first, that third-country nationals must have passed through that country on their way to the EU member state, and where relevant directly, and not having done so in a way specifically excluded by applicable agreements or arrangements. And second, that those agreements and arrangements must be in place, specifically relate to the readmission of persons who are not nationals of the transit country, and provide for clear frameworks for such readmission.

On this basis, I will not discuss customary international law or human rights law since neither would be agreements and arrangements relevant to transit countries within the meaning of the Directive. Even if this was not a specific requirement of the Directive, it would otherwise still be highly doubtful that those frameworks would have much relevance to the readmission by transit countries of non-nationals. Hailbronner has discussed the interesting notion that states might carry responsibility to readmit persons who irregularly entered another state from their territory, especially if they acted in a 'reproachable' manner to allow, or even encourage, such irregular migration.[1] He discusses this in relation to the principle of good neighbourliness, as well as the responsibility of states for cross-border harm.[2]

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1 Hailbronner 1997.

2 Hailbronner 1997, pp. 31-37. A contemporary example of such a situation arising might be found in the border conflict between Greece and Turkey in late February and early March 2020, when Turkey allegedly wilfully encouraged irregular migration to Greece and even provided transportation to the Greek land and sea borders. See, for example, Guiraudon 2020; Council of Europe Commissioner for Human Rights 2020. Greenhill 2010 sets out further historical examples in which states have used (the threat of) cross-border population movements in pursuit of foreign policy goals. The topic of state responsibility for causing refugee flows, including a possible duty to compensate the receiving state, has been explored by various authors in the 1980s and 1990s. See, for example, Coles 1981; Hofmann 1985; Lee 1986; Garry 1998.

However, he concludes there is a lack of sufficient evidence of such a norm and idea is also rejected by others.[3] The human right to return to a transit country would only apply in the exceptional circumstances that non-nationals have such close links to that country, so that it can be considered their 'own country,' which is very unlikely to occur if they only pass through it. To the extent that human rights-based claims to readmission to a transit country might exist, these would more likely be based on family connections in the country, although the bar for this would be very high. However, discussing this further would just be a diversion from the main point, because this falls outside the scope of obligatory return under the Directive.

Instead, attention will turn to the three categories of agreements and arrangements that were identified in Chapter 3 as being able to make a transit country an obligatory destination. These include, first of all, specific EU or bilateral readmission agreements. Such agreements and their implications for third-country nationals during the voluntary return procedure will be the main focus of this chapter. Section 6.2 will explore these implications, specifically what procedural steps are necessary to make such agreements work for voluntary return situations. It also addresses issues of evidence that arise when seeking readmission on the basis of these agreements, both in substance and who needs to supply this. It will particularly show that this is, by and large, not something third-country nationals can do by themselves, but for which close cooperation between them and the EU member state is necessary.

The second set of agreements identified as potentially qualifying as relevant instruments under Article 3(3) of the Directive comprises the various multilateral treaties dealing with international air and maritime transport, and the situation of smuggled persons or victims of trafficking. The implications of these for non-nationals seeking to return to transit countries on the basis of such treaties, and the clear limitations involved, will be discussed in section 6.3.

Section 6.4 will discuss the possibility that return to a transit country takes place on the basis of other arrangements. Although non-binding arrangements often do not appear to include provisions on the readmission of non-nationals, some conclusions about their potential role are discussed, including the relevance of the fact that such arrangements do not lead to legally binding readmission obligations on the part of the transit country. The conclusions to this chapter are set out in section 6.5.

3 Coleman 2009; Giuffré 2015; EP 2010, p. 13, and further references therein.

6.2 Return to transit countries under EU readmission agreements

This section focuses on the role of readmission agreements in facilitating return to transit countries. In particular, it will assess under what substantive and practical conditions they can provide a basis for readmission to a transit country, and what the implications of this are for the position of third-country nationals under the Directive.

6.2.1 Initial comments on readmission agreements and their relevance to returns to transit countries

As already noted in Chapter 2, the term 'readmission agreement' is potentially wide-ranging. When it comes to agreements specifically focused on readmission, these can either be EU agreements or bilateral agreements concluded by individual member states (or groups of them) with a third country. The prevalence, and arguably the importance, of such bilateral arrangements is much greater than EU readmission agreements.[4] This is also true for further bilateral agreements, such as implementing protocols, that are used to make certain elements of EU readmission agreements operational.[5] However, in Chapter 2 I have explained why – to enable somewhat coherent conclusions – this analysis will mainly focus on EU readmission agreements, largely leaving bilateral readmission agreements outside its scope. Nevertheless, it must be reiterated that conclusions based on EU readmission agreements may at times only be a very imperfect proxy for conclusions that could be drawn about bilateral agreements, because of their diversity in scope and content.

Furthermore, it was noted in Chapter 2 that a range of formal agreements which do not have readmission as their key focus, but that contain clauses on readmission ('agreements related to readmission') could be seen as 'readmission agreements' within the meaning of Article 3(3) of the Directive, at least in the abstract. However, in Chapter 4, I explained that such agreements generally do not provide for the readmission of non-nationals, or only commit to further negotiations on this, so they cannot be a basis for obligatory return to a transit country. These are therefore also excluded from the discussion.

Even when addressing only EU readmission agreements in a narrow sense, considerable questions remain about their real-life relevance to returns to transit countries, and even more specifically, voluntary returns. Carrera has noted that there are considerable gaps in information as regards the actual use of readmission agreements. This is particularly true for readmissions of non-nationals. He cites a study that noted that almost 100 per cent of readmissions based on EU agreements (to the extent avail-

4 See, for example, Billet 2010.
5 Carrera 2016, pp. 41-42.

able) concerned nationals of that country.[6] Furthermore, an evaluation of EU readmission agreements, published in 2011, concluded that, while data did not distinguish between voluntary and forced returns, such agreements were "very rarely used for voluntary returns."[7] This would indicate that voluntary returns of non-nationals under such agreements would be extremely rare in practice.

Theoretically, however, such agreements, although clearly being concluded with forced returns in mind, do not completely exclude voluntary returns, and some agreements even mention the priority of voluntary return specifically. Both the EU agreements with Armenia and with Azerbaijan, for example, set out among their fundamental principles that "[t]he Requesting State should give preference to voluntary return over forced return where there are no reasons to believe that this would undermine the return of a person to the Requested State."[8] As such, in the light of the emphasis of the EU on such agreements and on the priority of voluntary return, it is a matter that should be considered. Furthermore, since Carrera's observations there have been some developments tentatively indicating a role for readmission agreements also in relation to voluntary return. For example, since the conclusion of the EU-Turkey statement of March 2016, the implementation of voluntary returns from Greece to Turkey have been reported,[9] although there have been concerns over the conditions under which third-country nationals have acquiesced to such returns.[10] The exact legal basis used for these returns also remains somewhat vague. Formally, the implementation of the return and readmission part of the statement relies on both a bilateral readmission agreement between Greece and Turkey and the EU-Turkey readmission agreement.[11] However, there have been issues with the implementation of both.[12] Nevertheless, the above indicates at least the possibility of voluntary returns involving non-nationals being carried out under readmission agreements.

6 Carrera 2016, p. 16.

7 COM(2011) 76 final, 23 February 2011, p. 3; Carrera 2016, p 41.

8 See, for example, Agreement between the European Union and the Republic of Armenia on the readmission of persons residing without authorisation, OJ L 289, 31 October 2013, pp. 13-29, Article 2; Agreement between the European Union and the Republic of Azerbaijan on the readmission of persons residing with authorisation, OJ L 128, 30 April 2014, pp. 17-42, Article 2. However, similar clauses have not been included in the agreements with Tukey, Cape Verde and Belarus, although these entered into force after the ones with Armenia and Azerbaijan.

9 Wallis 2020.

10 HRW 2017.

11 A European Commission factsheet, published in March 2016, notes: "The legal framework for these returns is the bilateral readmission agreement between Greece and Turkey. From 1 June 2016, this will be succeeded by the EU-Turkey Readmission Agreement following the entry into force of the provisions on readmission of third country nationals of this agreement." European Commission 2016.

12 For an overview, see Heinrich Böll Stiftung 2019.

When discussing the potential use of EU readmission agreements for the purpose of voluntary returns to transit countries in practice, issues of procedure and evidence quickly become entangled. Procedurally, the most important aspect is that readmission under such agreements usually requires a formal readmission request, or at least prior notification, by the EU member state. This request must include the evidence of an individual's eligibility for readmission under the terms of the relevant agreement. The conditions for this are discussed in the following paragraphs.

6.2.2 Conditions for readmission

Transit countries' obligations to readmit under agreements concluded with the EU arise when two cumulative conditions are met. First, that the person to be returned irregularly entered, or was irregularly staying in, an EU member state. And second, that a relevant link between that person and the transit country exists. Both issues are discussed below.

6.2.2.1 Irregular entry or stay in the EU member state

Readmission obligations only pertain to third-country nationals who have been found to have entered or have been staying irregularly in the EU member state. The obligation to readmit such persons may in some cases be time-limited. For example, such obligations may lapse if, after a certain period following the detection of the irregular migrant in the EU, no readmission application has been made. A typical clause on this would state:

> *"The unlawfulness of entry, presence or residence shall be established by means of the travel documents of the person concerned in which the necessary visa or other residence authorisation for the territory of the requesting State are missing. A statement by the requesting state that the person concerned has been found not having the necessary travel documents, visa or residence authorisation shall likewise provide prima facie evidence of the unlawful entry, presence or residence."*[13]

Although irregular entry, presence or residence in the EU member state is a core element of the readmission obligation, Coleman has noted that the evidentiary requirements are quite simple to meet in most cases, since they technically do not need evidence of unlawful border crossing or stay as such, but the absence of evidence of lawful stay.[14] The irregular entry or stay of the individual is a necessary condition for readmission obligations to apply, but not a sufficient one. In addition, one of two conditions as regards the link between the individual and the transit country must be established.

13 EU-Albania Agreement, Article 9(3). Similar clauses can be found in each of the other agreements incorporated in this study.

14 Coleman 2009, pp. 95 and 100.

6.2.2.2 Link to the transit country

The first situation in which a transit country would be required to readmit non-nationals irregularly staying in an EU member state is if they hold a valid visa or residence permit in that transit country. This has already been discussed briefly in relation to the making of a readmission application above, as well as the situation of habitually resident third-country nationals in Chapter 5. However, habitual residence, which would be necessary to define a country as the country of origin, is not required for obligatory returns to transit countries. The readmission obligation relates to any non-nationals, including stateless persons, who hold a residence permit or visa for the transit country. Agreements differ on the moment at which such a permit or visa must still be valid. Generally, this is either the moment the third-country national entered the EU member state or the moment of the submission of the readmission application.[15]

The second element relates to a combination of the circumstances of entry into the EU member state and the prior presence of the individual in the member state. Some agreements formulate this quite broadly. For example, Albania is under an obligation to readmit non-nationals who "entered the territory of [EU] Member States after having stayed on, or transited through, the territory of Albania."[16] This would then cover non-nationals found to be irregularly staying in the EU member state, even if they initially entered lawfully, provided that evidence is available of prior stay in, or transit through, Albania. However, most other agreements are stricter in two ways. First, they limit the obligation to readmit to situations in which non-nationals entered the EU member state *unlawfully*.[17] It would thus exclude visa overstayers or persons who enjoy visa-free travel and stayed in the member state beyond the period allowed.[18] Second, such unlawful entry must generally have been *directly* following their transit through or stay on the territory of the transit country.[19] While there are various ways of providing evidence of prior stay in the transit country, the requirement of unlawful direct entry may raise more issues, especially

15 The agreements with Albania (Article 3(1)(a)), Serbia (Article 3(1)(a) and Ukraine (Article 3(1)(a) and (b)) require that the permit or visa was valid at the time the third-country national entered the EU member state, whilst those with Pakistan (Article 3(1)(a)), Russia (Article 4(1)(a) and (b)) and Turkey, at least where it concerns visas (Article 4(1)(a)) require these to be valid at the moment of the readmission application.

16 EU-Albania Agreement, Article 3(1)(b).

17 Coleman 2009, p. 94; EU-Pakistan Agreement, Article 3(1)(b); EU-Russia Agreement, Article 3(1)(c); EU-Serbia Agreement, Article 3(1)(b); EU-Turkey Agreement, Article 4(1)(c); EU-Ukraine Agreement, Article 3(1)(a).

18 Coleman 2009, p. 95-96.

19 As discussed in 3.1.1.1.

for non-neighbouring countries.[20] This, therefore, provides the basis for the exclusion of non-direct transit situations under many agreements as discussed in Chapter 3.

6.2.2.3 Exceptions

Some of the conditions for readmission already have some inherent limitations, such as regards the requirements of direct and unlawful entry into the EU member state. However, the various agreements also set out specific exception clauses, which would negate the readmission obligation, despite both the requirements of irregular stay in the EU member state and a relevant link with the transit country being established. First, as discussed in Chapter 3, each of the agreements exclude situations in which the non-national has only had an airside transit via an international airport of the transit country. Second, if the EU member state issued the individual a visa or residence permit, either before their entry or afterwards, this would also exempt the transit country from its readmission obligation.[21] This exception, however, is itself subject to exceptions. The readmission obligation comes back into play if the transit country had also issued a visa or a residence permit to the non-national, and the validity of such documents is longer than those issued by the EU member state.[22] This is also the case if the visa or residence permit issued by the EU was obtained through forged or falsified documents.[23] Third, as already noted, some agreements exempt transit countries from readmission if it concerns persons who enjoyed visa-free travel to the EU member state.[24] This could potentially exclude large numbers of irregular migrants in the EU from falling within the scope of readmission agreements.

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20 Carrera 2016, p. 3. But also see Cassarino 2007, p. 183, on neighbouring countries, referring to frequent disputes between Spain and Morocco, in relation to their bilateral agreement, over the question whether irregular migrants actually transited through Morocco, with the latter often arguing such persons may have transited through Algeria.

21 EU-Albania Agreement, Article 3(1)(a); EU-Pakistan Agreement, Article 3(1)(a); EU-Russia Agreement, Article 3(1)(a) and (b); EU-Serbia Agreement, Article 3(1)(a); EU-Turkey Agreement, Article 3(1)(a); EU-Ukraine Agreement, Article 3(1)(b) and (c).

22 EU-Albania Agreement, Article 3(2)(b); EU-Pakistan Agreement, Article 3(2)(b); EU-Russia Agreement, Article 3(2)(b); EU-Serbia Agreement, Article 3(2)(b); EU-Turkey Agreement, Article 3(2)(b); EU-Ukraine Agreement, Article 3(2)(b).

23 EU-Albania Agreement, Article 3(2)(b); EU-Pakistan Agreement, Article 7(1); EU-Russia Agreement, Article 10(3); EU-Serbia Agreement, Article 3(2)(b); EU-Turkey Agreement, Article 10(1) and (2).

24 EU-Russia Agreement, Article 3(2)(c) ; EU-Turkey Agreement, Article 4(2)(c); EU-Ukraine Agreement, Article 3(2)(c).

6.2.3 Means of evidence

The burden of proof that a transit state should readmit a non-national lies with the state requesting readmission. For establishing the link between the non-national and the transit country, the various agreements contain annexes with specific lists of evidence that can be accepted. These lists play a key role in the readmission procedure and it has been suggested that "[e]stablishing these lists represents one of the primary aims of the agreement."[25] In general, the lists set out two levels of evidence: proof and prima facie evidence. However, the terminology differs, with the EU-Russia agreement, for example, distinguishing proof and 'indirect evidence.'[26] And some others do not really clearly attach these labels, but just set out what consequences certain evidence has. Normally, when evidence that is considered proof is provided, this should trigger an obligation on the transit country to readmit without further investigation. Prima facie evidence, instead, only provides for a rebuttable presumption of an obligation to readmit, allowing the transit country to provide counter-evidence why it should not readmit.[27] However, this is not uniform across the different agreements. In some cases, prima facie evidence only triggers an obligation to further investigate the readmission claim.[28] In general, the annexes to the agreements allow for a wide range of evidence. This includes official (travel) documents and residence permits, visas or entry and exit stamps attached to these, but also other papers, such as hotel bills, credit card receipts, car rental agreements, air, sea, train and coach tickets, or other evidence showing that a third-country national was in the transit country. Furthermore, official statements by the member state's authorities such as border guards are often accepted. Various agreements also include as evidence statements made by third-country nationals themselves in administrative or judicial proceedings, and witness statements or declarations from family members or travelling companions. In some cases, information provided by international organisations, such as UNHCR, are also listed.

However, there is no uniformity in how a specific document or piece of evidence is classified across the different agreements. For example, under the agreements with Albania, Serbia and Turkey, a hotel bill showing that an individual previously stayed in the transit country is accepted as proof which requires readmission without further investigation.[29] Such same hotel bills, in the case of Pakistan, Ukraine and Russia, would only trigger

25 Coleman 2009, p. 99.
26 EU-Russia Agreement, Article 10(2).
27 EU-Albania Agreement, Article 9(2) and Annex 4; EU-Russia Agreement, Article 10(2) and Annex 5A; EU-Serbia Agreement, Article 9(2) and Annex 4; EU-Turkey Agreement, Article 10(2) and Annex 4.
28 EU-Pakistan Agreement, Article 7(2) and Annex IV; EU-Russia Agreement, Article 10(2) and Annex 5B; EU-Ukraine Agreement, Article 7(3)(b) and Annex 4b.
29 EU-Albania Agreement, Annex 3; EU-Serbia Agreement, Annex 3; EU-Turkey Agreement, Annex 3.

an obligation of further investigation or verification.[30] When it comes to air, train, boat or coach tickets, as well as passenger lists, Pakistan and Russia again recognise these as a basis for investigation,[31] but Ukraine, together with Albania, Serbia and Turkey, accepts these as proof that conditions for readmission are met. Differences can further be found, inter alia, as to the role played by statements made by EU member state officials or the non-nationals themselves. As such, the precise evidence to be provided, and the 'strength' of that evidence as a means to show conditions for readmission are met, will have to be determined in relation to each readmission agreement separately.

Generally, readmission agreements do not provide for annexes setting out lists of acceptable evidence on the irregular stay of individuals on the territory of the EU member state, confirming that this element is much more easily satisfied. Most of the agreements also provide that false documents cannot be used as evidence of eligibility for readmission.[32]

6.2.4 Readmission applications

In most cases, the procedure for readmission requires the requesting state (the EU member state) to submit a formal application to the competent authorities of the transit country.[33] This is a procedural step clearly set out in the agreements which must be followed by the parties. As such, when the readmission procedure requires this, there is no readmission obligation on the transit country without an application by the EU member state.

Beyond the readmission application's function of notifying the transit country of the request for readmission, several things must be submitted as part of it. First, the particulars of the person to be returned, which may include, depending on the agreement, a combination of name, surname, place and date of birth, gender and physical description, nationality and language, aliases, or civil status. Second, it should include the evidence underpinning the claim for readmission, in line with the discussion above. Third, information about the need for care or assistance, in particular in relation to the person's help, during the transfer, may have to be provided. And fourth, information about specific security issues related, such as the individual being a "dangerous person," may be required.[34] Readmission agreements provide for a standard form to be used to make an application

30 EU-Pakistan Agreement, Annex IV; EU-Russia Agreement, Annex 5B; EU-Ukraine Agreement, Annex 3B.

31 EU-Pakistan Agreement, Annex IV; EU-Russia Agreement, Annex 5B.

32 Although in some cases entry or exit stamps, even if found in a false document, can be considered evidence, see, for example, EU-Turkey Agreement, Annex 3.

33 Coleman 2009, p. 96-97; EU-Albania Agreement, Article 6(1); EU-Pakistan Agreement, Article 4(1) ; EU-Russia Agreement, Article 6(1) ; EU-Serbia Agreement, Article 6(1); EU-Turkey Agreement, Article 7(2); EU-Ukraine Agreement, Article 5(1).

34 Coleman 2009, p. 96.

and transmit this information, which should be signed and stamped by the EU member state.[35]

If the third-country national involved holds a valid visa or residence permit for the transit country, and also holds a valid passport, travel document or identity card – depending on the particular provisions of the agreement – there is no need for a readmission application.[36] If the person holds a valid visa or residence permit, but not such a travel or identity document, some agreements provide that a written notification by the EU member state that the individual is returning to the transit country on the basis of that agreement is sufficient. This would eliminate the need to provide all the information as above, but still entails a prior action by the EU member state to ensure the readmission obligation of the transit country is triggered.

6.2.5 Implications for third-country nationals and EU member states

Having set out some of the key substantive and procedural requirements of EU readmission agreements, attention now turns to the implications for third-country nationals. However, given the specific nature of readmission agreements, which provide for procedures between states, and not an instrument that (in most cases) can be invoked directly by the individual, this is better framed as a question of implications for third-country nationals and EU member states jointly. Two key issues in this respect are discussed below. First, whether member states can trigger readmission obligations of the transit country without the individual's consent. And second, what can be expected of the individual in terms of providing evidence for eligibility for readmission to the member state, so it can submit this to the transit country. Some short comments on situations in which prior action by the EU member state is not necessary are also made.

6.2.5.1 Triggering of readmission obligations: is the individual's consent needed?

While there are situations in which no prior action by the EU member state is necessary, in the majority of cases a readmission application (or a written notification) is necessary to enable readmission. The agreements make clear that this is something that must be done by the EU member state. The requirement of prior action by the EU member state is an odd fit with the notion of voluntary compliance, which depends, first and foremost, on individuals taking the necessary steps to return of their own accord without

35 EU-Albania Agreement, Annex 5; EU-Pakistan Agreement, Annex V; EU-Russia Agreement, Annex 1; EU-Serbia Agreement, Annex 6; EU-Turkey Agreement, Annex 5; EU-Ukraine Agreement, Annex 5.

36 The EU-Russia Agreement, Article 6(2), requires the person to be in possession of a valid national passport. The EU-Serbia Agreement, Article 6(2) refers to possession of "a valid travel document." Both the EU-Turkey Agreement (Article 7(3)) and the EU-Ukraine Agreement (Article 5(2)) refer to "a valid travel document or identity card."

further intervention by the EU member state. This raises the question, in particular, to what extent EU member states can make an application for readmission to a transit country during the voluntary departure period, even if this is not the third-country national's preferred option.

At first glance, the logic of voluntary return would appear to resist the idea of the member state taking action without the individual's consent. After all, at this stage it is generally up to third-country nationals to decide which destination they pursue in order to meet their obligation.[37] At the same time, an EU member state may prefer to submit a readmission request to a transit country to keep all options for return open, also with a view to swift removal of third-country nationals if their own voluntary return efforts do not pay off. Even in the case of voluntary return, I suggest, neither the Directive nor the wider international law framework for expulsion prohibits the EU member state from doing so.

As regards the Directive, EU readmission agreements were clearly foremost in the minds of the co-legislators when deciding on the formulation of the second limb of the definition of 'return' regarding transit countries. It has already been established that, under the conditions discussed in Chapter 3, return to a transit country is obligatory for third-country nationals, and they can thus be expected to pursue this option. This does not mean that they must return to a transit country in all circumstances; during the voluntary departure period they are free to pursue return to the country of origin or another third country too. This would not preclude the EU member state from ensuring, if it has this possibility, that other options are available. This is because, in contrast to the reference to 'another third country,' the third-country national's willingness to return to a transit country is not a factor. This is the case as long as it does not prematurely – that is, before the end of the voluntary departure period – coerce third-country nationals to use this option. As a matter of international law, the international expulsion regime prioritises return to countries under obligation to readmit, including under a readmission agreement, over return to countries where such obligations do not exist.[38] As such, the international expulsion regime also does not prevent an EU member state taking such steps in general, and, as discussed at several points, does not necessarily distinguish between voluntary and forced implementation of expulsion. This would be subject, of course, to the return to the transit country being in conformity with the EU member states' fundamental rights obligations. Normally, these should have been assessed before a return decision, but to the extent that this is not the case, the viability of return to a transit country is discussed in Chapter 7.[39]

37 See 7.2.

38 Article 22(1) ILC draft articles. Furthermore, it allows expulsion to a place of embarkation, i.e. a country from which the alien has directly entered the expelling state, see Article 22(2).

39 See 7.3.

The flipside of all this is that, if the EU member does *not* submit a readmission application or written confirmation in those cases that readmission agreements proscribe this, there is no readmission obligation on the part of the transit country. This preceeds any questions of evidence being assessed. If this would be due to a lack of cooperation by the third-country national, this would of course not absolve him or her from being held responsible. However, there may be reasons outside of the sphere of the third-country national's cooperation that may lead to a readmission application not being submitted. If member states truly want to benefit from the fact that voluntary returns are less administratively burdensome than removals,[40] they may choose not to engage in this process, especially if they feel that the third-country nationals' own efforts to return to their country of origin or another third country may well be successful.[41] Whatever the reason for non-submission, whether out of convenience or in error, as long as this is not directly due to the third-country national having put clear obstacles in the member state's way to doing so, this cannot lead to individual responsibility for non-return to the transit country. After all, in such a situation returning to a transit country cannot be considered obligatory under the Directive.

It may also be the case that it is not in the interest of the EU member state to ensure return to a transit country, but in the interest of third-country nationals themselves. For various reasons, they may prefer to return to a transit country, rather than their country of origin. If the EU member state then fails to submit a readmission application, this becomes a barrier for the individual to return to his or her preferred destination. This represents another side of the coin, which does not relate immediately to the scope of third-country nationals' obligations, but to the extent to which they can have the freedom to choose destinations. This is the subject of Chapter 7, which also includes a short discussion of this matter related to the return to transit countries under readmission agreements.

The discussion in this paragraph clearly excludes those situations, mentioned earlier, in which no prior action by the member state, either a readmission application or a written notification, is necessary. Since this involves situations in which third-country nationals are both properly documented for travel and can show a right of residence or a visa to the transit country's border authorities, they should be able to return without any other steps to be taken. In this situation, they would also normally not encounter any issues boarding transport for which they have made the appropriate arrangements. Such situations are clearly covered by the various readmission agreements and would thus meet the requirement of being "in accordance with Community or bilateral readmission agreements or arrangements," under Article 3(3) of the Directive.

40 See 2.2.1.

41 Although it may be wondered whether such inaction can be justified from the perspective of member states' obligation under the Directive of ensuring effective return, as discussed in more detail in 8.4.1,

6.2.5.2 Obligations to provide relevant information and evidence

If the member state is entitled to submit a readmission application regardless of third-country nationals' preferences, this must also entail a measure of cooperation by those individuals to enable the member state to do this. It could be argued that the obligation on individuals to cooperate in this regard could be broadly formulated as providing any personal information, as well as allowing pictures to be taken, as elements to be filled in on the readmission application form. The same would go for any evidence demanded by the member state. However, this may be nuanced both by the way the requirements of readmission agreements are formulated, and the principle, discussed in Chapter 5, that third-country nationals can be expected to provide what is necessary to ensure readmission. In that chapter, it was noted that this may mean something different than simply an obligation to provide whatever is asked.

It should be noted that the various agreements only require the member state to provide certain information or evidence "to the extent possible." For example, all agreements require information about specific care and any protection or security measures only to the extent possible.[42] While the provisions are written with removals in mind, the extent to which information on the need for special assistance or security issues is relevant may differ in voluntary return situations. Such information appears to be included for the purpose of allowing the transit country to make the appropriate arrangements when persons are removed, including the handover by the member state's escorts to the authorities of the transit country. If the return is instead voluntary, the concerned persons would normally travel, as much as possible, as any other international traveller. However, some communication on, for example, special medical arrangements may still be necessary, although this does not necessarily have to come from the EU member state's authorities, but could also be arranged through providers of assisted voluntary return services. Issues related to 'dangerous persons' may still be relevant, although it should be noted that none of the readmission agreements provide for the refusal of readmission of a non-national for reasons of security.[43]

Some agreements say that the particulars of the person to be returned, and even details of the evidence that conditions for readmission are met, only have to be provided to the extent possible.[44] While it is difficult to foresee how readmission can take place without appropriate evidence, this

42 Or in the case of the EU-Ukraine Agreement, "where necessary."

43 Although it may be a reason for the other contracting party to refuse to act as a place of transit for non-nationals on their way to their final destinations. See, for example, EU-Albania Agreement, Article 13(3)(c). But such a situation is not part of this analysis.

44 EU-Albania Agreement, Article 7; EU-Serbia Agreement, Article 7; EU-Turkey Agreement, Article 8. The EU-Russia Agreement, by contrast, only attaches this condition to certain information, such as the place of birth and place of last residence, see Article 7(1)(a).

should at least give flexibility as to the particulars. It would suggest that, even if personal information is not provided fully, readmission may still occur, on the condition that at least the necessary evidence of eligibility for readmission is available. So even in cases in which a third-country national does not fully share all details that should normally be filled in on the readmission application form, this is not necessarily fatal to the readmission process. Indeed, Coleman suggests that readmission agreements may be very flexible in this matter, and would "allow the readmission of a Mr or Mrs 'X,' provided there is sufficient evidence of nationality, c.q. stay or transit."[45]

At any rate, if we look at the issue from the perspective of what is necessary for readmission, the first question that comes up is which information or evidence is already in possession of the member state. In most cases, it may be presumed that the EU member state already has the personal information required for the purposes of the readmission application, for example from the various databases on which it can draw.[46] Since it can use this without the consent of the individual, unless there is a need for verification by the individual, further cooperation on this matter is not necessary. As such, the failure of third-country nationals to provide information that is already at the disposal of the member state may be seen as non-cooperation by the member state, but cannot be a factor in assessing whether they have complied with their obligation to return. The difference is of crucial importance to a fair and transparent use of the notion of individual responsibility in voluntary return procedures. This would be different if the member state does not possess information which is crucial to the readmission process, in which case the third-country national can be expected to provide this.

As noted, the most crucial element of the success of a readmission procedure is the provision of relevant evidence showing the conditions set out in the agreement are met. Here again, the third-country national can be required to provide information necessary for readmission not already in possession of the member state. However, what is 'necessary' is a bit less straightforward than for nationals. This is due, first of all, to the diversity of the lists of evidence. As such, what is necessary to ensure readmission will need to be assessed in the light of the relevant agreement. A further complication is that not all evidence has the same outcomes. It may lead to readmission without further investigation, but also a rebuttable presumption of readmission, or even just an obligation to investigate the readmission claim. Clearly, not all these outcomes provide the same level of certainty whether readmission will actually take place. Third-country nationals can thus be expected to provide to the member state such evidence that would trigger the strongest obligations on the part of the transit country, at least to

45 Coleman 2009, p. 97.

46 See, in this respect, also the proposal to expand the use of the Eurodac system (Regulation 603/2013, OJ L 180, 29 June 2013) to the identification of third-country nationals for the purpose of return, COM(2016) 272 final, 4 May 2016, and further proposed amendments in COM(2020) 614 final, 23 September 2020.

the extent that they can be reasonably be expected to have such evidence or to have the means to obtain it.

What third-country nationals, in their specific situation, could be reasonably be expected to obtain and provide in terms of the strongest possible evidence, is a matter that can only be determined on a case-by-case basis. It will require some kind of assessment by the member state of the likelihood that the individual indeed has such evidence (for example documents that they have kept at home). Or whether they could obtain these through others, such as family members or friends. This is a question of fact and cannot be answered in the abstract here. However, most agreements provide for such wide-ranging options that, even if proof is not available, the majority of third-country nationals may be presumed to at least be able to provide some form of prima facie evidence. In some cases, their own statements as to their prior presence in the transit country may act as prima facie evidence. Such statements are statements of fact, directly relevant to the question of readmission and therefore very different in nature from statements of willingness to return discussed in the previous chapter. Readmission based on these agreements is not dependent on the willingness of the individual, as evidenced by the fact that they can be used for, and are primarily focused on facilitating, removals. Indeed, with regard to the readmission of nationals, some of the agreements explicitly provide that travel documents for the purpose of return and readmission shall be issued irrespective of the will of the individual.[47] The fact that this is not repeated for non-nationals does not affect this.[48]

As a general point, if third-country nationals have provided evidence that falls into a certain category, there should be no more need for any evidence in 'lower' categories, and this would then fall outside their obligation. For example, if a person to be returned to Albania provides hotel bills or tickets, which constitute proof, he or she should not be expected to also make a specific statement on prior presence in Albania, or ask for a confirmation from family members or travel companions, which constitutes prima facie evidence. It should be noted that statements from the individual during administrative or judicial proceedings and official statements by the authorities of the EU member state are listed as means of evidence in various agreements. As such, while it is first and foremost up to the individual to provide relevant evidence, if the member state assesses that this will be very difficult or impossible to provide, other options to continue the readmission procedure are generally available, at least in theory. Again, the extent to which the non-provision of specific evidence has actually

47 EU-Russia Agreement, Article 2(2); EU-Turkey Agreement, Article 3(4) ; EU-Ukraine Agreement, Article 2(2).

48 The reason for this phrase being absent in provisions on non-nationals may be more related to the fact that their return does not raise questions of the interplay between inter-state and human rights-based obligations, discussed in the previous chapter. However, there is no reason to assume the same principle would not apply to them.

impacted on the readmission procedure should be a relevant factor in any assessment of non-compliance with the obligation to return, rather than the fact that such information was not provided in the abstract.

6.3 Return to transit countries under multilateral treaties

In Chapter 3 it was suggested that multilateral treaties containing provisions on readmission could arguably fall within the scope of Article 3(3), in the sense that, if relevant to the situation of a third-country national, they would make return to a transit country obligatory. In relation to transit countries, two situations related to such treaties may be relevant. The first is when they would require readmission of persons with a residence right, or at least accepting them for examination. This situation has been discussed with regard to habitually resident stateless persons and their return to countries of origin. However, since such treaties do not make specific distinctions between various categories of non-nationals, and only relate to specific residence rights and not necessarily habitual residence, the same points apply here. That is, of course, on the condition that the country where a third-country national holds such a residence right can be considered a country of transit, meaning that it must have been part of the migration journey to the EU at the very least.

However, treaties related to international air and maritime traffic may also contain readmission obligations that relate to the place of embarkation of a person subsequently found to be staying irregularly in an EU member state. This situation is briefly discussed here. After all, unless the place of embarkation is a third-country national's country of origin, it can be considered a transit country within the meaning of the Directive. Furthermore, the various treaties do not, like most readmission agreements, contain specific provisions that would exclude certain types of transit, such as airside transit at an international airport. Rather, the place of embarkation should be read as the place where the third-country national boarded the means of transport that brought him or her to the EU member state, which can therefore include international zones such as airports and seaports.

At least in theory, such multilateral treaties would considerably expand the scope of transit countries that could be obligatory destinations under the Directive, since they are widely ratified and are not subject to stringent conditions like readmission agreements. Furthermore, the Chicago and FAL Conventions cover two types of international traffic often used by migrants to the EU, and may thus cover a large number of persons eventually found to be in an irregular situation there. However, this is subject to some limitations. In particular, the provisions on readmission to a country of embarkation only pertain to situations when arriving third-country nationals are inadmissible to the EU member state. As such, they do not cover the situation of those that have already entered the territory of the EU member state and are subsequently ordered to return.

Under the Chicago Convention, an 'inadmissible person' is "[a] person who is or will be refused admission to a State by its authorities."[49] This relates to the lack of permission granted by the public authorities of a state in which the person arrives, in accordance with its national laws, to enter that state. The main provisions in relation to inadmissible persons do not relate either to the individual or to the country of destination. Rather, they focus on the 'operator,' that is, the airline which transported the person to the state where he or she was found inadmissible. The operator can be served with a 'removal order,' which is a "written order served by a State on the operator on whose flight an inadmissible person travelled into that State." The removal order directs the operator to remove such persons from its territory.[50] When faced with a removal order, the aircraft operator must subsequently take inadmissible persons to the point where they commenced their journey; or to any other place where they are admissible.[51] The latter may refer to the place where such persons have a right of entry, such as on the basis of a visa, or residence permit. In this way, the provisions of the Chicago Convention largely mirror EU rules on carrier liability, especially Article 26 of the Schengen Convention,[52] and the supplementing provisions of Directive 2001/51 on carrier sanctions.[53] However, the Chicago Convention also addresses the country of embarkation, something that the above-mentioned EU instruments obviously cannot do. In particular, the Convention requires that country to "accept for examination" the inadmissible person.[54] The FAL Convention contains a set of rules that is very similar for those who travel by sea. It also recognises as a specific category 'inadmissible persons,' although the FAL Convention does not define them. Again, when a person is found to be inadmissible, it is the shipowner that is held responsible for his or her return. The state can transfer the inadmissible person back to the custody of the shipowner, in which case the latter must effect his removal to the country of embarkation or any other place where the person is admissible.[55] If removal takes place to the country of embarkation, that country is bound to accept the returned person for examination. This obligation also applies when the person to be returned is a stowaway and was found inadmissible in the EU member state, and "it has been established to their satisfaction that stowaways have embarked a ship in a port of their State."[56]

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49 Chicago Convention, Annex 9, fifteenth edition Chapter 1, Section A (definitions).
50 Chicago Convention, Annex 9, fifteenth edition, Chapter 1, Section A (definitions).
51 Chicago Convention, Annex 9, fifteenth edition, standard 5.11.
52 Convention implementing the Schengen Agreement, OJ L 239, 22 September 2000, pp. 19-62.
53 OJ L 187, 10 July 2001, pp. 45-46.
54 Chicago Convention, Annex 9, fifteenth edition, standard 5.12.
55 FAL Convention, Annex, Section 3, Part A, Standard 3.3.6.
56 FAL Convention, Annex, Section 4, Part E, Standard 4.12.1.

As noted in Chapter 2, the Chicago and FAL Conventions do not exclude voluntary returns. Although the term 'removal order' is used in the former, this is a different kind of removal than meant in the Directive, where it relates to the enforcement of the return decision. In the case of the Chicago Convention, it refers to an obligation on the carrier to transport an inadmissible person, and there appears to be no reason to assume that this could not apply to persons that are given an opportunity to return voluntarily. In such a case, the transport out of the EU member state would already be guaranteed by way of the removal order imposed on the airline.

The extent to which third-country nationals could independently trigger the obligations of a transit country, and how they would apply for readmission, raises some questions. An intervention by the EU member state is necessary to secure the operator's obligation to transport inadmissible persons back to the country of embarkation. In principle, however, the obligation to accept for examination inadmissible persons is self-standing and would apply to any person transported back on this basis. If, therefore, individuals can show that they were inadmissible, for example by showing the return decision issued by the EU member state, this obligation should be in play. A key issue here arises out of the way in which the obligation on the country of embarkation is formulated. Accepting such persons for examination is much weaker than the clear readmission obligations contained in other instruments, or even in the Chicago and FAL Conventions themselves as regards other categories of international travellers. In a vacuum, a person could be transported back to the country of embarkation, where the process of examination would then begin. And if the country of embarkation would find it was not responsible, the person could be transported back to the EU member state again.[57]

A further question arises whether the requirement to accept inadmissible persons for examination is sufficient to make a country of embarkation through which third-country nationals have transited an obligatory destination under the Directive. After all, it does not provide for a clear guarantee that readmission will take place "in accordance" with a relevant agreement.[58] However, the Conventions do provide for an international law basis for at least examination, and on this basis it may be presumed that third-country nationals would at least turn to the relevant transit country to seek readmission.

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57 However, note that the Interpretative Notes to the CTOC Smuggling Protocol (paragraph 113) emphasise that a return shall not be undertaken before the nationality or right of permanent residence of the person whose return is sough has been duly verified. In the context of voluntary return, when it is up to the third-country national to decide on the appropriate steps, this would particularly appear to be of relevance.

58 To this the point might also be added that these are not 'obligations' in the same sense as other agreements, since they represent standards, from which states may diverge when having duly notified this.. However, it was also noted that, given the key role in providing an overall framework for international travel, the discussion would proceed on the basis that states will generally consider themselves to be bound by these standards.

Perhaps the biggest barrier to the application of the Conventions does not arise out of their own provisions, but out of the Directive itself. In particular, the possibility of member states not to apply the Directive, with the exception of some core protections, to persons apprehended or intercepted in connection with the irregular crossing of an external border and they have not subsequently obtained authorisation to stay.[59] This circumstance may well overlap with situations in which persons are found inadmissible, for example when they are trying to enter the member state by air or sea without appropriate documents. In such cases, the provisions on voluntary return may not apply. While member states have freedom in this matter, in practice this exception is applied widely across the EU.[60]

As a result, it can be concluded that multilateral treaties may theoretically play a role in returns to transit countries as places of embarkation, and third-country nationals may therefore be required to explore this option when relevant. However, the limits on the readmission obligation, the scope of persons included, as well as the exceptions provided for in the Directive clearly show that their practical added value for voluntary return procedures may be very limited.

6.4 Return to transit countries under non-binding arrangements

So far, the discussion about return to transit countries has focused on the existence of obligations on those countries, under international law, to readmit specific categories of third-country nationals returning voluntarily. Here, attention turns briefly to arrangements which do not impose legal obligations. As has been discussed in Chapter 3, and as will become evident below, such arrangements, at least as concluded at the EU level, will often have little practical relevance for voluntary return situations. However, such 'other arrangements' are an integral part of the definition of return in Article 3(3) of the Directive, which, in turn, provides the basis for the obligation that third-country nationals must meet during the voluntary departure period. For the sake of covering all the different elements of the obligation to return, it is at least necessary to address the matter of such 'other arrangements' briefly. This is also the case because the inclusion of such arrangements in Article 3(3) of the Directive was meant to cover a broad range of documents or other ways in which provisions for readmission are made with transit countries.[61] Various authors have noted the increasing turn towards 'informalising' readmission, with increased reliance on non-binding arrangements.[62] As such, their relevance to voluntary return situations may increase in the future.

59 RD Article 2(2)(a).
60 See Chapter 1, footnote 28.
61 Lutz 2010, p. 37.
62 Cassarino 2007; Carrera 2016, p. 19.

In Chapter 3, it was argued that such arrangements, to be at least theoretically applicable to voluntary return situations, must provide clarity about the conditions under which readmission can take place and how these should be fulfilled. Furthermore, unwritten or secret arrangements, I have argued, cannot provide a sufficient basis for compulsory return under the Directive, even if they would make return and readmission practically possible.[63] It has been noted that the turn towards informalising readmission has also come with concerns over the transparency and accessibility of such arrangements.[64] Any return under such an arrangement must be subjected to the same fundamental rights safeguards as returns on other bases, as a logical corollary of EU member states' fundamental rights obligations.

At least at the EU level, returns to transit countries under such arrangements appear, at the moment, a moot point. So far, in addition to formal readmission agreements, the EU has been able to agree on non-binding arrangements with six countries: Afghanistan, Bangladesh, Ethiopia, Gambia, Guinea, and Ivory Coast.[65] These have taken different forms, such as the Joint Way Forward with Afghanistan, or Standard Operating Procedures with Bangladesh. In other cases, they have been formulated as 'good practices' for return. However, in all these cases, the documents in question only refer to the return and readmission of nationals of the countries with which the EU has agreed them. Similarly, the EU has tried to enhance cooperation on migration, including sometimes return, with other countries, especially in Africa and Asia, such as through its Migration Partnership Framework.[66] However, the fifth progress report on the Partnership Framework, when discussing issues of readmission, also only covers nationals of the countries targeted.[67] Arguably, the EU-Turkey statement of March 2016 could also be considered as an EU arrangement, which would cover the return of third-country nationals, in addition to Turkish nationals. However, the General Court of the EU found it did not have jurisdiction since it is not an instrument between the EU and Turkey as such, but rather between member states and Turkey.[68] Furthermore, readmission, although clearly supported by this political agreement, must formally be based on the EU-Turkey readmission agreement or the bilateral readmission agreement between Greece and Turkey, as discussed above.

To the extent that 'readmission arrangements' with transit countries exist and would be relevant, these will have been concluded bilaterally. A database developed by Cassarino, with information about formal agree-

63 See 3.3.2.
64 Cassarino 2007, pp. 189-190; EP 2010, pp. 23 and 27; Carrera 2016, pp. 41-42.
65 Standard Operating Procedures were drafted for Mali and Ghana respectively, but have so far these have not been agreed.
66 COM(2016) 385 final, 7 June 2016.
67 COM(2017) 471 final, 6 September 2017.
68 General Court T-192/16, T-193/16 and T-257/16, *N.F., N.G. and N.M. v. European Council*, order of 28 February 2017.

ments of different sorts,[69] but also other arrangements, such as memoranda of understanding, exchanges of letters or administrative arrangements, concluded by the EU and member states, provides some useful insight into this. It particularly shows that the use of such non-binding arrangements by member states varies considerably.[70] Italy, for example, which seems to be the most active in making such arrangements, is listed as having around two dozen memoranda of understanding, administrative arrangements, or exchanges of letters with third countries, although this includes several countries with which different (possibly sometimes superseding) arrangements have been concluded.[71] By contrast, only five such arrangements are listed for France, and none for Germany.[72] Switzerland, which cannot benefit from EU agreements and arrangements, nevertheless mainly focuses on concluding formal agreements, with only three non-binding arrangements listed. Again, it is not clear to what extent such arrangements would deal with the return of third-country nationals, but likely the majority would only deal with nationals.

For reasons discussed in Chapter 2, bilateral readmission agreements are not specifically included in the analysis, and the same is true for such non-binding, bilateral arrangements. It may be presumed that many of these will be used primarily to facilitate removals, rather than voluntary returns, and may furthermore complement legally binding instruments already in place with such transit countries. To the extent that such arrangements provide for readmission of non-nationals and could be applicable to voluntary return situations, however, some general comments can be made. First of all, international law does not, in principle, resist expulsion of aliens to countries that are not under a clear legal obligation to readmit them. However, there should then be consent from the readmitting country. However, the absence of such a legal obligation may make it difficult to implement such arrangements in a predictable manner in practice, because they are dependent primarily on the political will of the transit country. It may well be argued that this is the case for all readmissions, regardless of the legal basis.[73] However, although they do not exclude non-cooperation by the transit country, agreements containing international legal obligations cement this commitment, and provide a clearer basis for addressing non-compliance. If international readmission obligations have meaning, therefore, the same must be true for the absence of such obligations. This,

69 Among which I also count police cooperation agreements, Political Cooperation Agreements, and Association Agreements, which are formally concluded between member states to create legal obligations, although in some cases the function may be more political than legal, see 2.8.

70 Also see EP 2010, p. 30, suggesting that Italy, Greece, France, Spain and the United Kingdom have particularly focused on ensuring more flexible readmission arrangements.

71 Cassarino n.d.

72 Cassarino n.d., dataset on France; dataset on Germany.

73 See, for example, Coleman 2009, p. 100, mentioning the role of goodwill of states to ensure proper implementation of readmission agreements.

I suggest, should particularly be evident from the basic presumptions about the readmission process. Where this is based on clear international obligations, there should be a presumption that, as long as relevant conditions are met, readmission will happen. This does not exclude factual information arising that would show the contrary, but the principle of good faith in international relations would at least provide for such a presumption. When such international obligations do not exist, the reverse may be true: the effectiveness of such arrangements cannot be presumed. Rather, it will have to be shown that they are capable of being effective. And this, initially, will be for the member state to establish. In particular, it will have to show that the rules set for readmission are sufficiently transparent and fair for third-country nationals, including that they provide for a safe return to the transit country.

The latter requirement follows logically from the general fundamental rights obligations of EU member states' in all cases of expulsion. However, informal arrangements may provide for specific risks, including because they may lead, even more so than formal readmission agreements, to an uncertain status of the returnee once readmitted. Informal arrangements also increase the risk of scrutiny being evaded, whether by the judiciary, monitoring bodies, parliamentarians, or others. Furthermore, although clearly imperfect in practice, formal readmission obligations should also be seen as entailing an acceptance by countries of return that they take formal responsibility for returnees.[74]

In the absence of international obligations regulating readmission, the conditions to be fulfilled could theoretically be whatever the transit country decides or informally agrees with the EU member state. This is a matter of state sovereignty in relation to the admission of aliens. However, this does not mean that such conditions are completely beyond the scope of regulation by international or EU law. For example, the EU member state cannot expect third-country nationals to meet conditions that are clearly discriminatory. Furthermore, additional demands by countries of return that would fall beyond the scope of individual responsibility, and which are applicable to all destinations, are discussed in Chapter 8.

Overall, the discussion of the role and possibilities of readmission inherent in other 'arrangements,' without detailed analysis of such individual arrangements, will necessarily have to stay somewhat general and inconclusive. Whether the requirements above are sufficiently met to require third-country nationals to pursue readmission to a transit country on the basis of such arrangements, and what legitimate expectations are in this respect, can only be properly assessed on a case-by-case basis. However, both practically and normatively, including from a fundamental rights perspective, the general role of such arrangements raises a lot of

74 For example, the EU readmission agreements discussed above contain so-called 'non-affectation clauses,' which reiterate the need for compliance with international human rights standards and the 1951 Refugee Convention.

questions. In my view, these cannot lead, as formal agreements do, to a situation in which third-country nationals can generally be expected to use the opportunities of return they provide. Rather, it puts a strong burden on the EU member state to show that such arrangements form an appropriate basis for obligatory and safe return of third-country nationals.

6.5 Conclusions

This chapter has examined the particular requirements that third-country nationals need to meet to gain readmission to transit countries, as one of the obligatory destinations under the Directive. It has set out the readmission obligations incumbent on transit countries and the implications that this may have for third-country nationals under the Directive. Since there are no generally applicable international obligations regarding the readmission of non-nationals, the specific implications will depend on the particular agreement in place. At the EU level, despite the repeated emphasis on their importance, specific readmission agreements have considerable limits in terms of their added value for return procedures, due to the small number of countries with which such agreements exist. Furthermore, even when these exist, they may exclude considerable numbers of third-country nationals found to be irregularly staying in EU member states, such as those enjoying visa-free travel or visa overstayers. Finally, the actual use of clauses covering non-nationals in EU readmission agreements may be limited, although this may be changing slowly.

When readmission agreements would be used for voluntary returns, there are various implications for third-country nationals and EU member states jointly, since the latter is usually required to take the appropriate steps. Especially the requirement that the EU member state should make a readmission application provides an odd fit with the notion of voluntary return. However, the fact that a third-country national has been granted a voluntary departure period does not preclude the member state from making a readmission application, thus ensuring that return can take place to a transit country. However, it cannot enforce a return to a transit country as long as the voluntary departure period is ongoing. If the member state does not make such an application, no readmission obligation on the transit country exists and voluntary return can thus not be effected to that country at any rate. Whether this falls within the individual responsibility of third-country nationals depends on an assessment whether the non-submission of the application is attributable to them. Non-submission by the member state, out of convenience or error, cannot be held against the individual. When no readmission application or prior notification by the EU member state is necessary, the third-country national can be expected to use this opportunity independently.

To enable the EU member state to submit a readmission application, the third-country national can be expected to provide relevant information and

evidence as necessary for this purpose. However, since various agreements are quite flexible as to the information they require, especially personal data, it will not easily be the case that a submission of a readmission application should be considered as impossible due to non-cooperation by the third-country national. When assessing whether omissions by third-country nationals in providing information can be considered non-compliance with the obligation to return must be assessed in relation to the impact on the possibilities of return, rather than just on non-cooperation. This also requires taking into account what information was already at the disposal of the member state which would have enabled it to make a readmission application.

Similar considerations relate to the provision of evidence that conditions for readmission are met. Again, the individual can be expected to provide the necessary evidence, but what is necessary is defined very differently in the various agreements. However, individuals can be expected, in principle, to obtain and provide evidence which will trigger the strongest obligation on the transit country. That is, they should aim to provide proof, rather than prima facie evidence. But what can reasonably be expected to be in their power to obtain and provide can only be assessed on a case-by-case basis. However, since readmission agreements provide for a very wide range of means of evidence, there can be a strong presumption that the individual can at least provide sufficient evidence to trigger some kind of obligation on the transit country, even if it is just to start a further investigation. In this respect, it is also significant that many readmission agreements accept as evidence statements from the individual on prior residence. In contrast to the discussion about statements of willingness to return in Chapter 5, these concern statements of fact, which third-country nationals can be expected to make.

Multilateral treaties on air and maritime traffic provide for certain obligations of readmission which may be applicable to transit countries, and could thus trigger an obligation to return there for third-country nationals. In addition to residence rights, this can be based on the transit country being a place of embarkation. However, while this could theoretically greatly expand the scope of readmission obligations on transit countries, their practical added value may be somewhat limited. For example, they only relate to persons who are inadmissible, who are often excluded from the scope of the Directive by member states. Furthermore, the obligations on transit countries as regards inadmissible persons (or stowaways) under the Chicago and FAL Conventions are limited to accepting such persons for examination. Nevertheless, since this obligation exists, this does provide a basis for member states to expect third-country nationals to try and seek readmission in countries of embarkation as part of the return procedure, even if the chances of success may be limited.

Other (non-binding) arrangements are also considered an appropriate basis for imposing on third-country nationals an obligation to return to a transit country under the Directive, if they at least meet the requirements

of accessibility and legal certainty already set out in Chapter 3. In practice, especially at the EU level, there do not appear to be arrangements covering non-nationals, but they may exist bilaterally. International law does not, in principle, resist returns to a country that does not have an obligation, under that international law, to readmit non-nationals, provided that the arrangements show a clear consent on the part of that country. However, basic presumptions about the effectiveness of readmission, as well as the extent to which the transit country takes formal responsibility for returnees, as under readmission agreements, must be reversed for such informal arrangements. This is particularly the case because such informal arrangements increase risks for the individual upon return and are more likely to evade judicial, democratic, and public scrutiny. For these reasons, I suggest, it would be appropriate to require the member state, first and foremost, to show that such arrangements conform to all necessary safeguards before they can give rise to an obligation to return for third-country nationals under the Directive. If this is the case, the conditions to be fulfilled for readmission, and thus the steps to be taken by the individual, are in principle up to the transit country, with some exceptions. For example, EU member states cannot expect third-country nationals to meet conditions that are clearly discriminatory, nor to acquiesce to other illegitimate requirements described elsewhere, especially in Chapter 8.