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

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7 Identifying appropriate countries of return in the individual case: destination choice and safe return

7.1 Introduction

This chapter will conclude the discussion of third-country nationals' obligations in relation to seeking readmission to destination states, as the first key element of the obligation to return. Whereas Chapters 4 to 6 zoomed in on specific destinations – the country of origin and transit countries – this chapter will again take a step back and look at more overarching issues that may arise in relation to countries of return. This focuses on two particular issues: destination choice and ensuring safe return.

On the first point, there may be situations in which return to both a country of origin or a transit country may be possible in an individual case. Additionally, the option of returning to another third country may exist. While voluntary return aims to provide third-country nationals a measure of autonomy in making decisions about return, such decisions may also impact on the interests of the member state. This may particularly be the case in relation to the choices third-country nationals make as regards the destination countries to which they pursue return. States may want to enjoy the benefits of voluntary return on their part, in particular reduced costs and administrative burdens, as much as possible. Furthermore, they may be concerned with the timeliness of return. These benefits may not be the same for all destinations, since gaining readmission to some may take longer, would make assisted voluntary return more expensive, or – as discussed in the previous chapter regarding transit countries – may require the member state to take certain administrative steps itself.

Seen from this perspective, the member state may have specific ideas about which return destination is the most appropriate for the third-country national to pursue. For example, it may see return to a country of origin as the quickest and easiest way to ensure voluntary departure, and as relieving the member state from any administrative burden associated with triggering readmission agreements with transit countries on behalf of the individual. Conversely, the member state may know from experience that the third-country national's country of origin is slow or reluctant to cooperate in returns, and may therefore prefer to see him or her return to a transit country. Third-country nationals may have their own reasons to want to return to one country and not another. This may be related to the presence or absence of family or other social links, the socio-economic situ-

ation in the various destination countries, or concerns about their personal safety or more general security situation there.[1]

If the preferences of third-country nationals and EU member states do not match, this may give rise to questions about the extent to which the former are free to choose their destinations. Or, put conversely, whether member states can direct individuals to pursue return to a specific destination. This issue has two sides. First of all, the extent to which the individual's possibility to choose between multiple possible destinations, free from interference by the member state, is guaranteed during the voluntary departure period. This issue will be discussed in section 7.2, which will look at various foundations on which freedom of choice might be based: customary international law, particularly as captured by the ILC draft articles, the right to leave any country, and the right to return to one's own country. Furthermore, it will discuss the situation in which the individual prefers return to a transit country under readmission agreements, in the context of the fact that such return is not possible without the EU member state's action, which it may be unwilling to take if it sees return to the country of origin as more appropriate.

The second point relates to safety of return, and more specifically whether the prohibition of *refoulement*, which is reiterated in the Directive, has a role to play during the voluntary return stage. As noted, third-country nationals may wish to avoid certain destinations because of security concerns. In principle, the Directive would exclude returns to places where security concerns – whether related to the individual situation of the third-country national or the general situation in the country of return – reach the threshold of *refoulement*. However, although the prohibition of *refoulement* is explicitly incorporated in the Directive, its role is not immediately evident. Persons falling within its scope have already received a decision that they must return, which would normally also include a consideration of any barriers to return in relation to *refoulement*, especially within the context of asylum procedures. This would make the Directive's reference to the prohibition of *refoulement* largely rhetorical. This may be even more the case when it comes to voluntary return. The fact that the individual takes steps towards return to a specific destination may be taken by the member state as a sign that he or she shares its assessment that return can take place safely. Or, even more, that if the return entails risks, the third-country national has consciously accepted these risks and assumes responsibility for any adverse outcomes. With this in mind, section 7.3 will discuss in more detail the interconnections and tensions between the prohibition of *refoulement* and the concept of voluntary return in the Directive. It will particularly look at whether this prohibition can be anything more than a symbolic inclusion, whether the voluntariness of return negates member states' responsibilities

1 Even if their asylum claims have been assessed and rejected, this does not mean that, on a personal level, such security concerns disappear. Indeed, this may remain one of their main concerns, and therefore a key element of the decision to return. Also see 7.3.

in this regard, and whether voluntary return can be seen as a waiver of any risks involved in return by the individual. On the basis of this discussion, some ways in which the protection against *refoulement* can be made meaningful during the voluntary return stage of the Directive's procedure are presented. Conclusions to this chapter are provided in section 7.4.

7.2 Choice of destinations

The logic of voluntary return would dictate that third-country nationals, at least during the voluntary departure period, have the freedom to make their own choices as to their preferred destination of return. While this will normally be unproblematic, it was suggested above that this may sometimes clash with the member state's interests. This section will look at several possible legal foundations for freedom of choice of destinations, and the extent to which limits on that freedom might be imposed.

7.2.1 Expulsion and destination choice in (the preparation of) the ILC draft articles

The question whether a person faced with expulsion has the freedom to choose his or her destination has been touched upon briefly in the preparation of the ILC draft articles and, although the final articles do not specifically address this, some mention is made in the commentary to the articles. Most of the discussion below, as with the majority of academic work on expulsions, focuses on removal situations. Nevertheless, some of the conclusions may be translated to the specific setting of voluntary returns.

In 2006, the ILC's secretariat published an extensive memorandum in preparation for the discussions about the expulsion of aliens. The memorandum outlines some of the international legal scholarship on the question of choice of destinations. It mainly shows that this scholarship has remained divided. Nowak, for example, has noted that a state's sovereignty to expel aliens does not necessarily include a right to decide where an individual is deported, which he considers a decision that is "primarily the province of the deportee himself, as well as other States that grant him entry."[2] By contrast, Gaja suggests that expulsion is by its nature a negation of choice, since forced return is by definition against the individual's wishes.[3] He acknowledges, however, that from a human rights perspective, it could be argued that it is up to the individual to choose and "that the expelling State's interest is satisfied once the alien is removed from its territory," presumably regardless of where that is.[4] However, in line with my comments in 7.1, he also finds that "considerations of expediency and

2 Nowak 1993, p. 228.
3 Gaja 1999, p. 293.
4 *Ibid.*, p. 294.

costs may prompt the expelling State to disregard the individual's wishes."[5] Doehring also notes that "[a] duty of the expelling state to give the individual the possibility of choosing a receiving country is not recognized although this opportunity may be, and often is, granted."[6] This is hardly a clear endorsement of an obligation on the state to accept any choice made by the individual. In this respect it has also been noted that "[i]t would be difficult to hold that in principle the expelling State is under an obligation to accept the choice made by the individual."[7]

Analysing various sources, the memorandum concludes that the right of an alien to choose his destination in expulsion procedures remains "unclear as a matter of international law."[8] Similarly, it finds "a lack of uniformity in the jurisprudence of national courts of different States in terms of the discretion of the expelling State to determine the State of destination of an alien who is subject to expulsion," but also the right of an alien to choose his destination, and even the limitations on the right to make such a choice.[9] The memorandum concludes, however, that the notion that the expelling state should allow an individual to choose his country of return "may be particularly true in cases in which the alien agrees to or is given the opportunity to leave the territory voluntarily."[10]

The eventually agreed draft articles mention destinations only in relation to those to which states may legitimately expel aliens, and not the expellee's choices. However, the commentary to draft Article 22 that deals with this subject does note that the various permissible destinations listed do not necessarily result in an order of priority as to the destination of expulsion. While this gives the state flexibility in deciding where to expel an alien, it should also "take into consideration, as far as possible, the preferences expressed by the expelled alien for the purposes of determining the State of destination," in which the expelling state retains a margin of appreciation.[11] As such, the commentary goes on, Article 22(1) acknowledges that an alien subject to expulsion may express a preference as to the State of destination, and thus permits him or her "to make known the State with which he or she has the closest links, such as the State of prior residence, the State of birth or the State with which the alien has particular family or financial links."[12] But at the same, this provision gives the expelling state "the right to assess such factors in order to preserve its own interests as well as those of the alien subject to expulsion."[13] In contrast to the secretariat's

5 *Ibid*., p. 294.
6 Doehring 1992, p. 111.
7 Gaja 1999, p. 298.
8 ILC 2006, paragraph 493.
9 ILC 2006, paragraph 497.
10 ILC 2006, paragraph 489.
11 Commentary to Article 22, paragraph (1), p. 33.
12 Commentary to Article 22, paragraph (2), p. 33.
13 *Ibid*.

memorandum, the commentary to the draft articles does not comment on how this principle would apply specifically to voluntary return situations. However, given the logic of voluntary return, it could be assumed that the individual's preference for a destination would normally be accepted, unless the state, after balancing its own interests and that of the individual, would have weighty objections to the preferred destination. But that it would otherwise not seek to impose, initially, a particular destination on the individual.

Interestingly, in suggesting in the commentary that states should take into consideration the preferences expressed by the alien, the ILC refers to two specific human rights instruments. First, it makes a reference to the Convention on Migrant Workers (CMW), which in Article 22(7) provides that "without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than is or her State of origin." It also cites Article 32(3) of the 1951 Refugee Convention, which says that states should allow a refugee subject to expulsion "a reasonable period within which to seek legal admission into another country."[14] This suggests that the ILC sees the need to consider the preference of the alien more as a result of human rights obligations than of general (customary) rules of international law. The two instruments above are used to interpret the scope of draft Article 22, but do not appear to provide sufficient grounds to regard taking into account an alien's preferred destination as a self-standing rule or principle, as evidenced by the fact that it is not included in the draft articles. From the perspective of the Returns Directive, their application also remains doubtful. As noted, the CMW does not have any effect in EU law.[15] And while the Refugee Convention can clearly inspire fundamental rights as general principles of EU law, this specific provision covers those who are refugees (or perhaps in a wider reading recipients of international protection). Although the requirement of Article 32(3) may well apply in situations in which a member state has withdrawn protection, it would be difficult to justify using this as a general rule for all third-country nationals faced with a return decision. However, the reference to these instruments does open up the possibility that a choice of destination could indeed be protected by human rights law. As I suggest below, however, this protection may be more usefully found in the right to leave and (to a more limited extent) in the right to return.

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14 Although Grahl-Madsen has argued that this would not apply in cases in which another country of refuge has a duty to readmit the person, "in which case he may be returned to that country without delay." See Grahl-Madsen 1997, commentary on Article 32, paragraph 11.

15 Although arguably the CMW does not create new rights, but rather restates existing rights, , in the specific context of the protection of migrant workers and their families, see UNESCO 2005, p. 7. This may then include those that do have effect in EU law.

7.2.2 The right to leave as a right to choose one's own destination?

In Chapter 2, it was noted that the right to leave any country, including one's own, as protected by the ECHR and ICCPR, should be regarded as a fundamental right under EU law. And furthermore, that this right continues to have relevance in situations in which the departure of a third-country national from an EU member state is compulsory, as in the case of the Directive. An important implication of the right to leave is that it touches upon the right to choose a destination. This is evident, for example, from the HRC's General Comment No. 27, which notes that, whilst there is no unrestricted right to travel to any country as one sees fit,[16] "the right of the individual to determine the State of destination is part of the legal guarantee" provided by Article 12(2) ICCPR.[17] Given that persons in expulsion proceedings are also entitled to enjoyment of their right to leave, "an alien being legally expelled from the country is likewise entitled to elect the State of destination, subject to the agreement of that State."[18] Similarly, the ECtHR has found that the right to leave, as guaranteed by Article 2(2) of Protocol 4 ECHR, "implies a right to leave for such country of the person's choice to which he may be admitted."[19] While the right to leave is not absolute, any restrictions of this right must be in accordance with law and necessary to protect national security, public order, public safety, public health or morals, the prevention of crime, or the protection of the rights and freedoms of others.[20] However, any restrictions to achieve such aims should also be proportionate. It will be up to the member state to justify any action that would lead to interferences with third-country nationals' pursuit of return to their preferred destination. In this respect, it should be noted that interferences with the right to leave can be both direct and indirect.[21]

16 See, for example, HRC *Lichtensztejn* [1983], paragraph 8.3; HRC *Varela Nunez* [1983], paragraph 9.3.

17 HRC General Comment No. 27, paragraph 8.

18 HRC General Comment 27, paragraph 8. Also see General Comment 15, paragraph 9: "Normally an alien who is expelled must be allowed to leave for any country that agrees to take him."

19 ECtHR *Baumann* [2001] paragraph 61; ECtHR *Napijalo* [2003], paragraph 68. It should be noted that in both judgments, the situation was not one of expulsion, but one in which the applicant was prevented from leaving a country (by confiscation of their passports) due to ongoing criminal proceedings. However, the Court clearly states that Article 2(2) of Protocol 4 intends to secure protection of the right to leave "to any person." Also see my comments on this in 2.3.1.2. Also see Council of Europe Commissioner for Human Rights 2013, p. 6: "States are not entitled to place obstacles in the way of foreigners leaving their countries irrespective of where the foreigners seek to go."

20 Article 2(3) of the Fourth Protocol to the ECHR, and Article 12(3) ICCPR set out permissible restrictions in largely similar terms. For a discussion of such restrictions, see, for example, Commissioner for Human Rights 2013; Harvey & Barnidge 2005.

21 Inglés 1963, pp. 36-55.

Perhaps the most likely scenario in which an EU member state exercises control over the destination of voluntary returnees is when their travel documents have been confiscated, a matter that has already come up earlier, and will be discussed later as well.[22] The issue of confiscated travel documents not being handed back to third-country nationals to make return to their preferred destination possible has come up in several ways in the Netherlands. A previous version of the Aliens Act Implementation Guidelines (*Vreemdelingencirculaire*), provided that travel documents would only be handed back to third-country nationals aiming to return to another third country if they could show evidence of having made arrangements to return (in the form of a ticket) and of holding a residence authorisation that would be valid for at least one year. Although this provision was later removed, there have been several reports of similar practices continuing. In 2015, for example, it was reported that a group of Syrian asylum seekers had decided to return voluntarily before any decision on their asylum application had been made, including due to concerns over the situation and health of family members left behind. But they had been unable to get their travel documents back in order to apply for a visa for Turkey or Jordan.[23] Another illustrative case arose in 2019, when a rejected asylum seeker from Bahrain was arrested, convicted to a life sentence, and allegedly tortured, after being removed by the Netherlands. The person in question had asked to return to Iran, but his passport had not been handed back to him to obtain the necessary visa, on the assumption that he would not be admitted to Iran anyway. A subsequent investigation by the Inspectorate for Security and Justice found that this was not the case, and that he may have been admitted by Iran, and thus have avoided return to Bahrain.[24]

Confiscation of travel documents, in and of itself, is an interference with the right to leave, since travel documents are a *sine qua non* for international travel.[25] In this specific context, confiscation can become a tool to push a third-country national towards returning to a particular destination, or preventing return to another destination. This is the case if these documents are only returned, for example, when third-country nationals agree to present themselves to the consular representation of their country of origin,[26] or if they can show they have purchased tickets to the member state's preferred destination. The confiscation of documents may

22 See 8.4.1.

23 Winters 2015.

24 Van Laarhoven 2019; NOS 2019. It should be noted that this concerned a person eventually detained in the Netherlands for the purpose of removal, but this appears to have been after already having attempted to make an appointment with IOM for the facilitation of his voluntary return to Iran. It should further be noted that this incident clearly also raises questions about the extent to which the assessment of the person's asylum claim was adequate, but this is another matter.

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

26 On contacts with consular representations and restrictions, see Chapter 8.

particularly happen in the context of the imposition of measures to prevent absconding under Article 7(3) of the Directive. This would ostensibly give such action a legal basis. Furthermore, the prevention of absconding may well be accepted as a legitimate aim, since both the HRC and the ECtHR have recognised a broad range of state interests as being capable of fulfilling this requirement.[27]

However, while the confiscation of documents may be necessary to prevent absconding in general, it would be much more difficult to justify that this objective could only be pursued if third-country nationals return to the member state's preferred destination. In such a situation, at a minimum, the member state would have to show that a third-country national's pursuit of a different destination would in fact just be a way to circumvent return obligations and be used to abscond. The fact that return to third-country nationals' preferred destinations would be slower or more bureaucratically cumbersome would not, in my view, be sufficient reason to interfere with their choice in this way. After all, this would fall within the scope of autonomous action which voluntary return allows. In this way, other interferences, including issuing direct instructions to third-country nationals to pursue return to a specific destination country (possibly with sanctions for non-compliance) would also be difficult to justify as necessary if these are only based on considerations of speed or convenience of the return.

7.2.3 The right to return to one's own country and interferences with choice

The above shows that the choice of destination, as a general principle, enjoys protection, although it may be open to interferences by the member state if sufficiently justified. However, to this must be added that the right to choose some destinations may enjoy special protection. This, I suggest, is the case for the choice of third-country nationals to return to their own country. As discussed in Chapter 4, return to one's country of origin, which largely (but not fully) overlaps with an individual's own country under human rights law, is normally the primary option. As such, if third-country nationals want to return to their own country, this should not normally lead to conflict with the interests of the member state. However, as also mentioned above, this may be different if the member state has doubts that return to that country will materialise in time, and sees better possibilities for effective return to a transit country, for example on the basis of a readmission agreement. The particular protection of return to the one's own country is noted, to some extent, in the ILC secretariat's memorandum:

> *"The right to enter or return to the State of nationality or one's own country may be of special significance to aliens who are subject to expulsion from the territory of a State.*

27 See, for example, ECtHR *Stamose* [2012], in which the Court appears willing to accept broad-ranging migration control considerations as a legitimate aim.

> *Even if the expelled aliens do not have a general right of choice with respect to destination under international or national law, aliens who are subject to expulsion (in contrast to extradition) may have the right to return to their State of nationality or their own State rather than being sent to a third State. This right may be recognized in the national laws and constitutions of States."*[28]

The finding that the right "may be" recognised, however, is far too careful, in my view. After all, this right is clearly established in international instruments which are broadly ratified, and, in the context of the EU, bind all member states. Furthermore, to the extent that individuals are nationals of the preferred destination country, this right is protected by the ECHR and should be considered as applicable to EU law as a general principle.[29] The right to return provides protection of the right to choose in addition to and above the right to leave. It is not qualified by a limitation clause, and considered, at least in the ICCPR, as virtually absolute. In my view, this means, at the very least, that any coercive means used by a member state to prevent a third-country national from pursuing readmission to one's own country would be unlawful in all but the most exceptional cases.[30] This is not the same as the member state informing third-country nationals about what it sees, on the basis of its experience, as appropriate return options. For example, a member state may inform third-country nationals that attempts to gain admission to another third country to which they want to return are rarely successful. And that, if they choose to pursue this option to the exclusion of others, there is a high likelihood of failing to meet their obligation to return within the voluntary departure period, which may lead to the use of coercive measures to enforce the return decision. However, this cannot be accompanied by undue pressure to follow the member state's preferred option.[31]

It should be noted that the issue of preference is not only a matter of the right to leave or return. It may also interact with other rights. For example, in *Ozdil and Others v. the Republic of Moldova*, the ECtHR considered the legitimacy of deprivation of liberty for the purpose of removal under Article 5(1)(f) ECHR of applicants who had expressed fear of returning to their country of origin, which was Turkey. One consideration, albeit arguably a minor

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28 ILC 2006, paragraph 503 and footnote 1197 with relevant references.

29 See 2.5.3.

30 On this point, also see the individual opinion of HRC members Chanet, Aguilar Urbina, Ando and Wennergren in HRC *Giry* [1990]. The case concerns a French national who had been arrested in the Dominican Republic and forced to take a flight to the United States, rather than his intended destination, Saint-Barthélemy. In this respect, the members note that "preventing him from travelling to another country of his choice and since he was obliged, against his will, to take a flight other than the one which he would have taken, the arrest in question also constitutes, in our opinion, a violation of article 12 of the Covenant." The members do not specifically refer to the right to leave or to return, which are both part of Article 12 ICCPR, but may have had the latter in mind as well, since Saint-Barthélemy is part of France.

31 On the issue of undue pressure, see 7.3.

one, in its finding that there had been a violation included the fact that "the Moldovan authorities not only failed to give the applicants the choice of jurisdiction to be expelled to, but deliberately transferred them directly to the Turkish authorities."[32] It is not entirely clear how the Court weighs this circumstance, although it may be considered evidence that deprivation of liberty was not necessary since the applicants could have left for another country. However, in the context of voluntary return the connection to deprivation of liberty would not be a relevant issue, since this would relate only to the enforcement stage.

7.2.4 A transit country as the third-country national's preferred destination

In Chapter 6, return to transit countries under EU readmission agreements was discussed. There, it was noted that this raises questions about the interaction between third-country nationals and the EU member state, since return under such instruments is only possible, in most cases, if the latter makes a readmission application or provides the transit country with a written confirmation. This was discussed from the perspective of the member state's ability to do so without the individual's consent. But we may also approach the question of the member state's and third-country national's respective responsibilities from the other side. That is, whether third-country nationals can require member states to trigger transit countries' readmission obligations on their behalf, even if the member state does not want to do so. After all, if a transit country is a third-country national's preferred destination, lack of action by the EU member state would deny him or her the possibility to act on this preference.

At first glance, in the light of the discussion in Chapter 6, it would appear that triggering a readmission agreement is a matter of discretion for the EU member state. It is simply one of the instruments available to EU member states to ensure return takes place. But it will generally be left up to that member state which instruments to use and when to do so. However, readmission agreements are specifically referenced in the Directive. Its preamble, for example, acknowledges the importance of readmission agreements "to facilitate the return process."[33] Furthermore, member states are under obligation to ensure the effective implementation of the Directive. The CJEU has found, for example, that the member state should "act with diligence" to take a position "without delay" on the legality of a third-country national detected.[34] Similarly, it should issue a return decision as soon as it is found the third-country national is unlawfully in the member state.[35] Moreover, once this becomes relevant, their removal should

32 ECtHR *Ozdil* [2019], paragraph 54.
33 RD Recital 7.
34 CJEU C-329/11 *Achughbabian* [2011], paragraph 31.
35 CJEU C-61/11 PPU *El Dridi* [2011], paragraph 35; CJEU C-329/11 *Achughbabian* [2011], paragraph 31; CJEU C-38/14 *Zaizoune* [2015], paragraphs 31-32. Also see Boeles 2011, p. 42.

be carried out as soon as possible.[36] All this is in the service of the effective fulfilment of the objectives of the Directive, for which member states are responsible. From that perspective, member states can be expected to utilise readmission agreements to the extent that this is necessary for the successful conclusion of a return procedure. Arguably, therefore, a member state would be acting in violation of EU law if it would fail to trigger a readmission agreement with a transit country if other options, such as direct return to a country of origin, would be ineffective. This should apply regardless of whether the procedure is in the voluntary or the forced return stage.

This does not answer, however, whether third-country nationals can lay a claim on an EU member state to put readmission agreements into play, if the question is not whether return can be effective, but rather, if this means that they can return to their preferred destination. The Directive's preamble, however, also reiterates the priority of voluntary return and that "Member States should provide for enhanced return assistance."[37] Although such assistance will normally be seen as assisted voluntary return services,[38] and the recital is not part of the operative part of the Directive, one could read in it a general principle that member states should facilitate voluntary return to the extent possible. Given the acknowledged importance of readmission agreements, it could be argued that member states use these as possibilities to facilitate voluntary departure. Moreover, next to effective return, a key objective of the Directive is to preserve fundamental rights. Voluntary return plays a crucial part in this.[39] As such, member states can be expected to give due effect to the priority of voluntary return, as a key principle of the Directive. I would thus venture that if it is reasonably within the powers of the member state to trigger a readmission agreement if the third-country national so requests, it can be required to do so. This would also be a specific expression of an arguably wider requirement on member states to cooperate constructively with third-country nationals to enable them to enjoy the opportunity to return voluntarily. This could be seen as a counterpart to implied obligations of cooperation by the individual, which are necessary to make return effective. Indeed, the recast of the Directive particularly emphasises the need to strengthen cooperation, although mainly as one-way traffic, implying duties incumbent on the individual, rather than on the member state. However, other EU legislation, such as the recast Qualification Directive, sets out more specific reciprocal cooperation obligations, when this is necessary for the effective achievement of its objec-

36 CJEU C-430/11 *Sagor* [2012], paragraph 43; CJEU C-38/14 *Zaizoune* [2015], paragraph 34.
37 RD Recital 10.
38 See 9.3.
39 See 1.2.1.2 and the discussion of voluntary return as a proportionality mechanism in relation to fundamental rights in 10.2.3.

tives.[40] As suggested above, a similar necessity might arise in the context of the Returns Directive, especially since allowing third-country nationals to enjoy voluntary return will also bring the other objective of the Directive, effective return, closer.

While they may thus generally be expected to do so on the request of individuals, at a minimum, the onus would be on member states to put forward substantial reasons why they will not trigger a readmission agreement on behalf of the third-country national. One reason could be that the readmission procedure set out in the agreement cannot be completed within the voluntary departure period, and therefore cannot lead to timely compliance with the obligation to return. However, this will be difficult to establish on the basis of the agreements themselves, because these usually set maximum time frames for replies and readmission, but procedures could be completed sooner. Furthermore, it may also require the member state to justify why, in the specific circumstances of the case, it will not extend the voluntary departure period so that the third-country national can return to the preferred destination.[41]

7.3 Avoiding unsafe returns: voluntary return, non-*refoulement* and questions of responsibility

This section turns attention to the question of safe returns to destination countries. The lack of a possibility of safe return may make a destination that is otherwise obligatory – according to the criteria set out in Chapter 3 – a place to which return cannot take place. Although the Directive does not refer to safety of return as such, the development of its text, as well as the wider consideration of the need for priority for voluntary return, has often been framed in terms of ensuring return "in safety and dignity."[42] More concretely, a requirement of safe return could be surmised from the general requirement that the implementation of the Directive is in accordance with fundamental rights as general principles of EU law, and international law, including refugee protection and human rights,[43] and particularly the explicit requirement to respect the principle of non-*refoulement*.[44] This principle can be summarised broadly as the obligation not to return individuals

40 Directive 2011/95, Article 4(1) provides that, in addition to the duty of applicants to provide all elements needed to substantiate an application for international protection, "*[i]n cooperation with the applicant*, it is the duty of the Member State to assess the relevant elements of the application" (my emphasis).

41 See 11.3.2.

42 See, for example, the Council of Europe's Twenty Guidelines for Forced Return, which, as mentioned, provided an important source of inspiration during the Directive's negotiations (see 2.9), commentary, background, paragraph 1. Also see the Global Compact for Safe, Orderly and Regular Migration, UNGA resolution A/RES/73/195, Objective 21.

43 RD, Article 1.

44 RD, Article 5.

to any place where they would face serious violations of their fundamental rights. This covers situations in which they would be subjected to a real risk of persecution on the grounds set out in the 1951 Refugee Convention,[45] but also exposure to a real risk to their right to life, including the death penalty, or to torture or inhuman or degrading treatment.[46] Other fundamental rights may also sometimes trigger non-*refoulement* obligations, but this is much more rarely the case. While the principle of non-*refoulement* is beyond dispute more generally, it is not immediately obvious how it relates to the situation of third-country nationals that are of interest in this dissertation, for which member states have already determined that they can be returned safely in line with relevant EU law.[47] The fact that they may return voluntarily, and therefore themselves take action to go to a specific country, may further raise doubt over the relevance of non-*refoulement* obligations of the member state in this respect, because it would be individuals who are exposing themselves to such risks, rather than the member state. On the other hand, the prohibition of *refoulement* in the Charter is set out quite broadly, prohibiting that anyone is "removed, expelled or extradited" to a serious risk of such treatment.[48] The Refugee Convention, furthermore, prohibits expulsion or return to persecution "in any manner whatsoever."[49]

In line with the discussion in Chapter 2, in which voluntary return was considered a form of expulsion, this would appear to indicate that this prohibition applies to all situations in which third-country nationals are compelled to return. In this section, I will discuss the interconnection between the principle of non-*refoulement* and voluntary return, and ultimately, what this means for third-country nationals' and member states' respective responsibilities to ensure safe return. Below, the relevance of non-*refoulement* in the Directive is first addressed generally. This is followed by a longer discussion of the specific link between voluntary return and responsibility. And finally, by a consideration of the implications for third-country nationals who are reluctant to return to specific destinations. Paragraph 7.3.1 will look at the way *refoulement* is embedded in the Directive, while 7.3.2 discusses whether the voluntariness of return might negate member states' obligations in relation to *refoulement*. The implications of the findings in that paragraph are discussed in 7.3.3, while 7.3.4 looks at ways in which the protection against *refoulement* can be given meaning in the context of voluntary return.

45 Refugee Convention, Article 33(1).
46 CFR Article 19(2); ECHR Articles 2 and 3; ICCPR Articles 6 and 7.
47 Directive 2011/95 (the recast Qualification Directive).
48 CFR Article 19(2).
49 1951 Refugee Convention, Article 33(1). Such persecution may involve other human rights violations than those covered in CFR Article 19(2). For a non-exhaustive overview of acts that could qualify as persecution, see Directive 2011/95/EU (the recast Qualification Directive), Article 9(2).

It should be noted that looking at safety of return through the lens of *refoulement* is necessarily somewhat limited. Even for those whose claims to non-return on the basis of *refoulement* have been thoroughly assessed and rejected by the member state, individuals may continue to worry about the safety of return. Indeed, this may be a key element in their decision whether or not to (cooperate in) return.[50] It is difficult to account for such personal perceptions of insecurity in this context. However, as will be noted below, there may be situations in which such concerns have not been adequately addressed before a return decision was issued. Furthermore, the discussion in section 7.4 will address, to some extent, this matter.

7.3.1 Non-*refoulement* in the Directive: a symbolic inclusion or real function?

The Directive makes multiple references to the prohibition of *refoulement*.[51] Nevertheless, it is not immediately obvious what role this prohibition can truly play once a third-country national comes within the Directive's scope. After all, the Directive itself neither deals with questions of admission (whether third-country nationals can stay in a member state) nor with decisions on expulsion (whether they can be required to leave). Rather, it just sets the framework for ensuring the return of those for whom member states have decided that expulsion is legitimate. Questions of the possible risk of *refoulement* will usually have to be addressed in relation to substantive decisions on admission and expulsion. Third-country nationals can make an appeal on member states to grant them a right to stay, particularly through asylum procedures, if they fear serious violations of their rights upon return. Such risks may also emerge when individuals are found to be irregularly staying in an EU member state, in which case the legitimacy of the expulsion must be assessed. Often, the two will overlap. If third-country nationals cannot be expelled to their country of origin due to fundamental rights reasons, this will often also trigger a right to asylum or other right of stay. This overlap is not complete, however. If expulsion is not possible, for example, to a transit country for fundamental rights-related reasons, return to the country of origin may still be required. Similarly, individuals' concerns about risks in their country of origin may be left aside when the member state considers they can be denied asylum because they could return to a safe third country.[52] In addition to rejection of asylum on non-substantive grounds, such as admissibility,[53] certain third-country nationals may also be excluded from protection.[54] Such persons can then be faced

50 See, for example, Van Wijk 2008; Goodman et al 2015.
51 RD Recital 8 and Articles 4(4)(b), 5(c) and 9(1)(a).
52 Directive 2013/32 (recast Asylum Procedures Directive), Article 38.
53 Directive 2013/32, Article 33.
54 Directive 2011/95, Article 12, mirroring the exclusion clauses in the 1951 Refugee Convention.

with a return decision and come within the scope of the Directive, even when they may not be returned to their countries of origin for fundamental rights reasons.[55] In the Netherlands, for example, the question of return of so-called '1F' cases – referring to those excluded as undeserving of protection in line with Article 1F of the Refugee Convention – is a long-standing dilemma, especially as regards Afghan nationals. Many of these had been excluded because of their links to the former security and intelligence services in Afghanistan, and the associated assumption that, due to this link, they had been complicit in the commission of serious human rights violations. While being unable, due to risks of retaliation and thus the risk of *refoulement*, to return to Afghanistan, these 1F cases, as so-called 'undesirable aliens'[56] remain under obligation to leave the Netherlands.[57]

Beyond such situations, there may be practical reasons why *refoulement* risks are not caught and addressed in all cases of persons eventually issued a return decision. In an ideal world, the best way to catch *refoulement* risks is through an asylum procedure, provided that it is fair and effective. However, the Directive does not make a distinction between persons who have been through an asylum procedure (and subsequently rejected) and other persons who do not, or no longer, have a right to stay in the member state. After receiving a return decision, they are all under the same obligation to return. This means that for at least a (substantial) group of third-country nationals faced with a return decision, no such assessment has been made. It could be argued that, in principle, it is possible for every person, also those considered 'normal' irregular migrants, to put forward an asylum claim to have *refoulement* risks assessed by the authorities. A person who does not, it would follow, has no *refoulement*-related concerns and can be returned without problem. This might be true in an ideal world but may run into problems in practice. First of all, asylum systems in several EU member states have proven to be very dysfunctional, with even gaining access to procedures hugely problematic.[58] Furthermore, increasingly restrictive asylum policies may push people who do have legitimate concerns underground. As Gibney has noted, there may be a growing group of third-country nationals who, not trusting that they will get protection, will prefer to seek "informal asylum." They may try to avoid any contact with the authorities to ensure that they can stay in the EU member state

55 Majcher 2020, pp. 105-106, 114.

56 A category that may also include persons denied a right of residence due, for example, criminal acts in the Netherlands.

57 For a detailed discussion, see Bolhuis, Battjes & Van Wijk 2017; Van Wijk & Bolhuis 2019. In view of the discussion in Chapter 3, such an obligation to return can only extend to transit countries, once the country of origin is excluded as a viable option, since other third countries cannot be considered obligatory destinations under the Directive.

58 See, for example, ECtHR *M.S.S.* [GC][2011]. On delays in registering for asylum more generally, see ECRE 2016a, p. 3.

irregularly, thus avoiding return to their countries where they might face human rights violations.[59]

As such, there are multiple scenarios in which persons that may have legitimate concerns about persecution or lack of security upon return are not recognised as such through an asylum or other admissions procedure. In such cases, the safeguards against *refoulement* in the Directive should act as "the last safety net."[60] Whether it can do so effectively, however, has been a matter of contention, with various commentators arguing that the Directive's procedure would still create risks that persons would be returned despite facing *refoulement*-related risks.[61] Majcher, in particular, has provided an in-depth analysis of the safeguards against *refoulement* in the Directive, noting that it "contains flaws in terms of the actual implementation of this principle in practice."[62] She finds, for example, that it lacks an explicit prohibition to issue a return decision when a return would violate the prohibition of non-*refoulement*, making the return, in principle, enforceable.[63] Additionally, she finds the Directive lacks mandatory safeguards ensuring that persons who cannot be expelled because of *refoulement*-related risks do not enter the return procedure, and that safeguards only kick in at the enforcement stage.[64] Such safeguards particularly comprise the requirement that removal is postponed when this would violate the prohibition of *refoulement*,[65] but they are not accompanied by an automatic pre-removal risk assessment.[66] At any rate, Majcher notes, there is no requirement to withdraw the return decision in such cases, creating the risk that persons whose removal has been postponed are left in legal limbo indefinitely.[67]

While such gaps in the safeguards to prevent *refoulement* are troubling in the overall scheme of the Directive, they may be particularly acute in relation to voluntary return. In this respect, Majcher's observation that "[i]t is only at the enforcement stage of return proceedings that the Directive intervenes" is especially significant.[68] This implies that for those who return voluntarily, such an already limited safety net might not exist. Ironically,

59 Gibney 2009, p. 25.

60 Majcher 2020, p. 107. She also notes that the Directive does not provide any limitation on its protection against *refoulement*, therefore also extending to people who have been excluded from protection under the recast Qualification Directive still enjoying the absolute protection against return to a serious risk of being subjected to the death penalty or to torture or inhuman or degrading treatment or punishment, in line with Article 19(2) of the CFR.

61 Baldaccini 2009; Cavinato 2011, pp. 48-49.

62 Majcher 2020, p. 112.

63 *Ibid*., p. 113. Although she also notes this may be mitigated to some extent by the fact that Article 6(4) RD allows member states not to issue a return decision for compassionate, humanitarian or other reasons, but that this is discretionary and perhaps not an appropriate way to frame *refoulement* risks, see Majcher 2020, p. 114.

64 *Ibid*., p. 115.

65 RD Article 9(1).

66 Majcher 2020, p. 115.

67 *Ibid*.

68 *Ibid*.

then, for some irregular migrants forced removal may provide more extensive safeguards against *refoulement* than its 'human rights-friendly' counterpart voluntary return. It is in this context that further examination of the relationship between voluntary return and the prohibition of *refoulement* is necessary.

7.3.2 Does voluntary return negate member states' responsibility for *refoulement*?

When member states enforce a return decision, this provides a clear trigger for their non-*refoulement* obligations. However, during the voluntary return stage, it is the individual who is taking steps towards return. In this paragraph, therefore, the question is addressed how such a situation, in which the third-country national is primarily responsible for return, relates to the obligations of the member state to prevent *refoulement*. This is done, first of all, by examining whether the fact that the third-country national returns voluntarily can be considered as a general indication that return is safe. And second, even if this is not necessarily the case, whether the voluntariness of the return would constitute a waiver by the individual of his or her right to be protected against *refoulement*, and therefore releasing the member state of its obligations in this respect.

7.3.2.1 Voluntary return as a sign of safe return?

Given that voluntary return allows for a certain degree of autonomy for third-country nationals as regards their return, it may be presumed that they would seek to avoid returning to any situation where they would fear facing serious violations of their fundamental rights.[69] From this perspective, the fact that a person engages in voluntary return could be considered a guarantee of safe return in and of itself. However, it is highly questionable that such reasoning would hold in all cases. First of all, it presumes a clear choice, not just in the abstract, but also in practice, between different destinations. Such a choice might not always exist because multiple viable destinations cannot always be identified. Or when they can, there may be problems in ensuring readmission. Furthermore, even if it is technically possible to choose between destinations, there may be important reasons for individuals to return to the riskier destination nonetheless. For example, they may feel unable to return to a transit country due to the lack of links

69 In some cases, the voluntary return of other persons to the same destination may even be used as an indicator of safety. In some cases, for example, the ECtHR has taken the fact that former refugees had been returning voluntarily to a country as one of the factors in considering whether an applicant might be at risk of treatment contrary to Article 3 ECHR upon return. However, it only ever appears to have used this as an element in a wider consideration of such risks, and never as the only, or even deciding, factor. See, for example, ECtHR *Cruz Varas* [1999], paragraph 80.

there, which may cause considerable problems in surviving. From a legal perspective such problems must be extremely severe to take a destination out of play for the purposes of the Directive. But for individuals themselves, even if this standard is not met, the problems faced may be of such nature that they feel unable to return to a particular destination.

But other reasons to return to a place where they face risks might also exist, such as the situation of family members. The example provided in 7.2.2 above about the group of Syrian asylum seekers having trouble getting their travel documents back from the Dutch authorities is telling in this respect. One of those interviewed recounts the situation of his wife, who stayed behind in Syria. While moving to Lebanon by car with her parents, he says, they had an accident, which killed the parents, but his wife survived. He states: "My wife is not well. She is depressed. I have to go to her." Another person interviewed says he needs to return because his wife, also left behind, was diagnosed with cancer and she has no money for medicines.[70] Furthermore, while still in the member state, persons faced with a return decision may face a number of difficulties due to their irregular status, which may create push factors to opt for return,[71] despite possible security concerns. This may result, for example, from the lack of access to accommodation or other basic services, limits on access to health care, difficulties of finding employment and providing for oneself, or the general uncertainty of irregular life, as well as the prospect of eventually being detained and removed. In the individual case, a large variety of factors may thus lead to action by individuals to return, even if security concerns persist. In some cases, voluntary return may even be taken up as a coping mechanism to deal with such concerns, for example, because such a return may attract less attention by the authorities of the country of return than (escorted) removal[72]. As such, it must be concluded that, at least in the abstract, the fact that third-country nationals take up voluntary return does not necessarily indicate that they do not have legitimate concerns about their safety.

7.3.2.2 Voluntary return as a waiver for protection against refoulement?

This then leads to a second issue. Even if it can be assumed that voluntary return does not provide evidence of the absence of harm upon return, the exposure to any harm is still the result of the third-country national's own steps to return. How does this relate to member states' responsibilities and the obligatory nature of return? It has been posited that, if the return of an

70 Winters 2015.

71 Van Wijk 2008, pp. 23-24, rather identifies these as 'deter' factors, which encourage third-country nationals in an irregular situation to leave.

72 This may be the case, for example, to avoid punishment in case of return to Eritrea, as discussed in 4.2.5.2. In the ECtHR case of *N.A. v. Finland*, discussed below, this was also provided as one of the reasons for opting for voluntary return.

alien to a situation of danger is his or her own choice, this would relieve the state from its obligations to protect him or her from *refoulement*.[73] It could be argued that by returning voluntarily, *refoulement* is 'self-inflicted' by the third-country national, and thus not within the scope of the member state's responsibility. However, it has also been noted that voluntary return is simply one of the ways to effect expulsion by the member state and that "the individual would not leave were it not for the expulsion."[74]

Perhaps the most elaborate consideration of the issue of 'self-inflicted' harm in relation to states' human rights obligations can be found in the case law of the ECtHR. In particular, it has considered, in relation to various rights, whether individuals could waive these rights, and thus states' responsibility for the consequences. In *Scoppola v. Italy (Nº. 2)*, for example, the Court dealt with an applicant who had explicitly waived certain fair trial rights, guaranteed by Article 6 ECHR, but subsequently argued he had not done so voluntarily. The ECtHR found that Article 6 did not prevent a person waiving rights of their free will, either expressly or tacitly, but that such a waiver must be established "in an unequivocal manner" and attended by "minimum safeguards commensurate with its importance."[75] This has subsequently acted as an important reference for questions regarding the possibility to waive other rights, including the prohibition of torture or inhuman or degrading treatment (Article 3 ECHR) in expulsion proceedings. In particular, in various cases, the ECtHR had to consider whether an individual agreeing to return voluntarily would constitute such a waiver, surrounded by sufficient safeguards.

In 2012, it considered this in the case of *M.S. v. Belgium*.[76] The case concerned an Iraqi national who had sought asylum in Belgium but who had been rejected, including due to posing a national security threat on account of his alleged links to terrorist groups. He had been detained repeatedly and for prolonged periods while the Belgian authorities had tried to secure his removal, as well as exploring options for removal to a third country. Eventually, the applicant acquiesced to return to Iraq with help from IOM, despite knowing he would be arrested there, if Belgium would provide him with a sum of money that was supposed to help him deal with legal proceedings and take care of his family. Upon return, he was indeed arrested and detained. In his complaint, he objected that he had only agreed to return 'voluntarily' because of the prospect of indefinite detention in Belgium, that this was the only way to be closer to his family left behind in Iraq, and that he had "lost hope."[77] The ECtHR found that, in his situation, the applicant was faced with several choices: stay in Belgium

73 Coleman 2009, p. 248, also referring to Goodwin-Gill 1978. Neither provide more discussion of the grounds for such an assumption, however.
74 Gaja 1999, p. 289.
75 ECtHR *Scoppola (No. 2)*[2009], paragraph 135.
76 ECtHR *M.S. v. Belgium* [2012].
77 *Ibid*., paragraph 107.

without any hope of obtaining legal stay and without a concrete perspective of living in liberty; return to Iraq despite the risks faced; or to go to a third country, which did not turn out to be an option that the Belgian government could realise. In this light, the applicant could not be considered to have properly waived his right to protection under Article 3, and the return should therefore be considered as a forced return, being able to trigger Belgium's responsibility.[78]

The *M.S.* case may not be the best benchmark for the question of voluntary return as a waiver of the protection of Article 3 ECHR, at least in relation to the Directive. After all, the applicant made this decision when already detained. Although there is an increasing practice of so-called 'assisted voluntary return from detention,'[79] it is doubtful this can be considered voluntary return within the meaning of the Directive, since detention only becomes viable during the enforcement stage.[80] A more relevant judgment was delivered in 2019, in the case of *N.A. v. Finland*, which considers the issue of voluntary return as a waiver of both Article 2 (the right to life) and Article 3 ECHR at some length.[81] The case concerns an Iraqi national who had sought asylum in Finland, and who had participated in an assisted voluntary return to Iraq after his asylum request was rejected. Shortly after his return to Iraq, he was allegedly killed. A complaint was lodged with the ECtHR by N.A., his daughter.

A significant part of the case deals with the question whether the Finnish authorities had adequately assessed the risks faced by N.A.'s father during his asylum procedure and subsequent appeals. This part of the case has become particularly controversial, as following its delivery doubts were raised whether documents establishing N.A.'s father's death in Iraq were forged.[82] Indeed, in February 2021, N.A. and her former husband were convicted in Finland for aggravated fraud and forgery, with the Helsinki District Court finding that the complaints were "entirely false."[83] The Finnish government applied to the ECtHR to have the judgment overturned,[84] which the Court accepted. In July 2021, it subsequently delivered a revised judgment declaring the complaint of N.A. inadmissible.[85] Notwithstanding the specific circumstances and controversies of this case, and the eventual revision of the judgment, there is reason to believe that the Court's findings in relation to the notion of the voluntariness of return, and how this relates to state responsibility, represent a more gener-

78 *Ibid*., paragraphs 124-125.
79 See, for example, PACE 2010, explanatory memorandum, paragraphs 43-46; Kox 2011.
80 Also see 1.2.2.4.
81 ECtHR *N.A. v. Finland* [2019].
82 Yle.fi 2020.
83 AFP 2021.
84 *Ibid*.
85 ECtHR *N.A. v. Finland* [2021].

ally applicable approach, especially since it is consistent with that taken in earlier judgments, such as those discussed above. As such, certain elements of the ECtHR's initial judgment in this case may still be of relevance to this analysis, despite the above-mentioned controversy.

In this regard, of particular relevance is the way the ECtHR dealt with the Finnish government's preliminary objection that the complaint under Article 3 was incompatible *ratione loci* with the ECHR, which is not so much connected to the (reportedly faked) circumstances in Iraq, but with the conditions under which N.A.'s father left Finland, despite continuing to claim this would expose him to *refoulement*. In particular, the Finnish government argued that N.A.'s father had submitted an application for assisted voluntary return to Iraq before lodging an appeal with the Supreme Administrative Court and requesting a stay of execution of the removal order which was issued to him with the rejection of his asylum application (and which had been upheld by the Helsinki Administrative Court). He had subsequently returned voluntarily to Iraq and his 'death' (as it was still presumed to have happened at that point) had taken place there. It argued that the Finnish authorities had not exposed him to a risk of ill-treatment. There was no causal connection between the removal order and the risk faced in Iraq, where he had *chosen* to return.[86] The government argued that responsibility under Articles 2 and 3 ECHR could arise only at the time when a measure was taken to remove an individual from its territory. Furthermore, the applicant had, when applying for return assistance, signed a declaration stating that "any agency or government participating in the voluntary return could not in any way be held liable or responsible."[87]

The applicant maintained that her father had not returned voluntarily to Iraq, but left as a result of the expulsion order. As such, his return was not genuinely voluntary but part of the process of the execution of that order. He opted for voluntary return over forced return to avoid detention, to attract less attention from the Iraqi authorities upon return and in order to avoid an entry ban of two years to the Schengen area. As such, the Finnish government should indeed be considered responsible for violations of Articles 2 and 3 ECHR as a result of its expulsion of the applicant's father.

In its consideration, the Court first noted that it had already dealt with the question of voluntary departure from a Contracting State and whether any subsequent incidents would satisfy the jurisdictional requirements of the ECHR. In *Abdul Wahab Khan v. the United Kingdom*, it had held that there was:

> *"no principled reason to distinguish between, on the one hand, someone who was in the jurisdiction of a Contracting State but voluntarily left that jurisdiction and, on the other hand, someone who was never in the jurisdiction of that State."*[88]

86 My emphasis.
87 ECtHR *N.A. v. Finland* [2019], paragraph 19.
88 *Ibid*., paragraph 54; ECtHR, *Abdul Wahab Khan* [2014], paragraph 26.

So, as a general starting point, someone who voluntarily removes himself from the jurisdiction of a contracting state cannot subsequently hold that state responsible for what happens to him or her outside that state's territory. However, the Court noted, the applicant had submitted that her father "had not left Finland voluntarily." The Court found that the removal order, notwithstanding the appeal with the Supreme Administrative Court (which at any rate was denied later) was enforceable.[89] Furthermore, the Court saw "no reason to doubt that he [the applicant's father] would not have returned there under the scheme of 'assisted voluntary return' had it not been for the enforceable removal order issued against him."[90] As a result, "his departure was not 'voluntary' in terms of his free choice." This situation thus differed from that cited above regarding jurisdiction, and the Court found that it could not hold that the facts of the case were incapable of engaging Finland's jurisdiction.

The Court also disagreed with the Finnish government that the applicant had waived his rights when he signed the declaration that the state could not be held responsible with regard to his voluntary return. It noted that Article 3, together with Article 2 ECHR, "must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe." It is cast in absolute terms, with exceptions and without possibility of derogation. Although the Court did not want to take a stand *in abstracto* whether the protections of Article 2 and 3 ECHR can be waived, it referred to its case law, and especially the general principles set out in *Scoppola (Nº. 2)*. It concluded, on this point:

> *"In the present case, the applicant's father had to face the choice between either staying in Finland without any hope of obtaining a legal residence permit, being detained to facilitate his return by force, and handed a two-year entry ban to the Schengen area, as well as attracting the attention of the Iraqi authorities upon return; or agreeing to leave Finland voluntarily and take the risk of continued ill-treatment upon return. In these circumstances the Court considers that the applicant's father did not have a genuinely free choice between these options, which renders his supposed waiver invalid."*[91]

In this light, the Court considered the applicant's father's return to Iraq as "a forced return engaging the responsibility of the Finnish State."[92] In comparison to the *M.S.* case, therefore, the situation in which a third-country

89 The appeal did not have suspensive effect.
90 ECtHR *N.A. v. Finland* [2019], paragraph 57.
91 *Ibid*., paragraph 60.
92 *Ibid.*

national has been issued a return decision,[93] but this is not yet being enforced by the member state, including by the use of detention, also cannot automatically lead to a presumption that the state is not responsible for human rights violations upon return.

Without necessarily doing so explicitly, the Court engaged with the distinction between the ordinary meaning of voluntariness, or 'truly voluntary' return, and its meaning in the Directive.[94] The judgment confirms the view that the existence of a return decision should be sufficient, in principle, to trigger a state's responsibilities as regards expulsion and its associated safeguards, since this does not leave a genuinely free choice between staying or returning. In this way, voluntary return does not mean that any consequences faced by the third-country national can be considered self-inflicted, and thus beyond the scope of a member state's responsibility. This is also clearly the case when the voluntary return is not assisted, and no documents that could be misunderstood as a 'waiver' are signed.

7.3.3 The scope of non-*refoulement* obligations during the voluntary departure period

On the basis of the previous paragraphs, it can be concluded that the non-*refoulement* obligations of the member state remain intact even if the third-country national decides to return voluntarily. Member states cannot expect third-country nationals to take steps that would lead to their return to a destination where they would face a real risk of fundamental rights violations similar to those explicitly prohibited in relation to *refoulement* in Article 19(2) the Charter of Fundamental Rights, which must, at a minimum, provide protection equivalent to that under the ECHR. This prohibition also applies to persons who are excluded from asylum, but who would still face *refoulement* risks. The source of such risks, as such, is not particularly important. Situations reaching a level of severity covered by Articles 2 or 4 of the Charter would fall within the prohibition of 'voluntary *refoulement*' too. This may also arise, for example, in relation to the returnee's medical conditions, especially if access to treatment or social networks are not available.[95] This may raise specific issues about the (im)possibilities of return of particularly vulnerable individuals, which may be further increased if

93 There may be some confusion over the use of 'removal order' in the judgment, as this may suggest there is still a difference between a situation in which a third-country national is told he should leave, and one where he is notified his removal is authorised. However, it should be noted that the Directive clearly allows member states to adopt a single decision encompassing the ending of a legal stay, a return decision, a removal decision and an entry ban in a single administrative or judicial act. And the joining of such decisions is not only possible, but recommended, see C(2017) 6505 final, 16 November 2017, Annex (Return Handbook), paragraph 12.2.

94 In this case, as transposed to Finnish law.

95 See, for example, ECtHR *Paposhvili* [GC][2016].

the return would take place to a transit country. An element in this consideration may also be whether specific return assistance may play a role in reducing the risks faced upon return. While this is a matter outside of the scope of this analysis, it should be noted that, while there may be some possibilities to do so, such assistance generally cannot adequately address structural problems that impact on the destination country, which may be at the heart of the problems faced by the returnee.[96] When return assistance is put at the service of the compulsory return of specific vulnerable groups, this may also raise further ethical issues.[97]

This does not mean that the obligation to return is immediately negated when *refoulement*-related risks exist. If multiple destinations are obligatory, third-country nationals may still be expected, if the circumstances discussed above do not create a right to protection in the EU member state, to pursue other, safe destinations. However, if this is not the case, the fact that return may be 'voluntary' cannot override the member state's non-*refoulement* obligations, and in limited scenarios it might thus negate the obligation to return altogether. Second, although as a matter of admission, *refoulement* is normally discussed in relation to the country of origin, the prohibitions of exposing individuals to such risks relate to all destinations. As such, if such risks arise in relation to transit countries, the same also applies. This includes protecting against chain *refoulement* by the transit country – meaning that the individual would be returned onward by the transit country to a next destination where *refoulement* risks exist – which may particularly be a concern if return would take place on the basis of informal agreements. Because of the broad-ranging nature of the prohibition of *refoulement*, this must also be assumed to apply to the safety of routes that must be taken to get to the destination, even if the destination itself is safe. This issue may come up, for example, if third-country nationals would have to travel through a dangerous country or area to get to their final destinations. Similarly, the protection accorded to third-country nationals discussed above may also have to extend to situations in which they would be required to use unsafe modes of transport, such as blacklisted airlines or unseaworthy boats, to enable their return.

7.3.4 Closing the protection gap during the voluntary departure period

While the prohibition of *refoulement* thus provides for relatively unambiguous protections, also applicable during the voluntary departure period, it is less evident how these can be made effective during that period. After all, as discussed, procedural safeguards against *refoulement* mainly exist in the stage before a return decision is issued, or at the enforcement stage as a last safety net, leaving a gap during the voluntary return stage. While

96 See, for example, Mommers et al 2009.
97 See, for example, Lemberg-Pedersen & Chatty 2015 on ERPUM.

third-country nationals may be expected to make any *refoulement*-related concerns known to member states, so these can be assessed properly, this will mostly take the form of submitting a (renewed) request for asylum or for postponement of return on other grounds. However, this may result in a Catch-22 situation: if the member state believes there were legitimate reasons to issue a return decision, such a request – unless based on new circumstances – would simply deliver the same result, with the obligation to return remaining in place. This leaves a considerable protection gap in the Directive, especially for those faced with voluntary return. Although this is a structural gap in the Directive's architecture,[98] some elements to close this gap somewhat in the voluntary return stage may be proposed.

One way to ensure more adequate protection against returning to unsafe destinations has already been discussed in section 7.2 in relation to choice. As noted above, if multiple destinations are available, this may provide individuals with alternative options for safe destinations that could be used by third-country nationals. As discussed, interferences by member states with destination choices by individuals should generally be limited, and need to be appropriately justified, with some destinations largely exempt from any such interferences. Additionally, third-country nationals can lay a claim on member states to facilitate their return to transit countries if this is their preferred destination. If there are multiple viable destinations, therefore, ensuring that third-country nationals can freely choose their preferred destination can be one way to help them avoid exposing themselves to danger. In particular, I suggest that, even if there would be legitimate grounds for member states to restrict such choice, substantiated objections by individuals that this would expose them to unsafe situations would have to weigh heavily in favour of the interests of the individual. If such objections point to a situation in which the lack of choice would expose them to a destination with a serious risk of *refoulement*, this would of course override the member state's interests altogether. Although this is perhaps not the most satisfactory solution from a principled perspective, since it still puts the onus on individuals to avoid unsafe situations, rather than being actively protected from having to return to such a situation, it may provide a pragmatic solution in those cases in which multiple destinations are available, and only one of these gives rise to security concerns.

However, this presumes that viable alternative options indeed exist. Whether this is the case will depend on the individual circumstances, in connection with the more general requirements for obligatory destinations set out in Chapter 3. If, for example, the country of origin is not safe, this would entail the identification of either other countries of nationality, or of transit countries meeting all the conditions set out in Chapters 3 and 6. While, again, the choice of destinations is primarily up to the third-country national, I would suggest that a fair approach to preventing *refoulement*

98 See 7.3.1 and particularly the references to Majcher's analysis therein.

requires that the individual and the member state come to a common understanding about the destinations that are viable in this situation. If this is not clarified, no assessment of whether sufficient alternatives for an unsafe destination exist can be made. As such, cooperation on this point between the third-country national and the member state would be necessary. This would imply, on the part of the third-country national, providing in good faith information that would lead to the identification of the country of origin or specific transit countries. But, provided this is done, would also imply that the member state recognises which destinations are indeed reasonable targets for the individual's return efforts.[99] With this, I mean that, provided the individual cooperates in this, the member state may have to communicate to the individual, and for the record, which destinations it believes he or she can pursue. Again, this would simply set those options out, leaving the choice up to the individual. However, it would provide a clear frame of reference for later assessment of compliance with the obligation to return, since the individual and the member state can 'tick off' the efforts made towards each destination commonly understood to be viable. This is particularly important for those member states that have transposed the obligation to *return* as an obligation to *leave* in their domestic laws.[100] The latter defines success of the return procedure not as the individual going to a specific destination state, but as departure from their own territories. This could thus lead to an expectation that third-country nationals go "anywhere but here." Although member states would still be required to stick with the Directive's definition of which destinations are obligatory, in practice it may make the question of where a third-country national should return, and whether efforts have been made towards all relevant destinations, much murkier.

By contrast, jointly identifying a closed list of relevant destinations would limit uncertainty, and would be in line with the ILC's (non-binding) comments that the expulsion process should be seen as being "*negotiated* between the expelling State and the alien subject to the expulsion order."[101]

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99 In CJEU C-924/19 PPU and C-925/19 PPU *FMS* [2020] , which deals, in part, with member states changing the destination of return in the return decision, the CJEU's reasoning strongly implies that the destination to which a third-country national is expected to return is explicitly mentioned in the return decision in the first place, even though the text of the Directive does not include such a requirement. It notes, for example, "an obligation to return being inconceivable … unless a destination, which must be one of the countries referred to in paragraph 3 [of Article 3] is identified" (paragraph 115). It also notes that the observance of the principle of non-refoulement "must be assessed by reference to the country to which it is envisaged that the person concerned will be ordered to be returned" (paragraph 119). While this could theoretically be done in practice, without mentioning the prospective destination country in the return decision, this may be problematic from the perspective of remedies, including in view of the CJEU's finding that any change to the obligatory destination by the member state should also be subject to remedies as set out in Article 13 of the Directive (paragraph 135).

100 See 9.4

101 ILC 2014, footnote 131 (my emphasis).

Of course, this will create further issues when third-country nationals do not provide all relevant information or do not sufficiently cooperate to identify all relevant destinations. However, whenever possible, such a 'negotiated' position on relevant destinations can be an important point of reference both for the assessment of compliance with the obligation to return more generally, and for any issues in relation to *refoulement*. On the latter point in particular, it would help the individual and the member state in identifying whether there are indeed alternative destinations. Furthermore, it may require the member state to engage with possible *refoulement* concerns in relation to *all* viable destinations. This is important because, as discussed, asylum procedures will generally focus only on one destination (usually the country of origin), or fail to engage with such issues in a substantive manner when the case can be dismissed on admissibility grounds or when exclusion clauses are in play. However, the Directive's *refoulement* prohibition also applies to destinations which have not been substantively assessed during the asylum procedure.[102]

A similar engagement could be expected when it comes to questions of safe return routes, rather than destinations themselves. An example of such an issue arose in 2012, when the Dutch government adopted the decision that various part of South and East Somalia, which were no longer controlled by terrorist group Al-Shabaab, could be considered as safe for return in individual cases. Subsequently, it would not provide prima facie protection to persons from that area anymore, and this opened the possibility, on a case-by-case basis, that persons from those areas would be faced with an obligation to return. The problem was, however, that the Somali capital Mogadishu, and particularly the area around the airport, were not safe due to continued Al-Shabaab activity there. This made removal of persons from South and East Somalia impossible for the Dutch government. Rather than providing these persons with some form of protection,[103] the government insisted that they still had an obligation to leave of their own accord. When asked how returnees could ensure they would be safe *en route* to their places of origin in Somalia if the government could not, the only answer was that this was their own responsibility. When pressed further, the minister for immigration affairs told Parliament that he had heard it might be possible to travel overland from Kenya to the safe areas of Somalia, but that he saw no role for the government in exploring in more detail what safe options existed for voluntary returnees.[104] In view of the discussion in the previous paragraphs, such a hands-off approach, leaving the question of

102 Majcher 2020, pp. 111-112: "The protection from *refoulement* under the Directive should be of the widest scope because it constitutes the last safety net for people not protected from *refoulement* under other protection schemes under EU law (the SBC, Qualification Directive, and Asylum Procedure Directive)."

103 As put forward by Spijkerboer 2013 as a logical and appropriate solution in this situation.

104 The situation was eventually resolved because Mogadishu and the airport became – in the view of the government – safe, so that returns could be enforced.

safe return routes to individuals, cannot be considered legitimate. Indeed, already before the Dutch government took the above-mentioned position, the ECtHR had found that while states may, under certain circumstances, deny international protection if only part of their country of origin is safe, such as in the case of Somalia, this is also subject to them being able to travel there safely.[105]

A particularly clear protection gap arises when there are no alternative destinations or safe travel routes available, and there is only one obligatory destination under the Directive, but the return decision is in place. The safeguard in the Directive in such a context is then formed by the possibility of postponement of removal.[106] Notwithstanding the practical difficulties of third-country nationals to get the member state to decide to implement such a postponement, this again raises questions about the situation of those still within the voluntary departure period. It might be presumed that the situation giving rise to a postponement of removal may also give rise to an extension of the voluntary departure period. However, the circumstances that may lead to a person nonetheless taking up voluntary return, discussed above, remain in place. Importantly, in this respect, the ILC noted that the facilitation by states of voluntary return "cannot be interpreted as authorizing the expelling State to exert undue pressure on the alien opt for voluntary departure rather than forcible implementation of an expulsion decision."[107] In other words, member states should leave sufficient space for third-country nationals to decide not to return voluntarily, which is (as discussed in 10.2) to be regarded as a right of the individual. This would not negate their obligation to return, but would put the ball back in the member state's court. In view of the discussion above, this would also make the state's non-*refoulement* obligations more visible and, perhaps, easier to trigger procedurally. As such, this could be conceived of as a 'right to be removed.'[108] What such a right would concretely entail is something that cannot be discussed here in detail. However, it would require consideration of the extent to which a range of measures taken by member states to

105 ECtHR *Sufi and Elmi* [2011], paragraph 277. Also see CTOC Smuggling Protocol, Article 18(5): "Each State Party involved with the return of a person who has been the object of [smuggling] shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person."

106 RD Article 9(1)(a).

107 ILC 2014, commentary to draft Article 21(1).

108 In addition to its relation to *refoulement* obligations, it could also more generally interact with the subjective element of a 'humane and dignified' return, as discussed in 10.4.3.2 in regard of persons who may consider removal a more dignified outcome of the return process than voluntary return. At the same time, this would further amplify dilemmas experienced by member states when countries of return refuse to cooperate in removals, leaving voluntary return as the only option to ensure the return decision is implemented.

encourage return would amount to "undue pressure."[109] While the legitimacy of such measures to encourage return in relation to the repatriation of refugees has been considered quite extensively,[110] this is much less the case for irregular migrants. Under the terms of the Directive, this would at least preclude member states from denying third-country nationals access to emergency health care and essential treatment, or depriving children from access to basic education.[111] However, such a consideration may also have to cover, for example, at what point threats of detention, which are normally part of the Directive's procedure, become illegitimate.[112] Undue pressure would arguably also be applied in case families are purposefully separated to push them towards return,[113] or when member states use deception to make third-country nationals take up voluntary return, such as by misinforming them about the situation in the country of return, tricking them into signing documents agreeing to return, or by making false promises of (financial) assistance.[114] A particular area that would need further attention in this respect is whether limiting third-country nationals' access to, or actively depriving them of, basic amenities such as shelter and food, would be unlawful as a means to 'encourage' return. European human rights bodies have dealt with the interrelation between such socio-economic rights

109 In this regard, Majcher 2020, p. 548, mentions the role of both incentives and disincentives to comply with the obligation to return. For a discussion of the practical application of such measures in the Netherlands, see, for example , Olde Monnikhof & De Vreede 2004, in particular pp. 58-59, where they distinguish between 'positive' and 'negative' measures in relation to return. For an application of this to voluntary return situations, see Mommers & Velthuis 2010.

110 See, inter alia, UNHCR 1996; Vedsted-Hansen 1997; Zieck 2004; Crisp & Long 2016.

111 RD Article 14(1)(b) and (c).

112 This could involve suggestions by member state officials that a third-country national will definitely be detained in case he or she does not return voluntarily, even if this has not yet been established in the individual case. It may also involve threats or use of detention in cases where there is no reasonable prospect of removal, and when this is just used in a punitive way, rather than as an enforcement measure.

113 Arguably, this would violate the principle that, during the return procedure, due account should be had of family life, RD Article 5(b). Also see ECtHR *Mengesha Kimfe* [2010]. The Court found a violation of Article 8 ECHR in relation to a married couple, of which both members were in removal proceedings, were forced to live in different cantons. However, the fact that they were unremovable due to non-cooperation by the country of origin may have played a role in this finding, which would have prevented them from resuming family life upon return within a reasonable time.

114 ILC 2006, p. 156, suggesting that the principle of good faith would prohibit such deception in expulsion proceedings. Such a prohibition may also flow from a human rights obligation, such as in the *Čonka* case, in which the ECtHR found that misleading an alien to make his detention easier was contrary to the right to liberty enshrined in article 5 ECHR, see ECtHR *Čonka* [2002], paragraph 42. For a discussion of deception in relation to the return of refugees, see Gerver 2018, Chapter 3.

and voluntary return in different ways.[115] However, it has been argued that such minimum economic and social rights should be protected also when persons are faced with a return decision, which would also suggest that withdrawing these as an 'incentive' for voluntary return would not be compatible with the Directive.[116]

None of the measures above are infallible ways to deal with the gap that the Directive leaves in relation to effective protection against *refoulement*, since this gap appears to be embedded in its architecture. However, the protection of the individual's freedom of choice of destinations, and joint efforts to identify appropriate destinations and safe routes, may close this gap somewhat, especially in voluntary return situations. In the absence of alternatives, limits on member states' possibilities to pressure third-country nationals to take up voluntary return should be in place. However, these would need much more extensive elaboration and consideration than has been possible above.

7.4 Conclusions

This chapter has discussed issues of choice of destinations, and of preventing that third-country nationals are put in unsafe situations as part of the voluntary return process. Both issues arise in relation to the issue of identifying appropriate destinations where third-country nationals should seek readmission, as part of the obligation to return.

The question of choice arises when there are multiple possible destinations available to third-country nationals to meet their obligation to return. There are different perspectives in legal scholarship on whether persons faced with expulsion can choose their destination and whether expelling states have an obligation to act upon the preference of individuals. As a matter of customary international law, at most a weak obligation to allow individuals to put forward their preference may be surmised, but expelling states appear to retain a lot of discretion whether to accommodate this. However, the right to choose is enshrined in several fundamental rights.

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115 The European Committee of Social Rights (ECSR), for example, when examining a complaint in this regard in relation to the European Social Charter (ESC), found that access to food water, shelter and clothing were essential to preserve human dignity, and furthermore, that "the provision of emergency assistance cannot be made conditional upon the willingness of the persons concerned to cooperate in the organisation of their own expulsion." ECSR *CEC v. the Netherlands* [2014], paragraphs 74 and 117. The ECtHR, dealing with a similar issue, but in relation to Article 3 ECHR, found that the government on the Netherlands had not fallen short of its obligations, including due to the lack of the cooperation of the applicant in the return process, see ECtHR *Hunde* [2016].

116 See, for example, Rodrigues 2016; Majcher 2020, pp. 198-228. Also see CJEU C-562/13 *Abdida* [2014] on the extension of such rights to non-removable persons. For an overview of the ECtHR's case law on the matter of making irregular migrants destitute and the applicability of Article 3 ECHR, see Slingenberg 2019.

First, the right to leave encompasses, in general, a right to choose one's destination, which is also relevant in situations in which individuals are faced with an obligation to return. This right is not absolute, but interferences with this right, such as through direct instructions by the member state or withholding confiscated documents until the third-country national agrees to return to the 'right' destination, must be duly justified. While wide reasons of migration control might be accepted as legitimate aims, it will not be easy for member states to justify why controlling an individual's destination is necessary, unless this clearly cannot lead to effective return, or this can be connected to the risk of absconding. Second, the right to return provides special protection to the choice of returning to one's own country, which imposes on the EU member state an obligation of non-interference. Given the almost absolute nature of the right in relation to one's 'own county' under the ICCPR, and the unqualified right to return to one's country of nationality under the ECHR, member states should normally refrain from any interference with third-country nationals' attempts to return to this particular destination under all circumstances.

The situation in which third-country nationals prefer to return to a transit country, if the EU member state has not yet submitted a readmission application, raises specific questions. As a corollary of member states' obligation to ensure the *effet utile* of the Directive, which in this case relates both to the objective of effective return and the priority of voluntary return, member states can be expected to submit such an application on behalf of the individual, unless they can provide specific motivation why this is not possible or in the interest of the return procedure.

As a general principle, meeting the obligation to return must be accomplished in a manner that ensures the safety and dignity of the individual involved. However, ensuring this, especially in the light of the prohibition of *refoulement*, raises specific questions when it is the third-country national, rather than the member state, that carries the primary responsibility for return. While individuals can be expected not to expose themselves willingly to danger, it was noted that several situations may occur when they do not receive protection from the member state, and find themselves in a situation in which they feel compelled to return voluntarily to unsafe destination countries or via an unsafe route. However, it was noted that member states cannot ignore their obligations of non-*refoulement* simply because return is taking place 'voluntarily.' Voluntary return cannot be seen as a guarantee that the situation in the destination country is safe. And neither does the decision of the third-country national to take up voluntary return present a waiver of his or her right to be protected against *refoulement*, since this decision is still the result of an expulsion action by the member state, triggering its obligations. While it was established that the prohibition of *refoulement* must be observed by member states also when dealing with third-country nationals in the voluntary departure stage of the Directive's procedure, it is not immediately obvious, beyond general awareness of this fact, what should be done to make such protection effective. This, it was

noted, is due to overall gaps in the architecture of the Directive, which may be amplified in relation to voluntary return.

As a general point, member states should refrain from requiring of third-country nationals that they put themselves in a situation which would violate the prohibition of *refoulement*. In lieu of a decision to grant the individual a right to stay, this can be achieved in part by ensuring that the freedom to seek return to his or her preferred destination is fully observed, and any concerns about the lack of safety of particular destinations are taken into account in this respect. Furthermore, it was suggested that – in order to avoid that third-country nationals being confronted with an obligation to go "anywhere but here" – a list of viable destinations is established between them and the member state. Such a negotiated list would provide a better basis for assessing risks associated with each destination and thus provide a reference point for ensuring the individual is not exposed to 'voluntary *refoulement*.' Member states' active engagement with return options would also be necessary in case that common return routes were found to be unsafe, putting an obligation of due diligence on the member state to work with third-country nationals to find appropriate alternatives, rather than leaving this simply up to them. Finally, as a more general safeguard, member states could be expected to refrain from putting undue pressure on third-country nationals to take up voluntary return. While some limits on action to encourage voluntary return can be deduced from the Directive directly (such as denying emergency health care or separating families), considerable further work would be necessary to specifically define them – an exercise that falls outside the scope of this analysis. However, it would likely require consideration of the link between voluntary return and the threat of detention, of actions that may be aimed at deceiving the individual into returning voluntarily, or of the extent to which denying access to basic services, such as shelter and food, is incompatible with the Directive and EU fundamental rights.