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Betreft Geannoteerde agenda van de formele JBZ-Raad, 13-14
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Bijlagen
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Hierbij bieden wij, mede namens de staatssecretaris van Justitie en Veiligheid en de minister van Binnenlandse Zaken en Koninkrijksrelaties, uw Kamer de geannoteerde agenda aan van de Raad Justitie en Binnenlandse Zaken (JBZ-Raad) van 13-14 oktober a.s. in Luxemburg. De minister van Justitie en Veiligheid en de minister van Asiel en Migratie zullen hieraan deelnemen.

Daarnaast informeren wij uw Kamer over de volgende onderwerpen.

Kabinetsappreciatie Aanbeveling onderhandelingsmandaat voor de Europese Commissie inzake het *Enhanced European Border Security Partnership*

Aanleiding

De Verenigde Staten van Amerika (VS) heeft een nieuwe voorwaarde gesteld aan de deelname aan het Amerikaanse visumvrijstellingsprogramma (VWP). De nieuwe verplichting houdt in dat met de VS een "versterkt partnerschap voor grensbeveiliging" (*Enhanced European Border Security Partnership*, hierna: EBSP) moet worden gesloten. De Europese Commissie zal namens de lidstaten de onderhandelingen voeren met de VS. Op 23 juli jl. presenteerde de Commissie een concept onderhandelingsmandaat dat richtsnoeren bevat voor de aanstaande onderhandelingen.¹ Middels deze brief wordt u geïnformeerd over het concept onderhandelingsmandaat en de appreciatie van het kabinet. De VS heeft aangegeven om vanaf 2027 te willen toetsen of lidstaten aan deze voorwaarde van het EBSP voldoen. De Commissie wenst daarom voor het einde van 2026 de onderhandelingen met de VS over de kaderovereenkomst af te ronden.

Essentie voorstel

Het voorstel ziet op de uitwisseling van informatie inzake het overschrijden van de buitengrenzen van de lidstaten en van de VS door bepaalde reizigers. De VS is voornemens informatie-uitwisseling tot stand te brengen over reizigers naar de VS die mogelijk een band hebben met het VWP-partnerland, aanvragers van immigratievoordelen of humanitaire bescherming in de VS en personen die door de rechtshandhaving van de VS in een grens- en immigratiesituatie in de VS worden aangetroffen. Het doel van deze informatie-uitwisseling betreft het controleren van de identiteit van onderdanen van derde landen en het kunnen vaststellen of zij een risico vormen voor de publieke veiligheid en openbare orde. De reikwijdte van de

¹ Europese Commissie, COM(2025) 447; Europese Commissie, bijlage bij COM(2025) 447.

informatie-uitwisseling (categorieën en soorten gegevens, soorten personen en soorten strafbare feiten) zal tijdens de onderhandelingen worden vastgesteld. De uit te wisselen informatie zal naar verwachting afkomstig zijn uit nationale en EU databanken. Op basis van de af te sluiten kaderovereenkomst kunnen lidstaten vervolgens bilaterale overeenkomsten afsluiten met de VS, om de uitwisseling van informatie vanuit nationale databanken mogelijk te maken.

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Beoordeling voorstel en inzet kabinet

Het kabinet verwelkomt de voorgestelde gecoördineerde aanpak van de Commissie om namens de Raad met de VS te onderhandelen over een kaderovereenkomst aangaande het EBSP. Er ontbreken echter details in de richtsnoeren waardoor de exacte omvang en reikwijdte van de overeenkomst en de uit te wisselen informatie lastig is in te schatten. Het kabinet acht het daarom van belang dat dit wordt verduidelijkt in de richtsnoeren. Het gaat daarbij vooral om een nadere uitwerking van principes als wederkerigheid, proportionaliteit en noodzakelijkheid en de uitgangspunten van gegevensbescherming, waaronder doelbinding en accuraatheid van de gegevens. Bovendien vindt het kabinet het belangrijk om overlapping met andere overeenkomsten met de VS, bijvoorbeeld op het gebied van internationale rechtshulp, te voorkomen. Daarnaast vindt het kabinet het van belang dat bij het vaststellen van de reikwijdte van informatie-uitwisseling rekening wordt gehouden met EU regelgeving. Het kabinet acht het ook van belang dat de informatie-uitwisseling zorgvuldig wordt ingekaderd en de verstrekking van gegevens vanuit de EU-lidstaten voldoet aan de strenge eisen die uit de EU-regelgeving voortvloeien. Dit betekent dat de inzet moet zijn dat de uitwisseling van informatie wordt vormgegeven op basis van een gelaagd model met menselijke tussenkomst en niet op basis van automatische verstrekking. Daarnaast mogen aan de VS verstrekte gegevens niet voor andere doeleinden worden gebruikt dan de doeleinden waarvoor zij zijn verstrekt. Daarnaast zal Nederland aandacht vragen voor noodzakelijke waarborgen, zoals voorgesteld in de opinie 24/2025 van de Europese Toezichthouder voor Gegevensbescherming (EDPS) om de bescherming van de grondrechten binnen de EU te waarborgen.²

Het kabinet vindt het daarnaast van belang dat in de kaderovereenkomst wordt vastgelegd welke maatregelen er op EU niveau genomen kunnen worden in geval van het niet naleven of het niet realiseren van de overeenkomst. Ook ziet het kabinet graag een verwijzing naar wederkerigheid als criterium voor goede naleving van de overeenkomst.

Krachtenveld

Binnen de EU is er brede steun voor een gecoördineerde, Europese aanpak en het sluiten van een kaderovereenkomst tussen de EU en de VS. Meerdere lidstaten hechten ook waarde aan het duidelijk afbakenen van de reikwijdte van de overeenkomst en het waarborgen van bovengenoemde EU principes en de uitgangspunten van gegevensbescherming. Het Europees Parlement (EP) moet uiteindelijk ook via een consultatieprocedure instemmen met de kaderovereenkomst tussen de EU en de VS.

² Advies 24/2025 van de Europese Toezichthouder voor Gegevensbescherming over de aanbeveling voor een besluit van de Raad houdende machtiging tot het openen van onderhandelingen over een kaderovereenkomst tussen de EU en de VS inzake de uitwisseling van informatie voor beveiligingsonderzoeken en identiteitscontroles (17 september 2025).

Uitvoering motie Van Zanten/Boomsma over verkenning modernisering/herziening verdragen

Op 12 juni jl. heeft de Tweede Kamer de motie van de leden Van Zanten en Boomsma aangenomen.³ De aangenomen motie verzoekt de regering om een juridische en diplomatieke verkenning te starten naar verdragen die mogelijk moeten worden gemoderniseerd of herzien. In het Commissiedebat Vreemdelingen- en Asielbeleid van 18 juni jl. is toegezegd de Tweede Kamer voor het verkiezingsreces te informeren over het plan van aanpak van deze motie. Hieronder vindt uw Kamer daarvan een uitwerking.

Het kabinet onderschrijft het belang van grip krijgen op migratie, onder andere door het asielstelsel ingrijpend te hervormen, de instroom te beperken en de asielketen te ontlasten. Het is hiervoor van belang dat alle mogelijke instrumenten verkend worden en dat Nederland nauw optrekt met gelijkgezinden landen. Het kabinet stelt vast dat uitdagingen in het beperken van het aantal aankomsten van asielzoekers in Nederland, de toegenomen complexiteit in de inhoudelijke beoordeling van asielaanvragen, en op het gebied van terugkeer verband houden met de rechten en plichten die voortvloeien uit internationale kaders.

Het kabinet brengt op dit moment in kaart welk handelingsperspectief er is binnen de huidige wet- en regelgeving en in hoeverre aanpassing van internationale verdragen en het Unierecht bij zou kunnen dragen aan mogelijke oplossingen voor deze uitdagingen. Het Unierecht wordt hierin specifiek meegenomen, gezien het feit dat het Nederlandse migratierecht - meer dan het EVRM of het Vluchtelingenverdrag - grotendeels uitvoering geeft aan verplichtingen die volgen uit het Unierecht. Met betrekking tot het handelingsperspectief is het bovendien de vraag of internationale verdragen een beperkende factor zijn, of dat gekeken moet worden naar de neerslag daarvan in het Unierecht, nationale recht en de relevante beleidskaders. In dit kader is bijvoorbeeld meermaals gewezen op de mogelijkheden tot het opvangen van meer asielzoekers buiten de EU en het afhandelen van asielverzoeken buiten het EU-grondgebied in relatie tot de internationale verdragen. Een eerste inventarisatie duidt erop dat het EVRM of het Vluchtelingenverdrag geen beperkende factor zijn. Het kabinet wil deze route verder uitwerken. Een verkenning is daarom uitgezet bij het onderzoeksinstituut Clingendael. Naar verwachting zal dit onderzoek in december 2025 afgerond zijn. Daarnaast wordt ambtelijk een analyse gemaakt van mogelijke maatregelen om de complexiteit in de behandeling van asielaanvragen terug te brengen en terugkeer te bevorderen. Denk hierbij onder andere aan maatregelen omtrent het uitzetten van criminele vreemdelingen, gezinshereniging en het hervatten van Dublinoverdrachten. De uitkomsten van deze analyse zal u gelijktijdig ontvangen met de reactie van het kabinet op het onderzoek van onderzoeksbureau Clingendael.

Zoals eerder aangegeven zal Nederland nauw optrekken met gelijkgezinde lidstaten. Nederland heeft zich daarom onder andere aangesloten bij het initiatief van Denemarken en Italië om opvolging te geven aan de brief van negen lidstaten over het EVRM. Zoals aangegeven in de Geannoteerde Agenda van de JBZ-Raad van 22 en 23 juli jl.⁴ en het Verslag van de Europese Raad van 26 juni jl.⁵ heeft

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³ Kamerstukken II, 2024–2025, 32 317, nr. 96.

⁴ Kamerstukken II, 2024–2025, 32317, nr. 976.

⁵ Kamerstukken II, 2024–2025, 21501, nr. 20.

Nederland uitgedragen de intentie achter deze brief te steunen, in zoverre deze betrekking heeft tot de noodzaak voor de verdere aanscherping van het asiel- en migratiebeleid. Hierbij is het van belang dat de vervolgstappen deze context reflecteren en daarmee een bijdrage leveren aan de daadwerkelijke aanscherping van het asiel- en migratiebeleid en zich niet beperken tot het vraagstuk van de uitzetting van criminele vreemdelingen, gezien het EVRM op dit specifieke vraagstuk voor Nederland in de huidige casuïstiek niet een primaire belemmering is. Nederland is daarom actief betrokken bij het vervolgproces om op Europees en internationaal niveau het handelingsperspectief in kaart te brengen en verder uit te werken. Hierbij geldt dezelfde overweging dat het kabinet kijkt naar internationale verdragen, het Unierecht en de mogelijkheden binnen de nationale rechtssystemen. Het kabinet houdt daarbij een brede blik en verkent en onderzoekt hierbij verschillende opties, waaronder de mogelijkheden voor een interpretatief rapport in het kader van het EVRM in lijn met de motie Van Zanten en motie Van der Plas⁶ en Yeşilgöz-Zegerius⁷. De Kamer zal over de relevante ontwikkelingen geïnformeerd worden via de Geannoteerde Agenda van de JBZ-Raad.

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Verruimd kader MTV

Zoals aan de Tweede Kamer gemeld in de brief van 25 april jl. over de verlenging van het binnengrenstoezicht werkt het kabinet aan de versterking van de juridische kaders van MTV-controles als onderdeel van het asielcrisispakket.⁸ Dit heeft als doel dat de Koninklijke Marechaussee (KMar) in de toekomst frequenter en flexibeler Mobiel, Toezicht en Veiligheids- (MTV) controles kan uitvoeren. Concreet betekent dit onder andere dat de huidige maxima voor controles per modaliteit (vliegtuigen, treinen, bussen, schepen, auto's en vrachtwagens) worden verhoogd. Om een nieuw juridisch kader te realiseren voor het uitvoeren van MTV-controles dient het Vreemdelingenbesluit 2000 gewijzigd te worden. Gestreefd wordt om deze wijzigingen in het voorjaar van 2026 in werking te laten treden.

Migratieconferentie München 4 oktober 2025

In lijn met de inzet van het kabinet om in de EU een voortrekkersrol te spelen in de verkenning van innovatieve oplossingen en aanscherping van het EU asiel- en migratiebeleid, meldt het kabinet uw Kamer dat de Minister van Asiel en Migratie op 4 oktober op uitnodiging van Duitsland zal deelnemen aan een migratieconferentie in München. Daar zal op basis van de informatie die momenteel beschikbaar is verder worden gesproken over de aanscherping van het EU asiel- en migratiebeleid in navolging van de migratietop in Beieren van 18 juli jl. Het kabinet zal in het verslag van de JBZ-Raad uw Kamer informeren over de uitkomsten van deze conferentie.

Informatieafspraken inzake het behandelvoorbehoud van de Eerste Kamer inzake een voorstel voor terugkeerverordening⁹

Conform de vastgestelde informatieafspraken naar aanleiding van het behandelvoorbehoud van de Eerste Kamer bij het voorstel voor een

⁶ Kamerstukken II, 2024-2025, 22 112, nr. 4122.

⁷ Kamerstukken II, 2025-2026, 36 800, nr. 24.

⁸ Kamerstukken II, 2024-2025, 30 821, nr. 273.

⁹ Kamerstukken I, 2025-2026, 25 0006, nr. 177653.

terugkeerverordening deelt het kabinet de onderzoeken – voor zover openbaar – waarnaar wordt verwezen in het voorstel. Het kabinet vertrouwt erop uw Kamer op deze manier voldoende te hebben geïnformeerd.

- Verslag thematische Schengenevaluatie “Nationale tekortkomingen verhelpen: naar een doeltreffend EU-terugkeersysteem” (*BIJLAGE 1*);
- MIRreM Conceptual Framework (“Gaining additional value from diversity in project partnership and stakeholder engagement: The MIRreM conceptual framework”) (*BIJLAGE 2*);
- De-centring the Study of Migrant Returns and Readmission Policies in Europe and Beyond (GAPS) richt zich op de bestudering van Return Migration Infrastructures (RMIs) (*BIJLAGE 3*);
- Horizon Europe Project ‘GAPS: De-centring the Study of Migrant Returns and Readmission Policies in Europe and Beyond’;

Hieronder vallen verschillende rapporten en artikelen. Onderzoek loopt momenteel nog.

- Five Shades of Grey: Policy and Practice in Return Migration, Assessment of EU return policy with a focus on Germany, Greece, the Netherlands, Poland, and Sweden (*BIJLAGE 4*);
- Framework paper on the concepts and typologies on returns - combined with four conceptual notes (*BIJLAGE 5*);
- Legal and Policy Infrastructures of Returns in the EU (*BIJLAGE 6*);
- Working papers, (*BIJLAGE 7*).
- Horizon Europe Project Motivations, experiences and consequences of returns and readmissions policy: revealing and developing effective alternatives;
Hieronder vallen verschillende rapporten en artikelen. Onderzoek loopt momenteel nog.
 - Policy recommendations for the dignified treatment of irregularised, non-removable third-country nationals in the EU (*BIJLAGE 8*);
 - Development of the Return and Readmission policy across Europe: multilevel analysis (*BIJLAGE 9*).

- Horizon Europe Project Finding Agreement in Return
Hieronder vallen veel verschillende rapporten en artikelen. Onderzoek loopt momenteel nog. Uw Kamer wordt vanwege de veelheid aan stukken verwezen naar de centrale pagina van het onderzoeksproject, [link](#).

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De Minister van Justitie en Veiligheid,

Foort van Oosten

De Minister van Asiel en Migratie,

D.M. van Weel

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Geannoteerde agenda van de bijeenkomst van de Raad Justitie en Binnenlandse Zaken, 13 en 14 oktober 2025

I. Justitie

1. Ontwikkelingen op het gebied van de rechtsstaat in de justitiële sector

Gedachtewisseling

Op dit moment zijn er nog geen achtergrondstukken beschikbaar. Het kabinet benadrukt dat respect voor de rechtsstaat en fundamentele waarden door lidstaten essentieel is voor een goed functionerende Europese Unie en voor het wederzijdse vertrouwen tussen de lidstaten. Daarom hecht het kabinet eraan dat de Europese Commissie (hierna: Commissie), als hoedster van de Verdragen, snel en doelgericht optreedt om terugval te voorkomen en waar nodig corrigerend op te treden, met volledig gebruik van het beschikbare rechtsstaatinstrumentarium. Tegelijkertijd ondersteunt het kabinet verdere versterking van het EU-rechtsstaatinstrumentarium, inclusief het koppelen van de ontvangst van EU-middelen aan de naleving van rechtsstatelijke beginselen en het Handvest van de grondrechten. Ook zet het kabinet in op een structurele rol voor de JBZ-Raad bij de bespreking van het EU rechtsstaatrapport. Nederland blijft zich inzetten voor het uitdragen van de EU als waardengemeenschap, met kernwaarden zoals menselijke waardigheid, vrijheid, democratie, gelijkheid, rechtsstaat, mensenrechten en grondrechten.

2. De Russische agressieoorlog tegen Oekraïne: strijd tegen straffeloosheid

Stand van zaken

Onder dit agendapunt licht het Voorzitterschap de ontwikkelingen toe betreffende het tegengaan van straffeloosheid voor internationale misdrijven in Oekraïne en de compensatie van geleden schade. Op dit moment zijn er nog geen achtergrondstukken beschikbaar.

Het kabinet hecht groot belang aan de opsporing, vervolging, uiteindelijk berechting van internationale misdrijven begaan in Oekraïne en compensatie van geleden schade, en zet hier in Europees en internationaal verband actief op in.

Het kabinet blijft zich inzetten om te komen tot de oprichting van een tribunaal voor de vervolging van het misdrijf van agressie en voor de oprichting van de Claimscommissie. Besluitvorming over het gastlandschap van het tribunaal zal op korte termijn aan de Ministerraad worden voorgelegd.

De oprichting van een Claimscommissie voor Oekraïne betreft de tweede stap naar een volwaardig Compensatiemechanisme. Tijdens de *Ad-hoc Committee on the Establishment of an International Commission* is op 12 september jl. een Verdrag tot oprichting van de Claimscommissie aangenomen. Op 17 september jl. heeft het Comité van Ministers van de Raad van Europa ingestemd met de verdragstekst en het doorgezonden naar de Parlementaire Assemblee van de Raad van Europa (PACE). Na een tweede bespreking in het Comité van Ministers zal eind 2025 een diplomatieke conferentie plaatsvinden waarbij de betrokken landen de verdragstekst kunnen ondertekenen.

Nederland zal de informatievoorziening van het Voorzitterschap aanhoren.

3. De toekomst van Eurojust

Gedachtewisseling

Op dit moment zijn er nog geen achtergrondstukken beschikbaar. Naar verwachting zal het agendapunt in het teken staan van de evaluatie van de Eurojust-Verordening die de Commissie

in juli jl. heeft gepresenteerd. In de evaluatie worden zowel de toegevoegde waarde van Eurojust als een aantal aandachtspunten voor de verdere ontwikkeling van het agentschap benadrukt. Hierbij worden onder andere genoemd de noodzaak van versterkte digitalisering en modernisering van het *Case Management System*, verduidelijking van besluitvormingsstructuren en *governance*, en een efficiëntere inzet van middelen. Naar verwachting zal de Commissie in de zomer van 2026 een herzieningsvoorstel van de Eurojust-Verordening met een aangepast mandaat voor Eurojust publiceren.

Nederland verwelkomt de evaluatie en onderschrijft het belang van een sterk en toekomstbestendig Eurojust. Nederland meent dat met name de governance-structuur van Eurojust versterking behoeft en heeft de Commissie opgeroepen de voor- en nadelen van de verschillende opties om dat doel te bereiken in kaart te brengen, voorafgaand aan de publicatie van een voorstel tot wijziging van de Eurojust-Verordening. De onafhankelijkheid van Eurojust in relatie tot individuele strafzaken moet daarbij uiteraard gewaarborgd blijven.

4. Toegang tot gegevens voor effectieve strafrechtelijke onderzoeken

Stand van zaken

Op 24 juni jl. heeft de Commissie de mededeling '*Roadmap for lawful and effective access to data for law enforcement*' gepubliceerd. Uw Kamer is hierover middels een BNC-fiche geïnformeerd.¹ Deze routekaart volgt op de oproep van de JBZ-Raad in december 2024 om in het tweede kwartaal van 2025 met een routekaart te komen in navolging van de aanbevelingen van de *High Level Group on Access to Data* (HLG).² In november 2024 heeft de HLG een eindrapport gepresenteerd waarin aanbevelingen zijn opgenomen met betrekking tot knelpunten in de toegang tot data voor opsporing. Daarin staan mogelijke oplossingen op drie deelonderwerpen: digitale opsporing, data retentie en toegang tot data.

De routekaart schetst de belangrijkste uitdagingen en vervolgstappen om toegang tot data te verbeteren, met oog voor fundamentele rechten en technologische ontwikkelingen. Het kabinet verwelkomt de routekaart en ondersteunt het doel en de algemene strekking van de stappen die de Commissie zal ondernemen. Hierbij is het van belang gedegen, prudente en concrete stappen te nemen. Het kabinet zal daarbij in Europa blijven uitdragen dat end-to-end encryptie niet onmogelijk mag worden gemaakt³ en het kabinetsstandpunt in acht nemen.⁴

De precieze focus die het Voorzitterschap voor ogen heeft is op moment van schrijven nog niet bekend. Naar verwachting zal er door de Commissie een toelichting worden gegeven op de huidige stand van zaken betreffende de routekaart. In de routekaart kondigt de Commissie aan te werken aan een technologische routekaart, het creëren van een gelijk speelveld tussen telecom- en communicatiediensten, en een meer gecoördineerde EU-aanpak voor digitale forensische toepassingen.

Op het gebied van dataretentie acht het kabinet geharmoniseerde dataretentieregelgeving noodzakelijk, gelet op de sterk uiteenlopende wetgeving in de lidstaten, om de door de Commissie en HLG genoemde rechtsongelijkheid die is ontstaan in het beschermingsniveau van EU-burgers en bedrijven aan te pakken en de retentie van gegevens ten behoeve van de strafrechtspleging onder strenge voorwaarden mogelijk te maken. Uiteraard zal, in lijn met de daartoe strekkende HLG-aanbevelingen, eventuele dataretentiewetgeving in lijn moeten zijn met grondrechten en de jurisprudentie van het Europees Hof van Justitie.

¹ Kamerstukken II 2024-2025, 22112, nr. 4116.

² Raadsconclusies d.d. 12 december 2024 (no. 16448/24) *Council conclusions on access to data for effective law enforcement*.

³ Kamerstukken II 2021-2022, 26643, nr. 885; Kamerstukken II 2022-2023, 26643, nr. 908.

⁴ Kamerstukken II 2015-2016, 26643, nr. 383.

Nederland zal de informatievoorziening tijdens de JBZ-Raad aanhoren.

5. Overige onderwerpen

a. Jaarlijks voortgangsverslag over handhaving en implementatie

Informatie van de Commissie

De Commissie zal het jaarlijkse voortgangsrapport over handhaving en implementatie van EU-wetgeving en -beleid presenteren aan de JBZ-Raad, zoals aangekondigd in het Commissie-werkprogramma 2025. Het verslag is bedoeld om gemeenschappelijk eigenaarschap van de instellingen te bevorderen en inzicht te geven in naleving, knelpunten en verbeterpunten. Het geagendeerde voortgangsrapport is nog niet verspreid.

Nederland zal de informatie aanhoren.

II. Binnenlandse Zaken

1. Verordening tot vaststelling van een gemeenschappelijk systeem voor de terugkeer van onderdanen van derde landen die illegaal in de EU verblijven

Beleidsdebat

Op 11 maart jl. heeft de Commissie een voorstel gedaan voor een Terugkeerverordening, die de huidige Terugkeerrichtlijn en gerelateerde EU-wetgeving moet vervangen. Sinds de publicatie van het voorstel is in de Raad regelmatig van gedachten gewisseld over het voorstel. Het Deense voorzitterschap heeft de ambitie uitgesproken om voor het einde van dit kalenderjaar een onderhandelingsmandaat te bereiken in de Raad. De verwachting is dat het Voorzitterschap tijdens de komende JBZ-Raad op hoofdlijnen overeenstemming wil bereiken in de Raad over een aantal onderdelen van het voorstel. Op moment van schrijven is nog niet bekend welke onderdelen van het voorstel het Voorzitterschap uit wil lichten tijdens de Raad.

Het kabinet ondersteunt de ambitie van het Deense voorzitterschap om voor het einde van dit kalenderjaar tot een onderhandelingsmandaat te komen in de Raad. Het voornemen van het Voorzitterschap om op de komende JBZ-Raad reeds een debat te voeren over een aantal onderdelen van het voorstel kan op steun van het kabinet rekenen. De onderhandelingen in de Raad zijn in volle gang en bespreking op ministerieel niveau om sturing te vragen komt op een gelegen moment. Voor het kabinet is van belang dat een nieuw juridisch kader in de EU de uitvoering van het terugkeerproces vereenvoudigt en versnelt en daarmee het aandeel vertrekplichtige vreemdelingen dat daadwerkelijk het grondgebied van de lidstaten verlaat vergroot. Daarbij zal het kabinet langs de lijnen van het BNC-fiche ingaan op de onderdelen van het voorstel die dat versterken en waar nog risico's worden gezien.⁵ Andere lidstaten zullen naar verwachting de bespreking van de onderhandelingen over het voorstel verwelkomen en daarbij hun prioriteiten naar voren brengen. Een aantal lidstaten zal erop wijzen dat snelle voortgang van de onderhandelingen niet ten koste mag gaan van de kwaliteit van de wetgeving.

2. Algemene toestand van het Schengengebied

a. Schengen barometer

b. Toekomst van Frontex

Gedachtewisseling

⁵ Tweede Kamer, vergaderjaar 2024-2025, 22112, nr. 4031.

In de Schengenraad zullen de lidstaten op basis van de nieuwste Schengenbarometer en een discussienotitie van het Voorzitterschap van gedachten wisselen over de algemene staat van het Schengengebied. Deze bespreking is onderdeel van de jaarlijkse Schengencyclus. De Schengenbarometer, opgesteld door de Commissie brengt op alle onderdelen van het Schengenacquis de meest in het oog springende ontwikkelingen, trends en risico's in kaart. De Commissie geeft onder andere aan dat er sprake is van een afname van het aantal irreguliere (buiten)grensoverschrijdingen met een daling van 18% t.a.v. 2024. Ook is er sprake van een daling van het aantal secundaire migratiebewegingen. Aan de buitengrenzen is er een positieve trend met betrekking tot het versterken van het buitengrensbeheer en het aanpakken van tekortkomingen en kwetsbaarheden in het grensbeheer. Tegelijkertijd zijn hiermee volgens de Commissie nog niet alle kwetsbaarheden aangepakt en zijn er extra investeringen nodig om deze tekortkomingen aan te pakken. Verder legt de Commissie in de barometer nadruk op het belang van crisis- en noodplannen, zowel op het gebied van aanpak hybride dreigingen als ten aanzien van buitengrensbeheer en bevorderen van terugkeer. Het kabinet heeft met interesse kennisgenomen van de nieuwste Schengenbarometer. Het maakt goed inzichtelijk wat de laatste trends, ontwikkelingen en risico's zijn.

Daarnaast zal de Schengenraad van gedachten wisselen over de toekomst van Europese Grens- en Kustwachtagentschap, Frontex met het oog op de door de Commissie aangekondigde herziening van de Europese Grens- en Kustwachtverordening. Op het moment van schrijven zijn hiervoor nog geen stukken beschikbaar. Naar verwachting zal er een reflectie worden gevraagd op de doorontwikkeling van Frontex, zowel met betrekking tot de uitbreiding van het permanent korps, de taken van het agentschap, waaronder buitengrensbeheer en terugkeer en de mogelijkheid tot uitbreiding van het mandaat van het agentschap, bijvoorbeeld op het gebied van visumbeleid, inzet van Frontex binnen het Schengengebied en de inzet van Frontex in derde landen. Het kabinet is van mening dat de uitbreiding van Frontex doelmatig moet zijn en het daarom van belang is dat er gekeken wordt waar een aanpassing van de Verordening, het mandaat van Frontex en de uitbreiding van het permanent korps een duidelijke meerwaarde bieden. Het kabinet verwelkomt dat de Commissie een uitgebreide impact assessment uitvoert. Het kabinet ziet buitengrensbeheer en terugkeer als de kerntaken van het agentschap en verwelkomt de versterking van deze pijlers, met name ook waar het aankomt op de inzet van Frontex in derde landen. Hier pleit het kabinet specifiek voor een uitbreiding van het mandaat van Frontex met meer flexibiliteit voor de inzet in derde landen, waardoor bijvoorbeeld ook ondersteuning bij terugkeer van derde land naar derde land mogelijk wordt gemaakt. Daarnaast is het voor Nederland van belang dat informatie-uitwisseling tussen de Europese agentschappen en lidstaten verbeterd wordt, zodat secundaire migratiebewegingen en georganiseerde criminaliteit beter in kaart kunnen worden gebracht. Andere lidstaten zullen de Barometer eveneens verwelkomen. Verwachting is dat de bespreking in de Schengenraad zich met name zal richten op de toekomst van Frontex. Naar verwachting zal er onder lidstaten brede steun zijn voor een doelmatige aanpak van de herziening van de Verordening en de inzet van Frontex in derde landen.

3. Implementatie van interoperabiliteit

Stand van zaken

In maart 2025 heeft de JBZ-Raad een herziene tijdlijn voor de tenuitvoerlegging van grootschalige IT-systemen en hun interoperabiliteit aangenomen.⁶ Naar verwachting zal de Commissie een update geven over de implementatie van deze systemen. Het Entry/Exit System (EES) zal 12 oktober 2025 gefaseerd van start gaan. Voorafgaand aan de vorige formele JBZ-Raad van 12-13 juni jl. heeft Nederland de verklaring van gereedheid bij de Commissie ingediend.

⁶ Zie Verslag van de JBZ-Raad van 5 en 7 maart 2025, Kamerstukken II 2024-25, 32317, nr. 935.

In aanvulling op de verklaring van gereedheid, heeft Nederland ook het nationale uitrolplan ingediend bij de Commissie. In dit uitrolplan, een verplichting uit de Verordening waaraan alle lidstaten moeten voldoen, geven de lidstaten aan hoe zij het EES op de verschillende grensdoorlaatposten zullen implementeren. Nederland start vanaf 12 oktober op twee grensdoorlaatposten (Eemshaven en IJmuiden/Amsterdam-Haven) en zal vervolgens opschalen en op zoveel mogelijk doorlaatposten starten om de mijlpalen uit de Verordening te halen.

Het *European Travel Information and Authorisation System* (ETIAS) staat gepland om van start te gaan in het vierde kwartaal van 2026. Verder is de implementatie van het vernieuwde Eurodac-systeem (*European Dactyloscopy*, de EU vingerafdrukdatabank) voorzien in juni 2026.

De verwachting is dat de Commissie en EU-LISA tijdens de JBZ-Raad aandacht zullen besteden aan de start van het EES in het weekend voorafgaand aan de Raad. Nederland zal dit aanhoren.

4. Europese Verordening ter voorkoming en bestrijding van seksueel misbruik van kinderen

Gedeeltelijke algemene oriëntatie

Het Deense voorzitterschap is voornemens een gedeeltelijke algemene oriëntatie ten aanzien van de Europese Verordening ter voorkoming en bestrijding van seksueel misbruik van kinderen (CSAM-Verordening) te agenderen. Het gaat om een gedeeltelijke algemene oriëntatie, zonder de bepalingen over het op te richten EU-centrum voor tegengaan kindermisbruik. Het Deense compromisvoorstel dat naar verwachting voorligt, bevat de mogelijkheid om onder voorwaarden de detectie van bekend en nieuw kinderpornografisch materiaal te verplichten. De positie en onderhandelingskaders van Nederland ten aanzien van dit voorstel zijn vastgelegd in de brief aan uw Kamer van 29 november 2024.⁷

Het Deense compromisvoorstel, met bovengenoemde elementen, past niet binnen deze onderhandelingskaders. Op basis van het huidige compromisvoorstel zal Nederland zich daarom desgevraagd aansluiten bij de lidstaten die de algemene oriëntatie niet kunnen steunen.⁸

5. Verordening betreffende de versterking van de politieke samenwerking bij de bestrijding van migrantensmokkel en mensenhandel

Politiek akkoord

Dit voorstel betreft de versterking van de politieke samenwerking met het oog op het voorkomen, opsporen en onderzoeken van migrantensmokkel en mensenhandel, en betreffende de versterking van de ondersteuning door Europol voor de voorkoming en bestrijding van die strafbare feiten. Het voorstel bevat bepalingen om de beheersstructuur inzake smokkel en de rol van EU-agentschappen, met name Europol, te versterken en de samenwerking tussen agentschappen op het gebied van justitie en binnenlandse zaken en de lidstaten, en met partnerlanden te intensiveren.

Uw Kamer is hierover met het BNC-fiche geïnformeerd.⁹ Op 19 juni 2024 is een algemene oriëntatie bereikt tijdens het Comité van Permanente vertegenwoordigers (COREPER). Momenteel worden de onderhandelingen in de triloog-fase gevoerd. Het Deense voorzitterschap is voornemens dit af te ronden om tot een politiek akkoord tijdens de JBZ-Raad te komen.

Het kabinet steunt de afronding van de onderhandeling in triloog. Het kabinet heeft geen bezwaar tegen de technische aanpassingen die in het voorstel zijn gedaan. Op maandag 22

⁷ Kamerstukken II, 2024-25, 32 317, nr. 906

⁸ U Kamer is apart geïnformeerd over de ontwikkelingen rondom de CSAM-Verordening.

⁹ BNC-fiche Verordening politieversterking inzake mensensmokkel en mensenhandel, 22112-3885, 9 februari 2024.

september vindt de volgende technische triloog plaats, gevolgd door de (mogelijk laatste) politieke triloog op 25 september. Tijdens de JBZ-Raad van 14 oktober is geen inhoudelijke discussie voorzien, maar hoopt het Voorzitterschap een politiek akkoord te kunnen vaststellen, dat Nederland naar verwachting zal kunnen steunen.

6. Uniemechanisme voor Civiele Bescherming en Gezondheidsnoodhulp

Beleidsdebat

Het Uniemechanisme voor Civiele Bescherming (UCPM) is een Europees samenwerkingskader op basis van solidariteit waarbij EU-lidstaten en enkele partnerlanden elkaar helpen bij rampen en crises, waaronder bosbranden, overstromingen en aardbevingen. Indien een getroffen land niet genoeg middelen heeft om de crisissituatie te bestrijden, kan het land via het UCPM om hulp vragen. Op basis van de hulpvraag coördineert de EU vervolgens de inzet van personeel, materieel of voorraden vanuit de capaciteit van andere landen.

Op 17 juli jl. heeft de Commissie een voorstel voor een Verordening over het UCPM gepubliceerd. Uw Kamer is hierover middels een BNC-fiche geïnformeerd.¹⁰ Met het voorstel beoogt de Commissie het UCPM te versterken om beter voorbereid te zijn op rampen, zodat sneller en efficiënter hulp geboden kan worden bij grote of meerdere crises tegelijk. Het voorstel verbreedt daarbij het kader van het UCPM door grensoverschrijdende gezondheidsbedreigingen, zoals pandemieën, daarin te integreren. Daarnaast is het doel een basis te creëren om civiel-militaire samenwerking mogelijk te maken.

Het Voorzitterschap heeft nog geen achtergronddocument gedeeld, waardoor de insteek van het beleidsdebat nog niet bekend is. De ambitie tot versterking van het UCPM sluit aan bij de inzet van het kabinet op nationaal, Europees en internationaal niveau. Het voorstel sluit aan bij de kabinetsdoelstelling om de nationale en Europese weerbaarheid te versterken. Het kabinet staat positief tegenover de voorgestelde versterking van de gezondheidscrisisparaatheid binnen het Uniemechanisme, met name op operationeel niveau. Nederland draagt zelf ook actief bij aan het UCPM, zodat als Nederland zelf ooit een beroep moet doen op het Uniemechanisme, Nederland kan rekenen op voldoende steun van andere landen.

7. Externe dimensie van migratie

Gedachtewisseling

Het Deense voorzitterschap heeft aangegeven belang te hechten aan een ambitieuze inzet op de externe dimensie van migratie, onder andere waar het gaat om het verder brengen van innovatieve oplossingen en het adresseren van grote uitdagingen, waaronder de instabiliteit in delen van de wereld, die op haar beurt invloed kan hebben op migratiebewegingen richting de Europese Unie. Naar verwachting zal het Voorzitterschap lidstaten vragen te reflecteren op de prioriteiten van de lidstaten op de externe dimensie van migratie en op de inzet op migratie met betrekking tot Syrië.

Het kabinet roept de Commissie op de ambitieuze inzet ten aanzien van opvang in de regio en gelijkwaardige en duurzame partnerschappen met migratie-relevante derde landen voort te zetten, om irreguliere migratie tegen te gaan, terugkeer te bevorderen en bescherming en opvang van migranten te versterken. Eveneens moedigt het kabinet het verder uitwerken van innovatieve oplossingen aan en neemt hierin tevens een voortrekkersrol in. Wat betreft Syrië benadrukt het kabinet dat grip op migratie inclusief de terugkeer van Syriërs en het tegengaan van irreguliere migratie van groot belang is voor Nederland. De Commissie heeft volgens het kabinet een rol in de coördinatie om te zorgen dat de inzet van lidstaten effectief is om terugkeer naar Syrië te bevorderen en het opbouwen van de migratieketen inclusief

¹⁰ BNC-fiche Verordening betreffende het Uniemechanisme en de financiering van de paraatheid en respons bij noodsituaties op gezondheidsgebied, 22112-4156, 12 september 2025.

grensmanagement te ondersteunen. Ook de inzet op de samenwerking met landen in de regio om Syriërs op te blijven vangen is hier een onderdeel van. Het kabinet roept de Commissie daarom op om gezamenlijk met de Syrische autoriteiten en landen in de regio te komen tot een strategie op migratie. Andere lidstaten zullen naar verwachting een breed scala van onderwerpen inbrengen en ook oproepen tot betere coördinatie.

8. Toegang tot gegevens voor effectieve wetshandhaving

Stand van zaken

Op 24 juni jl. heeft de Commissie de mededeling '*Roadmap for lawful and effective access to data for law enforcement*' gepubliceerd. Uw Kamer is hierover middels een BNC-fiche geïnformeerd.¹¹ Deze routekaart volgt op de oproep van de JBZ-Raad in december 2024 om in het tweede kwartaal van 2025 met een routekaart te komen in navolging van de aanbevelingen van de *High Level Group on Access to Data* (HLG).¹² In november 2024 heeft de HLG een eindrapport gepresenteerd waarin aanbevelingen zijn opgenomen met betrekking tot knelpunten in de toegang tot data voor opsporing. Daarin staan mogelijke oplossingen op drie deelonderwerpen: digitale opsporing, data retentie en toegang tot data.

De routekaart schetst de belangrijkste uitdagingen en vervolgstappen om toegang tot data te verbeteren, met oog voor fundamentele rechten en technologische ontwikkelingen. Het kabinet verwelkomt de routekaart en ondersteunt het doel en de algemene strekking van de stappen die de Commissie zal ondernemen. Hierbij is het van belang gedegen, prudente en concrete stappen te nemen. Het kabinet zal daarbij in Europa blijven uitdragen dat end-to-end encryptie niet onmogelijk mag worden gemaakt¹³ en het kabinetsstandpunt in acht nemen.¹⁴

De precieze focus die het Voorzitterschap voor ogen heeft is op moment van schrijven nog niet bekend. Naar verwachting zal er door de Commissie een toelichting worden gegeven op de huidige stand van zaken betreffende de routekaart. In de routekaart kondigt de Commissie aan te werken aan een technologische routekaart, het creëren van een gelijk speelveld tussen telecom- en communicatiediensten, en een meer gecoördineerde EU-aanpak voor digitale forensische toepassingen.

Nederland zal de informatievoorziening tijdens de JBZ-Raad aanhoren.

9. De impact van de huidige geopolitieke situatie op de interne veiligheid van de EU

Gedachtewisseling

Op dit moment zijn er nog geen achtergrondstukken beschikbaar. De verwachting is dat de Raad van gedachten zal wisselen over de gevolgen van de geopolitieke ontwikkelingen voor de interne veiligheid van de EU, waaronder de Russische agressie tegen Oekraïne en de schending van het luchtruim van EU lidstaten. Deze ontwikkeling is onderdeel van de toename van destabiliserende acties gericht op Europese lidstaten en laat zien dat de oorlog in Oekraïne op middellange en lange termijn risico's met zich meebrengt voor de veiligheid van de EU.

Mogelijk wordt er nog stilgestaan bij de parlementaire verkiezingen in Moldavië die op 28 september a.s. worden gehouden en waarbij het de verwachting is van de Commissie dat er sprake zal zijn van sterke Russische inmenging en beïnvloeding.

¹¹ Kamerstukken II 2024-2025, 22112, nr. 4116.

¹² Raadsconclusies d.d. 12 december 2024 (no. 16448/24) *Council conclusions on access to data for effective law enforcement*.

¹³ Kamerstukken II 2021-2022, 26643, nr. 885; Kamerstukken II 2022-2023, 26643, nr. 908.

¹⁴ Kamerstukken II 2015-2016, 26643, nr. 383.

Het kabinet blijft inzetten op de versterking van de civiele weerbaarheid en doet dit zowel op nationaal niveau als in Europees en NAVO verband. Daarnaast acht het kabinet het van groot belang de gestructureerde EU-veiligheidsdialoog met Oekraïne voort te zetten en deelt het de focus op de vier prioritaire onderwerpen van die dialoog: de verspreiding van illegale wapens, grensveiligheid, extremisme en terrorisme, en de gerechtigheid en verantwoording voor internationale misdrijven.

10. Overige onderwerpen

a. Jaarlijks voortgangsverslag over handhaving en uitvoering

Informatie van de Commissie

De Commissie zal het jaarlijkse voortgangsrapport over handhaving en uitvoering van EU-wetgeving en beleid presenteren aan de JBZ-Raad, zoals aangekondigd in het Commissiewerkprogramma 2025. Naar verwachting zal de Commissie een update geven van de stand van zaken rond de implementatie van het Asiel- en Migratiepact met een eerste doorkijk naar het Europees jaarverslag dat op 15 oktober aanstaande gepubliceerd zal worden. Het jaarverslag is een juridische verplichting die volgt uit de Asiel- en Migratiemanagementverordening (art. 9, AMMR), waarin de Commissie jaarlijks de situatie op het gebied van asiel, opvang en migratie in de voorgaande twaalf maanden en eventuele ontwikkelingen beoordeelt. De informatie uit het jaarverslag wordt bovendien meegewogen in de vaststelling van lidstaten die onder migratiedruk staan, hetgeen een belangrijke factor is voor de verdeling onder het solidariteitsmechanisme.

Voor het kabinet blijft het van belang dat de voortgang van de implementatie van het Pact regelmatig en ook op politiek niveau wordt besproken, zodat vertragingen en knelpunten in de implementatie tijdig geadresseerd kunnen worden. Daarnaast blijft het kabinet zich er in samenwerking met gelijkgezinde lidstaten voor inzetten dat ook het huidige acquis uitgevoerd wordt, in het bijzonder de verplichtingen in het kader van Dublin.

b. Jaarlijkse solidariteitspool

Informatie van het Voorzitterschap en de Commissie

De verwachting is dat het Voorzitterschap en de Commissie meer informatie zullen delen over het proces rondom de totstandkoming van de solidariteitspool en de daarbij behorende solidariteitsbijdrage van de lidstaten. De kabinetsinzet is erop gericht dat de solidariteitspool berust op een objectieve analyse, waarbij de hoogte van de pool realistisch is en niet extra druk legt op lidstaten. Daarnaast is de werking van Dublin voor het kabinet een belangrijke voorwaarde voor het ontvangen van solidariteit om de delicate balans tussen verantwoordelijkheid en solidariteit in het Pact te waarborgen. Het kabinet is met gelijkgezinde lidstaten en de Commissie in gesprek om tot een duidelijk plan van aanpak te komen voor het hervatten van Dublinoverdrachten naar verscheidene lidstaten. Het kabinet zal conform het regeerprogramma financieel bijdragen aan het solidariteitsmechanisme.



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ANNEX 2

ANNEX

to the

Commission Implementing Decision

**establishing the 2024 thematic Schengen evaluation report 'Bridging national gaps:
towards an effective EU return system through common solutions and innovative
practices'**

EVALUATION REPORT OF THE 2024 THEMATIC SCHENGEN EVALUATION ‘BRIDGING NATIONAL GAPS: TOWARDS AN EFFECTIVE EU RETURN SYSTEM THROUGH COMMON SOLUTIONS AND INNOVATIVE PRACTICES’

Executive summary

Hundreds of millions of people enter the Schengen area every year, making it the most visited destination in the world. Although the vast majority of third-country nationals arrive to the Schengen area in an authorised manner, irregular migration continues to be a challenge, with significant impact on Member States’ migration and security systems. This is why a well-functioning return system is crucial for effective migration management and security, safeguarding a well-functioning Schengen area of freedom, security and justice without internal frontiers.

The European Council conclusions of October 2024 recall the importance of a comprehensive approach to migration to best address the current challenges, and call for determined action at all levels to facilitate, increase and speed up returns, using all relevant EU policies, instruments and tools, including diplomacy, development, trade and visas.

It is therefore crucial that all necessary measures are taken to enforce return decisions issued by Member States and Schengen Associated Countries, while respecting fundamental rights safeguards in line with the EU Charter of Fundamental Rights and EU migration and asylum law. In this context, this report identifies a number of key challenges and best practices under the current return systems in the EU. It addresses key common obstacles that Member States and Schengen Associated Countries face in taking all necessary measures to enforce return decisions. These often stem from the complexity of the process of returning third-country nationals with no legal right to stay, where a high number of actors, authorities and stakeholders are involved.

The report is structured in three main chapters: (1) a well-functioning Schengen system requires effective returns, (2) ensuring effectiveness at key stages of the return process between national authorities and (3) maximising national efficiency through stronger European cooperation. These chapters take into consideration the need for effective planning, including for adequate capabilities, and effective coordination both at national and EU level. They also look at streamlined procedures to enhance effectiveness and coordination throughout key stages of the return process, including through the use of technology. Where relevant, the report includes descriptions of best practices observed in some Member States that can help address the key challenges identified in other Member States.

The thematic Schengen evaluation report emphasises the importance of return as a key part of the national strategies for European Integrated Border Management. To achieve this, effective interagency cooperation at national level is crucial, and enhanced information exchange is necessary for efficient and informed decision-making. This can be facilitated through the Schengen Information System and other large-scale EU information systems.

The thematic evaluation reveals that a well-functioning return system relies on ensuring a clear link between the initiation of the return process and different procedures relating to the end of legal stay. This allows issuing return decisions to illegally staying third-country nationals without delay, including the possibility to do this within a single decision. Additionally, effective remedy mechanisms must be in place to safeguard the fundamental rights of these individuals. The Schengen *acquis* on return gives Member States a margin for establishing

effective operational procedures and modalities that respect fundamental rights.

The evaluation also confirmed that the identification of third-country nationals is also a critical step for the effective implementation of the return procedure, including through the best use of available information at national and EU level. Effective identification can include measures to encourage third-country nationals to cooperate to facilitate the process, including through the use of incentives, or disincentives.

At the same time, a credible return system should prioritise dignified and sustainable voluntary return, supported by effective return counselling and reintegration assistance. Another important element of a credible return system is the effective monitoring of those ordered to leave to ensure that they comply with their return obligations in order to prevent absconding and secondary movements. This is facilitated through the functionalities of the Schengen Information System introduced in March 2023, but should be complemented with effective measures at national level. Furthermore, cooperation between authorities at national and EU levels is essential for prioritising the returns of third-country nationals posing a security threat.

The thematic evaluation paid particular attention to the contribution of the upgraded Schengen Information System (return alerts) to improving various aspects of return procedures, including the sharing of biometric data and the exchange of supplementary information. The Schengen Information System has also facilitated the possibility for Member States to mutually recognise return decisions issued by other Member States to increase the efficiency of returns. Finally, making best use of technical and operational support available through Frontex to complement the national return systems leads to gains in efficiency and resources.

The report concludes that, to maximise the impact of the Schengen system and existing European tools, Member States and Schengen Associated Countries must adopt additional measures and practices.

The outcomes of this evaluation report will contribute to and complement relevant policy and operational initiatives, ultimately supporting the development of a more effective common EU return system.

The thematic Schengen Evaluation – towards an effective EU return system

The process of returning third-country nationals with no legal right to stay in the Schengen area is complex, sensitive and involves a high number of actors, authorities and stakeholders. Although significant efforts with concrete results have been made over the last years to build a well-functioning EU return system, there is still a fragmented approach undermining the full extent of EU potential. In October 2023, the Schengen Council urged to look into operational solutions that enhance the effective and swift return of third-country nationals with no right to stay, in particular those who are considered a security threat. It called for urgent European solutions with common tools and increased coordination.

Against this background, the 2024 thematic Schengen Evaluation¹ towards an effective EU return system was considered a key initiative to achieve this objective. In accordance with Article 4(4) of the Schengen Evaluation Regulation, this thematic evaluation had a twofold objective: on the one hand, to identify the key common obstacles limiting authorities' ability to carry out the return of third-country nationals without a legal right to stay and, on the other hand, to build on common issues where common EU solutions and innovative practices would bring

¹ Commission Implementing Decision C(2023) 5300.

added value. The main goal is to reinforce the capacity of Member States and Schengen Associated Countries (collectively referred to as ‘Member States’ for the purpose of this report) in fulfilling their legal obligations with regard to those with no legal right to stay, taking into account that return is an essential tool to ensure the effectiveness and credibility of EU migration management, including by limiting secondary movements and addressing some key threats for the internal security of the Schengen area.

In line with these objectives, the thematic evaluation analysed the main bottlenecks and possible solutions in the national return systems, focusing on the **key stages of the return process**:

- Initiation of the return process.
- Identification of third-country nationals.
- National and European interagency cooperation.
- Voluntary return and enforcement of returns.

Considering that the effective return of third-country nationals with no right to stay in the EU requires planning, including for the development of adequate capabilities, and efficient coordination as an essential element of a well-functioning Schengen area, the thematic evaluation paid particular attention to **strategic and horizontal processes**, in view of ensuring an EU coordinated approach to returns.

In line with the 2024 Annual Programme for Schengen evaluations, an evaluation team was established by the Commission in December 2023, composed of 15 Member State experts, 2 Commission experts, as well as observers from the European Union Agency for Fundamental Rights and the European Border and Coast Guard Agency (Frontex). The evaluation team developed a dedicated questionnaire, which was shared with all Member States and Schengen Associated countries that fully implement the Schengen *acquis*, to identify similar challenges and best practices at national and EU level with the above-mentioned key stages of return, that could contribute to a well-functioning Schengen area. The evaluation team also looked at the past periodic Schengen evaluation reports to identify common challenges or best practices which fall under the scope of the thematic evaluation. Similarly, the evaluation team considered European Migration Network queries of relevance². Furthermore, five focus group discussions were held between the evaluation team and Frontex to further understand from the EU Agency’s perspective where key challenges may lie and where good practices have been observed.

Based on the answers to the questionnaire that the evaluation team received at the end of June 2024, three Member States (Italy, Norway and the Netherlands) were identified for visits during September-October 2024, taking into account practices that due to their nature cannot be effectively assessed remotely, as well as considering the need to avoid an additional burden on those Member States recently having been evaluated and those subject to periodic evaluations in 2024-2025, while ensuring a balanced and representative approach. Furthermore, videoconferences were carried out on specific topics to seek further information and clarifications with Austria and Denmark.

Best practices

Throughout the report, the evaluation team refers to best practices observed in Member States, either through the answers provided to the questionnaire, or through the visits and

² Ad-Hoc Query on 2024.10 Link between of asylum and return procedures and last-minute asylum applications (LMAs) and Ad-Hoc Query on 2024.51 Conditions and Practice of Mutual Recognition of return decisions in EU Member States.

videoconferences that were carried out³. This does not preclude that similar or other best practices do not also exist in other Member States. The aim is to provide Member States' authorities with additional tools when implementing the Schengen rules. Against this background, Member States are encouraged to assess the added value and feasibility of these best practices when developing remedial measures so as to build on proven approaches and techniques.

These best practices can be summarised as follows:

I. A WELL-FUNCTIONING SCHENGEN SYSTEM REQUIRES EFFECTIVE RETURNS

Return as a key part of Schengen governance

1. In line with the return component of the national European Integrated Border Management Strategy, adoption of a national return strategy that fosters coordination, collaboration, and a shared vision among key stakeholders, including the setting of periodic targets to ensure a coherent and holistic approach to shared common objectives.
2. Establishment of effective cooperation between different actors at strategic, operational, tactical, and international levels, supported by IT systems to enhance efficiency and to facilitate information exchange. Building on existing migration forecast products to further estimate the return caseload for the coming one to one and a half years.
3. Strategic processes on return build on existing migration forecast products that allow planning considering the estimated return caseload for the coming one to one and a half years.
4. Implementation of a resource allocation monitoring system to effectively plan the use of resources for the estimated return caseload, ensuring optimal resource utilisation.
5. Oversight of policy and performance through periodic planning and control cycles, allowing for adjustments to objectives as necessary to ensure effective return management.
6. Utilisation of the national IT case management system for statistical monitoring of return caseload, enabling data-driven decision-making and performance evaluation.

II. ENSURING EFFECTIVENESS AT KEY STAGES OF THE RETURN PROCESS BETWEEN NATIONAL AUTHORITIES

Effectively initiating and managing return procedures

7. Streamlined legal framework enabling the issuance of return decisions and decisions ending legal stay in a single administrative act or simultaneously, simplifying procedures for national authorities and third-country nationals.
8. Establishment of commonly agreed deadlines between return authorities and appeal bodies, ensuring prompt and predictable decision-making for both third-country nationals and national authorities, while facilitating effective case management and guaranteeing effective access to remedy.

³ These are practices considered by the Evaluation Team as improving the effectiveness of the EU return system. These have not undergone a compliance check with EU law, since Member States and Schengen Associated Countries remain fully responsible for ensuring compliance with the applicable rules.

9. Implementation of an efficient national procedure to deal with last-minute asylum applications that do not bring new facts or circumstances, lodged to hinder forced return, balancing the need for swift processing with the upholding of returnees' fundamental rights and in particular the respect of the non-refoulement principle (e.g. through a specialised unit or on-call duty within the immigration service).
10. Provision of specialised training for staff handling last-minute asylum applications that do not bring new fact or circumstances, lodged to hinder forced return, including those within appeal authorities, to ensure they are equipped to analyse complex cases while ensuring full respect of returnees' fundamental rights.

Digital Return Case Management System to ensure coordination between authorities (including large-scale IT systems)

11. Development of a national IT return case management system with automated interconnections to other national systems and relevant EU large-scale IT systems, facilitating data exchange and streamlined case management.
12. Conclusion of information-sharing agreements to enable real-time data exchange between relevant authorities in line with their legal mandates, ensuring a holistic and coordinated approach to return procedures and supporting the effective implementation of national return strategies.
13. Utilisation of automated translation tools to efficiently translate return-related decisions for third-country nationals, enhancing clarity and facilitating understanding.
14. Integration of EU-level tools, including the Frontex return platform operational module IRMA-FAR, into national procedures through the national IT case management system, simplifying requests for EU-level support and enhancing cooperation.

Identification procedures, including through the use of large-scale IT systems supporting the application of the Schengen *acquis*

15. Implementation of a balanced approach combining positive and negative incentives to guide the identification process and the return procedure, tailored to the level of cooperation exhibited by the third-country national, to encourage voluntary compliance and efficient return procedures.
16. Provision of tailored training for staff to account for individual case needs to handle complex and sensitive identification procedures, including through the involvement of return counsellors or psychologists as required.
17. Utilisation of all relevant national databases and biometric identifiers to verify identities and supplement with other national databases (e.g. visa, asylum, police) as needed.
18. Leveraging available EU databases (e.g. SIS, VIS, Eurodac) and international partners (e.g. Interpol) to supplement national databases and facilitate identification.
19. Integration of innovative mobile solutions into return-related procedures, such as during identification, to increase efficiency and streamline processes.
20. Consideration of open-source intelligence as potential sources of information, including from social media platforms for identification purposes, while acknowledging the need for adequately trained staff and addressing data reliability.
21. Investigation of electronic devices (e.g. personal computers, smartphones, tablets) with written consent from a magistrate or the concerned person, as a means to gather information for identification purposes, where legally permissible.

22. Development of protocols between various authorities involved with relevant immigration processes of third-country nationals to create a legal and operational framework for cooperation, outlining ways of working together on identification procedures.
23. Utilisation of tools, such as through the IT return case management system, to inform stakeholders of steps taken in the identification and return process, ensuring timely and efficient information exchange.

Credible return systems: coherence between voluntary and forced returns

24. Provision of return counselling to all returnees, which is adapted to the level of cooperation of the returnee and the stage of the procedure, to promote coherence between voluntary and forced return procedures.
25. Establishing uniform quality standards for return counselling across all providers through adherence to practical guidelines or established methodologies.
26. Training specialised return counsellors to handle sensitive cases, including children, families and vulnerable groups of persons with psychological or medical issues, or a criminal background.
27. Offering degressive amounts of effective reintegration assistance to returnees once a final and enforceable removal measure has been issued, to encourage cooperation and swift return.
28. Adopting a holistic, whole-of-government approach to encourage returns of certain categories of third country nationals (e.g. when a larger caseload is pending from specific third countries), temporarily activating multiple stakeholders simultaneously to increase the overall impact of measures.
29. Implementing mandatory return counselling, to effectively guide third-country nationals through relevant procedures and to monitor returnees' level of cooperation, whereabouts and obligation to leave, and facilitate information exchange on these aspects through the national IT case management system.
30. Establishing a categorisation of third-country nationals subject to return based on their readiness to return, to enable targeted follow-up by authorities and ensure the effectiveness and sustainability of return procedures.
31. Creation of a user-friendly, semi-automated system for reporting hits from external borders on alerts on return, facilitating the deletion of these alerts or their conversion into alerts on refusal of entry following confirmed exit, enabling a 24/7 service for this purpose, and streamlining return procedures.

Prioritised return of criminals and those who pose a security threat

32. Establishing legal provisions and procedures for cooperation between relevant authorities (e.g. authorities responsible for return, penitentiary services and judiciary) to commence return preparations as early as possible for third-country nationals subject to return who are serving a prison sentence, thus contributing to the effective enforcement of the return before the prison sentence expires, avoiding the need for further administrative detention.
33. Consideration of incentives to encourage cooperation from illegally staying third-country nationals serving prison sentences, facilitating effective and sustainable return (e.g. partial reduction or suspension of prison sentence in certain cases if removal can be enforced, or provision of vocational training to aid reintegration).

34. Adoption of a multidisciplinary approach involving various authorities to rapidly identify and assess potential security threats posed by third-country nationals with no right to stay, ensuring timely intervention and action as well as the introduction of the necessary information into the Schengen Information System.
35. Prioritisation of return case management for third-country nationals with no right to stay who pose a security threat, through coordinated inter-agency efforts (e.g. inter-ministerial coordination, dedicated teams or operative groups, intensive case management, and training for concerned authorities) to ensure effective and efficient return procedures.

III. MAXIMISING NATIONAL EFFICIENCY THROUGH STRONGER EUROPEAN COOPERATION

Enhancing exchange of information for more efficient and effective decision-making

36. Establishment of a seamless interconnection between return case management systems and the Schengen Information System, enabling effective decision-making and automated exchange of critical information (e.g. biometric data, security flags, travel documents) at national and EU levels.
37. Development of semi-automated procedures for SIRENE Bureaux to share supplementary information with return authorities, enhancing the efficiency of information exchange and decision-making in return procedures.
38. Insertion of alerts on return in the Schengen Information System corresponding to return decisions issued by Member States prior to the March 2023 entry into operation of the renewed SIS, ensuring information sharing and coordination between Member States on all return decisions.

Enhancing trust towards a common European system – Mutual recognition

39. Establishment of a procedure to maximise the information contained in alerts on return included in the Schengen Information System for mutual recognition of other Member States return decisions, enhancing return efficiency by eliminating unnecessary procedures for the issuance of a separate return decision and building on the reliable nature of information contained in SIS, its availability in each national language, and the possibility to verify the identity of the addressee of the return decision through biometrics, travel document copies or other relevant information.

Operational support through Frontex

40. Adaptation of national legal framework to fully utilise Frontex support and optimise the use of available resources, enhancing the effectiveness of returns through measures, such as deploying Forced Return Escorts at the airport for the departure process, as well as facilitating land transfers where necessary.

MIRREM

Measuring Irregular Migration

www.irregularmigration.eu

GAINING ADDITIONAL VALUE FROM DIVERSITY IN PROJECT PARTNERSHIP AND STAKEHOLDER ENGAGEMENT: THE MIRREM CONCEPTUAL APPROACH

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EXECUTIVE SUMMARY

MIRreM is a Coordination and Support Action commissioned to produce a handbook on the improvement of measuring irregular migration as well as a handbook on regularisation – two hitherto loosely connected policy domains. The project consortium unites a wide range of partners from research and civil society and involves external stakeholders in a collaborative manner – each from discrete professional fields with specific expertise. The implementation of project purposes occurs in independent but nested work packages and tasks – among the analysis of political handling of irregular migration issues, the inventory and advancement of data in irregular migration and the characteristics of migrants in an irregular situation, and the design of policy options that offer a way out of an irregular situation. Obviously, the MIRreM mission is exciting and supporting policy changes in the highly contested field of irregular migration governance.

Considering the diversity of involved actors and the heterogeneity of pursued purposes, this paper formulates a common conceptual framework that serves the goal of providing an orientation to reach a shared understanding of the project mission and a common conceptual alignment. At the same time, the paper aims to sensitize for the ambiguities and the complexity the project partners have to cope with in the implementation of the project's mission. The paper identifies five key themes, relevant both for the internal communication within the consortium and for external communication with stakeholders:

- A first theme concerns the diversity of purposes, tasks and expertise. An effective way to prevent disintegration is to consciously build an epistemic entanglement between the two issues – partners with expertise on regularisation consider which numbers and statistics are required for this task while partners with expertise on estimates and measurement consider which numbers and statistics are available or can be provided.
- A second theme concerns a shared basic understanding of the importance and implications of statistical thinking in our times. The concept of statistical thinking critically reflects the pervasive importance of quantification that shape public perception and political decision making and strengthen a tendency towards a governance by numbers. Awareness of the social and political implications of statistical thinking sensitizes for the risks and chances related to aspired changes in the measuring and governance of irregular migration.
- A third theme concerns the nature of different drivers for change in public policies. MIRreM strives for changes that display distinct features. The improvement of measuring is a first-order change – a variation that occurs within a given system that remains unchanged – while regularisation as a more contested issue display features of a second-order change – a variation whose occurrence changes the system itself - that involves discontinuity and constitute a new direction. As a coordination and support action, MIRreM has to be aware of the complexity and multi-centric nature of political decision making that rarely comply with expectations of rational procedures. In particular in the case of complex issues like irregular migration, changes occur in a situation of urgency as result of non-linear and non-predictable decision making influenced by a situational availability of

possible responses. MIRreM aims to develop and make available possibilities for the improvement of measuring irregular migration and implementation of regularisation.

- A fourth theme concerns the systematic development of policy options. The approach of Critique Guided Designing provides orientation for the development of policy options in highly contested policy fields. Critique Guided Designing entails the development of first-best policy design and systematically collects and reviews reservation in order to re-design a policy option that is technically feasible, politically acceptable and ethically preferable. Consequently, Critique Guided Designing enable as second-best options the identification of incremental steps towards the realization of technically feasible, politically acceptable and ethically preferable policy designs.
- A fifth theme concerns stakeholder engagement. MIRreM aims to produce the handbooks with stakeholders in a collaborative manner. Findings from stakeholder research indicate that the identification of and communication with stakeholders is an intricate issue and imply also risks. Considering that MIRreM operates in a contested policy field, the paper proposes to complement the classic criteria of stakeholder identification – power, urgency, legitimacy – with expertise and alignment. Stakeholder engagement should be organized with a task-specific orientation that focus in a first stage on the collaborative development of tasks with well-aligned stakeholders and in a second stage on the inclusion of a broader range of stakeholders in critique-guided assessment events.

Finally, the concluding chapter provides a brief summary of the paper, identifying the availability of more and more sophisticated policy options for change in the highly contested policy field of irregular migration governance as the main asset of MIRreM.

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THE MIRREM PROJECT

MIRreM examines estimates and statistical indicators on the irregular migrant population in Europe as well as related policies, including the regularisation of migrants in irregular situations.

MIRreM analyses policies defining migrant irregularity, stakeholders' data needs and usage, and assesses existing estimates and statistical indicators on irregular migration in the countries under study and at the EU level. Using several coordinated pilots, the project develops new and innovative methods for measuring irregular migration and explores if and how these instruments can be applied in other socio-economic or institutional contexts. Based on a broad mapping of regularisation practices in the EU as well as detailed case studies, MIRreM will develop 'regularisation scenarios' to better understand conditions under which regularisation should be considered as a policy option. Together with expert groups that will be set up on irregular migration data and regularisation, respectively, the project will synthesize findings into a Handbook on data on irregular migration and a Handbook on pathways out of irregularity. The project's research covers 20 countries, including 12 EU countries and the United Kingdom.

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1. INTRODUCTION

This paper outlines the corner stones of a common communication framework for the EU sponsored research project MIrreM. The project involves a wide range of academic partners and external stakeholders from administration, policy decision-making and civil society. MIrreM pursues a broad set of purposes and objectives which will be elaborated in co-production with divergent stakeholder. The objectives encompass the elaboration of proposals for measures with relevance for an *improvement* of technical aspects (quality of measurement), political aspects (policies dealing with irregular migration), institutional relevance (institutional missions, purposes, procedures and decisions) and societal relevance (improvement of coping and solving social problems linked with and assigned to irregular migration). The simultaneous pursuance of such a wide array of tasks imply the risk of compartmentalization.

The *MIrreM Common Conceptual Framework* responds to this challenge and points to common grounds and overlapping consensus that provide orientation for the joint efforts of the MIrreM consortium. The Common Conceptual Framework explores a set of general themes relevant for internal communication among project partners and for external communication with stakeholders.

- fostering coherence through epistemic entanglement
- understanding the implications of statistical thinking
- understanding the nature of drivers for policy change
- and the orientation to critique guided designing

In practical terms, the complicated structure of the project requires a consistent framework for stakeholding. While the final explication and practical implementation of stakeholding will be elaborated in other project deliverables, this paper provides at least some indications for

- stakeholder identification
- stakeholder communication

The paper is organized in six parts: (2) chapter two emphasizes epistemological entanglement as a chance to reduce the risk of compartmentalization, (3) chapter three introduces the ongoing debates on “statistical thinking” as an overarching theoretical frame of reference, (4) chapter four introduces selected theoretical explanations of change in policy making, (5) chapter five introduces the method of critique-guided designing as an approach for the development of alternative policy designs, (6) chapter six points to techniques of stakeholder identification and stakeholder communication, and (7) chapter seven present brief concluding remarks.

2. EPISTEMIC ENTANGLEMENT

MIRreM is a project that bases on a division of labour among a comparatively large number of different types of partners each with a specific disciplinary affiliation, being responsible for the implementation of different tasks, serving different functions and pursuing different partial goals in the project context. The overall feature is a high level of diversity. In order to avoid that the project activities fall apart, centripetal arrangements should be installed which promote coherence and integration of the parts. This chapter points to shared understanding of the project mission and epistemic entanglement of project activities as factors that foster coherence.

2.1 Awareness of the MIRreM mission

The project proposal introduces as set of overarching questions describing the core interest of the research:

“How can we promote a shared understanding of key dimensions of irregular migration and how these can be measured, in order to contribute to more effective and coherent policies on irregular migration and regularisation?”

A crucial aspect affecting successful performance of the project is academic and topical coherence. The MIRreM project addresses in response to the call two distinct issues: the improvement of measuring of irregular migration and the exploration of regularisation as one policy option. MIRreM project partners are expected to produce in cooperation with stakeholders as final *output* two handbooks:

- Handbook on Measuring Irregular Migration
- Handbook on Regularisation

The handbooks shall induce as *outcome* “a shared understanding of key dimensions of irregular migration and how these can be measured”. The expected *impact* consists in “more effective and coherent policies on irregular migration and regularisation”. Since MIRreM tackles and combines two usually separately treated areas, it is necessary to clarify the relationships, links and interactions of the issues at stake.

The project description only provides implicit answers to these questions. For example, the indexical “we” seems to imply the research consortium and external stakeholders; the key dimensions seem to refer to validity and reliability of data on the one hand and the social security of migrants in an irregular situation on the other hand; and the endeavour to

contribute to more effective and coherent policies implies the aspiration to contribute to a not-yet realized state of evidence-base in the governance of irregular migration.

2.2 Coherence through epistemic entanglement

In response to the EU-call, the project pursues two distinct and at first glance only loosely coupled issues: (1) The improvement of the measurement of irregular migration and (2) the improvement of policy responses with regularisation schemes as central measure.

In order to prevent a merely juxtaposed handling, the two strands I call *measurement section* and *regularisation section* should be epistemically entangled. This means in concrete terms, that the regularisation section should consciously and systematically tackle the issue of measurement in the context of exploring, designing and implementing regularisation possibilities. Addressing a quantitative dimension implies a systematic consideration of the role of numbers and quantitative reasoning in debates on regularisation initiatives. Consequently, this analysis identifies quantitative indicators relevant in these debates, including the existing and the non-existing statistical information. This implies, for example, an enhancement of the capacity to deal with the classic argument against regularisation as a pull-factor. Other requested data may relate to information from welfare associations providing assistance for irregular migrants. Such supply-related and process-induced data is significant for an assessment of possible impacts of policy measures, both stricter enforcement and regularisation.

Notwithstanding that the issue of regularisation policies is scheduled at a later phase of the project and mainly takes place in the second half of the project, the quantitative aspects of regularisation should be considered by all partners engaged in the collection and analysis of available stock and flow data.

On the other hand, the measurement strand should systematically include the aspect of regularisation and explore as additional field of statistical improvement how the regularisation related demand and supply of statistical information can be catered and improved. Such an epistemic entanglement generates overlapping interests and fosters the coherence of the MIrreM project.

2.3 Common conceptual frameworks

Coherence can be further supported with the formulation of an overarching conceptual framework that constitutes common points of reference for the interaction and cooperation of project partners. For this purpose, the paper proposes as frame of orientation three complementing themes: the ongoing debate on the importance and implications of *statistical thinking* in our times, the ongoing debate on the nature of the causation of change in political decision making, the approach of Critique Guided Designing as a method to produce alternative policy designs which are technically feasible, politically acceptable and ethically preferable; and finally the ongoing debate on the importance and implication of stakeholder engagement in political decision making. The following chapters provide a brief introduction of the four frameworks.

3. UNDERSTANDING THE IMPLICATIONS OF STATISTICAL THINKING

Following an exchange with partners, the idea of reflexive statistical thinking was identified as a suitable conceptual bracket for the MIRreM project. The notion of statistical thinking emerged as a category of analysis in the 1980s when Theodore Porter published a path-breaking study on the rise of statistical thinking in the 19th century (Porter, 1986). In the meanwhile, the notion of statistical thinking designates a flourishing research area that gained relevance due to the increasing capacity to produce and process mass data with digital tools.

Today, as Poldrack (2023, p. 13) explains, the foundations of statistical thinking come primarily from mathematics and statistics, but also from computer science, psychology, and other fields of study. The overflowing tendency to produce and relate to statistics induced a tendency towards the quantification of the world (Mennicken & Espeland, 2019). In a forthcoming textbook, Poldrack provides as definition: “Statistical thinking is a way of understanding a complex world by describing it in relatively simple terms that nonetheless capture essential aspects of its structure or function, and that also provide us some idea of how uncertain we are about that knowledge” (Poldrack, 2023, p. 1). As Mennicken and Espeland (2019, p. 223) argue, calculation and quantification have been critical features of modern societies, closely linked to science, markets, and administration. Scholarship on quantification flourishes, but unifying accounts of quantification should be met with caution. Instead, the essential ambiguity of different quantification regimes should be appreciated.

For the purpose of this exploration, I premise that statistical thinking encompass distinct but overlapping strands. On the one hand, statistical thinking designates attitudes and practices that take the application of statistical methods and techniques as a way to provide a quantitative representation of the world. The *affirmative statistical thinking*, as I propose to call this strand, is an elementary component of public deliberation and political decision making. On the other hand, statistical thinking designates a research strand that analyses the rise, the believe in and the effects of quantification and statistics from a social and cultural science perspective. The starting point of this *critical statistical thinking* is the observation that quantification is a constitutive feature of modern science and social organization that requires critical scrutiny (Espeland & Stevens, 2008, p. 402). Finally, *reflexive statistical thinking* emphasizes that statistics are contingent artefacts with performative power. Consequently, Mennicken and Salais (2022, p. 8) argue that it is important to look at quantification as both a technology of government, that reproduces a power structure, and as a tool that can facilitate political actions towards this structure, and its change. The reflexive strand aims to generate a deeper understanding of the chances and risks affiliated with statistical thinking.

3.1 Affirmative statistical thinking

Affirmative statistical thinking believes that proper application of statistics provides the basis for evidence based policy making. As Poldrack argues, statistical thinking distinguishes from other, less reliable forms of thinking like human intuition: “However, intuition fails us because we rely upon best guesses (which psychologists refer to as heuristics) that can often go wrong. For example, humans often judge the prevalence of some event (like violent crime) using an *availability heuristic* – that is, how easily we think of an example of violent crime. For this reason, our judgements of increasing crime rates may be more reflective of increasing news coverage, in spite of actual decrease in the rate of crime. Statistical thinking provides us with the tools to more accurately understand the world and overcome the biases of human judgement” (Poldrack, 2023, p. 1)

Poldrack continues that statistics can be used for three major operations: To describe a world that is complex in a simplified way that can be understood; to make decisions based on data, usually in the face of uncertainty; and to make predictions about new situations based on the knowledge of previous situations (Poldrack, 2023, p. 3).

Affirmative statistical thinking focusses on the promised beneficial effects of quantification. A statement by the UN Expert Group on Refugee Statistics (2018) illustrates how affirmative statistical thinking conceives the merits of quantification. The expert group states that quality statistics provide the requisite evidence to support (a) better policy formulation and sound decision making, (b) more effective monitoring, evaluation and accountability of policies and programs and (c) enhanced public debate and advocacy. In addition, the expert group underlines that robust statistics correspond with the expectations and demands of users (Expert Group on Refugee and Internally Displaced Persons Statistics, 2018, p. 13).

In this line, EUROSTAT launched a “power from statistics initiative” that was jointly organized by Eurostat and the European Political Strategy Centre. The initiative aimed to determine which topics will be relevant to decision makers and citizens in the future and how official statistics could best deliver information about them. As a first step, five thematic round table events were organized. Gathering expert participants from various stakeholder groups, the round tables covered trends in migration, globalization, new economic and business models, sustainable development as well as statistics, science and society (EUROSTAT, 2018, p. 196).

The expectations linked with “good statistics” are high. Good statistics are perceived to do a lot of good: They help to base decisions on factual arguments and simplify conflict resolution (Radermacher, 2022). However, as Radermacher continues, to facilitate these positive effects requires an understanding of the opportunities and risks, the strengths and limitations of statistical facts. Overestimation leads to exaggerated expectations and disappointments, underestimation to missed opportunities, risks. Even worse is the trouble if facts are influenced or manipulated with political intentions or if even the impression of arbitrariness is created with so-called ‘alternative facts’. The very bad excesses of political misuse of statistics are carried out with intent and not negligently. Nevertheless, it can be argued that the virus of false and manipulated information flourishes when the statistical literacy of the population is at a low level. On the less serious scale of missed opportunities or too high expectations regarding statistics, there are, also observations that suggest that an

improvement in statistical literacy would be very good for politics, both on the part of the population and on the part of politics itself. Rademacher concludes that an overall aim must be to promote and nurture a culture in which a conscious and experienced approach regarding data and statistics has become the standard (Rademacher, 2022). One way to reach this envisaged goal is the fostering of statistical literacy (Ben-Zvi & Garfield, 2004).

3.2 Critical statistical thinking

Critical statistical thinking is a strand that goes beyond the internal caveats addressing poor or erroneous calculations or the risk of manipulation and misuse. Far more fundamentally, critical statistical thinking addresses the performative and world-making power of statistics (Fioramonti, 2014; Gergen, 2015).

The emergence of critical statistical thinking is closely linked with the work of Theodore Porter who initiated the critical assessment of the quantification (Porter, 1986). He identified trust in numbers as a pervasive feature and standard of modern societies (Porter, 1995). His work fostered the consciousness that social arrangements and processes are highly impacted by practices to make things quantitative (Porter, 1994). He stated that success of quantification is related to the basic mechanism of reduction that creates a “technology of distance” (Porter, 1995, p. 10).

Consequently, quantification displays an overwhelming appeal in business, government and social research (Porter, 1995, p. 9). “Since the rules for collecting and manipulating numbers are widely shared, they can easily be transported across oceans and continents and used to coordinate activities and settle disputes. Perhaps most crucially, reliance on numbers and quantitative manipulation minimizes the need for intimate knowledge and personal trust. Quantification is well suited for communication that goes beyond the boundaries of locality and community. A highly disciplined discourse helps to produce knowledge independent of the particular people who make it” (Porter, 1995, p. 10). The methodological discipline implies that the authority provided by quantification is not power plus legitimacy but power minus discretion (Porter, 1995, p. 98).

Porter explains that the soft power of numbers and quantitative indicators is characteristic of our time. A vivid example provides the PISA process (e.g., Program for International Student Assessment) with its irresistible regime of testing. These tests are not merely measures but define new structures of incentives and shape the transformation of organizational structures and processes. Porter emphasizes, that the power of numbers and indicators may not require state power. One example provides the ratings privately produced by an American magazine that reshaped the preferences of students’ and even the law schools themselves. The prestige hierarchy as defined, though harshly criticized, became real because people acted on it. Porter emphasizes the impact of quantification on the public. Many public numbers are intrinsically value-laden, at least in the sense that they have consequences for people. The modern social sciences with their concerns for classification, quantification, and intervention produce looping effects. Hacking (1996) argues that looping processes produce particular human kinds – labels which assign a classificatory kind onto people and thus create their subjectivity: “By coming into existence through social scientists’ classification, human kinds change the people thus classified” (Hacking, 1996, p. 351).

Wild and Pfannkuch (2004, p. 21) argue that statistical thinking implies a performative power and permeates the way we operate and function in everyday life. Quantification and statistical accounting do not only mirror but make worlds (Gergen, 2015) and can achieve an own reality that is only loosely connected with social experiences but deeply influencing the social world (Boltanski, 2011). Numbers are particular deceitful when they move beyond descriptive measurement to function as targets or goals, a basis for rewards (Porter, n.d.) (Broome et al., 2018; Broome & Quirk, 2015). The tendency towards individual self-measurement through digital tools is a pertinent case. “The rise of numbers, data and indicators of societal self-observation is often viewed as a way to objectify and rationalize these activities and behaviours, but they themselves they are part of a valorization and value ascription process. They may not create quantitative representations of the social world, but they do re-create them and should therefore be understood as a reality that is sui-generis” (Mau, 2020, p. 20).

The quantification of political debates was particular visible during the Covid-19 pandemic with intensive disputes on and resistance to the governance through evidences and incidences (Münch, 2022). Scholars of statistical thinking observe that many contemporary societies experienced a shifting from government by rules to “governance by numbers” (Supiot, 2020) and that “authority is increasingly expressed algorithmically” (Pasquale, 2016, p. 9). While producing important new subjectivities and groups, the quantification of the world raises questions about the nature of political order, citizenship and democracy.

3.3 Reflexive statistical thinking

Between the hopeful and dewy-eyed expectation that statistical thinking can do good and a cautionary questioning of statistical thinking as powerful tool for manipulation and domination, a third position I call reflexive statistical thinking aims to deal with the insight that quantification is an inevitable but ambiguous component of the social world. Reflexive statistical thinking is not strictly separated but partly overlapping with and emanating from both the affirmative and critical strands.

Poldrack emphasizes that statistics can provide evidence. However, he continues that evidence is always tentative and subject to the uncertainty that is always present in the real world (Poldrack, 2023, p. 6). This caveat complies with the statement that statistics are products of social activities and as such are susceptible to errors. Instead of assuming that statistics are facts that simply exists, the users should be vigilant to “sort out the good statistics from the bad” (J. Best, 2012, p. 27). For that purpose users should think about three things every time a new statistics is encountered: who created it, why was it created and how was it created? (Poldrack, 2023, p. 6; see also Leese et al., 2022).

This recommendation relates to the proposal to overcome the risks of affirmative statistical thinking by fostering statistical literacy (Ben-Zvi & Garfield, 2004) – a move that accepts the shortcomings of statistics and shift attention to the user of data as weak link in the chain. However, Porter is sceptically to shift responsibility to users. He states that statistics should be treated as a technical field, in which statisticians and subject specialists (guided, perhaps, by political leaders) seek the best measures even when they do not correspond to the best outcomes.

Fligstein (1998, p. 331) argues that “the organization and relative power of external constituencies (i.e., who controls the economy and government) and scientific communities are the main forces that determine the development of quantification. Quantification is a language for negotiation in the public sphere. But it is also deeply embedded in political and economic arrangements, both current and historical, that dictate how and under what conditions it is used.”

An integral part of the reflexive strand is the request to consider not only available data but also the availability of data. Data absence has become as meaningful as data presence (Van Rossem & Pelizza, 2022, p. 2). A telling example for the implications of data absence is the registration of refugees in the so-called hotspot camps at the outskirts of the European Union. As Pelizza (2021, p. 275) shows, in Greece the competent authority “collects a range of standard basic data: name, nationality, gender, ID, photo and date of birth. On top of that, it also includes fewer standard categories, like name of father and mother, religion, ethnic group, educational level and languages spoken, profession, family situation and number of children, members of the family who already reside in Greece, socio-cultural ties with Greece. Furthermore, separate sections accessible only to specific profiles (e.g., physicians) collect health and vulnerability data.” However, only a fraction of this data is shared through the EURODAC system that serves the purpose to clarify EU member states’ responsibility for processing asylum procedures and enforcing removal. “What is not in the system is relevant here, especially if compared to the Hellenic Register of Foreigners: religion, ethnic group, educational level and languages spoken, profession, family situation and links within Greece, socio-cultural ties with the Hellenic Republic. Furthermore, most data are system native: they did not exist before the person was recorded in the system (e.g., place and date of the application for international protection). In other words, Eurodac creates a self-referenced digital index, in which information acquires meaning in the context of the system itself, and is functional to pursue its main goal: compare fingerprints with asylum requests” (Pelizza, 2021, p. 276). The absence of data at European level implies, that data like professional qualification or family affiliations cannot be used for the purpose of allocation of refugees among EU member states.

Within a wider scope, McAuliffe et al. (2022) reviewed the use of data in debates on and governance of migration. The authors concluded that the world has well and truly entered a data-driven age with a movement from evidence-based policy to data-driven policy (van Veenstra & Kotterink, 2017). “However, in moving in this direction we risk becoming more and more distant from the underlying meaning of data variables, thereby increasing the risk of ineffective data-driven policy that misunderstands and misinterprets social phenomena such as migration” (McAuliffe et al., 2022, p. 4). Consequently, reflexive statistical thinking decisively points to the ethical dimension of producing data and statistics. This raises the question about the impacts of data production and use: who is concerned, which purposes are at stake, what are the impacts (Leese et al., 2022)

Against this background, the efforts to improve statistics on migration in general and irregular migration in particular requires a careful reflection of purposes and the legitimacy of users’ interests, e.g., stakeholders in the field of irregular migration governance.

In addition, reflexive statistical thinking asks what *improvement* means in the context of measuring irregular migration and which possibilities of improvement are available. At least three approaches exist:

- The first is a “keep-it-up” approach of insufficient statistical accounting. Such an intentional ignorance and refusal to launch efforts to get reliable data on irregular migration is a prevailing feature in UK and Germany (Boswell & Badenhoop, 2021). Drawing on work from ignorance studies, Scheel and Ustek-Spilda (2019) interpret the acknowledged unreliability and non-coherence of migration statistics as a strategic ignorance intertwined with politics of expertise. They identify four practices producing strategic ignorance: (1) omission of the significant gap between recorded immigration and emigration events, (2) compression of different accounts of migration into one “world migration map,” (3) deflection of knowledge about the specificities of different methods to production sites of statistical data, and (4) usage of metadata for sanitizing the statistical production process of any messy aspects. In consequence, migration policies risk the danger to be characterized by an ineffective muddling-through policy style (Hampshire, 2013) that fuels disputes.
- At European and member state level some efforts had been initiated to produce better statistics in spite of or even because of the methodological problems related with the measuring of a hard-to-reach segment of population (Ardittis & Laczko, 2017; Vespe et al., 2017). These efforts are motivated by claims to establish evidence-based policies. The changes may be motivated by the affirmative intention to support the effectivity and efficiency of the dominating purpose to enhance the capacity to control cross border mobility. In this vein, efforts for the improvement of data production is shaped by and aligns to the purpose of migration control as dominant purpose.
- An alternative motivation is related to improve data production in order to increase the awareness of and knowledge for the creation of alternative policy designs that implies the evidence-based evaluation of alternatives to the dominant exclusionist migration governance. In this vein, efforts for the improvement aims to extent the framing of data production purposes and systematically include data useful for evidence-based assessments of the effects of more open migration policies on the quantitative development of irregular migration, including more liberal visa policies, granting access to social services or opening avenues for regularisation programs (PICUM, 2022).

As the statements indicate, reflexive statistical thinking refers to both affirmative and critical statistical thinking as inspiration for improvements and innovations in the measuring of irregular migration.

3.4 Implications for MirreM

The consideration of statistical thinking serves the purpose to provide an overlapping conceptual framework, to sensitize for the different contradicting and even antagonistic instrumental expectations and believes of stakeholder, to recognize pitfalls of affirmative statistical thinking like data absence and finally to address the ethical dimension of

measuring irregular migration. MIRreM efforts to improve the current practices and systems of data registration of irregular migration have to take into account the ethical and practical implications both of the current and of the proposed purposes and practices of data production.

MIRreM starts from the underlying premise that proper quantification and statistical representation of a phenomenon is principally possible and can provide the foundation for evidence based and thus reasonable decision making. The *statistical thinking* framework provides a common frame of orientation in two regards. On the one hand, the framework of reflexive statistical thinking offers a joint overarching conceptual approach that may serve as an overlapping discursive space for analysis and publications. On the other hand, conscious awareness of the logics and implications of affirmative statistical thinking helps to create mutual understanding how partners and stakeholder directly or indirectly involved in the MIRreM project relate to and make sense of quantification and statistics. Sharing a basic understanding of how statistical thinking works provides the chance to integrate the MIRreM components, to link more consciously to stakeholders and to enhance the probability that changes developed and recommend by the MIRreM partners will connect to stakeholders.

Taking into account that public measurement is often already in action, it is necessary to consider in advance how people will react to changes. In this context, it is important to recognize that numerical comparison can be valuable. However better numbers do not always correspond with genuine improvement; and different political, cultural, and economic systems may have good reasons to pursue different goals in differently-organized systems.

The next chapters offer a selective consideration of the literature on factors influencing political decision making.

4. UNDERSTANDING INSTITUTIONAL CHANGE

The main purposes of MIRreM are improvement of measuring irregular migration and designing feasible regularisation options. In other words: MIRreM is about changes in the design of irregular migration governance – a policy field characterized by a strong status quo bias (Hadj Abdou & Pettrachin, 2022). This means that established policies and practices continue when no agreement on changes can be found (Samuelson & Zeckhauser, 1988). From a conservative point of view the burden of proof for policy change should be on those wishing to make them because it has taken a great deal of time to establish institutions but they can be destroyed very rapidly (Wolff, 2018, p. 19). However, preferences for the status quo can resonate with strategic ignorance as a way to avoid confession that a status quo is problematic and requires changes (Boswell & Badenhop, 2021). A status quo bias with a refusal to develop and introduce alternative policy designs can endanger and undermine the existence of social systems when ongoing changes that respond spontaneously to occurring problems are also suppressed. A shared understanding of the nature and dynamics is important to launch proposals for improvements in the governance of irregular migration.

4.1 Institutional change as rational adaptation

Economic, social and political dynamics constantly necessitate adaptations of rules and institutional changes. Koremenos et al. (2004) consider institutional change in international politics as outcome of rational design. At international level, they observe continuing calls for change of institutional arrangements induced by the occurrence of new problems. Consequently, policy actors adapt established or create new institutions in the course of learning processes. Koremenos et al. (2004, p. 6) argue that many institutional arrangements in the realm of international relations are best understood through “rational design” among participants.

“This rationality is forward looking as states use diplomacy and conferences to select institutional features to further their individual and collective goals, both by creating new institutions and modifying existing ones. Even trial-and-error experiments can be rational and forward looking in this way. Although we do not argue that all institutional change is the product of conscious design, we do consider it the overriding mechanism guiding the development of international institutions” (Koremenos et al., 2004, p. 6).

In this view, institutional evolution involves deliberate choices made in response to changing conditions. Institutional development frequently depends on prior outcomes (“path dependence”) and evolutionary forces. As institutions evolve, rational design choices can arise in two ways. First, participants may modify institutions in stages, by making purposeful

decisions as new circumstances arise, by imitating features from other institutions that work well in similar settings, or by designing explicit institutions to strengthen tacit cooperation. Second, institutions may evolve as states (and other international actors) select among them over time. States favour some institutions because they are better suited to new conditions or new problems and abandon or downplay those that are not (Koremenos et al., 2004, p. 7).

Koremenos et al. treat international institutions as rational, negotiated responses to the problems international actors face. The sustainability of institutional rules depends on *incentive compatibility* which means that actors create, change, and adhere to institutions because doing so is in their interests. Incentive compatibility does not mean that members always adhere to rules or that every state always benefits from the institutions to which it belongs. It does mean that over the long-haul states gain by participating in specific institutions—or else they will abandon them.

4.2 Change and complexity in European migration policy

However, simple imaginations that human beings or collectives have the capacity and power to induce change and realize preferred future states in a linear and fully controllable process are misleading. Cairney points to complexity as an inevitable aspect of decision making in a decentred policy arena: “Decentred policymaking may result from choice, when a political system contains a division of powers or a central government chooses to engage in cooperation with many other bodies rather than assert central control. However, it is largely borne of necessity: governments would fail if they tried to centralize policymaking.” (Cairney, 2022, p. 46). Cairney introduce two arguments for this statement: (1) All policymakers face ‘bounded rationality’ and (2) engage in a policymaking environment over which they have limited knowledge and minimal control. The former suggests that they must ignore most information most of the time, since they can only pay attention to a tiny proportion of their responsibilities at any time. The latter suggests that there are many policymakers and influencers spread across many types of government, producing a myriad of rules, networks, locally dominant beliefs, and ways to respond to socioeconomic conditions and events outside of the control of any single ‘centre’. Some policymakers are more powerful than other actors, but not to the extent to conclude that there is singular central control” (Cairney, 2022, p. 47). Rather, policymaking is multi-centric (Cairney et al., 2019). Consequently, even when decision makers act interest-guided, they do not fully control the process and outcome of decision making (Geddes, 2021, p. 124f).

In spite of severe unexpected events usually experienced as crisis, no fundamental change has taken place in migration policies at European and national level. The European Union still pursues an approach based on deterrence that was established more than 30 years. Combatting irregular migration and reducing asylum-seeking entries have remained consistently the key component of EU action. Even increased resources and political attention on migration, as well as important institutional changes with the 2009 Lisbon Treaty have not changed EU’s “policy priorities” on immigration and asylum (Hadj Abdou & Pettrachin, 2022, p. 2).

A recent analysis of policy networks engaged in European migration policy making indicated and increasing diversity and diversification since 2015 (Hadj Abdou & Pettrachin, 2022, p. 11). Regarding the networks' policy preferences, Hadj Abdou and Pettrachin identified an economy-oriented preference for liberal migration policies, a preference for restrictive migration policy and border security and a preference for rights-based migration policies. Actors interact more intensively and fruitfully with actors within their own coalition that are perceived as like-minded or sharing similar perspectives, rather than with actors with different views (cit. op. 14).

However, the key programmers within the EU migration policy systems are National Interior Ministries, DG Home (EC), and permanent representatives at the EU level with a home affairs mandate. The "home affairs actors" are identified as core actors for the designing of European migration policies with a preference to perceive migration as a security issue and the continuation of control and deterrence policies. Although the dominant network of home affairs actors considers exchange with other networks as very valuable, in practice home affairs actors rely on internal sources (i.e. sources within their own institutions) such as staff on the ground, EU agencies and advisory boards and reports or information produced by other Home Affairs actors. Also traditional media were mentioned as key sources of information by many Home Affairs actors. "Conversely, other types of sources such as reports from think tanks, academic sources, and reports from other international organizations, were very rarely or never mentioned by the same interviewees. Reports produced by NGOs or other actors were never mentioned as key sources by any interviewee" (Hadj Abdou & Pettrachin, 2022, p. 15).

The authors summarize the findings: "First, our analysis has demonstrated that, despite an increasing diversification of migration policy networks, Home Affairs actors have remained the dominant actors within the EU migration policy system. Second, we highlighted that whilst these dominant actors mostly consider exchanges with other non-core actors as valuable, these exchanges are far less frequent and do not take place regularly. Third, Home-Affairs actors are less likely to describe these actors as holding similar perspectives to them, which points to the role of trust and cognitive and organizational proximity for the constitution of understandings and policymaking processes. Fourth, Home Affairs actors tend to rely on internal sources of information, and when they reach out beyond their organization they rely on 'like-minded' actors, i.e., actors with similar pre-set organizational goals and mandates (mostly: other core Home Affairs actors)" (Hadj Abdou & Pettrachin, 2022, p. 16).

As in other policy domains, also in migration politics new ideas face difficulties to reach the responsible (Hadj Abdou & Pettrachin, 2022). Responsible actors use to interact within their own circles (Hadj Abdou & Pettrachin, 2022, p. 14). At individual level, social-psychological mechanisms reinforce a status quo bias, among the trust in common heuristics (Kahneman, 2011), illusory truth effects (Hassan & Barber, 2021), efforts to avoid cognitive dissonance (Harmon-Jones & Mills, 2019) effects of motivated reasoning (Bolsen & Palm, 2019; Leeper & Mullinix, 2018) and the influence of emotions (Considine, 2018).

Governmental bodies in the field of European and national migration politics usually commission research to justify pre-ordained policy-decisions in order to get policy-based evidence making: "Policymakers in the EU, as in many member states, often claim that

policymaking is evidence-based. However, the evidence that may inform migration policy is a product of a process of knowledge generation that is shaped by the policy priorities themselves” (Singleton, 2015, p. 133).

Consequently, European migration policies display a status quo tendency, “the inclination of decisionmakers to continue with existing goals and plans beyond the point at which a neutral observer or a statistical model would recommend a change in course” (Silver & Mitchell, 1990, p. 34). Deterrence policy prevails over other goals like the protection of vulnerable population.

4.3 Understanding decision making in organizations

These considerations do not only cast doubts that the processes of political and administrative decision making is really as rational as commonly premised but also instigate questions regarding the relationship of science and politics. The classic policy cycle model conveys an idealized image of decision making intended to provide guidance for a rational organization of decision making grounded in thoroughly definition, analysis and evaluation as basis for evidence-based ruling. However, Cohen et al. (1972, 2012) describe the reality of organizational decision making as chaotic. In their view, problems, solutions and decision-makers form three independent streams, each generated separately and flowing disconnected from each other. These three streams meet only when a fourth stream, a situation requiring a decision, arise. In such a situation, the streams of previous and current problems and solutions come to the fore. Due to limited time and energy, participants in a decision-situation cannot all equally engage with the same intensity. At the same time, many things happen at once competing for attention. Proposed solutions are only loosely coupled and change during bargaining. To illustrate this process, Cohen et al. (1972) introduced the metaphor of a garbage can: In a decision situation, participants dump problems and solutions together as they are generated, similar to the use of a garbage can. The garbage can model emphasizes that decision emerges from the sorting of this messy and chaotic mix.

The political use of expert knowledge is part of this mix, as Boswell (2009) has shown. Political decision makers often maintain an instrumental relation to expert knowledge and utilize it for different objectives. It is selectively used as proof that a problem really exists and requires a response, as legitimation that a decision is evidence based, as producer and provider of feasible technical solution, and as an option to win time and curb a discussion by commissioning research or an expert commission.

However, ongoing natural and social proceedings jolt dynamics that challenge the routines of institutional arrangements. Institutional arrangements deal with these pressures by either incremental adaptations that retain the institutional arrangement or go – less frequently – through disruptive transformations implying the dissolution of an established arrangement and the emergence of a new one (Baumgartner et al., 2018). Watzlawick distinguished first and second order change (Watzlawick et al., 1974). First order change involves a variation that occurs within a given system which itself remains unchanged. The changes are incremental and involve improvements and development in the default direction. Second order change involves a variation whose occurrence changes the system itself. The change

constitutes a revolutionary jump, involves discontinuity and takes a new direction (Levy, 1986, p. 11).

Radical transformations do not come out of the blue. Schneidewind (2018) argues – with reference to Appiah (2011) – that great transformations involve a change of moral certainties that proceed in five steps: (1) Ignorance, a particular problem is not seen as such, a practice is not questioned although moral critique is already there; (2) recognition of the problem without a personal bearing, critique of a particular practice is formulated but without greater resonance; (3) recognition of a personal bearing without consequences, justification why a change is not feasible in spite of critique and alternatives; (4) acting, the powerful elites loose central position and new regulations are introduced that mirror the new understanding; (5) in a look backward incomprehension that old practices were accepted. “Nevertheless, at the end of the moral revolution, as at the end of a scientific revolution, things look new. Looking back, even over a single generation, people ask, “What were we thinking? How did we do *that* for all those years?” (Appiah, 2011: 9).

The model of moral transformation (Appiah, 2011) indicates that the formulation of alternative policy designs plays an important role in the occurrence of change. Horx (2014)¹ like many others points out that imagination and anticipation is the source and motor of the realization of alternative policy designs as a self-fulfilling prophecy (Bregman, 2018; Brewer, 1980; Levitas, 2013).

4.4 Implications for the MirreM project

As indicated, the modes of statistical measuring and political handling of irregular migration are the outcome of human decisions and thus subject to change. Due to the involvement of many actors with diverging interests, decision making is characterized by a level of uncertainty and unpredictability. Scholars of irregular migration research have consequently analysed policies as muddling-through like responses to migration movements that can neither be suppressed nor controlled (Cvajner & Sciortino, 2010). Consequently, Hampshire (2013) states that governments of receiving countries can only operate in the muddling-through mode with only incremental steps. However, even when no full control is possible, there is some capacity to influence at least developments.

MirreM operates in the muddling-through context of irregular migration governance with the production of two handbooks that can be assigned to the distinction between first and second order change as proposed by Watzlawick et al. (1974). The handbook on measuring irregular migration implies a first order change and relies upon step-by-step incremental learning, expansively building upon previous capabilities while simultaneously modifying what has been learned before. In contrast, the preparation of a handbook on regularisation implies a change of a second order type, because it demands fundamental shifts in thinking,

¹ <https://www.zukunftsinstitut.de/artikel/die-welt-neu-konstruieren/>

a reframing of previous learning which serves as a springboard for a transformation to new levels of comprehension (Maier, 1986).

5. METHODOLOGICAL APPROACH: CRITIQUE GUIDED DESIGNING

MIRreM is a coordination and support action (CSA) combining related but distinct areas each with specific tasks and purposes. The overarching common mission of these separate sub-actions is the purpose to support the improvement of policy design. A methodological orientation for this mission-oriented research provides the approach of Critique Guided Designing. The following section familiarizes with the key ideas of policy designing as general framework. The next section introduces the idea of Critique Guided Designing. The subsequent section considers implications for MIRreM.

5.1 A Policy design perspective

Critique Guided Designing of future-oriented policies resonates with current trends in political sciences to analyse and improve policy making with a design perspective (Howlett & Mukherjee, 2018b). Policy design aims to contribute to the generation of better or improved ways to construct policies and ensure that maximizing or even optimal results are achieved from the expenditure of scarce governing resources. Howlett and Mukherjee (2018a, p. 6) argue that a “policy formulation process guided by the design orientation is able to translate policy problems into possible policy means” (2018a, p. 6). At the heart of policy design is the *formulation of policy alternatives* that can achieve government objectives and the idea that a *formulation process* that is capable of doing this is the most effective approach.

Effective policy design embodies a process that pursues a more intentional and instrumental purpose and entails the intentional undertaking of linking policy instruments with unambiguously outlined policy goals. This mission involves the organized effort to analyse the effects that policy tools can have on a policy field. This appraisal is used to craft policy responses that can, in all practicality, lead to expected policy outcomes (Howlett & Mukherjee, 2018a, p. 5).

However, designing public policies is a difficult task for a number of reasons, among lack of resources, the existence of corrupt or inefficient bureaucracies and of other policy actors who are either incompetent or motivated by values other than doing the public good, the presence of powerful veto players among both state and societal actors who can block even the best thought-out plans, problems of vague goal definitions, and poor implementation, evaluation and other policy practices (Howlett & Mukherjee, 2018a, p. 3). Among the aspects that shape the potential of policy designing efforts, a government’s or administration’s *design intention* and the *capacity to carry it out* are particular important.

Competences to make policy designing is crucial and rely on their availability and the availability of adequate resources to allow them to be mobilized. These resources of capabilities must exist at the individual, organizational and systems levels in order to allow individual policy workers and managers to participate in and contribute to designing, deploying and evaluating policies. It includes not only their ability to analyse but also to learn and adapt to changes as necessary (Howlett/Mukherjee 2018: 11). Consequently, design spaces differ considerably. Some are rather simple, while others are more complex (Howlett & Mukherjee, 2018a, p. 3). The worst situation for design “is a politicized, religious or ideologically driven policy process with few governing resources. However, even when these values dominate, capacity remains a critical pre-requisite for successful formulation and implementation” (Howlett & Mukherjee, 2018a, p. 10).

Other crucial aspects that influence the opportunities for the formulation and implementation of design possibilities imply the goodness of fit of proposed designs with pre-existing governance preferences and the degrees of freedom designers have to innovate. “The extent to which this choice is led by design considerations is affected by the particular mix of partisan, electoral, legislative and other preferences governments have, including their habits and historical *modus operandi*” (Howlett & Mukherjee, 2018a, p. 9).

As the brief and selective description of policy design efforts indicates, a host of factors come into play affecting the different governments’ choices of different possible mixes of policy instruments. The design of policy mixes can encompass the need to ensure a good fit not only between packages and tools and government goals but also their institutional and behavioural contexts at specific moments in time. “Such decisions can be systematically modelled and analysed in terms of their effects on the process of policy designing” (Howlett & Mukherjee, 2018a, p. 10). Consequently, depending on the available space for the formulation and implementation of design, a context sensitive appraisal guides the decision to promote either first-best (theory-inspired) or second-best (real-world) design possibilities.

5.2 Critique Guided Designing

Critique Guided Designing offers orientation for MIRREM activities dealing with the highly contested field of irregular migration governance that is described as intractable or wicked problem (McConnell, 2017; Raadschelders et al., 2019). When solving a wicked problem is beyond reach, the clear understanding of alternatives which are not yet realized open an avenue to cope with the problem and tentatively solve it.

Critique Guided Designing pursues an intensification of the *formulation process* in policy design. In line with the policy design approach, Critique Guided Designing approaches a particular policy problem with the perspective to identify a first-best solution and to consider technical feasibility, political acceptability and ethical preferability in the light of governmental design intentions and capacities to implement them. Critique Guided Designing emphasizes that the formulation process should distinctively collect and grapple with reservations that cast doubts on the feasibility, acceptability and preferability of a proposed alternative policy design in a systematic and iterative manner.

Critique Guided Designing is a suitable approach for dealing with policy issues perceived as complex or wicked (McConnell, 2017; Raadschelders et al., 2019). Initially, Critique Guided Designing emerged in the context of the consideration of the tension between conflicting claims to acknowledge freedom of movement as an individual human right on the one hand and the claim to control and govern immigration as a right of political collectives (Cyrus, 2021). In general terms, CGD aims to provide a method to determine both preferable futures as not yet realized states (Weber, 2015) and formulate incremental steps towards these futures. The main difference to so called “realist” policy approaches is the willingness to explore possibilities perceived to be utopian as “real possibilities” (Bauder, 2017). As a “mission-oriented research” (Foray et al., 2012, p. 1697), CGD is about the designing of measures and mechanism for problem solving and the evaluation of its effectiveness and efficiency,

Critique Guided Designing does not conclude with a mere formulation of a blueprint of a preferred future but seeks actively to explore the technical feasibility, political acceptability and ethical preferability of this blueprint by collecting and dealing with objections in order to re-design the blueprint and gain more social robustness (Nowotny et al., 2003). Being aware that the assessment of policy designs is hardly consensual, Critique Guided Designing aims to identify second-best but feasible real-world options (Howlett & Mukherjee, 2018a, p. 4) that can be incrementally implemented. In other words: First-best (theoretical) conceptions of a preferred future serve as signposts and orientation while implementation of this future is designed as second-best (real world) projects with identification of incremental steps towards this future. The process of Critique Guided Designing advances in five steps.

(1) Defining preferred futures and researchable cases

As a policy design project, Critique Guided Designing refers to a policy problem that looks for a solution. Critique Guided Designing seeks to formulate as first step a policy alternative that is not only feasible in technical terms and acceptable in terms of political majorities but also preferable in terms of moral foundations and ethical fairness (Lever & Poama, 2018; Motilal et al., 2021).

Critique Guided Designing requires first of all to define a manageable problem. This step implies the determination of transparent criteria for the assessment of preferences, which may include instrumental (efficiency, effectivity, feasibility), political (appeal to voters, matching with values) and ethical (fairness, respect for human rights, harm avoidance or reduction) aspects. In order to identify and defend the preferences for a particular alternative policy design, it is necessary to dispose of reasons why a particular not-yet realized state is preferable in comparison to the current or other possible ones (Lever & Poama, 2018; Wolff, 2018).

Philosopher Wolff (2018) propose for the generation and ethical considerations of possible policy designs a sequence of six steps: (1) to identify the issue at stake and current state of affairs; (2) to identify the arguments and values; (3) to look at examples of practice at other times and places; (4) to create a profile of solutions; (5) to evaluate the options in terms of moral foundations and ethical legitimacy; (6) to recommend policy options.

In concrete steps, the identification of preferred futures may be carried with particular techniques like future-related methods (Poli, 2018) or “scenario planning” (Amer et al.,

2013) in cooperation or coproduction with well-aligned stakeholders (Andersen et al., 2021). In order to anticipate the probability of the realization of intended effects and impacts as well as of unintended and harmful side-effects, the explication of the underlying “theory of change” (UNEG, 2016) is instrumental, in particular the explication of an assumed intervention logic consisting of a description of “the expected chain of events by using a simplified model of causality” while “taking context into account” (European Commission, 2015, p. 54).

The final outcome of the first design step is the formulation of a not-yet realized policy option that the involved designers consider to be the first-best solution. At this stage, Critique Guided Designing does not shy away to formulate alternative policy designs that engender serious doubts and objections of various stakeholders regarding technical, feasibility, political acceptance and ethical preferability. The formulation of this alternative policy design serves the function to evoke critique and reservations.

In order to enhance the chance of stakeholder inclusion, it is crucial how a particular policy issue is framed (Düvell et al., 2008; Schön & Rein, 1994). Controversial issues do not present themselves automatically as problems capable of resolution or even sensible contemplation. They must be posed and formulated in fruitful and often radical ways in order to move them toward the vision of a solution. “The way the problem is posed is the way the dilemma will be resolved” (Getzels, 1979, p. 167). Since Critique Guided Designing contributes to controversies perceived to be intractable, wicked or complex with reasonable and feasible solutions, there is a good chance that critics and opponents pay attention and raise their voice.

(2) Collecting arguments and reservations

While proposed alternatives may initially sound plausible at least for all involved in the first-step designing process, it is an open question if and how they work in practice. Also, well-intended interventions can induce harmful effects and impacts, in particular when the knowledge and agency of local people is disregarded (Scott, 1998). Consequently, the second step implies procedures that more systematically acknowledge social complexity, uncertainty of causal relations in social affairs and the unpredictability of social dynamics (Geyer & Cairney, 2015). Some scholars point to the importance to systematically involve those affected by decisions also in the decision making. Such an involvement is not only a virtue with respect to formal legitimacy, as discussed in political philosophy (Habermas, 1991), but also with regard to the social robustness of procedures for decision making (Nowotny et al., 2003). The developing and designing of solutions that match local contexts require the co-design and co-creation with all affected by decisions (Amri & Drummond, 2020), an approach that also enhances innovativeness and sustainability (Cea & Rimington, 2017).

Critique Guided Designing implies a systematic stocktaking of reservations for selected topics and samples the references to obstacles in as concrete and practical terms as possible. Possible reservations against particular components may raise the issue of lacking capacities, imbalanced input-output relations, technical feasibility or impossibility, lack of public interest, political opposition, legal obstacles or ethical imbalances.

Since Critique Guided Designing aims to utilize the energy of criticism, the inclusion of stakeholders in a series of iterative deliberation (Benhabib, 2004) is a basic requirement. A careful identification of stakeholders is prerequisite. It is crucial to get to know the reservations held by powerful key-stakeholders. Due to the psychological mechanisms mentioned in the previous section, it is probable that some relevant stakeholder may be reluctant to engage or to participate in a constructive manner in cooperation (Kujala et al., 2022).

Ordering and Evaluating Reservations

Subsequently, the sampled reservations are ordered and evaluated. CGD operates with three classifications: (a) Affective pleas constitute a class of arguments that do not claim to refer to empirical facts but to a deep-felt conviction or faith (Furegon, 2022; Motilal et al., 2021, p. 14; Wirth et al., 2016). As a matter of conviction, affective pleas are hard to challenge, in particular when sentiments are reinforced in echo chambers and communities of faith adhere to conspiracy theories (Sunstein & Vermeule, 2008). Convinced believers resist rational arguments. Usually, affective pleas receive high public attention due to its alleged authenticity and compassionate and loud presentation. CGD has to avoid the pitfalls and traps of false balance in the attention towards arguments (Birks, 2019). (b) Fact-claiming statements can be made subject to methodological sound examination of evidence in a methodological systematic form. Here the response pattern consists in a test, exploring truth, evidence or logic of a reservation (Birks, 2019). (c) The third class of reservations refers to concerns regarding future impacts. Projective reservations constitute the class of arguments most difficult to deal with. Due to ontological and epistemological complexity (Geyer & Cairney, 2015) it is impossible to forecast what future will bring for sure – and social sciences have an impressive record in failed prognosis (Scott, 1998). “Possibilities, even mere one, must be reckoned with” (Bigelow, 1988, p. 37). In order to deal with this class of arguments, approaches from evaluation research (i.e., theory of change) (UNEG, 2016) or are forecasting approaches (Sardoschau, 2020) can be consistently applied in order to estimate the likelihood that a projective rejection becomes reality.

(3) Re-Designing alternative policy design

Based on the classification of reservations, CGD deals seriously with critique and aims to utilize the critical spirit and energy for an improvement of envisioned changes. CGD thus combines research and development in order to re-design the initially proposed alternative policy design in the light of reported reservation and enhance feasibility, preferability and acceptability. The operations implemented in step 1 activities are newly applied. The proposed alternative design then consists of a nuanced and concrete formulation of possibilities and steps towards their realization.

(4) Translating feasible formulations in incremental policies

The realization of envisioned changes is a political decision and depends on the support of stakeholders and uptake of political core actors (Hadj Abdou & Pettrachin, 2022). The chance to initiate developments towards envisioned changes depends on a set of factors: (1) An envisioned change have to be championed by an alliance of “great” actors (for example faith organizations, trade-unions, employer associations, political parties, NGOs) which engage continuously for a particular change in a non-blaming style; (2) it is helpful to

translate an issue from a politically contested issue into the question of technical feasibility: not if, but how to implement an proposed intervention; (3) it should be emphasized that the proposed change is in the best interest of all, including the local population; (4) and the message should be distributed in a variety of formats (including parliament petition, studies, articles, media coverage, blogs etc.) and channels (Cyrus, 2017b).

The communication strategy has to consider that debates on migration are contested, emotionally charged and dominated by styles of “fast thinking” (Kahneman, 2011). This view challenges the conviction that transfer of scientific knowledge primarily takes place in a rational policy-science nexus. Social scientists critically engaged in migration issues face serious problems to make their voice heard and to sell their ideas to politicians (Scholten, 2011). One reason for the mismatch is that policy decisions demand a particular kind of knowledge, i.e. expertise. Expertise translates scientifically based knowledge into applicable recommendations and complies with a contextually expected level of epistemic and social robustness (Nowotny et al., 2003).

Consequently, mission-oriented research on and development of alternative policy designs should broaden horizon and address beyond politics also civil organizations (including foundations, NGOs, faith organizations, trade-unions etc.) and media in a science–media–civil society–politics nexus. The different arenas require different kinds of expertise, and researchers together covering the different roles of academic, critical, political and public intellectual (Burawoy, 2005).

Researchers have to be particular sensitive regarding the naming of a concern. To give just one example: Many scholars adopted and use the term “refugee crisis” that popped up in public debates around 2015. The term implicitly suggests an understanding that refugees cause a crisis. In other words: This notion frames refugees as a threat to the public order. Independent from a speaker’s intention, the use of such a terminology repeats the message that refugees constitute a threat. Influencing the framing of public problems by using powerful metaphors is an explicit strategy of populist thinking to contaminate public perception. CGD would search for alternative metaphors that avoid such toxic connotations and provide an alternative framing. In the case of “refugee crisis” for example, the term “refugee protection crisis” provides an alternative frame that directs attention to the underlying driving problem, namely that the system of refugee protection failed (Cyrus, 2017a).

5.3 Implications for MIRreM: Awareness of options and obstacles

In the MIRreM context, the preferred futures relate to (1) robust and reliable measuring of irregular migration and (2) regularisation as a possible policy option. The two issues display different levels of general acceptance and preferability in the highly contested policy domain of migration governance. In a world of prevailing statistical thinking, the improvement of measuring irregular migration is an issue principally shared and widely accepted. However, the viewpoints of relevant stakeholders diverge with regard to political acceptability of purposes, the willingness to spend resources and the assessment of technical feasibility. The

efforts to improve the measuring of irregular migration relate to different policy preferences, among to support restrictive policies and strengthen migration control; to develop statistical accounting as an evidence base for the development and assessment of policy designs in migration governance that accomplishes the declared purposes effectively; and to gain evidence-based insights on shortcomings and unintended side-effects and unwanted consequences of ongoing migration governance efforts in order to call for alternative policies.

In contrast, the MIrreM mission to describe the possibilities and feasibility of regularisation address a principally contested issue in the governance of irregular migration that is very unevenly appreciated and practiced (Hinterberger, 2020; PICUM, 2022). The designing of regularisation programs constitute a second-order change in tension with the officially declared dominant policy preferences to manage, e.g., control migration movements and intensify restrictive efforts in response to the failure to accomplish declared policy targets (Geddes, 2021; Hadj Abdou & Pettrachin, 2022).

With regard to regularisation, a strategy to establish communicative overpass is the framing of regularisation as one component of an overall strategy to reduce irregular migration (Cyrus, 2008). Migration research provide innovative ideas for the identification and substantiation of preferred futures (for example Cyrus, 2022; Hinterberger, 2020; Jandl & International Centre for Migration Policy Development, 2007; Pécoud & Guchteneire, 2007; PICUM, 2022; Weber, 2015). With regard to the preferability of regularisation, ethical considerations emphasize that the refusal to offer regularisation as an exit option deprive persons in an irregular situation for an unlimited time of a perspective to make a living in dignity. The argument that regularisation induce additional irregular migration is a claim that lacks evidence. An increase of irregular migration after a regularisation program can be also interpreted as an indicator of failed migration and border control policies. The improvement of measuring irregular migration may involve the designing of statistical tools that enable a robust statistical exploration of this and other related questions.

6. STAKEHOLDER ENGAGEMENT

The MIRreM project displays a strong commitment to the development and implementation of objectives in co-creation with stakeholders. This feature calls for a clarification what stakeholding means in the very project context. This chapter provides a brief and focused review of stakeholder research and utilizes the findings for identification of and communication with stakeholders.

6.1 Stakeholder research

Stakeholder research advanced to a flourishing branch (Harrison et al., 2019) that emerged from management and business studies during the early 1980s (R. E. Freeman, 2010). The development of the stakeholder approach was a response to and critique of the then dominant perspective of shareholder (or stockholder) theory which stated that firms and enterprises are committed in their value production only to the interests of their immediate shareholders.

Stakeholder theory criticized the shareholder perspective as too narrow and dysfunctional and challenged the shareholder opinion that participants in business are self-interested actors extremely opportunistically pursuing maximization of shareholder profits as the only legitimate purpose of business (E. R. Freeman, 2011, p. 371). Such a tight focus on value creation in the sole interest of shareholders neglected ethical concerns regarding the consequences of transactions for employees, communities and nature. Moreover, the neglect of other actors' interests was identified as a potential threat for commercial value creation and the survival of a firm.

A stakeholder perspective states that executives have to pay much more attention to external forces and pressures in a fast-changing business environment. Strategic business action requires a more sophisticated version of dealing with customers, suppliers, employees, financiers, communities, societies, interest groups, media and the like (E. R. Freeman, 2011, p. 364). Consequently, stakeholder theory offered an alternative view to the dominant story about business in capitalism as primarily interested in making money. The stakeholder approach formulated a set of commitments in a business context, among the following three: (1) No matter what you stand for, no matter what your ultimate purpose is, you must take into account the effects of your actions on others, as well as their potential effects on you. (2) You have to understand stakeholder behaviours, values, and backgrounds/contexts including the societal context. (3) Stakeholder interests need to be balanced over time.

The widely accepted definition of stakeholder covers in a broad strategic sense “any group or individual that can affect or is affected by the achievement of a corporation’s purpose” (E. R. Freeman, 2004, p. 229). During the late 1990s, research on stakeholding in a business context intensified when researchers explored in interdisciplinary efforts the question what constitutes stakeholder’s salience (Mitchell et al., 1997; Wood et al., 2021).

The progress of research and theory building induced the diffusion of the stakeholder approach beyond the business domain. Stakeholder engagement gained relevance not only in the public sector with its focus on the production of common good as its specific value (B. Best et al., 2019) but also in scientific projects (Corbie-Smith et al., 2018; Slunge et al., 2017). In the meanwhile, political actors at all levels emphasize the relevance and importance of stakeholding (UNESCO & i4Policy, 2022).

The broad application of stakeholder theory in diverse contexts implies terminological fuzziness. According to Kujala et al. (2022), stakeholder research operates with a set of terms that have to be distinguished and coherently applied in order to avoid misunderstanding and confusion. The concept of *stakeholder management* remains inherently unilateral because when organizations conventionally manage their stakeholders, they “take steps to defend themselves from the demands of stakeholders”. The concept of *stakeholder inclusion* relates to the presence of stakeholders in organizational activities, such as decision making, to include stakeholders’ perspectives and knowledge in value creation. The term *stakeholder collaboration* refers to the joint activities with external stakeholders and can be depicted as a means for organizations “to pursue goals that would otherwise be difficult to achieve internally”. The term *stakeholder democracy* involves the idea that “stakeholders participate in processes of organizing, decision making, and governance in corporations.” Finally, *stakeholder engagement* refers to practices an organization undertakes to involve stakeholders in a *positive* manner in organizational activities. Stakeholder engagement constitutes a process that creates a dynamic context of interaction, mutual respect, dialog and change, not a unilateral management of stakeholders (Kujala et al., 2022, p. 1142 f).

However, as Kujala et al. (2022) continues, the bright image of stakeholder engagement as a process that creates a dynamic context of interaction, mutual respect, dialogue and change implies blind spots. In reality, stakeholder engagement may result in deadlocked relationships due to intractable conflicts, in particular when value dissensus is essentially high and values are protected and hardly negotiable. “Regarding the aims of stakeholder engagement, issues such as misfit or misuse of stakeholder engagement for firms’ or stakeholders’ purposes, or how the characteristics of the aims relate to moral reasons such as value incongruence, strategic reasons such as interest conflicts, and/or pragmatic reasons such as wicked social issues, remain largely underexplored” (Kujala et al., 2022, p. 1168). Misguided stockholding leads to poorly informed decision-making, exclusion of stakeholder voices or stereotyping marginalization of stakeholders. These observations call for a critical reflection of stakeholder engagement as a real-world process.

The shady sides of stakeholder engagement even matters more when public institutions are involved and the value at stake is a public one (Hartley et al., 2017). Stakeholder research emphasizes the particular role of state agencies. In a business context, the state is unique stakeholder that can set the organizational field in which industry or firm develops. This brings to bear power that is unattainable by other stakeholders. The state can influence both

the legitimacy of specific stakeholders and the possible set of transactions between them (Olsen, 2017, p. 71).

These considerations point to the particular framework that characterizes the development of policy designs in initiatives commissioned by state agencies. State agencies are involved at the same time as constituents, stakeholders and addressees. In order to deal with this constellation, it is reasonable to create distinct contexts in which representatives of involved state agencies are encountered with regard to one functional characteristic only, as stakeholder, addressee or constituent.

6.2 Stakeholder identification

The MIRreM project aims to develop the central outputs – the handbooks on improving measurement and regularisation schemes - in co-creation with stakeholders. Consequently, the identification and selection of stakeholders is a constitutive task and thus require careful implementation. In the MIRreM context, the term stakeholder encompasses all agents who are affected by or affect (1) the making and utilization of irregular migration measurement and (2) the making and implementation of regularisation schemes.

Stressing the relevance of stakeholder leads to the question how to identify stakeholders. Stakeholder research deals with this question since Mitchell et al. (1997) published their seminal work on stakeholder salience and identification.

The *stakeholder theory of salience* identified power, legitimacy and/or urgency as relevant indicators for the identification of stakeholders (B. Best et al., 2019, p. 1712). Power denotes the ability of stakeholders to impose their will on a given relationship through coercive utilitarian or normative means; a legitimate stakeholder is one whose actions and claims are perceived as appropriate, desirable and proper; urgency refers to the degree to which a stakeholder believes its claims are time sensitive or critical. Based on the uneven overlapping of these features, Mitchell et al. (1997) distinguished seven classes of stakeholders (see Figure 1).

The figure visualizes how combining the three analytically distinguished attributes yield seven classes of stakeholders. “Logically and conceptually, seven types are examined – three possessing only on attributes, three possessing two attributes and one possessing all three attributes. We propose that stakeholders' possession of these attributes, upon further methodological and empirical work, can be measured reliably. This analysis allows and justifies identifications of entities that should be considered stakeholders of the firm, and it also constitutes the set from which managers select those entities they perceive as salient” (Mitchell et al., 1997, p. 873). Consequently, the authors discuss in detail the features and the relevance of each type of stakeholder.

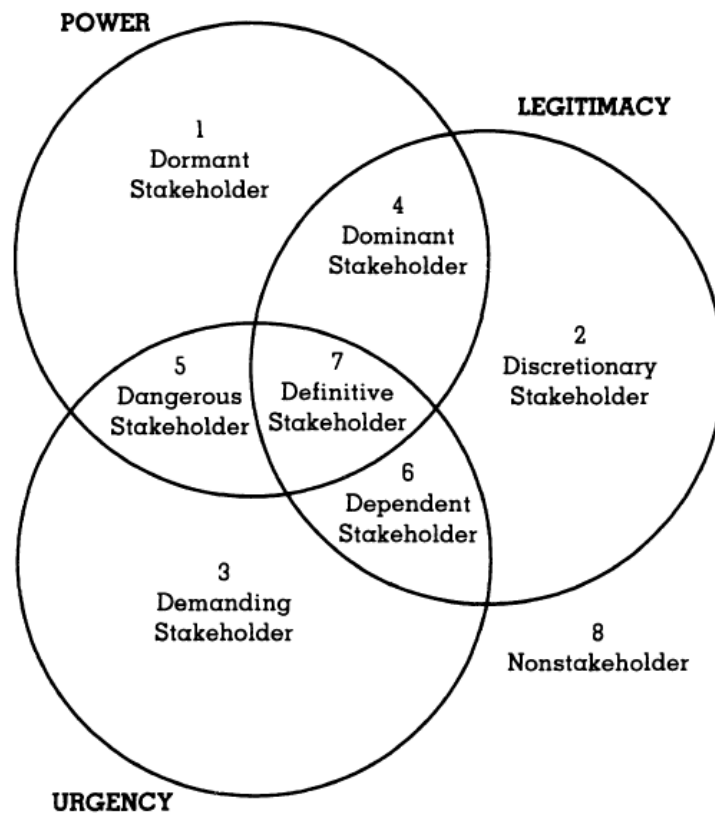


Figure 1: Stakeholder Typology (Source: Mitchell et al., 1997, p. 874)

Classic stakeholder research dealt with the creation of value in a business context. The expansion of and diffusion beyond business contexts instigated the development of alternative conceptions: “A final key shift entails a move away from managerial and corporate applications of the stakeholder concept. With initial stakeholder thinking the primary dependent variable was economic performance: stakeholder management had to be justified in economic terms. However, as stakeholder thinking expanded to other organizational contexts – namely the public and non-profit/nongovernmental sectors – alternative conceptions justified stakeholder thinking. In nonbusiness contexts organizing is more likely to happen around focal issues or problems, not focal firms or organizations. Research in this vein retains the basic stakeholder concept but does not emphasize business strategy or privilege managerial interests” (Koschmann & Kopczynski, 2017, p. 6).

This clarification implies that stakeholding in nonbusiness contexts has to be clear about the addressed issue, the purposes in addressing the issue and the conditions for facilitating change.

6.3 Stakeholder communication

Stakeholder communication is an issue attracting more attention in the last years (Feucht, & Lemp, 2006; Hoppenbrouwers et al., 2012; Koschmann & Kopczynski, 2017; Slunge et al., 2017). According to Koschmann and Kopczynski (2017, p. 1), stakeholder communication “involves any process of interaction or information exchange between an organization and relevant people, groups, other organizations, or broader constituencies. Almost any communication situation could be considered stakeholder communication because the participants involved all have some sort of stake in the interaction that prompted the interaction in the first place.”

Management research use to emphasize that organizations should be aware of and take into account shareholders' values and expectations in their strategic planning processes (Brummette & Zoch, 2015, p. 12). Stakeholder engagement is portrayed as a type of interaction that involves at minimum recognition and respect of common humanity and the ways in which the actions of each may affect the other (Noland & Phillips, 2010, p. 40). Stakeholder engagement is described as a social process where diverse stakeholders share a common forum, learn about each other's values, reflect upon their own values and create a shared vision and shared objectives (Brummette & Zoch, 2015, p. 1).

However, communication scholars engaged in stakeholder research challenge the harmonistic view that takes stakeholder communication as one-way models of illusory control or two-way models of disguised monologue. Communication is more than linear transmission of information. In the view of a constitutive approach to stakeholder engagement, communication is perceived as a social process in which the identities of stakeholder emerge in communication and are performed in conversation and meaning emerges through negotiation and consensus. “This perspective stands in sharp contrast to the ideas of stakeholder thinking as developed in the management literature, especially because it goes against many assumptions of strategic, managerial thinking – that dialogue is inefficient, it challenges hierarchical control, and it is unpredictable. But dialogue may also be the approach needed in today's organizational landscape, especially in contexts of increasing complexity and interdependency” (Koschmann & Kopczynski, 2017, p. 8).

The emphasis on dialogue as a social process points to the chance that stakeholder communication does not only create meaning regarding an issue at stake but also influences how stakeholders conceive the own position and role in a policy field.

6.4 Implications for MIrreM

The brief and selected review of stakeholder research yields a set of suggestions for stakeholder engagement in the context of the MIrreM project.

A first take-away refers to the broad and fuzzy use of the term stakeholder that blurs context- and task-sensitive understanding. MIrreM partners should agree upon the meaning of stakeholder engagement in the context of the project and distinguish between experts consulted due to their technical expertise and alignment with project purposes and

stakeholders included due to their relevance in the formulation of alternative designs in the governance of irregular migration.

Cooperation with stakeholders takes place at different stages of the project, is related to the accomplishment of distinct tasks and serves specific purposes. For example, the improvement of measuring irregular migration pose questions of technical feasibility, political acceptability and ethical preferability. While these dimensions are issues that matter in stakeholding, the particular roles and functions of the actors need to be distinguished. As a practical task, the improvement of measuring irregular migration requires professional expertise and alignment with this special purpose. Also, the production of a handbook on regularisation requires expertise and alignment with the purpose to develop a policy design that accepts regularisation as an option. Consequently, the identification of stakeholder should include in addition to the classic criteria of power, legitimacy and urgency also expertise and alignment.

The composition of stakeholders' inclusion in the project will differ with respect to the operational issue at stake, the national contexts, institutional settings and civil society engagement. The identification of key stakeholders is context and field specific. Against this background, MIRreM partners should pursue an aligned comprehensible approach for stakeholder recruitment and integration.

Since MIRreM operates in a highly contested policy field, it is operational to focus in the first step of Critique Guided Designing on an engagement with experts and stakeholders well aligned with the purpose to formulate alternative policy designs. In order to avoid that inappropriate stakeholder inclusion prevents or hampers the practical development of innovative policy designs, stakeholder engagement should be sequentially organized. For the stage of collaborative development, cooperation should be established with experts in alignment with the project purposes. Stakeholders not in alignment with project purposes should be included in the middle stage of critique-guided assessment of the alternative policy designs in order to gain more social robustness.

Starting from this consideration, the MIRreM partner may consider for each task to what extent the integration of all classes of stakeholders is instrumental and necessary – and partners may develop on this basis a consistent strategy how to identify, include and cooperate with key stakeholders.

MIRreM's combination of different purposes constitute distinct although overlapping fields and accordingly distinct but overlapping stakeholder landscapes. In the field of measuring irregular migration, the relevant actors include in a very broad approach all actors that collect data, generate quantitative or statistical accounts or use the generated statistics on irregular migration. On the other hand, the field of regularisation concerns actors because they are calling for regularisation, being the addressees for regularisation calls or benefit from regularisation programs.

Stakeholder communication need to be adopted with regard to the features of a special target group. The relevant aspect addressed should be clearly formulated. For example, with regard to the envisaged training for journalists, the main goal could be – in reference to the statistical thinking debate – described as enhancement of “statistical literacy” (Ben-Zvi & Garfield, 2004; J. Best, 2012; Steen, 2002; Van Witsen, 2018).

7. CONCLUDING REMARKS

As Coordination and Support Action, MIRreM aims to contribute innovative and alternative policy designs to the “stream of solutions” (Cohen et al. 1972) available in the governance of irregular migration.

The epistemic entanglement of the distinct but overlapping purposes to improve the measurement of irregular migration and to extend the possibilities of political handling of irregular migration with the formulation of regularisation options will broaden not only the understanding of the nature of irregular migration but also of the capacities to politically respond in a reasonable manner. MIRreM’s quest for an elaboration of technical feasibility, political acceptability and ethical preferability of alternative policy design in collaboration with stakeholders contributes to the development of not-yet realized possibilities.

Since appropriation and implementation of innovation occurs due to the complexity and multicentric nature of political decision making in a non-linear and unpredictable manner, alternative policy designs displaying a goodness of fit with established frameworks and governance preferences have a higher chance of implementation. Critique Guided Designing with a systematic attention to reservations and criticism provides an approach to enhance the goodness of fit and thus support reasonable decision making in a highly contested policy field.

Contributing to the availability of more and more sophisticated policy options for change in the highly contested policy field of irregular migration governance is the main asset of the MIRreM project.

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Decentring the Study of Migrant
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Framework paper on the concepts and typologies on returns - combined with four conceptual notes

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Summary

The overall aim of the GAPs project is to decentre the dominant, one-sided understanding of ‘return policymaking’ by bringing multiple perspectives into play and studying the complex interaction of diverse actors involved in the return processes; scrutinizing gaps and shortcomings in the governance of returns, with both its internal and external dimensions; and devoting specific attention to the study of practices. Developing a clear conceptual framework that describes how different actors identify migrant returns and how various disciplines are used to study return is a crucial step for decentring the dominant policy understanding and the focus of this paper. The paper underlines the context-specific use of the term which varies both among countries and regions. Specifically, this paper provides a conceptual framework for the clarification of whose return we are addressing – that is, whether of legal settled migrants, migrants without status, asylum seekers who have been refused, people under protection status, or people with tolerated or undefined status – and who is proposing the definitions and for what purpose. We introduce an analytical framework on the relationship between returns and coercion, while we elaborate the concept of ‘coerced returns’ as an overarching concept and spectrum. We thus propose a spectrum of returns based on coercion and taking the sites of return (before and after borders). We believe this approach may contribute to the scholarly calls to challenge the policy categories/dichotomies by illustrating how voluntary and forced mobilities are a continuum, not a dichotomy. The paper thematically links and complements the spectrum with the typology of return mechanisms taking into account both formal policies and informal practices in the governance of returns. Hence, we undertake several refinements to the concepts, labels, categories and typologies about return, specifically in relation to the actors, sites and levels of coercion. The conceptual discussion in GAPs builds on the rich body of work on migrant returns in several disciplines. this framework paper also adds the literature review pieces on return-related concepts used, principles underlined, highlights from the main debates in the disciplines of History, Economy, International Law and Anthropology.

The GAPs Project

GAPs is a Horizon Europe project that aims to conduct a comprehensive multidisciplinary study on the drivers of return policies and the barriers and enablers of international cooperation on return migration. The overall aim of the project is to examine the disconnects and discrepancies between expectations of return policies and their actual outcomes by de-centring the dominant, one-sided understanding of “return policymaking.” To this end, GAPs:

- examine the shortcomings of EU’s return governance;
- analyse enablers and barriers to international cooperation, and
- explore the perspectives of migrants themselves to understand their knowledge, aspirations and experiences with return policies.

GAPs combines its decentring approach with three innovative concepts:

- a focus on return migration infrastructures, which allows the project to analyse governance fissures;
- an analysis of return migration diplomacy to understand how relations between EU Member States and with third countries hinder cooperation on return; and
- a trajectory approach that uses a socio-spatial and temporal lens to understand migrant agency.

GAPs is an interdisciplinary 3-year project (2023-2026), co-coordinated by Uppsala University and the Bonn International Centre for Conflict Studies with 17 partners in 12 countries on 4 continents. GAPs’ fieldwork has been conducted in 12 countries: Sweden, Nigeria, Germany, Morocco, the Netherlands, Afghanistan, Poland, Georgia, Turkey, Tunisia, Greece and Iraq.

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1. Conceptual Framework Paper on Returns

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Introduction

The power of concepts, labels, and categories has been increasingly debated in migration and refugee studies (Snel et al. 2021; Crawley and Jones 2021; Crawley and Skleparis 2018). Yet the existing literature provides very little examination of the categories' relevance on return migration (Gemi and Triandafyllidou 2021) and deportation (Walters et al. 2022). As Cassarino (2004, p. 254) correctly notes, 'there are several definitional approaches to return migration and returnees' as these concepts are 'a multifaceted and heterogeneous phenomenon'. These definitions play a 'crucial role in orienting, if not shaping, the perceptions, taxonomies and policies adopted by governmental and intergovernmental agencies' (ibid.).

The Conceptual Notes prepared for the GAPS project shed light on the different disciplinary perspectives (sociology/anthropology; law; economics; history). They also point to the context-specific use of the term, which varies both among countries and regions as well as among who is using it (e.g. scholars, policymakers, practitioners, migrants, diaspora groups) and for what purpose. Indeed, it is important to clarify whose return we are addressing – that is, whether of legal settled migrants, migrants without status, asylum seekers who have been refused, people under protection status, or people with tolerated or undefined status – and who is 'doing the talking', in other words, who is proposing the definitions and for what purpose.

Our aim in this framework paper is not to add a new definition to the multiple ones on returns but to propose an analytical framework on the relationship between returns and coercion. Following on the heels of the literature reviews in this dossier that are part of this broader conceptual exercise (Rottman and Nimer 2023; Ozturk 2023; Istaiteyeh 2023; Barthoma 2023), we first discuss the different meanings assigned to return migration by different actors. We then look specifically at the relationship between the level of coercion and the return mechanism or procedure implemented, offering a thick description of the elements involved. The third section proposes a typology of return mechanisms and explores the entanglement of formal policies and informal practices in the governance of returns.

Returns: Actors and their Roles in Shaping Terminology

While return is a much broader conceptual and policy category (as discussed by Rottmann and Nimer 2023), here we focus on 'return policy' as defined by the European Union, notably when migrants are involved in 'return procedures' because their presence at destination is no longer desirable, allowed, or tolerated.

Such returns involve different **procedures**, whether the actual voluntary departure of the person, an expulsion (when a decision is handed to the person ordering them to leave the country within a number of days), a removal (notably when the expulsion is enforced and the person is deported), and readmission (of the person to their country of origin or a previous transit country by an agreement) or repatriation (specifically, the return to the person's country of origin) (cf. European Return Directive 2008; ECRE 2019; IOM 2019; UNHCR 2003). Particularly in the international law documents, the term of *refoulement* is also

commonly used ‘as shorthand for any returns or non-admissions that violate the principle of non-refoulement’ (IOM 2019, p. 170).

The adjective list of return and repatriation varies in relation to characteristics detected during the procedures such as voluntary, compulsory, State-induced, self-organised, or assisted returns, on the one hand, and those presented after the return process as safe, sustainable, permanent, or temporary, on the other (Chimni 2004; Crisp and Long 2016; Black and Gent 2006). They also refer to two ‘poles’ – what happens at the original destination country to enact the return and what then happens at the return destination country after the migrant has been returned.

Some actors are particularly engaged in promoting return terminologies and analyses, notably the United Nations High Commissioner for Refugees (UNHCR), International Organization for Migration (IOM), the European Union (EU) institutions, national authorities, as well as academics and migrants themselves. Accordingly, the identifiable scales include policy texts and their implementation; research perspectives, whether quantitative or qualitative, about conceptual or policy issues; and lived experiences of those directly involved, i.e., the migrants. On these scales, there are interplays, overlaps, and gradual alignments, particularly between IOM-UNHCR and nation-states, as well as divergences over the definitions, policy objectives, and interpretations of guiding principles between returning and origin State actors, civil society, and migrants themselves. Anne Koch (2014, p. 905) illustrates how practices of both ‘legitimise each other's engagement as well as the overarching return objectives of governments, and are, therefore, involved in norm-building regarding the acceptability of state-induced returns’. In many cases, EU-IOM joint programmes fund locally-owned civil society organisations in the origin countries as implementers. Their development and migrant-protection interests are brought in alignment with the European objective of curtailing irregular migration; they also ‘keep imagining, and to some extent, performing alternative ways of dealing with migration’ (Marino et al. 2022, p. 1). This all raises questions about knowledge production, norm-building, and epistemological discussions around returns, which is beyond the scope of this framework paper.¹

States, particularly destination countries, are the main actors who have full authority over returning or not returning people; hence, they decide which term to use. They have complete discretion and power to categorise displaced people who arrived in the territory as asylum seekers, refugees, irregular, or tolerated through border control and bureaucratic processes. This is also reiterated in international law, which underlines that ‘the states of destination have a legitimate interest in returning irregular migrants and failed asylum seekers who do not (or no longer) fulfil the requirements to remain in the territory of the State, and to secure the readmission of these migrants by their countries of origin’ (IOM 2017, p.1). Furthermore, the country of origin is required by international law to accept the return of their nationals (ibid.).

¹ See Bradley, M. (2021) Realising the right of return: Refugees’ roles in localising norms and socialising UNHCR. *Geopolitics*, pp. 1-28; Chimni, B. S. (1993) The meaning of words and the role of UNHCR in voluntary repatriation. *International Journal of Refugee Law*, 5(3), pp. 442-460; Chimni, B. S. (1991) Perspectives on voluntary repatriation: A critical note. *Int'l J. Refugee L.*, 3, 541; Koch, A. (2014) The politics and discourse of migrant return: The role of UNHCR and IOM in the governance of return. *Journal of Ethnic and Migration Studies*, 40(6), pp. 905-923; Van Houtte, M. and Davids, T. (2008) Development and return migration: from policy panacea to migrant perspective sustainability. *Third World Quarterly*, 29(7), pp. 1411-1429. For genealogy of return/repatriation concept see Hammond, L. (1999) Examining the discourse of repatriation: Towards a more proactive theory of return migration. In: *The end of the refugee cycle*, pp. 227-244.

Preliminary empirical work undertaken in the context of the project provides insights about the complexity of return procedures on the ground and how State policies shape such complexity. To illustrate the variations, we include two country examples: Turkey and Poland. In Turkey, for instance, these six categories of potential and actual people targeted for return procedures were identified: those targeted to be removed/at risk of being returned, i.e., irregular migrants (no registration at all, registered in the wrong city) such as Afghans, Iraqis, Iranians; those who might be targeted to be removed in the near future, e.g. as indicated by political discourse or change in geopolitical situation such as Syrians under temporary protection; those pushed back at border from Greece (often transit migrants, including Syrians); those denied when they tried to go (entered, applied for asylum, and rejected in Europe) such as Iraqi returnees from Greece; those with removal orders/briefly detained/people who had returned but came back; voluntary returnees as designated by IOM to de-dichotomise the forced/voluntary binary. In Poland, however, the categories of potential migrants who are already subjected or will be soon subjected differ and include: rejected asylum seekers; asylum seekers readmitted to Poland under the Dublin regulation,² e.g. Georgians; asylum seekers such as Iraqis coming from countries with low recognition rates or considered safe third countries; those pushed at the land border such as Chechens; beneficiaries of temporary protection such as those from Ukraine since their legal situation can change.

Beyond national States, international organizations, mainly UN organs, have been particularly active in the last 20 years in promoting and shaping both the discourse and the policy of returns (Bradley 2021; Chimni 1993). Even before becoming a UN body, the IOM worked closely with UNHCR, including on returns (Bradley 2021). Gradually IOM took more prominent actions for conceptualization (or norm-building) of returns. This is also part of the dynamic that although IOM and UNHCR once had ‘distinct worldviews’, the IOM is ‘currently the leading actor in terms of framing migration, thereby exerting a strong influence on global migration governance’ (Green and Pécoud 2023). It is the same for the return and reintegration field, hence its definition is critical for shaping policy frameworks and normative narratives.

Return and repatriation

IOM identifies **return** as ‘the movement of persons returning to their country of origin after having moved away from their place of habitual residence and crossed an international border’ (IOM 2019, p. 186). Before the IOM’s emergence as the lead actor in the return migration field, the UNHCR had been quite active in norm-building and had proposed ‘voluntary’ repatriation as part of a durable solution, using the term interchangeably with voluntary return. UNHCR prefers the term ‘voluntary repatriation’ to explain the State-involved mass returns (or expulsions) of asylum seekers or refugees from neighbouring host countries to the countries of conflict, particularly the UNHCR-led processes in Africa and Asia, such as the repatriation

² The Dublin II Regulation was adopted in 2003, replacing the Dublin Convention. The Dublin III Regulation (No. 604/2013) was approved in June 2013, replacing the Dublin II Regulation, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/country-responsible-asylum-application-dublin-regulation_en

from Iran to Afghanistan or Bangladesh to Myanmar. Since the 1990s, along with the pressure from the international community (Hammond 1999), UNHCR has presented ‘**voluntary repatriation**’ as one of the durable solutions, that is, ‘any means by which the situation of refugees can be satisfactorily and permanently resolved to enable them to lead normal lives’ (Chimni 2004, p.55; UNHCR 2016). No doubt that in this UNHCR definition, wording such as ‘satisfactorily and permanently’ and ‘normal lives’ is quite ambiguous. Three **durable solutions** proposed include voluntary repatriation, local integration, and resettlement to third countries. UNHCR holds the authority to engage in repatriation and resettlement and assist ‘governmental and private efforts to promote voluntary repatriation’ (Statute 1950). The IOM has a mandate to be involved in assisted voluntary returns. At the UN level, the UN’s Global Refugee Compact proposes the creation of conditions for the expedited return of irregular migrants (UN 2018).

Voluntariness is a critical feature of the terminology used by IOM and UNHCR (recently also by the EC), which repeatedly emphasise that the terms do not involve forced returns. **Voluntary return** is a formal policy defined as ‘the assisted or independent return to the country of origin, transit or third country, based on the free will of the returnee’ (IOM 2019, p. 12). IOM underlines that ‘voluntariness is assumed to exist if two conditions apply: (a) freedom of choice, which is defined by the absence of physical or psychological pressure to enroll in an assisted voluntary return and reintegration programme; and (b) an informed decision which requires the availability of timely, unbiased, and reliable information upon which to base the decision’ (IOM 2019, p. 13; referred to in EMN 2023). However, existing empirical evidence contests the voluntariness aspect in returns, including practices in the IOM’s own assisted voluntary return and reintegration programmes (Maâ 2023; Bartels 2017; Blitz et al. 2005)

Regarding the return of migrants, EU legislation and its **member states**’ respective national laws use more technical terms such as removal and readmission since there are no binding and uniform definitions of these terms. These concepts generally relate to the forced return (expulsion) of rejected asylum seekers and irregular migrants back to the country of origin or to the third ‘safe country’ despite some nuances. **Expulsion** refers to the legal order to leave the territory of a State and removal or deportation as well as to the actual implementation of such order in cases where the person concerned does not follow it voluntarily (IOM Dictionary 2019) [*comprehensive coverage*]. **Removal** is ‘the act following a deportation, expulsion, or removal order by which a State physically removes a non-national from its territory to his or her country of origin or a third country after refusal of admission or termination of permission to remain’ (IOM Dictionary 2019, p. 180). **Readmission** is an ‘act by a State accepting the re-entry of an individual (own national, national of another State – most commonly a person who had previously transited through the country or a permanent resident – or a stateless person’ (IOM 2019, p. 169).

Compared to removal, expulsion, and readmission, the term deportation is used more often by **academia and civil society/activists**. Deportation is typically understood in terms of the forcible (often violent) removal by State authorities of a ‘foreigner’, usually a ‘migrant’, from a country in which she or he ‘does not have citizenship’ (Walters et al. 2022). There is a well-established deportation studies field that embraces critical perspectives and closely engages with the broader works of literature on ‘critical geography, sovereignty and biopolitics, political economy, science and technology and race and postcolonial studies’ as well as border studies since the early 2000s (Coutin 2015; Lemberg-Pedersen 2022; Walters 2018; Drotbohm and Hasselberg 2015). This scholarship challenges the State-centric

methodological assumptions and criticises the terminological choices by questioning the policy purposes behind them. For example, El Qadim (2014) argues that readmission should be considered a robust deterrence and control instrument within the EU migration regime instead of a neutral term. Spathopoulou and colleagues (2020) contest that the EU's readmission programmes, for instance in Greece, can be better called as promotion of 'self-deportation'.

It is also important to note that the use of return-related concepts differs among world regions. Policy papers addressing forceful returns from Europe to origin countries use the terminology of readmission of individual rejected asylum seekers and also assisted voluntary returns (Walters et al. 2022; Sökefeld 2019); in Africa or Asia, such documents use the terminology of repatriation (Crisp and Long 2016; Gerver 2018), while in Africa they also increasingly adopt the terminology of readmission (in relation to the EU externalisation efforts). In North America, policy papers do not hesitate to use the terms expulsion and deportation for forceful returns of unwanted irregular migrants from Central and South America in the United States (Goodman 2020).

Critical scholars of migration, including ourselves, question the indiscriminate use of notions of 'voluntary return' under the pretence of free will while such returns actually often involve apprehension of the migrant by the authorities and different forms of coercion, structural violence, and abuse (De Genova and Tazzioli 2022, p. 856; see also Spathopoulou et al. 2020; Rosenberger and Koppes 2018; Kalir 2017; Cleton and Chauvin 2020; Leerkes et al. 2017). As correctly noted by Anissa Maâ (2023, p. 92), 'migrants' entangled appropriations of return are defined in close relationship with a wide range of actors intervening during the process of return. Ultimately, migrants reformulate the meaning of their involvement in voluntary return into strategic, moral, relative, and symbolic terms'.

Contrary to policymakers' and implementers' assumptions, from the **perspective of migrants**, returns are not the end of the migration journey or return 'home'; instead, returns only serve as a part of the migration circle and a point in the mobility continuum (Gemi and Triandafyllidou 2021). Reflecting on this reality, migration scholars conceptualise returns more broadly, stating that return is 'a part of the wider mobility process in which the migrants engage' as one dot in a non-linear course that may include multiple emigrations and return segments as well as re-migration (whether to the same destination country or third countries)' (ibid., p.3). From the scholarly view, the label or category of 'return' has been used to refer to refugees who restart living in their former 'homes'; who come back to their countries of origin but live elsewhere within this country; and those internally displaced people (IDPs) returned to their former area of residences. In fact, return migration as a process is much broader and spans the migrant's plans for staying, returning, or moving on and has typically very little to do with coercion and expulsion (Gemi and Triandafyllidou 2021; Cassarino 2015).

For this reason, both migrants and human rights advocates prefer the use of terms such as deportation, expulsion, and forced return to identify the returns induced by States and coordinated by international organisations, clearly distinguishing between those and broader return processes.

Coercion and ‘Returns’

This paper and the GAPs project overall focus more specifically on the return policies and procedures implemented by States and international organisations, albeit introducing also critical perspectives from the point of view of migrants, stakeholders, and experts. In this framework, the relationship between coercion and returns is particularly important and this is the focus of the next sections of this paper.

The links between return programmes/procedures and voluntariness/coercion are particularly complex. Scholars often question the extent to which the voluntariness principle is adopted in the return operations, given that migrants historically and currently are rarely included in the decision-making during State-induced returns (Kirui 2019). As early as 1999, Hammond (1999, p. 231) notes that:

The voluntary nature of the decision to return may be difficult and even impossible to distinguish in cases where those who opt not to repatriate face the closure of camps, cessation of aid, and harassment by local security forces. Those who choose not to return may also face harassment and intimidation from the host government or political groups in the country of origin whose interests repatriation may serve.

It is evident from the literature review that the vast majority of returnees from Europe or transit countries (such as Turkey, Libya, Tunisia, and Morocco) do not wish to ‘return’ but were somewhat coerced one way or another. This defies distinctions between voluntary and forced return as a dichotomy and points to a continuum starting with a spontaneous voluntary return out of despair with one’s situation to accepting a return after a refused asylum decision to resisting a coerced return and being deported and staying as irregular migrants. Some did not get a formal response to their asylum application but had waited too long under dire conditions. They observed others receiving negative responses or were told by their lawyers that they did not have a chance to get status. This group includes some who started an appeal process with the help of lawyers or NGOs but were still rejected or their processing was again too long, causing some to lose hope and hence decide to return, while others applied to the ‘AVRR programs’.

We thus propose a spectrum of returns based on coercion and taking the sites of return (before and after borders). We believe this approach may contribute to the scholarly calls to challenge the policy categories/dichotomies by illustrating how voluntary and forced mobilities are a continuum, not a dichotomy (Erdal and Oeppen 2017; Crawley and Skleparis 2017; Carling and Schewel 2018) and how migration journeys are ‘fragmented, non-linear, including different intermediate stops and multiple returns and new departures’ (Triandafyllidou 2022, p. 1). It also points to the need for acknowledging not only the State’s views but also the migrant perspectives towards return – which is the core aim of GAPs project by decentring the study of returns.

A first question to ask is whether return is truly voluntary or not. The voluntariness of the return can be assessed by the migrant’s own perspective but can also be categorised in relation to who initiated it: the migrant, State authorities, an international organisation, or a civil society organisation.

In similar vein, we need to consider whether the return was eventually organised by the migrant or by a third party, fully or in part (notably assisted or not) and whether it included

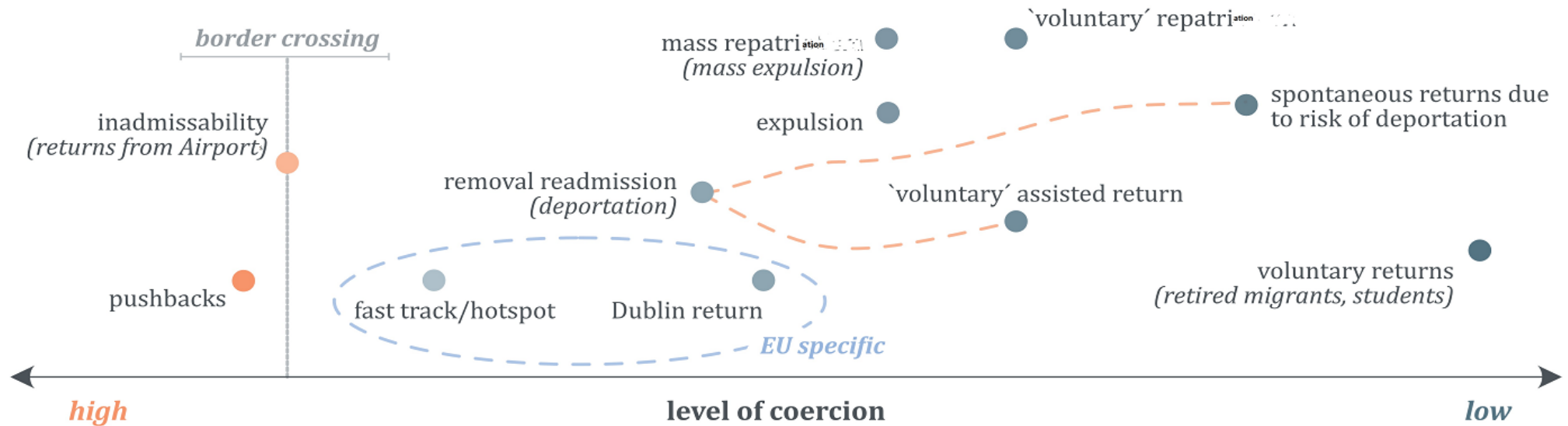
for instance incentives (e.g. a reintegration fee paid upon arrival at the origin country). Indicatively, we can consider whether the return was part of a larger project or initiative to incentivise returns and support reintegration within which the migrant may have decided to take the opportunity. We may also ask whether an ‘assisted voluntary’ return formed part of an enforcement campaign by a given destination or transit country, leading then to the apprehended migrants being given a ‘voluntary’ return option through an assistance programme.

In this case we should also consider whether a return was individual or whether it formed part of a larger program or campaign aimed at removing a set of people with a given status, for instance asylum seekers refused on first instance.

It is crucial to consider whether a return happens at the border, is notably a pushback or involves a deportation a few days after having crossed the border because the document has no status and may have been fast-tracked through the asylum procedure and been found inadmissible. Or whether the return happens from within the country, away from the border, after being apprehended or in any case as part of what we will discuss later as ‘incentivising’ returns.

Figure 1 complements this review by offering a visual representation of where and how return procedures happen.

Figure 1



Typology of Return Mechanisms

Building on the discussion of the previous sections, we propose **three mechanisms of return governance: pushing, imposing, and incentivising**. All three involve formal and informal policy instruments and practices (see Table 2); what differentiates them is the level of coercion and how informality is strategically deployed to achieve the desired outcome. Here, policy instruments refer to a ‘type of institution’ and a technical device with the generic purpose of carrying a concrete concept of the politics/society relationship and sustained by a concept of regulation’ (Trauner and Wolff 2014, p. 9).

Table 1: Types of Return Governing Mechanisms and Related Formal and Informal Practices

Mechanisms	Formal policy instrument	Informal practices to implement policy
Pushing returns	Strict border controls at the first arrivals	Pushbacks, impeding admission and asylum claims
Imposing returns	Dublin regulation of the EU; readmission agreements; administrative detention for returning; deportation; mass voluntary repatriation	irregularisation; dehumanisation, abandonment, deprivation, withholding aid; closing camps; limiting access to the registration, essential services, and mobility; criminalisation
Incentivising returns	Assisted voluntary return and reintegration programmes	Imposition of voluntariness or convincing by enticement

Pushing returns refers to enforcing returns of refugees and migrants ‘back over a border – generally immediately after they crossed it – without consideration of their circumstances and without any possibility to apply for asylum or to put forward arguments against the measures taken’ (ECCHR 2020). The formal policy of irregular migration control and border management is the basis for pushing returns.

However, our notion of ‘pushing’ returns focuses mainly on the informal – and illegal itself – practice of pushbacks. Pushbacks have been reported at several locations of the EU’s external borders, including along the Western Balkans route and in the Western, Central, and Eastern Mediterranean (Stefan and Cortinovis 2021). Pushbacks are officially defined (by the 47th session of the Human Rights Council) as ‘various measures taken by States which result in migrants, including asylum seekers, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied of any individual assessment on their protection needs which may lead to a violation of the principle of non-refoulment’ (European Parliament 2023). Pushbacks prevent migrants from effectively entering the country’s territory and

impede access to admission and asylum claims. National border guards, customs, and police have been found to practice pushbacks, while the European Border Agency, Frontex, has also been implicated.

Imposing returns means officially forcing an order to leave that has to be obeyed by the ‘irregular’ migrants or refused asylum seekers. In contrast, their stay in the country of asylum or transit is deemed ‘illegal’. Migrants may be coerced to return or maybe persuaded even if they are unwilling to do so. Imposing returns may occur through formal readmission or expulsion of a given migrant and their family. But imposing a return may also involve a mass voluntary repatriation of people who lack protected status and are deemed irregular migrants. While pushing returns usually happen on the way to the final destination, particularly during border crossings, imposing returns develop after one has arrived at their desired destination.

Regarding the imposition of returns in the EU, two formal policy instruments are critical: the Dublin regulation, which determines that an asylum claim needs to be processed at the first safe country of arrival, and readmission agreements with third countries of either the origin or of transit. Thus, if a migrant seeks asylum in another country and their fingerprints are found in the EURODAC (European Asylum Dactyloscopy) Database that collects data on asylum seekers and irregular migrants, they are returned to their first safe country of arrival where their fingerprints were taken upon entry to apply for asylum. In addition, if the national authorities apprehend a migrant without regularised status or a refused asylum seeker, they can be relatively quickly returned to their country of origin if that country has a readmission agreement with the government of arrival.

Incentivising returns refers to persuading refused asylum seekers or migrants without regularised status to ‘voluntarily’ return by offering some financial assistance. The EU’s most famous formal policy instruments for return governance are the Assisted Return (AR) and Assisted Voluntary Return and Reintegration programmes (AVRR). They are considered an ideal return mechanism to maintain the credibility and sustainability of the asylum system and unfold a humanitarian solution for irregular migrants as well as a way for the development of origin countries (EC Strategy 2021). These programmes offer migrants incentives to return voluntarily, and have become a central migration management tool in Europe (Lietaert and Van Gorp 2019). AVRRs are operated mainly by IOM with funding of interested European states and in partnership with local NGOs. For 2017, it was reported that EU member states run at least 96 AVRR initiatives, EU countries, including the UK before and since Brexit, have AR programmes. (Home Office 2021).

Currently, efforts such as capacity-building and knowledge transfer exist to establish national voluntary return mechanisms directly in transit countries (Mencutek 2022). Practices illustrate that voluntariness and assistance principles are conflated, while the line between formal and informal is blurred. Scholars argue that assisted voluntary returns hide the violence inherent to contemporary border regimes by masking it under the liberal democratic governing scheme and framing returns as ‘voluntary’ (Koch 2014; Spathopoulou et al. 2020). Voluntariness in the ‘voluntary assistant returns’ is also dismantled by a lack of preparedness, real alternatives, access to reliable and trusted information, and effective legal remedies (Crisp and Long 2016; Erdal and Oeppen 2017). Independent monitoring of the implementation of return, mainly regarding ethical and procedural standards, is rarely attainable (Pirjola 2007). Notably, essential ethical considerations like consent-taking are overlooked or manipulated at the practice level (Gerver 2018). Drawing from such realities about the implementation of

policies, many scholars put the AVRRs closer to the informality side in the formal-informal spectrum, voluntary deportation (Spathopoulou et al. 2020), or soft deportation (Leerkes et al. 2017) by showing their entanglements with the imposition of returns.

Discussion

It is important to challenge common binaries and show how return procedures are dynamic and need to be considered from multiple perspectives, particularly those of the migrants and civil society organisations, to showcase the policies' side effects. Our review and analytical framework, for instance, points to the fact that both **assisted/non-assisted (return)** and **voluntary/forced** return distinctions are continuums rather than binaries.

Considering also the hypocrisy behind the use of the term 'return' and so-called voluntariness, the question arises for this project of whether we should refuse the term and instead use terms such as expulsion, removal, or deportation.

These terms – particularly expulsion and deportation – have been largely dropped from the (EU) policy vocabulary for over 15 years now because of the negative connotation attached to them. At the same time researchers (Cassarino 2004; 2016; De Genova and Tazzioli 2022) have argued that the notion of 'readmissions' should also be challenged and we should actually speak of expulsions/deportations rather than readmissions. It is worth noting also that deportation needs to be understood as an executed expulsion. The term 'removal' has been used mostly to refer to individuals. Academics such as Jean-Pierre Cassarino and William Walters, among others, challenge researchers when they do not call practices deportation; using the terminology of 'readmission' can be one strategy.

Our suggestion is to adopt the term 'Coerced Returns' in keeping with the broad policy terminology but emphasising that returns that are part of these policies are coerced, to a greater or lesser degree. This will allow for our work to clearly connect and analyse national and EU legislation and policies (which of course include a variety of terms such as removal decisions, return decisions, expulsion decisions, and so on), while also providing for the necessary framework to critically analyse coercion in return governance.

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2. Concept note: Studying Return Migration from a Historical Perspective

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Introduction: The Significance of Historical Research

Neither return migrations nor politics of return are new. Nonetheless, as Russell King (2000, p. 7) pointed out, ‘return migration is the great unwritten chapter in the history of migration’. Although there has been an increasing amount of literature on return migration in recent decades, there remains a strong need to incorporate history as a disciplinary perspective into studies on return migration. This concept note aims to address this issue by presenting some initial ideas for adopting a historical approach to the study of return migration.

Beginning with the thought-provoking query of where history fits in migration studies, I will illustrate this with an analogy. In his acclaimed lecture in 1882, *What is a nation?*, Ernest Renan (2018) identified ‘forgetting history or getting history wrong (*l’erreur historique*)’ as an indispensable element in creating a nation. This conclusion can be extended to migration. Forgetting the historical origins and using migration history for contemporary debates can lead to distorted images and epistemologies of migration, where the knowledge and memories of historical experiences fade and become sedimented into pre-given facts about migration. As noted by historian Eric Hobsbawm in his book *On History* (1992), certain historical experiences become part of a broader historical memory, while others are overlooked. The history and memories of migration are often neglected in mainstream historiography, particularly in national histories such as those found in school textbooks. The impact of migration in the making of modern nations and nation-states recently received some scholarly attention (cf. Benjamin T. White, Laura Robson, see further down). Migration historians are well placed to offer a critical analysis of the foundational narratives of nations and nation-states.

Christophe Bertossi, Jan Willem Duyvendak and Nancy Foner (2021), in their introductory article to the special issue entitled *Past in the present: migration and the uses of history in the contemporary era*, analyse the notion of historical repertoires, which refer to elementary grammars of how the past is framed in contemporary public debates on immigration (ibid., pp. 4155, 4161). The authors discuss the divergences between US and European scholarship regarding the function of history in the context of immigration studies. American immigration scholarship has traditionally focused on past events, given the significant role that immigration has played in American history (Bertossi et. al. 2021, p. 4156). In the European literature, however, contemporary migration scholars have placed significant importance on history; for instance, social historian Leo Lucassen’s (2005) comparison of pre- and post-World War II immigrants in Europe demonstrates similarities in exclusion and integration patterns.

Migration scholars have generally paid little attention to the historical understanding of migration, often mentioning history merely as contextual background to the present. Nancy Green has noted that while historians may see parallels between contemporary migration patterns and those of earlier periods, sociologists often prioritise the notion of novelty (Foner 2005, p. 3). Historians Jan Lucassen, Leo Lucassen and Patrick Manning argued in their book *Migration History in World History* (2010, p. 4) that scholars, policymakers, and the media often ignore relevant historical analogies and perceive current developments as unprecedented. This emphasis on uniqueness, novelty, and unprecedentedness appears to be prevalent in many academic works (Bertossi et al. 2021), indicating a dearth of historical perspective in several studies.

For instance, using crisis rhetoric to frame migration is not a novel practice. Lucassen et al. (2010, p. 4) refer to the example of the economic historian William Cunningham (1897), who observed that Russian Jewish immigrants to London were as unassimilable as southern Europeans in the eyes of many American commentators and politicians around 1900. Before World War I, both the right and the progressive left in the US commonly feared ‘unskilled and defective poor immigrants’ (ibid.). The recurring patterns they refer to as ‘moral panics’ demonstrate how fear irrationally dominated public discourse and argue that revisiting historical accounts can offer a valuable temporal comparison for the present day, aiding our comprehension of both continuity and change, and ultimately placing recurrent moral panics in a more balanced context (ibid.). Thus the debate on migration (including returns) would benefit from the long-term insights developed in the field of migration history. Migration historians have the potential to rectify misrepresentations of the past, unveil collective amnesia around migration, and elucidate the logic behind the construction of collective memories.

Historical Approach to Migration and Returns

Historians approach migration as an integral part of human history. As Patrick Manning (2005, pp. 8-9) notes, migration is ‘the underlying human impulse’ that connects different parts of the world and creates social, cultural, and economic links. This statement is equally valid for returns, which constitute an inherent aspect of all forms of human movement. People do not only move from one place to another but also ‘return’ to their point of origin or continue to another destination. This non-linear understanding of mobility is crucial for understanding the historicity of return migration and broader patterns of human mobility.

Overall, historians studied return migration as an inextricable part of migration across a range of historical periods. They sought to identify the longitudinal patterns of human movement, whether voluntary or forced, by examining social, economic, cultural, and political factors that shape the return migration processes within the broader context of migration history. By examining historical data and sources, historians aimed to reveal the factors that influence individuals’ and groups’ decisions to return to their home countries. Additionally, they analysed the impact of return migration on the sending and receiving countries, how individuals negotiate their sense of belonging and identity upon returning to their home countries and communities, and how these factors shape their experiences and interactions.

The historical origins of modern-day return policies can be traced back to pre-modern and ancient times where exiles, deportations, and forced expulsions of individuals or groups from territories were commonly practiced. These actions were particularly prevalent in contexts involving wars, conquests, and the expansion of empires. Scholars such as Jan Felix Gaertner (2006) have noted that these methods were often employed as punishment tools, while also serving strategic and demographic purposes. States were granted power to determine who could reside in a territory as well as the circumstances under which an individual could exercise their *right of return*. Typically, the exercise of this right was directly related to the cessation of hostilities following a conflict, or with the changes of established social, political, or economic power structures. With the rise of nation-states, a change in terminology can be observed and deportations were employed as a political instrument, not only to define the boundaries of a nation-state *externally* but also *internally*. This led to the expulsion of ‘undesirable groups’ from the boundaries of nation-states with the goal of forming an ‘imagined’ and ‘homogenised’ community. For instance, during the 1880s, the US federal government established the nation's initial deportation policies, which reflected the ‘racism and nativism of the era’, targeting Chinese immigrants in addition to ‘idiots, prostitutes, alcoholics and public charges’ (Hester 2020).

Indeed, scholars have emphasised the strong link between nation-states and deportation practices, viewing deportations as a type of forced displacement with historical roots in colonial conquests and genocides (e.g. Lindberg 2023; Walters 2002; Peutz and De Genova 2010). They argue that deportation has been widely utilised as a ‘nation-building device’ (Lindberg 2023), a ‘technology of citizenship’ (Walters 2002, p. 282), and a form of ‘infrastructure of racism’ (Khosravi 2019, p. 114). As noted by Aristide R. Zolberg (1983), the formation of new States after the two world wars was a ‘refugee-generating process’. From a historical perspective, many nation-states were founded by deporting particular groups, which involved an element of demographic engineering. Forced return, in the form of deportation and the like, was widely implemented to carry out this ‘nation-building project’.

Before delving into the specifics of what can be termed a historical approach to return migrations, it would be helpful to contextualise the topic by providing a brief overview of major historical milestones. The periodisation below, however, is merely tentative and does not aim to provide an exhaustive account of all the return movements of refugees and displaced people.

Tracing Patterns of Returns in the Early Modern Period (ca.1500-1800)

Some historians have noted a significant rise in worldwide geographic mobility as a defining feature of a global early modernity. In early modern Europe, religious and confessional minorities stood out as the most prominent group of migrants (Behrisch et al. 2023). They established diasporas to maintain their unique cultural and linguistic identity across generations. From the perspective of return migration, these diasporic formations were crucial in preserving ties with their country of origin or imagined homelands.

Another example from the early modern period is the persecution and mass migration of Palatines and Huguenots in Europe. They sought refuge in England where they were recognised as Protestants fleeing Catholic oppression. In the early eighteenth century, the discourse around naturalising ‘Poor Palatines’ in England is fascinating and draws parallels with current migration debates. Advocates of Palatine integration stressed their potential to augment the British economy, citing their abilities as skilled farmers and craftsmen. Daniel Defoe, author of *Robinson Crusoe* and supporter of this political stance, wrote a pamphlet defending the ‘Poor Palatines’ in 1709 and campaigned for legislation to naturalise foreign-born Protestants. However, the hospitable stance faced escalating challenges with the surge in migrant numbers (Dresser and Fleming 2001).

The Tories waged a propaganda campaign against migrants and the Naturalisation Act, arguing that these migrants were a drain on the economy, taking jobs from the English poor and posing a threat to the nation’s security because they were not members of the Church of England. This narrative, resembling modern-day populist rhetoric, garnered support from specific segments of society. Due to the unfavourable social and political climate, numerous Palatines were resettled in the American colonies. Historians emphasise the role that transnational religious minorities such as the Huguenots and Palatines played in the expansion of capitalism and migratory routes across the Atlantic (ibid.).

The Age of Migration and Returns (1850-1913): Returning Europeans from the US

From the late eighteenth century onwards, Europeans started to migrate on an extensive scale, and this migration had a substantial impact on both the European continent and beyond (de Haan et al. 2023, p. 75). This particular era, as described by Castles and Miller (1998) and de Haan et al. (2023), helped shape a ‘global migration system’ with a variety of actors, such as sending and receiving countries and the migrants themselves, playing a role in its multiple processes. For instance, government policies of the host country constituted a significant factor in determining the fate of migrants. In the US, the surge in migration commenced only after a court in Indiana prohibited the ‘redemption system’ that had compelled destitute newcomers to become bonded servants upon borrowing money for entry (de Haan et al. 2023, p. 82). This judicial ruling unintentionally led to a massive influx of migrants and broader societal transformations.

Technological advancements throughout history have had a direct impact on human mobility, including return migration. In the early modern period, the scale of intercontinental migrations was relatively modest. The development of infrastructure – including highways, waterways, and railways – allowed more individuals to move away from their homes and social habitats. These same transport systems also facilitated people returning to their homelands, keeping in touch with relatives, and maintaining ties to their homeland through the proliferation of the telegraph and significant expansion of the press (de Haan et al. 2023, p. 75). Migration and return migration rates rose due to the shift from sail to steamships that reduced the cost and duration of the transatlantic voyage during the 1850s and 1860s. Travel time from Europe to the US shrank from one month in 1800 to eight days by 1870 (Hugill 1993; Cohn 2005). As a

result of this transportation revolution, Keeling (2010) estimates that eastward journeys (from the US to Europe) increased from 18 per cent of total transatlantic travel in the 1870s to 30 per cent by the 1900s. Due to technological advancements, the migratory pattern of this era has shifted from linear to circular.

Historical records demonstrate that the extent of return migration correlates with migration. Approximately 55-60 million individuals departed Europe and relocated primarily in the Americas during the 19th and early 20th centuries. Before the war, in 1914, Argentina had the largest immigrant community with 58 per cent of its eight million residents being first- or second-generation immigrants from Spain and Italy (de Haan et al. 2023, p. 80). Many of these migrant communities were geographically concentrated in the US, such as the Irish in Boston, the Dutch who founded Holland in Michigan, and the ‘German Belt’ spanning Ohio, Nebraska, Wisconsin, and Missouri (de Haan et al. 2023). This clustering allowed for ongoing interaction with their homeland, keeping the notion of return alive and creating conditions for a potential re-emigration to their European homelands.

According to Abramitzky et al. (2016), who compiled extensive data sets from Norwegian and US historical censuses during the Age of Mass Migration (1850-1913), it is noted that 30 million European migrants moved from Europe to the US in this period, and one-third of them eventually returned to Europe. During the period 1908 to 1923, official statistics from the US government showed that a comparable proportion of around 35 per cent of approximately 10 million immigrant arrivals left the country and returned to their countries of origin (Gould 1980; Wyman 1993, pp. 10-12; Hatton and Williamson 1998, p. 9). Some have suggested that these return rates may have been as high as 70 per cent, according to Bandiera et al. (2013).

Return rates vary between different immigrant groups. For example, a mere five per cent of Jewish immigrants to the US returned to Europe, whereas 59 per cent of Bulgarians and Serbians returned before World War I, and half of the Italians who migrated to the US between 1905 and 1915 subsequently returned to Italy (de Haan et al. 2023, pp. 82-83; see also Wyman 1993, p.11 and Gould 1980). Zachary Ward (2016) collected the first dataset from Ellis Island arrival records between 1917 and 1924 to investigate migrants’ intentions to stay or return home. His findings revealed that although only 15 per cent of the immigrants who arrived in the US in this period reported their intention to return home during entry, 40 per cent eventually did. Ward argues that the high rate of unplanned returns can be explained by the difficult initial years after arrival, which were more challenging than expected. The numbers decreased in the 1920s when new migration quotas were introduced. Additionally, contextual factors aside, it is important to consider the changing nature of migration motivations. Return is partially linked to the initial motivations for migration, but these early motivations are not fixed and often change during the post-migration period. For instance, in the early 20th century, some people moved to the US temporarily to accumulate savings and subsequently returned home to marry or purchase property. Return migration could also arise due to unemployment, sickness, or personal and family reasons. Edward A. Steiner (1906), an observer of the period, recognised

that return migrants typically fell into two disparate categories: ‘those who go home because they have succeeded and those who go home because they have failed’ (Steiner 1906).

Applying this logic, Francesco Cerase (1974) identified four different typologies in his study of Italian returnees from the US that illustrate four different types of return: ‘the return of failure’ in the host country, ‘the return of conservatism’ focused on investing in the home country, ‘the return of retirement’, and ‘the return of innovation’, where returnees are viewed as agents of change in their home country. Returnees of this era experienced an improvement in their financial standing compared to their pre-migration situation, purchasing farms on making other investments when returning (Wyman, 1993, pp. 79,132). ‘He who crosses the ocean can buy a house’, a popular phrase in Italy at the time, reflects the impact of temporary migration to the US (Cinel 1982: 71).

As several studies have shown, return rates increased during periods of economic downturn, e.g. following the panics of 1893 and 1907. A period of unemployment was a significant factor in facilitating the return journey of migrants back to their home (Wyman 1993, p. 79). A large number of returnees suffered from illnesses or injuries due to strenuous work conditions in the US. Tuberculosis, which the Irish dubbed ‘the American disease’, was common among the returnees (ibid., p. 85). Migrants were also targeted by popular animosity during economic downturns; particularly those who intended to return home, were singled out for not assimilating into mainstream American society and instead prioritising short-term financial gain (Foner, 1997, p. 367). This negative perception was also evident in official documents (cf. the Dillingham Commission’s 1907 report³) and several policies restricting migration were put forth for debate. For instance, in 1896, Representative John Corliss (R-MI) proposed an amendment suggesting that no one should be allowed to enter the US while still maintaining a residence in a foreign country (Wyman 1993, p. 104).

Rising Nationalism, Political Exiles, and Their Return Trajectories

The emergence of new nation-states, the rise of nationalism, and the dissolution of three multi-ethnic empires resulted in significant population shifts and facilitated the development of diasporic communities with strong connections to their countries of origin. Understanding these communities is crucial for comprehending specific return trajectories (de Haan et al. 2023, pp. 75-76). As previously stated, the idea and myth of return flourished and was bolstered amidst diasporic communities in correlation with the exponential growth of nationalism.

Another type of 19th-century European migration involved political exiles who played significant roles and influenced millions during their exile and upon their return. Prominent political and intellectual figures from this era include Karl Marx (1818-1883), who spent most of his life in Belgium, France, and England and produced influential work. The leader of the Bolshevik Revolution of 1917, Vladimir Lenin (1870-1924), spent many years in exile, as did other notable political figures such as the Pole Adam Mickiewicz (1798-1855), the German Heinrich Heine (1797-1856), and the Italian Giuseppe Mazzini (1805-1872) (ibid. p. 76). The

³ The US Immigration Commission report in 1911, about the negative view of ‘new immigrants’ from southern and eastern Europe and their ‘unwillingness’ to integrate into American society

Frenchman Victor Hugo (1802-1885) wrote some of his most famous works, including *Les Misérables*, while in exile in Guernsey.

Political exiles, typically, maintained involvement in politics and intellectual life in their home country. This extensive connection continuously fostered the discourse of return among this cohort and inspired some to aspire to change their nation's political system. The exiles were primarily comprised of a highly educated elite group. Their strong subjectivity allowed them to turn their exile into a space for innovation, particularly in 19th-century Europe. They published countless books, newspapers, and magazines and made significant contributions to intellectual and political life in their home countries and beyond. This aspect is an important topic beyond the scope of this conceptual note.

Migration of the ‘Colonial Subjects’ and of ‘Administrative Personnel’ Through Imperial Networks

Another trajectory for studying the migration and returns of this era is the ‘imperial networks’ through which ‘colonial subjects’ migrated to imperial centres as did a large number of administrative and military personnel (and their families) to colonies. The colonisation settlement underwent an essential shift during the 1920s and beyond, especially after the US introduced quota laws, which led to a shift in migration trajectories.

Following World War I, the colonies emerged as the principal destination for European emigrants. More than 400,000 individuals departed Britain to settle in colonies, while some 700,000 French citizens migrated to Algeria following its occupation in 1830 and its incorporation as a department of the French state in 1848 (de Haan et al. 2023, p. 83). Italy witnessed a similar pattern of immigration in the mid-1930s through the settlement programme initiated by Mussolini, and Portugal pursued its emigration programme to Angola and Mozambique, which constituted 50 per cent of Portuguese emigration in the 1950s. After World War II, decolonisation movements forced many European settlers to return. The repatriated millions of Europeans (British, French, Italian, Belgian, Portuguese, and Dutch) benefited from ‘assisted return’ and ‘reintegration programmes’ (Daniel et al. 2023, p. 93). Interestingly, these two terms are widely being used in EU’s current return and readmission policies. During the same period, the auxiliaries of colonial armies often received less support. A specific group, the *Harkis*, who served as auxiliaries for the French Army during the Algerian Independence War (1954-1962) and relocated to France, were permanently placed in camps (ibid.). This example highlights the underlying racial discrimination and segregation present in the nation-state project: being a crucial part of the French military in Algeria did not warrant equal citizenship status. The effects of ‘returnees’ on the host countries will be discussed in the next section.

Repatriations in the Aftermaths of WWI and WWII

The scale of World War I, in terms of population mobilisation and the extent of bloodshed, resulted in a vast displacement of people. In 1917, the war triggered the forced migration of seven million people (Daniel et al. 2023, p. 86). In the war’s aftermath, the term ‘return’ was

used to describe the process of repatriating soldiers and refugees to their country of origin. The League of Nations played a significant role by establishing repatriation commissions and envoys to deal with specific refugee groups – including Russians, Armenians, and Germans – and assist in their return to their homes. However, none of these efforts resulted in long-term arrangements (Lowe 2017). Katy Long (2013a) provides a comprehensive examination of the history of repatriation by tracing its roots in the early days of the international refugee regime following the end of World War I. Long (ibid.) criticises the international community's focus on repatriation as the ultimate solution to refugee crises and for overlooking the needs of refugees who are unable or reluctant to return.

Repatriations were also employed as a means of creating homogeneous nation-states. Repatriation of Greeks from Turkey and Turks from Greece during the 1920s and 1930s took place in the wake of the Greek-Turkish War as part of the population exchange agreement between Greece and Turkey. The populations were resettled on the basis of their ethnic and religious identities.

After World War II, there were also extensive repatriation efforts to return displaced persons, prisoners of war, and refugees to their home countries. This included the repatriation of some 40 million civilians from different European countries who were displaced during the war. The Allies drew up plans that differentiated between ‘refugees’ and ‘Displaced Persons’. The former was defined as ‘civilians not outside the national boundaries of their country’; the latter described as ‘outside the national boundaries of their country by reason of the war’ and expected to return to their countries of origin with the assistance of Allied authorities (Banko et al. 2022). The newly established United Nations formed separate bodies to deal with European, Palestinian, and Korean refugees.

The end of the war created a decade-long mass movement of populations from east to west and vice versa. Historian Bernard Wasserstein (2011) referred to these groups of distressed people who searched for safety and a new home as ‘wanderers’. The peace settlements at the end of World War II forced another massive number of people to leave their homes, driven by a process of ethnic sortition. This resulted in the expulsion of approximately 3.5 million German nationals (*‘Volksdeutsche’*) from Polish territory, 3.2 million people from Czechoslovakia, and approximately 225,000 people from Hungary. The vast majority of these *‘Heimatvertriebenen’* (expellees) settled in the Western occupation zones, increasing the total number of migrants in the newly established Federal Republic of Germany to roughly 12 million individuals (Daniel et al. 2023, p. 89). After the war, nearly two million Poles were compulsorily transferred from eastern areas of Poland that had been annexed by the USSR. Additionally, the involuntary repatriation of four million Russian POWs in German custody served as another significant instance. A considerable number of Soviet populations resisted repatriation, instead seeking refuge in Western Europe, the United States, Canada, or Australia (Daniel et al. 2023: 88; Wasserstein, 2011).

Decolonisation and Repatriations in the Post-War Period

Decolonisation led to mass population movements and repatriations. Following the partition of British India in 1947, Hindus and Sikhs repatriated to India from newly-formed Pakistan, while Muslims migrated to Pakistan from India. This mutual repatriation of Hindus/Sikhs and Muslims aimed to establish ethnically and religiously homogeneous nations, similar to the Greek-Turkish population exchange. The mass population exchanges resulted in the displacement of individuals from their historical homelands and livelihoods in the name of settlement of a war between countries. In the aftermath of the war and throughout the Cold War, repatriation policies implemented by the international community were predominantly presented as a ‘successful solution’ that aligned with the nationalist and liberal tenets of decolonisation movements and were seen as the ‘only’ way to address States’ refugee problems, even when returns were neither voluntary nor safe (Long 2013b).

After the Algerian War of Independence, repatriation waves included French citizens, *Pied Noirs* (European-descended Catholics and Sephardic Jews), and pro-French Algerians (*Harkis*) who opted to leave Algeria and return to mainland France. Within a few months in 1962, about 900,000 *Pied Noirs* and approximately 90,000 *Harkis* with their families fled to France (Daum 2015). The treatment of the *Harkis* is an exemplary case as they were unwanted by the French authorities and forced to live in camps for many years without any formal recognition.

One of the most poignant instances of repatriation occurred during the Bangladesh refugee crisis. In 1971, the war culminating in the independence of Bangladesh spurred around 10 million Bangladeshi refugees to escape to India, resulting in the most significant singular displacement of refugees in the latter half of the 20th century. In 1973, UNHCR played a pivotal role in facilitating the transfer of a significant number of peoples between Bangladesh and Pakistan – one of the largest population exchanges in history (UNHCR 2000). Katy Long's (2013b) evaluation report highlights the contentious implications of the collective decision-making surrounding the global community's repatriation policy, resulting in concessions that deviate from the universally-endorsed principle of voluntary refugee repatriation. Several studies, such as the cases of the repatriation of Rohingya refugees from Bangladesh to Myanmar in the early 1990s and the return of Rwandan refugees from Zaire and Tanzania in the mid-1990s, have shown that the principle of ‘voluntariness’ has been pushed to its limits (Barnett 2000, p. 8). Long (2013b) contends that repatriation operations entail a trade-off between competing interests, with some actors willing to compromise the principle of voluntariness to facilitate refugee returns. In extreme cases, framing returns as ‘voluntary’ may serve as a form of linguistic manipulation to justify politically expedient returns that do not satisfy minimum protection standards (ibid., p. 1). Despite the disconnect between the universal principle of voluntariness and its implementation, Long supports the continued relevance of the principle of voluntariness and proposes that UNHCR's repatriation operations be based on the criterion of ‘safety’.

Return Migration of Guest Workers and Post-Soviet Era ‘Voluntary’ Returns

In the 1970s and 1980s, the return of guest workers in Europe is a noteworthy case to examine the notion of voluntary returns. After the post-World War II economic boom, various European nations including Germany, France, and the Netherlands employed foreign workers to overcome labour shortages. These guest workers had initially planned to stay on a temporary basis. At least this was the initial perception and expectation of both receiving States and guest workers themselves. Consequently, in subsequent years, some guest workers and their families chose to return to their countries of origin voluntarily. This was due to changing economic conditions, family reunification, or a desire to reconnect with their cultural roots (Wessendorf 2007).

Razum et al. (2005) emphasise that Turkish returnees from Germany were not only motivated by economic factors but also by value-oriented motivations. Rittersberger-Tiliç et al. (2013) came to a similar conclusion. The authors present various factors that influenced returnees’ decision, such as attaining or failing to attain migration objectives, parents’ desire for their children to receive education in Turkey or grow up in their authentic cultural upbringing or both, the absence of future opportunities for their children to pursue higher education in Germany, as well as marriage, homesickness, difficult working conditions, health issues, and retirement. King and Kilinc (2013) identified five narratives of return among Turkish returnees in their study: return through a family decision; return as a traumatic experience; return as an escape for a new start; return as self-realisation; and return and the ‘Turkish way of life’.

Another wave of (voluntary) returns took place after the fall of Soviet regimes in 1991. Some nine million people (UNHCR 2000) found themselves on the move, having either found themselves outside their ‘homelands’ following the drawing of new national boundaries or having been deported by Stalin in the 1940s. Chudinovskikh and Denisenko (2017) note that migration flows between former Soviet republics after the breakdown of the Soviet Union are to a large extent the result of Soviet-era migration. The end of political restrictions opened up a free space for mobility. Returnees had different motivations: some had the desire to participate in political and economic transitions in their home countries, while for some the driving factor was a sense of national identity and belonging that were reconstructed after the fall of Soviet system. Voluntariness of these movements were highly structured by contextual factors shaped by economic (labour shortages), political (as an enabler and promotor of these movements), and social factors (e.g. family ties).

Returnees: Actors of Social Change?

One emerging topic in the work of historians is the impact of returnees on their home and receiving countries. In his extensive book, *Unsettling of Europe: How Migration Reshaped a Continent* (2019), Peter Gatrell argues that migration has been a fundamental force in shaping modern Europe. It has led to the creation of new communities and cultures and challenged traditional notions of national identity, generating both conflict and opportunity. Migration is

viewed as both a cause and a consequence of societal transformations (Manning and Trimmer 2020). Various historians have reached similar conclusions regarding the positive effects of migration (cf. Lucassen, Feldman and Oltmer, 2006). However, certain case studies demonstrate that neither immigration nor return migration generates unambiguous favourable results or leads to significant social change in the receiving countries. For instance, Cerase's (1974, p. 245) case study on returns from the US to southern Italy found that 'returned migrants cannot function as vehicles of social development'. In general, the potential impact of refugee returnees on the social or economic development of the origin country is rarely achieved (Mielke 2023; Van Houte and Davids 2008).

Historians have examined the short- and long-term impact of newcomers (including returnees) on the social fabric of host societies (Manning 2013; Lucassen and Lucassen 2014). The social historian Leo Lucassen (2021, p. 431) argues that migrants, including 'repatriates', had a more profound infrastructural impact on the receiving societies. Returnees bring 'new cultural experiences' ranging from technology to food and from ideologies to bureaucratic practices to the receiving society (ibid.). Lucassen particularly focuses on 'organisational migrants' –bureaucrats, soldiers, missionaries, and international skilled workers or NGO employees– whose migratory pattern is primarily determined by their organisational affiliation. Many organisational migrants moved through imperial networks and left their homeland only temporarily. African American soldiers who spent one or two years in Germany post-World War II provide a compelling example of the influence of cross-cultural migrants as they experienced a non-segregated society while in Germany. They were able to date White women and were treated equally by the locals. This experience enlightened them to alternative ways of living outside of their own racist society. Upon returning to the US, many of these African American soldiers became involved in the Civil Rights Movement (Lucassen 2021, pp. 433-435). Another example provided by Lucassen (ibid.) includes the French colonial experts who upon their return to France shaped the development of France's migration and integration policies. These colonial experts became advisors in Muslim affairs affiliated with the CTAM (*Conseillers Techniques pour les Affaires Musulmanes*), perpetuating the colonial divide between Western and non-Western societies that has subsequently become a key aspect of categorising immigrants since the 1970s. This practice was not unique to France, as all colonialist countries can trace their colonial legacy in contemporary migration and citizenship policies.

Diaspora Groups, Homeland, and the Myth of Return

Overall, scholars have recognised the significant contribution of diaspora communities in shaping and promoting a global cosmopolitan culture. The formation of diasporas, as outlined by Manning and Trimmer (2020), is essential for understanding the main patterns and cycles in the complex and diverse world of global migration and, more broadly, the heightened interconnectivity of various localities, socio-economic structures, and political systems.

Another issue studied by historians is the displacement and the repatriation or non-repatriation of minority and exile communities. Historically displaced and exiled communities

– especially those who have suffered mass expulsions such as Armenians, Kurds, Palestinians, and Christians from the Middle East – hold a ‘nostalgic’ desire to return to their ‘imagined’ homeland, while also acknowledging the emergence of substitute locations (Chatty 2010, p. 294). According to Cohen (1997), these minority groups are classified as a classical ‘victim diaspora’ due to their traumatic exile and the strong sense of victimhood incorporated into their diasporic identity. Nostalgia fosters attachment to a home space, which is an essential component of diasporic consciousness. Thus, home is depicted as a mythical space of blurred memories at both the individual and collective levels. Memories are crucial in shaping diasporas and preserving diasporic identities. Diasporic consciousness is constructed on the basis of what Maurice Halbwachs (1992) refers to as ‘recollection’ or culturally embedded memories (Erll 2011). Halbwachs argues that these recollections foster continuity and self-awareness within the group. Memories of the homeland and family stories are transmitted within a socio-cultural habitus (Bourdieu 1977, p. 53), where diasporic consciousness is fostered across generations. Second-generation immigrants, who were born in diaspora and have never seen their parents’ homeland, view home as a mythical space. I contend that for exiled populations, home is thus tied to the past and anchored in familial and cultural memories.

Another dimension of diasporic consciousness is what Vertovec (1997) defines as the awareness of decentred attachments – ‘multi-locality’ that connects dispersed yet collectively self-identified ethnic groups at global level in different localities. This awareness of decentred attachments demonstrates how diaspora groups can affiliate with multiple localities to position themselves physically and emotionally in different contexts. For scholars on transnationalism (Portes et al. 1999, p. 219), subjective evaluations by migrants of their homelands and self-identification play a vital role in their decision to return and their reintegration process. Numerous studies have been conducted on the perception of homeland among Turkish returnees. Kilinc (2014) shows in her article how second-generation Turkish-Germans constantly renegotiate their identities. Ayse Parla (2013) explored the concept of homeland among Bulgarian-Turkish returnees. She noted the ambiguity surrounding the ‘original’ location of homeland and emphasised that its location changes in both individual itineraries and across migrants who belong to the same migration wave and often mistakenly viewed as a monolithic entity.

The myth of return constitutes an essential part of diasporic consciousness, serving as the final piece of this analytical puzzle. This institutionalised discourse and well-established rhetoric are particularly prevalent among exiled populations who view their stay in host countries as temporary. Madawi Al-Rasheed (1994) explains in her study among Iraqi Arab and Assyrian refugees in London that the myth of return within a diasporic community is dependent on past refugee experiences and the group's relationship with its country of origin. Historians commonly use the term ‘myth of return’ when discussing non-return of exiled communities. Adherence to this myth is a powerful discourse in the diasporic consciousness. While the mythical portion pertains to the imagination of home or homeland, the real aspect displays the act of returning (ibid., pp. 200-201).

Drawing from literature on diaspora and transnationalism, historians also focus on issues related to belonging, changing identities over time, and relationships between diaspora

and homeland, as well as the roles of diasporic organisations, ‘homeland-oriented diasporic humanitarianism’ (McCallum Guiney 2023), ‘collective remittances’ (Galstyan and Ambrosini 2023), and memory – all of which are relevant to the issue of return/non-return. For instance, there exists a vast body of literature on the right of Palestinians to return to their homeland, restitution (reclaiming their confiscated property), and compensation (Chatty 2010). While this scholarship is distinctive in light of the Palestinians’ status, the same issues are pertinent to the displacement experiences of numerous minority groups and are deemed essential for returns.

Historical Methodologies for Decentring the Study of Returns

Historians have proposed various approaches to studying migration. The same methods can be applied to suggest some basic points for developing a historical approach to study return migration and the politics of return.

Methods for studying returns

Historians Jan Lucassen, Leo Lucassen, and Patrick Manning (2010, p. 18) argue that migration can be studied using a framework that covers a long period, wide geographical range, and a variety of disciplinary perspectives. The authors emphasise the significance of **longitudinal studies, an all-encompassing and inclusive global approach** that also critiques the dominance of Western historical writing and highlights the need for a multi-disciplinary framework.

Another method was proposed by Stephen Castles (2008). Castles argued against the fragmentation in migration studies and highlighted the failure to understand the historical nature of migration in migration scholarship, leading to false assumptions of one-way causality and an inability to understand the overall dynamics of migratory processes and their embeddedness in processes of societal change. Castles proposes an interdisciplinary approach, known as ‘**migration systems theory**’ to study both ends of the migratory flow, which is sensitive to historical formations such as ‘prior links between sending and receiving countries based on colonisation, political influence, trade, investment, or cultural ties’ (ibid., p. 5).

One important approach proposed by historian Patrick Manning (2003) is the ‘**relational world history-writing methodology**’. This method calls for an analysis of both local and global historical forces, as well as the experiences of individuals who attempted to utilise or oppose these forces.

Historian Klaus J. Bade notes that traditional historical migration research focused on movement in geographic spaces and spatial mobility. However, the emergence of transnationalism in the 1990s led to a shift towards micro-historical approaches that focus on social spaces, including meso-level network theories and theories and typologies of transnational social spaces and migrant identities (Bade 2001, p. 9810). Bade proposes that **historical migration research** should study the longitudinal patterns of migration movements, their volume, trajectories, and structures, as well as the behavioural patterns of migrants in relation to their socio-cultural and economic backgrounds, e.g., region, class, group, and gender (ibid., pp. 9810-9811).

Historians have explored connections between the past and present in various methods. Nancy Foner (2005) identifies two approaches she terms ‘**then-to-now**’ and ‘**then-and-now**’. The former is a temporal perspective that highlights the role of history and its evolution in explaining contemporary phenomena. In the latter approach, comparisons are drawn between historical events and social and cultural patterns of the past and the present to identify similarities and differences. However, the aim is not necessarily to explain the present through the lens of the past (Bertossi et al., p. 4160).

Lauren Banko, Katarzyna Nowak, and Peter Gatrell (2022) propose a ‘**refugee-focused approach**’ to develop historiographies of migration and analyse how migrants interacted with the refugee category while experiencing and negotiating displacement. Banko and colleagues emphasise that in the early period, historians had a policy-driven and institution-centric approach to refugees. This resulted in various publications on different aspects of the interwar refugee regime, such as the League of Nations’ operations and the prehistory of legal and institutional establishment including UNHCR, but that refugees were not considered in these studies (ibid., p. 6). For instance, there is limited understanding of the experiences of Greeks and Turks during the involuntary population exchanges of the 1920s. Although previous studies offered critical knowledge, the authors argue that they overlooked displaced individuals and the socio-economic, cultural, and political worlds that refugees helped to create. By exceeding the State’s power, the concept of ‘**refugeedom**’, as coined by the authors, encourages a global perspective. This includes focusing on global events and processes that led to mass population displacement as well as global and diasporic connections that acknowledge non-state-centric experiences and practices (ibid., pp. 2-3).

Decontextualising migration and return historiographies

Developing a historical approach to migration and returns necessitates critically examining migration and return historiographies, including academic literature. This critical engagement with the existing wealth of literature will open new avenues for writing history from the perspectives of actors excluded from writing their own history. Understanding migration and returns from the perspective migrants and returnees, co-writing down their experiences, and giving these experiences an analytical power should be a keystone of a historically-informed academic research.

Pluralising & decentralising history

The prominent Africanist historian Terence Ranger (1994) was one of the first scholars to critically analyse the problematic legal categories of refugees and underscore the need to integrate refugees and returnees into the mainstream of social history. Similarly, historian Paul Kramer (2020) encouraged fellow historians to think *with*, not just *of* refugees. The concept of refugeedom aims to provide refugees with their rightful place in history by decentralising and pluralising it (Banko et al. 2022, p. 8). Pluralising history involves shifting the focus from knowledge production channels produced in the Global North to the Global South to explore new epistemologies and adopt a more inclusive approach toward studying and discussing the history of migration. This approach also aims to pluralise geography (Cole 2021).

In line with pluralising the histories and historiographies⁴ of migration, the history of migration as we know it is dominated by the history of groups that were literate and thus had their history somewhat written down and documented. To move beyond this limited approach, it is necessary not only for migration historians, but also for other disciplines studying migration and returns, to make clear the historicity of each case in their methodologies. A perspective from the Global South sheds light on categorisation issues in the aftermath of decolonisation. The politics of categorisation have operated over time and space, necessitating a global approach to their examination.

Limited functionality of legal definitions: incorporating microhistories into the general framework

Historians have problematised formal legal and administrative definitions and terminologies and their dominance, analysing them as manifestations of the refugee regime, which are products of the nation-state order (cf. Banko et al. 20-22; Soguk 1999; Haddad 2008; Zetter 1988). Lucassen and colleagues (2010) highlight the limitations of existing formal categories in explaining the complexity of migrants. They argue that, like labour migrants, refugees rely on information and expectations about work and opportunities from their personal networks when making decisions. The authors emphasise that all refugees have both political and economic motivations. A historical perspective elucidates that socio-politically constructed dichotomies of migration – regular versus irregular, economic migrant versus refugee, voluntary versus involuntary – obscure the intricacies of migration.

A focus on microhistory will offer novel epistemologies for interdisciplinary research to grasp how migrants and returnees engaged and negotiated with ‘legal definitions’. Different agentic responses are shown in historical case studies. Migrants caught in situations of displacement engaged with the legal definitions imposed on them in disparate ways. For example, Palestinians adopted the term ‘refugee’ to draw attention to their exile and resist local integration or resettlement (Fiddian-Qasbiyeh 2016). Additionally, there has been a productive discourse on Palestinians’ usage of the term *Nakba*, which refers to the 1948 mass displacement. Palestinian refugees in Lebanon initially resisted using the term, seeing it as a permanent status for their temporary situation, preferring ‘returnees’ (see Sa’di and Abu-Lughod 2007). In contrast, repatriates in India during the Partition era rejected the ‘refugee’ label and demanded to be recognised as full citizens (Rahman and van Schendel 2003). This difference in the perception of a legal, hierarchical label can only be understood through a historical study that examines the counter-narratives developed within migrant communities in relation to the legal classifications imposed upon them.

State-building processes occur by externalising groups from the imagined community and deporting them from the territory, following a logical sequence. Studies have also examined the impact of refugees on shaping states. For instance, Benjamin Thomas White’s (2017) work on the French mandate period of Syria illustrated how French officials established

⁴ Here, the author deliberately used the plural form to show the multiplicity of histories that can be accounted for human movements.

a ‘buffer zone’ in Syria to consolidate colonial rule by settling Armenians. The placement of refugees prompted a reactive response among Syrian Arabs who constructed the notion of a ‘Syrian nation’, viewing Armenian refugees as both a threat and an example of Syrian hospitality. This interaction played a significant role in the formation of the State, as White (ibid.) notes. Examining the involvement of Assyrian refugees in shaping modern Iraq, Laura Robson (2017) analysed how the British and French colonial authorities, with the approval of the League of Nations, relocated Assyrian refugees to remote border regions in northern Iraq to consolidate their State power. The British viewed Assyrian refugees, who were forcibly displaced from present-day Turkey (Hakkari, Bothan region), as a valuable resource in combatting Iraqi resistance. This narrow-minded approach bolstered British control during their mandate, but it also reinforced the call for an independent Iraqi state, resulting in the 1933 Simele massacre of Assyrians. This event was later cited by Raphael Lemkin as a prime example when he presented his legal definition of ‘genocide’ to the League of Nations conference on international criminal law in Madrid (Safi 2018).

Another aspect that needs to be included in micro-histories of migration and return is the aspirations, experiences, and encounters of refugees and how they give meaning to each segment of the mobility. Banko et al. (2022) correctly assert that refugees' own experiences with space, networks, and institutions, the meaning of diaspora, as well as return for refugees who have embarked on repatriation journeys, are part of global histories of displacement. Another trope that has received considerable attention in micro-historiographies is the meaning of ‘home’ or the idea of homecoming and imagined returns, which offer dominant insights into the idea or myth of return and practices at the individual and group level (cf. for ‘homecomings’ studies by Cerase 1967; 1974; Stefansson and Markowitz 2004; Conway et al. 2005; Newbury 2005). Studies on ‘ethnic/diasporic return’ include those by Tsuda (2009). Studies on the construction of ‘home’ include those by Hammond (2004), Christou and King (2010), Stefansson (2006), and den Boer (2015).

Concluding Remarks

Historical research is well-suited to providing comprehensive explanations of the socio-economic processes and political developments that have shaped migration and return trajectories. As an interdisciplinary approach, the historical analysis of (return) migration is vital for examining patterns of continuity and change in migration and return policies from a longitudinal perspective, as well as for understanding the agentic responses of migrants and returnees.

Two questions are at the forefront of migration scholarship. How much history has been integrated into the field? To what extent have historians included various types of micro histories of (return) migration in their studies? In recent years, there has been a multidisciplinary effort to incorporate the lived experiences of migrants into the history of migration. It is important to consider the perspectives of those who have personally experienced migration to gain a full understanding of the phenomenon. These experiences serve as first-hand accounts of what occurred during their journey and upon their arrival. Each discipline studying migration should consider posing a similar inquiry about the extent to which

history is fully incorporated as a fundamental element in their epistemology. Additionally, how do these studies use micro-level experiences and historiographies in their theories? These and other related inquiries can be further explored. This conceptual note sought to explain the importance of history in migration studies, while also highlighting some key questions and preliminary remarks for understanding (return) migration from a historical perspective.

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3. Anthropology of Return Migration

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Introduction

This review paper outlines the history of anthropological research on return migration, first as a 'natural' homecoming experience and then in terms of more critical work on forced return and refugee return. The paper progresses from a focus on anthropology as a disciplinary approach to address interdisciplinary work (including anthropologists, sociologists, cultural theorists, and scholars from other related fields) that has contributed to the study of return governance, voluntariness, deportation, and re-migration.

Anthropology of Migration and Return

Early anthropologists ignored the study of migration because it did not fit with their notion of timeless and bounded cultures (Brettell 2003). In particular, return migration was not seen as worthy of study in anthropology and other disciplines, leading it to be called 'the great unwritten chapter in the history of migration' (King 2000, p. 7). Returning home was assumed to be the unproblematic reinsertion of the migrant into the original society – or it was believed that immigrants would never return. Noticing that many migrants intended to return but did not, anthropologists focused on the 'myth of return' (Al-Rasheed 1994; Anwar 1979; Dahya 1973; Zetter 1994; 1999), the 'return illusion' (Brettell 1979), or the 'ideology of return' (Rubenstein 1979). Anthropologists in the emerging field of diaspora studies in the 1990s emphasised the persistent presence of home as a symbolic resource while actual return to the mythic home remained strangely unexplored (cf. Clifford 1997; Tololyan 1991). In fact, return migration clashed with dominant narratives of assimilation, multiculturalism, and transnationalism that delineate the history of migration research (Stefansson 2004, p. 5).

Anthropologists first discussed return migration in a 1979 series on the topic in the *Papers in Anthropology* series (Rhoades 1979). This was followed by an *Annual Review of Anthropology* article in which return migration was defined as 'the movement of emigrants back to their homelands to resettle' (Gmelch 1980). Although the review's author, George Gmelch (1992), later published a book on the subject of Caribbean returnees, return migration remained a neglected topic. When transnationalism became a hot trend in the discipline in the 1990s, scholars started focusing on the ties that immigrants maintain with their countries of origin such as remittances, construction of homes, and participation in politics and cultural and social activities (Brettell 2003; Basch et al. 1994; Foner 1997; Glick Schiller et al. 1995; 1992; Kearney 1995; 2005). Ironically, in their focus on sending and receiving countries as a single transnational field, return migration rarely became a distinct topic of study. Return home was seen as a brief intersection in a 'transnational migration circuit' (Rouse 1991, p. 14). Furthermore, immigrants who returned permanently were considered 'temporary migrants' and therefore less worthy of study than permanently transnational migrants.

In the 2000s, return migration finally began to receive scholarly (and anthropological) attention with edited volumes (Conway and Potter 2009; Markowitz and Stefansson 2004; Al-Ali and Koser 2002; Long and Oxfeld 2004) and in-depth ethnographies,

including studies of long distance nationalism for Haitian-Americans (Glick Schiller and Fouron 2001), consumption practices of Moroccan-Italians (Salih 2003), home and belonging for British-born Cypriots (Teerling 2014), Greek returnees' emergence as a 'counter-diaspora' (King and Christou 2014), Mexican-Americans' reintegration efforts (Rothstein 2016), highly educated Somali returnees' nation-building struggles (Galipo 2019), Bulgarian-Turks' partial ethnic inclusion (Parla 2019), and German-Turks' ethical predicaments in their homelands (Rottmann 2019). At this time and in subsequent years, there was a lot of overlap with sociologists, geographers, and others. For example, in the volume edited by Anghel, Fauser, and Boccagni (2019), researchers reported on in-depth studies with ethnic Germans 'returning' to Romania's Transylvania region, workers from Libya and Ivory Coast to Ghana, and German-speaking returnees in Turkey and Romania among others.

Concept of Return Migration

In the initial approaches to return migration within anthropology, return migration as a concept or process was largely a neutral, descriptive term, aligning with the official EU definition: 'The movement of a person going from a host country back to a country of origin, country of nationality or usual residence usually after spending a significant period of time in the host country whether voluntary or forced, assisted or spontaneous'.⁵ Yet, such a definition of the term 'return migration' is, in fact, problematic (King 2000): return is construed as natural, as a teleological move of migrants back to the place 'where they truly belong'. Researchers have shown over and over again that such a simplistic definition does not reflect the reality of return migration for several reasons.

First, many migrants do not simply go to one country and return to their origin country permanently. Scholars tried to develop typologies of returns based on temporality and intention. One attempt identified three types: returns as one-time occurrences ending migration trajectories; returns as repeated occurrences; and returns as part of a continuing migratory process (Tsuda 2019). Another typology identified four types of return: occasional and short-term visits to see kin and friends; seasonal returns; temporary returns of a longer duration and with the intention to remigrate; and finally permanent returns, including resettlement (King 2000). All such typologies run into the same problem: the subjects of ethnographic research rarely fit neatly into any one typology. Migration experiences are multilocal; migrants may feel a 'belonging' to two or more places, not just to their 'home' country. Typologies further fail to focus on how intentions might change during the migration process (Kuschminder 2017, p. 7), and scholars have demonstrated that migrants' ideas are affected by movement through life, not merely between places (Olwig 1998). A second – and related – issue with defining return migration is with the labelling of any migrant as a 'returnee'. In some studies, migrants happily take up this label, but in others they do not refer to themselves or even think of themselves as 'return migrants' (Rottmann 2019). Furthermore, there are many cases where there can be no true 'return' to the status quo. For example, countries, regions, cities, and individuals can change drastically, making the notion of return or homecoming essentially meaningless. On the other hand, the most extreme kind of

⁵ https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/return_en

permanent return is probably the return upon death (Abu-Lughod 2011; Pauli and Bedorf 2018; Stefansson 2004).

A major finding for scholars studying return is that it is challenging for the migrants, who often face difficulties or impossible homecomings, resulting in ambivalence, ambiguity, misunderstandings, and disenchantment (Stefansson 2004; Gmelch 1992; Tsuda 2003; Huseby-Darvas 2004). Yet while they identify numerous spatial and social challenges – for example, research focused on conflicts in neighbourhoods, schools, and public spheres for German-Turkish return migrants (Rottmann 2013; 2015; 2018) – researchers also find joy, satisfaction, connection, and successful reintegration (Rottmann 2019). The study of return migration has provided a particularly fertile ground for anthropologists to explore concepts of ‘home’ and ‘belonging’ as places of tension between multiple forms of inclusion and exclusion (Brun and Fabos 2015; Olwig 2012; Parla 2019; Rottmann 2019).

Anthropology of Refugee Returns

The majority of early studies of return migration in anthropology were not focused on refugee, asylum seeker, or irregular migrant return. It was only in the 1980s that anthropologists started to study refugees, with the publication of ethnographies like Peter Loizos’s *The Heart Grown Bitter* (1981) about Cypriot war refugees and B. E. Harrell-Bond’s *Imposing Aid: Emergency Assistance to Refugees* (1986) about Ugandan refugees. As with other studies of migration that overlooked return migration at the time, the anthropological works that followed focused on the experiences of internally displaced people in camps and resettled refugees in countries of asylum (Gilad 1990; Habarad 1987; Hirshon 1989; Peteet 1995). Actually, a failure to focus on refugee return among resettled refugees aligns with research showing that numbers of refugee returnees are low among resettled refugees, even when socio-political conditions improve (Zetter 2021). Refugee return, when it did happen, was initially viewed by anthropologists as a type of ‘ethnic return migration’, or ‘post-colonial return’ (Stefansson 2004, p. 7), ‘roots migration’ (Wessendorf 2007), or ‘ancestral return’ (Teerling 2014). For example, anthropologists and others studied diasporic returns (returns of exile communities), exploring notions of homeland and ‘right of return’, or the ‘myth of return’ for displaced populations like Armenians, Palestinians, Middle Eastern Christians, and so on (Adelman and Barkan, 2011; Chatty, 2010; Al-Rasheed 1994; Baser and Toivanen, 2019).

As with other studies of returnees, researchers stressed the social, psychological, economic, and political complexities of return for refugees, even when the return itself was largely (or largely perceived to be) the free choice of the migrant (Barnes 2001; Black and Koser 1999; Hammond 2004; Muggeridge and Doná 2006; Long and Oxfeld 2004). Anthropologists joined other scholars, mainly sociologists and political scientists, in trying to understand structural incentives for return, such as access to services and employment opportunities in receiving countries, security, and possibilities of property restitution in origin countries (Rottmann and Kaya 2021), asset ownership, access to education (Al Husein and Wagner 2020) and living conditions, and legal status (Valenta et al. 2020). A few studies also looked at more emotional or ‘affective’ dimensions of return decisions (Perez Murcia, 2019).

The New Governance of Return Migration: Anthropological and Sociological Approaches

The last decade-and-a-half heralded a radical change in how the return migration of refugees, asylum seekers, and irregular migrants is conceived both within and beyond anthropology, as States have developed new concepts, tools, and methods focused on return. Rather than based mainly on seeking one's 'roots' or an 'ancestral home', the meaning of return migration is highly politicised. Return now meets an objective of receiving States that consider it the 'optimum durable solution' to refugee-hosting. In the EU, Member states (MSs) are frequently less focused on the successful integration of migrants than on swift returns, making return a main strategy pursued by UNHCR and other intergovernmental organisations as well as governments (Long 2013; Hammond 2014). Voluntary return and repatriation – 'the assisted or independent return to the country of origin, transit, or third country, based on the free will of the returnee'⁶ – is prioritised in the EU's return policies. MSs must enable third-country nationals subject to a return decision to leave the EU territory voluntarily by granting them a voluntary departure period (Article 7 Return Directive). With this new 'regime of return' in the political and legal sphere, return is positioned as something natural for States (if not also for citizens) – a process that restores the Westphalian order of the State-citizen bond to a defined territory (Shacknove 1985).

Researchers – and especially anthropologists – have long criticised the common-sense link between peoples and territories (Clifford 1997; Gupta and Ferguson 1992; Malkki 1995; Parent 2022), and thus are highly critical of any policies that posit a naturalness to return of migrants. For example, writing about refugee repatriation to Ethiopia, Lorie Hammond (2004, p. 79) challenges the '*assumption* that place plays a particular, generalizable, and predictable kind of role in community construction and identity formation across cultures' [emphasis in the original]. Ethnographic work among Palestinian youth in a refugee camp in Beirut has shown disillusionment with the 'Right to Return' movement and 'identities rooted in a purely nationalist discourse' (Allan 2014). On the other hand, we cannot assume that refugees have no relation to places at all and are in a permanent state of liminality (Brun and Fábos 2015; Ramsay 2019). In fact, strong connections to places can be an important locus of migrant agency and identity. Dawn Chatty's (2010) ethnography of Armenian, Christian, Kurdish, and Palestinian migrants points to the central importance of place – and multiple identities – as part of constructing welcoming cosmopolitanism across the Middle East. Writing about 'the jungle' encampment at Calais, France, Michel Agier (2018) posits that it is a space of vibrant creativity for migrants – far from meaningless, even though it is a challenging home. Thus, we must guard against common-sense notions of an essential national belonging or a solidified place-based identity and allow fine-grained ethnographies to lead the way to understanding the meaning of places for migrants.

Voluntariness of return, deportation, and assisted voluntary return

Today, the borders between anthropology and related fields are nearly unrecognisable. Most social scientists are highly sceptical of the widely-used term 'voluntary return' and accompanying new regimes of border security and deportation (Andersson 2016; De Genova

⁶ https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/voluntary-return_en

et al. 2022; Drotbohm and Hasselberg 2017). Research shows that although supposedly premised on the free will of the migrant, ‘voluntary return’ is in practice often dominated by State coercion, social destitution, structural violence, and abuse (De Genova et al. 2022, p. 856).

The contradictions between agency and governance emerge quite clearly in the classification of ‘**voluntary return migrants**’ by governments or international organisations. Some migrants may only be ‘willing’ to return because they either have no access to social amenities and shelter or they risk imprisonment, violence, and other abuse (such as separation from their children) in destination countries (de Haas 2021). Thus, their return is not based on a real, intrinsic desire to do so. Under such situations of extreme distress and pressure, migrants who ‘decide’ to return can even be compelled to sign forms confirming consent to ‘voluntary repatriation’, even if this is against their own intrinsic preferences or desires (Cleton and Chauvin, 2020). Boersema et al. (2014) call this process a ‘soft deportation’ (Leerkes, et al. 2017). The latter term indicates ‘that such return has deportation-like properties’, while acknowledging that it depends less on force and deterrence than ‘classic deportations. There are clearly very strong power dynamics involved, whose mechanisms are not sufficiently researched in the context of return migration. How power operates in voluntary return situations will be very interesting to examine in South-South return contexts studied by GAPs via individual trajectories. For example, is voluntary return in this context ‘soft deportation’?

Addressing this question requires a close look at how return aspirations are formed and imagined in a context of protracted displacement. It is important to take into account refugees’ broader life aspirations in interaction with individual characteristics and structural conditions. Time also plays a crucial role in how return is aspired and imagined (Müller-Funk and Fransen, 2022). These are all issues that we will explore in-depth in WP7.

Deportation creates an ultimate line between members and non-members, which is ‘constitutive of citizenship’ for the dominant group and disposability for the other (De Genova and Peutz 2010). Deportation may be entirely unexpected and unwanted for migrants (Peutz 2006). For example, a recent ethnography of migrants with deportation orders from the UK showed that they felt more ‘British’ than connected to any other homeland, so ‘return’ was perceived as unjust as well as difficult (Hasselberg 2016). Nicholas De Genova (2002, p. 439) coined the term **deportability** to name a universal condition shared by non-citizens that implies ‘the possibility of being removed from the space of the nation-state’. Although any unauthorised immigrant is theoretically subject to expulsion by the State, in practice not everyone can be forcibly relocated to their country of origin. Non-deportability often stems from the reluctance of origin States to cooperate on forced return. Indeed, deportation always requires the willingness of another State to accept the returnee (Gibney 2008). Variations in non-deportability shape the options available to government and NGO workers responsible for enforcing ‘return’.

Anthropological and sociological work often shows that return policies and discourses about migrant return support State agendas far more than they reflect refugee desires or needs. For example, research on Europe’s return discourses by Eleanor Paynter (2022) shows how they are based on ‘paratexts’ – political discourses produced in direct connection with policy or legal action (Brookey and Gray 2017). The discourse of

‘deservingness’ is used to justify racialised bordering practices that uphold a false refugee-economic migrant binary. This discourse then enables the deporting of economic migrants since they do not ‘deserve’ to be able to stay like supposed genuine refugees. Refugees can also become targets of discourses about social problems. In Germany, for instance, displaced people are blamed for economic and social difficulties and even for the creation of a crisis rather than being seen as themselves victims of crises (Holmes and Castañeda 2016). This lays the groundwork for deporting unruly individuals.

With the concept of ‘**assisted voluntary return**’ (when a State or agency facilitates a return of a migrant by providing transportation, funding, or other support), the notion of ‘voluntary’ is taken one step further and certainly beyond its original meaning. These processes are ostensibly designed to provide dignity and limited rights in situations of constrained options. In fact, anthropologists argue that they are directly linked to forced returns, deportations, and expulsions. Writing about Norway, Synnove Bendixsen (2016, p. 548) explains that ‘without assisted return, it becomes difficult to legitimise forced return, and without the latter, it becomes harder to implement the former’. She explains: ‘The government frequently presents assisted return programmes as a humanitarian option compared to forced returns, while the latter is legitimised by the argument that if irregular migrants “fail” to opt for assisted return, a forced return is the only option available to the government’ (ibid.). Thus ‘assistance’ seems to be quite forceful. Sharam Khosravi (2018, pp. 4-5) argues that deportees are part of a neoliberal moralising and ‘responsibilising’ project to make them believe that they have control over their lives before and after deportation. Rather than being subject to structural violence via deportation, deportation is positioned as the moral personal choice of migrants.

How do migrants feel about this situation? While researchers have attempted to understand the intentions and motivations of returnees and thereby to differentiate between voluntary and forced returns (Boehm 2016; Cassarino 2004), it is quite difficult to determine when a return is truly voluntarily (Akeson and Baaz 2015; Kuschminder 2017, p. 6). More ethnographic research is needed on the perspective of migrants themselves and how trajectories – onward movements and re-orientations as well as periods of rest and intermediate forms of settlement – develop for them (Schapendonk et al. 2021).

Amidst this burgeoning focus on return migration for refugees, asylum seekers, and irregular migrants, little research has focused on **returnees’ lives after migration** (Khosravi 2018). Some experience ‘double abandonment’ (Lecadet 2013), rejected both abroad and also after they return. Most studies show that experiences after forced return are negative, with deportees feeling ‘estranged citizenship’ (Khosravi 2018, p. 7). Another topic that needs more research is reverse migration or re-migration – when a returnee leaves the country of origin and travels back to the host country. Although re-migration rates differ, some research shows that numbers of re-migrants are high. For example, up to 80 per cent of Afghans forcibly removed to Kabul attempt to remigrate (Gladwell and Elwyn 2012). Re-migration is sometimes defined as ‘failed social reintegration’ or ‘failed remixing’ in today’s dominant political discourses, but in fact, research shows that back and forth movement can be part of a migration strategy. Writing about Syrian refugees in Turkey, Biner and Biner (2021, p. 883) report that ‘depending on the border policies of the Turkish state and the intensity and location of the fighting in Syria, many travel regularly to their home cities and towns in Syria to check on their property and family members and to discern what the future may bring’. While it is important to criticise forced return to unsafe places, it is also important

to remember that many refugees do want to return when conditions allow or – like any of us – they want to be able to freely move between homes, families, and live in more than one place, as return has more recently been portrayed as a life transition between separate geographic spaces and biographical times (Perez Murcia and Boccagni 2022). To explain the return orientations and practices of individuals, it is important to consider the meanings attributed to home by potential returnees and how these change over time (Boccagni 2022; Perez Murcia and Boccagni 2022).

Anthropological and Sociological Definitions Applied in GAPs

In this project, we are interested in how people affected by deportation regimes define return, assistance, and voluntariness. The deportation regime, in its many shapes (Leerkes and Van Houte 2020) is the State technology of control and exclusion that is used to deal with unwanted populations (Peutz and De Genova 2010). From this perspective, beyond a mere act (Peutz and De Genova, 2010), deportation is rather viewed as a practice that is ‘constitutive of citizenship’, reaffirming the boundaries of membership to countries (Anderson, Gibney and Paoletti 2011). It has a symbolic role as a ‘spectacle’ of State enforcement to make the State look powerful in front of the public (Mainwaring and Silverman 2016). Others have explained it as a disciplining apparatus shaped by the needs of the informal labour market (Karadağ and Sert 2023). In WP7, GAPs will try to understand how migrants perceive the deportation regime as governance apparatuses (border controls, laws, policies, officials, etc.) and how this affects their trajectories. These perceptions are often used to explain the gap between removal and rejected asylum applications (Gibney and Hansen 2003) and the limits of ‘migration control’ (Ellermann 2008).

With an anthropological approach, we also aim to bring the role of perceptions, experiences, and emotions (hope/despair, capacity to move on with life/resilience) to the forefront as a means of understanding what return means for people involved in it. We seek particularly to identify the different forms of agency in migrant lifeworlds, examining when and how agency becomes apparent with regards to mobility and, more specifically, return. We ultimately explore the characteristics of trajectories in different locations (with the goal of developing a typology) to show the precarity, plurality, and multi-directionality of mobility. In addition to governance and agency, WP7 explores the role of social networks and integration contexts in shaping trajectories. In this way, the precise definition of return is an open question and we expect multiple conceptions to emerge from the field research.

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4. Return and Related Concepts in International Law

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Introduction

Although the general literature on return migration studies has increased in recent years, there still needs to be more clarity regarding definitions, concepts, and terminology. The same ambiguity remains for the terminological definitions of and conceptual approaches to return-related matters, including the term ‘return itself’, particularly in international law. As stated in the International Commission of Jurists’ (ICJ) Practitioner’s Guide on migration and international human rights law (ICJ 2014, 39), one of the difficulties for any publication that aims to address problems of migration – in law or in practice – is the complexity and diversity of the migration experience. This difficulty, however, is not only related to the dynamic nature of the concept of return but also because of the general complexity of the system of international law, which is attracted both by State sovereignty and human rights (Wheatley 2019, p. 63; Reisman 1990, p. 876; Shen 2000, p. 419; Donnelly 2004, p. 2; Henkin 1995, pp. 31-32), especially when it comes to the migration-related matters (Higgins 1973, p. 342; Dauvergne 2004, pp. 589-591, Chetail 2014, p. 27).

As a principle in international law, based on the territorial sovereignty of States, each State has the discretion to regulate matters of entry into (admission), stay, and exit of foreigners. This discretion is also reflected in the States’ ‘right’ to expel foreigners. Hence, the legal scope of each component of the return activity is mainly defined or crystallised or both by each relevant State, and a binding, uniform, and thorough body of rules that define and regulate return migration in its broad meaning does not exist in international law. Nevertheless, there are certain attempts to assert uniform conceptualisation of some essential components of return migration, such as expulsion. In 2014, International Law Commission (ILC) adopted ‘Draft Articles on the Expulsion of Aliens’ (Draft Articles). At present, Draft Articles does not have a binding effect on international law; but it serves as a significant demonstration that supports the claim that expulsion, which is one of the fundamental elements of return migration, is a phenomenon recognisable and codifiable by international law (Kanstroom 2017, p. 50). Draft Articles defines expulsion as ‘a formal act or conduct attributable to a State by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State’ (Art. 2). Draft Articles, on the other hand, reiterates the ‘right of expulsion’ being a ‘right of a State’ (Art. 3) and therefore confirms the sovereignty-based State discretion on the matter. However, it should be noted that this discretion, not only for regulating the expulsion but also for regulating the other components of return migration such as entry-into (admission), exit, and stay of a foreigner is not of an absolute character. Apart from the mere domestic constitutional necessities of the rule of law, it is framed on two grounds that bear international character (Goodwin-Gill, 1976), as confirmed by the ILC under the Draft Articles, particularly in relation to expulsion. These are the principles in international law that apply to inter-State relations together with the obligations thereof and the principles of international human rights law, while from a

positivist view, the functional bindingness of both being subject to legitimacy through either existing rules under international conventions or within customary law.

Hence, there is a polarising nature of the concept of return that can be seen through the perspective of international law from two dimensions: namely, from the State-to-State interaction and from the State-to-individual interaction. This so-called polarisation in the first dimension appears to be between the sovereignty rights of each State and their obligations towards each other, whereas, in the second dimension, it is viewed in two forms: (1) between the inter-State obligations of the States and the obligations of the States to respect and protect individual rights; and (2) between the sovereignty rights of the States and the States' obligation to respect and protect individual rights. The debates regarding return-related matters in the legal literature are mostly derived from this backdrop, which is also one of the most significant demonstrations of the complexity of the international legal system itself. Consequently, the relevant literature in international law either focuses on clarification of the rights and obligations of the States not only towards each other but also towards the individual or, sometimes to seek for an equilibrium point, question and weigh the level of influence of the two attractors of the system, namely, sovereignty and human rights, which pull it in different directions at a time (Wheatley 2019, p. 63).

Return as a Matter of the Individual's Action: The Scope of Right to Leave and Right to Return (Enter) as a Fundamental Human Right

Direct mention of return in the binding instruments of international law can be seen in '**the right to return to one's own country**' provided under the Universal Declaration of Human Rights (UDHR) (Art. 13) and adopted by international human rights conventions. However, this statement does not define return but provides the scope of a guarantee attributed to individuals. This could be taken as one of the legal norms that function, as Aleinikoff (2002, p. 11) states, to constrain and channel State authority over migration. The reflection of this right can be seen in other international instruments,¹ albeit with a different wording: 'right to enter'. This difference in the wording has not been much of an interest of the literature as generally two terms are being used interchangeably. Goodwin-Gill (1995) states that the usage of the term 'return' *is used for convenience but should also be interpreted sufficiently broadly to include the admission of a national who, for whatever reason, may be making a first-time entry.*² Agterhuis (2004, p. 2) also has similar considerations for using the term in a broad sense. Bantekas (1998, p. 60) seems to have the only distinct opinion on the matter distinguishing right to return from right to enter.

Right to return (or right to enter) in the International Covenant on Civil and Political Rights (ICCPR) is regulated under freedom of movement, which is seen as one of the most significant connecting factors of extraterritorial human mobility to the area of international (human rights) law and a subject of interest among legal scholars (Juss 2006; McAdam 2011; Kochenov 2015; Goodwin-Gill 1995; De Vittor 2013; Paz 2018; Ramji-Nogales & Goldner Lang 2020). Hence, the legal scholarship indicates that the extraterritorial freedom of movement is uniquely expressed and channelled through a duo of proclaimed rights: the right to leave any country, including one's own, and the right to return to one's own country (Kochenov 2015, p. 149; McAdam 2011, pp. 5, 6; Harvey and Barnidge 2005, p. 3; Chetail 2014, p. 26).

One of the debates in the legal literature that is related to return-migration can be seen in the asymmetrical relation between the right to leave and the right

to return. Based on the scope of these rights enshrined under international law, scholars point out that the right to leave does not automatically secure the right to return (enter)³ (Juss 2006, p. 294; Harvey and Barnidge 2005, p. 1; Higgins 1973), although it is also asserted that the rights of entry, stay, and exit are inseparable: the denial of any one of these rights renders the exercise of the others illusory rather than tangible (Higgins 1973). The main reason for this is shown as the State's right to expel and duty to readmit their own nationals (Goodwin-Gill 1978, p. 21; McAdam 2011, p. 2; Coleman 2009, p. 28). This is why some scholars refer to freedom of movement of foreigners as a right that has remained 'incomplete' (Juss 2006, p. 294; McAdam 2011, p. 2; Paz 2018). Hence, the scholars tend to clarify each right in their own terms, especially considering their context in the instruments of international law (Agterhuis 2004; Goodwin-Gill 1995; Harvey and Barnidge 2005; Hannum 1987; Jagerskiold 1981; Whelan 1981; Chetail 2014).

Among the various international organisations of a universal character, created within their respective treaty systems, only the United Nations Human Rights Committee (HRC) has thoroughly investigated these rights within the framework of the ICCPR. In this setting, the General Comments (GC) and Communications of the HRC hold significance as they serve as the foundation for comprehending this entitlement. General Comments encompass fundamental principles that offer guidance on the practical implementation of the right. Communications exemplify how the right has been interpreted in cases where States are accused of violating their legal commitments under the ICCPR. On the other hand, the case law of the European Court of Human Rights (ECtHR) also constitutes a significant source for understanding the scope of these rights in international law, albeit a regional one.

Right to leave in the codified international law refers to 'the right to leave any country, including one's own country' whereas UDHR secures the **right to return** stating that 'everyone has the right to return his country'. However, both ICCPR and the P.4, Art. 3 (2) of the ECHR regulate the latter right with different wordings. While ICCPR stipulates that 'no one shall be arbitrarily deprived of the right to enter his own country', P.4, Art. 3(2) of the ECHR provides that no one shall be deprived of the right to enter the territory of the State of which he is a national.

Right to leave is not a non-derogable right and may be restricted on grounds of national security, public order, public health, or morals, or for the protection of rights and freedoms of others provided that such restrictions are in accordance with law and are necessary in a democratic society.⁴ Scholars have discussed that the majority of problems concerning the implementation of the right to leave, including one's own country, primarily may arise when States impose what they consider to be acceptable restrictions on this right due to the fact that certain restrictions require concretisation (Kochenov 2015, 168-172; Hannum 1987, 45; Goodwin-Gill 1995).

Right to return, on the other hand, is not subjected to the same restriction provision in the UDHR. However, the possible impact of the differentiation of the wording related to this right in international law is discussed among legal scholars on two inter-related matters: (1) the possible deprivation from entry (Agterhuis 2004, pp. 6, 7; Hailbronner 1997, pp. 5, 6; Coleman 2009, pp. 31, 32; Hannum 1987, p. 45); and (2) whether the personal scope of the right involves solely the citizens (Agterhuis 2004, pp. 7, 8; Hailbronner 1997, pp. 3-5; Coleman 2009, pp. 29, 30; Hannum 1987, pp. 56-63) .

For the personal scope of the right to leave, however, there is not much of a discussion because the ‘legality’ of the person’s situation in the departure country does not affect the enforceability of the right to leave. As further confirmed by the HRC, the right is not restricted to **persons lawfully within the territory of a state**.⁵ There are two consequences of this situation. First, considering that citizens of a State are in principle always lawfully within the territory of that State,⁶ the right should be applicable to foreigners as well as the citizens⁷ without a need for further clarification of the term ‘own country’. This is why there has been no interest in the legal literature to explain the term within that context, as opposed to the interest in defining the same term in relation to right to return. Second, a foreigner who is lawfully subjected to expulsion should also enjoy the guarantees secured by this right.⁸ The right is considered to secure the freedom to choose the State of destination (**choice of destination**) subject to that State’s agreement.⁹ Hence, a foreigner who is lawfully being expelled from a State also has the right to choose the specific country they wish to relocate to, provided that the receiving State agrees. As a result, it is asserted that if such a destination State exists, the exit State should not be able to forcibly remove the individual to another State¹⁰ (Gürakar-Skribeland 2022; Taylor 2020, p. 336).

Facilitating the right to leave a country does not preclude the provision of a passport or a substitute travel document as a standard requirement for international travel.¹¹ In this context, the HRC underlines that the right imposes obligations not only on the State of residence but also on the State of nationality, given that the **right to obtain necessary documents to travel** is included within the right to leave and that refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere.¹²

When considering the connection between the right to leave and the act of returning, particularly when it pertains to foreigners leaving a country, the requirement for travel documents, on some occasions, has been seen by some scholars to potentially restrict the exercise of this right (Kochenov 2015, p. 162) and by some to directly affect the practical exercise of the right (Hannum 1987, p. 21). Hailbronner (1997, p. 6), on the other hand, approaches the matter from the perspective of the right to return of the individual and the obligation of the State to readmit its nationals and concludes that, specifically, individuals who have left their home country without the required travel documents in order to seek asylum or those who have intentionally destroyed their travel documents, often face difficulties in obtaining the necessary papers to facilitate their return to their country of origin. It should be noted that the possible effect of the claimed restriction or the effect on the choice of destination and its impact on transforming a voluntary departure into a forced removal together with **detention** practices – indicated to be used increasingly in State practices for (forced) return activities (Majcher and Strik 2021, p. 126) – have not been comprehensively evaluated in the literature of international (human rights) law. Hence, McDonnell (2021) and Gürakar-Skribeland (2022) observe that the right to leave remains underexplored and often overlooked.

Return as a Matter of (Inter-) State Action: The Scope of the State’s Right to Expel and the Obligation to Readmit

The research on States’ right to expel and the duty to readmit in the international law literature mostly focuses on the clarification of the scope and legitimacy of these notions and their

position against or with the relevant rights of the individual (Hailbronner 1997; Coleman 2009; Goodwin-Gill 1976; Kochenov 2015; Opeskin 2009; Agterhuis 2004; Noll 1997). There is not much of a dispute among scholars regarding **the duty of a State to readmit its own nationals** and a **State's right to expel foreigners** being principles of international law (Aleinikoff 2002, p. 15; Noll 1997, p. 25; Hailbronner 1997, p. 7; Kochenov 2015, p. 145). Scholars tend to explain the inter-relation between these two notions by stating that the obligation to readmit a State's own national is the inherent counterpart of the right to expel foreigners (Hailbronner 1997, p. 7; Noll 1997, p. 30; Goodwin-Gill 1976, p. 58; Giuffrè 2015). The scope of the restrictions of the right to expel emerged from this inter-relation in international law therefore has been a debatable topic (Goodwin-Gill 1976; Coleman 2009, p. 30; Hailbronner 1997, pp. 15-37).

Another point in this regard is the restrictive effect of human rights law on the dominance of the State in migration control. Costello (2016, p. 316) criticises the State's sovereign prerogatives especially in a legal environment like the EU, where migration control and status are increasingly regulated by the EU law in a shared manner and the interaction across different human rights regimes is encouraged. In this context, the statist migration control assumption, which veils the human rights impacts of migration status and migration control measures, is unsettled (*ibid.*).

As a requirement of the principle of proportionality, the State's interest(s) in expelling a foreigner needs to be balanced with the effect of expulsion on the individual's fundamental rights. In that context, interference of family and private life with the State's right to expel has been a matter of discussion among scholars (Majcher 2020, pp. 124-146; Cholewinski 1994). However, as the strongest restriction on the right to expel derives from international human rights law, the effect of the **non-refoulement** principle has been widely researched in the literature. More recent debates on the matter are focused mostly on questioning the protectional scope provided by either ECtHR or United Nations Treaty Bodies (Simeon 2019; Çalı, Costello and Cunningham 2020; Blöndal and Arnadóttir 2019; Stoyanova 2018), the relationship between non-refoulement and climate change (Scott 2014; De Coninck and Soete 2022; Herrault 2021), extraterritorial application of the principle and border checks (Trevisanut 2014; Kim 2017; Goldner Lang and Nagy 2021; Özturanlı and Ergüven 2020), and the need for strengthening the protection level against restrictive interpretations of non-refoulement (Gil-Bazo 2015; Moran 2020).

Particular restrictions on expulsion have also been of interest in the literature, such as **prohibition of collective expulsion**, including **pushback** activities (Ciliberto 2021; Di Filippo 2022; Riemer 2020; Carlier and Leboeuf, 2020; Henckaerts 1995). Based on the ECtHR's case law derived from the P.4, Art. 4 of the ECHR where it is stated that the 'collective expulsion of the aliens is prohibited', the prohibition of collective expulsion prevents the expulsion of foreigners without an objective and reasonable examination of their concrete and individual circumstances.¹³ This type of expulsion is also prohibited under other regional international law instruments, such as American Convention on Human Rights (Art. 22/9), 2004 Arab Charter on Human Rights (Art. 26/2) and African Charter of Human and Peoples' Rights (Art. 12/5). Collective expulsion is also contrary to the procedural safeguards to which foreigners are entitled in the context of expulsion, for instance, provided under P.7, Art.1 of the ECHR and Art. 13 of the ICCPR.

Unlike the ECHR and the above-mentioned conventions, there is no explicit provision in the ICCPR on the prohibition of collective expulsion. However, the incompatibility of the safeguards secured under Art. 13 with collective expulsions has been emphasised by HRC, which has repeatedly condemned such expulsions and underlined that these practices are incompatible with the Covenant's provisions.¹⁴ In this respect, the prohibition does not prevent expulsion but rather group expulsion without such safeguards and without an individualised assessment (Wouters 2019, p. 952). Reimer (2020, pp. 17-22) highlights the use of two distinct terminologies in literature and conventional provisions regarding the prohibition of expelling a group of foreigners. For instance, while ECHR (P.4, Art. 4), American Convention, and Arab Charter use the term 'collective expulsion', African Charter refers to 'mass expulsion'. This differentiation is also seen in the literature. Reimer (2020, p. 14) questions whether these two terms are used for the same phenomenon and concludes that an analysis of the literature on these issues and of judgments and other legal documents reveals that there is no clear, universally applicable answer. Nevertheless, she concludes that 'mass' and 'collective' expulsion are legally indistinguishable and refer to the same group size (ibid., p. 21). Indeed, Henckaerts (1995, pp. 18, 19), as an author who uses the terms interchangeably, also strongly opposes the distinction between collective and mass expulsion as this would create unacceptable differences in protection standards and harm human rights. Collective expulsions, in some cases, may be initiated with pushback activities. In the case of *Hirsi Jamaa and Others v. Italy*, the ECtHR conducted a comprehensive analysis and defined 'expulsion' as the act of 'driving someone away from a place' in a general sense.¹⁵ The Court further concluded that when a State's authorities remove foreigners during interceptions on the high seas as part of their sovereign authority with the intention of preventing them from reaching the State's borders or 'pushing them back to another State', it is considered an exercise of jurisdiction under Article 1 of the Convention. This action makes the State accountable for violating the prohibition of collective expulsion as stated in P.4, Art. 4 of the ECHR.¹⁶ According to Den Heijer (2013, p. 290) the approach taken by the ECtHR in the *Hirsi* case highlights the need to first establish adequate reception systems and safeguards in transit countries before allowing any form of readmission, transfer, or return.

In certain situations, expulsion may not be possible, leading to individuals who cannot be deported – known as '**non-returnable**' or '**non-deportable**' people – becoming a cause for concern. This is highlighted by Mann (2021) and Majcher and Strik (2021), as well as Majcher (2020). Majcher points out that the situation of these individuals may be seen as a 'legal limbo' (2020, pp. 229, 234, 235). She asserts that individuals who cannot be deported and find themselves in a partially legal state of uncertainty (a semi-legal limbo) are at risk of being subjected to abuses and exploitation (ibid., p. 235). How this matter should be approached in terms of **regularisation** of these individuals in international (human rights) law, however, is somewhat underexplored. Majcher (ibid., p. 138) argues that the ECtHR case law on positive obligations under Article 8 (family and private life) can be applied by analogy to the situation of non-deportable people. On the other hand, although regularisation of the status of foreigners is mainly considered to be a matter that falls within State power (Aleinikoff 2002, p. 15), Costello (2016, pp. 82, 83) also argues that ECtHR case law reflects a recognition that time and ties matter and attachment to the host community continues over time. She asserts that in this recognition, ECtHR paves the way for other courts, particularly national ones, to conduct the regularisation role (ibid.). Concerning the return activities, **detention** practices have also been a point of focus among legal scholars in terms of their compatibility with international (human rights) law, especially regarding their length, proportionality,

necessity, and applicability for vulnerable individuals such as children (Majcher 2020; Cole 2002; Cornelisse 2010; Wilsher 2012; Guild 2016, pp. 141-155; Lyon 2014).

Another point scholars question in the context of the right to return and the personal scope of the duty of the States to readmit is whether permanent residents and former nationals fall under the scope of the State's duty to readmit (Hailbronner 1997; Coleman 2009; Bantekas 1998). Hailbronner asserts that given the absence of a consistent State practice and widespread acceptance, it is debatable whether there is a general customary international law obligation to readmit former nationals in cases where their status changes before entering a third country (1997, p. 24). On the other hand, the obligation to readmit permanent residents and other individuals with special ties with the given country is seen as a conventional obligation derived from ICCPR (Art. 12/4) towards the individual (Taylor 2020, pp. 346-349; Hannum 1987, pp. 56-63; Coleman 2009, pp. 29, 30).

While it is an obligation of international law to readmit a State's own national, there are instances where countries of origin do not comply with this obligation. Moreover, differently than the situation of readmission of a State's own national, there is no explicit binding rule either in a convention or in a form of customary norm in international law that obliges a State to readmit a third-country national. According to Hailbronner (1997, p. 31), the obligation contained in modern **readmission agreements** to readmit nationals of third States having entered unlawfully to a neighbouring State or staying illegally in the State of residence stems from the principle of (good) neighbourliness and the responsibility of a State for those impairments to other States emanating from its territory. However, he concludes that simply acknowledging this fact does not automatically establish a State practice and *opinio juris* (ibid., p. 34) – the two factors necessary for the emergence of a customary norm that would obligate States to readmit these individuals without requiring a readmission agreement. Yet, Hailbronner (ibid., p. 35) implies that there is an open door for the development of an obligation to readmit third-country nationals between neighbouring States. Against that backdrop, bilateral readmission agreements serve as a facilitator and an expeditor for the return of the nationals (Strik 2017, p. 313; Coleman 2009, p. 36) and as a compelling tool for the readmission of the third-country nationals (Hailbronner 1997, p. 37) based on the mutual consent of the sending and re-admitting State.

As a rule, readmission agreements do not cover asylum seekers or refugees directly but mainly focus on (irregular) migrants who are subjected to expulsion. However, safe third-country practice allows the State to reject the asylum application because the applicant could have requested or been granted protection elsewhere. As a result of the application's rejection (usually on inadmissibility grounds), the status of an individual is converted from being an asylum seeker (or applicant for international protection) to a foreigner who does not have a legal basis to stay in the country and, therefore, is subjected to expulsion. Against this background, (former) asylum seeker falls under the scope of the readmission agreement. Given that safe third-country practices are not regulated in a binding international law instrument that enables a uniform implementation but regulated under domestic laws, as stated by Coleman (2009, p. 67), it seems contradictory since the success of these policies relies on the involvement of related third countries. A country can label a third country as 'safe' according to its own laws and consequently refuse to provide refuge to those who passed through that country. But, if the third country doesn't agree to receive those individuals on its territory, this policy won't work. Hence readmission agreements also serve as a facilitator for,

and a complementary of, the practice of the **safe third-country concept** in the context of asylum (Abell 1999, p. 64; Coleman 2009, p. 67). Nevertheless, the lack of a binding instrument comprehensively regulating the safe third-country practice in international law and the function of readmission agreements for securing admission of rejected asylum seekers by a third country without a further requirement raise concerns regarding the compatibility with the non-refoulement principle (Suller 2022; Shamatava 2020; McDuff 2019) and with access to international protection (Abell 1999, 66; Alpes *et al.* 2017; Giuffre 2015). Recently, the functions and scope of these agreements, together with their effect on safe third-country practices, have been studied in the literature (Coleman 2009, p. 36; Hailbronner 1997; Majcher 2020, pp. 622-652), focusing especially on informal readmission arrangements (deals) as in the case of EU-Turkiye Deal of 18 March 2016. The literature mainly questions these arrangements' position towards the compatibility with international (human rights) law and refugee law, access to justice, transparency, and rule of law (Kassoti and Idriz 2022, p. 4; Peers 2016; Den Heijer and Spijkerboer 2016; Gatti 2016; Matusescu 2016; Carrera *et al.* 2017; Öztürk 2020; Thym 2016; Kaya 2020).

The interplay between the individual's right to leave and return and the State's right to expel and readmit has also been subject to debate in literature, particularly the effect of '**voluntariness**.' The literature approaches this matter from three main aspects. The first weighs the competing impacts of two notions, namely, voluntariness as a requirement of an individual's right, on the one hand, and the State's right to force derived from its duties, on the other. Hailbronner (1997) argues that if the obligation to readmit its own nationals can be derived from both the authority to regulate the entry and residence of foreigners, as established by international law, as well as from territorial sovereignty, it logically follows that this obligation exists independently of any individual's claim to a right of return. Referring to the inter-state character of the obligation to readmit, he concludes that the power of a State to terminate someone's residency generally implies an involuntary nature (*ibid.*, p. 5). On the other hand, Noll (1997) points out that the relationship between the inter-State obligation to readmit individuals and the individual's right to leave their own country is not clearly defined in international law. He concludes that if such an obligation includes citizens who are unwilling to return, it could potentially hinder the exercise of the right to leave one's country (*ibid.*, p. 417, fn.7).

The second aspect is in relation to certain practices, such as **voluntary departure** and (**assisted**) **voluntary return** and their qualification. If the action of relocation based on these practices is considered 'voluntary', they can potentially be qualified as exercises of an individual's right rather than a forced movement imposed by the State's right to expel. From this point of view, indicating that the element of voluntariness is often constrained and mixed with coercion in practice (Dünnwald 2013, p. 228; Cleton and Chauvin 2019), the question of 'to what extent these practices can be considered voluntary' is examined by the literature. Webber (2011) points out that voluntary return is presented as a less burdensome option instead of subjecting individuals to ongoing destitution and inevitable forced return. However, it is often challenging for the returnee to make an Informed decision regarding the specific country they will return to (*ibid.*, p. 103). Similarly, Majcher (2020) argues the level of voluntariness in voluntary departure practices¹⁷ and states that the individual's 'consent' in this context only indicates that the person has agreed to comply with the decision to return rather than implying an informed decision to return to their country of origin. The author concludes that as a result, such practice of the concept of voluntary departure should be seen as a euphemism (*ibid.*, p. 547).¹⁸ It should also be noted that scholars have raised another

matter in relation to voluntary departure practices: limiting the opportunities for voluntary departure and implementing (re-)entry bans upon exit may have the unintended consequence of reducing cooperation with the return process as fewer individuals would be inclined to participate willingly (Majcher and Strik 2021, p. 126). Scholars have also discussed entry bans in a wider context, including but not limited to non-refoulement and other requirements of international human rights law (Baldaccini 2009; Majcher 2020).

The third aspect is related to the second but focuses on **voluntary repatriation**. The term is not defined in a binding instrument as it is presented as one of the durable solutions by UNHCR in soft law instruments.¹⁹ UNHCR defines voluntary repatriation as the free and informed **return of refugees to their country of origin in safety and dignity**.²⁰ It also includes in the definition that the voluntary repatriation may be organised or spontaneous.²¹ Compared to the other notions researched in international law, repatriation is one of the most comprehensive matters that fall within the scope of return-migration in conjunction with international refugee law and human rights law (Chetail 2004, p. 30). The subject is covered by a range of studies; most of the discourse highlights the ‘voluntariness’ requirement of the term and argues how this could be maintained in practice (Selim 2021, pp. 562, 567; Hathaway 1997, p. 553; Mathew 2008, p. 161; Vedsted-Hansen 1997, p. 560; Fouda 2007; Cantor 2018).

Lastly, as a point of debate, scholars (Majcher 2020, p. 661; Alpes and Nyberg Sorensen 2016) indicate the risks of the human rights violations returnees may face upon return and emphasise the significance of **post-return monitoring** (Majcher 2020, p. 661).

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5. Unlocking the Economic Contribution of Returning Refugees to Their Home Countries

Rasha Istaiteyeh (HU)

Introduction

The economic perspective on the return of asylum seekers, refugees, and other migrants is an important aspect to consider in the overall debate. According to Wahba (2022) between 2010 and 2015, return migration accounted for a substantial 26 per cent to 31 per cent of all global migration movements, bringing to light its profound significance. Returnees may contribute to the economic progress of their countries of origin through various avenues (ibid.), such as in the reconstruction and development efforts of their home countries, nurturing entrepreneurship, accumulating human capital, facilitating the dissemination of knowledge, promoting aid and remittances, and transferring cultural norms back to the homeland. Returnees can bring back financial resources, whether through savings accumulated abroad or through remittances sent to their families during their stay in host countries (Beaman et al. 2022). These financial inflows can provide a boost to local economies, stimulate investment, and support small businesses and entrepreneurial activities. While the impact may be modest, it can still be significant in certain circumstances. The return of refugees may also alleviate the burden on host countries' economies and resources, which often face challenges in providing adequate support and services to large returnee populations. By going back to their country of origin, returnees can reduce the strain on public infrastructure, social services, and job markets in host countries, allowing these resources to be redirected towards the development and well-being of their own communities. Below, I elaborate on some of the impact mechanisms.

Human Capital and Brain Gain

According to Mottaghi (2018), when migrants – including refugees – decide to return to their home countries, they bring with them a wealth of education, skills, knowledge, experience, social capital, and networks. These valuable assets can be regarded as a form of human capital, capable of driving the social and economic development of their nations. Moreover, the social capital and networks they have cultivated within their host communities and among fellow migrants can foster collaboration, resource-sharing, and collective efforts towards rebuilding and contributing to the progress of their home countries. Effectively recognising this human capital is vital in order to maximise the potential impact of returning refugees on the overall development of their nations. By capitalising on their diverse expertise and networks, returnees can play a pivotal role in driving positive change, revitalising key sectors, and fostering sustainable development in their home countries (Dadush 2017).

Hagan and Wassink (2020) highlight discernible patterns in developing human capital and resource utilisation among international migrants. They note that upon their return, migrants harness the resources they have acquired abroad, including human and financial capital, to pursue economic advancement. These efforts are tailored to address the specific social, economic, and geographic characteristics of their communities of origin. As stated by Wahba (2022), migration offers another significant advantage: the acquisition of new skills

and human capital. In the context of return migration studies, there is a particular focus on examining how overseas migration affects the wages of returning migrants and making efforts to measure the economic benefits they gain from their experience working abroad.

Stark and Simon (2007) expand upon both the 'harmful brain drain' and 'beneficial brain gain' discussions. They delve into the notion that the expenses associated with 'educated unemployment' and overeducation can result in substantial setbacks for the affected individuals. These individuals often make up a significant portion of the educated workforce.

Remittances and Investment in Relation to the Local Market Dynamics

Olesen (2002) highlights that returning refugees/migrants have the potential to contribute to their home countries by remittances sent to their home countries while they were living abroad. These financial transfers can provide much needed support to families and communities, contributing to local economies and helping to alleviate poverty and improve living conditions. Additionally, returning refugees often play a role in complementing precarious work in the informal sector and humanitarian assistance. Their economic agency can extend beyond their immediate families and encompass assisting loved ones in both the places of origin and refuge in the Global South (Zuntz, 2021). This assistance can take various forms, including financial support, investment in small businesses, and knowledge-sharing.

As indicated by Kunuroglu et al. (2016), remittances play a significant role in influencing the decision to return to one's home country. In addition, the repercussions of migration on poverty, inequality, and societal consequences become evident upon individuals' return to their home countries. This is because the degree of inequality tends to either rise or decline due to migration, and the effects of remittances seem to fluctuate when examining different countries in case studies (Lucas 2005). In Zuntz (2021), remittances sent by returning refugees/migrants in present times serve as a vital emergency lifeline and are frequently used to meet immediate needs such as food and medical treatment. These remittances play a crucial role in providing essential support to refugees and their families, particularly in challenging circumstances where access to basic necessities is limited. By directing these funds towards essential goods and services, returning refugees contribute to improving their own well-being and that of their loved ones in both the country of origin and the host country.

Bahar (2023) highlights the significant potential of returning migration/refugees in transferring ideas and technology to their home countries thereby making valuable contributions to post-conflict reconstruction and the development of specific sectors. The process of knowledge and technology transfer can have a profound impact on the economic growth and progress and even a small number of returning refugees can generate substantial economic gains. Rapoport (2023), in his study, further highlights the potential for a notable increase in consumption and investment with the restoration of stability and the return of refugees. As people regain trust in the future of their country, they become more inclined to engage in economic activities, leading to a boost in overall economic growth. This renewed confidence can also attract foreign investors who recognise the potential opportunities in various sectors of the economy, including infrastructure development, manufacturing, services, tourism, and exports. The influx of foreign investment can further stimulate economic development, create employment opportunities, and contribute to the overall recovery and prosperity of the country. Returnees repatriate savings earned overseas that they

often utilise to establish businesses. Furthermore, returnees bring back fresh ideas and innovative perspectives (Wahba 2022). There is a valid correlation between return migration and entrepreneurial initiatives.

Dadush (2017) argues that when considering the contribution of a returning refugee or asylum seeker to their country of origin, particularly those who have not had sufficient time to build capital or acquire skills and who return under insecure conditions, there is limited evidence to suggest that their impact will be significantly better. This highlights the challenges faced by returning refugees as they may encounter difficulties in reintegrating into their home countries and making meaningful economic and social contributions.

The return of refugees to their home countries can have multifaceted effects on local labour markets, encompassing both positive and negative aspects. On the positive side, their return can address labour shortages by providing a new pool of workers to fill vacant positions, contributing to increased productivity and economic growth. This influx of skilled and motivated individuals can bring diverse perspectives, expertise, and entrepreneurial initiatives, thus fostering innovation and development in various sectors.

Although the current body of literature addressing the effects of return migration on upward mobility is notably limited (Wahba 2022), there are some hypotheses about the potential negative implications of return migration on labour market dynamics. The return of migrants can create heightened competition in the job market, leading to increased pressure on employment opportunities. This increased competition may result in downward pressure on wages, as employers may have more options to choose from, potentially impacting the earning potential of both returning refugees and native workers.

Transfer of Social, Institutional, and Political Norms

As individuals emigrate, they encounter diverse cultures, norms, and political ideologies that they may assimilate and subsequently bring back to their home country. In fact, in numerous instances, diaspora members and returning migrants act as conduits for transmitting these fresh ideas and norms to their country of origin. The transfer of ideas and technology from returning migrants can have a transformative effect on sectors such as agriculture, manufacturing, healthcare, infrastructure, and entrepreneurship. By introducing new methods, techniques, and approaches, migrants can help enhance productivity, streamline operations, and improve the quality of products and services. Notably, even a relatively small number of returning migrants can have a significant impact due to their unique expertise and the multiplier effect of knowledge diffusion. Their contributions extend beyond direct involvement and can inspire and benefit local communities, businesses, and institutions. By leveraging their acquired knowledge, returnees become agents of change, promoting progress and driving economic advancement within their home countries.

While the economic literature has extensively explored the effects of international migration on international trade and foreign direct investment (FDI), it is worth noting that many of these critical dimensions also experience growth due to return migration. Returnees, having established connections in their destination countries, play a significant role in promoting trade, foreign direct investment, and innovation upon their return. The available

evidence strongly indicates that return migration acts as a catalyst for the global diffusion of knowledge and substantially contributes to enhanced productivity (Wahba 2022).

Conclusion

The existing literature on the utilisation of the experiences of returning migrants and refugees yields mixed findings. It is essential to recognise the need for a distinct and comprehensive body of literature that focuses on the economic ramifications of returning refugees for their home countries. By delving specifically into the economic aspect, this dedicated literature can provide valuable insights into the potential contributions, challenges, and dynamics that arise when individuals re-enter their home countries after a period of migration or displacement. This specialised focus can offer a more nuanced understanding of how returning refugees impact their home economies. It can further serve as a valuable resource for policymakers, researchers, and practitioners seeking to address the complex issues surrounding refugee return and economic development.

The economic development potential of returnees relies on their skills being put to productive use. However, there are challenges and opportunities in addressing the legal and administrative barriers that returning refugees and migrants may encounter, including issues related to property rights, documentation, and access to public services. A crucial aspect to consider is skills-matching and recognition, which emphasises the significance of acknowledging and leveraging the skills and qualifications of returning refugees. It is essential to facilitate the effective matching of their skills with suitable employment opportunities and to ensure their seamless integration into the labour market. By removing barriers and creating an enabling environment that recognises and utilises the talents of returning migrants, their full potential can be unlocked and foster their positive contribution to economic growth and development.

When focusing solely on economic perspectives, the impacts of returns or non-returns to the economy of the country of origin are multifaceted. The return of migrants can infuse the origin country's economy with various benefits, including increased labour force participation, the potential for entrepreneurial activities, and the transfer of financial remittances. These contributions can stimulate economic growth and development. Conversely, non-returns may lead to labour shortages in certain sectors, affecting productivity and economic stability. At the household level, returnees often bring with them savings and enhanced skills, positively impacting their families' economic well-being. Communities left behind may also experience economic benefits through remittances sent by migrants that can boost local consumption and investment. Additionally, the concept of economic and social remittances emphasises the transfer not only of money but also of knowledge, practices, and ideas that can have a transformative effect on both individual households and broader societal structures within the country of origin. Therefore, examining returns or non-returns from an economic perspective sheds light on a complex web of influences that shape the economic fortunes of origin countries, households, and communities.

The inflow of remittances and the economic agency of returning refugees can have positive effects on the local economies of their home countries. These financial resources can contribute to job creation, entrepreneurship, and the overall development of key sectors such as healthcare, education, and infrastructure. It is important to recognise the significance of these contributions and to create an enabling environment that supports and facilitates the

potential of returning refugees. This includes policies and programmes that facilitate the reintegration of returning refugees, promote entrepreneurship and economic opportunities, and strengthen social and economic networks.

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HORIZON EUROPE PROJECT

Decentring the Study of Migrant Returns and
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Five Shades of Grey: Policy and Practice in Return Migration

Assessment of EU return policy with a focus on Germany, Greece, the Netherlands, Poland, and Sweden

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This policy brief is the result of a meticulous analysis of the key findings in country dossiers ([Germany](#), [Greece](#), [Poland](#), [Sweden](#), and [the Netherlands](#)) and the Horizon Europe GAPS project - [WP2 Comparative Report](#)¹ on Legal and Policy Infrastructures of Returns in the EU. The country dossiers systematically examine regulations, policies, and statistics on the return and readmission in each country, relying on legislative documents, reports, and other relevant secondary literature. The comprehensive comparative report compares the return policies of these five countries, along with the examination of fundamental statistics, key political developments and legislations at the EU level, and the analysis of the institutional frameworks. The policy brief, a culmination of this thorough analysis, presents critical policy-related insights from the project and provides recommendations.

Introduction

Facing substantial migration pressures, the European Union and its Member States have struggled to find a balanced policy response that respects migrants' rights while managing migratory movements. This challenge is illustrated in efforts to return migrants who enter or remain in a country without legal permission or clear grounds for asylum. How to address this issue is a subject of intense political debate in the EU and often features as

a campaign topic in regional, national, and European elections.

The return and readmission policy in the EU is multi-layered, involving various actors, including the European Commission, the Council of the EU, Frontex, and the European Asylum Support Office, among others. This complex framework is mirrored at the national level, where a blend of governmental and nongovernmental entities, alongside specialised agencies, play pivotal roles in the

¹ Gökalp Aras, N.E., Öztürk, N.Ö., Strik, T., Thorburn Stern, R., Trylińska, A. & Yüksel, U. (2024). "[WP2 Comparative Report: Legal and Policy Infrastructures of Returns in the EU](#)".

implementation of return policies. The involvement of multiple the EU and national actors underscores the collaborative yet intricate nature of managing migrant returns.

While the EU Member States are bound by common legal standards, such as the principle of non-refoulement and the EU Return Directive (2008), the implementation and impact of these standards vary significantly across the countries. There is a tendency to adapt the interpretation of the Directive's requirements to fit national laws rather than closely align national laws with the Directive. This reflects not only the heterogeneity of the EU Member States but also the complexity of the overarching challenge of balancing perceived security concerns with humanitarian obligations.

Based on rigorous research by the EU-funded GAPs consortium, this policy brief highlights the need for clearer legal frameworks, more accurate and comprehensive statistics, and a stronger commitment to humane and efficient return processes.

Evidence and Analysis

In terms of both policy focus and implementation strategy, the EU Member States take different approaches to migrant returns. Each country's approach is shaped by its unique political, social, and geographical context. While some countries prioritise strict control and deportations, others emphasise humanitarian approaches and voluntary returns. Despite decades of efforts by the EU and its Member States to forge a consensus on return policy, harmonisation within the EU's complex political landscape remains problematic.

EU return policies and practices

The EU has established multiple instruments over the years that continue to shape its approach to return migration. Here is a summary of the main developments to date:

- **Since 2004, the EU has actively worked with countries of return through the EU Readmission Agreements (EURAs).** These arrangements with non-EU countries aim to ensure cooperation on return and readmission.
- **The Return Directive (2008)** established common standards and procedures for returning third-country nationals. This constitutes the EU's most important legal development on returns to date. Aiming to ensure effective return procedures while respecting migrants' rights, the Directive lays down clear rules on voluntary return, removal, detention, and re-entry bans.
- Regulation (EU) 2019/189 increased the competences of **Frontex** regarding return and reintegration. Designed to support the EU Members and the Schengen associated countries in the management of the EU's external borders, Frontex provides operational and technical support within the different phases of return process when requested.
- **The Return Handbook** was issued to clarify procedures and best practices for returning migrants. Created in 2015 and updated in 2017, this document aims to enhance the effectiveness and uniformity of return practices across the EU.
- **The New Pact on Migration and Asylum** is the most recent development in the EU policy on return migration, which was adopted in May 2024. The long anticipated Pact introduces a mandatory solidarity system among Member States and a new expedited border procedure for individuals deemed unlikely to win asylum. It aims to ensure that their claims are processed quickly and, if rejected, that they are returned to their home countries within a specified timeframe.

Since 2018, the EU has been seeking to recast the Return Directive. The stated aim is to "reduce the length of return procedures, secure a better link between asylum and return procedures, and ensure a more effective use of measures to prevent absconding". Though

there have been significant procedural developments, efforts to date (June 2024) have not culminated in a finalised piece of legislation because of key challenges regarding the accelerated return procedures, appeals, voluntary return programmes, cooperation obligation, detention periods and risk of absconding.

Data collection and harmonisation

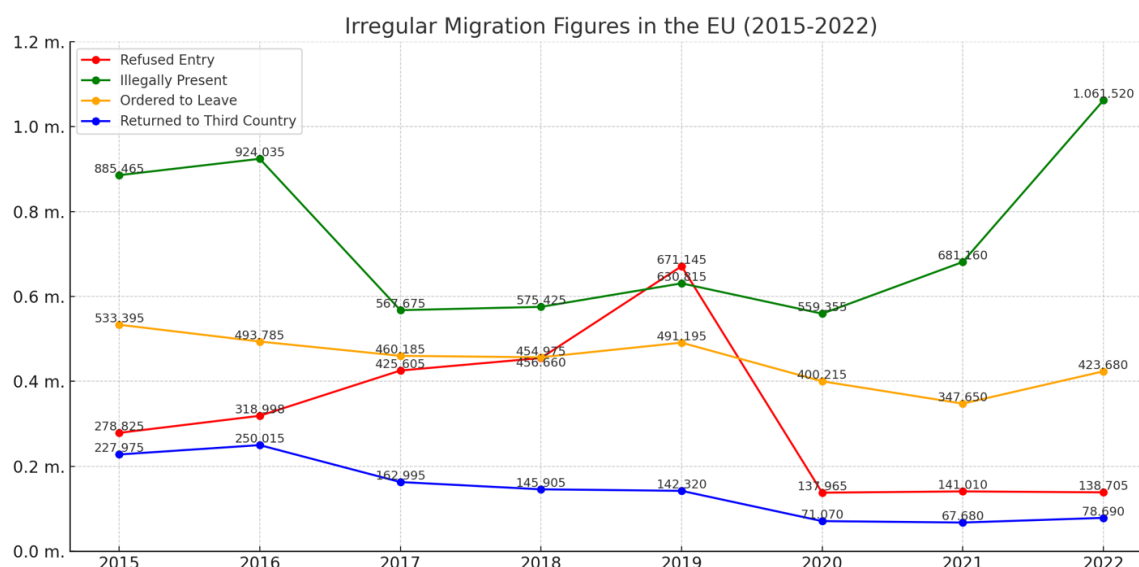
Systematic data collection plays a pivotal role in shaping effective migration management policies that are both humane and aligned with human rights principles. Harmonized statistics provide a basis for transparency and accountability, allowing assessment of comparative compliance with international and EU legal frameworks. Critically, universal data collection serves as a foundation for evidence-based policymaking, enabling the development of targeted interventions that

safeguard the rights and well-being of all migrants, regardless of their circumstances.

During the past 20 years, the EU and its Member States have been developing a comprehensive and coherent framework for a common analysis and the improved exchange of statistics on asylum and migration. These efforts have brought about several important changes designed to improve the completeness and harmonisation of these statistics. Since 2021, reporting quarterly statistics on returns has been mandatory for all Member States.

Building upon the results of the EU's statistical framework on migration and asylum (using Eurostat open access data), we created data visualisations for the period 2015 to 2022. Figure 1 below illustrates trends and shifts in irregular migration in the EU.

Figure 1:²

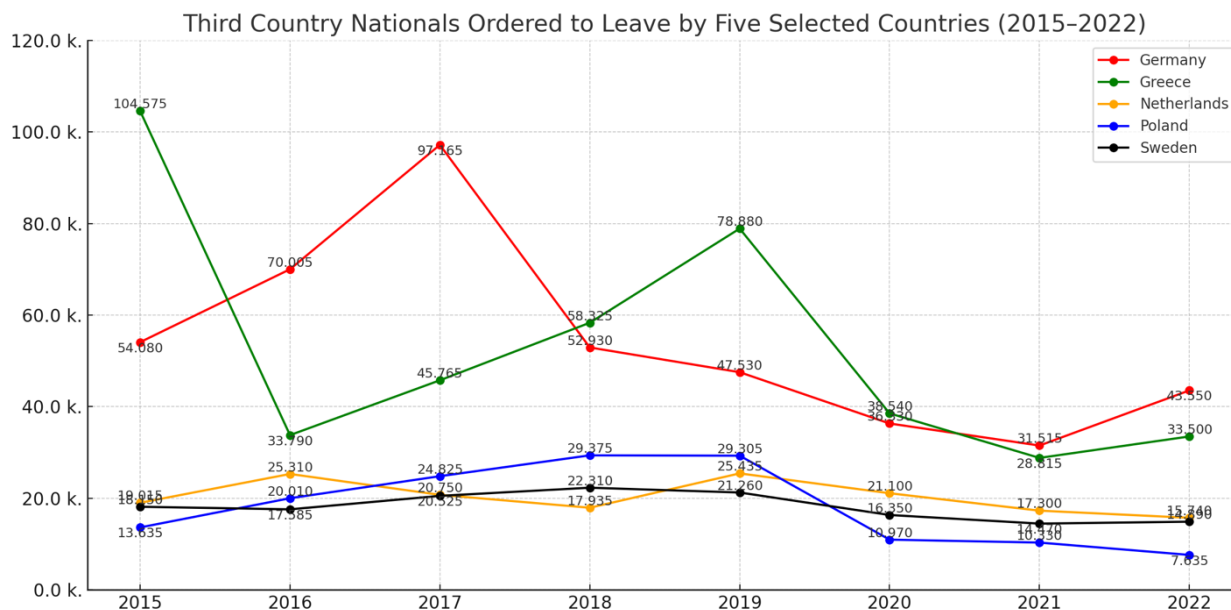


Source: GAPs WP2 Comparative Report, 2024, p. 18.

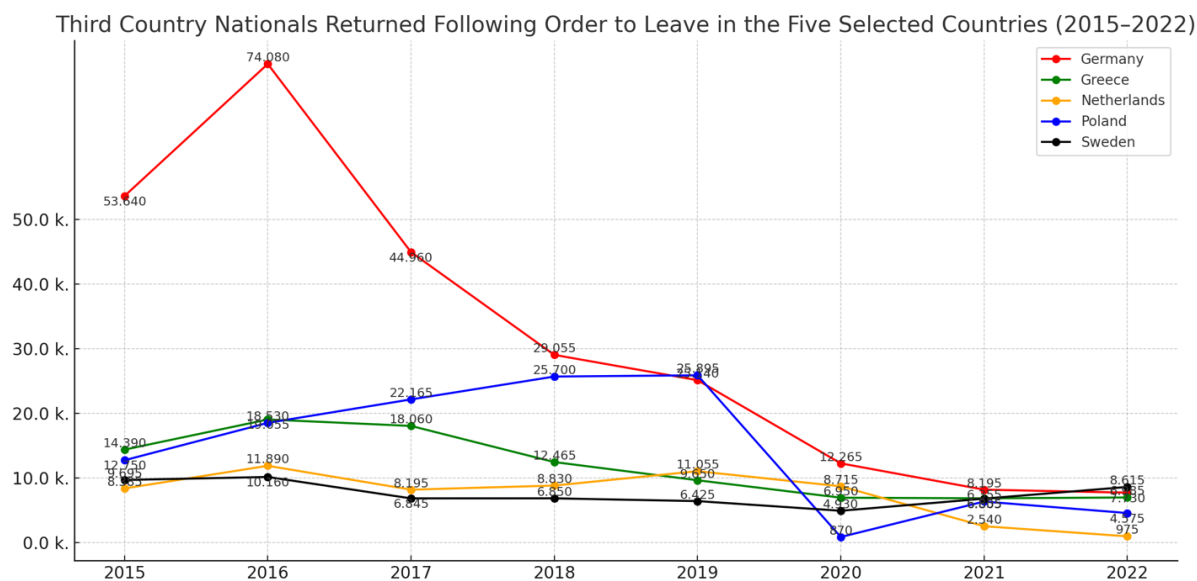
Figure 2 shows the number of third-country nationals ordered to leave by five countries from 2015 to 2022, while Figure 3 displays the number of returns following the order to

leave. The disparity between orders to leave and affected returns is often cited in political discussions as an indicator of the ineffectiveness of the EU's return policy.

² For more user friendly, interactive and comparative statistical data, check GAPs's <https://analytics.zoho.com/open-view/2252882000000306780>.

Figure 2:

Source: GAPs WP2 Comparative Report, 2024, p. 24.

Figure 3:

Source: GAPs WP2 Comparative Report, 2024, p. 25.

Our research has uncovered significant discrepancies between the number of “third country nationals ordered to leave” and those “actually returned”. These gaps highlight the difficulties in executing return procedures. Although progress has been made in data harmonisation on returns, there is still considerable variation between Member States with regard to data collection. The lack

of a unified European data collection system leads to inconsistencies across all countries in definitions (e.g., variation in the criteria for a return decision), reporting standards, and timelines. There is also the problem of double counting, where individuals might be counted in multiple countries if they move within the Schengen area.

Five shades of grey

To get a clearer picture of how EU return policy is interpreted and practised in the Member States, we examined the applicable frameworks (laws, institutions, and procedures) in a quasi-representative group of countries: Germany, Greece, Poland, Sweden and the Netherlands. Each has had impactful experience with migration and returns, experience we can draw upon to inform the evidence base.

Detailed examination of our five focus countries found that all have transposed the EU Return Directive into their national laws, but the method of transposition and clarity of application vary. In each country the decision to return is primarily an administrative action, with more than one administrative agency responsible for the return process.

The most significant discrepancy between EU and national law in these countries concerns the monitoring of returns, such as the lack of legal monitoring procedures and institutional mechanisms (e.g. ombudsman).

Our analysis of the legal, institutional and policy frameworks of the five selected Member States reveals that:

- **Germany** takes a decentralised approach, leading to variable enforcement across states.
- **Greece** demonstrates legal ambiguities and faces criticism for its detention conditions.
- **Poland** struggles with providing accessible legal remedies and has restrictive practices that hinder migrants' rights to appeal against return decisions.
- **Sweden**, which incorporates its return policy into a broader migration

management framework, faces legal uncertainties and displays shortcomings in providing adequate support mechanisms for returnees.

- **The Netherlands** faces criticism for limited judicial review of return decisions and non-compliance with EU directives.

Shared challenges

Despite their diversity, the Member States investigated for this policy brief all face a common set of challenges in returns policy and practice. These include:

- formulating more precise legal definitions
- aligning national practices with EU standards
- better protecting vulnerable individuals
- ensuring humane detention conditions

The most problematic issues are legal uncertainty and inconsistencies in the application of the Return Directive and international law. Concerns also exist about the effectiveness of procedural safeguards and protection from refoulement, particularly in border procedures and for vulnerable groups such as children.

Further serious concerns surround the use of detention as a default choice rather than a last resort, limited access to legal representation for detainees, and substandard conditions in detention facilities. Moreover, there are discrepancies in the effectiveness of administrative and judicial reviews and remedies, particularly regarding access to legal aid and the implementation of court decisions.

Policy Recommendations

EU-level recommendations

The recommendations offered below are based on our analysis of EU return policy and its implementation in a quasi-representative sampling of five Member States. Our EU-level suggestions pertain to gaps and needs identified in all countries examined.

Legal frameworks

- Formulate clearer legal definitions
- Align return policies with human rights standards and the legal frameworks safeguarding these rights.
- Create greater transparency for applicable laws and judicial process.
- Assure that procedures comply with fundamental and human rights.
- Strengthen mechanisms for monitoring and enforcing compliance with the EU Return Directive.
- To ensure compliance with EU law, Member States should avoid using detention as a sanction for those who do not comply with a return decision.

Data management and transparency

- Improve data collection on returns to address inconsistencies and missing data for countries. Timely publication of data is essential to inform policymaking.
- Ensure greater transparency by making data about the various aspects of return policies available to the public. This should include information on the application of alternative measures, the financial costs of removal operations, cooperation agreements to inform

discussions on effectiveness and efficiency of return policies.

Institutional frameworks and international cooperation

- Enhance institutional frameworks and international cooperation to manage return processes more effectively, including cooperation with countries of origin.
- Enhance support for voluntary return programmes and reintegration.

Detention as a last resort

- Use detention as a last resort, with alternatives to detention being considered first. This applies especially in fulfilling obligations to serve a child's best interests and treat detainees humanely.

Regularisation of migration pathways as a long-term, sustainable solution

- Conduct an evidence-based cost-benefit analysis of return versus regularisation or other measures. This could help shift the focus in practice and in public debate. In particular, finding solutions for those who cannot return and for undocumented migrants is a humanitarian issue that could be addressed in EC guidelines and future initiatives

Country-level recommendations³

Each Member State examined in our investigation faces unique challenges linked to its specific context. Hence, a differentiated, targeted approach is required in evaluating policies and formulating recommendations at the country level. Therefore, while the primary aim of this brief is to inform policymaking at the EU level, we also provide country-level recommendations that could have relevance for EU Member States beyond those mentioned.

Germany

Improve the legal framework and institutional practices to ensure effective returns while complying with fundamental/human rights.

- Establish a robust control and monitoring system.
- Create an independent institution for monitoring pre-removal and detention.
- Provide access to legal counselling and long-term funding for state and independent return counselling centres.

Greece

Clarify legal procedures and improve detention conditions.

- Define legal frameworks clearly to ensure the Return Directive's proper implementation.
- Enhance living conditions and rights for detainees.
- Consider alternatives to detention, especially for vulnerable groups like children and asylum seekers.

Poland

Reform legal and institutional cooperation to make the return process more humane and less restrictive.

- Restore the suspension effect of the claim to the court against return decisions.
- Introduce state-funded legal assistance.
- Use alternatives to detention, especially children and other vulnerable groups.

Sweden

Address legal gaps and policy inconsistencies that affect the return process.

- Incorporate definitions from the Return Directive into national law.
- Clarify what constitutes a practical impediment to enforcing return decisions.
- Ensure that detention practices align with EU law.
- Improve the credibility of Swedish migration policy by ensuring certainty about rules, procedures and implementation.

The Netherlands

Focus on better implementation of the Return Directive and less coercive enforcement measures, emphasising the best interest of the child and the fundamental rights of migrants.

- Practise less coercive enforcement measures.
- Emphasise detention as a last resort.
- Ensure the protection of children's rights.
- Consider more sustainable structures for successful integration or return.

³ For more detailed analysis of these countries, please consult the GAPs project's country-specific dossiers and policy briefs. <https://www.returnmigration.eu/publications-gaps>

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GAPs is a Horizon Europe research project that aims to conduct a comprehensive multidisciplinary study of the drivers of return policies and the barriers to and enablers of international cooperation on return migration. The overall aim of the project is to examine the disconnects and discrepancies between expectations of return policies and their actual outcomes by decentering the dominant, onesided understanding of “return policymaking.” To this end, GAPs:

- examines the shortcomings of the EU’s return governance;
- analyses enablers of and barriers to international cooperation, and
- explores the perspectives of migrants themselves to understand their knowledge, aspirations and experiences with return policies.

GAPs combines its approach with three innovative concepts:

- A focus on return migration infrastructures, which allows the project to analyse governance gaps;
- An analysis of return migration diplomacy to understand how relations between EU member states and third countries hinder cooperation on return and
- A trajectory approach which uses a socio-spatial and temporal lens to understand migrant agency.

GAPs is a three-year interdisciplinary research project (2023–2026) coordinated by Uppsala University and the Bonn International Centre for Conflict Studies (BICC) with 17 partners in 14 countries on four continents. GAPs’ fieldwork and desk research are conducted in several countries, including Afghanistan, Canada, Germany, Greece, Iraq, Jordan, the Netherlands, Nigeria, Morocco, Poland, Sweden, Tunisia, Türkiye, and the UK.



Decentring the Study of Migrant
Returns and Return Policies

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Framework paper on the concepts and typologies on returns - combined with four conceptual notes

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Summary

The overall aim of the GAPs project is to decentre the dominant, one-sided understanding of ‘return policymaking’ by bringing multiple perspectives into play and studying the complex interaction of diverse actors involved in the return processes; scrutinizing gaps and shortcomings in the governance of returns, with both its internal and external dimensions; and devoting specific attention to the study of practices. Developing a clear conceptual framework that describes how different actors identify migrant returns and how various disciplines are used to study return is a crucial step for decentring the dominant policy understanding and the focus of this paper. The paper underlines the context-specific use of the term which varies both among countries and regions. Specifically, this paper provides a conceptual framework for the clarification of whose return we are addressing – that is, whether of legal settled migrants, migrants without status, asylum seekers who have been refused, people under protection status, or people with tolerated or undefined status – and who is proposing the definitions and for what purpose. We introduce an analytical framework on the relationship between returns and coercion, while we elaborate the concept of ‘coerced returns’ as an overarching concept and spectrum. We thus propose a spectrum of returns based on coercion and taking the sites of return (before and after borders). We believe this approach may contribute to the scholarly calls to challenge the policy categories/dichotomies by illustrating how voluntary and forced mobilities are a continuum, not a dichotomy. The paper thematically links and complements the spectrum with the typology of return mechanisms taking into account both formal policies and informal practices in the governance of returns. Hence, we undertake several refinements to the concepts, labels, categories and typologies about return, specifically in relation to the actors, sites and levels of coercion. The conceptual discussion in GAPs builds on the rich body of work on migrant returns in several disciplines. This framework paper also adds the literature review pieces on return-related concepts used, principles underlined, highlights from the main debates in the disciplines of History, Economy, International Law and Anthropology.

The GAPs Project

GAPs is a Horizon Europe project that aims to conduct a comprehensive multidisciplinary study on the drivers of return policies and the barriers and enablers of international cooperation on return migration. The overall aim of the project is to examine the disconnects and discrepancies between expectations of return policies and their actual outcomes by de-centring the dominant, one-sided understanding of “return policymaking.” To this end, GAPs:

- examine the shortcomings of EU’s return governance;
- analyse enablers and barriers to international cooperation, and
- explore the perspectives of migrants themselves to understand their knowledge, aspirations and experiences with return policies.

GAPs combines its decentring approach with three innovative concepts:

- a focus on return migration infrastructures, which allows the project to analyse governance fissures;
- an analysis of return migration diplomacy to understand how relations between EU Member States and with third countries hinder cooperation on return; and
- a trajectory approach that uses a socio-spatial and temporal lens to understand migrant agency.

GAPs is an interdisciplinary 3-year project (2023-2026), co-coordinated by Uppsala University and the Bonn International Centre for Conflict Studies with 17 partners in 12 countries on 4 continents. GAPs’ fieldwork has been conducted in 12 countries: Sweden, Nigeria, Germany, Morocco, the Netherlands, Afghanistan, Poland, Georgia, Turkey, Tunisia, Greece and Iraq.

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1. Conceptual Framework Paper on Returns

Zeynep Sahin-Menciutek (BICC) & Anna Triandafyllidou (CERC)

Introduction

The power of concepts, labels, and categories has been increasingly debated in migration and refugee studies (Snel et al. 2021; Crawley and Jones 2021; Crawley and Skleparis 2018). Yet the existing literature provides very little examination of the categories' relevance on return migration (Gemi and Triandafyllidou 2021) and deportation (Walters et al. 2022). As Cassarino (2004, p. 254) correctly notes, 'there are several definitional approaches to return migration and returnees' as these concepts are 'a multifaceted and heterogeneous phenomenon'. These definitions play a 'crucial role in orienting, if not shaping, the perceptions, taxonomies and policies adopted by governmental and intergovernmental agencies' (ibid.).

The Conceptual Notes prepared for the GAPS project shed light on the different disciplinary perspectives (sociology/anthropology; law; economics; history). They also point to the context-specific use of the term, which varies both among countries and regions as well as among who is using it (e.g. scholars, policymakers, practitioners, migrants, diaspora groups) and for what purpose. Indeed, it is important to clarify whose return we are addressing – that is, whether of legal settled migrants, migrants without status, asylum seekers who have been refused, people under protection status, or people with tolerated or undefined status – and who is 'doing the talking', in other words, who is proposing the definitions and for what purpose.

Our aim in this framework paper is not to add a new definition to the multiple ones on returns but to propose an analytical framework on the relationship between returns and coercion. Following on the heels of the literature reviews in this dossier that are part of this broader conceptual exercise (Rottman and Nimer 2023; Ozturk 2023; Istaiteyeh 2023; Barthoma 2023), we first discuss the different meanings assigned to return migration by different actors. We then look specifically at the relationship between the level of coercion and the return mechanism or procedure implemented, offering a thick description of the elements involved. The third section proposes a typology of return mechanisms and explores the entanglement of formal policies and informal practices in the governance of returns.

Returns: Actors and their Roles in Shaping Terminology

While return is a much broader conceptual and policy category (as discussed by Rottmann and Nimer 2023), here we focus on 'return policy' as defined by the European Union, notably when migrants are involved in 'return procedures' because their presence at destination is no longer desirable, allowed, or tolerated.

Such returns involve different **procedures**, whether the actual voluntary departure of the person, an expulsion (when a decision is handed to the person ordering them to leave the country within a number of days), a removal (notably when the expulsion is enforced and the person is deported), and readmission (of the person to their country of origin or a previous transit country by an agreement) or repatriation (specifically, the return to the person's country of origin) (cf. European Return Directive 2008; ECRE 2019; IOM 2019; UNHCR 2003). Particularly in the international law documents, the term of *refoulement* is also

commonly used ‘as shorthand for any returns or non-admissions that violate the principle of non-refoulement’ (IOM 2019, p. 170).

The adjective list of return and repatriation varies in relation to characteristics detected during the procedures such as voluntary, compulsory, State-induced, self-organised, or assisted returns, on the one hand, and those presented after the return process as safe, sustainable, permanent, or temporary, on the other (Chimni 2004; Crisp and Long 2016; Black and Gent 2006). They also refer to two ‘poles’ – what happens at the original destination country to enact the return and what then happens at the return destination country after the migrant has been returned.

Some actors are particularly engaged in promoting return terminologies and analyses, notably the United Nations High Commissioner for Refugees (UNHCR), International Organization for Migration (IOM), the European Union (EU) institutions, national authorities, as well as academics and migrants themselves. Accordingly, the identifiable scales include policy texts and their implementation; research perspectives, whether quantitative or qualitative, about conceptual or policy issues; and lived experiences of those directly involved, i.e., the migrants. On these scales, there are interplays, overlaps, and gradual alignments, particularly between IOM-UNHCR and nation-states, as well as divergences over the definitions, policy objectives, and interpretations of guiding principles between returning and origin State actors, civil society, and migrants themselves. Anne Koch (2014, p. 905) illustrates how practices of both ‘legitimise each other's engagement as well as the overarching return objectives of governments, and are, therefore, involved in norm-building regarding the acceptability of state-induced returns’. In many cases, EU-IOM joint programmes fund locally-owned civil society organisations in the origin countries as implementers. Their development and migrant-protection interests are brought in alignment with the European objective of curtailing irregular migration; they also ‘keep imagining, and to some extent, performing alternative ways of dealing with migration’ (Marino et al. 2022, p. 1). This all raises questions about knowledge production, norm-building, and epistemological discussions around returns, which is beyond the scope of this framework paper.¹

States, particularly destination countries, are the main actors who have full authority over returning or not returning people; hence, they decide which term to use. They have complete discretion and power to categorise displaced people who arrived in the territory as asylum seekers, refugees, irregular, or tolerated through border control and bureaucratic processes. This is also reiterated in international law, which underlines that ‘the states of destination have a legitimate interest in returning irregular migrants and failed asylum seekers who do not (or no longer) fulfil the requirements to remain in the territory of the State, and to secure the readmission of these migrants by their countries of origin’ (IOM 2017, p.1). Furthermore, the country of origin is required by international law to accept the return of their nationals (ibid.).

¹ See Bradley, M. (2021) Realising the right of return: Refugees’ roles in localising norms and socialising UNHCR. *Geopolitics*, pp. 1-28; Chimni, B. S. (1993) The meaning of words and the role of UNHCR in voluntary repatriation. *International Journal of Refugee Law*, 5(3), pp. 442-460; Chimni, B. S. (1991) Perspectives on voluntary repatriation: A critical note. *Int'l J. Refugee L.*, 3, 541; Koch, A. (2014) The politics and discourse of migrant return: The role of UNHCR and IOM in the governance of return. *Journal of Ethnic and Migration Studies*, 40(6), pp. 905-923; Van Houtte, M. and Davids, T. (2008) Development and return migration: from policy panacea to migrant perspective sustainability. *Third World Quarterly*, 29(7), pp. 1411-1429. For genealogy of return/repatriation concept see Hammond, L. (1999) Examining the discourse of repatriation: Towards a more proactive theory of return migration. In: *The end of the refugee cycle*, pp. 227-244.

Preliminary empirical work undertaken in the context of the project provides insights about the complexity of return procedures on the ground and how State policies shape such complexity. To illustrate the variations, we include two country examples: Turkey and Poland. In Turkey, for instance, these six categories of potential and actual people targeted for return procedures were identified: those targeted to be removed/at risk of being returned, i.e., irregular migrants (no registration at all, registered in the wrong city) such as Afghans, Iraqis, Iranians; those who might be targeted to be removed in the near future, e.g. as indicated by political discourse or change in geopolitical situation such as Syrians under temporary protection; those pushed back at border from Greece (often transit migrants, including Syrians); those denied when they tried to go (entered, applied for asylum, and rejected in Europe) such as Iraqi returnees from Greece; those with removal orders/briefly detained/people who had returned but came back; voluntary returnees as designated by IOM to de-dichotomise the forced/voluntary binary. In Poland, however, the categories of potential migrants who are already subjected or will be soon subjected differ and include: rejected asylum seekers; asylum seekers readmitted to Poland under the Dublin regulation,² e.g. Georgians; asylum seekers such as Iraqis coming from countries with low recognition rates or considered safe third countries; those pushed at the land border such as Chechens; beneficiaries of temporary protection such as those from Ukraine since their legal situation can change.

Beyond national States, international organizations, mainly UN organs, have been particularly active in the last 20 years in promoting and shaping both the discourse and the policy of returns (Bradley 2021; Chimni 1993). Even before becoming a UN body, the IOM worked closely with UNHCR, including on returns (Bradley 2021). Gradually IOM took more prominent actions for conceptualization (or norm-building) of returns. This is also part of the dynamic that although IOM and UNHCR once had ‘distinct worldviews’, the IOM is ‘currently the leading actor in terms of framing migration, thereby exerting a strong influence on global migration governance’ (Green and Pécoud 2023). It is the same for the return and reintegration field, hence its definition is critical for shaping policy frameworks and normative narratives.

Return and repatriation

IOM identifies **return** as ‘the movement of persons returning to their country of origin after having moved away from their place of habitual residence and crossed an international border’ (IOM 2019, p. 186). Before the IOM’s emergence as the lead actor in the return migration field, the UNHCR had been quite active in norm-building and had proposed ‘voluntary’ repatriation as part of a durable solution, using the term interchangeably with voluntary return. UNHCR prefers the term ‘voluntary repatriation’ to explain the State-involved mass returns (or expulsions) of asylum seekers or refugees from neighbouring host countries to the countries of conflict, particularly the UNHCR-led processes in Africa and Asia, such as the repatriation

² The Dublin II Regulation was adopted in 2003, replacing the Dublin Convention. The Dublin III Regulation (No. 604/2013) was approved in June 2013, replacing the Dublin II Regulation, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/country-responsible-asylum-application-dublin-regulation_en

from Iran to Afghanistan or Bangladesh to Myanmar. Since the 1990s, along with the pressure from the international community (Hammond 1999), UNHCR has presented ‘**voluntary repatriation**’ as one of the durable solutions, that is, ‘any means by which the situation of refugees can be satisfactorily and permanently resolved to enable them to lead normal lives’ (Chimni 2004, p.55; UNHCR 2016). No doubt that in this UNHCR definition, wording such as ‘satisfactorily and permanently’ and ‘normal lives’ is quite ambiguous. Three **durable solutions** proposed include voluntary repatriation, local integration, and resettlement to third countries. UNHCR holds the authority to engage in repatriation and resettlement and assist ‘governmental and private efforts to promote voluntary repatriation’ (Statute 1950). The IOM has a mandate to be involved in assisted voluntary returns. At the UN level, the UN’s Global Refugee Compact proposes the creation of conditions for the expedited return of irregular migrants (UN 2018).

Voluntariness is a critical feature of the terminology used by IOM and UNHCR (recently also by the EC), which repeatedly emphasise that the terms do not involve forced returns. **Voluntary return** is a formal policy defined as ‘the assisted or independent return to the country of origin, transit or third country, based on the free will of the returnee’ (IOM 2019, p. 12). IOM underlines that ‘voluntariness is assumed to exist if two conditions apply: (a) freedom of choice, which is defined by the absence of physical or psychological pressure to enroll in an assisted voluntary return and reintegration programme; and (b) an informed decision which requires the availability of timely, unbiased, and reliable information upon which to base the decision’ (IOM 2019, p. 13; referred to in EMN 2023). However, existing empirical evidence contests the voluntariness aspect in returns, including practices in the IOM’s own assisted voluntary return and reintegration programmes (Maâ 2023; Bartels 2017; Blitz et al. 2005)

Regarding the return of migrants, EU legislation and its **member states**’ respective national laws use more technical terms such as removal and readmission since there are no binding and uniform definitions of these terms. These concepts generally relate to the forced return (expulsion) of rejected asylum seekers and irregular migrants back to the country of origin or to the third ‘safe country’ despite some nuances. **Expulsion** refers to the legal order to leave the territory of a State and removal or deportation as well as to the actual implementation of such order in cases where the person concerned does not follow it voluntarily (IOM Dictionary 2019) [*comprehensive coverage*]. **Removal** is ‘the act following a deportation, expulsion, or removal order by which a State physically removes a non-national from its territory to his or her country of origin or a third country after refusal of admission or termination of permission to remain’ (IOM Dictionary 2019, p. 180). **Readmission** is an ‘act by a State accepting the re-entry of an individual (own national, national of another State – most commonly a person who had previously transited through the country or a permanent resident – or a stateless person’ (IOM 2019, p. 169).

Compared to removal, expulsion, and readmission, the term deportation is used more often by **academia and civil society/activists**. Deportation is typically understood in terms of the forcible (often violent) removal by State authorities of a ‘foreigner’, usually a ‘migrant’, from a country in which she or he ‘does not have citizenship’ (Walters et al. 2022). There is a well-established deportation studies field that embraces critical perspectives and closely engages with the broader works of literature on ‘critical geography, sovereignty and biopolitics, political economy, science and technology and race and postcolonial studies’ as well as border studies since the early 2000s (Coutin 2015; Lemberg-Pedersen 2022; Walters 2018; Drotbohm and Hasselberg 2015). This scholarship challenges the State-centric

methodological assumptions and criticises the terminological choices by questioning the policy purposes behind them. For example, El Qadim (2014) argues that readmission should be considered a robust deterrence and control instrument within the EU migration regime instead of a neutral term. Spathopoulou and colleagues (2020) contest that the EU's readmission programmes, for instance in Greece, can be better called as promotion of 'self-deportation'.

It is also important to note that the use of return-related concepts differs among world regions. Policy papers addressing forceful returns from Europe to origin countries use the terminology of readmission of individual rejected asylum seekers and also assisted voluntary returns (Walters et al. 2022; Sökefeld 2019); in Africa or Asia, such documents use the terminology of repatriation (Crisp and Long 2016; Gerver 2018), while in Africa they also increasingly adopt the terminology of readmission (in relation to the EU externalisation efforts). In North America, policy papers do not hesitate to use the terms expulsion and deportation for forceful returns of unwanted irregular migrants from Central and South America in the United States (Goodman 2020).

Critical scholars of migration, including ourselves, question the indiscriminate use of notions of 'voluntary return' under the pretence of free will while such returns actually often involve apprehension of the migrant by the authorities and different forms of coercion, structural violence, and abuse (De Genova and Tazzioli 2022, p. 856; see also Spathopoulou et al. 2020; Rosenberger and Koppes 2018; Kalir 2017; Cleton and Chauvin 2020; Leerkes et al. 2017). As correctly noted by Anissa Maâ (2023, p. 92), 'migrants' entangled appropriations of return are defined in close relationship with a wide range of actors intervening during the process of return. Ultimately, migrants reformulate the meaning of their involvement in voluntary return into strategic, moral, relative, and symbolic terms'.

Contrary to policymakers' and implementers' assumptions, from the **perspective of migrants**, returns are not the end of the migration journey or return 'home'; instead, returns only serve as a part of the migration circle and a point in the mobility continuum (Gemi and Triandafyllidou 2021). Reflecting on this reality, migration scholars conceptualise returns more broadly, stating that return is 'a part of the wider mobility process in which the migrants engage' as one dot in a non-linear course that may include multiple emigrations and return segments as well as re-migration (whether to the same destination country or third countries)' (ibid., p.3). From the scholarly view, the label or category of 'return' has been used to refer to refugees who restart living in their former 'homes'; who come back to their countries of origin but live elsewhere within this country; and those internally displaced people (IDPs) returned to their former area of residences. In fact, return migration as a process is much broader and spans the migrant's plans for staying, returning, or moving on and has typically very little to do with coercion and expulsion (Gemi and Triandafyllidou 2021; Cassarino 2015).

For this reason, both migrants and human rights advocates prefer the use of terms such as deportation, expulsion, and forced return to identify the returns induced by States and coordinated by international organisations, clearly distinguishing between those and broader return processes.

Coercion and ‘Returns’

This paper and the GAPs project overall focus more specifically on the return policies and procedures implemented by States and international organisations, albeit introducing also critical perspectives from the point of view of migrants, stakeholders, and experts. In this framework, the relationship between coercion and returns is particularly important and this is the focus of the next sections of this paper.

The links between return programmes/procedures and voluntariness/coercion are particularly complex. Scholars often question the extent to which the voluntariness principle is adopted in the return operations, given that migrants historically and currently are rarely included in the decision-making during State-induced returns (Kirui 2019). As early as 1999, Hammond (1999, p. 231) notes that:

The voluntary nature of the decision to return may be difficult and even impossible to distinguish in cases where those who opt not to repatriate face the closure of camps, cessation of aid, and harassment by local security forces. Those who choose not to return may also face harassment and intimidation from the host government or political groups in the country of origin whose interests repatriation may serve.

It is evident from the literature review that the vast majority of returnees from Europe or transit countries (such as Turkey, Libya, Tunisia, and Morocco) do not wish to ‘return’ but were somewhat coerced one way or another. This defies distinctions between voluntary and forced return as a dichotomy and points to a continuum starting with a spontaneous voluntary return out of despair with one’s situation to accepting a return after a refused asylum decision to resisting a coerced return and being deported and staying as irregular migrants. Some did not get a formal response to their asylum application but had waited too long under dire conditions. They observed others receiving negative responses or were told by their lawyers that they did not have a chance to get status. This group includes some who started an appeal process with the help of lawyers or NGOs but were still rejected or their processing was again too long, causing some to lose hope and hence decide to return, while others applied to the ‘AVRR programs’.

We thus propose a spectrum of returns based on coercion and taking the sites of return (before and after borders). We believe this approach may contribute to the scholarly calls to challenge the policy categories/dichotomies by illustrating how voluntary and forced mobilities are a continuum, not a dichotomy (Erdal and Oeppen 2017; Crawley and Skleparis 2017; Carling and Schewel 2018) and how migration journeys are ‘fragmented, non-linear, including different intermediate stops and multiple returns and new departures’ (Triandafyllidou 2022, p. 1). It also points to the need for acknowledging not only the State’s views but also the migrant perspectives towards return – which is the core aim of GAPs project by decentring the study of returns.

A first question to ask is whether return is truly voluntary or not. The voluntariness of the return can be assessed by the migrant’s own perspective but can also be categorised in relation to who initiated it: the migrant, State authorities, an international organisation, or a civil society organisation.

In similar vein, we need to consider whether the return was eventually organised by the migrant or by a third party, fully or in part (notably assisted or not) and whether it included

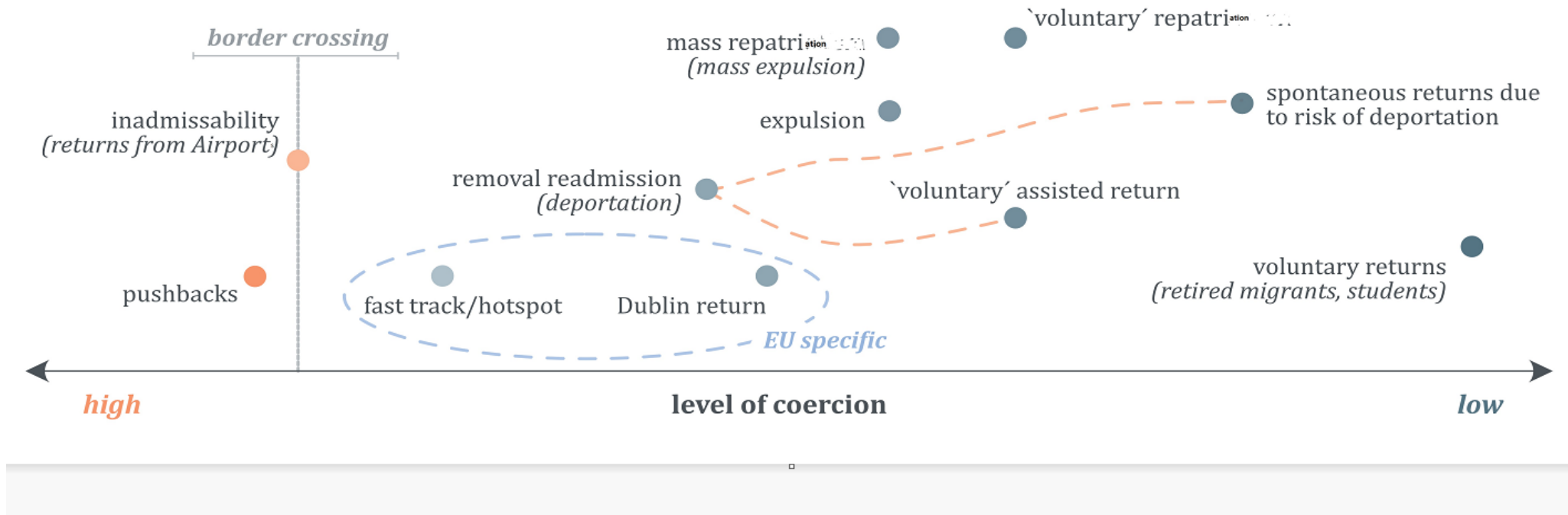
for instance incentives (e.g. a reintegration fee paid upon arrival at the origin country). Indicatively, we can consider whether the return was part of a larger project or initiative to incentivise returns and support reintegration within which the migrant may have decided to take the opportunity. We may also ask whether an ‘assisted voluntary’ return formed part of an enforcement campaign by a given destination or transit country, leading then to the apprehended migrants being given a ‘voluntary’ return option through an assistance programme.

In this case we should also consider whether a return was individual or whether it formed part of a larger program or campaign aimed at removing a set of people with a given status, for instance asylum seekers refused on first instance.

It is crucial to consider whether a return happens at the border, is notably a pushback or involves a deportation a few days after having crossed the border because the document has no status and may have been fast-tracked through the asylum procedure and been found inadmissible. Or whether the return happens from within the country, away from the border, after being apprehended or in any case as part of what we will discuss later as ‘incentivising’ returns.

Figure 1 complements this review by offering a visual representation of where and how return procedures happen.

Figure 1



Typology of Return Mechanisms

Building on the discussion of the previous sections, we propose **three mechanisms of return governance: pushing, imposing, and incentivising**. All three involve formal and informal policy instruments and practices (see Table 2); what differentiates them is the level of coercion and how informality is strategically deployed to achieve the desired outcome. Here, policy instruments refer to a ‘type of institution’ and a technical device with the generic purpose of carrying a concrete concept of the politics/society relationship and sustained by a concept of regulation’ (Trauner and Wolff 2014, p. 9).

Table 1: Types of Return Governing Mechanisms and Related Formal and Informal Practices

Mechanisms	Formal policy instrument	Informal practices to implement policy
Pushing returns	Strict border controls at the first arrivals	Pushbacks, impeding admission and asylum claims
Imposing returns	Dublin regulation of the EU; readmission agreements; administrative detention for returning; deportation; mass voluntary repatriation	irregularisation; dehumanisation, abandonment, deprivation, withholding aid; closing camps; limiting access to the registration, essential services, and mobility; criminalisation
Incentivising returns	Assisted voluntary return and reintegration programmes	Imposition of voluntariness or convincing by enticement

Pushing returns refers to enforcing returns of refugees and migrants ‘back over a border – generally immediately after they crossed it – without consideration of their circumstances and without any possibility to apply for asylum or to put forward arguments against the measures taken’ (ECCHR 2020). The formal policy of irregular migration control and border management is the basis for pushing returns.

However, our notion of ‘pushing’ returns focuses mainly on the informal – and illegal itself – practice of pushbacks. Pushbacks have been reported at several locations of the EU’s external borders, including along the Western Balkans route and in the Western, Central, and Eastern Mediterranean (Stefan and Cortinovis 2021). Pushbacks are officially defined (by the 47th session of the Human Rights Council) as ‘various measures taken by States which result in migrants, including asylum seekers, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied of any individual assessment on their protection needs which may lead to a violation of the principle of non-refoulment’ (European Parliament 2023). Pushbacks prevent migrants from effectively entering the country’s territory and

impede access to admission and asylum claims. National border guards, customs, and police have been found to practice pushbacks, while the European Border Agency, Frontex, has also been implicated.

Imposing returns means officially forcing an order to leave that has to be obeyed by the ‘irregular’ migrants or refused asylum seekers. In contrast, their stay in the country of asylum or transit is deemed ‘illegal’. Migrants may be coerced to return or maybe persuaded even if they are unwilling to do so. Imposing returns may occur through formal readmission or expulsion of a given migrant and their family. But imposing a return may also involve a mass voluntary repatriation of people who lack protected status and are deemed irregular migrants. While pushing returns usually happen on the way to the final destination, particularly during border crossings, imposing returns develop after one has arrived at their desired destination.

Regarding the imposition of returns in the EU, two formal policy instruments are critical: the Dublin regulation, which determines that an asylum claim needs to be processed at the first safe country of arrival, and readmission agreements with third countries of either the origin or of transit. Thus, if a migrant seeks asylum in another country and their fingerprints are found in the EURODAC (European Asylum Dactyloscopy) Database that collects data on asylum seekers and irregular migrants, they are returned to their first safe country of arrival where their fingerprints were taken upon entry to apply for asylum. In addition, if the national authorities apprehend a migrant without regularised status or a refused asylum seeker, they can be relatively quickly returned to their country of origin if that country has a readmission agreement with the government of arrival.

Incentivising returns refers to persuading refused asylum seekers or migrants without regularised status to ‘voluntarily’ return by offering some financial assistance. The EU’s most famous formal policy instruments for return governance are the Assisted Return (AR) and Assisted Voluntary Return and Reintegration programmes (AVRR). They are considered an ideal return mechanism to maintain the credibility and sustainability of the asylum system and unfold a humanitarian solution for irregular migrants as well as a way for the development of origin countries (EC Strategy 2021). These programmes offer migrants incentives to return voluntarily, and have become a central migration management tool in Europe (Lietaert and Van Gorp 2019). AVRRs are operated mainly by IOM with funding of interested European states and in partnership with local NGOs. For 2017, it was reported that EU member states run at least 96 AVRR initiatives, EU countries, including the UK before and since Brexit, have AR programmes. (Home Office 2021).

Currently, efforts such as capacity-building and knowledge transfer exist to establish national voluntary return mechanisms directly in transit countries (Mencutek 2022). Practices illustrate that voluntariness and assistance principles are conflated, while the line between formal and informal is blurred. Scholars argue that assisted voluntary returns hide the violence inherent to contemporary border regimes by masking it under the liberal democratic governing scheme and framing returns as ‘voluntary’ (Koch 2014; Spathopoulou et al. 2020). Voluntariness in the ‘voluntary assistant returns’ is also dismantled by a lack of preparedness, real alternatives, access to reliable and trusted information, and effective legal remedies (Crisp and Long 2016; Erdal and Oeppen 2017). Independent monitoring of the implementation of return, mainly regarding ethical and procedural standards, is rarely attainable (Pirjola 2007). Notably, essential ethical considerations like consent-taking are overlooked or manipulated at the practice level (Gerver 2018). Drawing from such realities about the implementation of

policies, many scholars put the AVRRs closer to the informality side in the formal-informal spectrum, voluntary deportation (Spathopoulou et al. 2020), or soft deportation (Leerkes et al. 2017) by showing their entanglements with the imposition of returns.

Discussion

It is important to challenge common binaries and show how return procedures are dynamic and need to be considered from multiple perspectives, particularly those of the migrants and civil society organisations, to showcase the policies' side effects. Our review and analytical framework, for instance, points to the fact that both **assisted/non-assisted (return)** and **voluntary/forced** return distinctions are continuums rather than binaries.

Considering also the hypocrisy behind the use of the term 'return' and so-called voluntariness, the question arises for this project of whether we should refuse the term and instead use terms such as expulsion, removal, or deportation.

These terms – particularly expulsion and deportation – have been largely dropped from the (EU) policy vocabulary for over 15 years now because of the negative connotation attached to them. At the same time researchers (Cassarino 2004; 2016; De Genova and Tazzioli 2022) have argued that the notion of 'readmissions' should also be challenged and we should actually speak of expulsions/deportations rather than readmissions. It is worth noting also that deportation needs to be understood as an executed expulsion. The term 'removal' has been used mostly to refer to individuals. Academics such as Jean-Pierre Cassarino and William Walters, among others, challenge researchers when they do not call practices deportation; using the terminology of 'readmission' can be one strategy.

Our suggestion is to adopt the term 'Coerced Returns' in keeping with the broad policy terminology but emphasising that returns that are part of these policies are coerced, to a greater or lesser degree. This will allow for our work to clearly connect and analyse national and EU legislation and policies (which of course include a variety of terms such as removal decisions, return decisions, expulsion decisions, and so on), while also providing for the necessary framework to critically analyse coercion in return governance.

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2. Concept note: Studying Return Migration from a Historical Perspective

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Introduction: The Significance of Historical Research

Neither return migrations nor politics of return are new. Nonetheless, as Russell King (2000, p. 7) pointed out, ‘return migration is the great unwritten chapter in the history of migration’. Although there has been an increasing amount of literature on return migration in recent decades, there remains a strong need to incorporate history as a disciplinary perspective into studies on return migration. This concept note aims to address this issue by presenting some initial ideas for adopting a historical approach to the study of return migration.

Beginning with the thought-provoking query of where history fits in migration studies, I will illustrate this with an analogy. In his acclaimed lecture in 1882, *What is a nation?*, Ernest Renan (2018) identified ‘forgetting history or getting history wrong (*l’erreur historique*)’ as an indispensable element in creating a nation. This conclusion can be extended to migration. Forgetting the historical origins and using migration history for contemporary debates can lead to distorted images and epistemologies of migration, where the knowledge and memories of historical experiences fade and become sedimented into pre-given facts about migration. As noted by historian Eric Hobsbawm in his book *On History* (1992), certain historical experiences become part of a broader historical memory, while others are overlooked. The history and memories of migration are often neglected in mainstream historiography, particularly in national histories such as those found in school textbooks. The impact of migration in the making of modern nations and nation-states recently received some scholarly attention (cf. Benjamin T. White, Laura Robson, see further down). Migration historians are well placed to offer a critical analysis of the foundational narratives of nations and nation-states.

Christophe Bertossi, Jan Willem Duyvendak and Nancy Foner (2021), in their introductory article to the special issue entitled *Past in the present: migration and the uses of history in the contemporary era*, analyse the notion of historical repertoires, which refer to elementary grammars of how the past is framed in contemporary public debates on immigration (ibid., pp. 4155, 4161). The authors discuss the divergences between US and European scholarship regarding the function of history in the context of immigration studies. American immigration scholarship has traditionally focused on past events, given the significant role that immigration has played in American history (Bertossi et. al. 2021, p. 4156). In the European literature, however, contemporary migration scholars have placed significant importance on history; for instance, social historian Leo Lucassen’s (2005) comparison of pre- and post-World War II immigrants in Europe demonstrates similarities in exclusion and integration patterns.

Migration scholars have generally paid little attention to the historical understanding of migration, often mentioning history merely as contextual background to the present. Nancy Green has noted that while historians may see parallels between contemporary migration patterns and those of earlier periods, sociologists often prioritise the notion of novelty (Foner 2005, p. 3). Historians Jan Lucassen, Leo Lucassen and Patrick Manning argued in their book *Migration History in World History* (2010, p. 4) that scholars, policymakers, and the media often ignore relevant historical analogies and perceive current developments as unprecedented. This emphasis on uniqueness, novelty, and unprecedentedness appears to be prevalent in many academic works (Bertossi et al. 2021), indicating a dearth of historical perspective in several studies.

For instance, using crisis rhetoric to frame migration is not a novel practice. Lucassen et al. (2010, p. 4) refer to the example of the economic historian William Cunningham (1897), who observed that Russian Jewish immigrants to London were as unassimilable as southern Europeans in the eyes of many American commentators and politicians around 1900. Before World War I, both the right and the progressive left in the US commonly feared ‘unskilled and defective poor immigrants’ (ibid.). The recurring patterns they refer to as ‘moral panics’ demonstrate how fear irrationally dominated public discourse and argue that revisiting historical accounts can offer a valuable temporal comparison for the present day, aiding our comprehension of both continuity and change, and ultimately placing recurrent moral panics in a more balanced context (ibid.). Thus the debate on migration (including returns) would benefit from the long-term insights developed in the field of migration history. Migration historians have the potential to rectify misrepresentations of the past, unveil collective amnesia around migration, and elucidate the logic behind the construction of collective memories.

Historical Approach to Migration and Returns

Historians approach migration as an integral part of human history. As Patrick Manning (2005, pp. 8-9) notes, migration is ‘the underlying human impulse’ that connects different parts of the world and creates social, cultural, and economic links. This statement is equally valid for returns, which constitute an inherent aspect of all forms of human movement. People do not only move from one place to another but also ‘return’ to their point of origin or continue to another destination. This non-linear understanding of mobility is crucial for understanding the historicity of return migration and broader patterns of human mobility.

Overall, historians studied return migration as an inextricable part of migration across a range of historical periods. They sought to identify the longitudinal patterns of human movement, whether voluntary or forced, by examining social, economic, cultural, and political factors that shape the return migration processes within the broader context of migration history. By examining historical data and sources, historians aimed to reveal the factors that influence individuals’ and groups’ decisions to return to their home countries. Additionally, they analysed the impact of return migration on the sending and receiving countries, how individuals negotiate their sense of belonging and identity upon returning to their home countries and communities, and how these factors shape their experiences and interactions.

The historical origins of modern-day return policies can be traced back to pre-modern and ancient times where exiles, deportations, and forced expulsions of individuals or groups from territories were commonly practiced. These actions were particularly prevalent in contexts involving wars, conquests, and the expansion of empires. Scholars such as Jan Felix Gaertner (2006) have noted that these methods were often employed as punishment tools, while also serving strategic and demographic purposes. States were granted power to determine who could reside in a territory as well as the circumstances under which an individual could exercise their *right of return*. Typically, the exercise of this right was directly related to the cessation of hostilities following a conflict, or with the changes of established social, political, or economic power structures. With the rise of nation-states, a change in terminology can be observed and deportations were employed as a political instrument, not only to define the boundaries of a nation-state *externally* but also *internally*. This led to the expulsion of ‘undesirable groups’ from the boundaries of nation-states with the goal of forming an ‘imagined’ and ‘homogenised’ community. For instance, during the 1880s, the US federal government established the nation's initial deportation policies, which reflected the ‘racism and nativism of the era’, targeting Chinese immigrants in addition to ‘idiots, prostitutes, alcoholics and public charges’ (Hester 2020).

Indeed, scholars have emphasised the strong link between nation-states and deportation practices, viewing deportations as a type of forced displacement with historical roots in colonial conquests and genocides (e.g. Lindberg 2023; Walters 2002; Peutz and De Genova 2010). They argue that deportation has been widely utilised as a ‘nation-building device’ (Lindberg 2023), a ‘technology of citizenship’ (Walters 2002, p. 282), and a form of ‘infrastructure of racism’ (Khosravi 2019, p. 114). As noted by Aristide R. Zolberg (1983), the formation of new States after the two world wars was a ‘refugee-generating process’. From a historical perspective, many nation-states were founded by deporting particular groups, which involved an element of demographic engineering. Forced return, in the form of deportation and the like, was widely implemented to carry out this ‘nation-building project’.

Before delving into the specifics of what can be termed a historical approach to return migrations, it would be helpful to contextualise the topic by providing a brief overview of major historical milestones. The periodisation below, however, is merely tentative and does not aim to provide an exhaustive account of all the return movements of refugees and displaced people.

Tracing Patterns of Returns in the Early Modern Period (ca.1500-1800)

Some historians have noted a significant rise in worldwide geographic mobility as a defining feature of a global early modernity. In early modern Europe, religious and confessional minorities stood out as the most prominent group of migrants (Behrisch et al. 2023). They established diasporas to maintain their unique cultural and linguistic identity across generations. From the perspective of return migration, these diasporic formations were crucial in preserving ties with their country of origin or imagined homelands.

Another example from the early modern period is the persecution and mass migration of Palatines and Huguenots in Europe. They sought refuge in England where they were recognised as Protestants fleeing Catholic oppression. In the early eighteenth century, the discourse around naturalising ‘Poor Palatines’ in England is fascinating and draws parallels with current migration debates. Advocates of Palatine integration stressed their potential to augment the British economy, citing their abilities as skilled farmers and craftsmen. Daniel Defoe, author of *Robinson Crusoe* and supporter of this political stance, wrote a pamphlet defending the ‘Poor Palatines’ in 1709 and campaigned for legislation to naturalise foreign-born Protestants. However, the hospitable stance faced escalating challenges with the surge in migrant numbers (Dresser and Fleming 2001).

The Tories waged a propaganda campaign against migrants and the Naturalisation Act, arguing that these migrants were a drain on the economy, taking jobs from the English poor and posing a threat to the nation’s security because they were not members of the Church of England. This narrative, resembling modern-day populist rhetoric, garnered support from specific segments of society. Due to the unfavourable social and political climate, numerous Palatines were resettled in the American colonies. Historians emphasise the role that transnational religious minorities such as the Huguenots and Palatines played in the expansion of capitalism and migratory routes across the Atlantic (ibid.).

The Age of Migration and Returns (1850-1913): Returning Europeans from the US

From the late eighteenth century onwards, Europeans started to migrate on an extensive scale, and this migration had a substantial impact on both the European continent and beyond (de Haan et al. 2023, p. 75). This particular era, as described by Castles and Miller (1998) and de Haan et al. (2023), helped shape a ‘global migration system’ with a variety of actors, such as sending and receiving countries and the migrants themselves, playing a role in its multiple processes. For instance, government policies of the host country constituted a significant factor in determining the fate of migrants. In the US, the surge in migration commenced only after a court in Indiana prohibited the ‘redemption system’ that had compelled destitute newcomers to become bonded servants upon borrowing money for entry (de Haan et al. 2023, p. 82). This judicial ruling unintentionally led to a massive influx of migrants and broader societal transformations.

Technological advancements throughout history have had a direct impact on human mobility, including return migration. In the early modern period, the scale of intercontinental migrations was relatively modest. The development of infrastructure – including highways, waterways, and railways – allowed more individuals to move away from their homes and social habitats. These same transport systems also facilitated people returning to their homelands, keeping in touch with relatives, and maintaining ties to their homeland through the proliferation of the telegraph and significant expansion of the press (de Haan et al. 2023, p. 75). Migration and return migration rates rose due to the shift from sail to steamships that reduced the cost and duration of the transatlantic voyage during the 1850s and 1860s. Travel time from Europe to the US shrank from one month in 1800 to eight days by 1870 (Hugill 1993; Cohn 2005). As a

result of this transportation revolution, Keeling (2010) estimates that eastward journeys (from the US to Europe) increased from 18 per cent of total transatlantic travel in the 1870s to 30 per cent by the 1900s. Due to technological advancements, the migratory pattern of this era has shifted from linear to circular.

Historical records demonstrate that the extent of return migration correlates with migration. Approximately 55-60 million individuals departed Europe and relocated primarily in the Americas during the 19th and early 20th centuries. Before the war, in 1914, Argentina had the largest immigrant community with 58 per cent of its eight million residents being first- or second-generation immigrants from Spain and Italy (de Haan et al. 2023, p. 80). Many of these migrant communities were geographically concentrated in the US, such as the Irish in Boston, the Dutch who founded Holland in Michigan, and the ‘German Belt’ spanning Ohio, Nebraska, Wisconsin, and Missouri (de Haan et al. 2023). This clustering allowed for ongoing interaction with their homeland, keeping the notion of return alive and creating conditions for a potential re-emigration to their European homelands.

According to Abramitzky et al. (2016), who compiled extensive data sets from Norwegian and US historical censuses during the Age of Mass Migration (1850-1913), it is noted that 30 million European migrants moved from Europe to the US in this period, and one-third of them eventually returned to Europe. During the period 1908 to 1923, official statistics from the US government showed that a comparable proportion of around 35 per cent of approximately 10 million immigrant arrivals left the country and returned to their countries of origin (Gould 1980; Wyman 1993, pp. 10-12; Hatton and Williamson 1998, p. 9). Some have suggested that these return rates may have been as high as 70 per cent, according to Bandiera et al. (2013).

Return rates vary between different immigrant groups. For example, a mere five per cent of Jewish immigrants to the US returned to Europe, whereas 59 per cent of Bulgarians and Serbians returned before World War I, and half of the Italians who migrated to the US between 1905 and 1915 subsequently returned to Italy (de Haan et al. 2023, pp. 82-83; see also Wyman 1993, p.11 and Gould 1980). Zachary Ward (2016) collected the first dataset from Ellis Island arrival records between 1917 and 1924 to investigate migrants’ intentions to stay or return home. His findings revealed that although only 15 per cent of the immigrants who arrived in the US in this period reported their intention to return home during entry, 40 per cent eventually did. Ward argues that the high rate of unplanned returns can be explained by the difficult initial years after arrival, which were more challenging than expected. The numbers decreased in the 1920s when new migration quotas were introduced. Additionally, contextual factors aside, it is important to consider the changing nature of migration motivations. Return is partially linked to the initial motivations for migration, but these early motivations are not fixed and often change during the post-migration period. For instance, in the early 20th century, some people moved to the US temporarily to accumulate savings and subsequently returned home to marry or purchase property. Return migration could also arise due to unemployment, sickness, or personal and family reasons. Edward A. Steiner (1906), an observer of the period, recognised

that return migrants typically fell into two disparate categories: ‘those who go home because they have succeeded and those who go home because they have failed’ (Steiner 1906).

Applying this logic, Francesco Cerase (1974) identified four different typologies in his study of Italian returnees from the US that illustrate four different types of return: ‘the return of failure’ in the host country, ‘the return of conservatism’ focused on investing in the home country, ‘the return of retirement’, and ‘the return of innovation’, where returnees are viewed as agents of change in their home country. Returnees of this era experienced an improvement in their financial standing compared to their pre-migration situation, purchasing farms on making other investments when returning (Wyman, 1993, pp. 79,132). ‘He who crosses the ocean can buy a house’, a popular phrase in Italy at the time, reflects the impact of temporary migration to the US (Cinel 1982: 71).

As several studies have shown, return rates increased during periods of economic downturn, e.g. following the panics of 1893 and 1907. A period of unemployment was a significant factor in facilitating the return journey of migrants back to their home (Wyman 1993, p. 79). A large number of returnees suffered from illnesses or injuries due to strenuous work conditions in the US. Tuberculosis, which the Irish dubbed ‘the American disease’, was common among the returnees (ibid., p. 85). Migrants were also targeted by popular animosity during economic downturns; particularly those who intended to return home, were singled out for not assimilating into mainstream American society and instead prioritising short-term financial gain (Foner, 1997, p. 367). This negative perception was also evident in official documents (cf. the Dillingham Commission’s 1907 report³) and several policies restricting migration were put forth for debate. For instance, in 1896, Representative John Corliss (R-MI) proposed an amendment suggesting that no one should be allowed to enter the US while still maintaining a residence in a foreign country (Wyman 1993, p. 104).

Rising Nationalism, Political Exiles, and Their Return Trajectories

The emergence of new nation-states, the rise of nationalism, and the dissolution of three multi-ethnic empires resulted in significant population shifts and facilitated the development of diasporic communities with strong connections to their countries of origin. Understanding these communities is crucial for comprehending specific return trajectories (de Haan et al. 2023, pp. 75-76). As previously stated, the idea and myth of return flourished and was bolstered amidst diasporic communities in correlation with the exponential growth of nationalism.

Another type of 19th-century European migration involved political exiles who played significant roles and influenced millions during their exile and upon their return. Prominent political and intellectual figures from this era include Karl Marx (1818-1883), who spent most of his life in Belgium, France, and England and produced influential work. The leader of the Bolshevik Revolution of 1917, Vladimir Lenin (1870-1924), spent many years in exile, as did other notable political figures such as the Pole Adam Mickiewicz (1798-1855), the German Heinrich Heine (1797-1856), and the Italian Giuseppe Mazzini (1805-1872) (ibid. p. 76). The

³ The US Immigration Commission report in 1911, about the negative view of ‘new immigrants’ from southern and eastern Europe and their ‘unwillingness’ to integrate into American society

Frenchman Victor Hugo (1802-1885) wrote some of his most famous works, including *Les Misérables*, while in exile in Guernsey.

Political exiles, typically, maintained involvement in politics and intellectual life in their home country. This extensive connection continuously fostered the discourse of return among this cohort and inspired some to aspire to change their nation's political system. The exiles were primarily comprised of a highly educated elite group. Their strong subjectivity allowed them to turn their exile into a space for innovation, particularly in 19th-century Europe. They published countless books, newspapers, and magazines and made significant contributions to intellectual and political life in their home countries and beyond. This aspect is an important topic beyond the scope of this conceptual note.

Migration of the ‘Colonial Subjects’ and of ‘Administrative Personnel’ Through Imperial Networks

Another trajectory for studying the migration and returns of this era is the ‘imperial networks’ through which ‘colonial subjects’ migrated to imperial centres as did a large number of administrative and military personnel (and their families) to colonies. The colonisation settlement underwent an essential shift during the 1920s and beyond, especially after the US introduced quota laws, which led to a shift in migration trajectories.

Following World War I, the colonies emerged as the principal destination for European emigrants. More than 400,000 individuals departed Britain to settle in colonies, while some 700,000 French citizens migrated to Algeria following its occupation in 1830 and its incorporation as a department of the French state in 1848 (de Haan et al. 2023, p. 83). Italy witnessed a similar pattern of immigration in the mid-1930s through the settlement programme initiated by Mussolini, and Portugal pursued its emigration programme to Angola and Mozambique, which constituted 50 per cent of Portuguese emigration in the 1950s. After World War II, decolonisation movements forced many European settlers to return. The repatriated millions of Europeans (British, French, Italian, Belgian, Portuguese, and Dutch) benefited from ‘assisted return’ and ‘reintegration programmes’ (Daniel et al. 2023, p. 93). Interestingly, these two terms are widely being used in EU’s current return and readmission policies. During the same period, the auxiliaries of colonial armies often received less support. A specific group, the *Harkis*, who served as auxiliaries for the French Army during the Algerian Independence War (1954-1962) and relocated to France, were permanently placed in camps (ibid.). This example highlights the underlying racial discrimination and segregation present in the nation-state project: being a crucial part of the French military in Algeria did not warrant equal citizenship status. The effects of ‘returnees’ on the host countries will be discussed in the next section.

Repatriations in the Aftermaths of WWI and WWII

The scale of World War I, in terms of population mobilisation and the extent of bloodshed, resulted in a vast displacement of people. In 1917, the war triggered the forced migration of seven million people (Daniel et al. 2023, p. 86). In the war’s aftermath, the term ‘return’ was

used to describe the process of repatriating soldiers and refugees to their country of origin. The League of Nations played a significant role by establishing repatriation commissions and envoys to deal with specific refugee groups – including Russians, Armenians, and Germans – and assist in their return to their homes. However, none of these efforts resulted in long-term arrangements (Lowe 2017). Katy Long (2013a) provides a comprehensive examination of the history of repatriation by tracing its roots in the early days of the international refugee regime following the end of World War I. Long (ibid.) criticises the international community's focus on repatriation as the ultimate solution to refugee crises and for overlooking the needs of refugees who are unable or reluctant to return.

Repatriations were also employed as a means of creating homogeneous nation-states. Repatriation of Greeks from Turkey and Turks from Greece during the 1920s and 1930s took place in the wake of the Greek-Turkish War as part of the population exchange agreement between Greece and Turkey. The populations were resettled on the basis of their ethnic and religious identities.

After World War II, there were also extensive repatriation efforts to return displaced persons, prisoners of war, and refugees to their home countries. This included the repatriation of some 40 million civilians from different European countries who were displaced during the war. The Allies drew up plans that differentiated between ‘refugees’ and ‘Displaced Persons’. The former was defined as ‘civilians not outside the national boundaries of their country’; the latter described as ‘outside the national boundaries of their country by reason of the war’ and expected to return to their countries of origin with the assistance of Allied authorities (Banko et al. 2022). The newly established United Nations formed separate bodies to deal with European, Palestinian, and Korean refugees.

The end of the war created a decade-long mass movement of populations from east to west and vice versa. Historian Bernard Wasserstein (2011) referred to these groups of distressed people who searched for safety and a new home as ‘wanderers’. The peace settlements at the end of World War II forced another massive number of people to leave their homes, driven by a process of ethnic sortition. This resulted in the expulsion of approximately 3.5 million German nationals (*‘Volksdeutsche’*) from Polish territory, 3.2 million people from Czechoslovakia, and approximately 225,000 people from Hungary. The vast majority of these *‘Heimatvertriebenen’* (expellees) settled in the Western occupation zones, increasing the total number of migrants in the newly established Federal Republic of Germany to roughly 12 million individuals (Daniel et al. 2023, p. 89). After the war, nearly two million Poles were compulsorily transferred from eastern areas of Poland that had been annexed by the USSR. Additionally, the involuntary repatriation of four million Russian POWs in German custody served as another significant instance. A considerable number of Soviet populations resisted repatriation, instead seeking refuge in Western Europe, the United States, Canada, or Australia (Daniel et al. 2023: 88; Wasserstein, 2011).

Decolonisation and Repatriations in the Post-War Period

Decolonisation led to mass population movements and repatriations. Following the partition of British India in 1947, Hindus and Sikhs repatriated to India from newly-formed Pakistan, while Muslims migrated to Pakistan from India. This mutual repatriation of Hindus/Sikhs and Muslims aimed to establish ethnically and religiously homogeneous nations, similar to the Greek-Turkish population exchange. The mass population exchanges resulted in the displacement of individuals from their historical homelands and livelihoods in the name of settlement of a war between countries. In the aftermath of the war and throughout the Cold War, repatriation policies implemented by the international community were predominantly presented as a ‘successful solution’ that aligned with the nationalist and liberal tenets of decolonisation movements and were seen as the ‘only’ way to address States’ refugee problems, even when returns were neither voluntary nor safe (Long 2013b).

After the Algerian War of Independence, repatriation waves included French citizens, *Pied Noirs* (European-descended Catholics and Sephardic Jews), and pro-French Algerians (*Harkis*) who opted to leave Algeria and return to mainland France. Within a few months in 1962, about 900,000 *Pied Noirs* and approximately 90,000 *Harkis* with their families fled to France (Daum 2015). The treatment of the *Harkis* is an exemplary case as they were unwanted by the French authorities and forced to live in camps for many years without any formal recognition.

One of the most poignant instances of repatriation occurred during the Bangladesh refugee crisis. In 1971, the war culminating in the independence of Bangladesh spurred around 10 million Bangladeshi refugees to escape to India, resulting in the most significant singular displacement of refugees in the latter half of the 20th century. In 1973, UNHCR played a pivotal role in facilitating the transfer of a significant number of peoples between Bangladesh and Pakistan – one of the largest population exchanges in history (UNHCR 2000). Katy Long's (2013b) evaluation report highlights the contentious implications of the collective decision-making surrounding the global community's repatriation policy, resulting in concessions that deviate from the universally-endorsed principle of voluntary refugee repatriation. Several studies, such as the cases of the repatriation of Rohingya refugees from Bangladesh to Myanmar in the early 1990s and the return of Rwandan refugees from Zaire and Tanzania in the mid-1990s, have shown that the principle of ‘voluntariness’ has been pushed to its limits (Barnett 2000, p. 8). Long (2013b) contends that repatriation operations entail a trade-off between competing interests, with some actors willing to compromise the principle of voluntariness to facilitate refugee returns. In extreme cases, framing returns as ‘voluntary’ may serve as a form of linguistic manipulation to justify politically expedient returns that do not satisfy minimum protection standards (ibid., p. 1). Despite the disconnect between the universal principle of voluntariness and its implementation, Long supports the continued relevance of the principle of voluntariness and proposes that UNHCR's repatriation operations be based on the criterion of ‘safety’.

Return Migration of Guest Workers and Post-Soviet Era ‘Voluntary’ Returns

In the 1970s and 1980s, the return of guest workers in Europe is a noteworthy case to examine the notion of voluntary returns. After the post-World War II economic boom, various European nations including Germany, France, and the Netherlands employed foreign workers to overcome labour shortages. These guest workers had initially planned to stay on a temporary basis. At least this was the initial perception and expectation of both receiving States and guest workers themselves. Consequently, in subsequent years, some guest workers and their families chose to return to their countries of origin voluntarily. This was due to changing economic conditions, family reunification, or a desire to reconnect with their cultural roots (Wessendorf 2007).

Razum et al. (2005) emphasise that Turkish returnees from Germany were not only motivated by economic factors but also by value-oriented motivations. Rittersberger-Tiliç et al. (2013) came to a similar conclusion. The authors present various factors that influenced returnees’ decision, such as attaining or failing to attain migration objectives, parents’ desire for their children to receive education in Turkey or grow up in their authentic cultural upbringing or both, the absence of future opportunities for their children to pursue higher education in Germany, as well as marriage, homesickness, difficult working conditions, health issues, and retirement. King and Kilinc (2013) identified five narratives of return among Turkish returnees in their study: return through a family decision; return as a traumatic experience; return as an escape for a new start; return as self-realisation; and return and the ‘Turkish way of life’.

Another wave of (voluntary) returns took place after the fall of Soviet regimes in 1991. Some nine million people (UNHCR 2000) found themselves on the move, having either found themselves outside their ‘homelands’ following the drawing of new national boundaries or having been deported by Stalin in the 1940s. Chudinovskikh and Denisenko (2017) note that migration flows between former Soviet republics after the breakdown of the Soviet Union are to a large extent the result of Soviet-era migration. The end of political restrictions opened up a free space for mobility. Returnees had different motivations: some had the desire to participate in political and economic transitions in their home countries, while for some the driving factor was a sense of national identity and belonging that were reconstructed after the fall of Soviet system. Voluntariness of these movements were highly structured by contextual factors shaped by economic (labour shortages), political (as an enabler and promotor of these movements), and social factors (e.g. family ties).

Returnees: Actors of Social Change?

One emerging topic in the work of historians is the impact of returnees on their home and receiving countries. In his extensive book, *Unsettling of Europe: How Migration Reshaped a Continent* (2019), Peter Gatrell argues that migration has been a fundamental force in shaping modern Europe. It has led to the creation of new communities and cultures and challenged traditional notions of national identity, generating both conflict and opportunity. Migration is

viewed as both a cause and a consequence of societal transformations (Manning and Trimmer 2020). Various historians have reached similar conclusions regarding the positive effects of migration (cf. Lucassen, Feldman and Oltmer, 2006). However, certain case studies demonstrate that neither immigration nor return migration generates unambiguous favourable results or leads to significant social change in the receiving countries. For instance, Cerase's (1974, p. 245) case study on returns from the US to southern Italy found that 'returned migrants cannot function as vehicles of social development'. In general, the potential impact of refugee returnees on the social or economic development of the origin country is rarely achieved (Mielke 2023; Van Houte and Davids 2008).

Historians have examined the short- and long-term impact of newcomers (including returnees) on the social fabric of host societies (Manning 2013; Lucassen and Lucassen 2014). The social historian Leo Lucassen (2021, p. 431) argues that migrants, including 'repatriates', had a more profound infrastructural impact on the receiving societies. Returnees bring 'new cultural experiences' ranging from technology to food and from ideologies to bureaucratic practices to the receiving society (ibid.). Lucassen particularly focuses on 'organisational migrants' –bureaucrats, soldiers, missionaries, and international skilled workers or NGO employees– whose migratory pattern is primarily determined by their organisational affiliation. Many organisational migrants moved through imperial networks and left their homeland only temporarily. African American soldiers who spent one or two years in Germany post-World War II provide a compelling example of the influence of cross-cultural migrants as they experienced a non-segregated society while in Germany. They were able to date White women and were treated equally by the locals. This experience enlightened them to alternative ways of living outside of their own racist society. Upon returning to the US, many of these African American soldiers became involved in the Civil Rights Movement (Lucassen 2021, pp. 433-435). Another example provided by Lucassen (ibid.) includes the French colonial experts who upon their return to France shaped the development of France's migration and integration policies. These colonial experts became advisors in Muslim affairs affiliated with the CTAM (*Conseillers Techniques pour les Affaires Musulmanes*), perpetuating the colonial divide between Western and non-Western societies that has subsequently become a key aspect of categorising immigrants since the 1970s. This practice was not unique to France, as all colonialist countries can trace their colonial legacy in contemporary migration and citizenship policies.

Diaspora Groups, Homeland, and the Myth of Return

Overall, scholars have recognised the significant contribution of diaspora communities in shaping and promoting a global cosmopolitan culture. The formation of diasporas, as outlined by Manning and Trimmer (2020), is essential for understanding the main patterns and cycles in the complex and diverse world of global migration and, more broadly, the heightened interconnectivity of various localities, socio-economic structures, and political systems.

Another issue studied by historians is the displacement and the repatriation or non-repatriation of minority and exile communities. Historically displaced and exiled communities

– especially those who have suffered mass expulsions such as Armenians, Kurds, Palestinians, and Christians from the Middle East – hold a ‘nostalgic’ desire to return to their ‘imagined’ homeland, while also acknowledging the emergence of substitute locations (Chatty 2010, p. 294). According to Cohen (1997), these minority groups are classified as a classical ‘victim diaspora’ due to their traumatic exile and the strong sense of victimhood incorporated into their diasporic identity. Nostalgia fosters attachment to a home space, which is an essential component of diasporic consciousness. Thus, home is depicted as a mythical space of blurred memories at both the individual and collective levels. Memories are crucial in shaping diasporas and preserving diasporic identities. Diasporic consciousness is constructed on the basis of what Maurice Halbwachs (1992) refers to as ‘recollection’ or culturally embedded memories (Erll 2011). Halbwachs argues that these recollections foster continuity and self-awareness within the group. Memories of the homeland and family stories are transmitted within a socio-cultural habitus (Bourdieu 1977, p. 53), where diasporic consciousness is fostered across generations. Second-generation immigrants, who were born in diaspora and have never seen their parents’ homeland, view home as a mythical space. I contend that for exiled populations, home is thus tied to the past and anchored in familial and cultural memories.

Another dimension of diasporic consciousness is what Vertovec (1997) defines as the awareness of decentred attachments – ‘multi-locality’ that connects dispersed yet collectively self-identified ethnic groups at global level in different localities. This awareness of decentred attachments demonstrates how diaspora groups can affiliate with multiple localities to position themselves physically and emotionally in different contexts. For scholars on transnationalism (Portes et al. 1999, p. 219), subjective evaluations by migrants of their homelands and self-identification play a vital role in their decision to return and their reintegration process. Numerous studies have been conducted on the perception of homeland among Turkish returnees. Kilinc (2014) shows in her article how second-generation Turkish-Germans constantly renegotiate their identities. Ayse Parla (2013) explored the concept of homeland among Bulgarian-Turkish returnees. She noted the ambiguity surrounding the ‘original’ location of homeland and emphasised that its location changes in both individual itineraries and across migrants who belong to the same migration wave and often mistakenly viewed as a monolithic entity.

The myth of return constitutes an essential part of diasporic consciousness, serving as the final piece of this analytical puzzle. This institutionalised discourse and well-established rhetoric are particularly prevalent among exiled populations who view their stay in host countries as temporary. Madawi Al-Rasheed (1994) explains in her study among Iraqi Arab and Assyrian refugees in London that the myth of return within a diasporic community is dependent on past refugee experiences and the group's relationship with its country of origin. Historians commonly use the term ‘myth of return’ when discussing non-return of exiled communities. Adherence to this myth is a powerful discourse in the diasporic consciousness. While the mythical portion pertains to the imagination of home or homeland, the real aspect displays the act of returning (ibid., pp. 200-201).

Drawing from literature on diaspora and transnationalism, historians also focus on issues related to belonging, changing identities over time, and relationships between diaspora

and homeland, as well as the roles of diasporic organisations, ‘homeland-oriented diasporic humanitarianism’ (McCallum Guiney 2023), ‘collective remittances’ (Galstyan and Ambrosini 2023), and memory – all of which are relevant to the issue of return/non-return. For instance, there exists a vast body of literature on the right of Palestinians to return to their homeland, restitution (reclaiming their confiscated property), and compensation (Chatty 2010). While this scholarship is distinctive in light of the Palestinians’ status, the same issues are pertinent to the displacement experiences of numerous minority groups and are deemed essential for returns.

Historical Methodologies for Decentring the Study of Returns

Historians have proposed various approaches to studying migration. The same methods can be applied to suggest some basic points for developing a historical approach to study return migration and the politics of return.

Methods for studying returns

Historians Jan Lucassen, Leo Lucassen, and Patrick Manning (2010, p. 18) argue that migration can be studied using a framework that covers a long period, wide geographical range, and a variety of disciplinary perspectives. The authors emphasise the significance of **longitudinal studies, an all-encompassing and inclusive global approach** that also critiques the dominance of Western historical writing and highlights the need for a multi-disciplinary framework.

Another method was proposed by Stephen Castles (2008). Castles argued against the fragmentation in migration studies and highlighted the failure to understand the historical nature of migration in migration scholarship, leading to false assumptions of one-way causality and an inability to understand the overall dynamics of migratory processes and their embeddedness in processes of societal change. Castles proposes an interdisciplinary approach, known as ‘**migration systems theory**’ to study both ends of the migratory flow, which is sensitive to historical formations such as ‘prior links between sending and receiving countries based on colonisation, political influence, trade, investment, or cultural ties’ (ibid., p. 5).

One important approach proposed by historian Patrick Manning (2003) is the ‘**relational world history-writing methodology**’. This method calls for an analysis of both local and global historical forces, as well as the experiences of individuals who attempted to utilise or oppose these forces.

Historian Klaus J. Bade notes that traditional historical migration research focused on movement in geographic spaces and spatial mobility. However, the emergence of transnationalism in the 1990s led to a shift towards micro-historical approaches that focus on social spaces, including meso-level network theories and theories and typologies of transnational social spaces and migrant identities (Bade 2001, p. 9810). Bade proposes that **historical migration research** should study the longitudinal patterns of migration movements, their volume, trajectories, and structures, as well as the behavioural patterns of migrants in relation to their socio-cultural and economic backgrounds, e.g., region, class, group, and gender (ibid., pp. 9810-9811).

Historians have explored connections between the past and present in various methods. Nancy Foner (2005) identifies two approaches she terms ‘**then-to-now**’ and ‘**then-and-now**’. The former is a temporal perspective that highlights the role of history and its evolution in explaining contemporary phenomena. In the latter approach, comparisons are drawn between historical events and social and cultural patterns of the past and the present to identify similarities and differences. However, the aim is not necessarily to explain the present through the lens of the past (Bertossi et al., p. 4160).

Lauren Banko, Katarzyna Nowak, and Peter Gatrell (2022) propose a ‘**refugee-focused approach**’ to develop historiographies of migration and analyse how migrants interacted with the refugee category while experiencing and negotiating displacement. Banko and colleagues emphasise that in the early period, historians had a policy-driven and institution-centric approach to refugees. This resulted in various publications on different aspects of the interwar refugee regime, such as the League of Nations’ operations and the prehistory of legal and institutional establishment including UNHCR, but that refugees were not considered in these studies (ibid., p. 6). For instance, there is limited understanding of the experiences of Greeks and Turks during the involuntary population exchanges of the 1920s. Although previous studies offered critical knowledge, the authors argue that they overlooked displaced individuals and the socio-economic, cultural, and political worlds that refugees helped to create. By exceeding the State’s power, the concept of ‘**refugeedom**’, as coined by the authors, encourages a global perspective. This includes focusing on global events and processes that led to mass population displacement as well as global and diasporic connections that acknowledge non-state-centric experiences and practices (ibid., pp. 2-3).

Decontextualising migration and return historiographies

Developing a historical approach to migration and returns necessitates critically examining migration and return historiographies, including academic literature. This critical engagement with the existing wealth of literature will open new avenues for writing history from the perspectives of actors excluded from writing their own history. Understanding migration and returns from the perspective migrants and returnees, co-writing down their experiences, and giving these experiences an analytical power should be a keystone of a historically-informed academic research.

Pluralising & decentralising history

The prominent Africanist historian Terence Ranger (1994) was one of the first scholars to critically analyse the problematic legal categories of refugees and underscore the need to integrate refugees and returnees into the mainstream of social history. Similarly, historian Paul Kramer (2020) encouraged fellow historians to think *with*, not just *of* refugees. The concept of refugeedom aims to provide refugees with their rightful place in history by decentralising and pluralising it (Banko et al. 2022, p. 8). Pluralising history involves shifting the focus from knowledge production channels produced in the Global North to the Global South to explore new epistemologies and adopt a more inclusive approach toward studying and discussing the history of migration. This approach also aims to pluralise geography (Cole 2021).

In line with pluralising the histories and historiographies⁴ of migration, the history of migration as we know it is dominated by the history of groups that were literate and thus had their history somewhat written down and documented. To move beyond this limited approach, it is necessary not only for migration historians, but also for other disciplines studying migration and returns, to make clear the historicity of each case in their methodologies. A perspective from the Global South sheds light on categorisation issues in the aftermath of decolonisation. The politics of categorisation have operated over time and space, necessitating a global approach to their examination.

Limited functionality of legal definitions: incorporating microhistories into the general framework

Historians have problematised formal legal and administrative definitions and terminologies and their dominance, analysing them as manifestations of the refugee regime, which are products of the nation-state order (cf. Banko et al. 20-22; Soguk 1999; Haddad 2008; Zetter 1988). Lucassen and colleagues (2010) highlight the limitations of existing formal categories in explaining the complexity of migrants. They argue that, like labour migrants, refugees rely on information and expectations about work and opportunities from their personal networks when making decisions. The authors emphasise that all refugees have both political and economic motivations. A historical perspective elucidates that socio-politically constructed dichotomies of migration – regular versus irregular, economic migrant versus refugee, voluntary versus involuntary – obscure the intricacies of migration.

A focus on microhistory will offer novel epistemologies for interdisciplinary research to grasp how migrants and returnees engaged and negotiated with ‘legal definitions’. Different agentic responses are shown in historical case studies. Migrants caught in situations of displacement engaged with the legal definitions imposed on them in disparate ways. For example, Palestinians adopted the term ‘refugee’ to draw attention to their exile and resist local integration or resettlement (Fiddian-Qasbiyeh 2016). Additionally, there has been a productive discourse on Palestinians’ usage of the term *Nakba*, which refers to the 1948 mass displacement. Palestinian refugees in Lebanon initially resisted using the term, seeing it as a permanent status for their temporary situation, preferring ‘returnees’ (see Sa’di and Abu-Lughod 2007). In contrast, repatriates in India during the Partition era rejected the ‘refugee’ label and demanded to be recognised as full citizens (Rahman and van Schendel 2003). This difference in the perception of a legal, hierarchical label can only be understood through a historical study that examines the counter-narratives developed within migrant communities in relation to the legal classifications imposed upon them.

State-building processes occur by externalising groups from the imagined community and deporting them from the territory, following a logical sequence. Studies have also examined the impact of refugees on shaping states. For instance, Benjamin Thomas White’s (2017) work on the French mandate period of Syria illustrated how French officials established

⁴ Here, the author deliberately used the plural form to show the multiplicity of histories that can be accounted for human movements.

a ‘buffer zone’ in Syria to consolidate colonial rule by settling Armenians. The placement of refugees prompted a reactive response among Syrian Arabs who constructed the notion of a ‘Syrian nation’, viewing Armenian refugees as both a threat and an example of Syrian hospitality. This interaction played a significant role in the formation of the State, as White (ibid.) notes. Examining the involvement of Assyrian refugees in shaping modern Iraq, Laura Robson (2017) analysed how the British and French colonial authorities, with the approval of the League of Nations, relocated Assyrian refugees to remote border regions in northern Iraq to consolidate their State power. The British viewed Assyrian refugees, who were forcibly displaced from present-day Turkey (Hakkari, Bothan region), as a valuable resource in combatting Iraqi resistance. This narrow-minded approach bolstered British control during their mandate, but it also reinforced the call for an independent Iraqi state, resulting in the 1933 Simele massacre of Assyrians. This event was later cited by Raphael Lemkin as a prime example when he presented his legal definition of ‘genocide’ to the League of Nations conference on international criminal law in Madrid (Safi 2018).

Another aspect that needs to be included in micro-histories of migration and return is the aspirations, experiences, and encounters of refugees and how they give meaning to each segment of the mobility. Banko et al. (2022) correctly assert that refugees' own experiences with space, networks, and institutions, the meaning of diaspora, as well as return for refugees who have embarked on repatriation journeys, are part of global histories of displacement. Another trope that has received considerable attention in micro-historiographies is the meaning of ‘home’ or the idea of homecoming and imagined returns, which offer dominant insights into the idea or myth of return and practices at the individual and group level (cf. for ‘homecomings’ studies by Cerase 1967; 1974; Stefansson and Markowitz 2004; Conway et al. 2005; Newbury 2005). Studies on ‘ethnic/diasporic return’ include those by Tsuda (2009). Studies on the construction of ‘home’ include those by Hammond (2004), Christou and King (2010), Stefansson (2006), and den Boer (2015).

Concluding Remarks

Historical research is well-suited to providing comprehensive explanations of the socio-economic processes and political developments that have shaped migration and return trajectories. As an interdisciplinary approach, the historical analysis of (return) migration is vital for examining patterns of continuity and change in migration and return policies from a longitudinal perspective, as well as for understanding the agentic responses of migrants and returnees.

Two questions are at the forefront of migration scholarship. How much history has been integrated into the field? To what extent have historians included various types of micro histories of (return) migration in their studies? In recent years, there has been a multidisciplinary effort to incorporate the lived experiences of migrants into the history of migration. It is important to consider the perspectives of those who have personally experienced migration to gain a full understanding of the phenomenon. These experiences serve as first-hand accounts of what occurred during their journey and upon their arrival. Each discipline studying migration should consider posing a similar inquiry about the extent to which

history is fully incorporated as a fundamental element in their epistemology. Additionally, how do these studies use micro-level experiences and historiographies in their theories? These and other related inquiries can be further explored. This conceptual note sought to explain the importance of history in migration studies, while also highlighting some key questions and preliminary remarks for understanding (return) migration from a historical perspective.

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3. Anthropology of Return Migration

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Introduction

This review paper outlines the history of anthropological research on return migration, first as a 'natural' homecoming experience and then in terms of more critical work on forced return and refugee return. The paper progresses from a focus on anthropology as a disciplinary approach to address interdisciplinary work (including anthropologists, sociologists, cultural theorists, and scholars from other related fields) that has contributed to the study of return governance, voluntariness, deportation, and re-migration.

Anthropology of Migration and Return

Early anthropologists ignored the study of migration because it did not fit with their notion of timeless and bounded cultures (Brettell 2003). In particular, return migration was not seen as worthy of study in anthropology and other disciplines, leading it to be called 'the great unwritten chapter in the history of migration' (King 2000, p. 7). Returning home was assumed to be the unproblematic reinsertion of the migrant into the original society – or it was believed that immigrants would never return. Noticing that many migrants intended to return but did not, anthropologists focused on the 'myth of return' (Al-Rasheed 1994; Anwar 1979; Dahya 1973; Zetter 1994; 1999), the 'return illusion' (Brettell 1979), or the 'ideology of return' (Rubenstein 1979). Anthropologists in the emerging field of diaspora studies in the 1990s emphasised the persistent presence of home as a symbolic resource while actual return to the mythic home remained strangely unexplored (cf. Clifford 1997; Tololyan 1991). In fact, return migration clashed with dominant narratives of assimilation, multiculturalism, and transnationalism that delineate the history of migration research (Stefansson 2004, p. 5).

Anthropologists first discussed return migration in a 1979 series on the topic in the *Papers in Anthropology* series (Rhoades 1979). This was followed by an *Annual Review of Anthropology* article in which return migration was defined as 'the movement of emigrants back to their homelands to resettle' (Gmelch 1980). Although the review's author, George Gmelch (1992), later published a book on the subject of Caribbean returnees, return migration remained a neglected topic. When transnationalism became a hot trend in the discipline in the 1990s, scholars started focusing on the ties that immigrants maintain with their countries of origin such as remittances, construction of homes, and participation in politics and cultural and social activities (Brettell 2003; Basch et al. 1994; Foner 1997; Glick Schiller et al. 1995; 1992; Kearney 1995; 2005). Ironically, in their focus on sending and receiving countries as a single transnational field, return migration rarely became a distinct topic of study. Return home was seen as a brief intersection in a 'transnational migration circuit' (Rouse 1991, p. 14). Furthermore, immigrants who returned permanently were considered 'temporary migrants' and therefore less worthy of study than permanently transnational migrants.

In the 2000s, return migration finally began to receive scholarly (and anthropological) attention with edited volumes (Conway and Potter 2009; Markowitz and Stefansson 2004; Al-Ali and Koser 2002; Long and Oxfeld 2004) and in-depth ethnographies,

including studies of long distance nationalism for Haitian-Americans (Glick Schiller and Fouron 2001), consumption practices of Moroccan-Italians (Salih 2003), home and belonging for British-born Cypriots (Teerling 2014), Greek returnees' emergence as a 'counter-diaspora' (King and Christou 2014), Mexican-Americans' reintegration efforts (Rothstein 2016), highly educated Somali returnees' nation-building struggles (Galipo 2019), Bulgarian-Turks' partial ethnic inclusion (Parla 2019), and German-Turks' ethical predicaments in their homelands (Rottmann 2019). At this time and in subsequent years, there was a lot of overlap with sociologists, geographers, and others. For example, in the volume edited by Anghel, Fauser, and Boccagni (2019), researchers reported on in-depth studies with ethnic Germans 'returning' to Romania's Transylvania region, workers from Libya and Ivory Coast to Ghana, and German-speaking returnees in Turkey and Romania among others.

Concept of Return Migration

In the initial approaches to return migration within anthropology, return migration as a concept or process was largely a neutral, descriptive term, aligning with the official EU definition: 'The movement of a person going from a host country back to a country of origin, country of nationality or usual residence usually after spending a significant period of time in the host country whether voluntary or forced, assisted or spontaneous'.⁵ Yet, such a definition of the term 'return migration' is, in fact, problematic (King 2000): return is construed as natural, as a teleological move of migrants back to the place 'where they truly belong'. Researchers have shown over and over again that such a simplistic definition does not reflect the reality of return migration for several reasons.

First, many migrants do not simply go to one country and return to their origin country permanently. Scholars tried to develop typologies of returns based on temporality and intention. One attempt identified three types: returns as one-time occurrences ending migration trajectories; returns as repeated occurrences; and returns as part of a continuing migratory process (Tsuda 2019). Another typology identified four types of return: occasional and short-term visits to see kin and friends; seasonal returns; temporary returns of a longer duration and with the intention to remigrate; and finally permanent returns, including resettlement (King 2000). All such typologies run into the same problem: the subjects of ethnographic research rarely fit neatly into any one typology. Migration experiences are multilocal; migrants may feel a 'belonging' to two or more places, not just to their 'home' country. Typologies further fail to focus on how intentions might change during the migration process (Kuschminder 2017, p. 7), and scholars have demonstrated that migrants' ideas are affected by movement through life, not merely between places (Olwig 1998). A second – and related – issue with defining return migration is with the labelling of any migrant as a 'returnee'. In some studies, migrants happily take up this label, but in others they do not refer to themselves or even think of themselves as 'return migrants' (Rottmann 2019). Furthermore, there are many cases where there can be no true 'return' to the status quo. For example, countries, regions, cities, and individuals can change drastically, making the notion of return or homecoming essentially meaningless. On the other hand, the most extreme kind of

⁵ https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/return_en

permanent return is probably the return upon death (Abu-Lughod 2011; Pauli and Bedorf 2018; Stefansson 2004).

A major finding for scholars studying return is that it is challenging for the migrants, who often face difficulties or impossible homecomings, resulting in ambivalence, ambiguity, misunderstandings, and disenchantment (Stefansson 2004; Gmelch 1992; Tsuda 2003; Huseby-Darvas 2004). Yet while they identify numerous spatial and social challenges – for example, research focused on conflicts in neighbourhoods, schools, and public spheres for German-Turkish return migrants (Rottmann 2013; 2015; 2018) – researchers also find joy, satisfaction, connection, and successful reintegration (Rottmann 2019). The study of return migration has provided a particularly fertile ground for anthropologists to explore concepts of ‘home’ and ‘belonging’ as places of tension between multiple forms of inclusion and exclusion (Brun and Fabos 2015; Olwig 2012; Parla 2019; Rottmann 2019).

Anthropology of Refugee Returns

The majority of early studies of return migration in anthropology were not focused on refugee, asylum seeker, or irregular migrant return. It was only in the 1980s that anthropologists started to study refugees, with the publication of ethnographies like Peter Loizos’s *The Heart Grown Bitter* (1981) about Cypriot war refugees and B. E. Harrell-Bond’s *Imposing Aid: Emergency Assistance to Refugees* (1986) about Ugandan refugees. As with other studies of migration that overlooked return migration at the time, the anthropological works that followed focused on the experiences of internally displaced people in camps and resettled refugees in countries of asylum (Gilad 1990; Habarad 1987; Hirshon 1989; Peteet 1995). Actually, a failure to focus on refugee return among resettled refugees aligns with research showing that numbers of refugee returnees are low among resettled refugees, even when socio-political conditions improve (Zetter 2021). Refugee return, when it did happen, was initially viewed by anthropologists as a type of ‘ethnic return migration’, or ‘post-colonial return’ (Stefansson 2004, p. 7), ‘roots migration’ (Wessendorf 2007), or ‘ancestral return’ (Teerling 2014). For example, anthropologists and others studied diasporic returns (returns of exile communities), exploring notions of homeland and ‘right of return’, or the ‘myth of return’ for displaced populations like Armenians, Palestinians, Middle Eastern Christians, and so on (Adelman and Barkan, 2011; Chatty, 2010; Al-Rasheed 1994; Baser and Toivanen, 2019).

As with other studies of returnees, researchers stressed the social, psychological, economic, and political complexities of return for refugees, even when the return itself was largely (or largely perceived to be) the free choice of the migrant (Barnes 2001; Black and Koser 1999; Hammond 2004; Muggeridge and Doná 2006; Long and Oxfeld 2004). Anthropologists joined other scholars, mainly sociologists and political scientists, in trying to understand structural incentives for return, such as access to services and employment opportunities in receiving countries, security, and possibilities of property restitution in origin countries (Rottmann and Kaya 2021), asset ownership, access to education (Al Husein and Wagner 2020) and living conditions, and legal status (Valenta et al. 2020). A few studies also looked at more emotional or ‘affective’ dimensions of return decisions (Perez Murcia, 2019).

The New Governance of Return Migration: Anthropological and Sociological Approaches

The last decade-and-a-half heralded a radical change in how the return migration of refugees, asylum seekers, and irregular migrants is conceived both within and beyond anthropology, as States have developed new concepts, tools, and methods focused on return. Rather than based mainly on seeking one's 'roots' or an 'ancestral home', the meaning of return migration is highly politicised. Return now meets an objective of receiving States that consider it the 'optimum durable solution' to refugee-hosting. In the EU, Member states (MSs) are frequently less focused on the successful integration of migrants than on swift returns, making return a main strategy pursued by UNHCR and other intergovernmental organisations as well as governments (Long 2013; Hammond 2014). Voluntary return and repatriation – 'the assisted or independent return to the country of origin, transit, or third country, based on the free will of the returnee'⁶ – is prioritised in the EU's return policies. MSs must enable third-country nationals subject to a return decision to leave the EU territory voluntarily by granting them a voluntary departure period (Article 7 Return Directive). With this new 'regime of return' in the political and legal sphere, return is positioned as something natural for States (if not also for citizens) – a process that restores the Westphalian order of the State-citizen bond to a defined territory (Shacknove 1985).

Researchers – and especially anthropologists – have long criticised the common-sense link between peoples and territories (Clifford 1997; Gupta and Ferguson 1992; Malkki 1995; Parent 2022), and thus are highly critical of any policies that posit a naturalness to return of migrants. For example, writing about refugee repatriation to Ethiopia, Lorie Hammond (2004, p. 79) challenges the '*assumption* that place plays a particular, generalizable, and predictable kind of role in community construction and identity formation across cultures' [emphasis in the original]. Ethnographic work among Palestinian youth in a refugee camp in Beirut has shown disillusionment with the 'Right to Return' movement and 'identities rooted in a purely nationalist discourse' (Allan 2014). On the other hand, we cannot assume that refugees have no relation to places at all and are in a permanent state of liminality (Brun and Fábos 2015; Ramsay 2019). In fact, strong connections to places can be an important locus of migrant agency and identity. Dawn Chatty's (2010) ethnography of Armenian, Christian, Kurdish, and Palestinian migrants points to the central importance of place – and multiple identities – as part of constructing welcoming cosmopolitanism across the Middle East. Writing about 'the jungle' encampment at Calais, France, Michel Agier (2018) posits that it is a space of vibrant creativity for migrants – far from meaningless, even though it is a challenging home. Thus, we must guard against common-sense notions of an essential national belonging or a solidified place-based identity and allow fine-grained ethnographies to lead the way to understanding the meaning of places for migrants.

Voluntariness of return, deportation, and assisted voluntary return

Today, the borders between anthropology and related fields are nearly unrecognisable. Most social scientists are highly sceptical of the widely-used term 'voluntary return' and accompanying new regimes of border security and deportation (Andersson 2016; De Genova

⁶ https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/voluntary-return_en

et al. 2022; Drotbohm and Hasselberg 2017). Research shows that although supposedly premised on the free will of the migrant, ‘voluntary return’ is in practice often dominated by State coercion, social destitution, structural violence, and abuse (De Genova et al. 2022, p. 856).

The contradictions between agency and governance emerge quite clearly in the classification of ‘**voluntary return migrants**’ by governments or international organisations. Some migrants may only be ‘willing’ to return because they either have no access to social amenities and shelter or they risk imprisonment, violence, and other abuse (such as separation from their children) in destination countries (de Haas 2021). Thus, their return is not based on a real, intrinsic desire to do so. Under such situations of extreme distress and pressure, migrants who ‘decide’ to return can even be compelled to sign forms confirming consent to ‘voluntary repatriation’, even if this is against their own intrinsic preferences or desires (Cleton and Chauvin, 2020). Boersema et al. (2014) call this process a ‘soft deportation’ (Leerkes, et al. 2017). The latter term indicates ‘that such return has deportation-like properties’, while acknowledging that it depends less on force and deterrence than ‘classic deportations. There are clearly very strong power dynamics involved, whose mechanisms are not sufficiently researched in the context of return migration. How power operates in voluntary return situations will be very interesting to examine in South-South return contexts studied by GAPs via individual trajectories. For example, is voluntary return in this context ‘soft deportation’?

Addressing this question requires a close look at how return aspirations are formed and imagined in a context of protracted displacement. It is important to take into account refugees’ broader life aspirations in interaction with individual characteristics and structural conditions. Time also plays a crucial role in how return is aspired and imagined (Müller-Funk and Fransen, 2022). These are all issues that we will explore in-depth in WP7.

Deportation creates an ultimate line between members and non-members, which is ‘constitutive of citizenship’ for the dominant group and disposability for the other (De Genova and Peutz 2010). Deportation may be entirely unexpected and unwanted for migrants (Peutz 2006). For example, a recent ethnography of migrants with deportation orders from the UK showed that they felt more ‘British’ than connected to any other homeland, so ‘return’ was perceived as unjust as well as difficult (Hasselberg 2016). Nicholas De Genova (2002, p. 439) coined the term **deportability** to name a universal condition shared by non-citizens that implies ‘the possibility of being removed from the space of the nation-state’. Although any unauthorised immigrant is theoretically subject to expulsion by the State, in practice not everyone can be forcibly relocated to their country of origin. Non-deportability often stems from the reluctance of origin States to cooperate on forced return. Indeed, deportation always requires the willingness of another State to accept the returnee (Gibney 2008). Variations in non-deportability shape the options available to government and NGO workers responsible for enforcing ‘return’.

Anthropological and sociological work often shows that return policies and discourses about migrant return support State agendas far more than they reflect refugee desires or needs. For example, research on Europe’s return discourses by Eleanor Paynter (2022) shows how they are based on ‘paratexts’ – political discourses produced in direct connection with policy or legal action (Brookey and Gray 2017). The discourse of

‘deservingness’ is used to justify racialised bordering practices that uphold a false refugee-economic migrant binary. This discourse then enables the deporting of economic migrants since they do not ‘deserve’ to be able to stay like supposed genuine refugees. Refugees can also become targets of discourses about social problems. In Germany, for instance, displaced people are blamed for economic and social difficulties and even for the creation of a crisis rather than being seen as themselves victims of crises (Holmes and Castañeda 2016). This lays the groundwork for deporting unruly individuals.

With the concept of ‘**assisted voluntary return**’ (when a State or agency facilitates a return of a migrant by providing transportation, funding, or other support), the notion of ‘voluntary’ is taken one step further and certainly beyond its original meaning. These processes are ostensibly designed to provide dignity and limited rights in situations of constrained options. In fact, anthropologists argue that they are directly linked to forced returns, deportations, and expulsions. Writing about Norway, Synnove Bendixsen (2016, p. 548) explains that ‘without assisted return, it becomes difficult to legitimise forced return, and without the latter, it becomes harder to implement the former’. She explains: ‘The government frequently presents assisted return programmes as a humanitarian option compared to forced returns, while the latter is legitimised by the argument that if irregular migrants “fail” to opt for assisted return, a forced return is the only option available to the government’ (ibid.). Thus ‘assistance’ seems to be quite forceful. Sharam Khosravi (2018, pp. 4-5) argues that deportees are part of a neoliberal moralising and ‘responsibilising’ project to make them believe that they have control over their lives before and after deportation. Rather than being subject to structural violence via deportation, deportation is positioned as the moral personal choice of migrants.

How do migrants feel about this situation? While researchers have attempted to understand the intentions and motivations of returnees and thereby to differentiate between voluntary and forced returns (Boehm 2016; Cassarino 2004), it is quite difficult to determine when a return is truly voluntarily (Akeson and Baaz 2015; Kuschminder 2017, p. 6). More ethnographic research is needed on the perspective of migrants themselves and how trajectories – onward movements and re-orientations as well as periods of rest and intermediate forms of settlement – develop for them (Schapendonk et al. 2021).

Amidst this burgeoning focus on return migration for refugees, asylum seekers, and irregular migrants, little research has focused on **returnees’ lives after migration** (Khosravi 2018). Some experience ‘double abandonment’ (Lecadet 2013), rejected both abroad and also after they return. Most studies show that experiences after forced return are negative, with deportees feeling ‘estranged citizenship’ (Khosravi 2018, p. 7). Another topic that needs more research is reverse migration or re-migration – when a returnee leaves the country of origin and travels back to the host country. Although re-migration rates differ, some research shows that numbers of re-migrants are high. For example, up to 80 per cent of Afghans forcibly removed to Kabul attempt to remigrate (Gladwell and Elwyn 2012). Re-migration is sometimes defined as ‘failed social reintegration’ or ‘failed remixing’ in today’s dominant political discourses, but in fact, research shows that back and forth movement can be part of a migration strategy. Writing about Syrian refugees in Turkey, Biner and Biner (2021, p. 883) report that ‘depending on the border policies of the Turkish state and the intensity and location of the fighting in Syria, many travel regularly to their home cities and towns in Syria to check on their property and family members and to discern what the future may bring’. While it is important to criticise forced return to unsafe places, it is also important

to remember that many refugees do want to return when conditions allow or – like any of us – they want to be able to freely move between homes, families, and live in more than one place, as return has more recently been portrayed as a life transition between separate geographic spaces and biographical times (Perez Murcia and Boccagni 2022). To explain the return orientations and practices of individuals, it is important to consider the meanings attributed to home by potential returnees and how these change over time (Boccagni 2022; Perez Murcia and Boccagni 2022).

Anthropological and Sociological Definitions Applied in GAPs

In this project, we are interested in how people affected by deportation regimes define return, assistance, and voluntariness. The deportation regime, in its many shapes (Leerkes and Van Houte 2020) is the State technology of control and exclusion that is used to deal with unwanted populations (Peutz and De Genova 2010). From this perspective, beyond a mere act (Peutz and De Genova, 2010), deportation is rather viewed as a practice that is ‘constitutive of citizenship’, reaffirming the boundaries of membership to countries (Anderson, Gibney and Paoletti 2011). It has a symbolic role as a ‘spectacle’ of State enforcement to make the State look powerful in front of the public (Mainwaring and Silverman 2016). Others have explained it as a disciplining apparatus shaped by the needs of the informal labour market (Karadağ and Sert 2023). In WP7, GAPs will try to understand how migrants perceive the deportation regime as governance apparatuses (border controls, laws, policies, officials, etc.) and how this affects their trajectories. These perceptions are often used to explain the gap between removal and rejected asylum applications (Gibney and Hansen 2003) and the limits of ‘migration control’ (Ellermann 2008).

With an anthropological approach, we also aim to bring the role of perceptions, experiences, and emotions (hope/despair, capacity to move on with life/resilience) to the forefront as a means of understanding what return means for people involved in it. We seek particularly to identify the different forms of agency in migrant lifeworlds, examining when and how agency becomes apparent with regards to mobility and, more specifically, return. We ultimately explore the characteristics of trajectories in different locations (with the goal of developing a typology) to show the precarity, plurality, and multi-directionality of mobility. In addition to governance and agency, WP7 explores the role of social networks and integration contexts in shaping trajectories. In this way, the precise definition of return is an open question and we expect multiple conceptions to emerge from the field research.

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4. Return and Related Concepts in International Law

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Introduction

Although the general literature on return migration studies has increased in recent years, there still needs to be more clarity regarding definitions, concepts, and terminology. The same ambiguity remains for the terminological definitions of and conceptual approaches to return-related matters, including the term ‘return itself’, particularly in international law. As stated in the International Commission of Jurists’ (ICJ) Practitioner’s Guide on migration and international human rights law (ICJ 2014, 39), one of the difficulties for any publication that aims to address problems of migration – in law or in practice – is the complexity and diversity of the migration experience. This difficulty, however, is not only related to the dynamic nature of the concept of return but also because of the general complexity of the system of international law, which is attracted both by State sovereignty and human rights (Wheatley 2019, p. 63; Reisman 1990, p. 876; Shen 2000, p. 419; Donnelly 2004, p. 2; Henkin 1995, pp. 31-32), especially when it comes to the migration-related matters (Higgins 1973, p. 342; Dauvergne 2004, pp. 589-591, Chetail 2014, p. 27).

As a principle in international law, based on the territorial sovereignty of States, each State has the discretion to regulate matters of entry into (admission), stay, and exit of foreigners. This discretion is also reflected in the States’ ‘right’ to expel foreigners. Hence, the legal scope of each component of the return activity is mainly defined or crystallised or both by each relevant State, and a binding, uniform, and thorough body of rules that define and regulate return migration in its broad meaning does not exist in international law. Nevertheless, there are certain attempts to assert uniform conceptualisation of some essential components of return migration, such as expulsion. In 2014, International Law Commission (ILC) adopted ‘Draft Articles on the Expulsion of Aliens’ (Draft Articles). At present, Draft Articles does not have a binding effect on international law; but it serves as a significant demonstration that supports the claim that expulsion, which is one of the fundamental elements of return migration, is a phenomenon recognisable and codifiable by international law (Kanstroom 2017, p. 50). Draft Articles defines expulsion as ‘a formal act or conduct attributable to a State by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State’ (Art. 2). Draft Articles, on the other hand, reiterates the ‘right of expulsion’ being a ‘right of a State’ (Art. 3) and therefore confirms the sovereignty-based State discretion on the matter. However, it should be noted that this discretion, not only for regulating the expulsion but also for regulating the other components of return migration such as entry-into (admission), exit, and stay of a foreigner is not of an absolute character. Apart from the mere domestic constitutional necessities of the rule of law, it is framed on two grounds that bear international character (Goodwin-Gill, 1976), as confirmed by the ILC under the Draft Articles, particularly in relation to expulsion. These are the principles in international law that apply to inter-State relations together with the obligations thereof and the principles of international human rights law, while from a

positivist view, the functional bindingness of both being subject to legitimacy through either existing rules under international conventions or within customary law.

Hence, there is a polarising nature of the concept of return that can be seen through the perspective of international law from two dimensions: namely, from the State-to-State interaction and from the State-to-individual interaction. This so-called polarisation in the first dimension appears to be between the sovereignty rights of each State and their obligations towards each other, whereas, in the second dimension, it is viewed in two forms: (1) between the inter-State obligations of the States and the obligations of the States to respect and protect individual rights; and (2) between the sovereignty rights of the States and the States' obligation to respect and protect individual rights. The debates regarding return-related matters in the legal literature are mostly derived from this backdrop, which is also one of the most significant demonstrations of the complexity of the international legal system itself. Consequently, the relevant literature in international law either focuses on clarification of the rights and obligations of the States not only towards each other but also towards the individual or, sometimes to seek for an equilibrium point, question and weigh the level of influence of the two attractors of the system, namely, sovereignty and human rights, which pull it in different directions at a time (Wheatley 2019, p. 63).

Return as a Matter of the Individual's Action: The Scope of Right to Leave and Right to Return (Enter) as a Fundamental Human Right

Direct mention of return in the binding instruments of international law can be seen in '**the right to return to one's own country**' provided under the Universal Declaration of Human Rights (UDHR) (Art. 13) and adopted by international human rights conventions. However, this statement does not define return but provides the scope of a guarantee attributed to individuals. This could be taken as one of the legal norms that function, as Aleinikoff (2002, p. 11) states, to constrain and channel State authority over migration. The reflection of this right can be seen in other international instruments,¹ albeit with a different wording: 'right to enter'. This difference in the wording has not been much of an interest of the literature as generally two terms are being used interchangeably. Goodwin-Gill (1995) states that the usage of the term 'return' *is used for convenience but should also be interpreted sufficiently broadly to include the admission of a national who, for whatever reason, may be making a first-time entry.*² Agterhuis (2004, p. 2) also has similar considerations for using the term in a broad sense. Bantekas (1998, p. 60) seems to have the only distinct opinion on the matter distinguishing right to return from right to enter.

Right to return (or right to enter) in the International Covenant on Civil and Political Rights (ICCPR) is regulated under freedom of movement, which is seen as one of the most significant connecting factors of extraterritorial human mobility to the area of international (human rights) law and a subject of interest among legal scholars (Juss 2006; McAdam 2011; Kochenov 2015; Goodwin-Gill 1995; De Vittor 2013; Paz 2018; Ramji-Nogales & Goldner Lang 2020). Hence, the legal scholarship indicates that the extraterritorial freedom of movement is uniquely expressed and channelled through a duo of proclaimed rights: the right to leave any country, including one's own, and the right to return to one's own country (Kochenov 2015, p. 149; McAdam 2011, pp. 5, 6; Harvey and Barnidge 2005, p. 3; Chetail 2014, p. 26).

One of the debates in the legal literature that is related to return-migration can be seen in the asymmetrical relation between the right to leave and the right

to return. Based on the scope of these rights enshrined under international law, scholars point out that the right to leave does not automatically secure the right to return (enter)³ (Juss 2006, p. 294; Harvey and Barnidge 2005, p. 1; Higgins 1973), although it is also asserted that the rights of entry, stay, and exit are inseparable: the denial of any one of these rights renders the exercise of the others illusory rather than tangible (Higgins 1973). The main reason for this is shown as the State's right to expel and duty to readmit their own nationals (Goodwin-Gill 1978, p. 21; McAdam 2011, p. 2; Coleman 2009, p. 28). This is why some scholars refer to freedom of movement of foreigners as a right that has remained 'incomplete' (Juss 2006, p. 294; McAdam 2011, p. 2; Paz 2018). Hence, the scholars tend to clarify each right in their own terms, especially considering their context in the instruments of international law (Agterhuis 2004; Goodwin-Gill 1995; Harvey and Barnidge 2005; Hannum 1987; Jagerskiold 1981; Whelan 1981; Chetail 2014).

Among the various international organisations of a universal character, created within their respective treaty systems, only the United Nations Human Rights Committee (HRC) has thoroughly investigated these rights within the framework of the ICCPR. In this setting, the General Comments (GC) and Communications of the HRC hold significance as they serve as the foundation for comprehending this entitlement. General Comments encompass fundamental principles that offer guidance on the practical implementation of the right. Communications exemplify how the right has been interpreted in cases where States are accused of violating their legal commitments under the ICCPR. On the other hand, the case law of the European Court of Human Rights (ECtHR) also constitutes a significant source for understanding the scope of these rights in international law, albeit a regional one.

Right to leave in the codified international law refers to 'the right to leave any country, including one's own country' whereas UDHR secures the **right to return** stating that 'everyone has the right to return his country'. However, both ICCPR and the P.4, Art. 3 (2) of the ECHR regulate the latter right with different wordings. While ICCPR stipulates that 'no one shall be arbitrarily deprived of the right to enter his own country', P.4, Art. 3(2) of the ECHR provides that no one shall be deprived of the right to enter the territory of the State of which he is a national.

Right to leave is not a non-derogable right and may be restricted on grounds of national security, public order, public health, or morals, or for the protection of rights and freedoms of others provided that such restrictions are in accordance with law and are necessary in a democratic society.⁴ Scholars have discussed that the majority of problems concerning the implementation of the right to leave, including one's own country, primarily may arise when States impose what they consider to be acceptable restrictions on this right due to the fact that certain restrictions require concretisation (Kochenov 2015, 168-172; Hannum 1987, 45; Goodwin-Gill 1995).

Right to return, on the other hand, is not subjected to the same restriction provision in the UDHR. However, the possible impact of the differentiation of the wording related to this right in international law is discussed among legal scholars on two inter-related matters: (1) the possible deprivation from entry (Agterhuis 2004, pp. 6, 7; Hailbronner 1997, pp. 5, 6; Coleman 2009, pp. 31, 32; Hannum 1987, p. 45); and (2) whether the personal scope of the right involves solely the citizens (Agterhuis 2004, pp. 7, 8; Hailbronner 1997, pp. 3-5; Coleman 2009, pp. 29, 30; Hannum 1987, pp. 56-63) .

For the personal scope of the right to leave, however, there is not much of a discussion because the ‘legality’ of the person’s situation in the departure country does not affect the enforceability of the right to leave. As further confirmed by the HRC, the right is not restricted to **persons lawfully within the territory of a state**.⁵ There are two consequences of this situation. First, considering that citizens of a State are in principle always lawfully within the territory of that State,⁶ the right should be applicable to foreigners as well as the citizens⁷ without a need for further clarification of the term ‘own country’. This is why there has been no interest in the legal literature to explain the term within that context, as opposed to the interest in defining the same term in relation to right to return. Second, a foreigner who is lawfully subjected to expulsion should also enjoy the guarantees secured by this right.⁸ The right is considered to secure the freedom to choose the State of destination (**choice of destination**) subject to that State’s agreement.⁹ Hence, a foreigner who is lawfully being expelled from a State also has the right to choose the specific country they wish to relocate to, provided that the receiving State agrees. As a result, it is asserted that if such a destination State exists, the exit State should not be able to forcibly remove the individual to another State¹⁰ (Gürakar-Skribeland 2022; Taylor 2020, p. 336).

Facilitating the right to leave a country does not preclude the provision of a passport or a substitute travel document as a standard requirement for international travel.¹¹ In this context, the HRC underlines that the right imposes obligations not only on the State of residence but also on the State of nationality, given that the **right to obtain necessary documents to travel** is included within the right to leave and that refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere.¹²

When considering the connection between the right to leave and the act of returning, particularly when it pertains to foreigners leaving a country, the requirement for travel documents, on some occasions, has been seen by some scholars to potentially restrict the exercise of this right (Kochenov 2015, p. 162) and by some to directly affect the practical exercise of the right (Hannum 1987, p. 21). Hailbronner (1997, p. 6), on the other hand, approaches the matter from the perspective of the right to return of the individual and the obligation of the State to readmit its nationals and concludes that, specifically, individuals who have left their home country without the required travel documents in order to seek asylum or those who have intentionally destroyed their travel documents, often face difficulties in obtaining the necessary papers to facilitate their return to their country of origin. It should be noted that the possible effect of the claimed restriction or the effect on the choice of destination and its impact on transforming a voluntary departure into a forced removal together with **detention** practices – indicated to be used increasingly in State practices for (forced) return activities (Majcher and Strik 2021, p. 126) – have not been comprehensively evaluated in the literature of international (human rights) law. Hence, McDonnell (2021) and Gürakar-Skribeland (2022) observe that the right to leave remains underexplored and often overlooked.

Return as a Matter of (Inter-) State Action: The Scope of the State’s Right to Expel and the Obligation to Readmit

The research on States’ right to expel and the duty to readmit in the international law literature mostly focuses on the clarification of the scope and legitimacy of these notions and their

position against or with the relevant rights of the individual (Hailbronner 1997; Coleman 2009; Goodwin-Gill 1976; Kochenov 2015; Opeskin 2009; Agterhuis 2004; Noll 1997). There is not much of a dispute among scholars regarding **the duty of a State to readmit its own nationals** and a **State's right to expel foreigners** being principles of international law (Aleinikoff 2002, p. 15; Noll 1997, p. 25; Hailbronner 1997, p. 7; Kochenov 2015, p. 145). Scholars tend to explain the inter-relation between these two notions by stating that the obligation to readmit a State's own national is the inherent counterpart of the right to expel foreigners (Hailbronner 1997, p. 7; Noll 1997, p. 30; Goodwin-Gill 1976, p. 58; Giuffrè 2015). The scope of the restrictions of the right to expel emerged from this inter-relation in international law therefore has been a debatable topic (Goodwin-Gill 1976; Coleman 2009, p. 30; Hailbronner 1997, pp. 15-37).

Another point in this regard is the restrictive effect of human rights law on the dominance of the State in migration control. Costello (2016, p. 316) criticises the State's sovereign prerogatives especially in a legal environment like the EU, where migration control and status are increasingly regulated by the EU law in a shared manner and the interaction across different human rights regimes is encouraged. In this context, the statist migration control assumption, which veils the human rights impacts of migration status and migration control measures, is unsettled (*ibid.*).

As a requirement of the principle of proportionality, the State's interest(s) in expelling a foreigner needs to be balanced with the effect of expulsion on the individual's fundamental rights. In that context, interference of family and private life with the State's right to expel has been a matter of discussion among scholars (Majcher 2020, pp. 124-146; Cholewinski 1994). However, as the strongest restriction on the right to expel derives from international human rights law, the effect of the **non-refoulement** principle has been widely researched in the literature. More recent debates on the matter are focused mostly on questioning the protectional scope provided by either ECtHR or United Nations Treaty Bodies (Simeon 2019; Çalı, Costello and Cunningham 2020; Blöndal and Arnadóttir 2019; Stoyanova 2018), the relationship between non-refoulement and climate change (Scott 2014; De Coninck and Soete 2022; Herrault 2021), extraterritorial application of the principle and border checks (Trevisanut 2014; Kim 2017; Goldner Lang and Nagy 2021; Özturanlı and Ergüven 2020), and the need for strengthening the protection level against restrictive interpretations of non-refoulement (Gil-Bazo 2015; Moran 2020).

Particular restrictions on expulsion have also been of interest in the literature, such as **prohibition of collective expulsion**, including **pushback** activities (Ciliberto 2021; Di Filippo 2022; Riemer 2020; Carlier and Leboeuf, 2020; Henckaerts 1995). Based on the ECtHR's case law derived from the P.4, Art. 4 of the ECHR where it is stated that the 'collective expulsion of the aliens is prohibited', the prohibition of collective expulsion prevents the expulsion of foreigners without an objective and reasonable examination of their concrete and individual circumstances.¹³ This type of expulsion is also prohibited under other regional international law instruments, such as American Convention on Human Rights (Art. 22/9), 2004 Arab Charter on Human Rights (Art. 26/2) and African Charter of Human and Peoples' Rights (Art. 12/5). Collective expulsion is also contrary to the procedural safeguards to which foreigners are entitled in the context of expulsion, for instance, provided under P.7, Art.1 of the ECHR and Art. 13 of the ICCPR.

Unlike the ECHR and the above-mentioned conventions, there is no explicit provision in the ICCPR on the prohibition of collective expulsion. However, the incompatibility of the safeguards secured under Art. 13 with collective expulsions has been emphasised by HRC, which has repeatedly condemned such expulsions and underlined that these practices are incompatible with the Covenant's provisions.¹⁴ In this respect, the prohibition does not prevent expulsion but rather group expulsion without such safeguards and without an individualised assessment (Wouters 2019, p. 952). Reimer (2020, pp. 17-22) highlights the use of two distinct terminologies in literature and conventional provisions regarding the prohibition of expelling a group of foreigners. For instance, while ECHR (P.4, Art. 4), American Convention, and Arab Charter use the term 'collective expulsion', African Charter refers to 'mass expulsion'. This differentiation is also seen in the literature. Reimer (2020, p. 14) questions whether these two terms are used for the same phenomenon and concludes that an analysis of the literature on these issues and of judgments and other legal documents reveals that there is no clear, universally applicable answer. Nevertheless, she concludes that 'mass' and 'collective' expulsion are legally indistinguishable and refer to the same group size (ibid., p. 21). Indeed, Henckaerts (1995, pp. 18, 19), as an author who uses the terms interchangeably, also strongly opposes the distinction between collective and mass expulsion as this would create unacceptable differences in protection standards and harm human rights. Collective expulsions, in some cases, may be initiated with pushback activities. In the case of *Hirsi Jamaa and Others v. Italy*, the ECtHR conducted a comprehensive analysis and defined 'expulsion' as the act of 'driving someone away from a place' in a general sense.¹⁵ The Court further concluded that when a State's authorities remove foreigners during interceptions on the high seas as part of their sovereign authority with the intention of preventing them from reaching the State's borders or 'pushing them back to another State', it is considered an exercise of jurisdiction under Article 1 of the Convention. This action makes the State accountable for violating the prohibition of collective expulsion as stated in P.4, Art. 4 of the ECHR.¹⁶ According to Den Heijer (2013, p. 290) the approach taken by the ECtHR in the *Hirsi* case highlights the need to first establish adequate reception systems and safeguards in transit countries before allowing any form of readmission, transfer, or return.

In certain situations, expulsion may not be possible, leading to individuals who cannot be deported – known as '**non-returnable**' or '**non-deportable**' people – becoming a cause for concern. This is highlighted by Mann (2021) and Majcher and Strik (2021), as well as Majcher (2020). Majcher points out that the situation of these individuals may be seen as a 'legal limbo' (2020, pp. 229, 234, 235). She asserts that individuals who cannot be deported and find themselves in a partially legal state of uncertainty (a semi-legal limbo) are at risk of being subjected to abuses and exploitation (ibid., p. 235). How this matter should be approached in terms of **regularisation** of these individuals in international (human rights) law, however, is somewhat underexplored. Majcher (ibid., p. 138) argues that the ECtHR case law on positive obligations under Article 8 (family and private life) can be applied by analogy to the situation of non-deportable people. On the other hand, although regularisation of the status of foreigners is mainly considered to be a matter that falls within State power (Aleinikoff 2002, p. 15), Costello (2016, pp. 82, 83) also argues that ECtHR case law reflects a recognition that time and ties matter and attachment to the host community continues over time. She asserts that in this recognition, ECtHR paves the way for other courts, particularly national ones, to conduct the regularisation role (ibid.). Concerning the return activities, **detention** practices have also been a point of focus among legal scholars in terms of their compatibility with international (human rights) law, especially regarding their length, proportionality,

necessity, and applicability for vulnerable individuals such as children (Majcher 2020; Cole 2002; Cornelisse 2010; Wilsher 2012; Guild 2016, pp. 141-155; Lyon 2014).

Another point scholars question in the context of the right to return and the personal scope of the duty of the States to readmit is whether permanent residents and former nationals fall under the scope of the State's duty to readmit (Hailbronner 1997; Coleman 2009; Bantekas 1998). Hailbronner asserts that given the absence of a consistent State practice and widespread acceptance, it is debatable whether there is a general customary international law obligation to readmit former nationals in cases where their status changes before entering a third country (1997, p. 24). On the other hand, the obligation to readmit permanent residents and other individuals with special ties with the given country is seen as a conventional obligation derived from ICCPR (Art. 12/4) towards the individual (Taylor 2020, pp. 346-349; Hannum 1987, pp. 56-63; Coleman 2009, pp. 29, 30).

While it is an obligation of international law to readmit a State's own national, there are instances where countries of origin do not comply with this obligation. Moreover, differently than the situation of readmission of a State's own national, there is no explicit binding rule either in a convention or in a form of customary norm in international law that obliges a State to readmit a third-country national. According to Hailbronner (1997, p. 31), the obligation contained in modern **readmission agreements** to readmit nationals of third States having entered unlawfully to a neighbouring State or staying illegally in the State of residence stems from the principle of (good) neighbourliness and the responsibility of a State for those impairments to other States emanating from its territory. However, he concludes that simply acknowledging this fact does not automatically establish a State practice and *opinio juris* (ibid., p. 34) – the two factors necessary for the emergence of a customary norm that would obligate States to readmit these individuals without requiring a readmission agreement. Yet, Hailbronner (ibid., p. 35) implies that there is an open door for the development of an obligation to readmit third-country nationals between neighbouring States. Against that backdrop, bilateral readmission agreements serve as a facilitator and an expeditor for the return of the nationals (Strik 2017, p. 313; Coleman 2009, p. 36) and as a compelling tool for the readmission of the third-country nationals (Hailbronner 1997, p. 37) based on the mutual consent of the sending and re-admitting State.

As a rule, readmission agreements do not cover asylum seekers or refugees directly but mainly focus on (irregular) migrants who are subjected to expulsion. However, safe third-country practice allows the State to reject the asylum application because the applicant could have requested or been granted protection elsewhere. As a result of the application's rejection (usually on inadmissibility grounds), the status of an individual is converted from being an asylum seeker (or applicant for international protection) to a foreigner who does not have a legal basis to stay in the country and, therefore, is subjected to expulsion. Against this background, (former) asylum seeker falls under the scope of the readmission agreement. Given that safe third-country practices are not regulated in a binding international law instrument that enables a uniform implementation but regulated under domestic laws, as stated by Coleman (2009, p. 67), it seems contradictory since the success of these policies relies on the involvement of related third countries. A country can label a third country as 'safe' according to its own laws and consequently refuse to provide refuge to those who passed through that country. But, if the third country doesn't agree to receive those individuals on its territory, this policy won't work. Hence readmission agreements also serve as a facilitator for,

and a complementary of, the practice of the **safe third-country concept** in the context of asylum (Abell 1999, p. 64; Coleman 2009, p. 67). Nevertheless, the lack of a binding instrument comprehensively regulating the safe third-country practice in international law and the function of readmission agreements for securing admission of rejected asylum seekers by a third country without a further requirement raise concerns regarding the compatibility with the non-refoulement principle (Suller 2022; Shamatava 2020; McDuff 2019) and with access to international protection (Abell 1999, 66; Alpes *et al.* 2017; Giuffre 2015). Recently, the functions and scope of these agreements, together with their effect on safe third-country practices, have been studied in the literature (Coleman 2009, p. 36; Hailbronner 1997; Majcher 2020, pp. 622-652), focusing especially on informal readmission arrangements (deals) as in the case of EU-Turkiye Deal of 18 March 2016. The literature mainly questions these arrangements' position towards the compatibility with international (human rights) law and refugee law, access to justice, transparency, and rule of law (Kassoti and Idriz 2022, p. 4; Peers 2016; Den Heijer and Spijkerboer 2016; Gatti 2016; Matusescu 2016; Carrera *et al.* 2017; Öztürk 2020; Thym 2016; Kaya 2020).

The interplay between the individual's right to leave and return and the State's right to expel and readmit has also been subject to debate in literature, particularly the effect of '**voluntariness**.' The literature approaches this matter from three main aspects. The first weighs the competing impacts of two notions, namely, voluntariness as a requirement of an individual's right, on the one hand, and the State's right to force derived from its duties, on the other. Hailbronner (1997) argues that if the obligation to readmit its own nationals can be derived from both the authority to regulate the entry and residence of foreigners, as established by international law, as well as from territorial sovereignty, it logically follows that this obligation exists independently of any individual's claim to a right of return. Referring to the inter-state character of the obligation to readmit, he concludes that the power of a State to terminate someone's residency generally implies an involuntary nature (*ibid.*, p. 5). On the other hand, Noll (1997) points out that the relationship between the inter-State obligation to readmit individuals and the individual's right to leave their own country is not clearly defined in international law. He concludes that if such an obligation includes citizens who are unwilling to return, it could potentially hinder the exercise of the right to leave one's country (*ibid.*, p. 417, fn.7).

The second aspect is in relation to certain practices, such as **voluntary departure** and (**assisted**) **voluntary return** and their qualification. If the action of relocation based on these practices is considered 'voluntary', they can potentially be qualified as exercises of an individual's right rather than a forced movement imposed by the State's right to expel. From this point of view, indicating that the element of voluntariness is often constrained and mixed with coercion in practice (Dünnwald 2013, p. 228; Cleton and Chauvin 2019), the question of 'to what extent these practices can be considered voluntary' is examined by the literature. Webber (2011) points out that voluntary return is presented as a less burdensome option instead of subjecting individuals to ongoing destitution and inevitable forced return. However, it is often challenging for the returnee to make an Informed decision regarding the specific country they will return to (*ibid.*, p. 103). Similarly, Majcher (2020) argues the level of voluntariness in voluntary departure practices¹⁷ and states that the individual's 'consent' in this context only indicates that the person has agreed to comply with the decision to return rather than implying an informed decision to return to their country of origin. The author concludes that as a result, such practice of the concept of voluntary departure should be seen as a euphemism (*ibid.*, p. 547).¹⁸ It should also be noted that scholars have raised another

matter in relation to voluntary departure practices: limiting the opportunities for voluntary departure and implementing (re-)entry bans upon exit may have the unintended consequence of reducing cooperation with the return process as fewer individuals would be inclined to participate willingly (Majcher and Strik 2021, p. 126). Scholars have also discussed entry bans in a wider context, including but not limited to non-refoulement and other requirements of international human rights law (Baldaccini 2009; Majcher 2020).

The third aspect is related to the second but focuses on **voluntary repatriation**. The term is not defined in a binding instrument as it is presented as one of the durable solutions by UNHCR in soft law instruments.¹⁹ UNHCR defines voluntary repatriation as the free and informed **return of refugees to their country of origin in safety and dignity**.²⁰ It also includes in the definition that the voluntary repatriation may be organised or spontaneous.²¹ Compared to the other notions researched in international law, repatriation is one of the most comprehensive matters that fall within the scope of return-migration in conjunction with international refugee law and human rights law (Chetail 2004, p. 30). The subject is covered by a range of studies; most of the discourse highlights the ‘voluntariness’ requirement of the term and argues how this could be maintained in practice (Selim 2021, pp. 562, 567; Hathaway 1997, p. 553; Mathew 2008, p. 161; Vedsted-Hansen 1997, p. 560; Fouda 2007; Cantor 2018).

Lastly, as a point of debate, scholars (Majcher 2020, p. 661; Alpes and Nyberg Sorensen 2016) indicate the risks of the human rights violations returnees may face upon return and emphasise the significance of **post-return monitoring** (Majcher 2020, p. 661).

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5. Unlocking the Economic Contribution of Returning Refugees to Their Home Countries

Rasha Istaiteyeh (HU)

Introduction

The economic perspective on the return of asylum seekers, refugees, and other migrants is an important aspect to consider in the overall debate. According to Wahba (2022) between 2010 and 2015, return migration accounted for a substantial 26 per cent to 31 per cent of all global migration movements, bringing to light its profound significance. Returnees may contribute to the economic progress of their countries of origin through various avenues (ibid.), such as in the reconstruction and development efforts of their home countries, nurturing entrepreneurship, accumulating human capital, facilitating the dissemination of knowledge, promoting aid and remittances, and transferring cultural norms back to the homeland. Returnees can bring back financial resources, whether through savings accumulated abroad or through remittances sent to their families during their stay in host countries (Beaman et al. 2022). These financial inflows can provide a boost to local economies, stimulate investment, and support small businesses and entrepreneurial activities. While the impact may be modest, it can still be significant in certain circumstances. The return of refugees may also alleviate the burden on host countries' economies and resources, which often face challenges in providing adequate support and services to large returnee populations. By going back to their country of origin, returnees can reduce the strain on public infrastructure, social services, and job markets in host countries, allowing these resources to be redirected towards the development and well-being of their own communities. Below, I elaborate on some of the impact mechanisms.

Human Capital and Brain Gain

According to Mottaghi (2018), when migrants – including refugees – decide to return to their home countries, they bring with them a wealth of education, skills, knowledge, experience, social capital, and networks. These valuable assets can be regarded as a form of human capital, capable of driving the social and economic development of their nations. Moreover, the social capital and networks they have cultivated within their host communities and among fellow migrants can foster collaboration, resource-sharing, and collective efforts towards rebuilding and contributing to the progress of their home countries. Effectively recognising this human capital is vital in order to maximise the potential impact of returning refugees on the overall development of their nations. By capitalising on their diverse expertise and networks, returnees can play a pivotal role in driving positive change, revitalising key sectors, and fostering sustainable development in their home countries (Dadush 2017).

Hagan and Wassink (2020) highlight discernible patterns in developing human capital and resource utilisation among international migrants. They note that upon their return, migrants harness the resources they have acquired abroad, including human and financial capital, to pursue economic advancement. These efforts are tailored to address the specific social, economic, and geographic characteristics of their communities of origin. As stated by Wahba (2022), migration offers another significant advantage: the acquisition of new skills

and human capital. In the context of return migration studies, there is a particular focus on examining how overseas migration affects the wages of returning migrants and making efforts to measure the economic benefits they gain from their experience working abroad.

Stark and Simon (2007) expand upon both the 'harmful brain drain' and 'beneficial brain gain' discussions. They delve into the notion that the expenses associated with 'educated unemployment' and overeducation can result in substantial setbacks for the affected individuals. These individuals often make up a significant portion of the educated workforce.

Remittances and Investment in Relation to the Local Market Dynamics

Olesen (2002) highlights that returning refugees/migrants have the potential to contribute to their home countries by remittances sent to their home countries while they were living abroad. These financial transfers can provide much needed support to families and communities, contributing to local economies and helping to alleviate poverty and improve living conditions. Additionally, returning refugees often play a role in complementing precarious work in the informal sector and humanitarian assistance. Their economic agency can extend beyond their immediate families and encompass assisting loved ones in both the places of origin and refuge in the Global South (Zuntz, 2021). This assistance can take various forms, including financial support, investment in small businesses, and knowledge-sharing.

As indicated by Kunuroglu et al. (2016), remittances play a significant role in influencing the decision to return to one's home country. In addition, the repercussions of migration on poverty, inequality, and societal consequences become evident upon individuals' return to their home countries. This is because the degree of inequality tends to either rise or decline due to migration, and the effects of remittances seem to fluctuate when examining different countries in case studies (Lucas 2005). In Zuntz (2021), remittances sent by returning refugees/migrants in present times serve as a vital emergency lifeline and are frequently used to meet immediate needs such as food and medical treatment. These remittances play a crucial role in providing essential support to refugees and their families, particularly in challenging circumstances where access to basic necessities is limited. By directing these funds towards essential goods and services, returning refugees contribute to improving their own well-being and that of their loved ones in both the country of origin and the host country.

Bahar (2023) highlights the significant potential of returning migration/refugees in transferring ideas and technology to their home countries thereby making valuable contributions to post-conflict reconstruction and the development of specific sectors. The process of knowledge and technology transfer can have a profound impact on the economic growth and progress and even a small number of returning refugees can generate substantial economic gains. Rapoport (2023), in his study, further highlights the potential for a notable increase in consumption and investment with the restoration of stability and the return of refugees. As people regain trust in the future of their country, they become more inclined to engage in economic activities, leading to a boost in overall economic growth. This renewed confidence can also attract foreign investors who recognise the potential opportunities in various sectors of the economy, including infrastructure development, manufacturing, services, tourism, and exports. The influx of foreign investment can further stimulate economic development, create employment opportunities, and contribute to the overall recovery and prosperity of the country. Returnees repatriate savings earned overseas that they

often utilise to establish businesses. Furthermore, returnees bring back fresh ideas and innovative perspectives (Wahba 2022). There is a valid correlation between return migration and entrepreneurial initiatives.

Dadush (2017) argues that when considering the contribution of a returning refugee or asylum seeker to their country of origin, particularly those who have not had sufficient time to build capital or acquire skills and who return under insecure conditions, there is limited evidence to suggest that their impact will be significantly better. This highlights the challenges faced by returning refugees as they may encounter difficulties in reintegrating into their home countries and making meaningful economic and social contributions.

The return of refugees to their home countries can have multifaceted effects on local labour markets, encompassing both positive and negative aspects. On the positive side, their return can address labour shortages by providing a new pool of workers to fill vacant positions, contributing to increased productivity and economic growth. This influx of skilled and motivated individuals can bring diverse perspectives, expertise, and entrepreneurial initiatives, thus fostering innovation and development in various sectors.

Although the current body of literature addressing the effects of return migration on upward mobility is notably limited (Wahba 2022), there are some hypotheses about the potential negative implications of return migration on labour market dynamics. The return of migrants can create heightened competition in the job market, leading to increased pressure on employment opportunities. This increased competition may result in downward pressure on wages, as employers may have more options to choose from, potentially impacting the earning potential of both returning refugees and native workers.

Transfer of Social, Institutional, and Political Norms

As individuals emigrate, they encounter diverse cultures, norms, and political ideologies that they may assimilate and subsequently bring back to their home country. In fact, in numerous instances, diaspora members and returning migrants act as conduits for transmitting these fresh ideas and norms to their country of origin. The transfer of ideas and technology from returning migrants can have a transformative effect on sectors such as agriculture, manufacturing, healthcare, infrastructure, and entrepreneurship. By introducing new methods, techniques, and approaches, migrants can help enhance productivity, streamline operations, and improve the quality of products and services. Notably, even a relatively small number of returning migrants can have a significant impact due to their unique expertise and the multiplier effect of knowledge diffusion. Their contributions extend beyond direct involvement and can inspire and benefit local communities, businesses, and institutions. By leveraging their acquired knowledge, returnees become agents of change, promoting progress and driving economic advancement within their home countries.

While the economic literature has extensively explored the effects of international migration on international trade and foreign direct investment (FDI), it is worth noting that many of these critical dimensions also experience growth due to return migration. Returnees, having established connections in their destination countries, play a significant role in promoting trade, foreign direct investment, and innovation upon their return. The available

evidence strongly indicates that return migration acts as a catalyst for the global diffusion of knowledge and substantially contributes to enhanced productivity (Wahba 2022).

Conclusion

The existing literature on the utilisation of the experiences of returning migrants and refugees yields mixed findings. It is essential to recognise the need for a distinct and comprehensive body of literature that focuses on the economic ramifications of returning refugees for their home countries. By delving specifically into the economic aspect, this dedicated literature can provide valuable insights into the potential contributions, challenges, and dynamics that arise when individuals re-enter their home countries after a period of migration or displacement. This specialised focus can offer a more nuanced understanding of how returning refugees impact their home economies. It can further serve as a valuable resource for policymakers, researchers, and practitioners seeking to address the complex issues surrounding refugee return and economic development.

The economic development potential of returnees relies on their skills being put to productive use. However, there are challenges and opportunities in addressing the legal and administrative barriers that returning refugees and migrants may encounter, including issues related to property rights, documentation, and access to public services. A crucial aspect to consider is skills-matching and recognition, which emphasises the significance of acknowledging and leveraging the skills and qualifications of returning refugees. It is essential to facilitate the effective matching of their skills with suitable employment opportunities and to ensure their seamless integration into the labour market. By removing barriers and creating an enabling environment that recognises and utilises the talents of returning migrants, their full potential can be unlocked and foster their positive contribution to economic growth and development.

When focusing solely on economic perspectives, the impacts of returns or non-returns to the economy of the country of origin are multifaceted. The return of migrants can infuse the origin country's economy with various benefits, including increased labour force participation, the potential for entrepreneurial activities, and the transfer of financial remittances. These contributions can stimulate economic growth and development. Conversely, non-returns may lead to labour shortages in certain sectors, affecting productivity and economic stability. At the household level, returnees often bring with them savings and enhanced skills, positively impacting their families' economic well-being. Communities left behind may also experience economic benefits through remittances sent by migrants that can boost local consumption and investment. Additionally, the concept of economic and social remittances emphasises the transfer not only of money but also of knowledge, practices, and ideas that can have a transformative effect on both individual households and broader societal structures within the country of origin. Therefore, examining returns or non-returns from an economic perspective sheds light on a complex web of influences that shape the economic fortunes of origin countries, households, and communities.

The inflow of remittances and the economic agency of returning refugees can have positive effects on the local economies of their home countries. These financial resources can contribute to job creation, entrepreneurship, and the overall development of key sectors such as healthcare, education, and infrastructure. It is important to recognise the significance of these contributions and to create an enabling environment that supports and facilitates the

potential of returning refugees. This includes policies and programmes that facilitate the reintegration of returning refugees, promote entrepreneurship and economic opportunities, and strengthen social and economic networks.

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Legal and Policy Infrastructures of Returns in the EU

Comparative Report & Country Dossiers (D2.1 – June 2024)

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Decentring the Study of Migrant
Returns and Return Policies

Legal and Policy Infrastructures of Returns in the EU

Comparative Report (WP2)

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List of Abbreviations

AMIF	Asylum, Migration and Integration Fund
AVRR	Assisted Voluntary Return and Reintegration
BAMF	Federal Office for Migration and Refugees
CEC	The Conference of European Churches
CJEU	The Court of Justice of the European Union
COA	Central Agency for the Reception of Asylum Seekers
CoE	The Council of Europe
CPT	Committee on the Prevention of Torture
DESTATIS	Federal Statistical Office
DT&V	Repatriation and Departure Service
EASO	The European Asylum Support Office
EC	European Commission
ECHR	European Convention on Human Rights
ECSR	The European Committee on Social Rights
ECtHR	European Court of Human Rights
EFTA	European Free Trade Area
EIL	Enforcement of Immigration Legislation
EMN	European Migration Network
ERF	European Return Fund
ERPUM	European Return Platform for Unaccompanied Minors
EU	European Union
EUAA	European Union Agency for Asylum
EURAs	European Union Readmission Agreements
EURCN	The European Return and Coordination Network
FRA	The European Union Agency for Fundamental Rights
FRONTEX	The European Border and Coast Guard Agency

GAPs	Decentring the Study of Migrant Returns and Readmission Policies in Europe and Beyond
IND	The Immigration and Naturalisation Service
IOM	International Organization for Migration
IRMA	Integrated Return Management Application
IRMS	Integrated Return Management System
LIBE	The European Parliament's Civil Liberties, Justice, and Home Affairs Committee
MSs	Member States
NGO	Non-governmental organisation
NPM	National prevention mechanism
TCNs	Third Country Nationals
UAMs	Unaccompanied minors

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Summary

Work Package 2 (WP2) of the GAPs Project (Legal and Policy Frameworks of Returns in the EU) focuses on the legal, institutional and policy frameworks regarding the return and readmission policies at the EU level and in the five selected EU member consortium countries (Sweden, Poland, Germany, Greece, Netherlands) as well as the related gaps. Three country snapshots of the non-consortium EU Member States (Italy, France, and Hungary) are also provided.

As a part of WP2, this comparative report is based on the examination and comparison of the return policies of the selected countries through the country dossiers that are provided as annexes of this report. It aims to identify the commonalities and variances within their legal and policy structures concerning the return of migrants against the backdrop of overarching EU directives, particularly the EU Return Directive. This exploration includes a comprehensive examination of fundamental statistics, significant political changes in this realm, and a comparative analysis of the institutional frameworks. After briefly addressing developments at the EU level, the report delves into the main gaps, similarities, and differences identified through the country dossiers in terms of statistics, policy and institutional frameworks. In this framework, the report underscores the critical role of accurate and comprehensive statistics in assessing the effectiveness of return policies, the efficiency of return operations, and adherence to human rights standards throughout the return process. For the political framework, pivotal moments at the EU level are initially delineated through a constructed timeline, followed by an examination of significant policy shifts and critical junctures within the focused countries. This analysis proceeds to explore similarities and some distinct differences specific to each country's context. The EU's institutional framework, characterised by the involvement of various actors, including the European Commission, the Council of the European Union, Frontex, and the European Asylum Support Office, outlines a complex and multi-layered approach to managing returns. This complexity is mirrored in the national contexts, where a blend of governmental and non-governmental entities, along with specialised agencies, play pivotal roles in implementing return policies.

Comparatively, the report reveals a range of policy focuses and implementation strategies among the MSs, influenced by their unique political, social, and geographical contexts. While some countries prioritise strict control and deportations, others emphasise humanitarian approaches and voluntary returns. This diversity reflects the challenge of harmonising return policies within the EU's complex political landscape.

Significant emphasis is placed on the legal considerations pertaining to returns, notably the EU Return Directive's establishment of common standards and procedures. These measures include prioritising voluntary return, ensuring procedural safeguards, and adhering to principles such as non-refoulement and proportionality. The analysis also delves into detention practices within the Member States (MSs), highlighting concerns over the conditions of detention and the treatment of vulnerable groups, especially children. The core legal framework addressed in the report is distilled into three sub-sections, pinpointed by examining the identified "gaps" across all reports. These prominent areas of concern, "Procedure to Issue Return Decisions", "Procedural Safeguards and Non-Returnability", and "Detention", have been analysed comparatively. The procedural safeguards are examined under four key areas: effective access to information and legal aid, the effectiveness of

administrative and judicial reviews and remedies, the effectiveness of guarantees directly related to non-refoulement, and lastly, the situation of persons who cannot be returned.

The report provides valuable insights into the legal and policy infrastructures governing returns in the EU and selected MS. It highlights the importance of data accuracy, the need for humane and efficient return processes, and the critical role of institutional frameworks in shaping national return policies. This comparative analysis serves as a foundation for understanding the intricacies of return policies within the EU, offering a basis for future research and policy recommendations aimed at enhancing the effectiveness, fairness, and humaneness of return practices across the MSs.

Based on the dossiers of the selected five consortium member countries and mainly focusing on the “gaps” dimension of those documents, it can be said that each country demonstrates unique issues, from Greece’s legal ambiguity and detention concerns to Germany’s decentralised enforcement, Poland’s restrictive access to legal remedies, Sweden’s legal uncertainties and institutional shortcomings, and the Netherlands’ limited judicial review and non-compliance with the EU directives. Common challenges across these countries include the need for more precise legal definitions, ensuring humane detention conditions, better protection for vulnerable individuals, and aligning national practices with EU standards. The country dossiers generally emphasise the need for reforms that balance migration control with human rights protections and the efficient implementation of return policies.

The most important aspects by country:

Germany exhibits a decentralised approach, leading to variable enforcement across states. This country’s case emphasises voluntary returns but needs more uniformity in practice.

Greece exhibits legal ambiguities and confronts criticism for its detention conditions. There is a pressing need for clearer legal definitions and humane treatment of detainees.

Poland struggles with providing accessible legal remedies and has restrictive practices that hinder migrants’ rights to appeal against return decisions.

Sweden, while seeking to include return policies with broader migration management systems, contends with legal uncertainties and the need for better protection and support mechanisms for returnees.

The Netherlands has been criticised for limited judicial review of return decisions and non-compliance with EU directives, highlighting the need for reforms to ensure rights are upheld.

Based on the legal analysis provided, the main similarities and differences between the five EU member countries (Germany, Greece, Poland, Sweden, and the Netherlands) regarding the return procedure, as well as the most problematic areas, are discussed in detail in the following paragraphs.

All five countries share a common legal framework, being parties to the Refugee Convention and international human rights treaties relevant to the return of migrants. They are obliged to respect fundamental principles such as the principle of non-refoulement. Additionally, all countries have transposed the EU Return Directive into their national laws, though the method of transposition and clarity of application vary. Another similarity is that in all countries, the decision to return is primarily an administrative action, with more than one administrative agency responsible for the return process. Furthermore, the scope of return decisions in all countries is linked to illegal stay, as required by the Return Directive.

However, there are notable differences among the countries. The degree of impact and modalities of adherence to international law vary, with some countries having a more direct interaction between national legal systems and international law than others. There are also differences in the clarity and effectiveness of the transposition of the Return Directive, with some countries preserving existing legal frameworks while others make significant changes to comply with the Directive. Procedural aspects of the return process, including the role and jurisdiction of the police, the clarity of return decisions, and the application of border procedures, also vary among the countries. Additionally, the period allocated for voluntary departure and the regulations regarding entry bans differ among the countries.

Several problematic areas have been identified in the return procedures of these countries. There is legal uncertainty and inconsistencies in some countries due to the lack of clear definitions and inconsistencies in the application of the Return Directive and international law. Concerns exist about the effectiveness of procedural safeguards and the protection from non-refoulement, particularly in border procedures and for vulnerable groups such as children. The use of detention as a default choice rather than a last resort, limited access to legal representation for detainees, and substandard conditions in detention facilities are significant concerns. Lastly, discrepancies in the effectiveness of administrative and judicial reviews and remedies, particularly regarding access to legal aid and the implementation of court decisions, are problematic.

The analysis of return migration policies in the EU countries reveals several key similarities.

- **Data Management and Transparency:** There is a consensus on the need for improved data collection, processing, and publication to inform policy-making and ensure transparency in return operations.
- **Institutional Frameworks and International Cooperation:** Recommendations across countries highlight the need for enhanced institutional frameworks and international cooperation to manage return processes effectively, including cooperation with countries of origin and respecting the values underlying foreign and development policies.
- **EU Directive Implementation:** All countries are working to align their national return migration policies with EU directives, though the extent and effectiveness of implementation vary.
- **Human Rights and Legal Frameworks:** There is a strong emphasis on ensuring that return procedures respect the human rights of migrants, with a focus on detention conditions and the treatment of vulnerable groups. Clear legal frameworks are needed to ensure transparency and easy navigation for migrants to understand their rights and obligations.
- **Voluntary Return Programmes:** There is a consensus on promoting voluntary return options as more humane and effective alternatives to forced returns.
- **Detention Practices:** Despite differences in conditions, duration, and legal oversight, there is a common reliance on detention as a measure for managing return migration. However, there is also a shared view that detention should be used as a last resort, with alternatives to detention to be considered first, especially in the context of children and the humane treatment of detainees.

- **Challenges with Vulnerable Groups:** Each country acknowledges gaps in adequately addressing the needs of vulnerable migrants, including unaccompanied minors (UAMs), victims of trafficking, and individuals with health issues.

In light of the comparative analysis of the five country dossiers, the most important policy recommendations can be summarised as follows:

- **Emphasis on human rights and legal frameworks:** All countries underscore the importance of aligning return policies with human rights standards and the legal frameworks safeguarding these rights. They advocate for clear legal definitions, transparency, and procedures that comply with fundamental and human rights.
- **Need for data management and transparency:** There is a consensus on the necessity for improved data collection, processing, and publication to inform policy-making and ensure transparency in return operations.
- **Institutional frameworks and international cooperation:** Recommendations across countries highlight the need for enhanced institutional frameworks and international cooperation to manage return processes effectively. This includes cooperation with countries of origin and respecting the values underlying foreign and development policies.
- **Detention as a last resort:** The countries advocate for detention to be used as a last resort, with alternatives to detention being considered first, especially highlighting the importance of the child's best interests and the need for the humane treatment of detainees.

Keywords: Legal and Policy Framework of Migration Returns, Return, Readmission, Return Policies, Comparative Analysis, Germany, Greece, the Netherlands, Poland, Sweden, EU

The GAPs Project

GAPs is a Horizon Europe project that aims to conduct a comprehensive multidisciplinary study on the drivers of return policies and the barriers and enablers of international cooperation on return migration. The project aims to examine the disconnects and discrepancies between expectations of return policies and their actual outcomes by decentring the dominant, one-sided understanding of “return policy-making”. To this end, GAPs:

- Examines the shortcomings of the EU’s return governance;
- Analyses enablers and barriers to international cooperation, and;
- Explores the perspectives of migrants themselves to understand their knowledge, aspirations and experiences with return policies.

GAPs combines its decentring approach with three innovative concepts:

- A focus on return migration infrastructures, which allows the project to analyse governance fissures;
- An analysis of return migration diplomacy to understand how relations between EU MSs and third countries hinder cooperation on return and;
- A trajectory approach that uses a socio-spatial and temporal lens to understand migrant agency.

GAPs is a three-year interdisciplinary project (2023–2026) coordinated by Uppsala University and the Bonn International Centre for Conflict Studies with 17 partners in 12 countries on four continents. The 12 countries in which fieldwork has been conducted are Sweden, Nigeria, Germany, Morocco, the Netherlands, Afghanistan, Poland, Georgia, Türkiye, Tunisia, Greece and Iraq.

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1. Introduction

This comparative report aims to scrutinise the return migration policies of selected European Union (EU) Member States (MSs), specifically Germany, Greece, Poland, Sweden, and the Netherlands. By drawing on detailed country dossiers, the report seeks to identify similarities and differences in legal and policy frameworks, assess alignment with EU directives, particularly the EU Return Directive, and understand the roles of institutional frameworks in managing return migrations. The report offers critical insights into the return policies of the EU and its MSs, emphasising the need for humane, effective, and rights-respecting return processes. It lays a foundation for future research and policy recommendations to improve the management of return migrations within the EU, advocating for policy alignment, legal reform, and enhanced cooperation among MSs.

Comparative studies on EU countries' return and readmission policies are instrumental in illuminating the nuances of return migration policies across different national contexts, bridging knowledge gaps and fostering collaboration between the EU, MSs and countries of origin. This report contributes to the academic and policy discourse on return migration. It offers important insights for policymakers to navigate the complexities of migration management in a manner that is effective, ethical, and aligned with the EU's values and international commitments.

In terms of methodology, this report employs a mixed-methods approach to comparative legal analysis that involves a detailed examination of the legal and political frameworks governing return migration policies in each country, including any relevant consumer protection laws or regulations. The analysis is structured in several phases to ensure a comprehensive understanding of each country's approach to return migration, facilitating a nuanced comparison across different legal and political contexts. The analysis is based on the document analysis of five country dossiers, each providing in-depth insights into the respective national frameworks.

In this framework, it reviews the literature regarding the EU and the national reports of the five countries to understand their return policies. Based on the literature review, the report identifies key themes or categories that are relevant to return policies. It extracts relevant information from each country's report according to the identified themes. This extraction reflects the critical aspects such as procedural safeguards, detention policies, procedural mechanisms for issuing return decisions, and notable political shifts impacting return migration policies. The thematic analysis seeks to highlight similarities and differences across the countries, focusing on how each nation navigates the complexities of return migration within its legal and political boundaries.

Based on the thematic analysis, a comparative analysis was developed to systematically assess and contrast the legal and political frameworks of the five countries. This framework guided the examination of each country's approach to return migration, considering the EU directives and international legal standards as reference points. The comparative framework enabled the identification of convergences and divergences in policy implementation, legal provisions, and handling return migration issues. By integrating a thematic analysis under three sub-sections ("procedure to issue return decisions", "procedural safeguards and non-returnability", and "detention") from a comparative perspective, the report offers a comprehensive overview of

the multifaceted nature of return migration policies, highlighting key areas for further research and policy development.

The report highlights similarities and differences and discusses the unique aspects of each country's policy. It presents the findings in a structured format, with clear headings for each theme and sub-sections for each country. It uses tables, charts, or graphs to compare the data visually. Finally, based on the comparative analysis, the report draws conclusions and provides recommendations.

The report is structured as follows. It begins with an analysis of the relevant statistics, policy, and institutional framework, followed by a legal framework analysis. It then details policy recommendations and a conclusion. Each section starts with a general overview of the EU and then continues with the selected five EU MSs. For the country cases, given the voluminous nature of the country dossiers, a short summary is provided, followed by a discussion of the comparative aspects, mainly focusing on similarities and differences.

2. Statistical Overview

2.1. Return Statistics and the EU

At both the EU and Member State levels, accurate and comprehensive data are essential for policy-making, monitoring, and evaluation purposes, enabling authorities to assess the impact of return policies and make informed decisions to address irregular migration. Additionally, statistics provide a basis for transparency and accountability, allowing for assessing compliance with international and EU legal frameworks. The Global Compact also states the importance of data for Safe, Orderly and Regular Migration (2018).¹ Out of the 23 objectives, the very first is to “collect and utilise accurate and disaggregated data as a basis for evidence-based policies” with an additional 11 sub-clauses. Meanwhile, the twenty-first objective is dedicated to returns and readmissions specifically, calling on states to “cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration”.

Under this section, this report will delve into the importance of statistics in the realm of return policy within the EU and its MSs, highlighting the critical role that data plays in shaping effective and humane migration management strategies. Systematic data collection plays a pivotal role in shaping migration management policies that are both humane and aligned with human rights principles. By gathering comprehensive statistics, including nuanced breakdowns such as the numbers of unaccompanied and separated children or individuals with disabilities, governments and policymakers are equipped with the crucial insights needed to understand the diverse needs of migrants. This detailed data collection fosters an environment of inclusion, compelling authorities to recognise and address the specific vulnerabilities and requirements of distinct migrant groups. It ensures that no individual falls through the cracks due to generalised policies that may overlook the unique challenges faced by certain populations.

Furthermore, universal data collection serves as a foundation for evidence-based policy-making, enabling the development of targeted interventions that safeguard the rights and

¹ United Nations (UN). 2018. Global Compact for Safe, Orderly and Regular Migration, 2018, Available at: <https://www.un.org/en/conf/migration/> (Accessed 8 April 2024).

well-being of all migrants, regardless of their circumstances. Therefore, this section examines the main gaps in current statistical practices, including the challenges of harmonising data collection, ensuring data quality, and facilitating data sharing among various stakeholders. In this framework, the return policy-related statistics and sources will be briefly examined, and then a comparative analysis will be provided in light of the selected countries' dossiers.

However, the country-based analysis as part of this work package (WP2) showed that significant gaps exist in collecting, analysing, and sharing return policy statistics. These gaps can hinder the ability of the EU and MSs to fully understand migration dynamics, evaluate policy effectiveness, and ensure that the rights of returnees are protected. Common challenges include discrepancies in data collection methodologies, lack of standardised definitions, and issues related to data sharing and privacy concerns. Such challenges can lead to incomplete or inconsistent data, making it difficult to draw accurate conclusions or compare policies and practices across different countries.

Since 2001, the EU has been working on a comprehensive and coherent framework for a common analysis and the improved exchange of statistics on asylum and migration. In April 2003, the European Commission (EC) released a communication to the Council and European Parliament, setting out an action plan for collecting and analysing the Union's statistics in the field of migration. This plan included several important changes designed to improve the completeness and degree of harmonisation of these statistics. Under the action plan, the EC aimed to propose legislation on community statistics, which resulted in the Council Regulation (EC) No 862/2007² of July 2007 on Community statistics on migration and international protection. Accordingly, the MSs shall supply to the Commission (Eurostat) statistics on the following categories, including one specifically regarding return policy:

- International migration, usually resident population, and acquisition of citizenship (Article 3);
- International protection (Article 4);
- Prevention of illegal entry and stay (Article 5);
- Residence permits and residence of third country nationals (Article 6), and;
- Returns (Article 7).

Enforcement of Immigration Legislation Data (EIL statistics) is based on Articles 5 and 7 of the Council Regulation (EC) No 862/2007, amended by Regulation 2020/851³ of June 2020. EIL statistics include some significant sections regarding return policy as follows:

- Refused entry at the external border;
- Found to be illegally present;
- Ordered to leave, and;

² Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers. Available at: [Regulation - 862/2007 - EN - EUR-Lex \(europa.eu\)](#) (Accessed 8 March 2024).

³ Regulation (EU) 2020/851 of the European Parliament and of the Council of 18 June 2020 amending Regulation (EC) No 862/2007 on Community statistics on migration and international protection; Available at: [Regulation - 2020/851 - EN - EUR-Lex \(europa.eu\)](#) (Accessed 8 March 2024).

- Returned following an order to leave.

In addition to the national authorities in the MSs, two key actors are involved in the data consolidation, quality and reporting in relation to return:

1. **Eurostat** is the community statistical authority of the Commission, and the legal basis for the production of European statistics is Regulation (EC) No 223/2009.⁴ Eurostat collects the data from the administrative records of the national authorities, mainly Ministries of Interior or Immigration Agencies. Eurostat publishes data sets, metadata, and national quality reports produced by countries.⁵
2. **The European Migration Network (EMN)** was formally established by Council Decision 2008/381/EC.⁶ The EMN's role is to provide up-to-date, objective, reliable, and comparable information on migration and asylum to support policy-making in the European Union and contribute to the public debate. The EMN has published annual reports on migration and asylum and has outlined significant political and legislative developments and debates in the EU MSs and at the EU level.⁷

Despite some categories of data being collected voluntarily, Regulation 2020/851⁸ introduced several changes, such as increasing the frequency of the data collection on returns and collecting more breakdowns for the statistics on third country nationals found to be in irregular situations and third country nationals returned. Statistics on third country nationals who are UAMs subject to return procedures are also collected following Regulation 2020/851. Regulation 2020/851 introduced new quarterly mandatory statistics on returns. The published data are based on the 2021 EIL Technical Guidelines⁹ and meet the minimum data quality requirements. From the first quarter of 2021, reporting quarterly statistics on returns became mandatory for all MS. However, some data availability issues still exist, and Eurostat

⁴ Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics and repealing Regulation (EC, Euratom) No 1101/2008 of the European Parliament and of the Council on the transmission of data subject to statistical confidentiality to the Statistical Office of the European Communities, Council Regulation (EC) No 322/97 on Community Statistics, and Council Decision 89/382/EEC, Euratom establishing a Committee on the Statistical Programmes of the European Communities, Available at: [LexUriServ.do \(europa.eu\)](https://eur-lex.europa.eu/lexUriServ.do?uri=CELEX:32009R0223:en:HTML) (Accessed 8 March 2024).

⁵ Eurostat, Enforcement of Immigration Legislation (migr_eil), Available at: https://ec.europa.eu/eurostat/cache/metadata/en/migr_eil_esms.htm (Accessed 8 March 2024).

⁶ 2008/381/EC: Council Decision of 14 May 2008 establishing a European Migration Network, Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008D0381> (Accessed 8 March 2024).

⁷ European Migration Networks Annual Reports, Available at: https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-publications/emn-annual-reports_en (Accessed 8 March 2024).

⁸ Regulation (EU) 2020/851 of the European Parliament and of the Council of 18 June 2020 amending Regulation (EC) No 862/2007 on Community statistics on migration and international protection, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.198.01.0001.01.ENG (Accessed 8 March 2024).

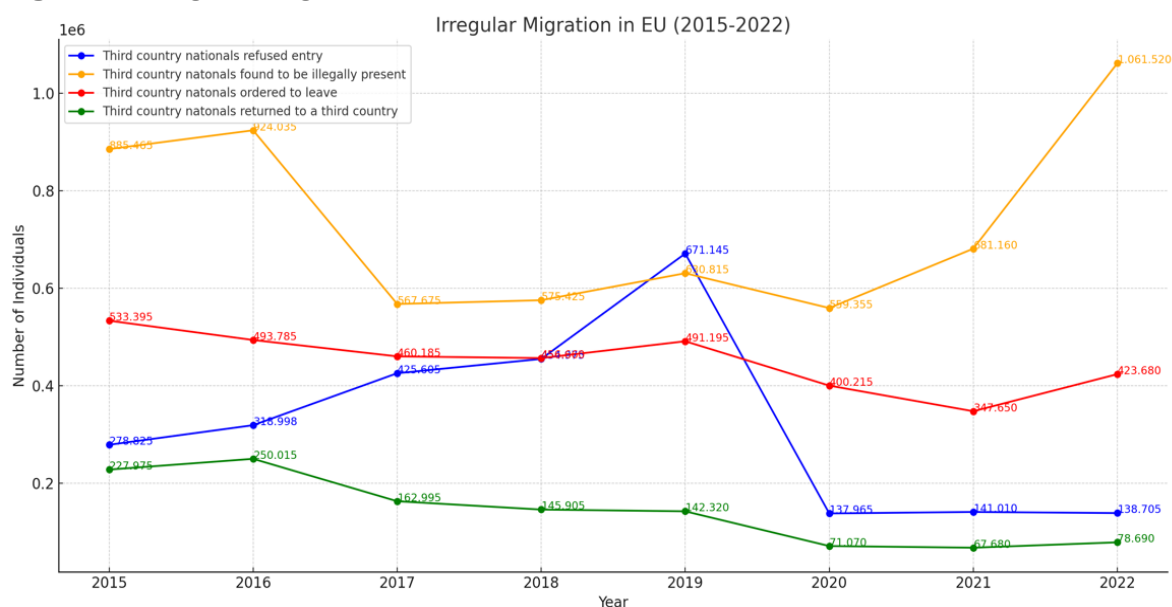
⁹ Technical Guidelines For The Data Collection Under Article 5 And 7 Of Regulation 851/2020 Amending Regulation 862/2007– Enforcement of Immigration Legislation (EIL) Statistics, January 2023, Available at: https://ec.europa.eu/eurostat/cache/metadata/Annexes/migr_eil_esms_an_5.pdf (Accessed 8 March 2024).

is in contact with each relevant country to provide the missing statistics. Some of the statistics are also affected by the derogations received for specific categories of data.

Building upon the framework established by the EU for the collection, analysis, and harmonisation of migration and asylum statistics, the data visualisations provided offer a tangible illustration of the trends and shifts in irregular migration and return types within the EU from 2015 to 2022. To create these data visualisations, the comparative report extracted the relevant data of the five countries covered in the report from the existing EU-sourced data in light of the identified indicators. As a result, we have ensured that data from all five countries can be viewed simultaneously in the visuals.

The trends observed in the data visualisations underscore the fluctuating nature of migration flows and the complexities involved in managing migration within the EU. The peak in refused entries in 2019, as depicted in Figure 1, reflects the outcomes of stringent border control policies and the EU's efforts to strengthen its external borders. These policies align with the EU's broader objective of managing migration more effectively and preventing illegal entry and stay.

Figure 1: Irregular Migration in the EU (2015–2022)



Source: Prepared by the authors for the EU level based on Eurostat data.¹⁰

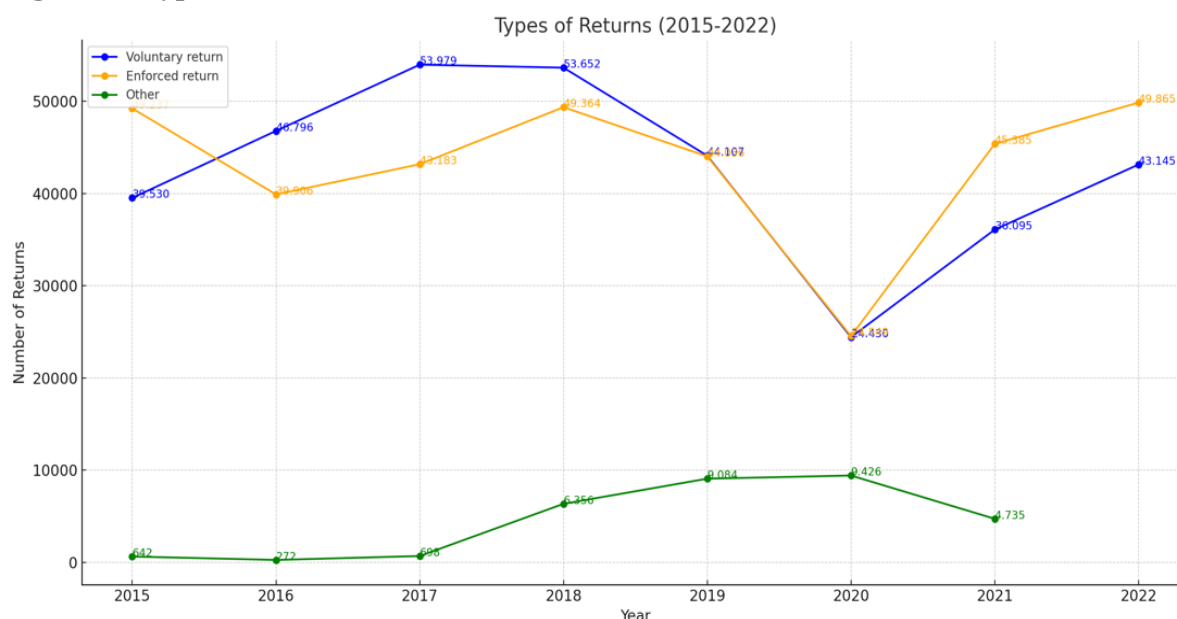
Figure 2 reveals the three types of return — voluntary, enforced, and other — highlighting the EU's multifaceted strategy for returns as part of its broader migration management framework. Return migration and return patterns disclose significant changes over the years,

¹⁰ Further details are available at: <https://ec.europa.eu/eurostat/databrowser/bookmark/fdca05e6-3c30-43dd-a929-f975a8764900?lang=en> (Accessed 8 March 2024), <https://ec.europa.eu/eurostat/databrowser/bookmark/aa6a64c1-96bf-45e6-af40-2cafo2dfcdb1?lang=en> (Accessed 8 March 2024), <https://ec.europa.eu/eurostat/databrowser/bookmark/3edb0480-65bf-4d0a-b469-8db643dac8fe?lang=en> (Accessed 8 March 2024), <https://ec.europa.eu/eurostat/databrowser/bookmark/2bcbae87-3e65-46ba-8d30-05fc3b121568?lang=en> (Accessed 8 March 2024), <https://ec.europa.eu/eurostat/databrowser/bookmark/o52da2b4-a854-4b27-977c-8228bc7ba4dc?lang=en> (Accessed 8 March 2024).

influenced by policy, enforcement, and external factors. However, the balance between voluntary and enforced returns has shifted slightly over the years, reflecting policy shifts.

The return of illegally staying third country nationals is one of the main pillars of the EU's policy on migration and asylum. However, recent Eurostat data show that the number of returns has not increased in proportion to the number of those ordered to leave, despite the significant increase in the number of rejected asylum applications and the number of return decisions issued. As shown by the EU's persistently low return rates in recent years, several significant challenges remain for the effective implementation of returns.

Figure 2: Types of Returns (2015–2022)



Source: Prepared by the authors for the EU as based on Eurostat data.¹¹

Despite the data harmonisation strategies, data collection and the actors involved in the process vary by country, reflecting the complexity of return migration governance in the EU. The issues and inconsistencies in the data collection processes significantly impact the comparative analysis of return migration statistics. The lack of a unified European data collection system leads to inconsistencies across all countries in definitions (e.g., variation in the criteria for a “return decision”), reporting standards, and timelines. There is also the problem of double counting, where individuals might be counted in multiple countries if they move within the Schengen area. Furthermore, the difference between the issuance of return orders and actual departures presents a challenge in assessing the effectiveness of return policies. Taking the five EU countries as cases, the section below provides an example of the data issues and actors involved.

¹¹ Available at: <https://ec.europa.eu/eurostat/databrowser/bookmark/13bofo8d-ab4a-4c67-b6ef-13907dc6defb?lang=en> (Accessed 8 March 2024), <https://ec.europa.eu/eurostat/databrowser/bookmark/d9d4012c-c793-4102-9e3d-7b2bf342490b?lang=en> (Accessed 8 March 2024).

2.2. Data Sources, Actors and Inconsistencies: Reflections on the Selected GAPs Countries

2.2.1. General Information

Germany's primary data collection sources are the Federal Office for Migration and Refugees (BAMF) and the Federal Statistical Office (DESTATIS). These bodies are responsible for compiling migration-related data, including asylum applications and enforcement of return decisions. Data from Germany shows complexity and heterogeneity due to the decentralised nature of its data collection, as the states (*Länder*) have their own programmes and practices. Therefore, the data is not standardised, making year-over-year and cross-national comparisons difficult. Remarkably, the number of refusals at the border includes figures for EU citizens, which is not a standard practice across other EU states, leading to inflated numbers compared to Eurostat.

The Hellenic Police and the Ministry of Migration Policy are key actors in **Greece's** data collection. The national data is also fed into the Eurostat database, where it is compiled and partially standardised. The Greek data show inconsistencies between annual and quarterly Eurostat data on TCNs returned following an order to leave. Moreover, allegations of push-back and other illegal practices have been consistently denied by the Greek government, yet investigations and reports by journalists and human rights organisations provide conflicting evidence and testimonies. The result is a gap between official statistics and on-the-ground reports.

The Office for Foreigners and the Border Guard are the primary agencies managing migration data in **Poland**, including the enforcement of returns. The increasing trend in border refusals and return orders may not be accurately captured due to differences in data collection methodologies between border enforcement and immigration services.

In **Sweden**, the Migration Agency and the Police Authority are the main actors collecting data on asylum, residence permits, and return decisions. Swedish data collection practices have been criticised for not being systematic or coherent. The Swedish Police Authority has stated the difficulty in providing accurate assessments of irregular migrants present. The Migration Agency's data collection on return-related matters is not readily accessible or disaggregated, which hampers external evaluation and contributes to a lack of clarity and potential dissemination of misinformation.

The Immigration and Naturalisation Service (IND), in conjunction with the Central Agency for the Reception of Asylum Seekers (COA) and the Repatriation and Departure Service (DT&V), collect data on migration and returns in **the Netherlands**. In the Netherlands, there are significant discrepancies between national and Eurostat statistics, particularly from 2015 to 2017. The national data do not align with the EMN's findings regarding the number of migrants who refused entry at the borders, were found to be illegally staying, and were ordered to leave. Additionally, there are differences in the reported numbers of forced returns, with the EMN's figures consistently higher than those of the national service (DT&V) from 2016 to 2018.

2.2.2. Comparative Statistical Analysis

In order to provide a comparative statistical analysis for the selected five countries, the Enforcement of Immigration Legislation (EIL) statistics of Eurostat were combined in a macro dataset that includes asylum applicants and irregular migration data categories. This dataset was later imported into the Zoho Analytics Dashboard¹² to contribute to a comparative analysis across the five selected countries. The section below provides the descriptive data analysis and visualisation of the respective data sets of Eurostat. The data in this section evidences the dynamic interaction among national policies, the geopolitical landscape, EU legislation, and the patterns of return migration. It suggests that the EU policy shifts have substantially influenced the enhancement of community statistics on return migration, though the degree of this enhancement varies across the five selected countries. Collecting data that includes origin and destination countries facilitates an analysis of geographical return patterns, which, in turn, informs the development of enforcement strategies and legal frameworks. The standardised collection of EIL statistics, mandated by the EU legislation, aids in unifying and diversifying the data amassed at the Member State level. However, technical issues often stem from divergent definitions, the specific data requirements of the MSs, and their varied institutional arrangements. Certain countries show a correlation between their geographical location along the Mediterranean corridor and rising numbers of asylum seekers and irregular migrants. Additionally, the research uncovers significant discrepancies between the number of “third country nationals ordered to leave” and those “actually returned”, highlighting the difficulties in executing return procedures. These insights align with ongoing discussions about the role of datafication in managing migration and forming the basis of evidence-driven policy-making.

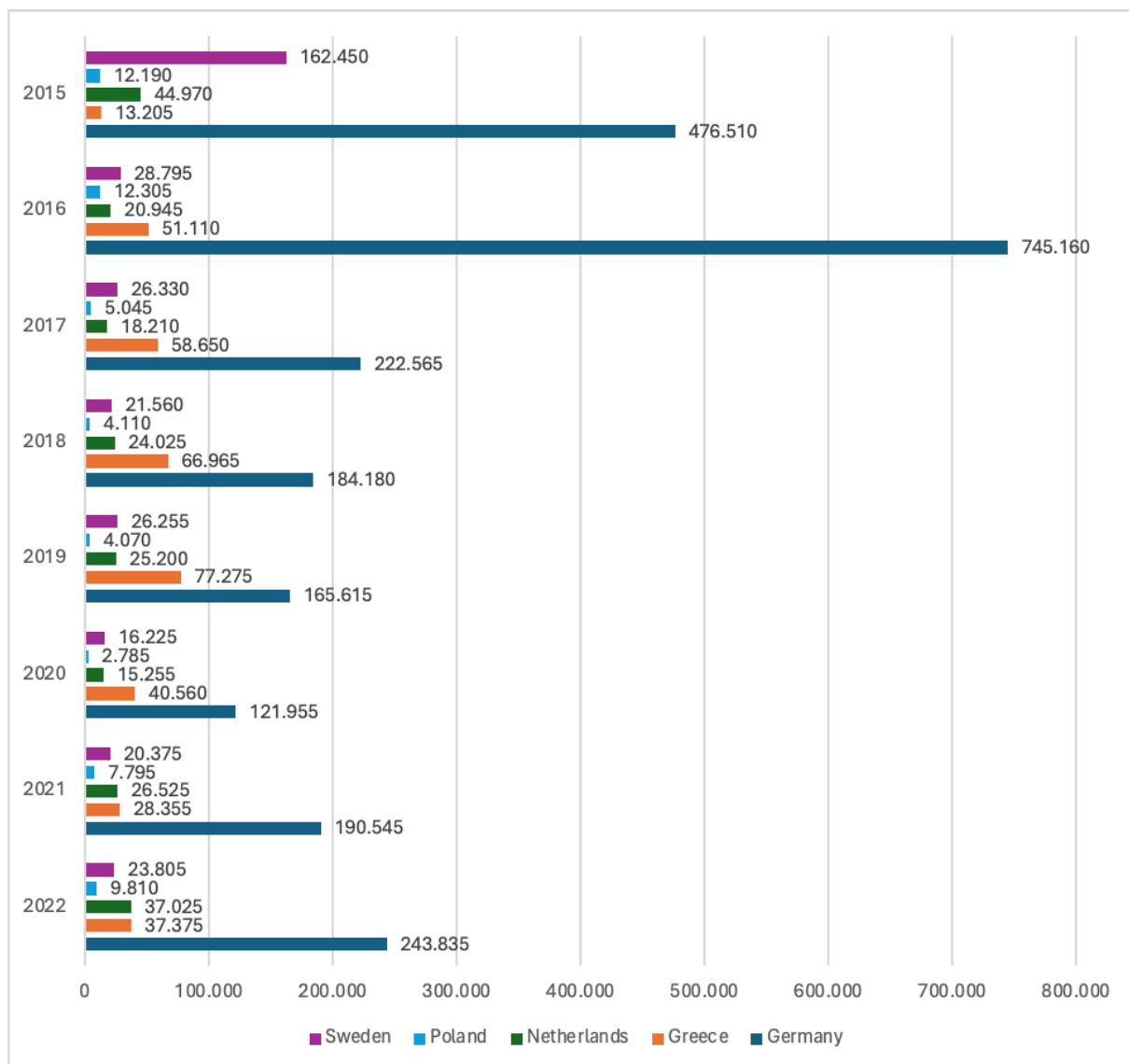
2.2.2.1. Asylum Applicants

The number of asylum applicants varies significantly across the five countries, with Germany experiencing a notable peak in 2016 (745,160 applicants). This peak indicates the social and environmental capacity during the “European migrant crisis”.¹³ Sweden also saw a significant number of applications in 2015 (162,450). Greece’s figures in 2016 (51,110) align with its geographical positioning on the Mediterranean route, showing an increasing trend until 2019. In comparison, the Netherlands and Poland experienced lower and more stable application numbers, suggesting different migratory pressures or policy responses.

Figure 3: Asylum Application in the Five Selected Countries (2015–2022)

¹² Available at: <https://analytics.zoho.com/workspace/22528820000000009677/view/22528820000000306780> (Accessed 8 March 2024).

¹³ This refers to the governance crisis that emerged during the 2015–2016 refugee emergency, characterised by an extraordinary flows of migrants and refugees into Europe, which exceeded the existing governance capacity and migration policies. This crisis was marked by increased instability and uncertainty, leading to the inadequacy of existing institutions and processes to manage the situation effectively. The governance crisis facilitated a process of policy change, involving the redefinition of institutional roles, transformation of pre-existing rules and norms, and the emergence of new discursive frames. As a result, the crisis significantly shaped migration governance in Europe, with lasting effects beyond the immediate crisis period.



Source: Prepared by the authors for the selected countries based on Eurostat data.¹⁴

2.2.2.2. Stock of Irregular Migrants

Germany has had an average of approximately 200,984 irregular migrants with a significant standard deviation, indicating a wide variation over the years. The minimum and maximum stocks were 117,930 and 376,435, respectively. Greece shows the highest variability, with an average of 191,895 irregular migrants. The standard deviation is quite large, reflecting the extreme fluctuation in numbers, ranging from a minimum of 38,015 to a maximum of 911,470. This deviation is also based on the significant changes between 2015 (the year of the height of the “European migration crisis” and the “long summer of migration”) and 2021 (owing to border closures due to COVID-19 and restrictive policies).

¹⁴ Asylum applicants by type—annual aggregated data, Available at: https://ec.europa.eu/eurostat/databrowser/view/tps00191/default/table?lang=en&category=t_migr.t_migr_asy (Accessed 8 March 2024).

The Netherlands had the lowest numbers, with an average of 3,568 irregular migrants. The figures are more consistent here, with a smaller standard deviation and numbers ranging from 2,120 to 5,510. Poland's average stock was 20,787, with numbers showing moderate variability over the years. The stock ranged from 10,510 to 31,245. Sweden had an average of 2,049 irregular migrants, with relatively low variability. The numbers ranged from 1,210 to 2,635.

Table 1: Stock of Irregular Migrants in the Five Selected Countries (2015–2022)¹⁵

Year	Germany	Greece	Netherlands	Poland	Sweden	Total
2015	376,435	911,470	3,150	16,835	1,445	1,309,335
2016	370,555	204,820	2,760	23,375	1,210	602,720
2017	156,710	68,110	2,120	28,470	2,145	257,555
2018	134,125	93,365	2,790	31,245	1,720	263,245
2019	133,525	123,025	3,565	30,900	2,170	293,185
2020	117,930	47,295	3,640	12,170	2,615	183,650
2021	120,285	38,015	5,010	12,795	2,635	178,740
2022	198,310	49,060	5,510	10,510	2,455	265,845

Source: Prepared by the authors for the selected countries based on Eurostat data.¹⁶

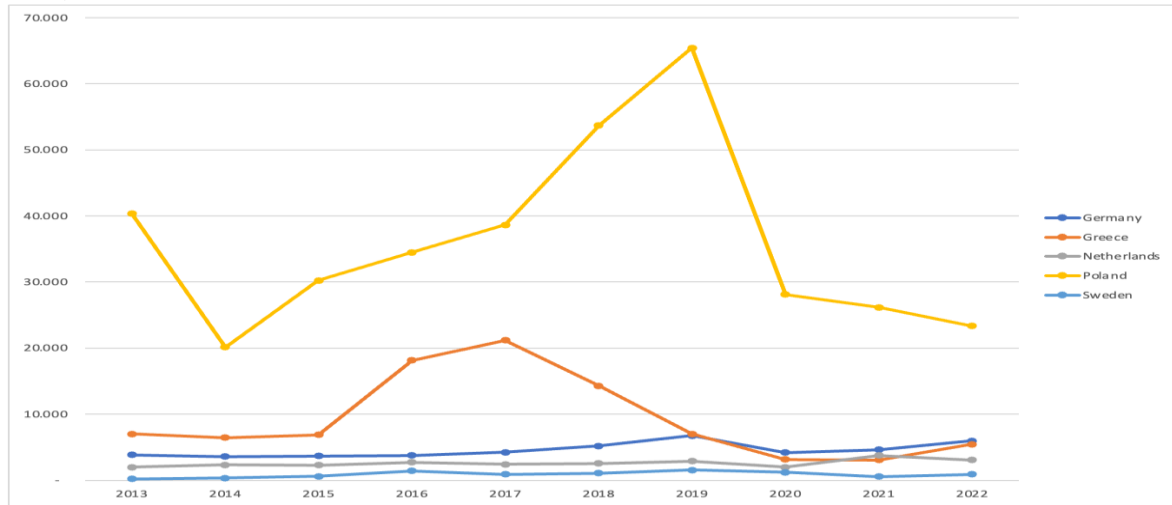
2.2.2.3. TCNs Refused at the Border

Poland's data indicates strict border enforcement, with refusal numbers progressively increasing from 2015 (30,245) to 2018 (53,695). Greece's increase in 2016 (18,145) is likely a consequence of heightened migration flows during the crisis. The lower and stable numbers in Germany, the Netherlands, and Sweden suggest established and effective immigration controls within the Schengen zone.

¹⁵ This table reflects the stock of irregular migrants in the selected country by year, and therefore does not represent unique number of irregular migrants, rather focuses on stock in the respective year.

¹⁶ Third country nationals found to be illegally present, annual data (rounded), Available at: https://ec.europa.eu/eurostat/databrowser/view/migr_eipre/default/table?lang=en (Accessed 8 March 2024).

Figure 4: Third Country Nationals Refused Entry at the Border in the Five Selected Countries (2015–2022)

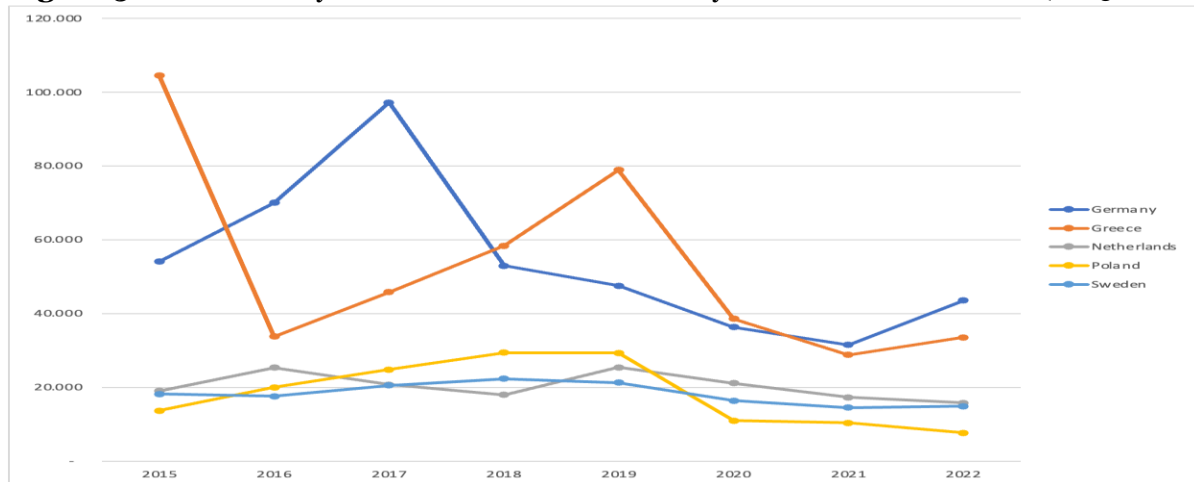


Source: Prepared by the authors for the selected countries based on Eurostat data.¹⁷

2.2.2.4. TCNs Ordered to Leave

In 2015, Greece directed a substantial number of TCNs to leave (104,575), reflecting the pressures of entry-point management. Germany's significant figures in 2017 (97,165) denote intensified enforcement actions, potentially due to the backlog from the 2016 asylum peak. The data from Poland and the Netherlands illustrate a growing trend of enforcement, while Sweden shows a modest increase by 2018 (22,310)

Figure 5: Third Country Nationals Ordered to Leave by Five Selected Countries (2015–2022)



Source: Prepared by the authors for the selected countries based on Eurostat data.¹⁸

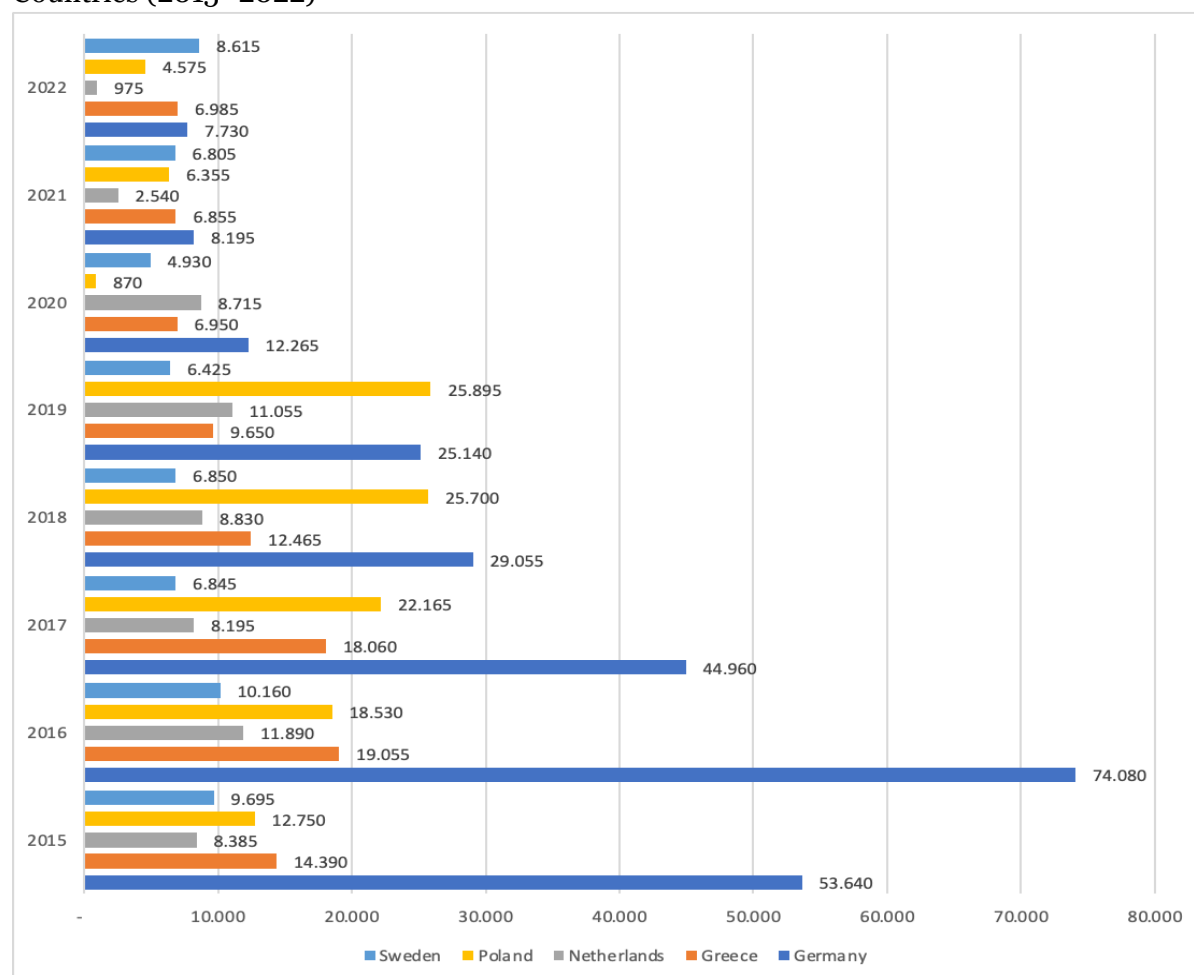
¹⁷ Prepared for the selected countries based on Eurostat data. Third country nationals refused entry at the external borders—annual data (rounded), Available at: https://ec.europa.eu/eurostat/databrowser/view/migr_eirfs/default/table?lang=en (Accessed 8 March 2024).

¹⁸ Prepared for the selected countries based on Eurostat data. Third country nationals ordered to leave—annual data (rounded), Available at: https://ec.europa.eu/eurostat/databrowser/view/migr_eiord/default/table?lang=en (Accessed 8 March 2024).

2.2.2.5. TCNs Returned Following Order to Leave

Germany experienced a peak in the number of TCNs returned in 2016 (74,080), with subsequent years showing a notable decrease to 44,960 in 2017 and down further to 29,055 in 2018. Greece had relatively lower numbers, with a slight increase from 14,390 in 2015 to 19,055 in 2016, followed by a decrease to 18,060 in 2017 and a further decrease to 12,465 in 2018. The Netherlands presented a varied trend, starting with 8,385 in 2015, increasing to 11,890 in 2016, then a decline to 8,195 in 2017, and a slight rise to 8,830 in 2018. Poland demonstrated a consistent year-over-year increase in the number of TCNs returned, from 12,750 in 2015 to 18,530 in 2016, 22,165 in 2017, and reaching 25,700 in 2018. Sweden displayed modest fluctuations over the years, with an initial figure of 9,695 in 2015, increasing to 10,160 in 2016, then decreasing to 6,845 in 2017, and remaining relatively stable with a slight increase to 6,850 in 2018.

Figure 6: Third Country Nationals Returned Following Order to Leave in the Five Selected Countries (2015–2022)



Source: Prepared by the authors for the selected countries based on Eurostat data.¹⁹

¹⁹ Prepared for the selected countries based on Eurostat data. Third country nationals returned following an order to leave—annual data (rounded), Available at: https://ec.europa.eu/eurostat/databrowser/view/migr_eirtn/default/table?lang=en (Accessed 8 March 2024).

3. Political and Legal Developments Regarding Return Policy: Reflections from the EU and the Selected Member States

This section explores the timelines of policy changes, identifying key moments that have shaped each country's approach to return and readmission. The section aims to uncover the main patterns and insights regarding return migration policies by examining the similarities and differences across these national frameworks. The EU and its return policy will be briefly visited before focusing on the comparative dimension and the cases of the selected countries.

3.1. The Policy Framework of the EU Regarding Return and Readmissions (1990–2023)

The timeline of the EU's policy framework highlights the EU's ongoing efforts to develop a cohesive, fair, and effective return policy as part of its broader migration management strategy. The emphasis has gradually shifted towards more efficient procedures and international cooperation, particularly with the third countries, reflecting migration dynamics' complex and evolving nature. The EU has aimed to balance the need for effective return procedures with the fundamental rights of migrants; ensuring that returns are carried out humanely and dignifiedly through implementing these principles is not always the case.

The EU's return policy encompasses a range of policy tools and mechanisms developed since the 1990s to manage the return of irregular migrants. This policy framework has evolved to address practical, legal, and operational challenges, reflecting the dynamic nature of migration patterns and the geopolitical context influencing migration to and within the EU.

The major turning points for the EU's return policy since the 1990s include the establishment of the Schengen Agreement (1985), the Schengen Convention (signed in 1990, entered into force in 1995)²⁰ and the Dublin Convention (signed in 1990, entered into force in 1997)²¹ in the

²⁰ The Schengen acquis (Schengen Agreement and the Convention), encompassing the agreement, convention, and associated rules, was incorporated into the EU's legal framework in 1999, and transformed into EU legislation through the Lisbon Treaty, which aims for an "area without internal frontiers" ensuring free movement of people. Today, the Schengen Area encompasses most EU countries, except for Cyprus and Ireland; while as of 31 March 2024, Bulgaria and Romania became the newest Member States to join the Schengen Area, any person crossing the internal air and sea borders will no longer be subject to checks. Nevertheless, a unanimous decision on the lifting of checks on persons at the internal land borders is still expected to be taken by the Council at a later date. Additionally, the non-EU States Iceland, Norway, Switzerland and Liechtenstein also have joined the Schengen Area. See the European Commission, "Schengen Area", 2024, Available at: https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area_en (Accessed 2 May 2024). Thus, the Schengen acquis includes provisions related to the return of individuals not authorised to stay in the Schengen area. In this regard appears as the early settings for cooperation on returns.

²¹ The Dublin Convention is no longer in force, but after the several changes it was replaced with the Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country

early 1990s, which laid the groundwork for the EU cooperation on migration and asylum issues, including returns. The Tampere European Council in 1999 further emphasised the need for a common EU asylum and migration policy. The “Management of Migration Flows” section stressed the importance of assisting countries of origin and transit to promote voluntary return and cope with their readmission obligations towards the EU and the MSs (Conclusion 26).

During the 2000s, the EU developed formalisation and initial policies. In 2002, the Seville European Council emphasised the importance of return policies in managing migration. In 2004, the European Agency for the Management of Operational Cooperation at the External Borders was established (reorganised as the European Border and Coast Guard Agency or Frontex in 2016). It plays a crucial role in coordinating and supporting joint return operations. Frontex assists in organising and funding charter flights for returns, provides training to national authorities, and enhances the operational efficiency of return procedures.

The 2000s also saw the establishment of the EU Readmission Agreements (EURAs) between the EU and non-EU countries, important tools to facilitate the return and readmission of individuals who do not or no longer fulfil the conditions for entry, stay, or residence in the EU or a partner country. EURAs are key instruments to ensure cooperation with third countries on return and readmission, streamlining the process of sending back irregular migrants. The first community readmission agreement with Hong Kong was signed in 2002 and entered into force in 2004.²² Additional EURAs were subsequently signed with the following countries: Macao (2004); Sri Lanka (2005); Albania (2006); Russia (2007); Ukraine, North Macedonia, Bosnia & Herzegovina, Montenegro, Serbia and Moldova (all in 2008); Pakistan (2010); Georgia (2011); Armenia, Azerbaijan, Türkiye and Cape Verde (all in 2014); and Belarus (2020).²³ In addition, legally non-binding readmission arrangements have also been reached with Afghanistan, Guinea, Bangladesh, Ethiopia, The Gambia, and the Ivory Coast.²⁴ The EU has concluded legally non-binding readmission arrangements such as the EU–Turkey Statement. In several legal instruments and informal policies, the EU has made other benefits for partner countries conditional upon good cooperation in return, such as in the regulations on visa facilitation and liberalisation and in broader cooperation agreements (such as the Cotonou Agreement, recently followed by the Samoa Agreement).²⁵ In 2019, the Commission proposed to condition trade tariff preferences for the least developed countries to their cooperation on returns.²⁶

national or a stateless person (recast), Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02013R0604-20130629> (Accessed 4 February 2024).

²² MEMO/02/271/EC of 27 November 2002, “Readmission Agreements”. Available at: https://ec.europa.eu/commission/presscorner/api/files/document/print/en/memo_02_271/MEMO_02_271_EN.pdf (Accessed 4 December 2023).

²³ European Commission, “A humane and effective return and readmission policy”, 2024a, Available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en, (Accessed 8 March 2024).

²⁴ Ibid.

²⁵ Article 8 and recital 22 of Regulation (EU) 2018/1806, Article 25a of Regulation (EU) 1155/2019; Art. 13(5)(c)(i) of the Cotonou Agreement, Decision 2000/483/EC of the Council of 15 December 2000.

²⁶ See Article 19(1)(c) of COM(2021) 579, the Commission proposal for a Regulation on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012.

However, the most important legal development was the adoption of the Return Directive in 2008,²⁷ which established common procedures for returning third country nationals who were staying illegally. This Directive can be seen as the cornerstone of the EU's return policy, setting common standards and procedures for returning illegally staying third country nationals. It introduced clear rules on voluntary return, removal, detention, and re-entry bans, aiming to ensure effective return procedures across MSs while respecting migrants' rights. Since then, the EU has continued to refine its return policy, with revisions proposed to the Return Directive. Following its adoption, the MSs were required to transpose the Directive into national law by December 2010. The initial years focused on monitoring the implementation across MSs, identifying best practices, and addressing challenges in harmonising return procedures. In order to support the MSs in implementing the Return Directive and financing measures to promote voluntary returns and improve the management of return processes, the decision²⁸ was taken regarding establishing the European Return Fund (ERF) in 2007. The ERF has facilitated the development of national return programmes and supported reintegration projects for returnees in their countries of origin.

During the 2010s, the enforcement and cooperation of the EU's return policy were strengthened. In 2011, the European Return Platform for Unaccompanied Minors (ERPUM) was launched, focusing on the return of UAMs.

In 2014, the Asylum, Migration and Integration Fund (AMIF) was established for the 2014–2020 period by merging the previous three separated funds for the 2007–2013 period, namely the European Refugee Fund, the ERF and the European Fund for the Integration of Third Country Nationals. AMIF funds significant actions regarding return policy management at the EU and the Member State level, such as supporting an integrated and coordinated approach to return, capacity development regarding effective and sustainable return, supporting assisted voluntary return and reintegration, cooperating with third countries, countering irregular migration and on effective return and readmission to manage migration.²⁹

In 2015, the European Agenda on Migration³⁰ proposed a more coordinated approach to managing migration across the EU, emphasising the role of returns. The EU's controversial and highly criticised hotspot approach was introduced as part of the Agenda as a strategy to manage the sudden and significant influx of migrants at the EU's external borders. It involves

²⁷ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0115> (Accessed 2 February 2024).

²⁸ Decision No 575/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Return Fund for the period 2008 to 2013 as part of the General Programme Solidarity and Management of Migration Flows, Available at: <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vitgbgimoxzr> (Accessed 4 January 2024).

²⁹ European Commission, "Asylum, Migration and Integration Fund (2021–2027)"; Available at: https://home-affairs.ec.europa.eu/funding/asylum-migration-and-integration-funds/asylum-migration-and-integration-fund-2021-2027_en (Accessed 4 January 2024).

³⁰ Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration', Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015AE4319> (Accessed 2 February 2024).

the establishment of first reception facilities, known as hotspots, where EU agencies such as the European Union Agency for Asylum (EUAA), Frontex, Europol, and Eurojust collaborate with the authorities of frontline MSs facing disproportionate migratory pressures. The primary goals are to enhance the registration, identification, and fingerprinting of incoming migrants and ensure that those needing international protection are quickly channelled into the appropriate asylum procedures. The hotspot approach is closely related to several critical aspects of EU return policy. For migrants not qualifying for international protection, Frontex assists MSs by coordinating the return of irregular migrants. The collaboration aims to dismantle smuggling and trafficking networks, thereby addressing one of the root causes of irregular migration. Despite these criticisms, the hotspot approach remains one of the key components of the EU's strategy to manage migratory pressures and align with its broader migration policy objectives, including the return and readmission of migrants not in need of international protection. After the European Council and the European Parliament endorsed the New Pact on Migration and Asylum (2023), the hotspot approach, which had initially been introduced as a temporary measure, was institutionalised. It involves treating individuals arriving at the border as if they had not entered EU territory, which leads to diminished protections and the confinement of these individuals in reception centres.

The EU has released several action plans on return, outlining measures to improve the effectiveness of return procedures during the 2010s. These plans include enhancing cooperation with third countries, improving data management, and increasing the capacity of MSs to carry out returns. The EC adopted the first EU Action Plan on Return in 2015, focusing on increasing the effectiveness of the EU system in returning irregular migrants and enhancing cooperation on readmission with countries of origin and transit. It was renewed in 2017 by the Commission.³¹

The “European migration crisis” has reinforced return efforts and collaboration with third countries. One of the developments in this regard is the Valletta Summit on Migration (2015),³² where the Action Plan outlined five specific areas. Regarding return, the Summit addressed enhancing measures for return, readmission, and reintegration of irregular migrants. The return element was the crucial element of the Summit, and the EU pledged to work with African partners to target criminal networks involved in migrant smuggling and trafficking. The EU offered to open more legal migration channels in return for greater cooperation. However, as legal migration remains primarily a competence of the MSs, where legal migration is often a contentious political issue, this intention has not led to a significant increase in the number of legal pathways.

In 2015, the Commission launched the “Integrated Return Management System” (IRMS) to improve practical cooperation among the MSs. This system is supported by the Integrated Return Management Application (IRMA), an online platform and a toolbox for return practitioners, “featuring a knowledge store with return related information on Third Countries

³¹ Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union—a renewed action plan, Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0200> (4 February 2024).

³² Further information is available at: <https://www.consilium.europa.eu/en/meetings/international-summit/2015/11/11-12/> (Accessed 9 February 2024).

[...]; information on (the transfer of activities of) EU-funded programmes; secure (national) workspaces; encrypted messaging and return data collection”.³³

The closure of the Balkan route in March 2016 was a significant event in the European migration crisis, profoundly impacting the flow of refugees and migrants towards Western Europe. This decision left thousands of asylum seekers stranded and underscored the EU’s divisions on how to handle the crisis. It also referred to the returns and refusals at the borders. With the adoption of the EU–Turkey Statement in 2016,³⁴ a new era of next-generation bilateral agreements based more on political consensus than traditional readmission agreements began. The Statement included provisions for return and readmission arrangements. Also in 2016, the European Border and Coast Guard Agency (Frontex) was established, replacing the European Agency for the Management of Operational Cooperation at the External Borders with a strengthened mandate, including the return of irregular migrants. In 2016, the Schengen Border Code³⁵ was adopted as a regulation, which has essential arrangements regarding return. In April 2024, the Parliament and Council adopted another revision of the Schengen Border Code, which allowed the MSs to immediately return undocumented third country nationals at the internal borders to the Member State they departed from unless they wanted to apply for asylum.

In 2017, the EU Return Handbook³⁶ was updated to provide more explicit guidance to the MSs on returning migrants. It was first issued in 2015 and updated subsequently. It clarifies procedures and best practices for returning migrants, aiming to enhance the effectiveness and uniformity of return practices across the EU. In 2018, the European Commission proposed a revision of the Return Directive intending to harmonise return procedures further and improve their efficiency.³⁷ Key proposals among the suggested changes to make returns more effective included removing the obligation to grant a voluntary departure period or shortening the deadlines for voluntary departure, a non-exhaustive list with criteria defining the risk of absconding, an extension of the grounds for detention and an obligation for a minimum detention period in national legislation, and more restrictions on the right to appeal if the asylum procedure has been completed. In addition, more straightforward rules on detention and a more streamlined appeal process have been suggested for more effective returns.

³³ Frontex, “Integrated return management application”, *Frontex Publications Office*, 2020, Available at: <https://op.europa.eu/en/publication-detail/-/publication/7f17a76a-719e-11eb-9ac9-01aa75ed71a1> (Accessed 5 March 2024).

³⁴ The EU–Turkey Statement, 18 March 2016, Available at: <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/EU-Turkey-statement/> (Accessed 5 March 2024).

³⁵ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399> (Accessed 3 February 2024).

³⁶ Return Handbook of 16 November 2017, C(2017)6505; its Renewed Action Plan, COM(2017); the Communication on voluntary return, COM(2021)120 and the Communication on enhancing cooperation on return and readmission, COM(2021)56.

³⁷ COM (2018)634, 12 September 2018, proposal for a recast of the Return Directive, https://eur-lex.europa.eu/resource.html?uri=cellar:829f8ece-b661-11e8-99ee-01aa75ed71a1.0001.02/DOC_1&format=PDF

As of 2024, the EU's efforts to recast the Return Directive, initially proposed in 2018, have seen significant procedural developments but have yet to culminate in a finalised piece of legislation. Despite the urgency and risk of absconding, the initial proposal by the EC in September 2018, the legislative process encountered delays. The European Parliament's Civil Liberties, Justice, and Home Affairs Committee (LIBE) has been central to the discussions, considering numerous amendments to the proposal. In the European Parliament, a draft report was presented but not adopted within the 2014–2019 parliamentary term, leading to a decision to resume work until after the 2019 elections. The COVID-19 pandemic further delayed proceedings, with a new draft report published in February 2020 and discussed in September 2020.

The committee has since been deliberating over the proposed amendments, indicating ongoing negotiations and adjustments to the initial proposal, but taking account of the negotiations on the New Pact, which include one part of the recast proposal (notably the return border procedure) and many other provisions on return.³⁸ The Council had already adopted a partial agreement in June 2019 but is currently working towards a more fundamental revision of the Return Directive, intending to provide guidance for a new Commission to replace the current Commission proposal with a new one.³⁹ The Council discusses, amongst others, the achievement of mutual recognition of a return decision with the establishment of a "European return decision", the simultaneous issuance of the rejection of an asylum claim and a return decision, more derogations to the safeguards for public policy reasons and an increased use of Frontex.

As of the 2020s, the new era starts for the EU's return policy, where instead of EURAs, the new pacts and enhancement take place. During this period, enhancements in operational cooperation for returns, including using Frontex for coordinated returns, have been observed. In 2020, the New Pact on Migration and Asylum was proposed to overhaul the EU's migration and asylum system, with the claim of being more efficient and humane return policies. However, the return border procedures, the numerous derogations from the safeguards in the border procedure and the Crisis Regulation⁴⁰ risk the opposite, which gives right to the MSs in crisis situations and exceptional circumstances, to derogate from certain rules and request solidarity and support measures.

In 2021, the EC adopted the EU strategy on voluntary return and reintegration.⁴¹ It promotes the importance of voluntary returns and aims to increase their share and number while

³⁸ European Parliament, "Proposal for a recast of the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals". 20 March 2024, Available at: <https://www.europarl.europa.eu/legislative-train/theme-promoting-our-european-way-of-life/file-proposal-for-a-recast-of-the-return-directive> (Accessed 2 February 2024).

³⁹ See Council document 15277/23, 13 November 2023, 'Making the Returns System more effective', <https://www.statewatch.org/media/4107/eu-council-return-plans-return-decision-15277-23.pdf>, (Accessed 28 March 2024).

⁴⁰ European Council, "Response to the migration crisis and force majeure situations", 23 April 2024, Available at: <https://www.consilium.europa.eu/en/policies/eu-migration-policy/eu-migration-asylum-reform-pact/migration-crisis/> (Accessed 2 May 2024).

⁴¹ European Commission, "Communication from the Commission to the European Parliament and the Council: The EU strategy on voluntary return and reintegration", 27 April 2021, Available at:

improving the quality of the support provided to returnees. The return coordinator, appointed by the EC in March 2022, is supported by the MSs' representatives on the High-Level Network for Return and Frontex.

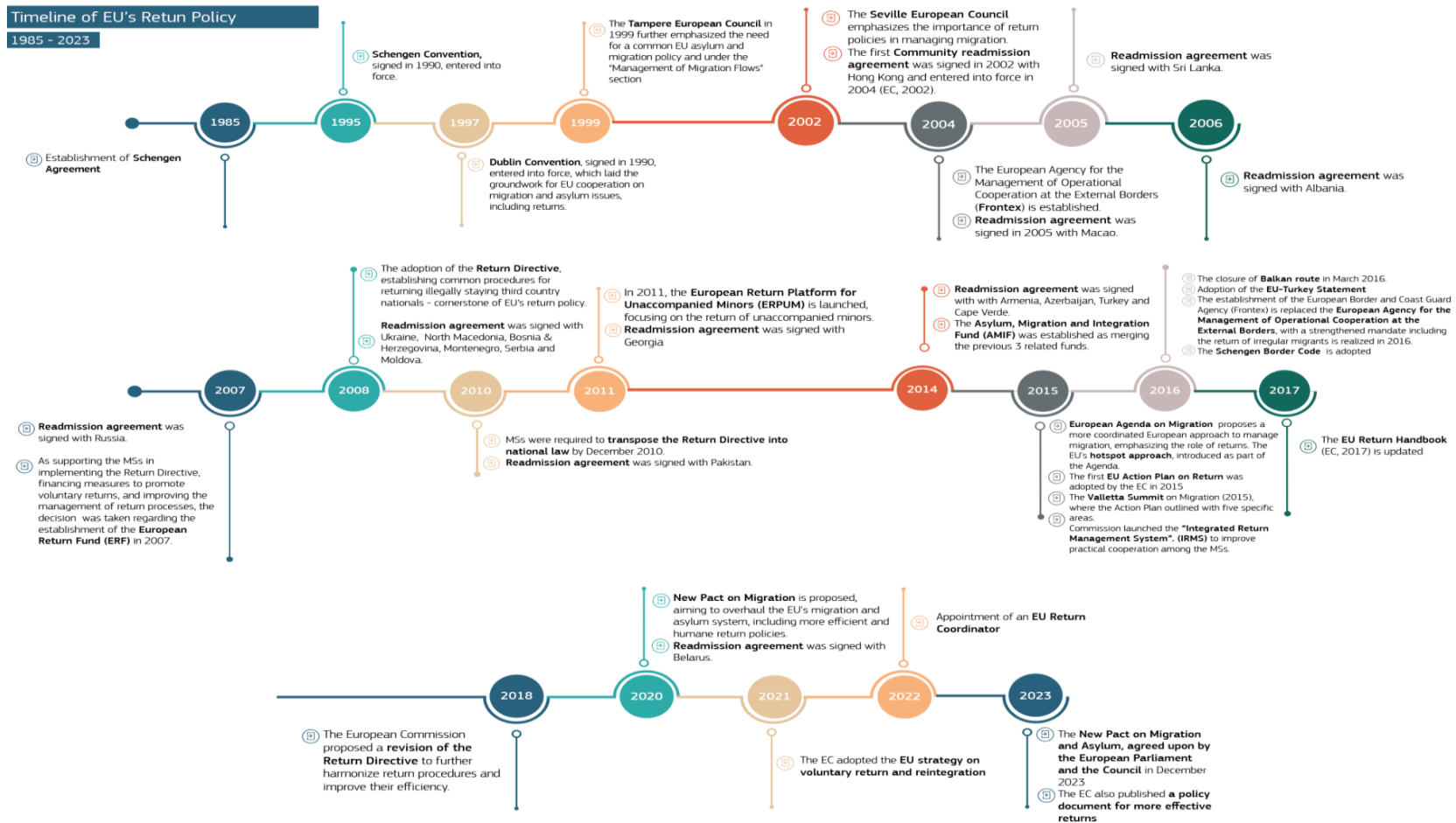
In December 2023, the European Parliament and the Council formally authorised the New Pact on Migration and Asylum. Implementation of the New Pact is set to begin in 2024, although full implementation may take up to two years. One of the core elements of the New Pact that pertains to returns is the enhancement of the EU's return policy. This includes making asylum, return, and border procedures more effective and flexible. The aim is to ensure a fair, efficient, and enforceable return strategy that respects fundamental rights and the principle of non-refoulement. The New Pact proposes to streamline and expedite return procedures to reduce the time irregular migrants spend in the asylum system if their applications are not successful. This includes the introduction of a new expedited border procedure for individuals deemed unlikely to win asylum, ensuring that their claims are processed quickly and, if rejected, that they are returned to their home countries within a specified timeframe.

Moreover, the New Pact emphasises the need for solidarity and responsibility sharing among the MSs, which extends to the return process. Such joint action entails improving cooperation on readmission with third countries and enhancing the operational support provided by Frontex in coordinating return operations. Finally, in 2023, the EC published a policy document for more effective returns.⁴²

The New Pact introduces an asylum border procedure and a return border procedure (mandatory for three categories of asylum seekers, optional in case a ground applies for an accelerated procedure) with a maximum duration of up to 6 months, in which asylum seekers (with the exception of UAMs) are subject to detention. This procedure includes a limited deadline for appeals and more derogations to the automatic suspensive effect of an appeal. The Crisis Regulation allows for more derogations from the Return Directive in situations of crisis, force majeure and instrumentalisation, and an expanded scope as well as a prolongation of the border procedures. Moreover, the New Pact introduces a mandatory solidarity system obliging MSs to support MSs under migratory pressure, in which they can choose to relocate asylum seekers, to support with funding or capacity, to contribute to the return process of rejected asylum seekers or to invest in enhanced cooperation on return with a third country.

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0120> (Accessed 3 February 2024).

⁴² European Commission, "Policy Document: Towards an operational strategy for more effective returns", January 2024, Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A0045%3AFIN> (Accessed 3 February 2024).

Figure 7: Timeline of EU's Return Policy (1985–2023)

Source: Prepared by the authors.

As Figure 7 shows, the development of the EU's return policy framework has been a dynamic process, marked by a gradual shift towards more efficient procedures and international cooperation, particularly with third countries. Over the years, the EU has aimed to balance the need for effective return procedures with the fundamental rights of migrants, although ensuring humane and dignified returns has remained a challenge.

Key milestones in the evolution of the EU's return policy include the establishment of the Schengen Agreement, the Dublin Convention, and the adoption of the Return Directive in 2008, which set common standards and procedures for returning irregularly staying third country nationals. The creation of Frontex and the introduction of EURAs have been instrumental in coordinating and supporting joint return operations and ensuring cooperation with third countries on return and readmission.

In response to the European migration crisis, the EU introduced the hotspot approach and the EU–Turkey Statement, aimed at managing migratory pressures and facilitating the return of migrants not in need of international protection. The New Pact on Migration and Asylum, proposed in 2020 and politically agreed upon in 2023, represents a significant step in enhancing the EU's return policy, introducing a mandatory solidarity system and a return border procedure, among other measures.

In conclusion, the EU's return policy framework has evolved significantly over the past decades, reflecting the complex and evolving nature of migration dynamics. The recent developments under the New Pact on Migration and Asylum signal a continued effort to streamline return procedures and enhance cooperation among MSs and third countries. However, ensuring the effectiveness, fairness, and humanity of return policies remains an ongoing challenge that requires a balanced approach, respecting the rights of migrants while managing migration flows effectively.

3.2. The Selected Country Cases from a Comparative Perspective

The detailed selected country dossiers are provided as annexes to this report. Under this section, only the important developments, country-specific differences, and main similarities in terms of policy framework will be reflected in those country cases.

Based on the country dossier,⁴³ the main feature of the policy framework in **Germany** regarding return migration displays that, in particular, during 2015–2022, there is a continuity in migration and return policy focus despite government change in 2021, with over 35 amendments to asylum and residence laws aiming to demonstrate control over deportable rejected asylum seekers. Germany's return migration policies focus on enforcing return decisions, increasing deportations, and enhancing cooperation with countries of origin. Significant policy developments include legislative changes to expedite the return process, the establishment of return centres, and initiatives aimed at improving the efficiency of the asylum

⁴³ Mielke K., Mencutek, Z.S., & Wolf, D., "Legal and Policy Infrastructures of Returns in Germany. WP2 Country Dossier" in *GAPs: Decentring the Study of Migrant Returns and Readmission Policies in Europe and Beyond*, 2024. DOI: 10.5281/zenodo.10671530.

system. These measures reflect Germany's approach to managing migration flows, balancing humanitarian responsibilities with public concerns about security and integration. Since 2020, Germany has introduced more extended periods of suspension to those in vocational training (max. three years), paving the way to regularisation. However, the scope and extension of such measures remained limited vis-à-vis the numbers of asylum seekers and the scale of their needs for certainty.

Greece's return migration policies have evolved through various periods, marked by significant policy shifts and legislative changes. Based on the country dossier⁴⁴, in the 1990s, Greece initially focused on deporting irregular migrants, mainly from Albania. Initially characterised by mass deportations and "sweep operations", policy shifted towards regularisation ahead of the 2004 Olympics, the aim being to stabilise the status of undocumented migrants. The mid-2000s saw the Dublin II agreement's impact, increasing the number of migrants trapped in Greece amidst deteriorating living conditions. After 2008, a deep economic recession led to voluntary returns and the launch of the International Organization for Migration's (IOM) AVRR programme. This period was also marked by spontaneous non-assisted returns, apart from the launch of AVRR. The 2015–2016 European migration crisis introduced new challenges, leading to the EU–Turkey Statement (2016) aimed at curbing refugee movements, yet actual returns remained low compared to arrivals. Ongoing issues with push-back operations and establishing a National Coordinator for Returns in 2023 indicate a continuous evolution in response to internal and external pressures. This period also saw an increase in reported push-back operations, which were criticised internationally but defended by Greek authorities as border protection measures. In recent years, we have witnessed further legal and operational developments, including establishing a National Coordinator for Returns and engaging with EU agencies like Frontex to strengthen border surveillance and manage returns more effectively.

Poland's return policy efforts to create a cohesive migration policy, with significant changes post-2015 election and 2021–2023 tightening of return regulations related to the humanitarian crisis on the Polish-Belarusian border.⁴⁵ For Poland, the country dossier outlines a journey from having a relatively open policy towards migration and focusing on integration to a more controlled and security-oriented approach, especially post-2015. Key turning points include implementing stricter asylum laws, increased border security measures, and a focus on voluntary returns alongside reintegration programmes. The policy shifts reflect Poland's response to the European migration crisis, changing domestic attitudes towards migration, and evolving geopolitical concerns, particularly concerning neighbouring countries.

On the other hand, **Sweden's** migration policy from 1999 to the present highlights significant changes and initiatives over the years due to the liberalisation of migration policies, the impact

⁴⁴ Hatziprokopiou, P., Kandyli, G., Komita, K., Koutrolidou, P., Papatzi, E., Tramountanis, A., "Legal and Policy Infrastructures of Returns in Greece", 2024, WP2 Country Dossier in *GAPs: Decentring the Study of Migrant Returns and Readmission Policies in Europe and Beyond*. DOI: 10.5281/zenodo.10665482

⁴⁵ Trylińska, A., Sieniow, T., Pachocka, M., Krępa, M. and Wach, D., "Legal and Policy Infrastructures of Returns in Poland", 2024, WP2 Country Dossier in *GAPs: Decentring the Study of Migrant Returns and Readmission Policies in Europe and Beyond*.

of the 2015/2016 migration crisis, and subsequent shifts towards more restrictive asylum policies.⁴⁶ The country dossier outlines various legislative changes, including the introduction of the “Temporary Law” and the Upper Secondary School Act, aimed at managing asylum seekers and integration. It also covers efforts to enhance the effectiveness of return policies for those without residency permits and discusses the political context influencing these policies, including the role of the Sweden Democrats and the Tidö Agreement. Lastly, it mentions Sweden’s role in the EU Pact on Migration and Asylum during its EU Council Presidency in 2023 and ongoing reforms to align with EU standards.

The dossier argues that from 1999 to 2014, there was a shift in responsibility for enforcing return decisions to the Migration Agency and a focus on voluntary returns. The 2015–2021 period can be seen as the response to the European migration crisis, with temporary laws for residence permits and a focus on increasing returns. From 2022 onwards, in line with the current government’s restrictive position on migration, the migration authorities are instructed to prioritise the returns of TCNs. Sweden’s migration return policies emphasise a humanitarian approach alongside strict regulations. Key turning points include legislative reforms to facilitate voluntary returns, integration of returnees, and cooperation with countries of origin. Sweden’s policies reflect a balance between ensuring humane treatment for migrants and fulfilling international obligations, highlighting a commitment to human rights and effective migration management.

The country dossier of **the Netherlands**⁴⁷ reflects the important shifts in policy after 2015 related to rejected asylum seekers’ access to services, with significant developments in addressing the needs of irregular migrants and unaccompanied minor migrants. The Netherlands’ approach towards migration return policies highlights a pragmatic stance that includes enforcement of return decisions and emphasis on voluntary returns, whereby the “individual responsibility” of the migrant to leave the Netherlands is key. Significant developments involve adjustments in legislation to streamline return processes, enhanced cooperation with countries of origin, and the introduction of programmes to improve returnees’ reintegration. These policy shifts reflect the Netherlands’ commitment to managing migration flows efficiently while respecting human rights and international obligations. The most contentious policies are the increased use of detention without an individual assessment of proportionality and the availability of alternatives, as well as the prison-like regime of immigration detention. In addition, the Dutch policies tend to leave UAMs of 15 years and older, whose asylum claim has been rejected, in legal limbo, despite a judgement from the Court of Justice of the European Union (CJEU) to provide a real perspective for this group and not to distinguish between minors based on their age. Furthermore, rejected asylum seekers who face obstacles to return are excluded from social services (mitigated by a number of municipalities offering temporary housing for them) despite decisions of the European Committee on Social Rights of the Council of Europe to always provide them with basic needs.

⁴⁶ Thorburn Stern, R. & Shakra, M., “Legal and Policy Infrastructures of Returns in Sweden”, 2024, WP2 Country Dossier in *GAPs: Decentring the Study of Migrant Returns and Readmission Policies in Europe and Beyond*.

⁴⁷ Ebrahim, S. & Strik, T., “Legal and Policy Infrastructures of Returns in the Netherlands”, 2024, WP2 Country Dossier in *GAPs: Decentring the Study of Migrant Returns and Readmission Policies in Europe and Beyond*.

Based on the country dossiers from Germany, Greece, Poland, Sweden and the Netherlands, the main similarities appear as follows:

- Use of regularisation and detention: All countries have implemented policies involving the regularisation of undocumented migrants and the detention of irregular migrants to some extent.
- Focus on voluntary returns: There is a common emphasis on encouraging voluntary returns, often facilitated by programmes offering assistance in the return process.
- Collaboration with international organisations: Countries collaborate with international organisations like the IOM to manage returns and reintegration, as well as Frontex.

The 2015–2016 European migration crisis appears as an important turning point with a substantial impact on all countries' policies, national legislative changes specific to each country's migration approach, and policy shifts. A commonality across these timelines is the reactive nature of policy changes to external migration pressures and internal political shifts, reflecting a broader European context of dynamically managing migration flows and return policies.

The major differences can be summarised as follows:

- Policy focuses and implementation: While some countries, like Germany, have focused on strict controls and deportations, others, like Sweden, initially adopted a more welcoming stance before tightening policies in response to crises.
- Treatment of asylum seekers and irregular migrants: There are differences in the treatment of asylum seekers and irregular migrants, with some countries being more receptive and others adopting more restrictive approaches, particularly in terms of detention and deportation.
- Political context and public sentiment: The political context and public sentiment towards migrants and return policies vary significantly among these countries, influencing policy formulation and implementation.

The selected country cases of Germany, Greece, Poland, Sweden, and the Netherlands highlight the diversity in national approaches to return migration policies. While all countries have implemented policies involving regularisation and detention and have emphasised voluntary returns, there are notable differences in policy focus, treatment of asylum seekers and irregular migrants, and the political context influencing these policies. In summary, the connection between the EU and the selected countries regarding return policy is characterised by the alignment of national policies with EU directives, collaboration with EU agencies like Frontex, participation in EU Readmission Agreements, and adherence to EU-wide initiatives such as the European Agenda on Migration and the New Pact on Migration and Asylum.

It should be noted that migration return policies are complex and multifaceted, influenced by political, economic, and social factors, as well as international agreements and crises. These policies are dynamic, evolving in response to changing migration patterns, public sentiment, and political leadership.

4. Institutional Framework of Return Policy in the EU and the Selected Countries

4.1. The Institutional Framework of the EU

In the context of return policy, the institutional framework encompasses a wide array of actors, including government agencies, law enforcement bodies, judicial authorities, international organisations, civil society groups, and other stakeholders involved in migration management. In this part of the report, we embark on an examination of the institutional frameworks governing migration return policies within the EU and the five selected MSs. This comparative analysis delves into the complex tapestry of legal, administrative, and operational structures that underpin the execution of return policies, a critical aspect of migration management that balances the need for effective immigration control with the imperative of safeguarding human rights. By dissecting the institutional infrastructure across these jurisdictions, we aim to illuminate the similarities and divergences that characterise their approaches to return migration, offering insights into how each framework contributes to the overarching objectives of the EU's migration policy.

In the EU's institutional framework regarding return policy, we see a complex institutional structure that spans multiple actors and agencies across different levels of governance. When we look at the primary actors and their roles within the EU's return and readmission framework, the European Commission develops and proposes legislation and policies on return and readmission, monitors the implementation of the Return Directive, and facilitates cooperation between MSs and third countries. The European Parliament and the Council of the European Union appear as co-legislators that adopt legislation related to return and readmission policies based on proposals from the Commission.

In addition to its major actors, the EU has important agencies regarding implementing the return policy. Among them, Frontex plays a crucial role in ensuring the support of the MSs in the technical and operational implementation of return operations, including organising and coordinating joint return flights. Although primarily focused on asylum support, the European Asylum Support Office (EASO) can be involved in the broader context of migration management, indirectly affecting return processes by supporting MSs under pressure. The European Union Agency for Fundamental Rights (FRA) provides expertise on fundamental rights considerations in the context of return and readmission, ensuring that policies and practices comply with EU fundamental rights standards. The European External Action Service (EEAS) assists in negotiating readmission agreements between the EU and third countries and promotes the EU's return and readmission policies within its broader external relations.

The EU financially supports its return policy through various funding mechanisms, with the primary source being the AMIF, which is a part of the EU's Multiannual Financial Framework. Within the 2021–2027 period, specifically for return, the AMIF supports actions that contribute to efficient return management, voluntary returns, reintegration support and capacity building. In addition to AMIF, the EU utilises other funding instruments and budget lines to support specific return-related actions, including emergency assistance funding for the MSs under pressure and financial support for cooperation with third countries in managing migration more broadly. The AMIF also financially supports the European Return

and Coordination Network (EURCN), which facilitates collaboration and exchange of information on return management among the MSs. The Commission and Frontex are the strategic partners of this ICMPD-coordinated project.

Non-governmental organisations (NGOs) and international organisations are not directly involved in the institutional structure. NGOs and organisations like the IOM play significant roles in advocating for the rights of returnees, providing support and assistance in voluntary return programmes, and monitoring the National Commission for Human Rights for monitoring returns and protecting rights.

This multi-layered framework aims to balance the effective management of return and readmission with respect for the rights of migrants, operational efficiency, and cooperation with third countries.

4.2. The Institutional Framework in the Selected Countries

The country dossier of **Germany**⁴⁸ outlines this country's return governance, emphasising a complex three-tiered governmental structure intertwined with courts and non-state actors, underpinned by the EU regulations and Frontex support. The Federal Ministry of the Interior leads policy-making, while the BAMF handles operational aspects, including asylum decisions. The framework also involves the Federal Ministry for Economic Cooperation and Development, the Federal Foreign Office, and the Federal Police. At the sub-national level, state and local foreign authorities play significant roles, with varying administrative structures impacting return enforcement. Inter-ministerial coordination and federal-state liaison facilitates policy implementation and advocacy, highlighting the dynamic interaction between different governance levels and the critical role of non-governmental counselling centres in return processes. In Germany, non-state actors, primarily NGOs, play a crucial role in return counselling and support for asylum procedures, operating independently or with government support. Regarding monitoring and evaluating returns, it is impossible to see a structured mechanism. However, the latest approach by the Federal Ministry of the Interior appears significantly centralised as it is based on "integrated refugee management" that consolidates various agencies and actors (state and non-state).

Based on the country dossier of **Greece**,⁴⁹ the institutional framework for return policy is primarily based on Law 3907/2011, which incorporates the EU Return Directive into Greek law, alongside Law 3386/2005 for other expulsion cases. The Ministry of Migration and Asylum is responsible for returns along with the Directorate of Returns and Withdrawals, which coordinates return processes under the Greek Asylum Service. The framework involves various actors, including the police, who issue return decisions and implement removals, and the IOM for assisted voluntary returns. In addition, the dossier highlights a collaborative approach involving multiple actors at national and European levels, supported by funding from the AMIF or Frontex, as providing operational support for return operations. The return process also engages civil society in mediation, and the Greek Ombudsman manage migration comprehensively.

⁴⁸ Mielke K., Mencutek, Z.S., & Wolf, D., Ibid.

⁴⁹ Hatziprokopiou, P., Kandyli, G., Komita, K., Koutrolidou, P., Papatzi, E., Tramountanis, A., Ibid.

Unlike the other EU consortium partner countries of GAPs, in **Poland**, migration and border policy is primarily overseen by the Ministry of Interior and Administration, with the Border Guard being the primary authority for return policy and readmission.⁵⁰ Furthermore, the recent legislative changes in March 2023 expanded the Border Guard's responsibilities, making it the sole authority for processing return cases. The Border Guard manages detention centres and decides on alternative measures to detention, carries out the legality of stay control, issues decisions on return obligations, and accepts foreigners under readmission agreements. The reform in April 2023 shifted full responsibility for obliging foreigners to return from the Office for Foreigners to the Border Guard, highlighting a centralised approach to managing returns within the Border Guard's jurisdiction. The centralised control of return policy in Poland, primarily managed by law enforcement (the Border Guard), could lead to potential issues such as a lack of comprehensive support for returnees, limited access to legal and humanitarian assistance, and challenges in ensuring the dignity and rights of individuals during the return process. Centralisation might also reduce transparency and accountability in handling returns, impacting the effectiveness and humaneness of the process. In Poland, the EU's role, notably through Frontex, is significant in providing operational support for return operations, including organising and coordinating return flights. The IOM has collaborated with the Polish government, specifically through an agreement with the Minister of Interior and Administration since 2005, to facilitate voluntary returns.

In **Sweden**, the Migration Agency and the Police Authority are central to return governance, alongside other actors within a structured institutional framework.⁵¹ The Migration Agency is primarily responsible for decisions on return, enforcement, and detention, initiating the return process even before decisions take legal effect to encourage voluntary return. The Police Authority takes over when enforcement involves coercion or individuals evade the process. The Migration Agency manages detention centres, while enforced returns are planned and executed with the involvement of the Police Authority and the Prison and Probation Service, highlighting a collaborative approach to managing returns within Sweden and through EU collaborations.

The country dossier of the **Netherlands**⁵² outlines that the return process involves collaboration between governmental, intergovernmental, and non-governmental organisations within the "migration chain". Non-state actors, including NGOs and the IOM, play significant roles in assisting returns, with the IOM being a key partner for voluntary returns. Like the Germany dossier, it does not detail a specific monitoring and evaluation mechanism for returns, focusing instead on the collaborative framework established for implementing return policies to ensure they adhere to international human rights standards. However, the inspector of the Ministry of Justice and Security is formally mandated to monitor the return processes, and the national prevention mechanism or NPM (which implements the Convention Against Torture) is tasked with monitoring the detention of migrants. This NPM was transferred from the ministry to the National Human Rights Institute at the beginning of 2024 after persistent calls from the UN Committee against Torture and the National Ombudsman.

⁵⁰ Trylińska, A., Sieniow, T., Pachocka, M., Krępa, M. and Wach, D., Ibid.

⁵¹ Thorburn Stern, R. & Shakra, M., Ibid.

⁵² Ebrahim & Strik, Ibid.

Regarding similarities, the institutional frameworks for return policy across Germany, Greece, the Netherlands, Poland, and Sweden exhibit structured approaches involving various governmental and non-governmental actors. Central authorities such as the Ministry of Interior or Migration Agencies, along with specialised agencies like the Border Guard or Police Authority, play significant roles in overseeing and enforcing return procedures. The involvement of the EU, chiefly through Frontex, enhances operational support in return operations. Non-state actors, including NGOs and the IOM, provide essential voluntary return assistance and reintegration support, highlighting a blend of national and EU-level coordination to manage return processes efficiently while adhering to legal and humanitarian standards. However, the direct responsibility of the national authorities in MSs to issue return decisions, organise return operations, and negotiate bilateral readmission agreements with third countries reflects a shared commitment to managing return migration humanely and orderly. This collective approach addresses the challenges of irregular migration within the broader framework of EU policies and international cooperation, underscoring a commitment to human rights and efficient return management.

These selected country cases underscore the complexity and dynamic nature of return policies and the responding institutional framework, reflecting the balancing act between managing migration flows, upholding human rights, and responding to domestic and international pressures.

5. Comparative Analysis of the Legal Framework Regarding Return Policy in the EU and the Selected Member States

This section of the report provides a comparative analysis of the relevant legal frameworks a) at the European level and b) in the selected MSs. For the second part, the analysis draws upon country-specific dossiers to identify key differences, gaps, and noteworthy aspects of each country's approach to these issues.

The comparison of the EU's MSs is structured around three main sub-sections, as outlined below:

- **Comparison of the Regular Procedure to Issue Return Decisions:** This section examines the procedures each Member State follows in issuing return decisions against non-EU nationals who are found to be irregularly staying within their territories.
- **Comparison of the Procedural Safeguards and Non-Removability/Returnability:** This subsection delves into the procedural rights and safeguards provided to individuals subject to return decisions, as well as conditions under which non-removability or returnability may apply.
- **Comparison of the detention-related framework:** The focus here is on the legal framework surrounding the detention of non-EU nationals pending their removal.

This comparative analysis aims to highlight the diversity of approaches among EU's MSs concerning the return of non-EU nationals, providing insights into areas where harmonisation might be improved or where best practices could be identified and adopted more widely.

5.1. European Standards on Return

5.1.1. The EU Level: EU Return Directive

The Treaty of Amsterdam provided for the legal basis of EU legislation on return procedures, which led in 2008 to the adoption of the Return Directive.⁵³ The Directive sets out common standards and procedures for returning irregularly staying TCNs in accordance with the fundamental rights enshrined in international and EU law.⁵⁴ The Directive aims to terminate irregular stay, which can be materialised through voluntary return or expulsion or by granting a residence permit. The Directive also aims to harmonise the return process as well as the procedural safeguards of those subject to these procedures. The Directive builds upon the principle of proportionality, which must be observed throughout all the stages of the return

⁵³ Directive 2008/115, adopted on 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals. See for the legal basis Article 63(3)(b) EC Treaty.

⁵⁴ See Article 1 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Available at: <https://eur-lex.europa.eu/eli/dir/2008/115/oj> (Accessed 8 March 2024).

procedure. This implies that the EU MSs have to apply the least possible coercive measure based on an individual assessment and that voluntary return must be prioritised.⁵⁵

Throughout the return procedure, the members must respect the principle of non-refoulement and consider the state of health, family life, and the child's best interests.⁵⁶ The application of the Directive must also be in compliance with the EU Charter of Fundamental Rights.⁵⁷ While interpreting many parts of the Directive, the CJEU has provided guidance on the application of the Directive. This case law also formed a basis for the Commission's recommendations.⁵⁸ Some of the recommendations however contradict the case law, like the encouragement to make more use of detention, while the CJEU emphasised in its *El Dridi* judgement that MSs must respect the proportionality principle through the gradation of measures from the least restrictive to the most restrictive one.⁵⁹

The MSs must issue a return decision, which implies an order to leave the EU territory, to TCNs who are not authorised to stay. However, if the person applies for asylum afterwards, all effects of the return decision will be suspended as long as he/she is allowed to await the outcome of the asylum procedure.⁶⁰ Also, if the TCN has a serious illness, it can have consequences for the possibility of issuing a return decision or its suspensive effect.⁶¹ After issuing a return decision, MSs must grant the TCN concerned a period for voluntary departure between 7 and 30 days.⁶² MSs may impose a reporting obligation, a deposit of a financial guarantee, submission of documents or the obligation to stay at a specific place during the period for voluntary departure.⁶³

By departing within the voluntary departure period, TCNs avoid the issuance of a ban on entry into EU territory. Shortening or refusing the period is only justified as a measure of last resort, for instance, in case of a risk of absconding or a risk to public policy or if an application for legal stay was fraudulent or manifestly unfounded. Article 11 of the Directive obliges MSs to impose an entry ban if no period for voluntary departure has been granted or if the returnee has not departed within, but at the same time, it allows MSs to refrain from doing so or to suspend an extant entry ban in a number of cases, for instance for humanitarian reasons. Violating an entry ban (i.e., after having left the country) as such cannot be grounds for a criminal penalty but can be if the entry ban is issued on account of the criminal record of the

⁵⁵ This is again emphasised in the Communication of the Commission, 'The EU strategy on voluntary return and reintegration', COM(2021) 120, 27 April 2021.

⁵⁶ Article 5 Directive 2008/115.

⁵⁷ See for the implications of the Charter for example the judgements *Abdida*, C-562/13 and *Gnandi*, C-181/16, on the right to an effective remedy (Article 47) and the principle of non-refoulement (Article 19(2) of the Charter.

⁵⁸ See for instance the Return Handbook of 16 November 2017, C(2017)6505; its Renewed Action Plan, COM(2017); the Communication on voluntary return, COM(2021)120 and the Communication on enhancing cooperation on return and readmission, COM(2021)56.

⁵⁹ CJEU 28 April 2011, *El Dridi*, Case C-61/11 PPU.

⁶⁰ CJEU 19 June 2018, C-181/16, *Gnandi*.

⁶¹ See CJEU 18 Dec. 2014, C-562/13, *Abdida*, and CJEU 22 Nov. 2022, C-69/21 X.

⁶² Article 7 Directive 2008/115. Also, the decision on the exact duration must be proportionate. See CJEU 11 June 2015, C-554/13, *Z.Zh. and I.O.*

⁶³ Article 7(3) Directive 2008/115.

TCN or the threat that he/she represents, and if the national legislation provides for such a ground.⁶⁴ Nevertheless, an irregular stay may be punished as an offence when the third country national stays in the EU territory without a well-founded reason for not pursuing a return if this would not undermine the effectiveness of the Directive (so not impeding the actual return).⁶⁵

Detention is only allowed on the grounds that there is a risk of absconding or if the TCN hampers the preparation of the return, as long as there is a reasonable prospect of removal.⁶⁶ The proportionality principle requires that returnees may only be detained where other less coercive measures cannot be applied and for the shortest possible term.⁶⁷

The Directive requires more safeguards for the detention of children and their families, as well as their detention circumstances.⁶⁸ Although Article 17(5) reiterates that the child's best interests must be the primary consideration, their detention is still allowed as a measure of last resort (which applies to adults as well). According to the UN Committee on the Rights of the Child, immigration detention is never in the best interests of the child and should, therefore, be abolished.⁶⁹ UAMs, who have the right to independent and adequate assistance before the issuance of a return decision, can only be returned to their family, a nominated guardian or adequate reception facilities in their country of return.⁷⁰

TCNs have the right to be heard during the whole return procedure, to appeal the return decision, and to request suspensive effect if this is not automatically granted.⁷¹ They have the right to free legal aid upon request. A detention measure requires a speedy judicial review, followed by periodic reviews during the detention, either automatically or upon appeal by the TCN.⁷² Courts must conduct full scrutiny in fact and in law to be able to replace the decision of the immigration authority.⁷³

⁶⁴ CJEU 17 Sep. 2020, C-806/18, *J.Z.*

⁶⁵ See for instance CJEU 28 Apr. 2011, C-61/11 PPU, *El Dridi*; CJEU (GC) 6 Dec. 2011, C-329/11, *Achughbabian*; CJEU 6 Dec. 2012, C-430/11, *Sagor*.

⁶⁶ Article 15 Directive 2008/115.

⁶⁷ See also CJEU 14 May 2020, C-924/19 PPU and C-925/19 PPU, *FMS, FNZ, SA, SA Junior*.

⁶⁸ Article 17 Directive 2008/115.

⁶⁹ See the joint general comment no. 4 of the CMW and CRC, on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit destination and return, CMW/C/GC/4-CRC/C?GC/23, 16 November 2017. See also the End Immigration Detention of Children advocacy letter of the United Nations Task Force on Children Deprived of Liberty, February 2024, Available at: <https://www.unicef.org/media/151371/file/Advocacy%20Brief:%20End%20Child%20Immigration%20Detention%20.pdf>

⁷⁰ Article 10 Directive 2008/115. See also CJEU 14 January 2021, C-441/19, *T.Q.*

⁷¹ Article 13 Directive 2008/115. See for the right to be heard CJEU 11 December 2014, C-249/13, *Boudljida*.

⁷² Article 15(2) Directive 2008/115.

⁷³ CJEU 5 June 2014, C-146/14 PPU, *Mahdi*.

5.1.2. Council of Europe

The legal instruments⁷⁴ of the Council of Europe (CoE), along with the jurisprudence of its monitoring bodies and policy statements from CoE bodies, form a comprehensive framework for protecting migrant rights, including in the context of return.

The ECHR provisions most relevant in return cases include Article 2 (right to life), Article 3 (the principle of non-refoulement), Article 5 (Article 5.1(f) on immigration detention), Article 13 (procedural rights in asylum and expulsion/extradition procedures) and Protocol 4, Article 4 (collective expulsion).

While the ECtHR, in its migration-related case law, routinely recognises that “States have the right [...] to control the entry, residence and expulsion of aliens”,⁷⁵ the ECtHR’s dynamic interpretation of the ECHR has helped advance the rights of migrants, including regarding the potential risks faced upon return to the country of origin (non-refoulement). The non-refoulement principle is crucial in the context of forced returns, serving as a legal constraint on the deportation practices of Contracting States derogation from which is disallowed.⁷⁶ Also, the ECtHR’s case law on the extraterritorial scope of Article 3 has greatly impacted the protection to be afforded to migrants.⁷⁷ At the same time, the ECtHR has been criticised for making excessive concessions to the interests of Contracting States in cases concerning border control and collective expulsion, not least in the aftermath of the 2015–2016 European migration crisis.⁷⁸

In addressing immigration detention, the ECtHR has established that for detention under Article 5.1(f) not to be arbitrary, certain basic conditions need to be met: detention needs to be carried out in good faith, be closely connected to a permitted ground; the place and conditions of detention should be appropriate, and the length of the detention should not exceed that reasonably required for the purpose pursued.⁷⁹ The Court has emphasised the need to consider less severe or alternative measures to immigration detention as well as the need for special considerations to be made regarding vulnerable individuals, minors in particular.⁸⁰ ECtHR case law stresses that detention of minors should only be used as a last

⁷⁴ Including the European Convention on Human Rights (ECHR), the European Social Charter and the European Social Charter (revised).

⁷⁵ The phrase was first used in ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94.

⁷⁶ For an overview, see e.g., ECtHR, Guide on the case law of the European Convention on Human Rights: Immigration, Available at: https://www.echr.coe.int/documents/d/echr/Guide_Immigration_ENG (Accessed March 12, 2024).

⁷⁷ A key ECtHR judgement in this context is *Hirsi Jamaa and Others v. Italy* (GC), Application No. 27765/09, 23 February, 2012.

⁷⁸ Cf. ECtHR, *N.D. and N.T. v. Spain* (GC), Application No. 8675/15 and 8697/15, 13 February 2020.

⁷⁹ See e.g., ECtHR, *Saadi v. The United Kingdom*, Application No. 13229/03, 29 January 2008; *A and Others v. The United Kingdom*, Application No. 3455/05, 19 February 2009, § 164.

⁸⁰ For an overview, see e.g., ECtHR, Guide on the case law of the European Convention on Human Rights: Immigration, Available at: https://www.echr.coe.int/documents/d/echr/Guide_Immigration_ENG and ECtHR, Guide on Article 5 of the European Convention on Human Rights: Right to liberty and security, Available at: https://www.echr.coe.int/documents/d/echr/guide_art_5_eng (last accessed March 12, 2024).

resort and that placing minors in unsatisfactory premises may constitute a violation of Article 3 as well as of Article 5.1(f).⁸¹ The Court's position on immigration detention, however, also has been criticised for diverting from otherwise generally applicable principles to deprivation of liberty, including its approach to "transit zones".⁸²

The CoE's Committee on the Prevention of Torture (CPT) considers the situation of individuals in immigration detention a primary focus of its work. The CPT standards for immigration detention concern detention as a last resort, safeguards during detention, suitable premises, adequate material conditions, an open regime qualified staff, established procedures for discipline, segregation and means of constraint, effective monitoring and complaints mechanisms, adequate health care and care of vulnerable individuals, children in particular.⁸³ The CPT has repeatedly expressed concern regarding detention conditions, pushbacks, and the situation of vulnerable individuals in the CoE Member States.⁸⁴

The CoE Committee of Ministers' 2005 Twenty Guidelines on Forced Return stress the importance of conducting returns in a humane manner, minimising the use of coercion and ensuring that the health and well-being of returnees are protected throughout the process.⁸⁵ The guidelines address the following themes: voluntary return, the removal order, detention pending removal, readmission and forced removals. The guidelines may be seen as a set of standards regulating expulsion/return according to which the practice of CoE Member States may be assessed. The Committee of Ministers' 2022 recommendation⁸⁶ on protecting the rights of migrant, refugee and asylum-seeking women and girls underscores that voluntary return should be the preferred option and that "returns should always be carried out in safety and with dignity, in line with the principle of non-refoulement".⁸⁷

The European Social Charter is applicable to nationals and legal residents of the ratifying states, but in some circumstances, it is also applicable to third country residents who are not authorised to stay. In 2009, the European Committee on Social Rights (ECSR), which serves as a supervisory body of the charter, concluded upon a complaint by the NGO Defence for Children that the Dutch policy to deprive children of all basic needs constituted a violation of

⁸¹ See e.g., *Mayeka and Mitunga v. Belgium*, Application No. 13178/03, 12 October 2006, M.H. and Others v. Croatia, Application No. 15670/18 and 43115/18, 18 November 2021.

⁸² See e.g., Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet', *Current Legal Problems*, Volume 68, Issue 1, 2015, pp. 143–177 and Vladislava Stoyanova, "The Grand Chamber judgment in *Ilias and Ahmed v. Hungary*: Immigration Detention and how the ground beneath our feet continues to erode" blogpost, Strasbourg Observers, <https://strasbourgobservers.com/2019/12/23/the-grand-chamber-judgment-in-ilias-and-ahmed-v-hungary-immigration-detention-and-how-the-ground-beneath-our-feet-continues-to-erode/> (accessed 25 February, 2024).

⁸³ CPT Fact Sheet on Immigration Detention 2017.

⁸⁴ CPT annual report 2009, CPT annual report 2022.

⁸⁵ Council of Europe Committee of Ministers. (2005). Guidelines on forced return.

⁸⁶ Recommendation CM/Rec(2022)17 of the Committee of Ministers to members on protecting the rights of migrant, refugee and asylum-seeking women and girls (Adopted by the Committee of Ministers on 20 May 2022 at the 132nd Session of the Committee of Ministers.

⁸⁷ *Ibid*, Section VI.

Articles 31(2) and 17(1) of the European Social Charter.⁸⁸ It ordered the Dutch government to provide adequate shelter and basic care to children who are unlawfully present in the Netherlands.⁸⁹ In 2013, the Conference of European Churches (CEC) requested the provision of the same basic needs for adults as well. The ECSR decided that denying irregular migrants the right to necessary food, water, clothing, and shelter constitutes a breach of the right to human dignity.⁹⁰ According to the ECSR, the equal treatment provision regarding social and medical assistance of Article 13(4) of the Revised European Social Charter (which refers to lawfully present migrants) is also applicable to migrants in an irregular situation. It concluded that the right to shelter, as enshrined in Article 31(2) RESC, must unconditionally apply to adult migrants in an irregular situation, “even when they are requested to leave the country”.⁹¹

5.2. Interaction of Common Sources with National Laws Regarding the Return Procedure

The instruments of international and EU law described in the preceding section collectively form a common legal framework for the countries included in this comparative study. This common legal framework aims to ensure the harmonisation of norms and establish minimum legal standards. However, the existence of a common legal framework does not in itself lead to the harmonisation of legal instruments and case law at the national level.

The five EU countries studied for the purpose of this comparative report are all parties to the Refugee Convention and international human rights treaties relevant to the return of migrants and, therefore, also obliged to respect fundamental principles such as the principle of non-refoulement. However, the degree, impact, and modalities of adherence vary according to whether states adopt a monist or dualist approach⁹² to the relationship between international law and national law, as well as, or maybe more dominantly, according to the level of practical implementation and clarification of these principles and their limits in national law. On this point, there are clear differences between the countries studied. In some countries, the impact of these common sources on national law and their interaction with national law is relatively more clearly guaranteed and more effectively reflected in practice, while in others, the situation is different.

Even in monist systems, where the interaction of national legal systems with international law is assumed to be more direct, in practice, the immediate impact of international law may be

⁸⁸ Complaint no. 47/2008, *Defence for Children International v. The Netherlands*, ECSR, Council of Europe.

⁸⁹ ECSR, 20 October 2009, Decision on complaint no. 47/2008, *Defence for Children International v. The Netherlands*, www.coe.int.

⁹⁰ ECSR, 25 October 2013, Decision on Immediate Measures, complaint no. 90/2013.

⁹¹ ECSR, 1 July 2014, *CEC vs the Netherlands*, complaint no. 90/2013, report to the Committee of Ministers, published 10 November 2014.

⁹² As the country dossiers mainly rely on constitutional provisions and, in more controversial cases, on majority opinions in the doctrine, the Netherlands, Greece, and Poland have a monist system, while the legal systems of Germany and Sweden are considered to be dualist.

obscured. For instance, Greece⁹³ and Poland,⁹⁴ which are considered to be predominantly monist, are reported to lack a consistent tendency towards effective direct application of international law. The Greek Constitution (Article 28) states that international agreements, once ratified by an Act of Parliament, become an integral part of Greek law and take precedence over any earlier provision, except for the provisions of the constitution. However, Greek judicial practice has not always fully embraced international law; instead, it relies on constitutional provisions related to fundamental values and human rights.⁹⁵ In Poland, although the Convention relating to the Status of Refugees and the Convention on the Rights of the Child are frequently enforced directly, the same cannot be said for other international conventions addressing issues relevant to return and readmission. The Poland Country Report suggests that other conventions in this field are often disregarded.⁹⁶ There is even a controversial approach of the Polish Constitutional Tribunal, which found some provisions of the EU Treaty and Article 6.1 of the ECHR contrary to the Polish Constitution, which, although not directly related to return, is an example of the dilution of the influence of international law (and the EU law) in general.

On the other hand, the Dutch legal system, which is moderately monist, is known for being relatively open toward international law. This means that the national and international legal systems complement each other and that national authorities must follow national and international laws. The Constitution of the Netherlands not only clarifies the direct effect and the primacy of international law but also explicitly refers to the binding decisions of international organisations, including the ECtHR and the CJEU. The Minister of Foreign Affairs also submits an annual report to the parliament on the judgements made against the Netherlands and those made against other state parties that could affect the Dutch legal system.⁹⁷

Although customarily perceived as a country in the dualist tradition, the effect of the ECHR and the ECtHR is similarly evident in Sweden's legal system. Under Swedish law, the ECHR is granted special constitutional protection. Chapter 2, Section 19 of the Instrument of Government (one of four fundamental laws forming the Swedish Constitution) states that no law or other provision conflicting with Sweden's obligations under the ECHR may be enacted. This stipulation means no law or provision contradicting Sweden's obligations under the ECHR may be issued. Since the ECHR was incorporated, both the treaty and ECtHR case law have increasingly had an impact on the interpretation and implementation of Swedish law, not least in the field of migration law. Over the years, the ECtHR has addressed several migration-related issues concerning Sweden, and in certain cases, it has led to significant changes or clarifications in Swedish practice.⁹⁸ One famous example is the case of *RC v. Sweden* (2010), which focused on the allocation of the burden of proof.

⁹³ Hatziprokopiou, P., Kandylis, G., Komita, K., Koutrolidou, P., Papatzani, E., Tramountanis, A., Ibid, p. 17.

⁹⁴ Trylińska, A., Sieniow, T., Pachocka, M., Krępa, M. and Wach, D., Ibid., p. 20.

⁹⁵ Hatziprokopiou, P., Kandylis, G., Komita, K., Koutrolidou, P., Papatzani, E., Tramountanis, A., Ibid, p. 17.

⁹⁶ Trylińska, A., Sieniow, T., Pachocka, M., Krępa, M. and Wach, D., Ibid., p. 19.

⁹⁷ Ebrahim, S. & Strik, T., Ibid. p. 16.

⁹⁸ Thorburn Stern, R. & Shakra, M., Ibid., pp. 15, 16.

Just like the difference in the interaction between international law and national laws of the five countries scrutinised in this report, there is also a difference in the interaction of the Return Directive with national laws. The difference arises especially in terms of the method of transposition and the clarity of the Directive's effective application. All five countries have transposed the Return Directive. In most countries, this transposition has reshaped the relevant legal arrangements through the adoption of amendments and new regulations deemed necessary for harmonisation with the Directive. However, it can also be observed that there are differences in terms of transposition. For example, in Sweden, the existing legal framework has been largely preserved on the grounds that it is already compatible with the Directive. In Greece, on the other hand, it is observed that some legal arrangements have been made in order to comply with the Directive, but other regulations on forced removal are still in force. The preference for different methods of transposition of secondary legislation of EU law into domestic law may be considered both necessary and natural in light of the specific structures and requirements of legal systems. However, in some cases, these choices may also have practical consequences that affect a fully harmonised or foreseeable implementation. At this point, a common tendency is observed in most of the countries. This is the tendency to adapt the interpretation of the requirements of the Directive to national law rather than to adapt national law to the requirements of the Directive in a strict sense. In this context, it can be argued that the countries concerned aim to preserve the existing legal framework as much as possible, leaving themselves a more expansive room for manoeuvre.

This approach can be seen as positive, particularly in terms of ensuring the effective use of existing experience and preserving the safeguards provided in national law, which exceed those of the Directive. However, it is also understood that this approach may sometimes aim to shift the balance of freedom and security in favour of security and to bypass the obligations stipulated by EU legislation. In such cases, the flexible limits of manoeuvrability may also risk complicating the return procedure, undermining legal certainty and creating outcomes incompatible with human rights law and EU law, particularly in terms of procedural safeguards. Examples of such situations can be found in all five countries. For instance, although Sweden's approach of retaining its existing arrangements has the consequence of preserving the safeguards that overlap with the Directive, legal certainty may be called into question by the fact that some concepts that are key to the Return Directive (such as illegal stay) are not sufficiently defined in national law. Greece is one of the most prominent examples of bypassing the Directive. In Greek law, the transposition of the Directive into national law and shaping the procedure for return decision-making was mainly completed through Law 3907/2011.⁹⁹ The content of this regulation is largely in line with the Directive. However, Greek law also has a separate law on administrative expulsion,¹⁰⁰ which regulates expulsion procedures that fall outside the requirements of the Directive. This law covers the procedure for persons who need to be removed from the country on grounds of public order, national

⁹⁹ Greece Ministry of Citizen Protection, "Law no. 3907/2011 G.G. A-7/26.01.2011 - Establishment of Asylum Service and Service of first reception", Available at: https://migrant-integration.ec.europa.eu/library-document/law-no-39072011-gg-726012011-establishment-asylum-service-and-service-first_en (Accessed 8 March 2024).

¹⁰⁰ Greece, "Law no 3386/05 on the Entry, Residence and Social Integration of Third-country Nationals in the Hellenic Territory", Available at: https://migrant-integration.ec.europa.eu/library-document/law-no-338605-entry-residence-and-social-integration-third-country-nationals_en (Accessed 8 March 2024).

security and public safety. These are mostly persons registered on the List of Undesirable Third Country Nationals. However, as the Greece Country Report points out, the Greek authorities (the Greek police, who are responsible for the operation of this procedure) may include in this list persons who have entered the country illegally or who have remained illegally, although the regulations in the national law require the existence of objective signs to establish a concrete connection between the threat and the person. The Country Report of Greece reveals that the police have the tendency to register TCNs on the list indiscriminately based on the fact that, at some point, they entered Greece irregularly from a non-legislated point of entry and resided illegally.¹⁰¹ In this case, TCNs who should have been subject to the Directive's requirements may be channelled to a different procedure. When the said approach is evaluated from the Polish perspective, it can be observed that the Border Guard, whose powers are quite extensive, carries out the return procedures on its own, which creates incompatibilities with the Directive, especially regarding the effectiveness of procedural safeguards. Another prominent issue for Poland is the slow and superficial implementation of ECtHR judgements into domestic law.

On the other hand, a significant example of the inference in Germany and the Netherlands is the fictive/non-entry practice. In the law of both countries, a certain perimeter of borders is fictively recognised as a non-entry area. This avoids the necessity of applying both the requirements of the Return Directive and the Dublin system. Article 2((2)(a) of the Return Directive allows MSs to not apply the Directive in those cases.

5.2.1. Procedural Aspects of the Return Process

In all five countries, the decision to return is primarily an administrative action unless a court issues the decision for a criminal case, such as in Swedish law (Swedish Aliens Act, Chapter 8 a). In most countries, more than one administrative agency may be responsible for the return process. In Greece, the Greece Asylum Service (GAS), the Ministry of Migration and Asylum (MMA) and the Greek police; in the Netherlands, the foreigners' police, IND, Sea Port Police (ZHP) or Royal Military Police (Kmar); in Sweden (apart from the criminal cases), the Migration Agency and the Police Authority; in Germany, BAMF or the Foreigners' Authority are the administrative agents involved in the decision of the return process. The common feature in countries where the police are effective in the process is that the jurisdiction of the police is related to the protection of security and public order. The police are generally effective in all countries at the stage of apprehension and removal. However, the authority of the police to decide on return and the limits of its jurisdiction are clearer in some countries and more ambiguous in others. For example, in Swedish law, the powers of the police are defined by law and framed relatively clearly.

Similarly, in the Netherlands, there are clear limitations on the authority of the police, especially at the apprehension stage.¹⁰² In this way, it is understood that the issue of maintaining the balance between freedom and security is aimed to be reflected in the legal regulations. However, in Greece and Poland, it is observed that the spheres of influence and

¹⁰¹ Hatziprokopiou, P., Kandyliis, G., Komita, K., Koutrolikou, P., Papatzani, E., Tramountanis, A., Ibid., p. 49.

¹⁰² Ebrahim, S. & Strik, T., Ibid., p. 25.

powers of administrative agents associated with security (Hellenic Police in Greece and Border Guard in Poland) are relatively more flexible and uncertain. For example, in Greece, all return decisions other than those based on the refusal or (implicit) withdrawal of an application for international protection or the refusal or revocation of a residence permit or renewal application are under the jurisdiction of the police.¹⁰³ In addition, the fact that two different laws regarding forced return, namely Law 3386/2005 and Law 3907/2011, co-exist in Greek law creates confusion about procedural certainty and questions the consistency with the Return Directive.¹⁰⁴ Hence, “administrative deportation” practised under Law 3386/2005, where the police are designated as the decision-making authority, gives the impression that legal certainty is blurred and that the calibre of the freedom and security, which is expected to be in balance, has shifted overwhelmingly to the security side. Similarly, in Poland, the balance of the legal framework in the return procedure has shifted in favour of security. Due to amendments in the Act of Foreigners in Poland, since 2023, the Border Guard is the sole body that deals comprehensively with return proceedings.¹⁰⁵

5.2.2. Scope of the Return Decisions

Regarding the scope of return decisions, three issues stand out in comparison. The first is “illegal stay”, which constitutes the grounds for the return decision under the Directive; the second is the procedure to be applied in border cases; and the third is the situation of illegally staying TCNs who are granted autonomous authorisation for the right to stay.

As required by Articles 2(1) and 3(2) of the Return Directive, in all GAPs countries, the scope of the decision to return is linked to illegal stay. However, the content of the term “illegal stay” in national laws is not uniform in terms of clarity. Some countries have more precise definitions, while others’ are more general. While Greek law provides a rather general definition, Polish law and Swedish law do not define this term. Dutch law, on the other hand, defines this concept comparatively more clearly by referring to both the situations that fall within the context of the term (i.e., situations where a person does not meet the conditions of entry or other conditions for entry, stay or residence as set out in Article 5 of the Regulation (EU) 2016/399 (Schengen Borders Code)), and situations that are not covered by this term (such as obstacles to return or a pending application for a residence permit).¹⁰⁶ The fact that the content of the term is not sufficiently clarified in some national laws, or, as in Swedish law, that its content is determined through the definition of the opposite term (legal stay),¹⁰⁷ risks creating uncertainty as to whether certain situations fall within this scope. For instance, as stated in the Polish Country Report, although not explicitly defined, the illegal (irregular) stay is considered a situation in which a foreigner does not have a document entitling her/him to a legal stay in the country’s territory as well as entering the territory without proper documents.¹⁰⁸ The Country Report highlights that there is a discrepancy in the interpretation of how the position of migrants pushed to Poland by Belarusian forces should be considered, especially regarding the principle of non-refoulement in the absence of either effective

¹⁰³ Hatziprokopiou, P., Kandylis, G., Komita, K., Koutrolidou, P., Papatzani, E., Tramountanis, A., Ibid., pp. 5, 20.

¹⁰⁴ Ibid., pp. 23, 46.

¹⁰⁵ Trylińska, A., Sieniow, T., Pachocka, M., Krępa, M. and Wach, D., Ibid., pp. 5, 36, 55.

¹⁰⁶ Ebrahim, S. & Strik, T., Ibid., p. 21, 22.

¹⁰⁷ Thorburn Stern, R. & Shakra, M., Ibid., p. 18.

¹⁰⁸ Trylińska, A., Sieniow, T., Pachocka, M., Krępa, M. and Wach, D., Ibid., p. 24.

procedural safeguards (especially for border cases) or a precise definition of the term illegal stay.

Similarly, the Swedish Country Report highlights the issue of the absence of a clear definition of what constitutes an illegal (irregular) stay, coupled with the lack of a specific provision that enables individuals to legally stay in Sweden while awaiting a decision on their application for a residence permit. This situation puts the migrants in a precarious position, making it difficult for them to access fundamental rights such as healthcare.¹⁰⁹ In short, the lack of clarity around legal status not only carries the risk of blurring the scope of the return decisions but also makes the situation of the migrants unstable, leading to difficulties in accessing basic rights.

The second prominent issue regarding the scope of the return decisions in line with the Return Directive is cases of irregular border crossings by TCNs and TCNs subject to return as a criminal law sanction. As regulated under Article 2(2)(a,b) of the Return Directive, MSs have the discretion to exclude these two situations from the implementation sphere of the Directive in their national laws. Germany,¹¹⁰ the Netherlands,¹¹¹ and Greece¹¹² do not apply the Directive in these situations, whereas Sweden generally does not use the exemptions provided therein [Article 2(2)(a,b)]. However, there are some exceptions in the Swedish law. For instance, individuals mentioned in Article (2)(2)(a) are not subject to time limits for voluntary return in case of denied entry. Additionally, time limits do not apply to individuals who have been issued a return decision by a court as part of their sentence in a criminal trial [Article (2)(2)(b)].¹¹³ The lack of clarity and inconsistency with the relevant provisions of the Return Directive regarding the border procedures are mostly observed in Greece and Poland, two countries forming the external borders of the EU. In Greek law, border procedures are dealt with under Law 3386/2005. The Greece Country Report states that TCNs irregularly entering Greece at the borders are arrested, detained and an expulsion decision is issued against them in dereliction of the reception and identification process set out in Law 4939/2022, which regulates reception, international protection of third country nationals and stateless persons, and temporary protection in cases of a mass influx of displaced migrants.¹¹⁴

Moving from that point, we can also observe that the Greek practice demonstrates discrepancies in terms of consistency with the exemption provided under Article 2(2)(a) of the Return Directive. The said provision of the Directive, *inter alia*, enables the exemption for cases where the TCN is “apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State”. Later, the CJEU clarified the term “in connection with the irregular crossing” and ruled that Article 2(2)(a) of the Directive requires a “direct temporal and spatial link with that

¹⁰⁹ Thorburn Stern, R. & Shakra, M., *Ibid.*, pp. 39, 40.

¹¹⁰ Mielke K., Mencutek, Z.S., & Wolf, D., *Ibid.*, p. 19.

¹¹¹ Ebrahim, S. & Strik, T., *Ibid.*, p. 22.

¹¹² Hatziprokopiou, P., Kandyliis, G., Komita, K., Koutrolikou, P., Papatzani, E., Tramountanis, A., *Ibid.*, p. 28.

¹¹³ Thorburn Stern, R. & Shakra, M., *Ibid.*, p. 23.

¹¹⁴ Hatziprokopiou, P., Kandyliis, G., Komita, K., Koutrolikou, P., Papatzani, E., Tramountanis, A., *Ibid.*, p. 46.

crossing of the border”.¹¹⁵ Moreover, the said provision of the Directive also stipulates that the exemption is enabled for those who “have not subsequently obtained an authorisation or a right to stay in that Member State”. In Greek practice, if the TCN applies for international protection and obtains authorisation to stay in the country, their expulsion will be suspended until the examination of their application is completed. When the application is rejected, the expulsion decision will be executed in line with the procedures of Law 3386/2005, which are not covered by the requirements of the Directive. Hence, this procedure raises concerns regarding compatibility with the said article of the Return Directive, which specifies that an exception from the scope of the Directive can only occur if TCNs caught irregularly crossing the border were not subsequently granted the right to remain in the country.¹¹⁶ Similar concerns are also valid for the implementation of the Polish Law.¹¹⁷ Both the Greek and Polish country dossiers also demonstrate a lack of clear regulations and transparent practice in terms of conducting the border procedures, indicating the risk of pushbacks and collective expulsion incidents.¹¹⁸

At this point, Germany should also be mentioned. The Germany Country Report¹¹⁹ states that there is a lack of documentation regarding the legality of removals in border procedures and the number of such removals. However, mounting evidence of push-back within the internal Schengen area is also indicated. For instance, at the Austrian border, some individuals have been turned back to Austria without undergoing a regular asylum procedure despite having repeatedly informed German officials (even with the assistance of interpreters) that they intended to seek asylum in Germany.¹²⁰ The report also refers to ProAsyl’s (2023) conclusion that systematic returns happen without proper border procedures based on statistical peculiarities and various reports.¹²¹

The third issue regarding the scope of return decisions is the situation of persons who are waiting for the outcome of their application for a legal stay (including renewal) (pursuant to Article 6(5) of the Return Directive) and persons provided with an autonomous right to stay (pursuant to Article 6(4) of the Return Directive). In the first situation, all five countries have similar regulations preventing or suspending the decision to return during the examination

¹¹⁵ CJEU, Case C-47/15 *Affum b Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai*, 7 June 2016, para 72; Case C-444/17 *Arib*, 19 March 2019, para 46.

¹¹⁶ Hatziprokopiou, P., Kandyli, G., Komita, K., Koutrolidou, P., Papatzani, E., Tramountanis, A., *Ibid*, p. 46.

¹¹⁷ Trylińska, A., Sieniow, T., Pachocka, M., Krępa, M. and Wach, D., *Ibid*, pp. 27-30.

¹¹⁸ Hatziprokopiou, P., Kandyli, G., Komita, K., Koutrolidou, P., Papatzani, E., Tramountanis, A., *Ibid*, p. 51; Trylińska, A., Sieniow, T., Pachocka, M., Krępa, M. and Wach, D., *Ibid*, pp. 27-35.

¹¹⁹ Mielke K., Mencutek, Z.S., & Wolf, D., *Ibid*, p. 19.

¹²⁰ Bayerischer Flüchtlingsrat, “Belege für systematische Pushbacks nun auch an der deutsch-österreichischen Grenze. NGOs schlagen Alarm. Gemeinsame Pressemitteilung am”, 30. Mai 2023, Pushback Alarm Austria, Border Violence Monitoring Network, Bayerischer Flüchtlingsrat. <https://fluechtlingsratbayern.de/belege-fuer-systematische-pushbacks-nun-auch-an-der-deutsch-oesterreichischen-grenze/> EN: NGOs sound alarm. Evidence of systematic pushbacks now also at the German-Austrian border. https://borderviolence.eu/app/uploads/ilovepdf_merged-4.pdf

¹²¹ *Ibid.*, p. 20; PRO ASYL, “Rechtswidrige Abweisungen – auch an deutschen Grenzen?”, 26 October 2023, Available at: <https://www.proasyl.de/news/rechtswidrige-abweisungen-auch-an-deutschen-grenzen/> (Accessed 8 March 2023).

process in line with the Directive. On the other hand, what stands out in the second case is that the implementation of Article 6(4) of the Directive is ensured by permits with content that can be explained as “tolerating stay in the country” (e.g., Duldung/Duldung light, temporary suspension of deportation) in Germany, tolerated or humanitarian stay in Poland) rather than residence permits. Another common point regarding these permits is that it is difficult to establish a uniform and predictable practice due to the flexibility of the discretion of the regulatory authority regarding them.

5.2.3. Voluntary Departure Terms and Entry Bans

Without prejudice to the exceptions provided therein, the Return Directive stipulates the issuance of an appropriate period for voluntary departure. In line with the Directive, all five countries regulate the obligation to provide a voluntary departure term within the return decision and clarify the exceptions in their national laws. The period allocated for voluntary departure varies among the countries, and in all five countries, the period is subjected to extension in special conditions, although the efficacy of individual assessments for the consideration of the duration varies in practice. In Sweden, duration is regulated for expulsion up to two weeks and for deportation up to four weeks;¹²² in Poland, this duration is between 8–30 days;¹²³ in Germany, 7–30 days;¹²⁴ in Greece, 7–25 days;¹²⁵ and in the Netherlands, 28 days.¹²⁶ As stated above, in all countries, these indicated time periods may be extended upon discretion, whereas in the Netherlands, the duration can be extended or shortened up to the administrative discretion based on individual conditions of the case at hand.¹²⁷

In all five countries, the national legal framework also includes exceptions for providing the voluntary departure terms in line with Article 7(4) of the Directive. At this point, one distinctive issue in terms of comparison is related to the clarity of the concepts regarding these exceptions. In this case, Greece stands out. In Greek law, the term “risk of absconding”, which is also referred to by the Return Directive as a ground for the exception for issuing a voluntary departure term, is defined in a vague manner and unlike other countries, the national law does not include an exhaustive and indicative list.¹²⁸

Regarding the entry bans, similar legal regulations are observed within the five countries that are mainly in line with the Directive’s Article 11, which regulates the matter of entry bans in relation to return decisions. The consistency is seen especially in terms of the duration of entry bans (a maximum of 5 years unless there is a threat to public policy, security or national security) and the dependence on the condition of either the situation falls under the exceptions of providing a voluntary departure term or constituting a threat to public policy or national security. However, it is necessary to point out some points regarding harmonisation with the

¹²² Thorburn Stern, R. & Shakra, M., Ibid, p. 28.

¹²³ Trylińska, A., Sieniow, T., Pachocka, M., Krępa, M. and Wach, D., Ibid, p. 25.

¹²⁴ Mielke K., Mencutek, Z.S., & Wolf, D., Ibid, p. 24.

¹²⁵ Hatziprokopiou, P., Kandyliis, G., Komita, K., Koutrolidou, P., Papatzani, E., Tramountanis, A., Ibid., p. 31.

¹²⁶ Ebrahim, S. & Strik, T., Ibid., p. 24.

¹²⁷ Ibid.

¹²⁸ Hatziprokopiou, P., Kandyliis, G., Komita, K., Koutrolidou, P., Papatzani, E., Tramountanis, A., Ibid., pp. 27, 50.

Directive. The first of these concerns the German practice. It is observed that Germany's regulations on entry bans are relatively stricter compared to other countries. For example, entry bans imposed on grounds of public order, national security or public safety can last up to 20 years. Additionally, German national law allows for a temporary re-entry ban for TCNs from a safe country of origin whose asylum applications have been rejected, even if they leave Germany voluntarily.¹²⁹

On the other hand, pursuant to German law, an entry ban is imposed by deportation, which means that it is applied by law in every case of deportation. However, the German Country Report highlights that the consistency of such practice is arguable under Article 3(6) of the Directive, which states that an entry ban can only be imposed via an official or judicial decision and not by a legislator's decision.¹³⁰ Moreover, there have been instances in Germany where deportations were carried out without an accompanying entry ban, which was issued only after the person had re-entered Germany. It is necessary to establish whether a deportation can result in an entry ban that is only limited in time after the deportation, as assumed by the German Federal Administrative Court.¹³¹ However, the interpretation of the EU Return Directive [Article 3(6)] does not support this view, as it specifies that the entry ban should 'accompany' the return decision and not follow it.¹³²

The second example that raises questions about compliance with the Directive is the Greek practice regarding issuing entry bans for individuals on the List of Undesirable TCNs. Pursuant to Greek law, TCNs in this category are subjected to entry bans automatically as they are channelled to the border deportation or administrative expulsion procedures, which require immediate removal. Although the regulations in the national law require the existence of objective signs to establish a concrete connection between the threat and the person, it is understood that this issue is not complied with in practice. The Country Report of Greece reveals that the police have the tendency to register TCNs on the list based on the fact that, at some point, they entered Greece irregularly from a non-legislated point of entry and resided illegally.¹³³

5.3. Procedural Safeguards

In the light of the information provided in the country dossiers, under this heading, the outstanding issues in terms of procedural safeguards are examined under four key areas: effective access to information and legal aid, the effectiveness of administrative and judicial reviews and remedies, effectiveness of guarantees directly related to non-refoulment, and lastly, the situation of persons who cannot be returned. It is important to underline that the ineffectiveness in these areas would have implications not only for the requirements of EU law, in particular the Return Directive, but also, relatedly, for obligations to protect fundamental rights and freedoms, including but not limited to the positive obligations arising out of fundamental rights covered by the non-refoulment principle (e.g., right to life, prohibition of torture), negative obligations arising out of especially the prohibition of torture,

¹²⁹ Mielke K., Mencutek, Z.S., & Wolf, D., Ibid, p. 34; BAMF, 2023a, section 3.2, p. 197.

¹³⁰ Ibid., p. 33.; Oberhäuser, 2019, p. 12.

¹³¹ Oberhäuser, T., Ibid., p. 14.

¹³² Mielke K., Mencutek, Z.S., & Wolf, D., Ibid, p. 33.

¹³³ Hatziprokopiou, P., Kandyliis, G., Komita, K., Koutrolidou, P., Papatzani, E., Tramountanis, A., Ibid., p. 49.

prohibition of collective expulsion, right to private and family life and right to an effective remedy in connection with these rights.

5.3.1. Access to Information and Legal Aid

A comparison of country dossiers shows that Sweden stands out regarding effective access to information and legal aid (including language interpretation services). In Sweden, the provision of documents in a language that the foreigner understands and the use of translators is effectively secured by law. A similar situation is observed in terms of legal aid. The Swedish Aliens Act even provides a broader right to legal representation than the right to legal aid specified by the EU Asylum Procedures Directive. Due to the presumption rule stated in the legislation, a legal counsel may be assigned, free of charge and not subject to means-testing, in almost all cases of expulsion, deportation, and enforcement proceedings involving the detention of a TCN.¹³⁴ Free legal aid based on low income is also reported to be available in Greek law upon request.¹³⁵

However, it is difficult to say that effectiveness in these areas has been achieved on a uniform basis in other countries. In Poland, the decision to return is not translated into a language the foreigner understands. In some cases, it is (partially) translated verbally, but this translation is not always effective.¹³⁶ In the final stages of the process, it is necessary to send all documents and evidence related to the return case to the Border Guard in the Polish language. If the evidence is in the foreigner's native language, it must be accompanied by a sworn translation paid for by the TCN.¹³⁷ It is asserted by the Poland Country Report (p. 40) that TCNs are afraid to sign documents in Polish as they might unknowingly consent to being deported.¹³⁸ It is also indicated that they are sometimes asked to sign a declaration waiving their right to appeal. Some TCNs sign a form waiving their right to appeal without understanding the implications, which constitutes a questionable practice in terms of compatibility not only with EU law but also ECtHR case law. A foreigner has the right to review the case file and file motions before a decision is made; however, it is indicated that this right is often restricted in practice.

Moreover, TCNs have the right to a proxy for administrative procedures in Poland, but they must pay for it. Free legal advice is available but may not be effective. Only 80 cases of complaints against return decisions received free legal aid from the Voivodeship Administrative Court in Warsaw during the last four years; however, the number of foreigners obliged to return during this time was 60,000. Due to language and legal complexities, petitioning for free legal aid is difficult without a Polish lawyer.¹³⁹ In Germany, on the other hand, it is asserted that for persons subject to the return procedure, the heterogeneity of laws and the complexity of the institutional landscape create a high degree of legal uncertainty.¹⁴⁰ Additionally, discrepancies in accessing information and legal aid are reported as particularly valid for those under detention awaiting deportation.

¹³⁴ Thorburn Stern, R. & Shakra, M., *Ibid*, pp. 33–34.

¹³⁵ Hatziprokopiou, P., Kandylis, G., Komita, K., Koutrolidou, P., Papatzani, E., Tramontanis, A., *Ibid*, p. 36–37.

¹³⁶ Trylińska, A., Sieniow, T., Pachocka, M., Krępa, M. and Wach, D., *Ibid*, p. 44.

¹³⁷ *Ibid*, p. 46.

¹³⁸ *Ibid*, p. 44.

¹³⁹ *Ibid*, p. 46.

¹⁴⁰ Mielke K., Mencutek, Z.S., & Wolf, D., *Ibid*, p. 42.

5.3.2. Protection from Non-Refoulement

Doubts about the effectiveness of procedural safeguards for the principle of non-refoulement are mainly concentrated in the border countries, namely Greece and Poland. In the border procedures of these countries, procedural safeguards, particularly concerning access to international protection, push-back and collective expulsion, are considered unclear or ineffective. As mentioned earlier, Greek law operates two separate procedures for return, namely return based on a return decision and return based on expulsion, which are regulated in two separate laws without a connection in terms of procedural safeguards. It is also reported that the police tend to include almost all illegal stayers in the second procedure. Against this background, the Greece Country Report notes that the procedural safeguards for the second procedure under Law 3386/2005 are much more limited than for the other procedure.¹⁴¹ Especially for the border procedure, the compatibility of this situation with the Return Directive becomes questionable. This is because Article 4(4)(a) of the Directive stipulates that in such cases, certain safeguards in the Directive cannot be derogated from.

Additionally, it is reported that NGOs and official actors have accused the Greek authorities of applying the concept of a safe third country in a way that results in the systematic rejection of international protection applications. This is due to the use of pre-formulated, similar, and repeated decisions (template decisions), which raises serious doubts about whether individual assessments of applications are carried out as required by national law and Directive 2013/32/EU on Asylum Procedures.¹⁴² A similar situation applies to Poland. Especially in the context of border procedures, procedural safeguards in the context of access to international protection and the related principle of non-refoulement are not implemented effectively enough, and the Border Guard does not demonstrate effective practice in this regard.¹⁴³

Some points should also be evaluated in German law for protection from the prohibition of refoulement. The first of these is related to “airport procedures”. In this practice, due to the “principle of immediacy”, the application is assessed very quickly while the person concerned stays at the premises within the airport. The German Country Report states that this practice circumvents the non-refoulement requirements of Article 33 of the 1951 Convention relating to the Status of Refugees.¹⁴⁴ The second issue related to Germany is the occurrence of push-back and non-receipt of asylum applications, especially in so-called non-entry areas. Although in such cases, as the Country Report notes, the aim or the consequence is to circumvent the practical execution of the Dublin Regulation,¹⁴⁵ such a practice may also have negative effects in terms of non-refoulement, especially for asylum seekers.

¹⁴¹ Hatziprokopiou, P., Kandyli, G., Komita, K., Koutrolidou, P., Papatzi, E., Tramountanis, A., Ibid., p. 28.

¹⁴² Ibid., p. 48.

¹⁴³ Trylińska, A., Sieniow, T., Pachocka, M., Krępa, M. and Wach, D., Ibid, pp. 27–35.

¹⁴⁴ Mielke K., Mencutek, Z.S., & Wolf, D., Ibid, p. 20.

¹⁴⁵ Ibid., p. 19.

5.3.3. Effectiveness of Administrative and Judicial Reviews and Remedies

An evaluation of the country dossiers reveals that some countries have more effective review procedures than others. For example, in Dutch law, the DT&V, which is responsible for implementing the return decisions, conducts removability checks at various times and consults with the IND on whether the foreign national is still required to leave the Netherlands.¹⁴⁶ If the TCN applies for asylum just before departure, a specialised IND team assesses the presence of new facts or elements. Additionally, there are postponements and temporary permits in case of medical circumstances.¹⁴⁷ Similarly, in Swedish law, the assessment of whether there are impediments to return/removal is done not only during but also after the issuance of the relevant decision. These impediments to enforcement may be related to the risk of non-refoulement, be of a practical nature or a medical nature.¹⁴⁸ However, the Sweden Country Report reveals a discrepancy in terms of legal clarity regarding the practical impediments as these impediments are neither defined in the legislation nor is it clarified what criteria TCNs must meet in order to be considered to have sufficiently participated in the implementation of the decision which in practice sought as a criterion when assessing the impediments of a practical nature.¹⁴⁹

In Greece and Poland, however, discrepancies are more evident. In Greek practice, a return decision may be incorporated when rejecting an application for international protection, revoking the status of international protection, or discontinuing the examination of a request. However, as stated in the Greece Country Report,¹⁵⁰ when independent Appeals Committees examine such decisions in the second instance, they do not determine whether conditions exist for postponing removal due to a risk of refoulement. Instead, they consider the police the responsible authority for executing the removal. This situation is considered contradictory because it reduces the guarantees of the procedure by transferring relevant competence from Appeals Committees, in which judges participate, to police officials.

Moreover, this goes against the authorities' duty to examine non-refoulement considerations before issuing a removal order, not just before its execution.¹⁵¹ In Poland, remedies are reported to be ineffective, especially regarding border procedures. It is indicated that according to the data provided by the Border Guard, there were 1010 orders (orders to leave the territory of Poland) issued in the first half of 2023; however, in none of these situations, despite available remedies in law, were the foreigners able to file appeals.¹⁵² Similarly, it is asserted that at the border crossing point with Belarus in Terespol, the claims of asylum seekers were repeatedly ignored, and they were not even handed a standardised form with the refusal of entry decision against which they could file an appeal.¹⁵³ In Poland, the Border Guard also serves as an appellate body. Foreigners can submit a claim to the court against the final (second) decision of the Border Guards, but this does not have a suspensive effect, which is

¹⁴⁶ Ebrahim, S. & Strik, T., *Ibid.*, p. 34.

¹⁴⁷ *Ibid.*, p. 34, 35.

¹⁴⁸ Thorburn Stern, R. & Shakra, M., *Ibid.*, p. 40.

¹⁴⁹ *Ibid.*

¹⁵⁰ Hatziprokopiou, P., Kandylis, G., Komita, K., Koutrolidou, P., Papatzani, E., Tramountanis, A., *Ibid.*, p. 47.

¹⁵¹ *Ibid.*

¹⁵² Trylińska, A., Sieniow, T., Pachocka, M., Krępa, M. and Wach, D., *Ibid.*, p. 45.

¹⁵³ *Ibid.*

highlighted in the Poland Country Report as not being consistent with the Return Directive's requirement to be effective.¹⁵⁴

In Germany, however, ineffectiveness is reported, especially regarding the process of asylum applications. It is stated in the Country Report that the decisions made by Foreigners Authorities and administrative court judges can lead to contradictory results due to considerable leeway in how they assess an applicant's situation and the situation in their country of origin or a safe third country. In 2017, the Federal Constitutional Court (BVerfG) ruled that administrative courts must base their decisions on current knowledge and not just refer to previous decisions and sources. However, the Country Report asserts that due to the lack of binding country-of-origin information and the overburdening of judicial panels, lawyers dealing with asylum law must be up-to-date and bring relevant information to each case's court proceedings.¹⁵⁵ Moreover, it is reported that the decisions concerning asylum and return depend on the competence and attitude of the staff working with the Local Foreigners Authorities.¹⁵⁶

5.3.4. Situation of Non-Returnable Persons

It is understood that a common problematic issue in all five countries concerning non-returnable persons is uncertainty about the nature of their status and the effectiveness of their access to rights. The German protection system provides a temporary suspension of deportation known as *Duldung*, which is neither considered a regular status nor an irregular stay. However, this limbo situation puts those affected at a disadvantage when it comes to participating in society and claiming their entitlements.¹⁵⁷ Similarly, in Sweden, non-returnable persons may be issued temporary residence permits, which may create limbo situations.¹⁵⁸

In the Netherlands, when a TCN has exhausted all legal means to stay in the Netherlands and cannot be removed due to no fault of their own, such as lack of cooperation from the country of return on the issuance of documents, the DT&V could request the IND to grant the TCN on behalf of the Secretary of State a no-fault residence permit.¹⁵⁹ In case of medical circumstances that prevent the removal of the TCN or a family member, or if the TCN is a victim, witness of or has reported human trafficking, the return will be postponed, in some cases followed by the granting of a residence permit based on humanitarian grounds.¹⁶⁰ However, it is indicated in the Netherlands Country Report that the migration authorities seldom grant residence permits in case of unremovable TCNs. Even if TCNs cannot be removed due to no fault of their own, they do not easily receive a so-called "no-fault" residence permit, although the law stipulates that they should be granted residence permits in such circumstances. In the last few

¹⁵⁴ Ibid., pp. 55, 57.

¹⁵⁵ Mielke K., Mencutek, Z.S., & Wolf, D., Ibid, p. 42.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid., p. 42-43.

¹⁵⁸ Thorburn Stern, R. & Shakra, M., Ibid., p. 31, 39-40.

¹⁵⁹ Immigratie en Naturalisatiedienst, "Unaccompanied Minors", IND, March 13, 2023, Available at: <https://ind.nl/en/about-us/background-articles/unaccompanied-minors> (Accessed 8 March 2024).

¹⁶⁰ Ebrahim, S. & Strik, T., Ibid., pp. 35-36.

years, approximately 20 no-fault residence permits have been issued per year, while the number of applications was three times higher.¹⁶¹

In Greece, it is reported that there is no specific humanitarian status for individuals who do not meet the requirements for international protection but are unable to leave the country. This constraint leaves several groups of vulnerable TCNs, particularly those with significant health problems, without adequate protection. As a result, it is anticipated that this situation can lead to a violation of Article 3 of the ECHR.¹⁶²

In Poland, non-returnable persons may be granted a permit for a tolerated stay. The Act on Foreigners also allows irregularly staying TCNs to submit an application for any type of temporary stay. However, it is reported that in most cases, they receive a refusal decision due to irregular stay. Therefore, the mere submission of an application for residence exposes the foreigner to the initiation of proceedings for the obligation to return.¹⁶³

5.4. Detention

This section reflects on selected aspects of the use of detention in the context of return in the countries examined for the purpose of the comparative study. The assessment takes the minimum standards established in EU law, the CoE policy recommendations and ECtHR case law as a starting point.

5.4.1 Detention and Alternative Measures

In all countries studied, detention for removal is primarily an administrative measure regulated by migration law and administrative law at migration law and administrative law on the national level. In Germany, which is a federal state, the legal basis of detention for the purpose of removal is found in national legislation, while the detailed conditions of implementation are regulated by sub-national/state law.

While immigration detention is not considered a punitive measure (EMN Glossary), it could nevertheless be argued that it has a punitive dimension in the sense that it means a deprivation of liberty based on the previous behaviour or the presumed future behaviour of the alien. Imposing detention as a criminal law sanction for not complying with a return decision is, however, contrary to EU law.¹⁶⁴ In most countries, potential behaviour motivating detention would be the risk of absconding, risks to public security and public order, engaging in criminal activities, obstructing the execution of the return decision, or risks to national security. The Netherlands is the one country of the study in which a “risk of absconding” is the only ground allowing for detention in the return process. The other countries have opted for additional

¹⁶¹ Ministerie van Justitie en Veiligheid, “Wat houdt bemiddeling in het kader van ‘buitenschuld’ in?,” Leg Mij Nou Eens Uit. VreemdelingenVisie, July 6, 2023, Available at: <https://www.vreemdelingenvisie.nl/vreemdelingenvisie/2023/07/buiten-schuld-vergunning> (Accessed 8 March 2024).

¹⁶² Hatziprokopiou, P., Kandyliis, G., Komita, K., Koutrolidou, P., Papatzani, E., Tramountanis, A., Ibid., p. 49.

¹⁶³ Trylińska, A., Sieniow, T., Pachocka, M., Krępa, M. and Wach, D., Ibid, pp. 37–38.

¹⁶⁴ See C-329/11, *Achughbabian*, 6 December 2011.

grounds, thereby going beyond the grounds specifically mentioned in Article 15.1 of the Return Directive. In the case of Sweden, the argument for including additional grounds has been that Article 15.1 of the Return Directive is not exhaustive, which may be seen as an indication of how states seek to find alternative uses for detention in addition to those specifically allowed.

Article 15.1 of the Return Directive further stipulates that detention for the purpose of removal should be used as a last resort (“unless other sufficient coercive measures can be applied effectively in a specific case”). The authorities also need to conduct the return procedure with due diligence. Alternative measures, such as daily reporting to the authorities, seizure of travel documents, bail, or electronic surveillance, should, as far as possible, be used instead of detention. While this approach, in theory, applies in all of the countries in the study, all of the country dossiers point to the fact that detention, in practice, often seems to be the default choice. In Greece, it is even stipulated by law that pre-removal detention is the first choice; migrants awaiting removal are to be placed in detention unless the conditions for less coercive alternatives are met.¹⁶⁵ In Poland, the Netherlands and Sweden, the national reports indicate that while detention as the first choice may not be as pronounced a policy as in Greece, it is nevertheless routinely used. This raises questions about the compatibility of detention policies with the demands outlined in ECtHR case law, CoE and CPT Guidelines, and the EU Return Directive for necessity and proportionality of the measure applied. It also raises questions about to what extent a person’s vulnerability and individual circumstances are sufficiently taken into account when considering detention as an option, given that detention in those cases is to be avoided as far as possible.

5.4.2. Decisions, Appeals and Duration of Detention

The body issuing the original decision on detention varies between the countries – in some countries, it is the migration or police authorities (Greece, the Netherlands); in other countries, a court (Poland, Germany); and in others, yet again all of the above, depending on the procedural circumstances (Sweden). In all countries, a decision on detention may be appealed. In some countries, time limits apply for appeals: in Poland, a court order on detention may be appealed within seven days from the day of receiving the translation of the court order, while in Germany, the detainee’s appeal needs to be submitted within a month. In contrast, there are no time limits for appealing detention decisions in Sweden or the Netherlands – an appeal may be submitted at any point during the time in detention. In addition, a decision on detention in Sweden, Poland, Greece and the Netherlands automatically is subject to judicial review within specific time limits. The purpose of this automatic review differs between countries: in Greece, the review concerns the legality of an extension of detention only, not the detention per se, while in Sweden, it is the decision as such that is reviewed. In several countries, access to legal representation in detention cases is an issue, in particular, if the detainee has no prior legal representative.

The general maximum duration of pre-removal detention is six months in Greece, Poland, the Netherlands and Germany, with the possibility of extension under certain circumstances to a maximum of 18 months. The maximum duration of detention may vary depending on the grounds for detention in the individual case. In some cases, such as Poland, a person may be

¹⁶⁵ Danai Angeli and Dia Anagnostou, “A Shortfall of Rights and Justice: Judicial Review of Immigration Detention in Greece”, 2022, *European Journal of Legal Studies*, May 22, 97–131, p. 105.

held in detention for longer than 18 months under certain circumstances (24 months in total, the additional six months being if they lodge an application for asylum while in detention). In Sweden, the maximum duration of pre-removal detention is two months, which can be extended to 3 months if there are special reasons and, under certain circumstances, to 12 months. These time limits, however, do not apply if the alien has been expelled by a criminal court due to criminal offences, in which case the alien can be detained for much longer than what would otherwise be the case.¹⁶⁶

5.4.3. Conditions in Detention/Detention Regime

TCNs who are subject to return are usually detained in special facilities (usually known as “detention centres”), which is in line with Article 16.1 of the Return Directive. The CJEU has made clear that detention must take place in special facilities.¹⁶⁷ The Greek Ombudsman, however, notes that a large number of TCNs in the country continue to be held in police stations due to insufficient space in detention facilities. In Sweden, the Migration Agency may decide that an alien taken into detention is placed in a penitentiary, remand centre, or police custody when i) the deportation decision is part of a ruling in a criminal case or ii) certain special circumstances apply. In such a case, the alien must be held separate from other detainees. In some of the countries (e.g., Poland and Greece), TCNs in the return procedure and asylum seekers are detained together.

All of the countries included in the study have been criticised for the conditions in detention facilities, including the lack of space allocated for each detainee, insufficient and lack of access to information, the use of practices such as solitary confinement as a punishment, lack of privacy and lack of meaningful daily activities. Several of the country dossiers note that the conditions in detention centres are very restrictive and do not exist in practice as they differ very much from penitentiary facilities. This once again raises the question about the punitive dimension of detention and the way it may play out in practice in the MSs.

5.4.4. Children in Detention (Accompanied/Unaccompanied)

European law does not prohibit immigration detention of children. The possibilities of putting minors in detention are, however, restricted and surrounded by special safeguards. The ECtHR, in several cases, has emphasised that children under immigration detention, accompanied or not, are regarded as being extremely vulnerable and in need of special attention from the authorities. The CoE encourages states to end immigration detention of children.¹⁶⁸

The need for special safeguards for children in immigration detention and awareness that this is a measure to be used only as a last resort appears to be recognised in all the countries included in the study. In Germany and the Netherlands, alternative measures must be considered before a decision on detention is made. In the Netherlands, UAMs can only be

¹⁶⁶ Swedish Migration Court of Appeal MIG, 2014:15 and MIG 2022, p. 8.

¹⁶⁷ CJEU, C-473/13; C-514/13, Bero and Bouzalmate (CJEU, 17 July 2014).

¹⁶⁸ CoE, Available at: <https://pace.coe.int/en/pages/campaign-detention-children> (Accessed 8 March 2024).

detained if there is a weighty interest for the authorities to keep the minor at their disposal. However, this specific safeguard for UAMs does not lead to children not being detained or that the best interests of the child in practice are the primary consideration in the context of detention of children pending removal.¹⁶⁹

While the maximum time limits for the detention of children were not addressed in all of the country dossiers, it can nevertheless be held with some accuracy that the duration of time a child can spend in immigration detention, in general, is much shorter than would be the case for an adult. The most restrictive rules are found in Sweden, where a child may not be detained for more than 72 hours or, if exceptional grounds apply, for another 72 hours. In all of the countries, UAMs and families with children are to be detained in special facilities accommodating their particular needs. There is also the possibility of detaining one parent in the case of a family with minor children while the other family members remain in a so-called restrictive accommodation centre (the Netherlands) or at liberty (Sweden).

5.4.5. Concluding Reflections

A general reflection is that while, in many cases, the legal framework in theory may live up to the minimum standards identified by monitoring bodies, the situation on the ground may often be quite different. One point of concern is for detention to be considered the default choice rather than a last resort. The extreme example here is Greece, but similar tendencies are also found in other countries. Another concern is that access to safeguards such as legal representation for detainees is limited in some countries, at least in practice. A third point of concern is that the conditions in detention facilities are not always up to standard, and there are many similarities between immigration detention and punitive detention, although they serve completely different purposes. The latter may be seen as an indication of how the idea of irregular migration as something criminal has had a substantive impact on the approach to immigration detention as well as on other parts of the migration process.

¹⁶⁹ CoE Guidelines on Return 2005.

6. Policy Recommendations from the GAPs EU Member Countries

Based on the country dossiers, the main and most important country-based policy recommendations can be summarised as follows:

In **Germany**,¹⁷⁰ the primary focus is improving the legal framework and institutional practices to ensure effective returns while complying with fundamental/human rights. This includes establishing a robust control and monitoring system, an independent institution for monitoring pre-removal and detention, and providing access to legal counselling and long-term funding for state and independent return counselling centres. The emphasis is on maintaining the legitimacy of deportations through transparency and rights compliance.

Greece's recommendations¹⁷¹ stress the need to clarify legal procedures and improve detention conditions. Key suggestions include disambiguating legal frameworks to ensure the Return Directive's proper implementation, enhancing living conditions and rights for detainees, and considering alternatives to detention, especially for vulnerable groups like children and asylum seekers. The approach suggests a more humane and legally coherent return process.

Poland's suggestions¹⁷² focus on legal reforms and institutional cooperation to make the return process more humane and less restrictive. This includes restoring the suspension effect of the claim to the court against return decisions, introducing state-funded legal assistance, increasing collaboration with Frontex for transparency, and using alternatives to detention. The emphasis is on enhancing legal safeguards and support for returnees, especially children and other vulnerable groups.

Sweden's recommendations address legal gaps and policy inconsistencies that affect the return process.¹⁷³ Suggestions include incorporating definitions from the Return Directive into national law, clarifying what constitutes a practical impediment to enforcing return decisions, ensuring that detention practices align with EU law, and addressing the mixed messages in Swedish migration policy that create uncertainty and undermine credibility. The focus is on improving legal clarity, safeguarding rights, and ensuring policy coherence.

The Netherlands is advised to focus on better implementation of the Return Directive and less coercive enforcement measures, emphasising the best interest of the child and the fundamental rights of migrants.¹⁷⁴ Recommendations include practising less coercive enforcement measures, emphasising detention as a last resort, ensuring the protection of children's rights, and considering sustainable structures for successful integration or return. The emphasis is on a humane approach to return that respects migrants' rights and needs.

¹⁷⁰ Mielke K., Mencutek, Z.S., & Wolf, D., Ibid.

¹⁷¹ Hatziprokopiou, P., Kandyli, G., Komita, K., Koutrolidou, P., Papatzani, E., Tramountanis, A., Ibid.

¹⁷² Trylińska, A., Sieniow, T., Pachocka, M., Krępa, M. and Wach, D., Ibid.

¹⁷³ Thorburn Stern, R. & Shakra, M., Ibid.

¹⁷⁴ Ebrahim, S. & Strik, T., Ibid.

Each country's recommendations highlight a blend of improving legal frameworks, enhancing institutional cooperation, safeguarding human rights, and ensuring the humane treatment of returnees. These aspects reflect the complex challenges facing return governance and the need for balanced approaches that respect both national security concerns and the rights of individuals.

From a comparative perspective, the policy recommendations/suggestions for Germany, Greece, Poland, Sweden, and the Netherlands showcase similarities and differences in their approaches to return governance, legal frameworks, institutional frameworks, data management, international cooperation, public communication, and implementation practices.

The main similarities:

- *Emphasis on human rights and legal frameworks:* All countries underscore the importance of aligning return policies with human rights standards and the legal frameworks safeguarding these rights. They advocate for clear legal definitions, transparency, and procedures that comply with fundamental and human rights.
- *Need for data management and transparency:* There is a consensus on the necessity for improved data collection, processing, and publication to inform policy-making and ensure transparency in return operations.
- *Institutional frameworks and international cooperation:* Recommendations across countries highlight the need for enhanced institutional frameworks and international cooperation to manage return processes effectively. This includes cooperation with countries of origin and respecting the values underlying foreign and development policies.
- *Detention as a last resort:* The countries advocate for detention to be used as a last resort, with alternatives to detention to be considered first, especially highlighting the importance of the child's best interests and the need for the humane treatment of detainees.

The main differences:

- *Specific legal and policy recommendations:* While the overarching themes are similar, specific legal and policy recommendations vary. For example, Germany focuses on establishing an independent monitoring institution and addressing data gaps, whereas Greece emphasises the need to disambiguate legal procedures and improve living conditions for detainees.
- *Public debate and integration:* Germany and Sweden address the need for public debate on alternatives to return, such as regularisation and the integration of migrants into society. This reflects a broader view of migration management, including societal integration and public perception.
- *Approach to detention and legal assistance:* Poland and the Netherlands emphasise structural reforms in detention practices and the introduction of state-funded legal assistance for return procedures, focusing on procedural safeguards and support for returnees.
- *Child protection and vulnerable groups:* The Netherlands specifically mentions protecting children's rights and the child's best interest in its national legislation,

indicating a targeted approach towards the most vulnerable groups in the context of return policies.

In summary, while there is a common understanding of the need to adhere to human rights standards, improve data management, enhance institutional frameworks, and use detention judiciously, the specific recommendations reflect each country's unique challenges and priorities in migration management. Differences in the focus areas and specific proposals illustrate the varied approaches to addressing the complexities of return governance within the broader European context.

7. Conclusion

This comparative analysis investigates the legal and policy frameworks surrounding return policies within the EU and the five selected MSs (Germany, Greece, Poland, Sweden, and the Netherlands). This report sheds light on the complexities and divergences that mark the execution of these policies, revealing the nuanced challenges of harmonising return procedures in a landscape shaped by diverse legal, political, and human rights considerations.

The **statistical analysis** sheds light on the critical role of accurate, comprehensive, and harmonised statistical data in shaping, evaluating, and refining return policies to ensure they are both effective and aligned with fundamental human rights standards. The findings highlight a shared recognition across the EU and the selected MSs of the need for improved data collection, processing, and publication. This collective understanding underscores the importance of data as the backbone of evidence-based policy-making, enabling the development of targeted interventions that respect the rights and dignity of migrants. The challenges identified in harmonising data collection practices, such as discrepancies in definitions and reporting standards, underscore the need for concerted efforts to address data gaps and inconsistencies.

The **policy framework analysis** reveals a gradual evolution of the EU's return policy, characterised by a shift towards more efficient procedures and international cooperation, especially with third countries. The EU has endeavoured to balance the need for effective return procedures with the protection of migrants' fundamental rights, though challenges remain in ensuring humane and dignified returns. The adoption of the EU Return Directive, the establishment of Frontex, and the implementation of the EURAs are pivotal milestones that have shaped the current landscape of return migration management. However, the report also underscores the complexity of harmonising return policies across the EU due to varying legal, social, and political contexts within MSs.

The comparative analysis uncovers diverse policy focuses and implementation strategies among the MSs, influenced by their unique contexts. This diversity, reflecting the EU's complex political landscape, challenges achieving a harmonised approach to return policies. Operational challenges in conducting returns, including the effectiveness of reintegration measures and cooperation with third countries, further complicate the landscape. The analysis underscores the uneven capacity across the EU to ensure dignified, humane, and sustainable returns, reflecting disparities in resources, political will, and geopolitical considerations.

The **institutional framework analysis** of return policy in the EU is characterised by a multi-layered approach involving various actors, including the EC, the Council of the EU, Frontex, and the EASO, among others. This complex framework is mirrored at the national level, where a blend of governmental and non-governmental entities, alongside specialised agencies, play pivotal roles in the implementation of return policies. The involvement of multiple EU and national actors underscores the collaborative yet intricate nature of managing migration returns. The findings from the country dossiers illustrate diverse approaches to return migration policies, influenced by each country's unique circumstances. While some prioritise strict control and deportations, others emphasise humanitarian considerations and voluntary returns.

The legal framework analysis reveals that the return procedures in the five studied EU MSs constitute a complex landscape influenced by the interaction of national laws with international and EU legal frameworks. While all five countries are bound by common legal standards, such as the principle of non-refoulement and the EU Return Directive, the implementation and impact of these standards vary significantly across the countries. A common trend observed is the tendency to adapt the interpretation of the Directive's requirements to fit national laws rather than strictly aligning national laws with the Directive. While the five selected countries have transposed the Return Directive into their national laws, the extent and clarity of transposition vary, reflecting each state's unique political, social, and legal contexts. This variance underscores the complexity of harmonising return policies across the EU, a challenge exacerbated by differing degrees of adherence to international law and the procedural nuances of the return process in each country.

One notable difference is the degree of adherence to international law, which is affected by whether countries adopt a monist or dualist approach. For example, despite being predominantly monist, Greece and Poland have shown inconsistencies in the direct application of international law. On the other hand, with their relatively open approach to international law, the Netherlands and Sweden have demonstrated a more integrated legal system where national and international laws complement each other.

Procedural aspects of the return process, such as the role of the police and the clarity of return decisions, differ among the countries. In Greece and Poland, the powers of administrative agents associated with security are more flexible and uncertain, leading to confusion and potential shifts in the balance between freedom and security. The scope of return decisions, particularly regarding illegal stay and border cases, lacks uniformity and clarity, creating uncertainty for migrants and challenges in accessing basic rights. The report reflects significant disparities in the approaches to issuing return decisions across the EU, particularly within the selected MSs. The comparative analysis highlights the inconsistent application of procedural safeguards and criteria for non-removability/returnability. The protection offered to vulnerable individuals and those at risk of persecution or harm upon return varies markedly, raising questions about the EU's commitment to human rights and the principle of non-refoulement.

Furthermore, the divergent detention practices among MSs, including reasons for detention, application of the proportionality test, and conditions within detention facilities, are concerning from a human rights perspective. The inconsistencies between the MSs regarding non-removable migrants and the scarce use of the option in the Return Directive [Article 6(4)] to grant a residence permit justify the need for an EU harmonised approach to resolving irregularity by granting a residence right in case of non-culpable obstacles to return. Granting residency would serve the aim of the Directive to terminate irregular stays and elaborate on the call-in recital.

The use of detention as a measure in the return process raises significant concerns. Despite being considered a last resort by the EU Return Directive; detention often appears to be the default choice in practice. Conditions in detention facilities have been criticised, and the treatment of children in detention highlights the need for special safeguards and the importance of considering the best interests of the child.

Briefly, based on the legal framework analysis, the most problematic areas are:

- **Legal Uncertainty and Inconsistencies:** In some countries, the lack of clear definitions and inconsistencies in the application of the Return Directive and international law create legal uncertainty and undermine legal certainty.
- **Procedural Safeguards and Non-Refoulement:** Concerns exist about the effectiveness of procedural safeguards and the protection from non-refoulement, particularly in border procedures and for vulnerable groups such as children.
- **Detention Practices:** The use of detention as a default choice rather than a last resort, limited access to legal representation for detainees, and substandard conditions in detention facilities are significant concerns.
- **Effectiveness of Administrative and Judicial Reviews:** Discrepancies in the effectiveness of administrative and judicial reviews and remedies, particularly regarding access to legal aid and the implementation of court decisions, are problematic.

In conclusion, the report calls for enhanced cooperation among EU MSs and between the EU and third countries, as well as legal reforms and policy alignment to improve the management of return migrations. It advocates for a balanced approach that respects migrants' rights while effectively managing migration flows. The necessity for clear legal frameworks, accurate and comprehensive statistics, and a commitment to humane and efficient return processes stands out as fundamental to advancing the EU's return migration policies. The ongoing effort to harmonise return policies and practices across the EU underscores the complexity of migration management in a context that seeks to balance security concerns with humanitarian obligations.

In order to navigate the above-mentioned challenges, the need for a multifaceted approach aimed at harmonising return policies within the EU should be emphasised. Strengthening mechanisms for monitoring and enforcing compliance with the EU Return Directive is imperative to align the MSs' practices more closely with established standards. There is a pressing need for greater consistency in procedural safeguards, especially concerning appeals processes and the protection of vulnerable groups. Uniform standards on detention practices, emphasising alternatives to detention and improving conditions in detention facilities, are crucial to upholding international human rights standards.

Moreover, enhancing support for voluntary return programmes, ensuring accessibility and dignity, and implementing effective reintegration measures are vital for sustainable return processes. Improving international cooperation on readmission and reintegration must balance effective returns with respect for returnees' rights.

By addressing these identified gaps and moving towards a more unified and humane approach, the EU and its MSs can better balance migration management objectives with a steadfast commitment to human rights and international law, enhancing the effectiveness, fairness, and humaneness of return practices across the Union.

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Decentring the Study of Migrant
Returns and Return Policies

Legal and Policy Infrastructures of Returns in Germany

Country Dossier (WP2)

Authors

Katja Mielke, Zeynep Sahin Mencütek, Daphne Wolf

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List of Abbreviations

AnkER	“Arrival, decision and return” facilities
AsylG	German Asylum Act (<i>Asylgesetz</i>)
AufenthG	German Residence Act (<i>Aufenthaltsgesetz</i>)
AufenthV	German Residence Ordinance (<i>Aufenthaltsverordnung</i>)
BAMF	German Federal Office for Migration and Refugees
BMI	German Federal Ministry of the Interior and Community
BMZ	German Federal Ministry of Economic Cooperation and Development
BICC	Bonn International Centre for Conflict Studies
BVerwG	German Federal Administrative Court (<i>Bundesverwaltungsgericht</i>)
CERC	Canada’s Excellence Research Chairs Program
CJEU	Court of Justice of the European Union
EU	European Union
GEAS	Common European Asylum System (<i>Gemeinsames Europäisches Asylsystem</i>)
GETZ	Joint centre for countering extremism and terrorism (<i>Gemeinsames Extremismus- und Terrorismusabwehrzentrum</i>)
GFFO	German Federal Foreign Office
GG	German Basic Law (<i>Grundgesetz</i>)
GIZ	German International Cooperation
GTAZ	Joint Counter -Terrorism Centre (<i>Gemeinsames Terrorismusabwehrzentrum</i>)
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
MP	Member of the German parliament (<i>Bundestag</i>)
OVG	Higher Administrative Court (<i>Oberverwaltungsgericht</i>)
SBC	Schengen Borders Code
TCNs	Third-country nationals
VG	Administrative Court (<i>Verwaltungsgericht</i>)
ZAB	Central Foreigners Authority (<i>Zentrale Ausländerbehörde</i>)
ZUR	Repatriation support centre (<i>Gemeinsames Zentrum zur Unterstützung der Rückkehr</i>)

Summary

This report focuses on the legislative and institutional frameworks, as well as the procedural infrastructure related to the return of rejected asylum seekers and other unauthorised migrants from Germany between 2015 and 2023. The analysis shows that the political rhetoric of ‘closing the deportation gap’ and improving returns through increased effectiveness has had important policy consequences since 2015 and has continued under the current coalition government formed in 2021. The so-called return offensive rhetoric has been translated into legal provisions to increase the number and effectiveness of returns as well as a growing emphasis on finalising international migration ‘partnership’ agreements. Beyond politics of return, the field of return governance in Germany is very dynamic and, at the same time, reveals structural deficiencies, operational shortcomings, heterogeneous practices and internal contradictions. There are clear gaps in at least six areas, including legislative structure, institutional framework, international cooperation, data collection/sharing, implementation and political communication.

In terms of legislative infrastructures, the report shows that Germany adopted the EU Return Directive since 2008, but its implementation at the federal level has been ambivalent. In contrast, the Court of Justice of the European Union (CJEU)’s case-law, which developed in its wake is having greater significance in enhancing protection and is widely used by lawyers and courts at the operational level. The authority and discretionary powers of judges in district and administrative courts, as well as of the street-level bureaucrats working in local migration agencies, have complicated the interpretation of legislation and procedures, as well as their outcomes. It is not uncommon for national rule-of-law-based return policymaking to be contrasted in practice with federal regulations and enforcement practices.

The report also highlights the extent to which Germany’s institutional infrastructure dealing with returns is highly complex due to the multi-level governance with discretionary powers of the *Länder* (*federal states*) and sub-national administrative actors (districts and municipalities) in the federal system. The parallel existence of international, EU, national and state legal frameworks also brings advantages and disadvantages for those affected by and those implementing return policies. In Germany, the 16 states and their subordinate administrative bodies and institutions (e.g., police) are solely responsible for enforcement, and there is a mix of cases where the states themselves are active policymakers, where they directly adopt EU law or where they follow national legal provisions.

In their analysis, the authors have identified some key legal gaps with regard to non-compliance with fundamental/human rights and the EU law:

- Although there are no official figures, there is ample evidence that detentions are mostly unlawful and thus, sometimes not used as a measure of last resort in the case of removal as foreseen in German jurisdiction. It is, therefore, necessary to review the judicial authority of the district courts and examine their independent handling of cases.
- The most significant discrepancy between EU law and national law concerns the monitoring of returns. Germany has neither a law nor provisions for systematic monitoring or the institution of an ombudsperson.
- There is increasing evidence of pushbacks at internal (Schengen) borders. Furthermore, the issuance of a post-deportation entry ban is not in line with EU law, and the fact that the decision is taken by a legislator instead of being reviewed officially or by a judge violates Art. 3.6 of the EU Return Directive (2008).
- The German legal framework for asylum law and reception conditions, which mirrors return legislation, seems to entail a compliance gap with EU law. The German framework is built on the decentralised implementation of EU and national law. In terms of procedures, it remains unclear who exactly is not complying and how.

- German authorities bend the law according to EU provisions, e.g., by preferring to apply the Schengen Borders Code for border controls and *Zurückweisungen* (refusals of entry) instead of the EU Return Directive. However, the successive extension of border controls with the argument of ever different but similarly defined security threats point to ambivalences and contradictions in EU law, which Germany, like other EU states exploits.

Keywords: return, deportation, voluntary departures, governance of returns.

The GAPs Project

GAPs is a Horizon Europe project that aims to conduct a comprehensive multidisciplinary study of the drivers of return policies and the barriers to and enablers of international cooperation on return migration. The overall aim of the project is to examine the disconnects and discrepancies between expectations of return policies and their actual outcomes by decentring the dominant, one-sided understanding of “return policymaking.” To this end, GAPs:

- examines the shortcomings of the EU’s return governance;
- analyses enablers of and barriers to international cooperation, and
- explores the perspectives of migrants themselves to understand their knowledge, aspirations and experiences with return policies.

GAPs combines its approach with three innovative concepts:

- A focus on return migration infrastructures, which allows the project to analyse governance gaps;
- An analysis of return migration diplomacy to understand how relations between EU member states and with third countries hinder cooperation on return; and
- A trajectory approach, which uses a socio-spatial and temporal lens to understand migrant agency.

GAPs is a three-year interdisciplinary research project (2023–2026), coordinated by Uppsala University and the Bonn International Centre for Conflict Studies (BICC) with 17 partners in 12 countries on four continents. GAPs’ fieldwork has been conducted in 12 countries: Sweden, Nigeria, Germany, Morocco, the Netherlands, Afghanistan, Poland, Georgia, Turkey, Tunisia, Greece and Iraq.

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1. Statistical Overview: Returns and Readmissions at the National Level

According to the German Federal Ministry of the Interior and Community (BMI), some 250,749 people were classified as having the obligation to leave Germany at the end of October 2023 (Tagesschau, 2023). Two hundred one thousand eighty-four of these were granted a temporary suspension of deportation/removal¹ (*Duldung*) which means that 49,665 people were potential enforceable returnees (Tagesschau, 2023). According to the same source, the new provisions of the Repatriation package coming into force in 2024 will (only) lead to an estimated 600 additional deportations/ removals per year from 2024 onwards, after Germany had deported around 12,000 people in 2021 and 2022 annually. It is well known that in recent years, Germany has stepped up the voluntary and coerced return of those migrants and asylum seekers from Georgia, North Macedonia, Albania, Moldova and Serbia, whose applications had been rejected. German media, citing statements by the BMI, report that deportations of failed asylum seekers increased by more than a quarter in the first six months of 2023 (Deutsche Welle, 2023). However, as in other European Union (EU) member states, the figures and statements on return rates and their nature are often disputed in Germany.

The full data table on return-related statistics, which is mainly based on the Eurostat database, can be found in **Annex I**. In addition to Eurostat statistics, there is a considerable amount of statistical data on returns available at the national level. However, due to the multiplicity of actors and the federal logic in Germany, the data sets are very complex and heterogenous. As the federal states (*Länder*) pursue their own programmes and implementation practices, they are not obliged to collect data according to the same standards, and consequently, the data is not comparable and cannot be added to provide reliable national figures (Bundesregierung, 2022, p. 137; Rietig & Günnewig, 2020, p. 13). Gaps in national databases are discussed in Section 6.4.

It should be acknowledged that various actors, in particular some political parties, have played an outstanding role in documenting or requesting data on returns through their parliamentary authority. Specifically, members of the party *Die Linke*² in the German parliament (*Bundestag*) have used the instruments of parliamentary minor inquiries (*Kleine Anfrage*) and major interpellations (*Große Anfrage*) to obtain data from the executive bodies on migration, asylum and return-related figures, how they are obtained and documented. Accordingly, in this report, the authors extensively consulted parliamentary inquiries from 2015 to 2022 to compile return statistics and allocated budgets. We also checked the websites of the relevant ministries at the federal and state level. Some of the figures presented are included in the relevant sections throughout the report.

An important numerical figure for interpreting return data is the number of asylum applications, which is relatively high in Germany. For example, according to EU sources, 243.835 first-time applications in the European Union, representing 25 per cent of all first-time applications in

¹ Deportation and removal terms are synonymous in the German context.

² Due to internal rifts in the party *Die Linke*, it lost its parliamentary group (faction) status in December 2023, and it remains to be seen whether the qualitatively different/ minor parliamentary group status remaining for the current parliamentary term will allow its members of parliament (MPs) to continue with the inquiries. If not, the German public faces a serious risk of a loss of transparency and increasing non-information about migration-related operational, legal and institutional developments in Germany and its embedding in the European migration and asylum/return landscape.

2022, were made in Germany.³ National data shows slightly higher figures for 2022, as shown in the table below.

Table 1. Asylum applications

Year	# Asylum applications
2015	476.649
2016	745.545
2017	222.683
2018	185.853
2019	165.938
2020	122.170
2021	190.816
2022	244.132

Source: Bundesamt in Zahlen Asyl, Migration und Integration, p. 17.

https://www.bamf.de/SharedDocs/Anlagen/DE/Statistik/BundesamtinZahlen/bundesamt-in-zahlen-2022.pdf?__blob=publicationFile&v=4. Accessed 02.02.2024.

In general, some of the statistics mentioned in the parliamentary questions are consistent with the Eurostat database (Annex I), while others show changes due to the use of different categories. For example, figures on the approximate number of irregular migrants,⁴ are not available in German statistics; however, it is possible to collect figures on illegal entries, persons obliged to leave the country and refusals at the borders, which together can give a rough idea of the proxy of stock of irregular migrants.

Table 2. Illegal entries

Year	#Illegal entries
2015	217.237
2016	111.843
2017	50.154
2018	42.478
2019	40.610
2020	35.435
2021	57.637
2022	91.986

Source: Migrationsbericht 2021, p. 138. <https://shorturl.at/gST36>

Table 3. Persons obliged to leave the country

Year	#Persons obliged to leave the country
2015	204.414
2016	207.484
2017	228.859
2018	235.957
2019	249.922
2020	281.143
2021	292.672
2022	304.308

Source: Illegale Einreisen im Zeitraum 1. Januar 2009 to 31. December 2022, p. 8. <https://shorturl.at/bdDo3>

We checked the number of people refused entry at the border from the parliamentary inquiries for each year. However, the numbers of refusals at the border do not correspond to the Eurostat

³ 'Infographics, Asylum applications in the EU, <https://www.consilium.europa.eu/en/infographics/asylum-applications-eu/>. Accessed 03.01.2024.

⁴ Third country nationals (TNCs) found to be illegally present in the country.

statistics (Annex 1), as the German version also includes refusals of EU citizens. Nevertheless, it provides some proxy figures.

Table 4. TCNs/foreign nationals refused entry at the border (including EU citizens)

Year	Numbers	Sources
2015	8.913	Abschiebungen im Jahr 2015, p. 12. https://dserver.bundestag.de/btd/18/075/1807588.pdf
2016	20.851	Abschiebungen im Jahr 2016, p. 14. https://dserver.bundestag.de/btd/18/111/1811112.pdf
2017	12.370	Abschiebungen im Jahr 2017, p. 15. https://dserver.bundestag.de/btd/19/008/1900800.pdf
2018	12.079	Abschiebungen und Ausreisen im Jahr 2018, p. 15. https://dserver.bundestag.de/btd/19/080/1908021.pdf
2019	13.689	Abschiebungen und Ausreisen im Jahr 2019, p. 15. https://dserver.bundestag.de/btd/19/182/1918201.pdf
2020	19.690	Abschiebungen und Ausreisen 2020, p. 14. https://dserver.bundestag.de/btd/19/270/1927007.pdf
2021	13.183	Abschiebungen und Ausreisen im Jahr 2021, p. 12. https://dserver.bundestag.de/btd/20/008/2000890.pdf
2022	25.538	Berichte über Zurückweisungen von Schutzsuchenden an den Binnengrenzen, p. 3. https://dserver.bundestag.de/btd/20/056/2005674.pdf

Data is also available on sensitive issues such as the return of unaccompanied minors or readmitted citizens.

Table 5. Return of unaccompanied minors

Year	Deportation according to sec. 58 residence act (Abschiebung)	Deportation according to sec. 57 residence act (Zurückschiebung)	Source
2015	0	10	Abschiebungen im Jahr 2015, p. 23. https://dserver.bundestag.de/btd/18/075/1807588.pdf
2016	0	29	Abschiebungen im Jahr 2016, p. 29. https://dserver.bundestag.de/btd/18/111/1811112.pdf
2017	1	66	Abschiebungen und Ausreisen im Jahr 2017, p. 27. https://dserver.bundestag.de/btd/19/008/1900800.pdf
2018	0	56	Abschiebungen und Ausreisen im Jahr 2018, p. 27. https://dserver.bundestag.de/btd/19/080/1908021.pdf
2019	n/a	28	Abschiebungen und Ausreisen im Jahr 2019, p. 17. https://dserver.bundestag.de/btd/19/182/1918201.pdf
2020	n/a	40	Abschiebungen und Ausreisen 2020, p. 17. https://dserver.bundestag.de/btd/19/270/1927007.pdf
2021	n/a	86	Abschiebungen und Ausreisen im Jahr 2021, p. 14. https://dserver.bundestag.de/btd/20/008/2000890.pdf
2022	n/a	120	Abschiebungen und Ausreisen 2022, p. 15. https://dserver.bundestag.de/btd/20/057/2005795.pdf

2. Political Context/Framework

The German political context for return policy in the period 2015 to 2022 is, on the one hand, primarily characterised by continuity despite a change of government in 2021. On the other hand, it is a repetition of the migration policymaking and rhetoric of the first half of the 1990s.⁵ The persistent trend is for migration and return policymaking to be grounded in domestic factors, particularly the steady rise of right-wing populist political voices and political groups that rally against immigration. Populist rhetoric portrays immigrants as a burden on the German social welfare system; immigrants are accused of asylum fraud; municipalities and the state are portrayed as victims, and there is a tendency to associate immigrants with security risks, public disorder and criminality. As a result, restrictions, efforts at control, and a focus on return have dominated migration policymaking during the observation period, with more than 35 amendments to asylum and residence laws since 2015.⁶ The narrow political focus on rejected asylum seekers, who are considered deportable, is intended to demonstrate steering capacity. In contrast, other steering options remain limited, e.g., for the increasing number of rejected protection seekers who are tolerated by the authorities because they cannot be returned for various reasons (see Section 5.3). During the period 2015 to 2022, there was a significant shift in public perception occurred from the 'welcome culture' (*Willkommenskultur*), which the German public had displayed during what later became known as the 'refugee crisis'—the influx of more than one million migrants in 2015/16—to the de facto 'culture' of return and deportation, the first measures of which have their roots in the same period and continue to this day.⁷

The change of federal government in 2021 after 16 years of various coalitions under the leadership of the Christian (Social) Democrats (CDU/ CSU), to a coalition of Social Democrats (SPD), Greens (Bündnis 90/Grüne) and Liberals (FDP), led to the (*Ampel*-)⁸coalition's claim of a paradigm shift in migration policy. It is based on the idea of comprehensive migration agreements with countries of origin and the recognition that Germany is an immigration country and needs migrant workers. At the same time, a concerted effort for safe and effective returns and faster asylum procedures

⁵ Immigrants from countries of the global South in the early 1990s—a new phenomenon after the Cold War, when mainly 'good' dissidents from the East had sought refuge in large numbers in West Germany—were attacked by racist mobs in several German cities. The ruling politicians perceived the situation as a threat to public order and the rule of law, and interpreted the high numbers of immigrants as a reaction to the fundamental right of asylum, which was granted by Article 16 of the German Basic Law (GG). Subsequently, a constitutional amendment was discussed and presented as the only solution, with the so-called asylum compromise—the clarification in a newly added Article 16a that excluded immigrants from so-called safe third countries from the individual right to asylum in Germany. The change in asylum policy had an impact on German and European refugee law in the following years and is seen as a precursor to the concept of safe countries of origin both in Germany and in the European Union, the Dublin Regulations (1997, 2003) and the Airport Procedure (*Flughafenverfahren*), which allows entry refusals in the German national law. Moreover, the asylum compromise was accompanied by the enactment of the Asylum Seekers Benefits Act (*Asylbewerberleistungsgesetz*) in 1993, which limited social assistance payments to selected, mostly in-kind, benefits and lowered the subsistence level for protection seekers in comparison to other groups. The public debate in Germany about restrictions on immigration in 2022/23 is very similar, and the political demands of the opposition parties go in the same direction (restrictions and removals).

⁶ See Hruschka & Rohmann, 2020 and Hruschka & Schrader, 2021, p. 5. For examples, confer to the entries 'Asylum packages 1 (2015), 2 (2016), Integration Act 2016, First and Second Act to improve the enforcement of the obligation to leave the country 2017/ 2019' in the flow chart (Figure 1).

⁷ The number of deportations increased from 2015 onwards, with a focus on rejected asylum seekers from the Western Balkans (to Albania, Kosovo, and Montenegro until they were declared 'safe countries of origin', also in 2015).

⁸ The new coalition government is widely called '*Ampel*' ('traffic light') because of the colours associated with the coalition parties: red (Social Democrats), yellow (Liberals), green (Greens).

was announced.⁹ In 2023, the German government agreed on domestically highly controversial topics in the proposed legislation for a 'New Pact on Migration and Asylum' by the EU Council, which provides for a so-called border procedure (*Grenzverfahren*) at the EU's external borders and a regulation on crisis and force majeure situations in migration and asylum (*Krisenverordnung*). In short, for the policy field of return in migration policy, the announced paradigm shift in 2021 does not bring about any significant changes but rather represents a continuation of the existing de facto repatriation offensive.

Figure 1: Flowchart Political context¹⁰

2015	2016	2017	2018	2019	2020	2021	2022	2023
European Migration Agenda Migration Summit in Valletta, Malta EU hotspots approach Launch of the EU Integrated Return Management System (IRMS)	UN 2030 Agenda enters into force EU Commission first proposed New Pact but no agreement (putative) closure of Balkan Route EU-Turkey refugee agreement Schengen Borders Code	EU Return Manual adopted together with the EU Action Plan Act to Improve the Enforcement of the Obligation to Leave the Country more than 200 baseless control raids by Bavarian police in migrant shelters (permitted by Integration Act)*	Global Compact for Safe, Orderly and Regular Migration and Global Compact for Refugees counseling centers open in Nigeria and Iraq	New Regulation on Family Reunification Act Second Act to Improve the Enforcement of the Obligation to Leave the Country ('Law of orderly return', with temporary suspension of removal [Duldung] 'light')	EU Commission's Migration and Asylum Package: New Framework for long-Term Migration Management and Normalization of Migration OVG basic decision that migrant shelters are protection spaces in accordance with Article 13 of the Basic Law (GG), prohibiting arbitrary raids	European Commission presents strategy on voluntary return and reintegration new Law on the Central Register of Foreigners (Ausländerzentralregister, AZR), extending access and type of stored data; new Regular Needs Assessment Act Coalition agreement of the new 'Ampel' government promises a paradigm shift toward a "modern immigration country", incl. a "repatriation offensive"/ concerted effort on return.	Decision to activate Directive 2001/55/EC (mass influx and temporary protection) by the Council of the EU Emergency aid and one-time payment law with changes in residence and social law for war refugees from Ukraine as of 01.06.2022 BAMF-measures to accelerate decision-making for protection applications counseling center opens in The Gambia Migration and Mobility Agreement with India	EU Commission policy document: Towards an operational strategy for more effective returns New Pact on Migration and Asylum agreed betw. MS and EU Parliament on 20 Dec., incl. Regulation addressing situations of crisis and force majeure EU-migration agreement with Tunisia closed (July 2023), undone (Oct 2023), partly revived again (Dec 2023) ** CJEU-ruling on possibility of refugee status revocation for criminals who are potential threats for security (three cases BE, AU, NL), 6.7.23 Appointment of the new special representative for migration agreements 45 politically motivated attacks on asylum seekers' accommodation registered Jan-March 2023 (more than twice in comparison 1st qu. 2022) Agreement on new Repatriation Improvement Law and declaration of Georgia and Moldova as safe countries of origin (pending approval Upper House of Parliament/ Bundesrat in 2024) Joint Migration Agreement with Georgia
Asylum Package 1 (Asylum Procedure Acceleration Act): Albania, Kosovo and Montenegro declared safe countries of origin + Act Redefining the Right to Remain and Termination of Residence Admission of more than 1 mio. refugees Government Special Initiative 'Flight/ Displacement' active (launched in 2014) Law to change Asylum-Seekers' Benefits Act notion of 'prospect of staying' introduced in Germany: those without good prospects subject to return policy/ deportability	EU and D agreement with Afghanistan on forced and voluntary repatriation Government allocates €10 mio for voluntary return assistance programs (mainly REAG/GARF) Act on Facilitated Deportation of Delinquent Foreigners Asylum Package 2 Incl. Act on the Introduction of Accelerated Asylum Procedures Integration Act and Program for the admission of labor migrants from western Balkan states tolerated migrant kills 12 people, injures 48 in terrorist attack at Berlin Christmas market (19 Dec 2016)	Measures on return and reintegration come into force: "Perspektive Heimat", "StarthilfePlus", Joint Return Support Center (ZUR), Information on return and reintegration support when applying for asylum counseling centers open in Morocco, Tunisia, Ghana and Senegal	Masterplan Migration introduced (BMI), preceded by a government crisis. Third law amending the Asylum Act EU and International Germany Return	The Gambia and Pakistan included in the "Perspektive Heimat" programme	counseling centers open in Pakistan and Egypt			

⁹ At the time of writing (October 2023), these measures are being fleshed out in draft legislation, such as a new law to improve repatriation. In their political rhetoric, the opposition (CDU/ CSU) and even a coalition partner of the government (Liberals, FDP) are careful not to question the basic right to asylum but to claim that the return of undeserving immigrants makes it possible to protect those who are 'really in need', thus calling for all kinds of measures to restrict the freedoms and benefits of protection seekers to make Germany an unattractive destination in line with their assumption that most people come to commit and live from asylum fraud.

¹⁰ See the source for context 2017 (Germany)* "Razzien in Flüchtlingsunterkünften..."(2018); for context 2023 (EU) ** González & Hierro (2023).

3. Relationship Between National Law/ EU Law/ Public International Law

The relationship between international and supranational EU law and national law is governed by Articles 23, 24 and 25 of the German Basic Law (GG). Art. 25 (1) GG states that international treaties requiring consent or participation have the status of federal law in the German legal system. One exception is the European Convention on Human Rights, which technically has the status of national law but is also used by the German Federal Constitutional Court as an instrument of interpretation.¹¹

The primacy of EU law is based on Article 24 of the GG; in 1992, Article 23 of the GG was amended for the transfer of sovereign powers to the EU (Gaja, 2018). The German Constitutional Court has referred to and ruled on the primacy of EU law in several judgements, and while it generally accepts the principle, it has also pointed out some limits to the primacy.¹² According to the Court, the primacy of EU law is conditional and ends when fundamental rights and principles of the German GG are violated (Herdegen, 2023, §10.24). However, since the protection of fundamental rights in the EU Charter of Fundamental Rights is more or less equivalent to that in the German GG, this dispute has little practical relevance (Skouris, 2021, EuR 3, 9). The more practical implications of the relationship between EU and German domestic law are the implementation of EU regulations and directives, the secondary EU law and their status in national law. Regarding the transposition of the EU return regime into German national law, the EU Return Directive was implemented in 2011¹³, the recast of the Qualification Directive in 2013, the Asylum Procedures Directive and the Receptions Conditions Directive in 2015 (Hoffmeyer-Zlotnik & Stiller, 2023).

Key UN human rights treaties ratified by Germany include ¹⁴

- International Covenant on Civil and Political Rights (ICCPR),
- International Covenant on Economic Social and Cultural Rights (ICESCR),
- International Convention on the Elimination of all Forms of Racial Discrimination (ICERD),
- Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),
- Convention on the Rights of the Child (CRC),
- International Convention of the Protection of the Rights of all Migrant Workers and Members of their Family (ICMW),
- International Convention for the Protection of all Persons from Enforced Disappearance (CPED),
- Convention on the Rights of Persons with Disabilities (CRPD).

There are also optional protocols to some of these conventions, which offer more extensive protection or complaint procedures to the relevant monitoring body. Germany has also ratified all optional protocols except the one to the International Covenant on Economic, Social and Cultural Rights (ICESCR). Germany ratified all Conventions without reservations, except the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

¹¹ See Deutscher Bundestag/ Wissenschaftliche Dienste (WD), 2019, p. 4.

¹² BVerfGE 37, 271 (Solange I); BVerfGE 73, 339 (Solange II); BVerfGE 126, 286 (Lissabon-Urteil); BVerfGE 156, 340 (PSPP-Urteil).

¹³ Official Gazette I no. 59 of 22 November 2011, p. 2258.

¹⁴ UN OHCHR, 2023; Deutscher Bundestag/ WD, 2019, p. 6f.

(CAT), where a reservation was made to Art. 3 of the Convention, stating that it would only apply through EU law.¹⁵

With regard to the status of Public International Law in domestic law, Germany follows the dualist system. Thus, international human rights treaties must be incorporated into German domestic law by a separate act of ratification. The general rules of Public International Law include the norms of customary international law and *ius cogens*. For these rules to be directly applicable, they must be sufficiently specific and absolute (“self-executing”).¹⁶

Judgements of the European Court of Human Rights are legally binding on Germany under Article 46 of the EU Convention on Human Rights and Article 59 (2) (3) GG, if Germany is a party to the proceedings. In cases in which Germany is not a party, the judgements still have a factual orientation and guidance function (Herdegen, 2023, §3.75). The findings and observations of the monitoring bodies of the UN human rights treaties are not legally binding; however, they serve as guidance and orientation and are used for further developments and decisions (Oette, 2018).

¹⁵ See UN Treaty Collection (n.d.).

¹⁶ Jarass et al., 2022, Art. 25, Rn. 1-5, 14.

4. Institutional Framework and Operational Infrastructure

The German return governance landscape consists of a three-tier governmental hierarchy with policy and operational responsibilities and is flanked by courts and non-state actors at national and sub-national levels while embedded in the international return regime with EU regulations and operational support (e.g., from Frontex). Annex 1 lists the main actors and their competencies and responsibilities. Due to the complexity of the German federal system of governance, at the sub-national level, mainly categories of actors with a specific task/activity profile are included, without mentioning individual authorities in all locations, that is district courts as a generic category are listed, but not all existing district courts in the 16 federal states of Germany.¹⁷

Return policymaking is the responsibility of the federal government, with the Federal Ministry of the Interior and Community (BMI) taking the lead. It provides the guidelines and legal framework for return policy, negotiates bilateral admission and migration agreements and designs and finances return assistance programmes. The Federal Office for Migration and Refugees (BAMF), a higher federal authority, acts as the operational arm of the BMI. It is a multi-tiered authority with branch offices (*Außenstellen*) in the major migrant reception facilities and other relevant administrative divisions.¹⁸ The BAMF is the agency responsible for deciding on applications for protection (asylum) (see Section 5.3) and is also responsible for legal measures and decisions concerning aliens (§5.1 AsylG). Within this remit, the BAMF administers the entire asylum process before deciding on a protection status or rejection (including Dublin cases). Other actors at the federal level include the Federal Ministry for Economic Cooperation and Development (BMZ), which is mainly involved in financing reintegration and improving livelihood measures in countries of origin (with its implementing organization GIZ responsible for programme implementation), the German Federal Foreign Office (GFFO) and the Federal Police. The latter plays a key role in enforcing returns through removals. In 2023, the inter-ministerial position of a Special Representative for Migration Agreements was established with the office physically located at the BMI.

According to German Basic Law (GG), the implementation of federal policy is subject to the competences and organizational and political preferences of the federal states (*Länder*). Within the federal legal framework, the states enforce the repatriation of persons obliged to leave the country on the basis of different administrative structures and bureaucratic responsibilities within the states. Moreover, states may organize their own bilateral return programmes or

¹⁷ The same applies to return counselling centres, other civil society and advocacy organisations, various types of research institutions, and the so-called Foreigners Authorities (*Ausländerbehörde/-amt*) working at the municipal level. Despite different naming conventions in the federal states (authority vs. office), the authors use the term ‘Foreigners Authority’ throughout this Dossier for municipal level institutions (in addition to the Central Foreigners Authority [*Zentrale Ausländerbehörde*, ZAB] at district or higher level). See Annex 1 for an overview of authorities involved in migration return governance.

¹⁸ According to §5.3 AsylG (German Asylum Act), the opening of a BAMF branch office is mandatory where a local reception facility accommodates more than 1,000 persons but can also be established—in coordination with the states—in locations with lower numbers and outside of reception centres. In 2023, there were 60 local branch offices of the BAMF. See Annex 2 for further distinctions in the naming of BAMF branch offices; distinction is made between arrival centres, AnKER centres and decision-making centres. This is partly due to the current government’s rejection of the AnKER centre concept introduced by the previous government (2017–21) in 2018. The main idea, however, of bundling the competencies of all relevant agencies for the asylum process in one place, remains, albeit reformulated as ‘integrated refugee management’ (BAMF, 2018).

individual components.¹⁹ This results in a complex set of actors, especially at the third tier of government, where different municipal categories (urban vs rural districts, different types of municipalities) use different administrative structures (e.g. in the case of Foreigners Authorities) and procedures, e.g. regarding the responsibility for removal action, which may be the responsibility of either a state's police or state executive services or the Foreigners Authority (Rietig & Günnewig, 2020).

The local Foreigners Authorities are the main actors with the most executive power in the return process. The approximately 600 offices practically grant or revoke protection status, order expulsion, deportation and removal detention and enforcement, and ensure that the necessary documents (passports) are obtained. The discretionary powers of employees of that third tier of government have been the subject of discussion between advocacy groups in parliamentary inquiries and the government (BAMF and BMI) because of contrasting decisions resulting from the considerable leeway given to decision-makers.²⁰ Administrative courts play a key role in reviewing rejection decisions and can offer legal remedies; ordinary courts are responsible for issuing detention orders. Decisions are thus highly dependent on the municipality (as the local level) and the capacity and qualifications of the staff in the relevant institutions (court, Foreigners Authority).

Since 2015, the German return governance framework has been expanded to include intermediate coordination structures between the federal and state levels (federal–state interfaces). Inter-ministerial coordination at federal level and between the interior ministries of the states has also increased. As repatriation is the responsibility of the states but is in the interest of the Federation, the BMI has made efforts to support the states administratively (document procurement, migration agreements with countries of origin) and with training. The Repatriation Support Centre (ZUR) is the primary interface for the regular enforcement of returns, while two counter-terrorism exchange platforms (GETZ and GTAZ, see Annex 1) offer advice in the assessment and eventual removal of persons who potentially constitute a threat to internal security.

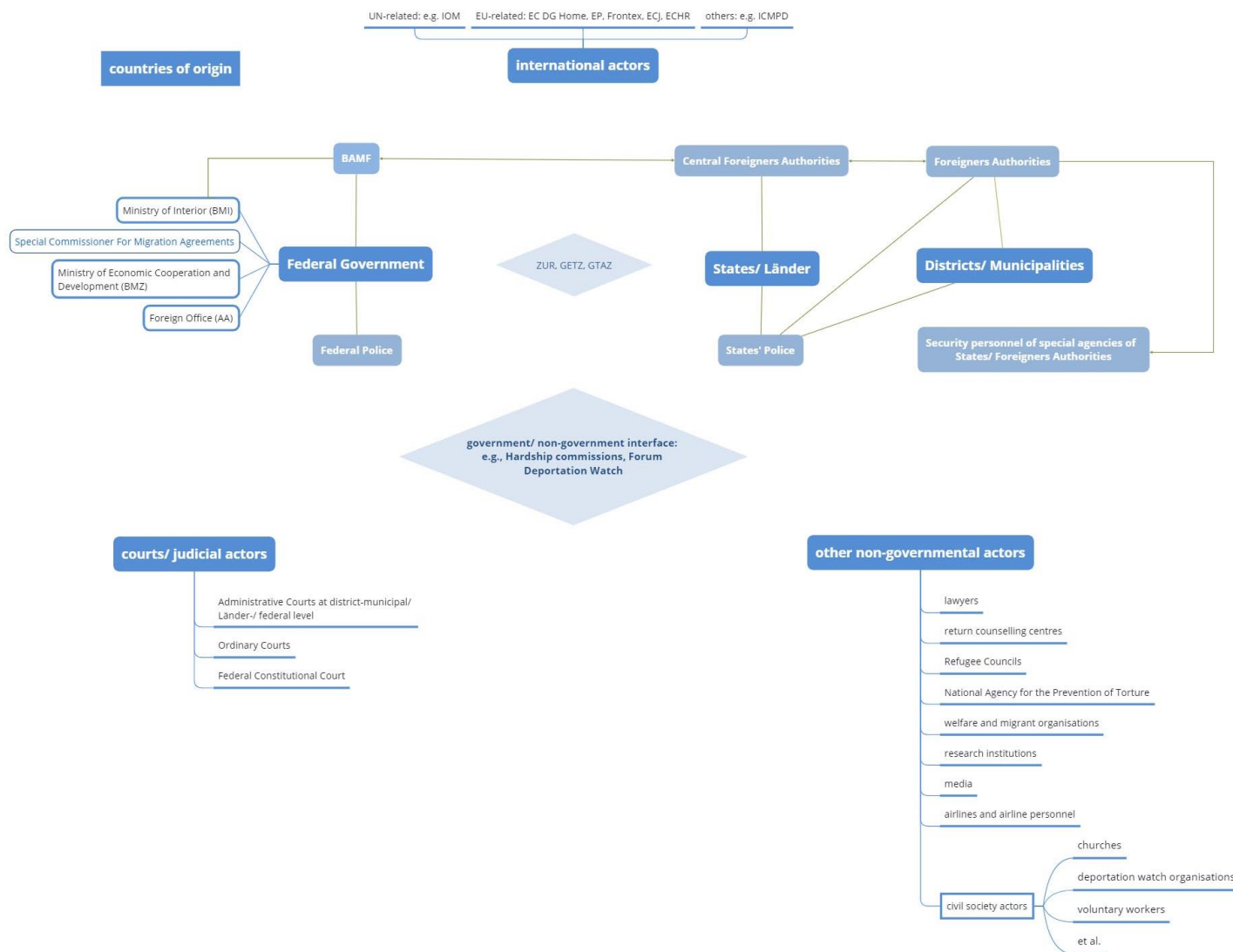
In addition, the importance of the states for policy-making at federal level and the pressure built up 'from below' should also not be underestimated. The above-mentioned federal–state interfaces provide an outlet for pressure and political advocacy by the states on the federal level. The intermediate structures thus serve a two-way vertical function (top-down and bottom-up) and facilitate horizontal exchange among the states, which is likely to facilitate mutual 'learning' about procedures and practices (imitation) that could have a positive or negative impact, depending on the political priorities of those in charge.

The return governance framework is complemented by non-government actors, mainly return counselling centres run by NGOs, which offer free individual and voluntary counselling on asylum procedures independently or based on government support (§12aAG). The Federal Ministry of the Interior's most recent approach to 'integrated refugee management' sees its task fulfilled accomplished in reception facilities (former AnkER-centres and functionally equivalent facilities) where various agencies are located on the same site or in the immediate vicinity: BAMF, Foreigners Authority, welfare associations, application offices of the administrative courts, the Federal Employment Agency as well as other non-governmental counselling and support providers and, at some locations, the state police and, if necessary, the Federal Police (especially in the case of Dublin III transfers).

¹⁹ For example, Bavaria and Hesse follow this approach; even municipalities have decided to grant voluntary return assistance (cf. Rietig & Günnewig, 2020).

²⁰ Among other factors, this is manifest in own fact-finding, inquiry and interpretation of information about the situation in the applicant's country of origin by the employee of the foreigners authority/ office.

Figure 2: German actor landscape: Migration return governance



5. National Legal Framework/ Return Infrastructure

The two main German laws governing return regulations are a) the Asylum Act (*Asylgesetz*, AsylG) and its amendments (including the recent laws on accelerated asylum procedures and on improving the enforcement of the obligation to leave the country (see Annex I) and b) the Residence Act (*Aufenthaltsgesetz*, AufenthG).²¹ In addition, the Basic Law (GG) provides for the right to political asylum in principle (Article 16a GG).²²

5.1 Definitions and Concepts

Return (*Rückkehr*) is not a legal term in German legislation; however, there are several concepts that denote the procedural variations that return/s may entail or comprise. The most important ones are the following:

- **Third-country national:** German law uses the term *Ausländer* (foreigner/alien) to refer to third-country nationals. Sometimes, the term *EU-Ausländer* is used to refer to nationals of EU member states.
- **Asylum:** According to the German Asylum Act (AsylG), the right to asylum can be realised through three forms of protection: the right to asylum, refugee protection, and subsidiary protection. In addition, a national ban on deportation can be issued if the other forms of protection do not apply based on the fact that the return to the destination country would violate the EU Convention on Human Rights or that “a considerable concrete danger²³ to life, limb or freedom exists in that country” (BAMF, 2018b) according to §60.5/ 7 AufenthG.
- **Refusal of entry at the border (Zurückweisung)** (§15 AufenthG) refers to the refoulement of attempted unauthorised entry at the border. It is a measure to prevent entry in accordance with international law. If a deportation order has been issued and cannot be enforced immediately, the foreigner can be detained by order of a court to secure his or her deportation (detention pending refoulement deportation: *Zurückweisungshaft*).
- **Expulsion (Ausweisung)** (§53 AufenthG) refers to an official administrative act (also known as a ‘return decision’ according to the EU Return Directive, Article 3(4)), which means the termination of the right of residence of foreign nationals in Germany and the commencing of their obligation to leave (*Ausreisepflicht*) according to §50 AufenthG. The persons concerned are requested to leave the territory of the Federal Republic of Germany by a certain date. If they do not comply with this request to leave, they are threatened with deportation. Expulsion is a prerequisite of the return procedure and is carried out by removal. Constitutive for the expulsion is the so-called interest in expulsion (*Ausweisungsinteresse*, §54 AufenthG), which is asserted to a different extent if the foreigner has been convicted of a criminal offence

²¹ In addition, the Residence Ordinance (*Aufenthaltsverordnung*, AufenthV) regulates detailed issues relating to entry and residence in Germany, fees and procedural requirements for the issuance and extension of residence titles.

²² See footnote 1 in Section 2 of this Dossier.

²³ This could be “for health reasons if a return would cause life-threatening or serious disease to become much worse,” see BAMF, 2018b. For more information on the different types of deportation bans, see below (Section 5.3, FN 40).

and has been detained, has concealed his or her identity or has committed other illegal acts (cf. §54 AufenthG, 1.1-1.5, 2.1-2.9).²⁴

- **Deportation²⁵ (Abschiebung)** (§58 AufenthG) is defined as the forcible removal of a foreigner from Germany if the foreigner does not have a valid residence title (such as toleration or an approved asylum application) or is no longer allowed to stay in Germany for other reasons. *Abschiebung* refers to the more extensive procedure that sets in when it becomes clear that the foreigner has not left voluntarily within the specified period provided for in the rejection of his/ her application for protection, which means that he/ she will be forcibly deported. It presupposes that the obligation to leave is enforceable and that supervision of the departure appears necessary. It is usually²⁶ preceded by the issuance of a so-called deportation warning (*Abschiebungsandrohung*), with the setting of a deadline of between seven (if the asylum application is rejected as manifestly unfounded) and 30 days (if the application is rejected outright) for voluntary departure to a specified destination country.²⁷ Deportation involves the physical transportation of the foreigner from Germany (often with the help of the state and federal police), which is sometimes more narrowly/ technically referred to as removal.
- **Deportation/ removal order (Abschiebungsanordnung)**
 - §58a AufenthG: A deportation order may be issued against a foreigner by a supreme state authority (*oberste Landesbehörde*) on the basis of a fact-based prognosis to avert a particular threat to internal security or a terrorist threat without prior expulsion. The deportation order contains an expulsion order and the relevant order of enforcement; it is, therefore, immediately enforceable by the Federal Police and does not require the prior announcement of a removal/deportation warning (*Abschiebungsandrohung*).
 - §34a AsylG: If a foreigner is to be returned to a safe third country or to a third country responsible for the asylum application of the person seeking protection (Dublin rule), a deportation order is issued once the deportation is enforceable. In these cases, a prior removal warning (*Abschiebungsandrohung*) is not necessary. If the deportation is not enforceable, i.e., if there are grounds for non-enforcement, a removal warning is issued for deportation to the country in question.

According to a recent Court of Justice of the European Union (CJEU) ruling²⁸, the non-enforcement of deportation orders under §34a AsylG has to be examined by BAMF alone, which has consequences for the lawfulness of the removal threat. Previously, the clarification of possible grounds for non-enforceability of deportation was divided between BAMF for the applicability of national deportation bans and the Foreigners Authority for the so-called other grounds for non-enforcement (*Vollstreckungshindernisse*). This has led to unlawful removal

²⁴ A related concept concerning the obligation to leave is used in the case when a foreigner is apprehended immediately after unauthorised entry and subjected to leave because under an enforceable obligation to leave (*vollziehbar ausreisepflichtig*).

²⁵ Authorities also speak of 'repatriation' as a synonym for the term deportation. 'Deportation' is the term used for removal in the translation of the German Residence Act (AufenthG). It has the same meaning as 'removal' as used in the EU Return Directive.

²⁶ A threat of deportation is not considered necessary when other administrative procedures connected to return have already provided the necessary information for the to-be deported person. Cf. §59.1 AufenthG.

²⁷ Exceptionally a shorter deadline may be set or a deadline waived if necessary according to public interest, cf. for details §59 Art. 1.1-1.2.

²⁸ CJEU ruling of 15 February 2023, C-484/22: Revocation of the return decision if family ties and the best interest of the children/ minor asylum seekers are violated.

threats for persons with family ties where the best interests of the child have to be taken into account.

- **Deportation detention²⁹ (Abschiebungshaft)** (§62 AufenthG) is ordered and enforced if there is a risk of absconding, in the case of unauthorised entry or if the deportation warning cannot be carried out immediately (§62.3 AufenthG). While other measures are preferred, and the detention should be as short as possible, it can be ordered for up to six months with a possible two-month extension.³⁰ Families with children and minors are to be exempted from detention (§62.1 AufenthG). Deportation detention is used for returns to origin countries and Dublin returns.
- **Pre-removal detention pending departure (Ausreisegewahrsam)** (§62b AufenthG) is the detention of a foreigner for up to ten days on the basis of a court order to ensure the feasibility of deportation under certain conditions (cf. §62b.1) irrespective of the risk of absconding.³¹ Detention pending removal can take place in the transit zone of an airport or in a facility near the border where the expulsion will be enforced. In some cases, these are the same detention facilities used for deportation detention (*Abschiebungshaft*).³²
- **Removal following unauthorised entry at/across the border into neighbouring countries (Zurückschiebung)** (§57 AufenthG) refers to the forced return of apprehended foreigners who entered Germany without permission (unauthorised). In line with EU regulation 2016/399 (Art. 2.2 [external border]), they are returned (removal) within a short period after their entry into their country of origin or deported back to the EU or Schengen country that is responsible for them.
- **Temporary suspension of deportation (Duldung)** (§60a-d AufenthG) is based on international law or humanitarian considerations or to safeguard the political interests of Germany. It can be used to prohibit the deportation of foreigners from/ to specific states for a maximum period of three months in cases where deportation is impossible for factual or legal reasons and no residence title is granted while the temporary presence of the person concerned on German territory is tolerated. A foreigner may be granted a temporary suspension if urgent humanitarian or personal reasons or substantial public interests require his or her temporary continued presence on the territory of Germany. There are various reasons for granting temporary suspension status, such as medical needs, unclear identity status, enrolment in vocational training, and work contract (see Section 5.6).

²⁹ Or *Sicherungshaft*, i.e. preventive detention.

³⁰ Absolute maximum for detention is 18 months (§62.4 AufenthG), including preceding so-called preparatory detention (§62c.1 AufenthG)—*ergänzende Vorbereitungshaft*—during the preparation of the deportation warning (§34 AsylG) or if the detainee poses a considerable threat to the public/ to domestic security, etc.

³¹ The newly agreed repatriation package (adopted in January 2024, to be in effect in first half of 2024) includes another law on improving returns (*Gesetz zur Verbesserung der Rückführung*), which foresees the extension of *Ausreisegewahrsam* (pre-removal detention pending departure) from 10 days to 28 days. See <https://www.bundestag.de/dokumente/textarchiv/2024/kw03-de-rueckfuehrung-986284>

³² Noted by migration lawyer Peter Fahlbusch in the podcast “Abschiebungshaft – Kritik an...” (2023).

5.2 Return at the Border

In compliance with the Schengen Borders Code (Art. 23), the German authorities refuse entry at the border to persons who do not fulfil the entry requirements (authorisation, visa, using an official border crossing point, etc.).³³ The so-called border procedure (*Grenzverfahren*) at land borders allows the police to refuse entry (*Zurückweisung*) to any person within a 30 km strip from the border because the person is considered not to have crossed the border yet (§2, Bundespolizeigesetz). This so-called legal figure (*Rechtsfigur*), otherwise known as fiction of non-entry (cf. §13.2.2 AufenthG), is used to circumvent the practical execution of the Dublin Regulation. A person attempting unauthorized entry is then returned to the bordering country.

The Federal Police (*Bundespolizei*) has applied this procedure at the German–Austrian border since 2015 with border controls which continue to this data. New stationary border controls at the Swiss, Polish and Czech borders began in mid-October 2023 (Migrationsbericht der Bundesregierung, 2022) in accordance with Art. 25-28 of the Schengen Borders Code (temporary reintroduction of border controls at national borders).³⁴ The latest available data shows a total of 25,538 refusals of entry for 2022 (19,142 of which at the land borders) and 12,589 (9,465 of which at the land borders) for the first half of 2023, including at the borders with Poland and the Czech Republic, Austria, Switzerland³⁵, France, Luxembourg, Belgium, the Netherlands and Denmark (Deutscher Bundestag, 2023i, p. 8).

There is no documentation on whether and how many removals in border procedures are (il)legal. However, there is increasing evidence of (internal Schengen) pushbacks: For example, at the border with Austria, persons have been returned to Austria without a regular asylum procedure being initiated, although they had repeatedly told German officials—even in the presence of interpreters—that they want to apply for asylum in Germany (Bayerischer Flüchtlingsrat, 2023).³⁶

³³ In accordance with Art. 2.2a of the EU Return Directive, Germany does not apply the directive to TCNs and instead subjects them to Art. 13 (on border surveillance) of the Schengen Borders Code. If a TCN is apprehended by the police near the border before reporting to a reception facility, a police station or an office of the Foreigners Authority and before having been issued an ‘arrival certificate’, the police are obliged—as part of the entry interview—to ask the TCN whether he/ she intends to apply for asylum. If this is the case, the police must refer the protection seeker to the relevant nearby authority (§18.1 AsylG). Upon arrival at the airport, undocumented migrants shall be given the opportunity to lodge an asylum application at the BAMF branch office affiliated with the border control post.

³⁴ Border controls at internal borders can be reintroduced for a maximum of six months (Art. 25.4 Schengen Borders Code), and are an option of last resort, conditional upon the existence of a serious threat to public policy or internal security in a member state (Art. 25.1 SBC). The continuous prolongation of border controls at the Austrian–German border is thus de facto unlawful but has been passed because of adjustments in the ‘threat’ description that justifies the extraordinary measure. Moreover, a CJEU ruling on removals at internal borders of 21 September 2023 that declared extended returns at the French Côte d’Azur to be unlawful is de facto irrelevant for Germany because of exceptional bilateral readmission agreements that Germany had already concluded with all neighbouring countries prior to the entry into force of the EU Return Directive in 2009 (Thym, 2023).

³⁵ Special bilateral legal arrangements with Switzerland dating back to 1961 (e.g., the most recent *Gemeinsamer Aktionsplan zur Vertiefung der grenzpolizeilichen und migrationspolitischen Zusammenarbeit*—joint action plan to strengthen border police and migration policy cooperation, unpublished) allow the Federal Police to carry out border police controls across the Swiss border (so-called *Zone*), during which German legal and administrative regulations, including those of the Residence Act, may apply. However, if asylum seekers who wish to apply for asylum in Germany are found on Swiss territory (*Zone*), the Dublin Regulations apply, and responsibility lies with the Swiss authorities. See Deutscher Bundestag (2023i, p. 21).

³⁶ The indicated source contains links to testimonies of those affected by pushbacks (defined as ‘informal cross-border expulsion without due process of individuals or groups to another country’) which the NGO

In 2022, there were also reports about refusals of entry and pushbacks at the Polish border (Deutscher Bundestag, 2022b; Hoffmann & Bachmann, 2022). According to ProAsyl (2023), several statistical peculiarities and reports lead to the conclusion that systematic returns without border procedures are taking place. These include, in particular, the discrepancy between the number of persons who entered Germany without authorisation (22,824 in 2022) and the number of persons who applied for asylum (only 2,771). (At the same time, more than 10,500 arrivals came from Afghanistan, Syria and Turkey.). Further indicators include the occurrence of asylum applications at different borders (e.g., only 17 per cent of those apprehended at the Austrian border had applied for asylum, compared to 50 per cent at the Czech, Polish and Swiss borders) and the increase in refusals of entry into Switzerland from 94 in 2021 to 3,664 in 2022, as well as the doubling of this type of returns to Austria within the same period (ProAsyl, 2023).

In the so-called airport procedure³⁷ (*Flughafenverfahren*, §18a AsylG), protection seekers arriving from a so-called safe country of origin (§29a) are prevented from entering Germany until the asylum decision has been taken (protection granted), and they are often housed on the airport premises.³⁸ The decision has to be made within two days according to the ‘principle of immediacy’; however, via the legal counselling and appeal option that foresees max. 14 days of legal summary proceedings, the overall stay in the airport premise can last up to 19 days (BAMF, 2023, p. 45). The airport procedure is in fact an instrument used by the Federal Police to circumvent the non-refoulement principle of the 1951 Refugee Convention because without it, “the Federal Police would have to allow any person who has destroyed their passport and applies for asylum to enter Germany” (BAMF, 2019).

Once the border has been crossed by unauthorised entry (Art 2.2 EU 2016/399), the Residence Act (§57a AufenthG) provides for *Zurückschiebung* (removal following unauthorised entry) if a person is apprehended within six months after entry. This applies to Dublin cases and entrants from so-called safe third countries. In 2022, 4,978 people were removed following unauthorised entry at the German land border, 31 at the sea border, and 171 at airports (Deutscher Bundestag, 2023b, p. 14).³⁹ They can be removed without warning and without granting a period for voluntary return (Hailbronner, 2017, p. 359).

5.3 Regular Procedure When Issuing a Return Decision

Rejected asylum application

During the asylum process in Germany, the Federal Office for Migration and Refugees (BAMF) examines whether the applicant fulfils the required conditions to be granted one of the four types of protection, i.e. political asylum, refugee status, subsidiary protection or national and federal

Pushback Alarm Austria has systematically documented; they are available at the website of the Border Violence Network, cf. <https://borderviolence.eu/>

³⁷ The procedures were based on EU Decisions 2015/1523 of 14 September 2015 and 2015/1601 of 22 September 2015, both since expired. Cf. BAMF, 2019.

³⁸ This is also the case if the inpatient treatment of an illness of the protection seeker prevents temporary housing on an airport premise. The BAMF has set up an airport branch office in Frankfurt and subordinate offices at the airports in Düsseldorf, Hamburg, Berlin and Munich (BAMF, 2023, p. 45).

³⁹ According to the same source, of the total number of persons removed at land borders and airports (5,149), 349 were minors, of whom 120 were unaccompanied. The Police Crime Statistics (*Polizeikriminalstatistik*, PKS) records cases of unauthorised entry and re-entry after removal. See Bundeskriminalamt, 2023.

deportation bans.⁴⁰ If an asylum application is rejected, the obligation to leave Germany arises from the notice of rejection issued by BAMF. Depending on whether the application is rejected outright (*unzulässig*) or is rejected as ‘manifestly unfounded’ (*offensichtlich unbegründet*), the person concerned is given a deadline to leave the country voluntarily, in the first case within 30 days, in the second within seven days. During this period, the rejected asylum seeker has one week to file an appeal (*Anfechtungsklage*) with legal assistance at the local administrative court (VG). While the appeal has suspensive effect in the case of ‘normal rejections’ (§75 AsylG), a separate request for suspensive effects must be filed within one week in the case of manifestly unfounded rejections. Once the action and the application for suspension have been filed, the person threatened with deportation cannot be removed until the court has made its decision. A negative court decision results in a new deadline to leave Germany within 30 days of the decision taking effect and must be communicated to the Foreigners Authority.

The notice of rejection also includes a deportation/ removal warning (§34.1 AsylG) if the deadline for departure is not met.⁴¹ The removal warning serves as a precondition for the initiation of the deportation proceedings, including removal, once the deadline has passed without the person concerned leaving the country. Under European law, a removal warning is considered equivalent to a return decision. The return decision is, therefore, an administrative act; it states that a person is staying in Germany irregularly and orders the person to leave the country.⁴² The return decision must be issued in writing and contain a statement of reasons as well as information on available legal remedies (*Rechtsbehelfsbelehrung*). Once issued, there is no time limit on the validity of the return decision.

Some indicative figures are as follows. Every year, more than 50 per cent of all rejected asylum applications are challenged before the local administrative courts (VG). In 2021, the figure was 57.2 per cent, compared with 2020, when 73.3 per cent of all rejections were challenged. Of the 106,137 local court decisions in 2021 on BAMF-rejections of first and second asylum applications, 18.6 per cent were granted protection status and 33.1 per cent of appeals were rejected (Migrationsbericht der Bundesregierung, 2022, p. 95). The total duration of the procedure up to

⁴⁰ Deportation bans can relate to an origin country to which removals are prohibited, they can cover a certain defined group of people who are persecuted in the country of origin and thus suspend the potential deportation of members of this group, or they can be issued for a certain time of the year (winter deportation ban) for humanitarian reasons and cover all potential deportees from a certain federal state: In 2023, Germany had national deportation bans for Afghanistan and Iran in place, but the latter expired on 31 December 2023 (Bachmann, 2024). Individual federal states introduced deportation bans for Yezidi women and children from Iraq, e.g., Thuringia on 4 January 2024 for three months, and North Rhine-Westphalia on 18 December 2023 for three months with the option of a further three month-extension (see Santos, 2024; Wolf, 2023). In 2023, Berlin (as a city-state) introduced a temporary general deportation ban during the winter months for the second time (after 2022) suspending deportations for two months from 22 December 2023 to 28 February 2024 (Peter, 2023). This unique humanitarian ban excludes, however, criminal offenders who have been sentenced to pay a fine of more than 50 daily rates and potential attackers/ ‘persons posing a threat to public safety’ (*Gefährder*). Critics argue that a fine of 50 daily rates is often given for petty offences (*„Bagatelldelikte“*) which means that people who are caught fare dodging are categorized as criminals and thus become subject to deportation (Peter, 2023).

⁴¹ The deportation/ removal warning must specify the country to which the person concerned is to be removed, if necessary, and in such a way that the person concerned can also be removed to another state to which he/she is entitled to enter or which is obliged to admit him or her (§ 59.2 AufenthG).

⁴² In contrast to the EC Recommendation, the return decision does not contain the information that the person concerned has to leave the Schengen area or the EU to comply with the obligation to leave. See Flüchtlingsrat Thüringen e.V., 2016, p. 2.

the final adjudication, that is including the appeal and the decision by the administrative court, has increased over time (2016 = 8.7 months, 2018 = 17.6 months, 2020 = 25.9 months).⁴³

Expiry, withdrawal or revocation of a residence title

If a third-country national (TCN) is obliged to leave the country because his or her residence title has expired, been withdrawn or was lost, the competent Foreigners Authority issues a return decision (§50.1 AufenthG, §59.1 AufenthG in combination with §71.1 AufenthG). In another scenario, the BAMF revokes the recognition of asylum, the granting of refugee status, the granting of subsidiary protection or terminates national deportation bans (§60.5/7 AufenthG) if the conditions for these no longer exist or the criteria are no longer met. The protection status is withdrawn (a) if the persecution situation in the country of origin has changed permanently or is no longer applicable and the persons concerned would no longer be in danger if they were to return, (b) if it was granted on the basis of incorrect information or failure to disclose essential facts, (c) because the foreigner has become a criminal offender or represents a threat to domestic security and his/ her continued presence gives rise to a (serious/ particularly serious) interest in expulsion on the part of the authorities. (§54.1.2/4). The BAMF initiates a revocation assessment upon receipt of an investigation request from the responsible Foreigners Authority or other authorities.⁴⁴ The BAMF communicates the result of the revocation examination to the Foreigners Authority and notifies the person whose status has been examined. In the event of revocation or withdrawal, the foreigner can file an appeal against the decision; if successful, he or she can continue to enjoy the residence title ‘for other reasons’. Even if no revocation or withdrawal takes place after a review of the protection granted, subsequent attempts at revocation and enforcement are not ruled out.⁴⁵

5.4 Special Cases and Their Relation to the Obligation to Issue a Return Decision

Exceptional situations and interest in expulsion

As an exception for particularly dangerous situations (potential offenders), a removal order pursuant to §58a (AufenthG) contains an expulsion order and the corresponding enforcement order. It can serve as grounds for detention if the removal cannot be enforced immediately (§62.3.1a AufenthG). In the case of a refusal of entry or removal following an unauthorised entry at the border, no return decision is issued. Refusal of entry and removal following an unauthorised entry can be enforced without a preliminary warning or period for voluntary departure and are

⁴³ According to observers, this increase is mainly due to the high number of poor and flawed asylum decisions issued by the BAMF. Almost one-third of all decisions issued by the BAMF were found to be incorrect and unlawful by the courts following an appeal. Cf. Deutscher Bundestag, 2022a, p. 2.

⁴⁴ Since 2018, the protection status beneficiaries have to participate in the examination upon request of the BAMF (see BAMF, 2023).

⁴⁵ The number of annual revocation examinations has risen enormously over the period from 2016 to 2022. While their number was 3,170 in 2016, it rose to more than 77,000 in 2017, around 200,000 in 2018 and 2019, respectively, and 188,000 in 2020 (Deutscher Bundestag, 2018, 2021). However, actual revocations were very low in 2020 and 2019, at around 3.4 per cent each year. Critics question the justification for the increase in the number of BAMF staff dealing exclusively with asylum revocation procedures (268 employees in 2018 vs. 797 at the end of 2019 and 482 in 2021). The regular revocation reviews every three to five years are a unique practice in Germany and not common in other European Union member states. The current government has changed its policy to carry out ad hoc revocation reviews instead (Deutscher Bundestag, 2022a).

not covered by the provisions of the EU Return Directive (Hailbronner, 2017, p. 359). This de facto deprives people affected of their right to apply for asylum.

Accelerated asylum procedures and orderly return

Applicants from so-called safe countries of origin, those applying a second time (*Folgeantrag*), those who deceive the authorities by withholding identity information, those who refuse to be fingerprinted and those who pose a potential threat to internal security can be subject to accelerated asylum procedures (§30a AsylG), in which case, a decision is to be made within one week. However, the average duration in 2021 was 3.3 months; the share of accelerated procedures in the total number of decisions was 0.2 per cent (Deutscher Bundestag, 2023e).

Refusal of entry under the notion of ‘safe third countries’: Removal without issuing a return decision

In the case of refusal of entry or removal following unauthorised entry, no return decision is issued, and no entry ban is imposed. On the basis of administrative agreements and special administrative readmission programmes between the German Federal Ministry of the Interior (BMI), the Greek Ministry of Migration and the Spanish Ministry of the Interior on the refusal of asylum seekers (Deutscher Bundestag, 2023j, p. 34), the Federal Police in 2018 was able to refuse entry at the border to Austria and forcibly return persons to Greece and Spain within 48 hours if they had previously applied for asylum there (Hoffmeyer-Zlotnik, 2022).⁴⁶ This practice constitutes a means to avoid official Dublin transfers (comparable with refusals of entry from the territory of Germany’s neighbours, cf. Section 5.2 Return at the Border). Between August 2018 and May 2021, 46 persons were returned to Greece and four to Spain. As refusal of entry can only be enforced at borders with mobile/ temporary or stationary border controls, the statistics do not include cases of refusals of entry from the German–Polish border in connection with the humanitarian crisis at the Polish–Belarusian border in 2021/22, as these refusals of entry are illegal. Accordingly, apprehended TCNs were directed to reception facilities close to the border, and police controls focused on search operations to detect potential smuggling activities (Hoffmeyer-Zlotnik, 2022).

Return decisions for Dublin cases from Greece—at the end of 2022, approximately 41,000 persons⁴⁷ with a presumed protection status in Greece were residing as asylum seekers in Germany (Deutscher Bundestag, 2023d)—had been postponed in 2020 until April 2022. Court rulings clarified that it was not permissible to return people with refugee status from Germany to Greece due to the miserable housing and survival conditions and the exposure to discrimination and human rights violations. Nevertheless, Germany had sent 10,427 requests for Dublin transfers to Greece, but only one transfer took place (Hoffmeyer-Zlotnik, 2022) during that period, none in 2022 (Deutscher Bundestag, 2023d, p. 36). In 2022, there were 212 transfers from Greece to Germany, including 208 for ‘family reasons’ (Deutscher Bundestag, 2023d, p. 38). In new decisions on applicants from Greece since April 2022, BAMF reviews the protection status the applicants received in Greece. There are several cases in which applicants were granted subsidiary protection in Germany even though they had been granted refugee status in Greece

⁴⁶ After two forced returns were challenged before a Munich court, the Federal Police was obliged to return asylum seekers from Greece in two cases in 2019 and 2021. While further cases were pending, in May 2021, the court ruled in a temporary injunction that the Dublin Regulation had to be applied instead of the procedure foreseen by the Administrative Regulations Agreements, and that the removal could not take place without an examination by BAMF. By 2023, the court had rejected two summary judicial proceedings, causing the BMI to insist on its legal opinion. Cf. Deutscher Bundestag (2023i, p. 26).

⁴⁷ In 2021 alone, 29,508 persons applied for protection in Germany while holding a protection status in Greece.

(Deutscher Bundestag, 2023d). In three per cent of the applications reviewed, the cases were rejected (outright).

Dublin III transfers to/ from Poland (4,482 requests by Germany in 2022) are similarly controversial because the Polish authorities legalized and carried out pushbacks at the border with Belarus and detained protection seekers who had entered Poland under inhumane conditions and violations of their human rights (Deutscher Bundestag, 2023d).

5.5 Voluntary Departures

An emphasis on voluntary return is also one of the fundamental principles set out in the EU Return Directive. “Voluntary, assisted return is an integral part of migration policy and migration management in Germany” (Kothe et al., 2023, p. 14). German migration authorities seek ways to facilitate the voluntary departure of rejected asylum seekers and migrants in irregular situations. The German Residence Act gives priority to voluntary departure over deportation. The consensus for this prioritisation is that voluntary departures are low-cost and more humane than forced removals (Olivier-Mensah et al., 2020; Koch et al., 2023). This perspective was also confirmed by ministerial representatives the authors met in an exchange meeting. They underlined that the “focus should be on voluntary return rather than deportation, as the former is less costly, more legitimate and more humanitarian”; measures could be better if more development components could be integrated” (Stakeholder Expert Panel Notes, 12 December 2023).

Germany’s voluntary return landscape consists of multiple actors, their networks and variations in practice. Actors involved in voluntary return have discretionary powers and considerable scope for implementation (Grote, 2015). Besides government-assisted repatriation programmes, support for returns is also provided by the states and municipalities, creating multiple pathways for voluntary return but also challenges in coordination (Vollmer & Mencutek, 2023). Some return-related tasks, such as return counselling, are delegated to local or Foreigners Authorities and welfare associations. As a result, their implementation and outcomes vary (Feneberg, 2019). Since March 2017, to enable coordination, the Repatriation Support Centre (Gemeinsames Zentrum zur Unterstützung der Rückkehr, ZUR), which is part of the BMI, has been aiming to “improve operative coordination of the Federal and Land authorities in the area of voluntary and forced return” (Hoffmeyer-Zlotnik, 2017).

As ‘voluntary departure’ means compliance with the obligation to return within the time limit set for this purpose in the return decision (European Commission, 2008, p. 6), the question of time limits is critical but also quite technical and case-specific. In law, Germany complies with the EU Return Directive, which states that “a return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days” (Return Directive 2008, Article 7). However, the exact length of the voluntary departure period depends on the decision by the BAMF. If the asylum application is manifestly unfounded, the person concerned must leave the country within seven days (Section 36 subs. 1 AsylG); if the application is rejected for other reasons, the period is 30 days (Section 38 subs. 1 AsylG). However, the Foreigners Authority can decide on the person’s a quick departure if it is justified by a threat to the public interest, public safety or law and order. During determined time limits (7-30 days) period, the Foreigners Authorities can impose certain obligations on persons obliged to leave the country to ensure that they actually leave the country (Hoffmeyer-Zlotnik, 2017, p. 5). Even when a removal order under the Dublin procedure is issued, no time limit is set for leaving the country. Depending on the specific circumstances of an individual case, the period for voluntary departure can be extended,

for example in the case of children who needs caring of parent(s), an application to an assistance programme that often takes more than 30 days or appeals by legal representatives against the asylum procedure as well as if there is a suspicion that the person is the victim of human trafficking or illegal employment (Hoffmeyer-Zlotnik, 2017). A general criticism of the legislation and implementation is that the time period is too short to make an informed decision about voluntary departure and to prepare and implement a voluntary departure procedure (Grote, 2015). On the other hand, authorities are concerned about people absconding if longer periods for voluntary departure are granted. In October 2023, the German government presented a repatriation package, approved by the Cabinet, “which includes swifter deportation of criminals” (Bundesregierung, 2023). However, the package did not include an item on voluntary departures.

German return actors have several instruments at their disposal when it comes to voluntary departures. The dissemination of information to raise awareness is where many concrete tools have been put into practice. For example, one focus has been on raising awareness of the legal consequences of forced removal and absconding (e.g. longer re-entry bans and obligation to bear the repatriation costs). Several information channels are introduced to spread the message, such as hotlines or a sophisticated information portal on return, online counselling, a video explaining how voluntary return works, and the distribution of a return information package during the asylum application (Hoffmeyer-Zlotnik, 2017, p. 75).

As suggested in the EU Return Directive (2008, p.2), Germany seeks to provide enhanced return assistance as an incentive. The two main instruments offered by the German authorities to facilitate voluntary departures are counselling and financial assistance in the pre-return phase and reintegration assistance for the post-return phase. As with other return-related issues, there is considerable variation between the federal states in their return counselling and financial assistance programmes for return and reintegration. They include measures on ‘in-kind’ benefits at the place of return, such as housing assistance and reintegration support services, such as job search assistance or psychosocial services.

Voluntary return assistance programs are not new to the German migration landscape. The REAG programme, which covers travel costs and allowances, was launched in 1979 by the then Federal Ministry for Family Affairs, Youth and Health and has since been implemented by the IOM (Kothe et al., 2023, p. 14). Another programme, GARP, was introduced and financed by the Federal Ministry of the Interior in 1989 as an additional component to provide initial start-up assistance to people returning or moving on. In 2000, when the Federal Ministry of the Interior took over responsibility for both programmes, they were merged into the REAG/GARP programme, which is financed by the federal government and state governments. Different criteria, such as nationality, country of return, financial status or age, determine eligibility for support. StarthilfePlus was developed as a supplementary support programme for migrants who were returning within the framework of REAG/GARP. Since 2017, this BAMF-funded programme has supported the reintegration of people in the countries of return. The programme mainly addresses people who are awaiting a decision on their asylum application or whose application has been rejected. When the programme was developed in 2017, two funding levels were provided, depending on the timing of the return decision (Kothe et al., 2023, p. 15). To simplify the programme, it was further developed in 2019 and consisted of three components between 2019 and 2022, which—unlike the funding levels in 2017 and 2018—were linked to the countries of return (Kothe et al., 2023, p. 16). Since 2023, the StarthilfePlus programme has been continuously developed and monitored on the basis of the needs of returnees, internal evaluation reports and the situation in the countries of origin (Kothe et al., 2023, p. 17).

The current return and reintegration programme aims to assist a wide range of people. According to the official website [returningfromgermany.de](https://www.returningfromgermany.de) four categories of non-EU nationals can apply for voluntary return assistance. The categories include “1) those who are currently in the asylum procedure, 2) those whose asylum application has been rejected and are obliged to leave the country, 3) those who are entitled to asylum or have discretionary leave to remain, 4) those who have become victims of human trafficking or forced prostitution.”⁴⁸ Another category that can apply for assistance is EU nationals who have been victims of human trafficking or forced prostitution.⁴⁹ As can be seen from the wide range of categories, assisted return does not only target rejected asylum seekers; it is increasingly embedded in the earlier stages of the asylum procedure and in various categories. However, the Expert Council on Integration and Migration (Sachverständigenrat für Integration und Migration) and ProAsyl highly criticise the approach of offering a special bonus to persuade asylum seekers to withdraw their application a return (Hoffmeyer-Zlotnik, 2017, p. 23). It should be underlined that as of December 2023, returns to Afghanistan, Syria, Libya, Yemen or Ukraine are not supported, while voluntary return to Eritrea and Somalia has to be assessed on a case-by-case basis.⁵⁰ When a person decides on voluntary return, they need to apply for REAG/GARP through a counselling centre, independent (e.g. organisations/charities) or governmental counselling centres.

The budgetary costs of return and reintegration programmes are not systematically recorded at the national level in Germany. The federal states run their own funding schemes and are not obliged to share these costs nationally (Oomkens & Kalir, 2020; Rietig & Günnewig, 2020). Furthermore, in some federal states, municipalities run regional AVR programmes, which diffuses clarity on programmes' responsibility and budgetary issues (Oomkens & Kalir, 2020). Some available cost figures on the national level belong to the REAG/GARP and Starthilfe Plus programmes. For example, Rietig & Günnewig note that “in 2017 and 2018, Germany spent around 30 million euros on each of the REAG/GARP and Starthilfe Plus programs” (2020, p. 18). In response to parliamentary questions asked in November 2018, the federal government disclosed that the total financial allocation for the REAG/GARP schemes from 2013 to 2017 (including federal and state funding) was 78,454,955.13 Euro (Oomkens & Kalir, 2020, p. 71).

The German federal authorities pay special attention to return counselling as suggested in the EU Return Directive, on the assumption that counsellors can help migrants to familiarise themselves with the opportunities and challenges upon return to their origin country and with potential support to re-establish their lives. As of 2023, BAMF reports that “more than 1000 state and non-governmental return counselling centres support people interested in returning to make an informed return decision.” Despite ongoing efforts in various federal states, structural problems such as fragmented legal frameworks, insufficient resources and coordination problems among related stakeholders in the migrant destination and origin countries hinder the way to high-quality counselling. Also, current practices indicate that some counselling efforts often fail to address migrants' individual needs, receiving communities' complex characteristics and managing expectations of returnees in the process. There is still no consensus on the impact of the different counselling models/techniques (e.g. reintegration scouts, decelerating benefits model, training, motivational interview techniques) used and which are most effective (Mencutek, 2023). The content and quality of return counselling in Germany varies due to the complex and constantly changing return regime. As a result of the diverse counselling landscape, the federal

⁴⁸ See <https://www.returningfromgermany.de/en/>

⁴⁹ See <https://www.returningfromgermany.de/en/>

⁵⁰ See <https://www.returningfromgermany.de/en/>

and state governments have agreed on a standard guideline document (BMI & BAMF, 2023). Research has also shown that the offer of assisted return is not necessarily attractive to the many migrants from countries outside Europe who are obliged to leave the country, such as Iraqis, Afghans or West African migrants. Even if they are partial data, figures and investments on voluntary return in Germany show that investments in voluntary return programmes have increased slightly since 2017 in line with EC recommendations, while the number of returns has not increased significantly (Oomkens & Kalir, 2020).

The biggest challenge for the authorities is to verify whether departure is voluntary or not. A so-called border crossing certificate often verifies the voluntary departure. If this is not confirmed by the certificate or other means (e.g. a ticket), the police can use their search tools to locate and apprehend the person. The person may also be entered into the Schengen Information System. However, it is known that the German authority, the Central Register of Foreigners (Ausländerzentralregister, AZR), does not fully record the number of unassisted voluntary departures (Hoffmeyer-Zlotnik, 2017). According to practitioners, as of late 2023, there has been a better working system for the collection of ‘reliable’ data by the state authorities (Stakeholder Expert Panel Notes, 12.12.2023). The details and evaluation of all available assisted return and reintegration programmes at the federal, state and municipal level are beyond the scope of this mapping exercise. Actors, practices and materials used for assisted return programmes will be further explored in the GAPs’s work package on return infrastructure.

5.6 Forced Return/ Removal/ Exit

Two main categories of forced return/ removal can be distinguished in Germany. These are based on the type of stay and its legal basis (see Section 5.3 above).

On the one hand, **expulsion** (§53 AufenthG) (see Section 5.1 in this report) can be directed against **foreigners whose stay in Germany poses a threat to public order and domestic security**, irrespective of the residence status they enjoy (asylum seeker, refugee status, permanent residence permit, temporary tolerated status, etc.). A supreme state authority (oberste Landesbehörde) can issue a removal/ deportation order (“*Abschiebungsanordnung*” - §58a AufenthG) against a foreigner without a prior expulsion order on the basis of an objective prognosis to avert a particular threat to domestic security or a terrorist threat. The deportation order contains an expulsion order and the relevant order of enforcement; thus, it is immediately enforceable by the Federal Police and does not require prior announcement threatening deportation, i.e., a removal/deportation warning (*Abschiebungsandrohung*).

On the other hand, **rejected asylum seekers** whom BAMF considers not entitled to protection in Germany are subject to **forced return** if they do not leave the country voluntarily within the deadline specified in their removal warning and if they are deportable (§34.1 AsylG), i.e., if the obligation to leave the country can be enforced because there are no circumstances, which would require toleration in Germany (see below), and if it seems necessary to supervise their departure. As a rule, the removal warning is issued together with the rejection notice. A removal/ deportation order (*Abschiebungsanordnung*, §34a AsylG) is issued to a foreigner who is to be returned to a safe third country or for whom a third country is responsible for the asylum procedure, as soon as it is clear that the deportation is enforceable. If this is the case, a preceding removal warning is not necessary. If the deportation is not enforceable, only the removal warning (*Abschiebungsandrohung*) to the country in question will be valid—with the mentioning of a

deadline for departure and a listing of the countries into which deportation of the person is not permissible.

Both categories of removal are not permitted to a country in which the life or freedom of the deportee is threatened on account of their race, religion, nationality, membership of a particular social group or because of their political convictions, exposure to serious harm, persecution, etc. (§60.1-10 AufenthG). A foreigner threatened with deportation to such a state can invoke the prohibition of deportation under the refugee clause (application for refugee status), which is then examined by the BAMF in an asylum procedure (if such a procedure is not already underway at the time the obligation to leave the country is announced).

Remedies against a removal order: Temporary suspension of deportation (Duldung)

According to §60a AufenthG, the supreme state authority (oberste Landesbehörde) can temporarily suspend the deportation of foreigners from certain countries of origin or certain groups of foreigners for a maximum period of three months on grounds of international law, for humanitarian reasons or to safeguard political interests. This is known as temporary suspension of deportation (*Duldung*). It comes into effect when deportation cannot be enforced for legal⁵¹ or other⁵² reasons, including those related to the situation in the country of origin or transit, which is responsible for the protection seeker's asylum procedure and when, at the same time, the person does not qualify for any type of residence title (*Aufenthaltserlaubnis*) (§60a.2 AufenthG). What has remained constant in recent years is that about four out of five people who would be obliged to leave Germany by a BAMF decision have received a temporary suspension of deportation (*Duldung*), which means that they do not have a residence title but cannot be forced to leave as long as the reasons for the suspension remain unchanged. The suspension of deportation does not affect the obligation to leave the country (§60a.3 AufenthG). The suspension of deportation is documented by written notice (§60a.4 AufenthG), and the responsible Foreigners Authority can revoke a temporary suspension at any time and revoke or extend it at the latest before the end of a suspension period. The suspension will be revoked if the reasons preventing deportation no longer apply. If this is the case, the person will be deported

⁵¹ This may be the case if a suspension becomes necessary because the public prosecutor's office or the criminal court deem a person's temporary presence in Germany to be appropriate for criminal proceedings relating to a crime. In addition, the person cannot be deported for seven days after a failed deportation attempt or border removal and the non-application of deportation detention (§60a.2a AufenthG). A legal suspension is also necessary if the country of origin is unwilling to cooperate and readmit the person.

⁵² A foreigner may also be granted a suspension if urgent humanitarian or personal reasons or substantial public interests require their temporary continued presence in the federal territory, such as the notarisation of the acknowledgement of paternity, etc., for the duration of the court proceedings. Likewise, the deportation of a minor's parents and siblings with residence status according to §25a.1 AufenthG, who live as a family with the former is to be suspended (§60a.2b AufenthG). Moreover, if the deportee has medical proof that a deportation would deteriorate their state of health significantly or if the deportee is pregnant, the removal is to be suspended (§60a.2c-d). Pregnant migrant women whose status is unclear can apply for *Schwangerschaftsduldung* (temporary suspension of deportation on the grounds of pregnancy), e.g., in Berlin at the Foreigners' Authority three months before the expected birth, and suspension can last until three months after (cf. Suerbaum, 2021). If the child is born to a father of German nationality, the child can be granted German nationality, and the custodial mother is entitled to reside in Germany. The conditions for suspending deportation due to health concerns were made more restrictive by the 2017 Act to Improve the Enforcement of the Obligation to Leave the Country.

immediately upon expiry of the suspension of deportation without further warning or setting a deadline unless the suspension is renewed (§60a.5 AufenthG).⁵³

Often, a suspension is extended over several years, resulting in a series of renewals (*Kettenduldung*). Since 2020, more extended periods of suspension have been granted to those who are in vocational training (max. three years) (*Ausbildungsduldung*, §60c AufenthG) or are employed (two and a half years) (*Beschäftigungsduldung*, §60d AufenthG).⁵⁴ A newly introduced type of suspension is the so-called ‘*Duldung-light*’ for persons whose identity is not verified (§60b AufenthG), that is for those protection seekers who do not actively cooperate in clarifying their identity and do not present a personal identification document such as a passport that can be used as proof of identity.⁵⁵

The temporary suspension is discussed critically among academics. It denotes a non-status for very heterogeneous groups of people without regularising their presence in Germany, and, according to Schütze (2022), the interpretation of temporary suspension as a durable solution for non-deported migrants without international protection does not hold. Instead, restrictions outweigh the rights associated with the (non-)status of temporary suspension (Schütze, 2022, p. 426). In recent years, the rights of tolerated persons have been increasingly differentiated by successive new legal regulations. Newly introduced classification distinctions between deserving tolerated persons, those who are permanently excluded because their identity is unclear, and those who are undesirable because they come from so-called safe countries of origin have problematic consequences for those affected (see Nachtigall, 2020, p. 276ff). In particular, limbo situations (‘the politics of endless temporariness’) violate the human dignity of those concerned (Schütze, 2022, p. 423). Moreover, temporary suspension has increasingly been linked to security policy, as Schütze (2022, p. 421) notes, “In the debates, disenfranchisement of persons with a *Duldung* was often justified by a criminalisation discourse”, fuelling the political discourse on ‘persons posing a threat to public safety’, so-called *Gefährder* (Schütze, 2022, p. 422).

Operational enforcement of removal and modes of transport

In most cases, the state police authorities support the Foreigners Authorities in actual removal measures; in some cases, special state agencies (Lower Saxony) or the Foreigners Authority itself (Hamburg, Schleswig Holstein) organise and carry out the transport of the deportees to the German border or airport. At airports, the Federal Police take over. There are two types of removal

⁵³ If deportation has been suspended for more than one year, the deportation provided for by revocation must be announced at least one month in advance; the announcement must be repeated if the suspension has been renewed for more than one year (§60a AufenthG).

⁵⁴ According to Peitz (2023, p. 4), the 2023 Law on further skilled labour immigration (*Gesetz zur Weiterentwicklung der Fachkräfteeinwanderung*) allows for *Ausbildungsduldung* resulting in a residence permit according to §16g AufenthG.

⁵⁵ Cf. Second Act to Improve the Enforcement of the Obligation to Leave the Country (‘Orderly Return Law’) (*Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht* [Geordnete Rückkehr-Gesetz], 2019). Persons with the “*Duldung light*” status are subject to the condition of having a fixed place of residence (*Wohnsitzauflage*). Of the 136,542 asylum applications submitted in 2022, 50.6 per cent were of unclear identity/ without identity papers (Deutscher Bundestag, 2023f). New legal provisions (2017 Act to Improve the Enforcement of the Obligation to Leave the Country - *Gesetz zur besseren Durchsetzung der Ausreisepflicht*), which allow a search on applicants’ data carriers (mobile phones, clouds, etc.) for the purpose of identity clarification, have not proved effective in clarifying identity, according to a parliamentary request (Deutscher Bundestag, 2023f), as, for instance, 69.9 per cent of the 4,278 approved data carrier checks and 3,726 results did not yield usable results, in 27 per cent of cases, the identity was confirmed, in 3.1 per cent of cases (117) the identity was proven to be false.

by air: accompanied by Federal Police⁵⁶ or airline security personnel or unaccompanied. In both scenarios, it depends on the deportees' ability to make the flight attendants aware of his/ her unwillingness to be deported to prevent the execution of the removal.⁵⁷

The operational dimension of deportations is not fully transparent, raising questions about human rights violations. There are reports of abuse of power by the police/ security personnel involved (Rietig & Günnewig, 2020), including police violence, family separation, shackling and forced medication (Deutscher Bundestag, 2023h, p. 1).⁵⁸ While it is legal to restrain deportees with so-called aids of physical violence (handcuffs, shackles, steel manacles and body cuffs) in cases of resistance, a recent analysis found that deportations to certain destination countries (Senegal, Algeria, Ethiopia) more often, even frequently used aids of physical violence (Deutscher Bundestag, 2023b). In 2022, however, the overall use of aids of physical violence documented by the authorities in charge amounted to six per cent of all deportations⁵⁹; for the period between 2015 and 2019, research found a huge increase in the use of violence, from 130 to almost 1,800 cases (Rietig & Günnewig, 2020). Return operations are carried out by scheduled or chartered flights, with the latter option being used for an increasing number of collective deportations in recent years⁶⁰, sometimes in cooperation with other countries. In 2021, Frontex financed 98.8 per cent of these deportations (5,394 out of 5,462 removals). Mini-charter flights for up to four deportees have become common since 2017, in particular for deportations to Turkey and for Dublin deportations.⁶¹ The use of the scheduled flights for deportations is based on bilateral agreements between the Federal Police (Central Bureau) and several airlines.⁶² Aircraft captains

⁵⁶ Federal police officers receive special training in accompanying deportees leaving the country by air. In 2022, 9,118 officers of the federal or state police or other authorities accompanied 4,620 deportees (of which, 8,721 Federal Police officers accompanied 4,406 deportees) in the framework of deportations (Deutscher Bundestag, 2023b). For a comparison, the number of deportations accompanied by airline security amounted to 1,637; the number of unaccompanied deportations amounted to 6,348.

⁵⁷ In such cases, the pilot as the authority ultimately responsible for the flight, refuses to take the deportee/s on the grounds that a deportee could compromise flight safety, resulting in the cancellation of the deportation on that day. For example, in 2017, pilots refused to take deportees on their flights in more than 200 cases (Leubecher, 2017). In 2018, 506 deportations failed due to pilot refusals (Litschko, 2019). While human rights advocacy groups praise the moral courage of the pilots, the Federal Police contests the pilots' decisions, arguing that in those cases where Federal Police officers accompany deportees, they ensure flight safety. The Federal Police also argues that the fixation of resistant deportees with shackles for immobilisation is done for flight safety (cf. Leubecher, 2017).

⁵⁸ The Council of Europe's Committee for the Prevention of Torture published a critical report by its delegation that accompanied a deportation flight from Munich to Kabul in 2019, see CPT, 2019. Further, the portal "Abschiebungsreporting NRW" project documents disproportionate deportations since 2021 for the State of North Rhine-Westphalia. See <https://www.abschiebungsreporting.de>

⁵⁹ In particular, a high incidence of the use of restraints has also been recorded in deportations to Nigeria, Afghanistan, and Ghana (Deutscher Bundestag, 2023b). Aids of physical violence were used in 716 deportation cases in 2021 (Deutscher Bundestag, 2023b) and in 800 cases in 2022 (Deutscher Bundestag, 2023h, p. 2).

⁶⁰ In 2021, collective/ group deportations in chartered flights accounted for 46 per cent of all deportations (2020: 37 per cent, 2019: 27 per cent). See Deutscher Bundestag, 2023b.

⁶¹ For details see Deutscher Bundestag, 2023b. For 2021, 23 group deportations in mini-charter flights are documented; in 2022, 91 persons were deported via 24 charter flights, of which Frontex led one operation at a cost of 20,875 EUR; Frontex may have been involved in other operations as well.

⁶² Since 2019, the German government has classified information on which airlines are used for deportations fearing public criticism and the subsequent withdrawal of airlines from transport contracts due to public pressure (Deutscher Bundestag, 2023b). Between 2017 and 2019, the German airline Lufthansa was the number one deportation carrier (Deutscher Bundestag, 2019). See information on charter deportation carriers for 2020 on these websites: <https://noborderassembly.blackblogs.org/abschiebe-alarm/> and for 2021: <https://deportationalarm.com/>

have the right to refuse to carry deportees if they fear consequences for travel safety during the flight; however, the number of cancelled flights related to this right has remained very low.

Forced return monitoring procedures

While the EU Return Directive (Article 8(6)) obliges member states to establish “an effective system for monitoring returns”, the German government claims to already have such a system in place with the judicial appeal system (courts), administrative checks and balances (Rietig & Günnewig, 2020, p. 42), as well as selective monitoring of deportation at airports by NGOs⁶³ and the National Agency for the prevention of torture (Nationale Stelle zur Verhütung von Folter).⁶⁴ The existing mechanisms do not fully comply with the standards of the EU Agency for Fundamental Rights (FRA); Germany has no return monitoring law and no systematic independent oversight over the entire deportation process⁶⁵ established (FRA, 2022). In the case of deportation flights organised by Frontex, the border agency’s ‘forced return monitors’ are present throughout the process. The rights of deportees are limited to lodging a complaint with Frontex; however, Frontex is responsible for assessing the complaint’s legitimacy.⁶⁶ An ombudsman institution does not yet exist in the German return system. The problems with monitoring and transparency raise questions about possible human rights violations in practice.

5.7 Return of unaccompanied minors

According to §58.1a AufenthG, before deporting an unaccompanied minor⁶⁷ (UAM), the returning authority must ensure that they are handed over to a family member, a person entitled to personal care or a suitable reception facility in the country of return. If these conditions cannot be met, removal is not legally possible and a suspension of removal must be granted. Nor can a removal warning and deportation order be issued if the examination has shown that there is no possibility for the UAM to be accepted in the country of origin or a safe third country.⁶⁸ Only in exceptional circumstances can a UAM be kept in deportation detention (§62 AufenthG), in which case compliance with Article 17 of the EU Return Directive (2008) concerning age-specific requirements has to be observed.

In 2022, around 120 unaccompanied minors were removed at the border crossing following unauthorised entry (*Zurückschiebung*) (Deutscher Bundestag, 2023b, p. 15) while in the same year, of a total of 7,277 unaccompanied minors apprehended at German borders, 1,945 were

⁶³ In Germany, there are currently independent deportation observers and mixed forums at the following airports: Berlin, Düsseldorf, Cologne/ Bonn, Hamburg, Frankfurt and Leipzig/ Halle. The Berlin ‘Forum’ monitoring deportation includes members of the Federal Police, federal and state authorities involved in deportation procedures, churches, welfare associations, UNHCR, Amnesty International and ProAsyl. See Caritas, 2023.

⁶⁴ Together with the Joint Commission of the States (*Länder*), it was designated the OP-CAT/ UN Treaty Against Torture’s National Preventive Mechanism. While the federal body deals with federal institutions, the states’ commission deals with states’ authorities. See the website of the UN National Preventive Mechanisms, Subcommittee on Prevention of Torture: <https://www.ohchr.org/en/treaty-bodies/spt/national-preventive-mechanisms>

⁶⁵ There is no monitoring at the pick-up of deportees from the shelters and during the flight.

⁶⁶ For further details, e.g., voluntary commitments of Federal Police and Frontex officers, see Rietig & Günnewig (2020, p. 43).

⁶⁷ In the German asylum procedure, children and young people under the age of 18 are considered minors.

⁶⁸ The German principle is ‘*Keine Abschiebungsandrohung ohne konkret-individuelle Aufnahmemöglichkeit*’ (‘No deportation warning without concrete, individualised possibility of admission’).

refused entry (*Zurückweisung*)⁶⁹, and 4,857 were handed over to the youth welfare office (*Jugendamt*) in accordance with §§42a to §42 SGB VIII (German Social Code Book 8/ *Achtes Buch Sozialgesetzbuch*) (Deutscher Bundestag, 2023i, pp. 13-16). Of the asylum applications submitted by unaccompanied minors in 2021-22, 269 were rejected in 2021, and 220 in 2022 (incl. removal warnings to countries of origin, such as Afghanistan in 2021:106, 2022: 4). In the case of forced return, unaccompanied minors may be granted reception assistance (meeting the minor at the gate, assisting them during entry controls and handing them over to the person authorised to meet them according to IOM (2018, p. 8). The authors were unable to identify other specific German provisions.

Unaccompanied minors in Germany are usually granted a suspension of deportation; as asylum seekers under the age of 18, they do not have the ability to act within the asylum procedure. Until adulthood, they are assigned a legal guardian who can submit an asylum application on their behalf in writing to BAMF. According to the 2017 Act to Improve the Enforcement to Leave the Country, the youth welfare office is to immediately submit an asylum application for the child/young person immediately in cases where it can be assumed that international protection is required (§1.1.2 AsylG).⁷⁰ If asylum is not applied for before the minor reaches the age of 18, they lose protection from deportation on their 18th birthday, including all associated rights/entitlements (Suerbaum, 2021, p. 29). The prospect of remaining in the country after reaching the age of majority determines the person's integration and protection options. For example, if an unaccompanied minor has been residing in Germany for at least six years without interruption on a tolerated or permitted basis or with a residence permit for humanitarian reasons and if it seems certain that they will be able to integrate, they may be granted a residence permit for humanitarian reasons in accordance with §23.1.1 AufenthG (§104a AufenthG). The person is also entitled to a temporary suspension of removal if they are enrolled in vocational training and a residence permit if employed.

According to EU law (Procedures Directive 2013/32/EU), a guardian should be appointed for the asylum process to comply with the requirements to consider the best interests of the unaccompanied minor. Unaccompanied minors above the age of five and up to the age of 13 can be heard; it should be clarified with the guardian whether s/he considers a formal hearing useful and possible. Alternatively, a written statement from the guardian may replace a hearing in an asylum procedure. From the age of 14, minors must be heard, but a hearing can be waived if the asylum application is accepted.

⁶⁹ It remains unclear to what extent unauthorised entries are counted more than once, as no personal data is obtained from those who are refused entry at the border (*Zurückweisungen*), see Deutscher Bundestag, 2023i, p. 18. Regarding the fulfilment of the overriding consideration of the best interests of the child, the German government claims that international protection regulations are fully taken into account. For example, the competent authorities of the country of destination must be informed in good time; the border authority ensures that the minor is handed over to a family member, a nominated guardian or a suitable reception centre, see Deutscher Bundestag, 2023j, p. 7.

⁷⁰ The youth welfare office is entitled and obliged to carry out all legal acts necessary for the welfare of the child or young person. BAMF employs trained special representatives for UAM hearings and is committed to safeguarding the best interests of the child at every step of the asylum procedure. Long-term limbo situations are to be avoided in the best interest of the child, according to government sources. However, the duration of an asylum procedure until a decision is made is considered to be very long and causes major stress (BMFSFJ, 2023, pp. 103, 105).

5.8 Entry bans

Delayed voluntary departures and forced removals/ deportations are subject to a re-entry ban of a maximum of five⁷¹ or, in exceptional cases, ten or twenty⁷² years, depending on individual circumstances (§11.1./7 AufenthG and §34/34a/35 AsylG). According to §11.1 AufenthG, an entry ban arises by deportation, i.e. by law in each case of deportation (*Abschiebung*). This contradicts Section. 3.6 of the EU Return Directive (2008), according to which an entry ban is an “official or judicial decision”, not a decision of a legislator (Oberhäuser, 2019, p. 12). Moreover, according to §11.7 AufenthG, TCNs from a safe country of origin whose asylum application has been rejected can be subject to a temporary re-entry ban even if they leave Germany voluntarily (BAMF, 2023a, section 3.2, p. 197).⁷³ The ban and the time frame have been decided and enforced by the Foreigners Authorities since 2019 (before the BAMF Federal office). In the case of the first order, the duration of the ban does not exceed one year. In the case of a second or subsequent unsuccessful application, the duration of the ban after deportation can be up to three years. Once in force, the ban is entered into the national police information system (INPOL), the Central Register of Foreigners (Ausländerzentralregister, AZR), and the Schengen Information System (SIS). According to BAMF (2018a), “As a matter of principle, the ban on entry and residence does not apply only to Germany, but in fact to the entire Schengen area, so that it is also entered in the Schengen Information System (SIS). This means that individuals can be prevented from entering the Schengen area. No entry, therefore, needs to be made in individuals’ passports.”

Re-entry bans with a duration of less than 20 years can be revoked or shortened on a case-by-case basis. Violations of a re-entry ban (both breach and attempted breach) is a criminal offence, punishable by up to three years of imprisonment or a fine. Entry bans are not issued without return decisions, that is, in the case of refusal or removal following unauthorised entry at the border (Hoffmeyer-Zlotnik, 2017).

There are several cases in Germany where deportations were not accompanied by an entry ban and were only issued after a person had re-entered Germany. It needs to be clarified whether a deportation can lead to an entry ban if it is only limited in time after the deportation, as the German Federal Administrative Court assumes (Oberhäuser, 2019, p. 14). The EU Return Directive (Art. 3.6) excludes such an interpretation, stating that the entry ban ‘accompanies’ the return decision and does not follow it.⁷⁴ This leads Oberhäuser (2019, p. 15) to conclude that §11.1 AufenthG violates EU law to a considerable extent and that the Federal Administrative Court

⁷¹ In line with and introduced by the EU Return Directive.

⁷² The time limit starts from the date of removal and can be up to ten years if the individual has been convicted of a criminal offence or has been found to be a danger to public safety and order. If a person has committed war crimes, crimes against humanity and peace, or poses a terrorist threat, the entry ban is 20 years (see BAMF, 2018a).

⁷³ Initially provided for in with the 2015 German Act Redefining the Right to Remain and Termination of Residence (*Gesetz zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung*) and concretised in the 2019 Second Act to Improve the Enforcement of the Obligation to Leave the Country (2. *Gesetz zur besseren Durchsetzung der Ausreisepflicht*). Accordingly, a re-entry ban can be considered for persons from safe countries of origin whose asylum application has been rejected as “manifestly unfounded” and for persons whose subsequent or second application has been repeatedly rejected as inadmissible (§11.7.1-2 AufenthG). In addition, a ban on entry and residence can be ordered if a person who is obliged to leave the country is at fault for not leaving within the prescribed departure term.

⁷⁴ Oberhäuser (2019, p. 14-15) also questions that, if a time limit set after deportation results in an entry ban, whether this would then have to be the ‘return decision’ according to EU Return Directive Art. 11.1, although ‘entry ban’ and ‘return decision’ are different according to EU Return Directive Art. 11.1 and Art. 3.6, and the ordering of an entry ban being not related to the determination of an obligation to return in accordance with Art. 4.3 EU Return Directive.

would be well advised to refer the open questions to the CJEU instead of closing loopholes to the detriment of those affected.

5.9 Procedural safeguards

The deportation decision by BAMF may be confirmed by a court decision.

Legal status of persons during the return procedure

Throughout the asylum procedure, individuals are legally treated as protection/ asylum seekers. Before lodging an asylum application, individuals are considered as irregular migrants; after the asylum application has been rejected, they are obliged to leave the country (rejected asylum seekers). However, if their return is not possible their removal is temporarily suspended (they are '*geduldet*'), but this is not a legal (protection) status.

Review of deportation decisions

Unsuccessful asylum seekers can lodge an appeal against the BAMF's decision to reject their application; however, the appeal must be lodged within a short period of time as a matter of principle.⁷⁵ Moreover, an appeal for annulment against a return decision does not automatically have a suspensive effect, but – if the application has been rejected as manifestly unfounded (*offensichtlich unbegründet*) – has to be filed together with a request for suspension.⁷⁶ The written notice of rejection contains information on legal remedies (*Rechtsbehelfsbelehrung*) concerning appeals and deadlines. Many NGOs and advocacy groups offer legal advice. Appeals can be lodged against both the removal warning and the rejection of an asylum decision. The court of first instance is the Administrative Court (Verwaltungsgericht, VG) where the person concerned may file an appeal against the negative BAMF decision (§34a.2 AsylG).⁷⁷ The VG rejects or confirms the BAMF decision; in the first case, it can oblige the BAMF to grant protection. If an appeal to the Higher Administrative Court (Oberverwaltungsgericht, OVG), on points of fact and law (*Berufung*) is sought, this is only possible if the OVG allows it upon application by the asylum applicant or the BAMF (§78.2-3 AsylG). The case is completely re-evaluated by the OVG, and legal representatives are required for all parties (§67.4-1 of the Code of Administrative Court Procedure/ Verwaltungsgerichtsordnung). The Federal Administrative Court (Bundesverwaltungsgericht – BverwG) is the third instance (appeal on points of law only, *Revision*) and is involved if a factual or legal issue of fundamental importance is at stake and requires clarification, if a judgement deviates from a supreme court ruling or if procedural errors have occurred in the second instance at the OVG. With a recent reform of the Federal Administrative Court, which entered into force on 1 January 2024, it is now also entitled to review facts, not just law. Rulings of the Federal Administrative Court cannot be appealed against in German administrative jurisdiction (§132.1-2/ §132 of the Code of Administrative Court Procedure). The CJEU in Luxembourg may be called upon by the lower administrative courts during ongoing proceedings to give a preliminary ruling in cases of doubt under Community Law (Treaty on the Functioning of the EU, Article 267). In the framework of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz – BVerfGG -§90ff), constitutional complaints can be

⁷⁵ A court action against a rejection of an asylum application has to be lodged within two weeks; if the application was rejected as manifestly unfounded, the deadline is one week (§74.1, §36.3 AsylG).

⁷⁶ Filing a suit against a removal warning for other reasons, e.g., because a residence title has expired, does also not have a suspensive effect in most States (*Länder*).

⁷⁷ It is not absolutely necessary for the litigant to have an attorney in the first instance court (Code of Administrative Court Procedure, *Verwaltungsgerichtsordnung*).

lodged with the Federal Constitutional Court of Germany if fundamental rights to asylum are affected. In addition, if all else fails, an application can be made to the European Court of Human Rights in Strasbourg if it is considered that a state measure or decision (of BAMF, VG, OVG, etc.) has violated the applicant's human rights (EU Convention on Human Rights Art. 34ff).

From a practitioner/ lawyer's perspective, invoking EU law in court cases is seen as an effective strategy to ensure that courts rule in favour of procedural safeguards.

Provisions regulating or facilitating the regularisation of non-returnable people

The temporary suspension of removal/deportation (*Duldung*) applies here (cf. Section 5.6: Temporary suspension of deportation). Obstacles to removal/ deportation arising from the situation in the country of destination are examined by the BAMF (§24.2 AsylG), including whether a removal to this country would violate the non-refoulement clause of the Geneva Convention or the rights under the EU Convention on Human Rights (§60.5 AufenthG). While the suspended foreigner is still obliged to leave the country, the Foreigners Authorities can issue a temporary residence permit after 18 months if the preconditions for deportability are unlikely to change in the near future and are not the foreigner's fault. Persons who have been found to be ineligible for deportation (*Abschiebeverbot*) in accordance with §60.5/7 AufenthG (danger to life and limb, deprivation of fundamental rights) should be granted a residence permit (§25.3 AufenthG) for at least one year (§26.1 sentence 4, AufenthG). For those whose removal has been suspended, such as minors or young adults with good integration perspectives (§25a-b AufenthG), there are several possibilities to legalise their stay in Germany, including the temporary suspension for the purpose of training (*Ausbildungsduldung*).

Vulnerabilities of certain groups addressed in law and policymaking on return

There is no legal definition of 'vulnerability' in the context of return. The Residence Act (AufenthG) contains safeguards for the deportation of unaccompanied minors (see Section 5.7 above) and detention criteria for other vulnerable persons. The federal states have so-called hardship commissions (Härtefallkommissionen), which can apply to the supreme land authority for a temporary residence permit in specific cases (§23a.1 AufenthG) on humanitarian and political grounds. Moreover, German law contains specific provisions on the forced return of minors and families of victims of human trafficking, as well as on removal bans on medical grounds (see 4.6 above).

5.10 Detention

The federal states are in charge of enforcing returns. Pre-removal detention is an administrative measure with a punitive dimension (Oomkens & Kalir, 2020, p. 37).⁷⁸ Detention decisions are subject to a judicial order by the district courts (Amtsgerichte, first instance of ordinary jurisdiction).⁷⁹ German residence law provides for several types of detention in the context of

⁷⁸ E.g., clearly, the detention for cooperation, see below.

⁷⁹ Droste & Nitschke (2022) use the case of ten deportees as an example to show how the *Amtsgerichte* (courts of ordinary jurisdiction, cf. Annex 1) generally follow the proposal of the Foreigners Authority ordering the detention, and thus 'adopt(ing) the perspective of the latter' (p. 146). The hearing is very short, and the detainee is usually not asked to explain him/herself and to contribute facts on the basis of which the decision for or against detention is made; instead, according to Droste & Nitschke's research, the decision seems to be 'pre-determined'. The apparent lack of serious consideration of the asylum seeker's

return⁸⁰, namely for (1) cases of unauthorised entry, (2) in cases related to the obligation to leave the country, and (3) in cases of irregular stay (Haberstroh, 2021, pp. 12–13).⁸¹ The legal bases for the different types of what can be summarised below as ‘deportation detention’ are national regulations; the detailed conditions of implementation are subject to sub-national/state laws on deportation detention and—where not (yet) regulated by law—to the ‘house rules’ (*Hausordnungen*) of the individual specialised facilities (Droste & Nitschke, 2022, p. 42).

(1) Detention for to unauthorised entry

Detention pending exit from the federal territory (***Zurückweisungshaft***, §15.5 AufenthG): In the case of an attempted unauthorised entry at the border, a person will be refused entry after detection (see Section 5.1 above). If a removal decision has been issued and cannot be enforced immediately, the foreigner can be detained by court order to secure the refusal of entry.

Enforcement of custody awaiting deportation (***Abschiebungshaft***, §62 AufenthG) and removal at/across the border to a neighbouring country after unauthorised entry (***Zurückschiebungshaft***, §57/ §62 AufenthG): To prepare for the removal of apprehended persons within a short period of time after their entry and to deport them to their country of origin or to the EU or Schengen country responsible for them.

The maximum period of detention in connection with unauthorised entry (both types) is 18 months, with an initial period of three, in some cases six months. An extension to a maximum of 12 months may be ordered if the removal cannot be carried out for reasons for which the person concerned is responsible.

(2) Detention in connection to the obligation to leave

Custody to prepare deportation (***Vorbereitungshaft***, §62.2 AufenthG)⁸²: Preparation for either deportation on the grounds of expulsion or for the enforcement of a removal order (§58a AufenthG, concerning potential criminal offenders) if a decision regarding expulsion or removal cannot be taken immediately and the deportation would be in danger of failing or would be considerably more difficult without a detention measure. This type of detention is restricted to a limited group of persons who are considered a threat to public safety and order (§58a AufenthG) and should not exceed six weeks.⁸³

Supplementary custody to prepare deportation (***ergänzende Vorbereitungshaft***) according to §62.c AufenthG applies when persons are apprehended residing in Germany despite an existing

perspective raises pertinent questions about the role of the courts of ordinary jurisdiction and their judicial independence (see also pp. 156f).

⁸⁰ Both, for Dublin transfers or following a return decision. Most federal states do not distinguish between detention in these two contexts (Hoffmeyer-Zlotnik, 2022, p. 130). Until at the time of writing, the fact that a person has applied for asylum, has prevented them from being detained; with the new Repatriation Package, which was adopted in January 2024 and will likely come into force in the first half of 2024, an asylum seeker can be detained during the asylum procedure, that is before the asylum application case is decided.

⁸¹ This section on detention and alternatives to detention is largely based on Haberstroh (2021), see there for further details on all topics related to detention in the context of to return.

⁸² This type of detention was created in 2020 with the Act to postpone the census until 2022 and to amend the Residence Act.

⁸³ In exceptional cases—if the issuance of the return decision is delayed for “special, unforeseeable reasons or if exceptional circumstances for which the foreigners authority is not responsible” render a decision on the return decision “impossible within six weeks” (Bavarian Higher Regional Court [Oberstes Landesgericht/ OLG Bavaria], ruling of 25 November 1993, margin no. 8)—longer periods in the first order or extension are possible.

entry and residence ban (§11.1.2 AufenthG) and without an entry permit (§11.8 AufenthG) or if they pose a significant danger to the life and limb of third parties or important legal interests of domestic security or if another serious interest for expulsion exists. Thus, the requirements for supplementary preparation detention are lower regarding the extent of the danger posed and the maximum detention period. Detention ends with the BAMF decision notification or at least four weeks after the asylum application has been submitted. If the asylum application is rejected as inadmissible (§29.1.4 AsylG) or manifestly unfounded and an application for temporary legal protection is filed, the detention can be extended in each case. If the application is rejected by the VG (administrative court), detention ends no later than one week after the court decision to enable a transition from supplementary preparation detention to detention pending deportation enforcement (cf. 3 below).

(3) Detention in connection with irregular stay/ illegal residence

Precautionary detention (**Sicherungshaft**), pursuant to §62.3 AufenthG: Initially three, maximum eighteen months⁸⁴ detention to secure removal if there is a risk of absconding. This applies to persons who are subject to an enforceable obligation to leave Germany due to unauthorised entry or if a removal order (§58a AufenthG) has been issued, which cannot be enforced immediately. If the removal is unlikely to be carried out within three months for reasons beyond the control of the person concerned, detention is not permitted. In exceptional cases, the authority responsible for the detention application may arrest a TCN and temporarily detain them without a prior court order. However, the foreigner must be brought before a judge immediately for a decision on the precautionary detention order.

Detention for failing to cooperate (**Mitwirkungshaft**, §62.6 AufenthG):⁸⁵ If TCNs who are obliged to leave Germany fail to comply with the obligation to cooperate with the authorities (§82.4 AufenthG)—that is to appear in person at identification appointments with the authorities or to undergo a medical examination to determine their fitness to travel—and have been warned about the possibility of detention in the event of non-cooperation, they may be detained for a maximum of 14 days without extension.

Custody to secure departure (**Ausreisegewahrsam**, §62b AufenthG): Detention pending removal to secure deportation regardless of the risk of absconding can be issued by judicial order in cases where a TCN's obligation to leave voluntarily has expired and removal is possible within a period of ten days maximum.⁸⁶ This requires that the removal can be enforced within the given time limit, and that the deportee can be expected to try to avoid or obstruct the removal procedure (corresponds to the grounds for detention under §15 (1)(b) EU Return Directive). Custody to secure departure can take place in the transit area of an airport or in an accommodation from which the deportee can leave the country without travelling a significant distance to a border crossing point (§62b.2 AufenthG). According to migration lawyer Peter Fahlbusch, this type of detention is questionable under constitutional law because it is excessive and disproportionate

⁸⁴ Usually three months for the first order, but up to six months possible, with a maximum extension of 12 months (§62.4 AufenthG). The maximum total period of detention of 18 months shall include the duration of any previous preparatory detention and/ or detention for cooperation.

⁸⁵ This type of detention evolved from the Second Act on the better enforcement of the obligation to leave the country (2019). It implemented §15.1b of the EU Return Directive.

⁸⁶ The duration of custody pending departure was extended from a maximum of four days to ten days in 2017 with the Act to improve the enforcement of the obligation to leave the country. With the new Repatriation Package that is due to enter into force in the first half of 2024, the duration of custody pending departure was extended to 28 days.

(see Fahlbusch, 2023). Foreign authorities use custody to secure departure mainly to carry out collective deportations (*Sammelabschiebungen*) by ensuring access to people's detention centres.

Alternatives to detention

The different types of custody awaiting deportation in connection with §62 (*Abschiebungshaft*, see sub-sections 2 & 3 in this section on detention) are de jure only permissible if the purpose of detention cannot be achieved by other (milder) means, that is alternatives to detention. When applying for a detention order, municipal authorities must explain why there are no alternatives to detention (Hoffmeyer-Zlotnik, 2017, p. 39). Haberstroh (2021, p. 21) lists the following alternative measures:⁸⁷

- Obligation to report regularly to the Foreigners Authority or police for residence monitoring (reporting obligation),
- Spatial restriction of residence,
- Obligation to stay in a place or accommodation designated by the Foreigners Authority,
- Night-time restriction/ house arrest at night/ availability order,
- Bail,
- Sureties,
- Electronic surveillance.

Persons who have been subject to alternatives to detention pending deportation ordered by the Foreigners Authorities may – if provided for by state law – lodge an objection within one month of notification and file an appeal against the ordered measures. If the objection is found well-founded, the Foreigners Authority will revoke the measure; if not, an objection decision will be issued, against which the person concerned can appeal with the VG (administrative court) within one month of notification (§§73-74 AufenthG) (Haberstroh, 2021, p. 32).

Rights of detainees

The duration of detention is to be limited as much as possible. In the case of minors, all possible alternatives must be considered together with the youth welfare office before detention is ordered. Thus, minors and families with minors may only be detained in special exceptional cases and only for as long as is appropriate, taking into account the best interests of the child. The special needs of minors (dependent on their age) and other vulnerable persons (unaccompanied minors, disabled, elderly, pregnant, single parents with minor children, persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence) have to be taken into account in accordance with §17 of the EU Return Directive. During deportation detention, detainees have the right to contact legal representatives, family members, competent consular authorities and relevant assistance and support organisations who may also visit the detainees upon request to provide social and psychological support (§62a.2-4). In addition, detainees awaiting deportation must be informed of their rights and obligations and of the rules in the facility. Anecdotal evidence suggests that very restrictive rules are imposed on detainees in pre-removal detention centres (e.g. cf. Hoffmeyer-Zlotnik, 2022, pp. 149-150).

Despite the existence of these rights on paper, the practice of access to rights by detainees reflects a different reality. Often, persons are detained during scheduled meetings with the Foreigners Authority where they come to extend their temporary suspension of deportation (*Duldung*) (Droste & Nitschke, 2022, p. 135). There are still cases, where families with children are detained in deportation detention, which violates the principle of the best interests of the child (*“Abschiebungshaft – Kritik an...”*, 2023); however, usually, a mother is detained while her

⁸⁷ For the legal basis underlying these measures see Haberstroh, 2021, pp. 21-23.

children are placed under the supervision of the relevant youth welfare office (*Jugendamt*). Droste & Nitschke (2022, pp. 43-64, 87, 100-104, 211-249) have documented the experiences of detainees in the detention centre of Darmstadt-Eberstadt (Hesse) and Büren (North Rhine-Westphalia), including several rights violations in addition to isolation detention and lack of access to legal representation or even counselling. The lack of information on procedures, the position of detainees and the restriction of their rights and entitlements in detention is a serious shortcoming (p. 94).

Legal remedies against detention

The detainee or their legal representative may appeal against the decision of the district court (Amtsgericht) within one month of the written notification. However, in the absence of a court-appointed defence, it is often difficult for the detainee to contact a lawyer within a reasonable time if they did not have a lawyer's reference prior to detention. The next higher instance is the regional court (OVG), followed by the Federal Court of Justice as the third instance (see Annex 1). Legal representation is not mandatory in the first instance of appeal. The Family Procedure Act (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*, FamFG) provides that the court may appoint a guardian ad litem to represent the interests of the person concerned (§419 FamFG). However, critics point out that the relevant law (FamFG) does not deal with the right of residence at all and that family courts would be largely uninformed. Moreover, the fact that different courts (see Annex 1) are involved in detention decisions contributes to legally unjustified detention rulings—confirming the suspicions of lawyers who document deportation detention cases in their area of expertise that most detentions are unlawful.⁸⁸ Indeed, the statistics compiled by migration lawyer Peter Fahlbusch on the detention cases he has been dealing with for 22 years show that about half of his clients have been detained unlawfully, with an average detention period of just under four weeks (Fahlbusch, 2023). This has been a constant (trend) for two decades, and although it is a legal scandal, the official authorities deny the figures, and at the same time, the states claim not to receive data on deportation detention.

In Germany, people on low incomes have the right to free legal assistance (advice), regardless of nationality. Legal assistance in removal cases includes legal counsel and, if necessary, representation; it does not depend on whether a case has a reasonable chance of success. Non-governmental organisations offer free legal advice in matters of residence law before detention while access to legal advice from within detention is theoretically possible but difficult in practice (see above 'rights of detainees').

Facilities of (pre-removal) detention

The authors of this report did not find any evidence of significant privatisation of pre-removal detention despite the fact that the law provides for the separation of pre-removal detainees from ordinary prisoners in specialised detention centres. Since 1 January 2022, there have been a total of 821 places in pre-removal detention centres in twelve states (Hoffmeyer-Zlotnik, 2022, p. 131), 14 specialised deportation detention facilities (*Abschiebehafteinrichtungen*) in the federal states as of 2019, with four more in the planning stage (Droste & Nitschke, 2022, p. 32). Many of these

⁸⁸ See the statistical documentation compiled by the lawyer Peter Fahlbusch (2023). Fahlbusch has been documenting his removal detention cases as a lawyer since 2001 and publishes information on the court decisions on a quarterly basis. According to the latest figures, he defended 2,458 people in deportation detention proceedings, (*Abschiebungshaftverfahren*), of whom 52.5 per cent were found to have been detained unlawfully for between one day and several months, with an average period of detention of 25.8 days.

are former prisons (*Justizvollzugsanstalten*) in Germany. The establishment of specialised pre-removal detention centres in all states was a consequence of the 2014 CJEU ruling based on the obligation in Article 16 (1) of the EU Return Directive; with few exceptions, they are managed by the prison authorities under the aegis of a state ministry of justice or state police (Oomkens & Kalir, 2020, p. 34).⁸⁹ From the perspective of the states, specialised detention facilities are rather unattractive because of the very high costs involved.⁹⁰ There have been calls for better training of staff in these centres (Oomkens & Kalir, 2020, p. 37). Measures to separate detainees pending deportation from ordinary prisoners were temporarily suspended until the end of June 2022 (Second Act to Improve the Enforcement of the Obligation to Leave the Country of 2019) because not enough places were available in these specialised facilities. Potential offenders should also be detainable in penal institutions (§62a.1 AufenthG). If families are detained for pre-removal detention in special deportation detention facilities, they are to be accommodated separately from other pre-removal detainees and shall be able to enjoy privacy (§62a.1 AufenthG).

5.11 Emergency situations

Article 18(1) of the EU Return Directive on emergency situations has been transposed into German law. As mentioned in the previous paragraph, the 2019 Second Act to Improve the Enforcement of the Obligation to Leave the Country temporarily suspended the separation of detainees pending deportation from ordinary prisoners until the end of June 2022 due to a lack of specialised detention facilities. Combined with the claim that there was a lack of capacity to accommodate persons in pre-removal detention, this provided the grounds for invoking an emergency situation for suspension.⁹¹

5.12 Readmission procedure

Germany has concluded 31 formal bilateral readmission agreements with 30 countries of origin as of January 2023, of which more than 50 per cent are with countries outside the European Union.⁹² Critical observers point out that the mere existence of agreements does not imply constructive cooperation in the area of return. Examples include the bilateral readmission agreement between Germany and Morocco in 1998 and the informal EU declaration with Afghanistan in 2016, which is often mistaken for a formal readmission agreement (Rietig & Günnewig, 2020). While the German government sent démarches to 17 uncooperative countries of origin⁹³ in 2016, the outcome is unclear as cooperation depends on many factors (Deutscher Bundestag, 2023c, p. 8). According to the German government, a country's obligation under international law to take back its citizens is unconditional and not linked to any quid pro quo, such as facilitated labour migration (Deutscher Bundestag, 2023c, p. 14). The current government intends not to make repatriation agreements subject to separate readmission programmes but to

⁸⁹ E.g., in Bavaria, the Bavarian State Office for Asylum and Returns (Bayerisches Landesamt für Asyl und Rückführungen) in Munich Airport Hangar 3.

⁹⁰ Discussion point during Expert Stakeholder workshop at BICC, 12 December 2023.

⁹¹ In retrospect, it became clear that the claimed lack of capacity was mere rhetoric and that the instrument of pre-removal detention was not used to the extent that existing capacity would have reached its limit. Notes, Expert Stakeholder Workshop, 12 December 2023, Bonn.

⁹² Cf. BMI (2023). A second agreement on the readmission of stateless persons was concluded with Romania in 1998.

⁹³ Besides Asian countries of origin, these included African states Algeria, Benin, Guinea-Bissau, Morocco, Niger, Nigeria, Senegal and Sudan.

include readmission components within the framework of other agreements, so-called comprehensive migration agreements (*ganzheitliche Migrationsabkommen*) (Bundesregierung, 2021). The model for such agreements is the Migration and Mobility Agreement concluded with India in 2022.⁹⁴ Germany reportedly signed a Joint Declaration of Intent between the Federal Republic of Germany and the Republic of Iraq on Cooperation in the Field of Migration in May 2023⁹⁵, another agreement with Georgia in December 2023 (BMI, 2023a), and agreed a close migration partnership with Morocco in January 2024 (BMI, 2024).

⁹⁴ The Agreement is classified, but a parliamentary question shows that the basic components of the bilateral agreement include legal migration, in particular the mobility of skilled workers and academics, and cooperation on returns. To facilitate returns, the agreement provides for the use of charter flights, biometric identification procedures and the observance of certain deadlines (Section 12 of the Agreement) (Deutscher Bundestag, 2023c, p. 13).

⁹⁵ See the text of the agreement on the website of the Refugee Council North-Rhine Westphalia: https://www.frnw.de/fileadmin/frnw/media/downloads/Themen_a-Z/EU-Politik/Joint_Declaration_of_Intent_Migration_Iraq.pdf (accessed 31 January 2024).

6. Gaps

Apart from outlining gaps in the legal, institutional and international cooperation frameworks, the authors have found few other areas of work where gaps are evident and need to be addressed. These are gaps in data, management, policy communication and research, amongst others. It is important to note, however, that some of the gaps identified below are ambivalent in terms of deriving policy recommendations because of ethical-normative concerns (see section 7 on policy suggestions for further elaboration).

6.1 Gaps in the legal framework

Gaps in the legal framework appear at two levels of the return governance regime. First, there are (albeit few) discrepancies between EU law and national law. For the other, national policies and laws coexist with subnational heterogeneous policy implementation and the implementation and making of own policies by states within the federal system. States act independently within their competencies, and some directly transpose EU law. Municipalities even organise and implement voluntary return programmes at the third level of return governance. The impact of national law on the implementation of state return policies is subject to negotiation and varies across the 16 federal states due to different institutional and actor arrangements for policy implementation. The ‘outcomes’ of these negotiations depend, among other things, on the political orientation of the responsible state government (ruling parties vs. opposition), the strength of civil society pressure groups and whether or not states share an EU border with neighbouring countries. For people who are subject to the return policies as asylum seekers, deportees or tolerated foreigners, the heterogeneity of the laws, and the complexity of the institutional landscape create a high degree of legal uncertainty.

The law is not well accessible because it is neither foreseeable nor easy to understand. Even decisions on asylum applications (or rulings on appeals against rejections) lead to contradictory results, as Foreigners Authorities at the municipal level and administrative court judges have considerable leeway to assess the situation of an applicant according to their understanding of his or her situation and the situation in the country of origin or a so-declared safe third country. The Federal Constitutional Court (BVerfG) ruled in 2017⁹⁶ that administrative courts have a general obligation to base their decisions on current knowledge and not merely refer to previous decisions and sources. However, in the absence of binding country-of-origin information⁹⁷ and given that the judicial panels of the administrative courts are usually overburdened, the reality is that lawyers dealing with asylum law have to be up to date and bring relevant information to the court proceedings to refer to it in each individual case (Naumann, 2019, p. 306). The administrative leeway is based on the fact that the municipalities, as the third level of government subject to state law, can implement their programmes, e.g. for voluntary return, with municipal regulations varying from location to location (e.g. the towns of Bonn vs Siegburg which are 20 minutes apart). Local Foreigners Authorities depend on the competence and attitude of the staff employed in their asylum and return decision-making (see Sections 5.3, 5.6).

The legal non-status of a temporary suspension of deportation (*Duldung*) in the German protection system occupies a middle ground between regular status and irregular stay⁹⁸ to the detriment of the chances of those affected to participate in society and to claim their entitlements.

⁹⁶ See: BVerfG, Decision of 27 March 2017, 2 BvR 681/17, asyl.net: M24951.

⁹⁷ BAMF issues non-binding country of origin-specific analyses (*Länderanalysen*), see <https://www.bamf.de/EN/Behoerde/Informationszentrum/Laenderanalyse/laenderanalyse-node.html>

⁹⁸ Interestingly, EU statistics count persons with a temporary suspension of the obligation to leave as not obliged to leave, whereas German statistics count them as obliged to leave.

The limbo situation and the exclusionary character of *Duldung* lead to a fiction of temporary residence. At the same time, there is a massive imbalance between the likelihood that the temporary suspension of deportation is lifted and the political rhetoric that emphasises improving the enforceability of returns, which is reflected in the intended increase in the number of people deported from Germany, leading to new acts to improve the enforcement and acceleration of returns. A series of renewals (*Kettenduldung*) is widespread, but so far does not allow the potential for regularisation to be exploited by linking recent new types of temporary suspension, such as suspension for the purpose of training or employment (*Ausbildungs- oder Beschäftigungsduldung*) with long-term naturalisation.

The most significant discrepancy between EU law and national law concerns the monitoring of returns. Here, Germany has neither a law nor provisions for systematic monitoring or the institution of an ombudsman. This is a matter of serious concern, as any deportation or removal procedure runs the risk of violating the human rights of a deportee (cf. Section 5.10 in this Dossier); the accumulating evidence of pushbacks at internal (Schengen) borders is only one indicator. Furthermore, the imposition of a post-deportation entry ban (cf. Section 5.8) is not in line with EU law, and the fact that the decision is taken by a legislator rather than being reviewed officially or by a judge violates Art. 3.6 of the EU Return Directive (2008). As the discussion during the Expert Panel (12 December 2023) showed, it can be argued that the German legal framework for asylum law and reception conditions (the mirror image of return legislation) contains a compliance gap with EU law based on the decentralised implementation of EU- and national law (which has largely adopted EU law, lest the exceptions mentioned above). As a result, it remains unclear who exactly is not complying and how.⁹⁹ In other cases, the German authorities bend the law according to EU rules, as shown by the preferential application of the Schengen Borders Code for border controls and *Zurückweisungen* (refusals of entry) and the continuous extension of border controls on the basis of ever different but similarly defined security threats. For example, border controls with Austria have continued since 2015 despite the prescribed maximum duration of six months (Section 5.6).

A more general observation concerns the role of EU law as a reference point for national policymaking and sub-national policy practice (enforcement of legal provisions) at the federal state levels. Accordingly, as standards in EU law fall, generous protection provisions in national law may disappear.¹⁰⁰ For example, it is conceivable that the New Pact on Migration and Asylum will open up more possibilities for restrictions, for instance with regard to access to legal counselling, and that a hearing will no longer be mandatory.¹⁰¹ This is linked to the EU Commission's shift towards a more restrictive approach to returns despite the EU Parliament's insistence that the emphasis on effectiveness in return policymaking and enforcement must comply with human rights standards.¹⁰²

⁹⁹ For this reason, the authors of this report refrain from suggesting enhanced compliance with EU law in section 7.

¹⁰⁰ It is noteworthy, though, that, e.g., the enforcement of the EU Return Directive from 2010 onwards in Germany initially also provided for major improvements in Germany's and States' handling of returns. For example, access of non-governmental organisations to detention facilities became possible and the separation of prisoners and deportees was introduced. Cf. Droste & Nitschke (2022, p. 31).

¹⁰¹ Outcome of the discussion at Stakeholder Expert Workshop on 12 December 2023 organised by BICC (Bonn).

¹⁰² See the EU Parliament's resolution on the implementation of the EU Return Directive (2008/115/EC) adopted on 17 December 2020 which signaled an attempt to align EU return policy provisions with international standards and to provide guidance for EU MS on how to reconcile legal/ protective safeguards and national return policies that usually focus on restrictive policies (detention of children, automatic entry bans, etc.) and increasing returns. Cf. Majcher (2021).

6.2 Gaps in the institutional framework

Gaps in the institutional framework reflect what has been said about the challenges of multi-level policymaking and implementation. The same tensions inherent in the federal system, i.e., between the federal and sub-national levels with the federal states and different types of municipalities (see Annex 1), exist and manifest themselves in a heterogeneous landscape of institutions and policy implementation actors. The academic literature reviewed for this Dossier confirms that the problem is well known. In Germany, several interface bodies and institutions have been established in recent years to bridge the gaps between the different levels of policymaking and implementation, particularly between the federal and state levels.

Another gap is the involvement of courts of different types of jurisdiction in decisions on deportation detention and their appeals, which are often found to be inconsistent with legal regulations (see Section 5.10 above). The relationship between civil society organisations and the political authorities, particularly the BAMF, is ambivalent. Since 2015, several communication formats have been created, such as annual conferences and workshops, to learn more about each other's perspectives and challenges as stakeholders in the return process. In doing so, both sides seem to engage with each other on the basis of mutual understanding that they are working towards the same goal: to improve and humanise return and asylum policies and their impact on protection seekers. Important instances of CSO participation have been facilitated in the framework of deportation monitoring groups (mixed forums) at German airports (cf. Section 5.6 on forced return deportation monitoring). In the process of law making and -amending, CSO participation is limited, and the time available to prepare positions for consideration in new draft laws is very short.¹⁰³ The media often does not seem to play a constructive role but rather helps to distort the public debate in which politicians argue for ever more restrictive approaches and the need to deport more TCNs based on false facts/ problematic data. Besides lacking investigative efforts, journalists and the media also fail to address structural problems and gaps.

6.3 Gaps in international cooperation

International cooperation is mainly discussed in the context of bilateral readmission agreements and soft laws. However, the implications of return policies and their unintended consequences for international cooperation, such as the social and political consequences in countries of origin, are often muted in these discussions. Koch et al. (2023) have recently pointed out why and how return policy needs to be seen in the context of larger international political structures of (non)cooperation, including foreign, development and security policy. Narrow return policies driven by domestic politics, which include the intention to conclude cooperation agreements with the countries whose citizens constitute the largest group of rejected asylum seekers, are unrealistic and often fail because origin countries have little interest in 'taking back' their citizens. If they are willing to engage, German policy often runs the risk of legitimising authoritarian regimes. Moreover, Koch et al. (2023) argue that there is a discrepancy between the foreign policy goal of stabilising fragile states or contexts and the fact that this is undermined by returns. Furthermore, the closure of soft law—informal migration agreements—undermines good governance standards such as democratic accountability and transparency in the other partner states. Another gap is the need for a sober debate on the conditionality of return policies and their implementation in the international arena (Walter-Franke, 2023). However, one interesting development in this field was the appointment of the Special Commissioner for Migration

¹⁰³ Point from discussion during Expert Stakeholder Workshop, 12 December 2023, Bonn.

Agreements in Germany by the governing coalition in February 2023. The Commissioner is expected to “provide important new ideas for shaping the external dimensions of migration policy. In doing so, he will closely coordinate with the federal ministries concerned.”¹⁰⁴

6.4 Gaps in databases

It is striking how the legal and institutional complexity seems to prevent a coherent collection of data on returns that could lead to a unified understanding of facts and figures in the German return regime. Data gaps are manifold, and only a few highlights can be mentioned here:

- The Federal Police and the BAMF do not reconcile and compare data on Dublin transfers (Deutscher Bundestag 2023b), i.e., for example, the Federal Police officers count the number of persons actually deported, while the BAMF counts the number of persons who were requested to leave Germany according to the Central Registry of Foreigners (*Ausländerzentralregister*, AZR) (Deutscher Bundestag, 2023g, p. 6);
- There is almost no published data on cooperation with third countries on return/s (cf. Section 5.12);
- There is no sound statistical database on voluntary return (neither assisted nor unassisted) on an annual basis, as the federal states and municipalities partly run their own voluntary return programmes, and there is no obligation to report to a single database according to common standards and criteria;
- The AZR¹⁰⁵ has been of limited use in the past, as it reportedly contains many incorrect data entries that are hardly detected or corrected; others are missing, such as information on actual employment based on permits issued to foreigners with residence titles (Deutscher Bundestag, 2023a, pp. 73f, 77);
- Rejections of asylum are not recorded with regard to the influence of family protection;
- No data is collected on the withdrawal of removal warnings based on BAMF or court decisions (following the CJEU ruling of 14 January 2021 C-441/19);
- Data on deportation (deportation orders, different types of detention and alternatives to detention, as well as the use/ existence of complaint mechanisms in deportation detention procedures) are not systematically collected (Hoffmeyer-Zlotnik, 2017, p. 34). This limits the ability to analyse detention versus alternatives and their respective impacts.

Furthermore, data on returns is difficult to access, and the public, media and politicians cannot rely on a sound database for informed public debate and decision-making.

It is important to note that with the notable exception of the (lack of) data on detention, the argument about gaps in databases here is not that the amount of data available is limited; on the contrary, the above elaborations should have made clear the complexity and heterogeneity of data sets due to the multiple actors and federal logic in Germany. the comparability of documented data across the states and their synthesis for informed national policy discussions remains a

¹⁰⁴ See <https://www.bmi.bund.de/EN/ministry/commissioners/specialcommissioner-migration-agreements/specialcommissioner-migration-agreements-node.html>. Accessed 06.02.2024.

¹⁰⁵ A new law on the reform of the AZR was adopted in 2021. Upon implementation, the scope of data and access to data for more users shall be realized (Hoffmeyer-Zlotnik, 2022, p. 14), albeit civil society organisations fear data misuse and show concern about data insecurity, while the government is still in the process of finding solutions (Deutscher Bundestag, 2023a, p. 74).

distant dream at least for two reasons: 1) the multiple rules and regulations for data collection and standards for datasets in the federal states and reporting by federal authorities (e.g. Federal Police); 2) strong legal concerns about the protection of personal data and provisions limiting the use of data to the original purpose for which they were collected,

In recent years, various actors have played a prominent role in documenting or requesting data on returns through their parliamentary authority. For example, deputies of the parliamentary faction *Die Linke*¹⁰⁶ have used the inquiry instruments of *Kleine Anfrage* (minor inquiry) and *Große Anfrage* (major interpellation) in the *Bundestag* to obtain data from the executive bodies on migration, asylum and return-related figures, their collection and documentation processes, etc., and thus to regularly scrutinise transparency in these areas. Equally important are the efforts of lawyers and NGOs, such as the association ‘Hilfe für Menschen in Abschiebehaft in Büren’ (support for people in deportation custody in Büren), mentioned above.

6.5 Gaps in implementation

The identified shortcomings in the legal and institutional framework reveal further ‘management’ gaps in the operational implementation and enforcement of return policies. The ambivalence resulting from the decentralised implementation of EU-, international and federal law by multiple actors and institutions was highlighted as having either positive or negative effects on migrants/returnees in different situations. Internal contradictions between what is presented as a solution to the politically defined problem of the deportation gap and the applied solutions perpetuate the antagonistic discourse with an emphasis on increasing the effectiveness of returns. Meanwhile the operational focus is kept on (re-introducing) border controls to apprehend migrants at or near the border, partly to avoid the initiation of asylum applications and official Dublin transfers. This is in stark contrast to the official discourse on the rule of law-based return policymaking pursued by the BMI. Moreover, the national rule of law narrative is in practice contrasted with subnational regulations and enforcement practices.

A related tangible tension (‘conflict of interest’) lies in the relationship between the domestic policy fields of integration, returns and internal security. A strategic approach with a long-term perspective that considers alternatives to return (e.g., regularisation) on the foundation of evidence-based analysis is lacking in national and sub-national return policymaking. Furthermore, a cost-benefit analysis (Koch et al., 2023) and comprehensive evaluations (e.g., of the voluntary return programmes) have not yet been carried out.

There is a lack of uniform and binding quality standards for return counselling. The limited funding available hinders the establishment of mandatory training for counsellors in governmental and independent return counselling centres. Moreover, funding for legal counselling is reportedly decreasing.

¹⁰⁶ Due to internal rifts in the party *Die Linke* (a democratic socialist political party in Germany), it lost its parliamentary group (faction) status in December 2023, and it remains to be seen whether the qualitatively different/ smaller parliamentary group status for the current legislative period will allow its members of parliament to continue with the requests. If not, the German public faces a serious risk of a loss of transparency and increasing non-information about migration-related operational, legal and institutional developments in Germany and its embedding in the European migration and asylum/ return landscape.

6.6 Gaps in political communication

The narrative of a deportation deficit has haunted German politics since 2015; it arises from the perceived discrepancy between rejected asylum seekers who are, theoretically, obliged to leave, and their continued stay in Germany due to the mostly ongoing ‘temporary’ suspension of deportation to the country of origin or a third country. The public debate is not based on factual information and solid databases. Rather, it is driven by opinions and distorted impressions based on incomplete data and their uptake in the media.

The distorted public debate is influenced by:

- a) The discrepancy between the discourses and the practical handling of protection. While the discourse is symbolic and generates pressure for highly restrictive return policies, the practical treatment of asylum seekers—partly conditioned by legal and bureaucratic requirements that hinder the smooth implementation of restrictive policies and the heterogeneous, decentralised implementation of EU and national legal frameworks—is in their favour. Appeals to the courts and years-long court cases, for example, give tolerated persons time to ‘integrate’ and to demonstrate documented integration success, which in the long run help their case for acceptance.
- b) A gap in the type of return emphasised in the public debate. The media hardly ever report on voluntary return and its significance in the overall field of migration policy. There is a noticeable contrast between the over-emphasis on deportation on the one hand and voluntary returns on the other. However, the number of voluntary returns is much higher than the small number of rejected asylum seekers who are forcibly returned. As voluntary (assisted) returns seem to be much more important for the effectiveness of returns than forced returns, that is deportations, the focus in the public debate is misleading.

At the same time, within the overall framework of (forced) migration, asylum and integration policies, critical observers question whether forced returns are the main problem in these areas—as successive legal restrictions and political and media discourse seem to suggest—given that of the total of 300,000 persons obliged to leave Germany according to the AZR, more than 250,000 are tolerated (having *Duldung* status), and between 30,000 and 50,000 are to be returned (Dublin countries or origin countries).¹⁰⁷ Thus, it can be concluded that the official rhetoric about effective returns is owed to

- c) symbolic policymaking—a style of policymaking that distracts from gaps and shortcomings in other policy areas (e.g. not necessarily detrimental municipal and sub-national discretionary powers, over-bureaucratisation of administrations, securitisation, lack of capacity in administrations). This tends to prioritise responding to right-wing pressures by introducing restrictions, criminalising rejected asylum seekers and focusing public rhetoric on deportations, rather than addressing structural gaps and shortcomings in migration-related policy fields, including development and economic/ trade cooperation.

¹⁰⁷ According to the BMI, at the end of October 2023, 250,749 persons were classified as having the obligation to leave Germany and the deportation of 201,084 of whom was temporarily suspended, which means that 49,665 persons were potential enforceable returnees (see Tagesschau, 2023). The same source mentions that the new provisions of the Repatriation package coming into force in 2024 will (only) lead to an estimated 600 additional deportations/ removals per year from 2024 onwards, after Germany had deported around 12,000 people per year in 2021 and 2022.

6.7 Gaps in scholarship

In the case of Germany, there is a gap between the rhetoric of forced return and the academic analysis of procedures,¹⁰⁸ coercive methods and the involvement of actors (Grawert, 2018). The desideratum for research on the German return regime is also reflected in the experience that the authors of this Dossier had to turn to the asylum debate to gather knowledge on policies of forced return and procedures piece-by-piece. As asylum and return scholarship are two sides of the same coin, we see asylum scholarship as a key reference for the analysis of return policies and practices. However, given the multi-faceted differentiation of the asylum system as a multi-level policymaking and implementation container with multiple-actors, it seems valid to establish return scholarship as its sub-field.¹⁰⁹ The discussion in the Expert Panel Workshop highlighted that the study of return is sometimes seen as unethical because it is implicitly assumed that scholars working in this field would not be concerned with the protection, the rights and dignity of individuals categorised as returnees and, more generally, would not be critical of the global political and economic inequalities, international legal and power constellations that underpin the international migration regime. We disagree with these assumptions and argue that return scholarship can make a significant contribution to ensure transparency that can ultimately reveal systemic violations of individuals' dignity and make an authoritative effort to develop alternatives to return.

Thus, while most of the scholarship to date has been confined to analysing the process of the asylum procedure and to address the protection and status of those who wish to have a perspective to remain, there is a desideratum regarding the treatment of those who are deemed ineligible or undeserving of the right to remain and reside in Germany. Moreover, the successive adoption of increasingly restrictive laws in Germany and in the framework of the Common European Asylum System (Gemeinsames Europäisches Asylsystem, GEAS) at the European level confirm, in our view, the need to systematically address (the rightfulness of) these laws, the dimensions of their enforcement and their explicit meaning, also and distinct for returns, as the political aim of increasing return effectiveness underlies legal reforms. Thereby, critical scholarship¹¹⁰ is tasked to challenge sovereign and government-centric notions such as 'rule of law-based return policies' and the common framing that merely corrective reforms are needed in the asylum and return regime ("to improve deportations in order to make them more 'humane'", Borrelli, 2023, p. 462) while state-induced return practices are assumed to be rightful in principle. Moreover, the gaps in data on returns can only be addressed by a community of scholars who systematically demand transparency and access to different data sets. To date, scholars have been concerned with inadequate access to timely data and the incoherence of the federal and state data collection approaches. On a practical level and as a form of transdisciplinary return research, collected evidence on return mechanisms and practices could help to rationalise the return decision-making processes from the bottom up, thus balancing the current dominant top-down push for efficiency (Feneberg, 2019).

¹⁰⁸ Research on voluntary return (programmes) is more common, e.g., the BAMF research centre conducted the project "Returning with 'Starthilfe Plus'" between 2017 and 2023. Cf. <https://bamf.de/SharedDocs/ProjekteReportagen/EN/Forschung/Migration/rueckkehr-starthilfeplus.html>

¹⁰⁹ Existing references to deportation scholarship (Leerkes & Van Houte, 2020), voluntary return scholarship and returnee networks show that the body of work on return is quite diverse and could also benefit from systematisation and state-of-the-art-elaborations to define the field and its way forward.

¹¹⁰ See Lemberg-Pedersen (2022) for an outline of deportation studies.

7. Policy suggestions

The field of return governance in Germany is very dynamic and, at the same time, reveals many gaps: structural deficiencies, operational shortcomings and heterogeneous practices due to the federal system. While it would be logical to present policy proposals by addressing each gap, a close analysis of the gaps revealed that details and practices matter. Also, deriving a broad policy proposal that addresses the identified gap in the institutional framework between different levels of policy and practice will at the same time be too broad to be helpful and will not do justice to the intricacies of the circumstances that condition/ frame and cause the different situations. Furthermore, as alluded to in the introductory paragraph of Section 6, ethical-normative concerns lead the authors to discuss possible policy solutions critically and to refrain from making straightforward suggestions that subscribe to the overall problematic drive for more effective returns at the expense of non-compliance with fundamental/ human rights.

Policy points concerning the legal framework:

- If the German government intends to adhere to deportations as a legitimate instrument of its ‘rule of law-based migration policy’, a legally defined robust control and monitoring system for transparency is needed to maintain the current focus on effective returns in compliance with fundamental/ human rights and thus legitimacy.
- An independent institution (ombudsman or similar) should be established to monitor pre-removal and detention. Detainees and deportees should have a complaint mechanism in case of human rights violations.
- The definition of public interest, (threats to) internal security and public order should be reviewed and provided with clear legal definitions as the current interpretations are used to legitimise exceptional measures (such as long-term border controls at Schengen borders, unlawful refusals of entry).

Policy points concerning the institutional framework:

- Provide access to a duty lawyer/ public defender/ court-appointed counsel for those subject to detention pending deportation.
- As a rule, provide detainees with information on removal procedures, their position, rights, and entitlements in detention.
- Require district courts (*Amtsgerichte*) to review cases independently of proposals from the Foreigners Authorities and to remedy deficiencies in hearings prior to detention decisions.

Policy points concerning data gaps:

- As far as the protection of personal data allows, the BMI, BAMF, the Federal Police, state administrations and the Repatriation Support Centre (*Gemeinsames Zentrum zur Unterstützung der Rückkehr*, ZUR) should endeavour to regularly collect, process and publish up-to-date, consistent data that is comparable and provides a solid basis for analysis and decision-making. This is particularly relevant for voluntary return, pre-removal detention, alternatives to detention, investigations into the reasons for failed deportations, illegal return of deportees, border protection, and the costs of pre-removal detention and return measures in general.
- The implementation of the reform of the Central Register of Foreigners (AZR) should be used as an opportunity to urge the BAMF to voluntarily and regularly publish available

data at the sub-national level as well as those data sets that have so far been obtained by the instrument of parliamentary questionnaires.

Policy points concerning international cooperation:

- Cooperation with countries of origin or safe third countries should be conducted in a more transparent and strategic manner, taking into account the conditions in the country (political will and benefits) and taking more seriously the values underlying German foreign and development policy (avoidance of double standards).

Policy points concerning management/ implementation:

- A cost-benefit analysis of return versus regularisation or other measures based on factual elaborations (evaluations) could contribute to shifting the focus in practice and public debate from the effectiveness of return to regularisation/ integration, from welfare burden to granting protection and rights, from racial profiling and framing of individuals as a risk to security and public order to reflecting on mechanisms of structural social exclusion present in the German return governance system (criminalisation of rejected asylum seekers and deportation detention).
- Provide legal counselling and long-term funding for state and independent return counselling centres.
- Provide mandatory training for counsellors and long-term funding for state and independent return counselling centres.
- Provide stable funding for court-appointed legal counselling and defence for persons subject to the various forms of deportation detention to reduce the number of unlawful detentions.

Policy point concerning communication/ public debate:

- A discussion on alternatives to return, such as regularisation, should enter the public debate, while different stakeholders are urged to analyse possibilities of regularisation. They should draw on previous regularisation programmes in Germany (e.g., in 1999) and international comparisons (Strban et al., 2018). The contradictory debates on the need for skilled labour immigration versus the deportation gap and more effective returns should be reconciled by exploring regularisation policies (Jonitz & Leerkes, 2022). First tentative steps in this direction have been taken with the instrument of temporary suspension for the purpose of training or work (*Ausbildungsduldung* and *Beschäftigungsduldung*), and the Law on further skilled labour immigration (*Gesetz zur Weiterentwicklung der Fachkräfteeinwanderung*), which came into force in January 2024, promising to link the need for skilled labour immigration and the regularisation of those whose removal has been suspended with the prospect of obtaining a residence permit for selected groups (Peitz, 2023). However, these measures are not very present in the public debate, and various stakeholders (government, states, academics) could step up efforts to change the narrative.
- A critical discussion is also needed on the criteria according to which some are given certain rights and a perspective to stay, while others in need of protection are denied a perspective.

8. Conclusions

This report mapped out the legislative, institutional frameworks and procedural infrastructures related with the return of rejected asylum seekers and other unauthorised migrants from Germany with a focus on the period 2015 to 2023. It also outlined the three-tiered institutional framework to explain how existing structures and newly emerging interfaces lead to a complex landscape of legislations and policies. It explained the procedures for return at the border and from within the national territory, the return of the unaccompanied minors, forced and voluntary return to unpack the return processes. In addition to the special cases concerning the obligation to return, it also discussed entry bans, detention and safeguards to fully understand the procedural infrastructures. Sections 5 and 6 of the report also dealt with Germany's readmission efforts with EU and non-EU countries, including those preceding the implementation of the EU Return Directive from 2009 onwards. Finally, it identified other gaps besides those in the legislative, institutional and international cooperation frameworks, for example in relation to data bases, the management of returns (implementation), political communication, and in scholarship.

As the German institutional framework for returns is highly complex due to multi-level governance with discretionary powers of the federal states and sub-national administrative actors (districts and municipalities) in the federal system, an attempt is being made to create more coherence. Since 2015, the return governance framework has expanded to include intermediate coordination structures between the federal and state levels as well as inter-ministerial coordination at the federal level and between the state ministries of the interior. It remains to be analysed in detail what benefits this type of interactions brings and for whom.

The resulting authority and discretionary powers of judges in district and administrative courts, as well as of the individual 'decision-makers' of the third-level Foreigners Authorities are noteworthy in that they embody a heightened/ ethical responsibility to make well-informed decisions. They can only be challenged in higher administrative courts. It varies from court to court and municipality to municipality how decisions on return are justified at the local levels and how appeals are accepted or rejected. Moreover, the involvement of different types of courts (administrative vs. general jurisdiction) complicates the governance framework.

Taking into account the perspective of returnees, the authors of this report refrain from recommending a stricter harmonisation of policies as the influence of more restrictive EU legislation has lowered the protection standards for returnees/ deportees in Germany in some dimensions, while improving protection in others. Nevertheless, there are clear gaps in at least six areas discussed above (section 6), namely in legal framework, institutional framework, international cooperation, databases, implementation and political communication. The research findings have the potential to fill existing gaps not only in the legal but also in the practical shortcomings of return policy implementation processes. Thus, their analysis and clarification can improve return decision-making, increase transparency and inform the public debate, leading to a more factual discussion on migration and return in Germany.

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Annex 1. Statistics on Returns from Germany based on Eurostat Database

Year	Stock of irregular migrants and/or # TCNs found to be illegally present	# Asylum applications	# TCNs/foreign nationals* refused entry at the border	# TCNs/foreign nationals* ordered to leave Total	# TCNs/foreign nationals* returned following an order to leave (annual data)	# Third country unaccompanied minors returned following an order to leave	# TCNs/foreign nationals* who have left to the territory by citizenship	# TCNs/foreign nationals* returned following an order to leave, by type of return			
								# assisted 'voluntary' return	# assisted forced return	# non-assisted 'voluntary' return	# Total
2015	376.435	476.649	3.670	54.080	53.640	N/A	N/A	N/A	N/A	N/A	N/A
2016	370.555	745.545	3.775	70.005	74.080	N/A	N/A	N/A	N/A	N/A	N/A
2017	156.710	222.683	4.250	97.165	44.960	N/A	N/A	N/A	N/A	N/A	N/A
2018	134.125	185.853	5.175	52.930	29.055	N/A	2134	N/A	N/A	N/A	N/A
2019	133.525	165.938	6.730	47.530	25.140	N/A	N/A	N/A	N/A	N/A	N/A
2020	117.930	122.170	4.210	36.330	12.265	N/A	N/A	N/A	N/A	N/A	5015
2021	120.285	190.816	4.635	31.515	8.195	75	N/A	0	10.785	0	10.785
2022	198.310	244.132	5.970	32.865	7.725	110	N/A	0	13.135	0	13.135
2023		87.777									
Data sources:	eurostat	statistica.com	eurostat	eurostat	eurostat	eurostat	eurostat	eurostat			

Annex 2: List of authorities involved in migration return governance

Authority (En/ DE) ¹¹¹	Tier of govt (national-regional-local)	Type of organisation	Area of competence in the fields of return (role briefly explained)
FEDERAL GOVERNMENT (BUND) = 1st tier of government			
Federal Ministry of the Interior and Community (BMI) Bundesministerium des Innern und für Heimat (BMI) ¹¹²	Federal government ministry	National ministry	Migration and refugee policy, asylum and residence law, refugee protection, European harmonisation of asylum and migration issues, nationality and naturalisation matters; return policymaking: drafts legislation at the federal level, takes the lead in negotiating bilateral readmission agreements with countries of origin, designs and finances return assistance programmes (REAG-GARP, Starthilfe Plus)
Federal Government Special Commissioner for Migration Agreements (2023 newly established.) Sonderbevollmächtigter für Migrationsabkommen ¹¹³	Federal institution with supra-ministerial assignment	office assigned to the Federal Ministry of the Interior and Community (BMI)	promote the conclusion and implementation of migration agreements: initiate practical cooperative agreements with key countries of origin, taking into account human rights standards; provide new ideas for shaping the external dimensions of migration policy in close coordination with the federal ministries concerned
Minister of State in the Federal Chancellery/ Commissioner for Migration, Refugees, and Integration Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration ¹¹⁴	Federal institution	focal point under Chancellery with supra-ministerial assignment	est. 2005, first Commissioner, then Minister of State; compiles and submits a report (Report of the Commissioner for Migration, Refugees and Integration), in line with Section 94 (2) of the Residence Act, to the German Bundestag at least every two years; 2022 calling for faster and more pragmatic asylum procedures
Federal Office for Migration and Refugees (BAMF) Bundesamt für Migration und Flüchtlinge (BAMF) ¹¹⁵	Higher federal authority (national level) within the portfolio of the Federal Ministry of the Interior (BMI) with - multi-tiered organisational structure, broken down into Directorates-General, Groups and Divisions - decentralised locations, including branch offices (partly known as 'regional offices'), arrival centres and decision-	Federal office under the supervision of BMI	Asylum and Dublin procedures, resettlement and relocation, voluntary returns

¹¹¹ Authorities defined and authorised by the law are listed in this column, where the legal significance of return governance actors is not clear, they are listed in the second column, except for the entries concerning BAMF, BMZ and international agencies: here, the second column comprises sub-agencies of the superior/ umbrella authority listed in the line above.

¹¹² www.bmi.bund.de

¹¹³ <https://www.bmi.bund.de/EN/ministry/commissioners/specialcommissioner-migration-agreements/specialcommissioner-migration-agreements-node.html>

¹¹⁴ <https://www.integrationsbeauftragte.de/ib-de>

¹¹⁵ <https://www.bamf.de/EN/>

	making centres at the federal states' level (Bundesländer) and local level - cf. below sub-authorities:		
	AnKER ("arrival, decision and return") facilities (8?) Anker(Ankunft, Entscheidung, Rückkehr)-Zentren ¹¹⁶	Subordinated facility of BAMF at the municipal level	est. 2018-20 building on arrival centres; bundle all the functions and responsibilities – from the asylum application and the decision to the allocation to municipalities as well as the initial measures to prepare for the return of asylum applicants – through the presence of all authorities involved in situ, e.g. BMI has branch offices in nine AnKER facilities and eight functionally equivalent facilities
	Branch offices/ Außenstellen (54 [2021]/ 60 [2023], thereof 17 in arrival centres, 8 in AnKER facilities, 1 in authorities centre, 1 being BO and regional office)	Subordinated facility of BAMF at the municipal and district level	Decision-making on asylum applications, carry out asylum procedure (incl. filing of application, interview, decision on more complex cases)
	Decision-making centres Entscheidungszentren	Suboffice of BAMF at municipal/ district level	Decision-making on asylum applications of already interviewed applicants, esp. individuals from unsafe countries of origin such as Syria, Iraq and Eritrea. "The decision-making centres (...) take some of the strain from the arrival centres and branch offices."
	Arrival centres (18) Ankunftszentren	The subordinated facility of BAMF, similar to AnKER centres at the municipal level	"Integrated refugee management": usage of a nationwide core data system by all involved authorities, covering all steps in the asylum procedure, incl. registration in the respective Federal Land , health examination, recording of the personal data, identity check, application, the interview and the Federal Office's decision ('notice) on the asylum application, initial integration measures (e.g., "initial orientation courses"), initial advice on access to the labour market by a local employment agency
Federal Ministry of Economic Cooperation and Development Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung (BMZ) ¹¹⁷	Federal government ministry		finances reintegration programmes („Perspektive Heimat“) since 2017; engaged in programming for mitigating living conditions in displacement contexts in the framework of the Special initiative 'Flight/ displacement' of the Federal government
	German International Cooperation Gesellschaft für Internationale Zusammenarbeit (GIZ) ¹¹⁸	Implementing the organisation of BMZ	implements reintegration programs, esp. "Perspektive Heimat"; builds and operates migration counselling centres; provides reintegration scouts; carries out qualification measures in preparation for reintegration in Germany and in country of origin.

¹¹⁶ Note: the current coalition government (SPD, the Alliance 90/The Greens and the FDP, in power since late 2021) decided not to continue establishing AnKER centres. Functionally equivalent centres were opened also in the previous government period (until mid-2021).

¹¹⁷ www.bmz.de

¹¹⁸ www.giz.de

German Federal Foreign Office (GFFO) Auswärtiges Amt (AA) ¹¹⁹	Federal government ministry		Compiles situation reports on and supports communication with countries of origin, also issuing of return documents/ IDs; German diplomatic missions may get involved in return examination procedure for unaccompanied minors
Federal Police Bundespolizei ¹²⁰	Federal/ national authority	Federal/ national authority	Police surveillance of borders and regions close to borders Support of Federal States in forced returns: responsible for the return and deportation of illegally entering aliens at national borders and airports, accompanies deportations and Dublin transfers, trains law enforcement officers to become air escorts (<i>Personenbegleiter Luft</i>), provides administrative assistance in obtaining substitute passports in individual cases
FEDERAL STATES (LAND/ LÄNDER) = 2nd tier of government			
State Ministries of Interior Landesinnenministerium State Ministry of Justice Landesjustizministerium			Issuing legal framework at State-level, e.g. <i>Länder</i> Reception Act, and relevant procedures
State Ministries of Social Affairs Landesministerium für Soziales			<i>Länder</i> are responsible for the accommodation and care of protection seekers in accordance with the <i>Länder</i> Reception Act (<i>Landesaufnahmegesetz</i>) on the initial reception procedure (<i>Erstaufnahmeverfahren</i>) and the associated implementing ordinances.
State Police/s Landespolizei/ Länderpolizeien	Sub-national <i>Länder</i> -jurisdiction	<i>Länder</i> -authorities of federal states	Removals: in charge of transporting deportees from the place of pick-up to the airport and handing them over to the federal police
	Bavarian Border Police Bayerische Grenzpolizei		
Central Foreigners Authority Zentrale Ausländerbehörde (ZAB)		Decision-making	

¹¹⁹ <https://www.auswaertiges-amt.de/en>

¹²⁰ www.bundespolizei.de

Key removal headquarters of a state <i>Zentrale Abschiebestelle (ZAS)</i>	e.g., in Thuringia, called as ZAS; in Baden-Württemberg located in the office (<i>Regierungspräsidium, RP Karlsruhe</i>) of one of the governmental districts (<i>Regierungsbezirk</i>) ¹²¹ in that particular state; in Bavaria called Bavarian State Office for Asylum and Repatriation <i>Bayerisches Landesamt für Asyl und Rückführungen (LfAR)</i>	Operational; implements ZAB-decision about return; Superior State Authority	Upon receipt of the personal files of the rejected applicant after the deportation order of the foreigners authority, the ZAS checks the requirements for deportation, obtains identification documents (passport procurement) and, for example, organises the removal operation (flight to the country of origin; for the day of the deportation foreigners authority, state police and federal police are notified regarding the details for implementation) ZAS (where existing) operate on behalf of the local foreigners authorities who are responsible in principle
BUND-LÄNDER INTERFACES (INTERMEDIATE COORDINATING STRUCTURES BETWEEN FEDERAL AND STATES LEVEL)			
Repatriation Support Centre <i>Gemeinsames Zentrum zur Unterstützung der Rückkehr (ZUR)</i>	federal-state cooperation platform under the leadership of the Federal Ministry of the Interior (BMI)	With different sub-sections, e.g., for passport replacement work or for collection and review of quantitative and qualitative return data	est. 2017 to coordinate work of federal and state governments and enhance cooperation between state governments in the area of return (through networking, workshops, and training; representatives of the federal states, the BAMF and the Federal Police perform return-related tasks, such as coordination to improve the utilisation of charter flights or the compilation of data; BMI supports in prioritised repatriation of foreign criminals and foreigners who pose a significant threat to public security (case processing is independent of residence status and comprises entire repatriation process, incl. status-legal questions, identity clarification, passport replacement procurement
	Working group on integrated return management <i>Arbeitsgruppe Integriertes Rückkehrmanagement</i>	at the level of the heads of unit (<i>Referatsleitung</i>) of the responsible ministries of the <i>Länder</i> as well as the BMI, BAMF, and the Federal Police	exchange twice a year
AnKER-centres and functionally equivalent (FE) facilities <i>Anker-Zentren und funktional äquivalente Einrichtungen</i>	open reception facilities where various agencies are located in the same premise or its immediate vicinity: BAMF, foreigners authority, welfare associations, application offices of the administrative courts, the Federal Employment Agency, as well as other non-governmental counselling and support actors and, at some locations, the state police, plus federal police on demand (esp. in case of Dublin III-transfers)		Protection seekers – except UAM – are required to remain accommodated in the AnKER/FE facilities until the conclusion of the asylum procedure; those whose applications have been rejected should, if possible, remain in these facilities until they leave the country or are deported; benefits are given in kind as far as possible; although open facilities, the presence of asylum seekers is consistently recorded aim is to optimise the asylum procedure in all phases of the process - from the arrival of the asylum seekers to their distribution to the local authorities or their return - through short distances and direct contact between the local agency representatives on the basis of a model administrative agreement of the federal government outlining the main fields of joint cooperation between the federal and state governments: e.g., responsibilities for accommodation, counselling and support services, identification and the asylum procedure, day structuring measures, return counselling, voluntary return and repatriation.
	Standing Conference of Ministers of the Interior ¹²² and Senators-Working		elaborated recommendations “to remove legal and actual obstacles pertaining to the return of potential offenders” to the IMK/ Standing Conference in 2018, e.g., amendments to the Residence Act (2019), to initiate a working group to elaborate how potential offenders can be held at prisons, for the reduction of the number of judicial authorities involved in removal orders concerning potential offenders, and for instilling an awareness in

¹²¹ Governmental districts are a subdivision of some of the 16 federal states in Germany.

¹²² <https://www.innenministerkonferenz.de>

	Group 'Challenges related to repatriation of potential offenders' Arbeitsgruppe der Innenministerkonferenz ,Herausforderungen im Zusammenhang mit der Rückführung von potenziellen Straftätern'		the judiciary of diplomatic assurances in connection with removals regarding compliance with Art. 3 of the European Convention on Human Rights (Prohibition of torture in the country of destination)
Joint centre for countering extremism and terrorism (GETZ) Gemeinsames Terrorismus- und Terrorabwehrzentrum	Multi-agency exchange platform with representatives of BAMF, the Federal Office for the Protection of the Constitution, the Federal Intelligence Service, the Federal Office for the Military Counter-Intelligence Service, the Land Offices for the Protection of the Constitution, the Federal Criminal Police Office, the Federal Police, the European Police Office (EUROPOL), the Federal Public Prosecutor, the Central Customs Authority, the Land Criminal Police Offices, the Federal Office for Economic Affairs and Export Control		BAMF is the point of contact regarding politically motivated crime involving foreign, but not Islamist ideology based on its expertise in residence- and asylum-related issues and its status as a migration authority at federal level
Joint Counter-Terrorism Centre Gemeinsames Terrorismusabwehrzentrum (GTAZ)	Inter-agency platform of information exchange and support, participants include the Federal Office for the Protection of the Constitution (Verfassungsschutz), the Federal Criminal Police Office (Bundeskriminalamt), and the Federal Police (Bundespolizei), BAMF, BMI, and foreigners authorities.	Different working groups, e.g. Risk management, Status, Deradicalisation Working Groups	est. 2004, operates in the field of "monitoring and combating Islamist terrorism", pools the expertise of the German security services, enhances federal/state cooperation for the repatriation of criminals and dangerous persons (who constitute a threat to domestic security); individual case assessments, e.g., to check revocation of protection status and legal actions pending following revocation; Foreigners Authorities and BAMF participate in the 'Status-Related Accompanying Measures' and BAMF in 'Deradicalisation' working group
DISTRICTS, MUNICIPALITIES (KOMMUNEN) = 3rd tier of government			
Foreigners Authorities Ausländerbehörden (ALB, ABH ¹²³), in some locations Foreigners Offices Ausländeramt (ALA)	rural and urban district-level (Landkreis, kreisfreie Städte in few fed states), larger cities belonging to districts also have their own foreigners authorities (e.g. in Hesse, all cities with a population of 50,000 or more)		Deportation order and enforcement: tasked with enforcing the law on foreigners; residential and passport measures, expulsion decisions/ deportation order: issue return decisions to all categories of third-country nationals
COURTS (GERICHTE)			
Federal Constitutional Court Bundesverfassungsgericht	Federal/ national court	Highest judicial authority	Administrative jurisdiction: constitutional complaints, appeals, revisions relating to the fundamental rights of asylum, e.g., Ruling on AsylbLG 2012

¹²³ Acronym depending on region in Germany.

Federal Administrative Court Bundesverwaltungsgericht ¹²⁴		Third instance court for appeals	2022: discussion whether BVerwG should issue country guidance notes to support more transparent asylum decision-making of BAMF and courts in future
Higher administrative courts Oberverwaltungsgerichte (OVG) (called Verwaltungsgerichtshof in few federal states)	Federal	Second instance/ highest court of administrative jurisdiction in German federal states	court of general administrative jurisdiction between the Administrative Court (VG) and the Federal Administrative Court (BVerwG) and usually decides in the second instance, in certain cases also in the first instance.
Administrative Court Verwaltungsgericht (VG)	district-level (Landkreis) and larger independent municipalities	First instance court	decide on the legality of the administrative decision on return and deportation
Federal Court of Justice ¹²⁵ Bundesgerichtshof	Supreme court of the federal government		court of appeal in administrative law matters against decisions of the higher administrative courts (OVG)
District courts Amtsgerichte	district-level (Landkreis) and larger independent municipalities		Order of detention pending deportation; the scope of the examination by the custodial judge on the existence of the obligation to leave the country and the conditions for return is limited to a formal examination.
NON-GOVERNMENTAL ACTORS (at national and sub-national/ local level)			
Return counselling centres Rückkehrberatungsstellen		government-funded or based on independent support	advise on return options and funding programmes, help those wishing to return to apply for funding
refugee councils Flüchtlingsräte ¹²⁶	State and municipal level, part of advocacy network 'Working Group for Refugees' by PRO ASYL		state refugee councils are independent representatives of the refugee self-organisations, support groups and solidarity initiatives active in the federal states; see it as the state's task to provide refugees with generous reception, effective protection, sustainable integration and a self-determined future in accordance with their displacement trajectory and humanitarian needs
	other civil society and advocacy organisations (e.g., welfare and migrant organisations)	various, e.g., nationwide working group for refugees PRO ASYL, deportation watch/ monitoring at airports	

¹²⁴ Administrative Jurisdiction (marked grey) is to be distinguished from ordinary jurisdiction (blue) in Germany. The administrative courts are responsible for public law disputes of a non-constitutional nature (§ 40.1 Rules of the administrative courts [VwGO]). The administrative jurisdiction is structured in three tiers: Federal Administrative Court, Higher Administrative Courts (called the Administrative Court (VGH) in Baden-Württemberg, Bavaria and Hesse) and the administrative courts. The demarcation to the civil courts of ordinary jurisdiction and to the social jurisdiction is sometimes quite complicated and also controversial.

¹²⁵ The ordinary court system of domestic courts in Germany is structured in four tiers: federal court of justice, higher regional courts, regional courts, district courts. Relevant for the issuing of orders of detention pending deportation are the district courts (*Amtsgerichte*).

¹²⁶ <https://www.fluechtlingsrat.de/>

	Lawyers		
	Research institutions (academia, think tanks, foundations, consulting agencies, etc.)	various	
National Agency for the Prevention of Torture Nationale Stelle zur Verhütung von Folter ¹²⁷	National institution and <i>Länder</i> agencies		independent agency to prevent inhuman conditions and treatment at places of detention; publishes annual report, e.g., 2022 ¹²⁸ with recommendations for standards concerning deportations, pre-removal detention, etc.
	media / social media		distort public debate on returns, rarely highlight structural and operational problems
INTERFACES BETWEEN GOVERNMENTAL AND NON-GOVERNMENTAL ACTORS			
	Hardship commissions in federal states Härtefallkommissionen	varying composition, including representatives of state and church agencies, welfare organisations and State refugee council	examines whether protection seekers who are already under an enforceable obligation to leave Germany, fulfil requirements for being granted residence permit for special humanitarian reasons; can propose granting of residence permit but not enforce; decisive criteria for examination is the degree of integration in Germany and hardship from uprooting the person newly through deportation
	Forum/s Deportation Watch Forum Abschiebebeobachtung	at various German airports, members from Federal police, State authorities, churches, welfare organisations, UNHCR, ai, Pro Asyl	deal with questions and problems in connection with the enforcement of deportations by air, e.g. family separations, communication challenges during deportation detention (de-escalation), lack of packed lunch/ supplies during individual case deportations
	Several institutionalised communication formats (symposia, expert conferences, e.g. for judges)	Dialogtagung etc. between BAMF and NGOs	exchange on challenges and procedural hick-ups and structural problems in the areas of asylum and return
INTERNATIONAL			
UN-related (various)			
	IOM		implements return assistance programs on behalf of countries worldwide
European			
	EC DG Home		drafts proposals for regulations and directives at EU level (e.g., Return Directive); negotiates EU readmission agreements with countries of origin
	EP		legislative function

¹²⁷ <https://www.nationale-stelle.de/en/the-national-agency.html>

¹²⁸ Nationale Stelle zur Verhütung von Folter (2023), pp. 25-29.

	Frontex		finances and supports German agencies in the logistical implementation of deportations with charter flights; Frontex return monitors accompany Frontex-organised deportation flights
	European Court of Justice (ECJ)		can be called on by the lower administrative courts of German administrative jurisdiction on asylum procedures whilst proceedings are pending to hand down a 'preliminary ruling' on cases of doubt under Community law
	European Court of Human Rights		application might be lodged based on the consideration that a state measure or decision in the asylum and appeal process has violated the human rights of the applicant as confirmed by the ECHR
	Non-governmental INGOs/ advocacy organisations (various)		
		ICMPD	supports EU MS in strengthening national return monitoring systems and supports Frontex in establishing a pool of return monitors
Countries of origin			identify their nationals and issue passport replacement documents; negotiate readmission agreements or arrangements to take back their nationals (or not); issue landing permits for charter deportation flights

Annex 3: International cooperation

Readmission Agreements with EU countries

State	Signature	Entry into force	Reference
Agreement between Belgium, Germany, France, Italy, Luxembourg, Netherlands and Poland	29.03.1991	01.05.1991	BGBI. II 1993, Nr. 23, S. 1099

Bilateral agreements for the implementation of multilateral readmission agreements

State	Signature	Entry into force	Reference
Poland (Warsaw Protocol on Determination on techn. Conditions)	29.09.1994	29.09.1994	BGBI. II 1994, Nr. 60, S. 3775

Annex 4: Funding return (budget) and related programmes

	Federal Budget Plan ¹	Budget for REAG/GARP ²			StarthilfePlus ²			Bund-Länder-Projekt URA ²		Promotion of voluntary departures to Syria, Yemen, Libya and Eritrea that were not processed via the REAG/GARP programme ²
	Subsidy for programs to promote voluntary departure in EUR	Budget according to the finance plan in EUR	Of that personnel- and administrative cost in EUR	Invoiced cost in EUR	Budget according to finance plan in EUR	Of that Personnel- and administrative cost in EUR	Invoiced cost in EUR	Federal government's share of invoiced expenditure in euros	Of that Personnel- and administrative cost in Euro	Expenses in EUR
2015	16.327.000,00									
2016	19.520.000,00									
2017	32.783.000,00	18.538.241,00	2.096.643,00	11.585.947,67	17.610.902,12	1.065.379,03	706.350,87	679.044,85	354.272,43	35.713,50
2018	32.707.000,00	21.859.776,53	2.391.179,14	9.462.376,22	32.767.803,30	4.836.347,15	19.933.131,70	264.234,55	249.343,95	517.035,76
2019	34.453.000,00	19.623.269,84	2.733.789,64	13.358.586,81	12.950.262,28	4.449.694,93	12.927.731,21	439.244,11	306.564,70	499.425,49
2020	27.602.000,00	13.993.674,41	2.634.616,17	8.179.064,52	20.436.880,17	4.942.125,52	12.663.434,91	509.588,29	321.915,33	112.191,10
2021	36.089.000,00	10.137.642,25	2.404.133,04	9.553.774,50	18.280.800,89	4.527.936,28	18.280.800,89	519.149,59	333.744,45	102.871,19
2022	39.057.000,00	13.756.658,92	2.552.744,27	ongoing	15.628.319,35	4.941.197,07	ongoing	536.785,86	337.065,14	85.950,72 (until 22 June 2022)
2023	38.100.000,00									

Source #1:

Rechnung über den Haushalt des Einzelplans 06 Bundesministerium des Inneren für das Haushaltsjahr 2015, p. 267.

<https://www.bundeshaushalt.de/static/daten/2015/ist/epl06.pdf#page=33>

Rechnung über den Haushalt des Einzelplans 06 Bundesministerium des Inneren für das Haushaltsjahr 2016, p. 262.

<https://www.bundeshaushalt.de/static/daten/2016/ist/epl06.pdf#page=36>

Rechnung über den Haushalt des Einzelplans 06 Bundesministerium des Inneren für das Haushaltsjahr 2017, p. 279.

<https://www.bundeshaushalt.de/static/daten/2017/ist/epl06.pdf#page=37>

Rechnung über den Haushalt des Einzelplans 06 Bundesministerium des Inneren, für Bau und Heimat für das Haushaltsjahr 2018, pp. 266-267.

<https://www.bundeshaushalt.de/static/daten/2018/ist/epl06.pdf#page=40>

Rechnung über den Haushalt des Einzelplans 06 Bundesministerium des Inneren, für Bau und Heimat für das Haushaltsjahr 2019, p. 278.

<https://www.bundeshaushalt.de/static/daten/2019/ist/epl06.pdf#page=42>

Rechnung über den Haushalt des Einzelplans 06 Bundesministerium des Inneren, für Bau und Heimat für das Haushaltsjahr 2020, p. 291.

<https://www.bundeshaushalt.de/static/daten/2020/ist/epl06.pdf#page=43>

Rechnung über den Haushalt des Einzelplans 06 Bundesministerium des Inneren, für Bau und Heimat für das Haushaltsjahr 2021, p. 307.

<https://www.bundeshaushalt.de/static/daten/2021/ist/epl06.pdf#page=43>

Rechnung über den Haushalt des Einzelplans 06 Bundesministerium des Inneren und für Heimat für das Haushaltsjahr 2022, p. 308.

<https://www.bundeshaushalt.de/static/daten/2022/ist/epl06.pdf#page=44>

Bundeshaushaltsplan 2022, Einzelplan 06 Bundesministerium des Inneren und für Heimat, p. 54.

<https://www.bundeshaushalt.de/static/daten/2022/soll/epl06.pdf>

Bundeshaushaltsplan 2023, Einzelplan 06 Bundesministerium des Inneren und für Heimat, p. 55.

<https://www.bundeshaushalt.de/static/daten/2023/soll/epl06.pdf>

Sources #2:

Deutscher Bundestag, Kosten der Migration, pp. 26-28,

<https://dserver.bundestag.de/btd/20/028/2002845.pdf><https://dserver.bundestag.de/btd/20/028/2002845.pdf>

Sources #3:

Deutscher Bundestag, Abschiebungen im Jahr 2015, p. 38,

<https://dserver.bundestag.de/btd/18/075/1807588.pdf>

Deutscher Bundestag, Abschiebungen im Jahr 2016, p. 46, <https://dserver.bundestag.de/btd/18/111/1811112.pdf>

Deutscher Bundestag, Abschiebungen und Ausreisen im Jahr 2017, p. 49, <https://dserver.bundestag.de/btd/19/008/1900800.pdf>

Deutscher Bundestag, Abschiebungen und Ausreisen im Jahr 2018, p. 57, <https://dserver.bundestag.de/btd/19/080/1908021.pdf>

Deutscher Bundestag, Abschiebungen und Ausreisen 2019, p. 37, <https://dserver.bundestag.de/btd/19/182/1918201.pdf>

Deutscher Bundestag Abschiebungen und Ausreisen 2020, p. 36, <https://dserver.bundestag.de/btd/19/270/1927007.pdf>

Deutscher Bundestag, Abschiebungen und Ausreisen im Jahr 2021, p. 27,

<https://dserver.bundestag.de/btd/20/008/2000890.pdf>

Deutscher Bundestag, Abschiebungen und Ausreisen 2022, p. 19, <https://dserver.bundestag.de/btd/20/057/2005795.pdf>

Annex 5: Legislation mapping

The title of the policy/legislation in English	The title in the original language	Date
Nationality Act	Staatsangehörigkeitsgesetz/StAG	July 22, 1913
Law on Return Assistance	Rückkehrhilfegesetz	November 28, 1983
Germany: Return to 'Safe country of origin'	Art. 16a(2)-(3) Grundgesetz	June 28, 1993
Asylum Seekers' Benefits Act	Asylbewerberleistungsgesetz	November 1, 1993
Central Register of Foreigners Act	Gesetz über das Ausländerzentralregister (AZRG)	September 2, 1994
Act on the General Freedom of Movement for EU Citizens	Freizügigkeitsgesetz/EU	July 30, 2004
Regulation on the revision of the Asylum Responsibility Determination Regulation	Verordnung zur Neufassung der Asylzuständigkeitsbestimmungsverordnung	April 2, 2008
General administrative Regulation to the Residence Act	Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz (AVwVAufenthG)	October 26, 2009
Law on the Implementation of European Union Residence Directives and the Adaptation of National Legislation and the EU Visa Code	Gesetz zur Umsetzung Aufenthaltsrechtlicher Richtlinien der europäischen Union und zur Anpassung nationaler Rechtsvorschriften und den EU-Visakodex	Nov 22, 2011
Act to Improve the Rights of Persons Entitled to International Protection and Foreign Workers	Gesetz zur Verbesserung der Rechte von international Schutzberechtigten und ausländischen Arbeitnehmern	August 29, 2013
Act to classify further states as safe countries of origin and to facilitate access to the labor market for asylum seekers and tolerated foreigners	Gesetz zur Einstufung weiterer Staaten als sichere Herkunftstaaten und zur Erleichterung des Arbeitsmarktzugangs für Asylbewerber und geduldete Ausländer	October 31, 2014
Guideline for nationwide return counselling	Leitlinie für eine bundesweites Rückkehrberatung	April 9, 2015
Act on the redefinition of the right to stay and the termination of residence	Gesetz zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung	July 27, 2015
Asylum Act	AsylG	September 2, 2015 before Asylum Procedure Law which was announced August 1, 1982
Act on the Acceleration of Asylum Procedures (Asylum Package I)	AsylverfahrensbeschleunigungsgG	October 20, 2015
Data Sharing Improvement Act	Gesetz zur Verbesserung der Registrierung und des Datenaustausches zu aufenthalts- und asylrechtlichhen Zwecken/Datenaustauschverbesserungsgesetz	February 2, 2016
"Asylum Package II", incl. Act on the Introduction of Accelerated Asylum Procedures	Gesetz zur Einführung beschleunigter Asylverfahren (Asylpaket II)	March 11, 2016
Act to Facilitate the Expulsion of Aliens with Criminal Records and to Expand the Exclusion of Refugee Recognition in the Case of Asylum Seekers with Criminal Records	Gesetz zur erleichterten Ausweisung von straffälligen Ausländern und zur erweiterten Ausschluss der Flüchtlingsanerkennung bei straffälligen Asylberwerben	March 11, 2016
Integration Act	Integrationsgesetz	July 31, 2016
Act to improve the enforcement of the obligation to leave the country	Gesetz zur besseren Durchsetzung der Ausreisepflicht	July 20, 2017
Law on the extension of the suspension of family reunification with beneficiaries of subsidiary protection	Gesetz zur Verlängerung der Aussetzung des Familiennachzuges zu subsidär Schutzberechtigten	March 8, 2018

Act on the Reorganization of Family Reunification with Beneficiaries of Subsidiary Protection (Family Reunification Reorganization Act)	Gesetz zur Neuregelung des Familiennachzugs zu subsidiär Schutzberechtigten (Familiennachzugsneuregelungsgesetz)	July 12, 2018
Third Law amending the Asylum Act	Drittes Gesetz zur Änderung des Asylgesetzes	December 4, 2018
Law on toleration in training and employment	Gesetz über Duldung bei Ausbildung und Beschäftigung	July 8, 2019
Second Data Exchange Improvement Act	Zweites Datenaustauschverbesserungsgesetz (2. DAVG)	August 9, 2019
Second Act to improve the enforcement of the obligation to leave the country ('Law of orderly return', with toleration [Duldung] 'light')	Geordnete-Rückkehr-Gesetz Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht	August 15, 2019
Act to postpone the census until 2022 and to amend the Residence Act	Gesetz zur Verschiebung des Zensus in das Jahr 2022 und zur Änderung des Aufenthaltsgesetzes	December 3, 2020
Asylum Procedure Secretariat Instructions	Dienstanweisung AVS (Asylverfahrenssekretariat)	February 2022
Asylum Instructions	Dienstanweisung Asyl	February 4, 2022
Act on the acceleration of asylum court proceedings and asylum procedures	Gesetz zur Beschleunigung der Asylgerichtsverfahren und Asylverfahren	December 21, 2022
Law on the introduction of an opportunity residence law	Gesetz zur Einführung eines Chancen-Aufenthaltsrechts	December 21, 2022
Dublin Instructions	Dienstanweisung Dublin	February 2023
Law on further skilled labour immigration	Gesetz zur Weiterentwicklung der Fachkräfteeinwanderung	2023
Agreement on new Repatriation Improvement Law	Gesetz zur Verbesserung der Rückführung	2023 (enters into force 2024)

Annex 6. Flow Chart on Asylum Procedure



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Legal and Policy Infrastructures of Returns in Greece

Country Dossier (WP2)

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List of abbreviations

AMIF	Asylum, Migration and Integration Fund
AVRR	Assisted Voluntary Return and Reintegration
CJEU	Court of Justice of the European Union
DRC	Danish Refugee Council
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GAS	Greek Asylum Service
GCR	Greek Council for Refugees
GNCHR	Greek National Commission for Human Rights
HIAS	Hebrew Immigrant Aid Society
IOM	International Organisation of Migration
JMD	Joint Ministerial Decision
MENA	Middle East and North Africa
MMA	Ministry of Migration and Asylum
MS	Member State
NCCBS	National Coordinating Centre for Border Control and Surveillance
NGO	Non-Governmental Organisation
OCAVRR	Open Centre for Migrants Registered for Assisted Voluntary Return and Reintegration
PD	Presidential Decree
PROKEKA	Pre-Removal Detention Center
RSA	Refugee Support Aegean
TCN	Third Country National
UAM	Unaccompanied Minor
UNHCR	United Nations High Commissioner for Refugees

Summary

Greece has a long history of (formal, informal and irregular) return migration policies and practices that have taken different forms depending on the political and socioeconomic context, including forced returns, deportations, push backs, spontaneous returns, and assisted voluntary returns. Since 2015, a number of developments foregrounded specific return procedures and practices, such as the EU-Turkey Statement and the increasing number of land and sea pushbacks (as reported/evidenced especially after the events in the Greek-Turkish border region of Evros in 2020). More recently, further institutionalisation of returns can be observed with the establishment of the Directorate of Returns and Withdrawals in 2020 and the position of a National Coordinator of Returns in late 2023 within the Ministry of Migration and Asylum (MMA).

The present Country Dossier discusses the legal and institutional framework governing returns in Greece and highlights a number of gaps in terms of legal certainty, consistency and guaranties. The legal framework is characterised by ambiguity, mainly due to preceding legal arrangements on ‘administrative expulsion’ that remain in force. Particularly, Law 3907/2011 which transposed the Return Directive 2008/115/EC into the Greek legislation and determines the operation of returns, coexists with Law 3386/2005 concerning the administrative expulsions of Third Country Nationals. An additional complexity also arises as regards the multiple national, supranational and international actors involved in returns.

While the responsibility to design and implement migration policy as a whole lies with the MMA, the police authorities also have wide legal competences in return migration governance, especially in what concerns administrative expulsions, return decisions, detention and the management of the detention system. Existing legal safeguards against return, as for example those applying to minors, pregnant women, crime victims etc., are implemented under the proviso that a TCN is not considered dangerous for national security reasons, something which is again decided by the police.

As a result, a number of inconsistencies emerge, including the fact that the respective state administration is often able to bypass the procedures of the Directive and apply the deportation procedures. This is the case, for example, with expulsion decisions issued against TCNs illegally entering Greece at the borders even if the TCNs subsequently apply for international protection and obtain a permit to stay in the country; something that raises issues of compatibility with Article 2 para. (2) (a) of the Return Directive.

Furthermore, the implementation of return, in most of its forms, is usually closely linked to detention as detention is the rule rather than the exception when there is a decision for return or deportation. This becomes evident as administrative detention is used extensively, on the grounds of public order and national security reasons, in some cases solely on the grounds of illegal¹ entry, and despite numerous reports evidencing that the existing detention conditions severely violate detainees’ rights and dignity.

Existing legal inconsistencies are accompanied by poor data availability on returns. Data inconsistencies exist among different data categories (e.g. between administrative procedures

¹ Throughout this dossier the term ‘illegal/illegality’ refers to the official terminology of the Greek legal system. The Greek term in the legislation is *παράνομος* which has the sense of ‘violating the law’. Obviously, enough, the term also has political and moral connotations which the authors do not endorse, while being aware that the reproduction of official terminologies almost unavoidably reinforces such nuances.

and actual enforcement of returns), different data sources and different terms used. These observations may partly point to shifts in systems of recording and reporting on data over the years, alongside (in)consistency between statistical and legal categories and (lack of) convergence with EU terminology.

Assisted Voluntary Return and Reintegration program run by IOM provides the ground for a more humane approach to return migration, even if the context in which it operates is one of coercion, as it also addresses migrants who have been issued with a return decision and even detainees. Nevertheless, it remains underfunded if compared to other types of forced removals, a choice that reveals the political priorities of the authorities in current return and – more generally – migration issues.

The GAPs Project

GAPs is a Horizon Europe project that aims to conduct a comprehensive multidisciplinary study on the drivers of return policies and the barriers and enablers of international cooperation on return migration. The overall aim of the project is to examine the disconnects and discrepancies between expectations of return policies and their actual outcomes by de-centring the dominant, one-sided understanding of “return policymaking”. To this end, GAPs:

- examine the shortcomings of EU’s return governance;
- analyse enablers and barriers to international cooperation, and
- explore the perspectives of migrants themselves to understand their knowledge, aspirations and experiences with return policies.

GAPs combines its decentring approach with three innovative concepts:

- a focus on return migration infrastructures, which allows the project to analyse governance fissures;
- an analysis of return migration diplomacy to understand how relations between EU Member States and with third countries hinder cooperation on return; and
- a trajectory approach that uses a socio-spatial and temporal lens to understand migrant agency.

GAPs is an interdisciplinary 3-year project (2023-2026), co-coordinated by Uppsala University and the Bonn International Centre for Conflict Studies with 17 partners in 12 countries on 4 continents. GAPs’ fieldwork has been conducted in 12 countries: Sweden, Nigeria, Germany, Morocco, the Netherlands, Afghanistan, Poland, Georgia, Turkey, Tunisia, Greece and Iraq.

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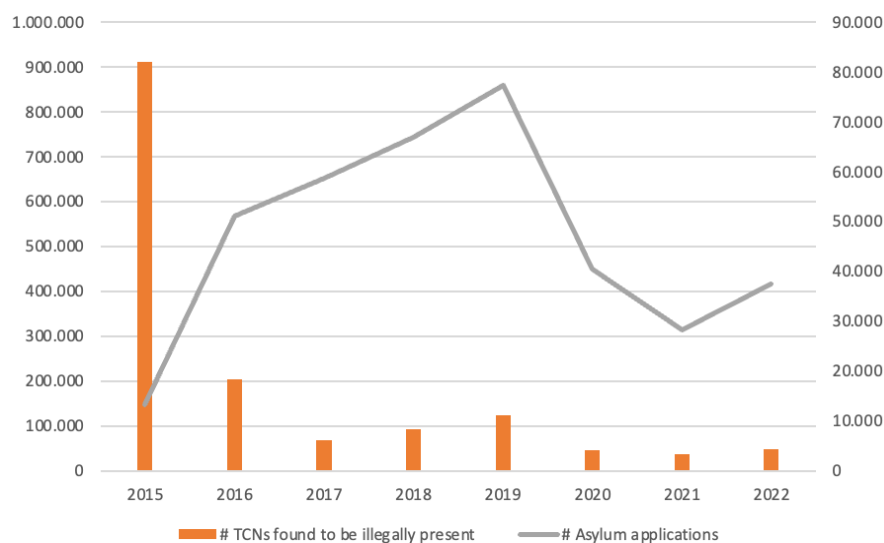
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1. Statistical Overview Regarding Returns and Readmissions at the National Level

The full data table is included in the **Annex I**. This introductory section provides a broad overview and description of key data, the implied patterns and trends but also inconsistencies between different data categories and sources. The graph below brings together the first two columns of the Table: data on the ‘stock’ of irregular migrants (literarily: ‘TCNs found to be illegally present in the country’ - see orange bar/ left axis, Column B in Table), and data on asylum applications (line/ right axis, Column C), as derived from the Eurostat database. The overall picture for the period 2015-2022 records the rather ‘exceptional’ pick in the former category over 2015, year of the so-called European migration ‘crisis’, with significant decreases thereafter (considering also the EU Turkey Joint Statement of March 2016), alongside the growth of asylum applications. Since 2017 annual figures of both categories of data appear to show an almost parallel trend, growing steadily and in parallel between 2017-2018, then dropping significantly in 2020-21 (owing to the covid-19 pandemic and its management, involving subsequent lockdowns and highly enforced border controls), while rising again in 2022².

Figure 1.



Source: Eurostat (own elaboration)

Next, the table below presents the numbers of TCNs ordered to leave (Column G in Table). We observe a sharp increase during 2016-19, then decline over 2020-21 before rising again in

² The former category is based on data on apprehensions for irregular entry or stay, until 2019 also appearing on the Greek police website (<https://www.astynomia.gr/statistik-es-etirides/statistika-stoicheia-2/statistika-stoicheia-paranomis-metanastefsis>). Yet this data seemingly counts the number of arrests rather than persons (hence an individual may have been arrested e.g. twice, once for irregular entry, and another time for irregular stay). At the same time, while this data match exactly Eurostat data for the year 2016, and only slightly diverge (1-2 persons/arrests) for the years 2015 and 2017/2018, the difference between the two sources reaches nearly 700 in 2019. After that year, these statistics are not anymore published on the police website, and no possible comparison can be made between other official Greek online sources and Eurostat data. Moreover, data on Asylum applications also differ between Eurostat and Greek sources (Ministry of Migration & Asylum).

2022, following a parallel trend with the data described above. Interestingly, the shares of this category in the numbers ‘found to be illegally present’ appear to grow from 11.5% in 2015 to more than 60% in 2017-19 and over 80% in 2020 (presumably, four out of five of those arrested for irregular entry or stay received an order to leave); and remain high thereafter. Notwithstanding the fact that data refer to administrative procedures rather than actual persons (and so statistics for different categories in the same year do not really match as implied above, i.e. do not refer to the same population), this is possibly further indicative of more restrictive policies, increased controls, etc., and may include (potential or failed) asylum claimants.

Table 1.

Year	# TCNs ordered to leave	% in TCNs found to be illegally present	# TCNs returned following an order to leave (annual data)	% in the total # of TCNs ordered to leave
2015	104,575	11.5	14,390	13.8
2016	33,790	16.5	19,055	56.4
2017	45,765	67.2	18,060	39.5
2018	58,325	62.5	12,465	21.4
2019	78,880	64.1	9,650	12.2
2020	38,540	81.5	6,950	18.0
2021	28,815	75.8	6,855	23.8
2022	33,500	68.3	6,985	20.9

Source: Eurostat (own calculations)

For a number of reasons, however, a minority only of those receiving such an order do actually leave the country. As also shown on the Table, the share of TCNs returned following an order to leave (Column J) among the total number of those ordered to leave was important in 2016 (>50%) and 2017 (nearly 40%) but remained fairly lower since then (12-24%). An even more nuanced picture emerges when looking at the respective nationalities of those ordered to leave and those actually returned (Appendices 1 & 2 in Data Repository). For instance, the overall weight of Albanian nationals somehow distorts the picture: while they form the largest share of returned TCNs (on average exceeding 50% of the annual totals), they rate an annual average of less than 20% among those ordered to leave. On the other hand, more than 70,350 Syrians were ordered to leave during 2015-2022, yet only 1% were returned following such an order; but of 9,660 Georgians ordered to leave over the same period, nearly three out of four were actually returned. In short, major gaps (disparities) are observed between migrants ordered to leave and actual returns following such an order, but also among different nationalities of migrants and countries of return, which are indicative of variations in the diplomacy, implementation and enforcement of returns.

Table 2.

Year	# TCNs returned following an order to leave, by type of return (# Total from Quarterly data)	# TCNs who have left to the territory by citizenship
2015	-	-
2016	-	-
2017	-	-
2018	-	12,488
2019	-	-
2020	-	6,083
2021	6,880	6,875
2022	7,015	-

Source: Eurostat

Moreover, annual Eurostat data on TCNs returned following an order to leave are inconsistent with quarterly data on TCNs returned following an order to leave by type of return (Column P), as shown in the Table above. Disparities are not as large, yet when quarterly data are rounded per year they do not match annual data. Similarly, as also shown in the table, there are variations between these two Eurostat tables and that of TCNs who have left the territory by citizenship (Column L). Lastly, relevant data from official Greek sources also reveal different figures (even though not too far from Eurostat ones above), illustrated in the graph below.

Figure 2.

* 2023 data cover January to November

Source: Greek Ministry of Civil Protection (own elaborations)³

³ Monthly data for 2016-19 are downloaded and elaborated from the government data repository (<https://archive.data.gov.gr/dataset/anagkastikes-kai-e8eloyisies-apelaseis-mh-nomimwn-metanastwn>), also available on the portal for European data: <https://data.europa.eu/data/datasets/apelaseis-mh-nomimwn-metanastwn-ana->

Eurodata data also indicate an overall decline in the numbers of returns over that period: from over 19,000 in 2016-17, they dropped to about just above 7000 in 2021-22. Forced returns as a share of the total has also declined, while voluntary returns have increased. The proportion of forced returns was reduced: from 68-70% of total returns in 2016-17, they came to form 47.7% in 2021 and 38.2% in 2022. Between 2016-19, the ‘forced’ category was broken down into two sub-categories, labelled ‘compulsory expulsions’ (literally translating the Greek term ‘αναγκαστικές απελάσεις’) and ‘border deportations’ (‘επαναπροωθήσεις’ in Greek, literally ‘re-forwardings’) – see also section 5.1 in the Dossier on concepts and terms. In the data for years 2019-2020 this category is called ‘returns’ ‘based on the simplified readmission procedure from the northern borders of the country’. Its overall weight within forced returns appears to decrease, from 27.5% in 2016 and 32.8% in 2017 to 25.1-21.5% in 2019-20. No such distinction is made thereafter.

‘Voluntary’ return on the other hand is also depicted in two categories. The most significant is the Assisted Voluntary Return and Reintegration programme (AVRR) implemented by the IOM, which appears to have increased in proportions (e.g. over 40% of total returns in the last couple of years as compared to about 30% in 2016-17, yet the number of beneficiaries in 2022 was about half that in 2016). In 2019 a new category is recorded labelled (non-assisted) ‘voluntary’ (‘οικειοθελής’ in Greek), which remains fairly low but is on the rise (from 12% in 2019 to 19/3% in 2022. In 2016 and early 2017 data, this appeared to refer to ‘voluntary’ returns implemented by the Police; but in the 2019-20 datasets is specified as ‘returns in the context of the returns directive (Law 3907/2011, Art. 22) following a return order with a deadline for voluntary departure, holders of a 78α certificate (of non-removal for humanitarian reasons), withdrawal from an asylum claim’.

Finally, as the Greek government consistently denies performing pushbacks or other illegal practices involving the forced/violent removal of foreign nationals from Greek territory, in response to relevant allegations, relevant estimations based on evidence and testimonies are provided by investigations and documentation by journalists and human rights organisations (see point 15 in section 8 of the Dossier).

yphkoothta?locale=en), while 2020-2023 data come from the monthly statistic reports on Ministry of Migration & Asylum’s website (<https://migration.gov.gr/en/statistika>).

2. The Political Context

Greece has a quite long record of (formal, informal and irregular) return migration policies and practices, at least since the massive increase of migrant arrivals in the early 1990s, mainly of people from Balkan and Eastern European countries, and predominantly from Albania. During that decade hundreds of thousands of deportations to Albania were taking place every year, on the fringes of official legal rules⁴. The so-called ‘sweep operations’ (*epichirisi skoupa*), performed by the police as a means to combat irregular migration and the allegedly associated criminality, enjoyed wide coverage in the national media.

However, from the late 1990s onwards, and in light of the forthcoming 2004 Olympic Games, large-scale regularisation process took place in order to ensure the worker status of previous undocumented migrants⁵. Cheap and precarious migrant labour, especially in constructions, agriculture and domestic services, contributed to the high rates of economic growth of that period. Despite seemingly decreasing, deportations of irregular migrants never ceased to take place, with a number of them constituting land pushbacks. However, accurate official data are lacking⁶.

By the mid-2000s, with the enforcement of the Dublin II agreement, the numbers of people trapped in Greece increased, while their living conditions were seriously deteriorating due to the ongoing recession. After the economic collapse in 2010 and in a context of severe recession and austerity, return migration was influenced in two ways. On the one hand, a hard to estimate number of established migrants with various legal statuses started to leave Greece spontaneously, due to restricted employment opportunities. For some of them this meant their repatriation which, at least for those from neighbouring countries (such as Albania or Bulgaria), has often been associated with the adoption of circular migration routes (often associated with seasonal employment in agriculture and tourism). In the same period the International Organisation of Migration (IOM) launched its program for assisted voluntary returns and reintegration (AVRR).

On the other hand, worsening life conditions in the country were exploited to augment racist discourses and discrimination against migrants (employing the ‘Greeks versus migrants’ tactic). The 2012-2013 conservative government launched an extensive and durable police operation (ironically called Xenios Zeus akin to the ancient God of hospitality) to arrest and deport irregular migrants. What this campaign brought about was not so much an increase of deportation, but a significant increase of the number of racialised people imprisoned in harsh conditions in pre-removal detention centres around Greece, even for periods longer than two years⁷. This specific incarceration and return policy had serious repercussions for newcomers, as the number of people arriving from war-torn and/or poverty-stricken countries continued to rise. During this period, we also witnessed the spatialisation of the EU’s deterrence practices

⁴ Baldwin-Edwards, M. & Fakiolas, R. (1998) Greece: The contours of a fragmented immigration policy. *South European Society & Politics*, 3(3): 186-204; Maroukis, T. (2008) *Undocumented migration: Counting the uncountable. Data and trends across Europe*. Country report for CLADESTINO project. Available at: [www.eliamep.gr/wp-content/uploads/2017/12/clandestino_report_greece_final_3.pdf]. Accessed: 9/9/2023.

⁵ Lazaridis, G. & Poyago-Theotoky, J. (1999) Undocumented migrants in Greece: Issues of regularisation. *International Migration*, 37(4): 715-740.

⁶ Kourtovik, I. (2001) Migrants between law and illegality. In Marvaki, A., Parsanoglou, D., & Pavlou, M. (eds.) *Migrants in Greece*. Athens: Ellinika Grammata, pp. 163-198. (In Greek).

⁷ Human Rights Watch (HRW) (2012) *Hate on the Streets. Xenophobic Violence in Greece*; HRW (2013) *Unwelcome Guests. Greek Police Abuses of Migrants in Athens*, Athens: Human Rights Watch.

on Greek borders. Already from 2010 Frontex has been present in the country with different operations taking place at the land (Evros) and sea (Aegean) borders.

The ‘refugee crisis’ of 2015-16, i.e. the large and rapid increase in arrivals of asylum seekers from Syria, Iraq, Afghanistan and other countries of MENA region (Middle East and North Africa), contributed to a short-term alteration of the dominant negative stances, especially since this was considered as a temporary refugee ‘inflow’ that was directed to other European countries. However, it did not take long before a new return agreement, known as the EU – Turkey Statement was agreed upon in March 2016 aiming to curb the refugee movement. Under this Statement migrants and asylum seekers with unfounded or inadmissible claims would be ‘returned’ (sic) from Greece to Turkey. While its implementation resulted in the decrease of departures from Turkey, it didn’t really reduce the numbers of actual returns that remained very low in comparison with the number of arrivals. At the same time, other EU agreements with Third Countries were paving the way for deportations of specific nationals.

Push-back operations targeting people crossing the Aegean Sea or the Greek-Turkish border region of Evros have been reported in the past⁸, but the number of such reports has escalated since 2019⁹. The Greek governments systematically argue that these allegations ‘are clearly unfounded’ and state officials prefer to talk about entry prevention or effective border guarding¹⁰. Yet the Greek Ombudsman has identified that pushback operations ‘have been the work or have at least involved state agencies and state agents at the levels of operational planning, logistics and perpetrators’¹¹, while the UN Special Rapporteur on the Human Rights of Migrants argued in 2022 that ‘[i]n Greece, pushbacks at land and sea borders have become de facto general policy’¹². According to data submitted to the Greek Parliament by the Minister of Public Order¹³, 230.993 third country nationals were prevented from entrance in the 10 first months of 2022. Frontex has also been accused of facilitating or remaining inactive in the face of pushbacks, and it has been the subject of several undergoing investigations¹⁴.

⁸ FIDH, Migreurop, REMDH (2014) *Frontex Greece-Turkey: The borders of denial*, Paris: FIDH; Greek Ombudsman (2023) *Returns of third-country nationals. Special report 2022*. Available at: <https://www.synigoros.gr/en/category/eidikes-ek8eseis/post/special-report-or-return-of-third-country-nationals-2022>. Accessed: 18/11/2023.

⁹ Border Violence Monitoring Network (2020) *Annual Torture Report*. Available at: borderviolence.eu/app/uploads/Annual-Torture-Report-2020-BVMN.pdf. Accessed: 10/09/2023; United Nations, General Assembly (2022) *Human Rights Violations at International Borders: Trends, Prevention and Accountability: Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales, A/HRC/50/31*, 26 April 2022. Available at: <https://daccess-ods.un.org/tmp/3621627.98643112.html>. Accessed: 19/12/2023.

¹⁰ Hellenic Republic Ministry of Migration and Asylum (2021) Statement by the Minister of Migration & Asylum of Greece Mr. Notis Mitarachi about Alleged ‘Pushbacks’. Hellenic Republic Ministry of Migration and Asylum Press Release, July 13, 2021. Available at: <https://migration.gov.gr/statement-by-the-minister-of-migration-asylum-of-greece-mr-notis-mitarachi-about-alleged-pushbacks/>. Accessed: 19/12/2023.

¹¹ Greek Ombudsman (2023) *Alleged Pushbacks to Turkey of Foreign Nationals Who Had Arrived in Greece Seeking International Protection*. Available at: https://old.synigoros.gr/resources/060521-pushbacks-interim-report_eng.pdf. Accessed: 19/12/2023.

¹² United Nations, General Assembly (2022) *Human Rights Violations at International Borders: Trends, Prevention and Accountability: Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales, A/HRC/50/31*, 26 April 2022. Available at: <https://daccess-ods.un.org/tmp/3621627.98643112.html>. Accessed: 19/12/2023.

¹³ AIDA-ECRE (2023) Country Report: Access to the territory and push backs. Available at: https://asylumineurope.org/reports/country/greece/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/#_ftnref7. Accessed: 19/12/2023.

¹⁴ Ibid.

Timeline of return policies in Greece

Table 3. Return policies timeline in Greece

1990s	Early 2000s	Post-2008 debt crisis	Post-2015 ‘refugee crisis’
Law 1975/1991 is adopted to regulate entry and residence of migrants in Greece and to organise deportation procedures. Large-scale deportations of irregular Albanian migrants without legal process, widely known as ‘sweep operations’. Fewer deportations of citizens of other countries.	Deportations decrease (but never cease) after successive regularisation programs, in the context of high rates of economic development supported by cheap migrant labour. A Bilateral Readmission Protocol between Turkey and Greece is signed in 2001. EU readmission agreements between various third countries (incl. Albania, Russia, Ukraine and other Balkan and Eastern European countries). Dublin 2 implementation.	Large numbers of migrants leave Greece voluntarily due to high unemployment, either seeking for opportunities in other countries or returning to their countries of origin – sometimes adopting circular migration routes. RABIT operation Frontex (2010-2011) and operation Shield (2012-2013). Construction of the fence in the Greek-Turkish borders (Region of Evros) starts in 2012. Law 3907/2011 is adopted to transpose the Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals. Massive arrests aiming at identifying and subsequently deporting irregular migrants are held under the ‘Xenios Zeus’ operation (2012-2013). The Greek Ombudsman launches the Recording Mechanism of Informal Forced Returns in 2014. A system of pre-removal detention centres is established with a Ministerial Decision in 2015, regulating already existing detention facilities. IOM launches Assisted Voluntary Return and	Push-back operations in the Aegean Sea and Evros region are increasingly reported. In 2015 Greece becomes one of the main entry points to Europe for more than 1 million refugees and migrants. Five hotspots are established in the islands of Lesbos, Chios, Samos, Leros and Kos. The EU Turkey statement of 2016 creates ground for returns to Turkey. The following years extensive and substantial amendments of the Greek asylum law took place. Closing of the Balkan Route (2016). In 2016, a distinct Ministry of Migration Policy is established for the first time in Greece. In 2020 thousands of migrants gather at the Greek-Turkish border. After that the patrols are reinforced on the Greek side. Seven successive reforms of the Greek asylum legislation follow the launching of the EU-Turkey Statement (18/03/2016). IOM Greece continues AVRR with repeated programs. Frontex gets deeply engaged in border surveillance. The National Commission for

		Reintegration (AVRR) program in Greece. The Greek Asylum Service (GAS) was established in 2011, and started its operation in 2013.	Human Rights (HCHR), launches the Recording Mechanism of Informal Forced Returns in 2023. In the end of 2023, the position of the National Coordinator for Returns is established in the MMA (Law 5078/2023).

Source: Authors' own elaboration

3. Relationship between National Law/EU Law/Public International Law

The Greek national law consists of the Constitution, which prevails over any other piece of legislation, followed, in order of precedence, by statute law, presidential decrees, and administrative measures (including ministerial decisions, joint ministerial decisions and circulates). The adoption of new rules of statute law and the amendment of existing ones is initiated by the responsible minister, who asks a special legislative committee to draft a bill. After being inspected by intermediate institutions (the General Secretariat to the Government and the State General Accounting Office), the bill is laid before the Parliament, accompanied by an introductory report explaining its objectives and reasoning. Presidential decrees make provisions for the implementation of statute laws and are made by the President of the Republic on a proposal from the responsible minister(s). Specific administrative measures regulate matters of minor or technical character.

As an EU Member State (MS), Greece follows the principle of the primacy of European law, meaning that EU law prevails whenever a conflict between European and national legislation occurs. In this sense, all European legal instruments prevail over all domestic legal instruments apart from the Greek Constitution. The founding treaties of the European Union are at the same level as the Constitution.

As in other member states, EU regulations are binding and directly effective in Greece, while EU directives are incorporated into domestic law by statute, Presidential decree or ministerial decision. Moreover, all relevant EU directives have been transposed into the national law¹⁵.

Greece has signed and ratified almost all UN core international human rights treaties¹⁶, apart from the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)¹⁷.

¹⁵ These include:

1. The Directive 2008/115/EC 'on common standards and procedures in Member States for returning illegally staying third-country nationals'.
2. The Directive 2001/40/EC 'on the mutual recognition of decisions on the removal of third-country nationals'.
3. The Directive 2003/110/EC 'on assistance in cases of transit for the purposes of removal by air'.
4. The Directive 2009/52/EC 'on providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals'.
5. The Directive 2004/82/EC 'on the obligation of carriers to communicate passenger data'.

¹⁶ OHCHR (2014) The Core International Human Rights Treaties. New York – Geneva: United Nations Publication. Available at: [<https://digitallibrary.un.org/record/765800>]. Accessed: 12/9/2023.

¹⁷ <https://www.mfa.gr/en/foreign-policy/global-issues/human-rights.html>. Accessed: 12/9/2023; Greece has entered only one reservation on Article 27 of the Convention on the Rights of Persons with Disabilities. This reservation states that: 'The provisions of Article 27(1) of the Convention on the Rights of Persons with Disabilities shall not apply with respect to employment and occupation in the armed and security forces in so far as it relates to a difference of treatment on grounds of disability concerning the service thereto, as provided in Article 8(4) of Law 3304/2005 for the implementation of the principle of equal treatment, adopted pursuant to Articles 3(4) & 4 of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation'.

It is quite complex to discern whether the Greek legal order can be considered as a monist or a dualist system. The Greek Constitution stipulates that the ‘generally recognised rules of international law are part of the Greek legal order’¹⁸. Nevertheless, the Greek constitution provides that international treaties are incorporated by ratification into Greek legal order and this incorporation is not automatic since it takes place through the adoption of a formal law for each treaty. According to some scholars¹⁹, the Greek Constitution provides for a largely monist approach to international law, which is thus meant to be invocable and applicable before Greek courts. However, Greek judicial practice has not necessarily engaged fully with international law, preferring to rely on constitutional provisions regarding human rights and other ‘fundamental’ values.

Article 28 of the Constitution stipulates those international conventions, once ratified by an Act of Parliament, become an integral part of domestic Greek law and prevail over any earlier provision, with the exception of the provisions of the Constitution²⁰. The settlement of controversies related to the designation of rules of international law as generally acknowledged in accordance with Article 28 belongs to the competency of the Special Highest Court of Greece²¹.

The incorporation of international treaties into the Greek legal order takes place through the adoption of a law²². Furthermore, the Greek Constitution²³ stipulates that ‘Conventions on trade, taxation, economic cooperation and participation in international organisations or unions and all others containing concessions for which, according to other provisions of this Constitution, no provision can be made without a statute or which may burden the Greeks individually, shall not be operative without ratification by a statute voted by the Parliament’.

¹⁸ Greek Constitution (Art. 28, para 1)

¹⁹ Apostolaki, M. & Tzanakopoulos, A. (2019) “Greece”. In *Duelling for supremacy: International Law vs National Fundamental Principles*, Cambridge University Press, pp. 106-126; Contiades, X., Papacharalmpous, Ch. & Papastylanos, Ch. (2019) The Constitution of Greece: EU Membership Perspectives. In: A. Albi and S. Bardutzky (eds.) *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, https://doi.org/10.1007/978-94-6265-273-6_14; Rose, M. (2015) Greece and International Law. Available at: [<https://ourpolitics.net/greece-international-law/>]. Accessed: 21/12/2023.

²⁰ Art. 28 stipulates that ‘*The generally recognized rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity*’. According to the same article, ‘*Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organisations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote on the law ratifying the treaty or agreement*’. Furthermore, the Greek constitution provides that: ‘*Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity*’. Additionally, Art. 2 (para 2) of the Greek Constitution provides that the Greek State adheres to international law.

²¹ Greek Constitution (Art 100, para 1)

²² Greek Constitution (Art 28, para 1)

²³ Greek Constitution (Art. 36, para 2)

As in other EU member states, the judgments of the Court of Justice of the European Union (CJEU) have the force of law in Greece. Its judgments prevail upon national legislation and decisions of national courts that are contrary to the provisions of the EU legislation²⁴.

Greece ratified the European Convention on Human Rights (ECHR) in 1974 and is obliged to execute ECtHR judgements. The execution is primarily the competence of the Legal Council of the State, which represents the government before the ECtHR²⁵. Greece has been repeatedly found to violate the ECHR in various cases that concern migration policy, including 'administrative detention, reception and accommodation conditions, the treatment of migrants by the police and border authorities, the asylum system, the treatment of unaccompanied minors, and human trafficking'²⁶.

Regarding compliance with the ECtHR judgements concerning migrants, Greece often responded with long delays. Greek authorities tend to take minimal general measures aimed primarily at ending Committee of Ministers supervision rather than strengthening rights protection in the long term and changing entrenched administrative practices²⁷.

Regarding the Preliminary reference procedure (Art. 267 of the TFEU), in legal proceedings of eminent importance involving the application of the EU law rules, the Greek courts have made use of recourse to the preliminary reference mechanism. However, it is usually the national supreme courts rather than the courts of appeal that initiate the dialogue with CJEU, whereas first instance Greek courts abstain from exploiting this option²⁸.

Regarding decisions of UN human rights bodies, Van Alebeek & Nollkaemper argue that according to findings by the Human Rights Committee (HRC), the Greek state acts in contravention of its obligations under the International Covenant on Civil and Political Rights (ICCPR) which seems not to be considered as legally binding, but can be accepted as a basis of liability of the state. The latter may be obliged to pay compensation under the Greek civil law²⁹.

²⁴<https://guides.law.columbia.edu/c.php?g=1221803&p=9087306>. Accessed 12/9/2023.

²⁵ Anagnostou, D. (2023) Domestic implementation of European Court of Human Rights' judgments related to immigration in Greece. ELIAMEP Policy Paper No 127. Available at: [<https://www.eliamep.gr/wp-content/uploads/2023/02/Policy-brief-127-Anagnostou-final-EN-1.pdf>]. Accessed: 15/9/2023.

²⁶ Ibid, p.3.

²⁷ <https://guides.law.columbia.edu/c.php?g=1221803&p=9087306>. Accessed 12/9/2023.

²⁸ Perrakis, M. (2018) The Activation of the 'Preliminary Reference Procedure' Before the Greek Courts. Available at: [<https://www.greeklawdigest.gr/topics/judicial-system/item/320-%CF%84he-activation-of-the-preliminary-reference-procedure-before-th-greek-courts>]. Accessed: 20/9/2023.

²⁹ Van Alebeek, R. & Nollkaemper, A. (2011) The Legal Status of Decisions by Human Rights Treaty Bodies in National Law. Pp. 18-19. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1817532]. Accessed: 20/9/2023.

4. The Institutional Framework/Operational Infrastructure

The institutional framework determining the operation of returns and particularly the actors related to return governance are prescribed basically in Law 3907/2011³⁰ that transposed the Return Directive 2008/115/EC in the Greek legislation. Concurrently, Law 3386/2005³¹ still regulates all the other cases of expulsions of Third Country Nationals (TCNs). Moreover, important changes took place regarding state authorities during the last few years. More specifically, the GAS started its operation in 2013. Three years later, in 2016, a Ministry of Migration Policy was established for the first time in Greece. In 2019 the Ministry was dissolved and merged with the Ministry of Citizen Protection. In January 2020 the Ministry was reinstated as a Ministry of Migration and Asylum (MMA).

In parallel with the establishment of the MMA, with the Presidential Decree (PD) 106/2020³², the Directorate of Returns and Withdrawals was founded as one of the five Directorates of the GAS³³. The Directorate consists of three Departments: a) the Department for the coordination of returns from the mainland and of voluntary returns, b) the Department for the coordination of returns from the islands, and c) the Department of recalls and exclusion³⁴. Its operational objective, determined by the aforementioned PD is to:

‘coordinate, monitor and participate in the planning of the management of readmission, return, deportation or relocation procedures, both on national and European Union level, in cooperation with the regional services of the Ministry, the competent Ministries and other stakeholders, the representation of the Ministry in all kinds of conferences, seminars, meetings, technical meetings, working groups or programs and the submission of proposals on the conclusion of bilateral and multilateral agreements and agreements on issues of its competence and assistance to the regional services of the GAS with regard to the procedures for withdrawal, exclusion and review of international protection status’³⁵.

Moreover, at the end of 2023 a position of a National Coordinator of Returns was established in the MMA³⁶.

The goal for an integrated and coordinated approach to return (and migration) management, both at the EU and at the Member States’ level, is supported through funding from the Asylum, Migration and Integration Fund (AMIF). The state authority responsible for the coordination of the funded actions (including those that aim at developing capacities for

³⁰ Law 3907/2011 ‘On the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC, etc’.

³¹ Law 3386/2005 ‘Entry, residence and social integration of Third Country Nationals on the Greek territory’.

³² Presidential Decree 106/2020, Art. 26.

³³ The GAS was established under the Law 3907/2011 (then under the Ministry of Citizen Protection) to deal with the examination of international protection applications. Today it pertains to the MMA. Prior to its establishment this was a responsibility of the police authorities.

³⁴ For a detailed description the full list of each Department’s responsibilities, see here:

<https://migration.gov.gr/en/gas/dioikisi/>

³⁵ Presidential Decree 106/2020 (Art. 31).

³⁶ Law 5078/2023 (Art. 191) ‘On reform of occupational insurance, streamlining of insurance legislation, pension arrangements, appointment and recruitment system of teachers of the Public Employment Service and other provisions’.

effective and sustainable return and reducing incentives for irregular migration³⁷) is the General Directorate for the Coordination and Management of Programs on Migration and Internal Affairs³⁸ of the MMA, with a Special Service of the Directorate responsible for implementation and supervision³⁹.

In what concerns return procedures, any decision made by competent authorities about a) the rejection of an application for international protection, b) the interruption/discontinuation of examination of the application for international application, c) the revocation of international protection status, d) the rejection of an application for granting or renewal of a residence permit, and e) the revocation of a valid residence permit is accompanied by a return decision which is issued by the same authority and is defined as an integral part of the procedure. Particularly, competent authorities for the receipt and processing of applications of TCNs and for granting or renewing a residence permit are the services of the Ministry of Immigration and Asylum and the Foreigners and Immigration Services of the Decentralised Administrations under whose territorial jurisdiction the TCNs fall. Within the international protection procedure, the decision is issued either by the GAS at first instance or by the Appeals Authority at second instance (reporting to the Secretary General of Migration Policy). In all other cases of TCNs residing illegally in Greece the return decisions are issued by the police (Ministry of Citizen Protection), and particularly the competent police Director and, in case of the General police Directorates of Athens and Thessaloniki, the police Director in charge of aliens or a higher officer, appointed by the competent General police Director⁴⁰. The police is also the responsible authority for cases of administrative expulsion which are imposed pursuant to Law 3386/2005.

The removal procedure is implemented by the police authorities⁴¹. Particularly, it is the Aliens and Border Protection Branch which deals with detention and return issues⁴² consisting of: a) the Directorate for the Borders Protection, b) the Directorate of Illegal Immigration (which includes the Department for the Management of Detention and Return Facilities⁴³, and c) the Directorate of Aliens. Furthermore, the Ministry of Citizen Protection, and more particularly the Department of Analysis and Documentation of the National Coordinating Centre for Border Control and Surveillance (NCCBS)⁴⁴ monitors the process of returning migrants, while the Department of International Relations of NCCBS monitors the initiatives of the competent authorities to conclude police cooperation agreements and readmission agreements with the competent authorities of other States and ensure their implementation. Frontex is also a key actor in the field of returns at an operational level providing support to EU MS at all stages of the return process, by organising, coordinating and conducting return

³⁷ Asylum, Migration and Integration Fund (2021-2027).

https://home-affairs.ec.europa.eu/funding/asylum-migration-and-integration-funds/asylum-migration-and-integration-fund-2021-2027_en

³⁸ <https://migration.gov.gr/dg-coordination-management-amif-isf-otherfunds/>

³⁹ <https://migration.gov.gr/ma/managing-authority/>

⁴⁰ Law 3386/2005 (Art. 76)

⁴¹ Law 3907/2011 (Art. 23)

⁴² Presidential Decree 178/2014 'Organisation of Greek police Services' (Art. 2). <https://www.e-nomothesia.gr/kat-astynomikos-astynomia/idrysi-leitourgia-uperesion/pd-178-2014.html>

⁴³ For the full list of responsibilities of the Department for the Management of Detention and Return Facilities, see the Presidential Decree 178/2014 (Art. 11).

⁴⁴ <https://www.minocp.gov.gr/ethniko-syntonistiko-kentro-elegchou-kai-epitirisi-synoron-eskees/diarthrosi-eskees/>

operations with an enhanced role as determined in the EU Regulation 2019/1896 on the European Border and Coast Guard. Recently (March 2023) the Ministries of Citizen Protection and Immigration and Asylum signed a Memorandum of Understanding⁴⁵ with Frontex to support and provide expertise to enhance forced and voluntary returns of irregular migrants as well as reintegration and resettlement actions in their countries of transit and/or origin.

TCNs who are subject to return are detained for the preparation of the removal process in 'Special Facilities', also known as Pre-Departure Detention Centers (PROKEKA). The Special Facilities are established and abolished by a joint decision of the Ministry of Citizen Protection, the Ministry of Immigration and Asylum and the Ministry of Finance and fall under the competence of the Ministry of Citizen Protection and the police. In the facilities, health care and medical treatment services are provided. Non-Governmental Organisations (NGOs) or other national and international actors have the right to visit the Special Facilities⁴⁶. Objections against the detention (procedure for challenging detention) are lodged before the President of the first instance Administrative Court in the region of the place of detention⁴⁷.

As regards the assisted voluntary return, the Greek authorities – and particularly the Directorate of Returns and Withdrawals of the MMA – cooperate with the IOM in Greece. IOM has been implementing the Assisted Voluntary Return and Reintegration (AVRR) program since 2010 nationwide, while the Ministry is the donor of the program using AMIF resources. IOM also runs an Open Centre for migrants registered for AVRR (OCAVRR) that provides shelter and other services to returnees.

The return procedure may also involve the engagement of other actors, including civil society actors that mediate to inform the TCN about the return decision⁴⁸; the Ministry of Interior and Decentralisation and E-Government or the territorially competent Aliens and Immigration Service that shall inform the competent police authorities to initiate the return process by removal, within three days from the end of the deadline for voluntary departure⁴⁹; and the significant number of actors that may provide confirmation of the voluntary departure⁵⁰. The role of the Greek Ombudsman is also important, as they hold the formal responsibility of monitoring removal procedures⁵¹ (aiming at the transparency of administrative action and the protection of the fundamental rights of returnees⁵²). The Ombudsman also cooperates with the Fundamental Rights Officer of Frontex who notifies the former of allegations of rights violations in Frontex operations by acts of the MS institutions involved⁵³.

It should be also mentioned that other actors, not officially defined in the legal framework, have also established mechanisms of returns' monitoring. More particularly, in 2021, the

⁴⁵ Ministry of Migration and Asylum (2023). The Ministries of Citizen Protection and Immigration and Asylum sign an agreement with Frontex on the return of irregular migrants. Press Release. <https://migration.gov.gr/en/ypografi-symfonias-ton-ypoyrgeion-prostasias-toy-politi-kai-metanasteysis-kai-asyloy-me-ton-frontex-gia-tis-epistrofes-paratypon-metanaston/>

⁴⁶ Law 3907/2011 (Art. 31).

⁴⁷ Law 3386/2005 (Art. 76).

⁴⁸ Law 3907/2011 (Art. 31).

⁴⁹ Law 3907/2011 (Art. 36).

⁵⁰ Law 3907/2011 (Art. 36).

⁵¹ Law 3907 (Art. 23 para 6).

⁵² Greek Ombudsman (2023) *Returns of third-country nationals*. Special report 2022. Available at: [https://www.synigoros.gr/en/category/eidikes-ek8eseis/post/special-report-or-return-of-third-country-nationals-2022]. Accessed: 18/11/2023.

⁵³ Ibid.

National Commission for Human Rights (NCHR), an independent advisory body of the State in matters of promotion and protection of human rights, launched the Recording Mechanism of Informal Forced Returns to monitor, record and report informal forced return incidents of TCN from Greece to other countries⁵⁴. The Mechanism is a synergy between the NCHR and 11 civil society organisations active in the field, offering pro bono services to TCNs, while the UNHCR office in Greece contributes its expertise and technical support, as a co-operating Agency. The need behind the creation of this body was the absence of an official and effective system for recording the reported incidents of informal forced returns, the need to connect the bodies, which until then recorded on their own initiative the incidents of illegal push backs that allegedly took place at the expense of persons who come to their services⁵⁵, as well as the fact that pushbacks 'have become de facto general policy' as the UN Special Rapporteur on the Human Rights of Migrants has noted⁵⁶.

A list of the authorities involved in the migration return governance defined and authorised by the Law, as described above, is provided in **Annex II**.

⁵⁴ <https://nchr.gr/en/recording-mechanism.html>. Accessed: 18/1/2024

⁵⁵ Ibid.

⁵⁶ United Nations, General Assembly (2022) *Human Rights Violations at International Borders: Trends, Prevention and Accountability: Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales*, A/HRC/50/31, 26 April 2022. Available at: [<https://daccess-ods.un.org/tmp/3621627.98643112.html>]. Accessed: 19/12/2023.

5. The National Legal Framework Regarding Return

The Return Directive (2008/115/EC) was transposed in the Greek legal order in 2011⁵⁷. However, the relative legal framework is characterised by complexity and ambiguity, mainly due to the co-existence of the preceding procedure of the ‘administrative expulsion’ that still remains valid. The latter is regulated by Law 3386/2005 ‘on entry, residence and social integration of Third Country Nationals on the Greek territory’. In 2021, Law 4825/2021 ‘on reform of deportation and return procedures of TCN, etc.’ introduced amendments in return procedures. One of the basic objectives of this law was to clarify the scope of the two Greek laws (Law 3386/2005 and Law 3907/2011)⁵⁸. Civil society actors strongly criticised the changes brought about by Law 4825/2021 arguing, inter alia, that the ambiguity in the relative legal framework still exists⁵⁹ and highlighting legal gaps stemming from changes brought about by the new law in terms of assessment of legal obstacles to return prior to issuing a return decision, resulting in breach of Article 3 ECHR and related standards⁶⁰.

Furthermore, in 2014 the European Commission opened an infringement procedure⁶¹ by sending a Letter of Formal Notice to Greece (INFR(2014)2231) stating that the latter has incorrectly transposed certain provisions of the Return Directive⁶². In addition, in 2022 the Commission has sent an additional Letter of Formal Notice to Greece for failing to comply with the EU rules on returns of the illegally staying TCNs⁶³.

An overview of the legal framework on return policy in Greece is provided in **Annex III** while a diagram of the national return system is presented in **Annex IV**.

⁵⁷ Transposition by Law 3907/2011 ‘on the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC etc.’ (Art. 16-41).

⁵⁸ Ministry of Immigration and Asylum (2021) *Draft Law: ‘Reform of procedures for deportations and returns etc., Analysis of consequences of regulation’*, p. 2. Available at: [\[http://www.opengov.gr/immigration/wp-content/uploads/downloads/2021/06/ansynryth.pdf\]](http://www.opengov.gr/immigration/wp-content/uploads/downloads/2021/06/ansynryth.pdf). Accessed: 9/9/2023.

⁵⁹ RSA, GCR, HIAS, DRC (2021). *Observations on the Draft Law Reformation of procedures for deportations and returns of third-country nationals, issues of residence permits and procedures for granting international protection*. Available at: <https://shorturl.at/coqTY>. Accessed: 9/9/2023.

⁶⁰ Ibid. See also chapter “detention” and chapter “GAPs”

⁶¹ European Commission (29.9.2022). *September Infringements package: key decisions*. Available at: [\[https://ec.europa.eu/commission/presscorner/detail/en/inf_22_5402\]](https://ec.europa.eu/commission/presscorner/detail/en/inf_22_5402). Accessed: 10/1/2024

⁶² On 20/3/2014 the Greek Legal Council of State published the “Opinion 44/2014” according to which ruled in favour of prolonging of the detention of migrants indefinitely and until their deportation becomes feasible, if a decision to deport has already been taken but has not been possible to implement. See more at:

- 1) [\[https://www.gcr.gr/en/news/press-releases-announcements/item/352-ep-aoriston-kratisi-mia-eftheia-prosvoli-tou-ethnikoy-evropaikoy-kai-diethnoys-dikaioy\]](https://www.gcr.gr/en/news/press-releases-announcements/item/352-ep-aoriston-kratisi-mia-eftheia-prosvoli-tou-ethnikoy-evropaikoy-kai-diethnoys-dikaioy);
- 2) https://www.europarl.europa.eu/doceo/document/O-7-2014-000055_EN.html.

Accessed: 12/1/2024

⁶³ European Commission (2022) *September Infringements package: key decisions*. Available at: [\[https://ec.europa.eu/commission/presscorner/detail/en/inf_22_5402\]](https://ec.europa.eu/commission/presscorner/detail/en/inf_22_5402) (accessed: 24/1/2024)

5.1. Definitions and Concepts

Administrative expulsion

There is no specific definition in Greek legislation for this term. According to Mazos ‘Administrative expulsion’ is the act of an active administrative body, issued according to the special procedure provided for by law, which orders the removal of a TCN from the country⁶⁴. According to Poularakis the administrative expulsion ‘is an individual administrative act that aims to remove unwanted TCNs from the national territory for reasons of public or social interest’⁶⁵. As Stavroulaki argues, ‘administrative expulsion’ is ‘the forced departure of a TCN from Greek territory which is ordered by a relevant administrative act’⁶⁶. The administrative expulsion can⁶⁷ be imposed by competent police authorities to a TCN under the following conditions (which apply disjunctively)⁶⁸: i) the TCN ‘has been irrevocably sentenced to a freedom-depriving sentence of at least one year or s(he) has been irrevocably sentenced (regardless of the penalty) for crimes against the political system or treason, crimes related to drug trafficking, money laundering, international financial crimes, crimes with the use of high technology, currency-related crimes, crimes of resistance⁶⁹, child abduction, crimes against sexual freedom and economic exploitation of sexual life, theft, fraud, misappropriation, extortion, usury, violation of the law on intermediaries, forgery, false statement, slander, smuggling, crimes related to weapons, antiquities, smuggling of “illegal migrants”⁷⁰ or facilitation of their transport or provision of accommodation for hiding them; ii) the TCN has infringed the provisions of the Immigration Code; iii) the TCN’s presence in the Greek territory is considered dangerous for the country’s public order or security⁷¹; iv) the presence of the TCN constitutes a risk to public health, because s(he) suffers from an infectious disease or belongs to groups vulnerable to infectious diseases, in particular due to the public health situation in his/her country of origin or the use of intravenous, illicit substances or prostitution, or resides under conditions that do not meet the elementary rules of hygiene according to health regulations’. Furthermore, it can be imposed to a TCN who has violated the provisions regulating the entry and the residence of TCNs in the Greek Territory.

⁶⁴ Mazos. E. (2011) *The administrative expulsions in the Jurisprudence of the Council of State*. Available at: [<https://shorturl.at/kmBC8>. Accessed: 12/1/2024]

⁶⁵ Poularakis, E. (2014) *The temporary judicial protection of the alien from the act of administrative deportation*, p. 27. Nomiki Vivliothiki Publications.

⁶⁶ Stavroulaki, E. (2016) *Immigration Law and Citizenship Law*, p.441. Nomiki Vivliothiki Publications.

⁶⁷ The exact wording of the law ‘administrative deportation of a foreigner is permitted’, seems to provide to the administrative authority the discretion to impose it. However, the Council of State ruled in a series of decisions that deportation is mandatory, given that a legal title is required for legal residence (Council of State Decision 3603/1991, 927/1996, 892/1998, 310, 311/2000, 618/2008)

⁶⁸ Law 3386/2005 (Art. 76 para 1).

⁶⁹ Crimes of resistance against Authorities as they are defined in the Greek Penal Code.

⁷⁰ Exact translation from the Greek law.

⁷¹ Civil Society Actors insist that in Greece the characterisation of TCN as dangerous for the public order and security is broadly applied in police decisions ordering detention/expulsion without a proper justification (see for example the AIDA Country Report: Greece (2022) p. 206. Available at: [<https://asylumineurope.org/reports/country/greece>]. Accessed 18/1/2024

Return

The ‘re-entry process of a TCN either by voluntary compliance with an obligation to return or compulsorily to: a) the country of his/her origin or b) to a transit country, according to EU or bilateral readmission agreements or other arrangements or c) to another third country, to which he/she voluntarily decides to return and to which he/she is accepted’⁷².

Judicial deportation

There is no specific definition in Greek legislation for this term. Judicial deportation used to be imposed by the criminal judge as a security measure⁷³. Even though, judicial deportation was abolished in 2019⁷⁴, the draft amendment to the Criminal Codes submitted to public consultation in late 2023 includes reinstatement of the judicial deportation⁷⁵.

Border deportation (επαναπροώθηση)

Even though ‘Refoulement’ is the word that can best translate the Greek word ‘επαναπροώθηση’⁷⁶ (used in Law 3386/2005⁷⁷), here the term ‘border deportation’ is used in order to avoid confusion of terms. There is no specific definition in Greek legislation for this term, but according to Roukounas ‘επαναπροώθηση’ is the measure taken by the police authorities at the borders and denotes ‘the expulsion in too great haste of the illegally entered TCN in the Greek territory to his/her country from which he/she came from and not necessarily to the state of his/her citizenship or residence’⁷⁸.

Readmission

There is no specific definition in Greek legislation for the term ‘readmission’. The term is listed separately from the terms ‘return’ and ‘deportation’, as for example in Law 4939/2022 ‘on ratification of the Code on reception, international protection of third-country nationals and stateless persons, and on temporary protection in cases of mass influx of displaced migrants’⁷⁹ and refers to cases for which ‘a return or readmission or deportation decision is already in force’. The term seems to be used in general with the meaning of an ‘act by a State accepting the re-entry of an individual (own national, national of another State – most commonly a person who had previously transited through the country or a permanent resident – or a stateless person)’⁸⁰.

⁷² Law 3907/2011 (Art. 18c). The term is also defined in the same way in Law 4251/2014 & in Law 5038/2023

⁷³ Provided by Art. 74 of the Greek Criminal Code

⁷⁴ by Law 4619/2019

⁷⁵ Ministry of Justice (23.11.2023). Draft law “Interventions in the Criminal Code and the Code of Criminal Procedure etc.”. Available at: <http://www.opengov.gr/ministryofjustice/?p=17062>. Accessed: 10/01/2024

⁷⁶ The literal translation of the word in english is ‘re-forwarding’.

⁷⁷ Law 3386/2005 (Art. 82 para 3 & Art. 83 para 2)

⁷⁸ Roukounas, E. (1995). *International Protection of Human Rights*, p. 237. Estia Publications, in Simeonidis, E. *Administrative Expulsion* (2008) p. 240. Sakkoula Publications

⁷⁹ Law 4939/2022 (Art. 69 para 5)

⁸⁰ IOM (2019) *Glossary on Migration*. Available at:

[\[https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf\]](https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf). Accessed: 9/9/2023.

Readmission of beneficiaries of temporary protection

There is no specific definition in Greek law for the term ‘readmission of beneficiaries of temporary protection’. The term was mentioned in the Presidential Decree 80/2006 ‘on the provision of temporary protection in the event of a mass influx of displaced TCNs’⁸¹ and it is also mentioned in the Greek Asylum Code⁸².

Voluntary repatriation & Enforced repatriation

There are no specific definitions in Greek law for the terms ‘voluntary repatriation’ and ‘enforced repatriation’. Initially, the terms were mentioned in the Presidential Decree 80/2006⁸³ which transposed the EU Directive 2001/55/EC and today are mentioned in the Greek Asylum Code⁸⁴. They correspond to the terms ‘voluntary return’⁸⁵ and ‘enforced return’⁸⁶ of the above-mentioned Directive.

Removal

In Greek law⁸⁷ ‘removal’ is defined as the ‘enforcement of the obligation to return by physical transportation out of the Greek territory’.

Return decision

In Greek law⁸⁸ ‘return decision’ is defined as the ‘administrative act, stating or declaring the stay of a TCN to be illegal and imposing an obligation to return’.

Third Country National

In Greek law⁸⁹ the term follows the EU definition⁹⁰.

Illegal Stay

In Greek law⁹¹ ‘illegal stay’ is defined as ‘presence in Greek territory of a TCN who does not fulfil, or no longer fulfils, the conditions of entry, as set in Art. 5 of the Schengen Borders Code, or the other conditions of entry, stay or residence of the legislation’.

⁸¹ Presidential Decree 80/2006 (Art. 11). The PD 80/2006 transposed the EU Directive 2001/55/EC ‘on minimum standards for giving temporary protection in the event of a mass influx of displaced persons’ into Greek legal order’. It was abolished by Law 4939/2022.

⁸² Law 4939/2022 (Art. 127) according to which a person who enjoys temporary protection status in Greece and illegally attempts to enter or remain in the territory of another EU MS is re-admitted to Greek territory. In the event that a beneficiary of temporary protection in another EU member state is found to be or is attempting to enter the Greek territory illegally s(he) is obliged to return to the other EU MS.

⁸³ Presidential Decree 80/2006 (Art. 21). The Presidential Decree was abolished by Law 4939/2022.

⁸⁴ Law 4939/2022 (Art. 137)

⁸⁵ Directive 2001/55/EC (Art. 21)

⁸⁶ Directive 2001/55/EC (Art. 22)

⁸⁷ Law 3907/2011 (Art. 18e).

⁸⁸ Law 3907/2011 (Art. 18d).

⁸⁹ Law 3907/2011 (Art. 18α).

⁹⁰ It is defined as ‘any person who is not a citizen of the EU within the meaning of Art. 17 (para 1) of the Treaty and who is not enjoying the Community right of free movement, as defined in Article 2 (para 5) of the Schengen Borders Code’.

⁹¹ Law 3907/2011 (Art. 18β)

Entry ban

In Greek law⁹² ‘entry ban’ is defined as ‘administrative act, which accompanies the return decision and which prohibits, for a certain period of time, the entry and stay in the Greek territory or in the territory of another EU member state’.

Risk of absconding

In Greek law⁹³ ‘risk of absconding’ is defined as ‘the well-founded assumption, which is based on a confluence of objective criteria, that in a specific individual case the TCN, who is subject to return procedure, may escape’. Even though according to the Return Directive the risk of absconding’ means ‘the existence of reasons in an individual case which are based on objective criteria defined by law⁹⁴, the Greek law includes a non-exhaustive and indicative list of such criteria⁹⁵.

Voluntary departure

In Greek law⁹⁶, ‘voluntary departure’ is defined as ‘the compliance with the obligation to return within the time-limit set for this purpose in the return decision’.

Assisted voluntary return

There is no specific definition in Greek legislation for the term ‘Assisted Voluntary return’. It is used to describe the assisted, unforced return of a TCN to the country of origin within the Assisted Voluntary Return and Reintegration program (AVRR) implemented by IOM in Greece. Greek Asylum Code repeatedly mentions the administration's obligation to provide information on the option of voluntary return⁹⁷.

Vulnerable persons

According to the law⁹⁸ that transposed the Return Directive into Greek legislation, the term ‘vulnerable persons’ includes ‘minors, unaccompanied minors, persons with special needs, the elderly, pregnant women, women having recently given birth, single-parent with minor children, victims of torture, rape or other serious forms of psychological, physical or sexual violence or exploitation, as well as victims of human trafficking’.

⁹² Law 3907/2011 (Art. 18στ)

⁹³ Law 3907/2011 (Art. 18ζ)

⁹⁴ Return Directive 2008/115/EC (Art. 3 para 7)

⁹⁵ Such objective criteria are indicatively: a) non-compliance with the obligation of voluntary departure; b) the explicit manifestation of the intention to non-compliance with the return decision; c) the possession of forged documents; d) the provision of false information to the authorities; e) the existence of convictions for criminal offences, pending criminal proceedings or serious indications that a criminal offence has been committed or is about to be committed by the specific person; f) the lack of travel or other identity documents; g) the previous escape; and h) the noncompliance with an existing entry ban

⁹⁶ Law 3907/2011 (Art. 18η)

⁹⁷ For example: Law 4939/2022 (Art. 39)

⁹⁸ Law 3907/2011 (Art. 18θ)

5.2. Return at Border

Return procedures are not applicable in border cases⁹⁹. In these cases, after the illegal crossing of the borders, the Law 3386/2005 is applicable¹⁰⁰ as well as the readmission terms and provisions, as they bind Greece directly or indirectly, through its participation in the EU, or as they arise from international customary law¹⁰¹. For the TCNs who are not subject to return procedures, authorities must ensure that they have the same treatment as TCNs subject to return procedures in terms of restrictions on the use of coercive measures, postponement of removal for reasons related to their physical or mental condition, emergency health care, therapeutic treatment, consideration of needs of vulnerable persons and conditions of detention. Furthermore, the principle of non-refoulement must also be applicable to their case¹⁰². However, in practice, the application of Law 3386/2005, comparatively, provides less procedural guarantees than the application of Law 3907/2011.

Border deportation is imposed in two situations: The first case¹⁰³ refers to TCNs who are included in the List¹⁰⁴ of unwanted TCNs¹⁰⁵. TCNs of this category are subject to entry ban, therefore are not permitted to enter Greece and they are obliged to depart immediately, otherwise they must be returned back to the country of origin or to a third country, where entry may be allowed. The TCN can request to be removed from the List of Unwanted TCNs. The method and the preconditions of deletion vary depending on the reason for which the TCN was registered. The TCN theoretically can submit an appeal against the entry ban. However, in reality the TCNs are much more likely to resort to the international protection process to avoid deportation.

The second case¹⁰⁶ where border deportation is imposed is of criminal nature: In the event that a TCN enters Greece or departs without the necessary legal formalities, the Public Prosecutor of the Magistrate Court, with the approval of the public Prosecutor of the Court of Appeal, under prerequisites, may refrain from initiating criminal proceedings for illegal entry/exit.

⁹⁹ According to Law 4825/2021 (Art. 1) & Law 3907/2011 (Art. 17) the return procedures do not apply to TCNs who are subject to entry bans (according to Art. 14 of the Schengen Borders Code) or are arrested or monitored by authorities, in connection with illegal/land/sea/air crossing of the external borders (within the meaning of the Art. 2, par. 2 of the Schengen Borders Code) to whom a permit/right to stay in Greece has not been subsequently granted. In addition, return procedures do not apply to TCN are subject to deportation imposed by court order, as a security measure or as an incidental penalty or subject to extradition procedures in accordance with the provisions of an international convention that binds the Country or of articles 436-456 of the Code of Criminal Procedure or Law 3251/2004 'on European Arrest Warrant etc.'

¹⁰⁰ Law 4825/2021 (Art. 1)

¹⁰¹ Law 3907/2011 (Art. 34)

¹⁰² Law 3907/2011 (Art. 19 para. 2)

¹⁰³ Law 3386/2005 (Art 82 para. 3)

¹⁰⁴ The criteria and the procedure for entering and removing TCNs from the List are determined by decision of specific ministries.

¹⁰⁵ The List is maintained by the Ministry of Citizen Protection

¹⁰⁶ Law 3386/2005 (Art 83 para 2)

5.3. Regular Procedure to Issue a Return Decision

A return decision is issued by the competent authorities in cases of¹⁰⁷: a) rejection of an application for international protection; b) discontinuation of examination of the application for international protection (due to implicit withdrawal); c) withdrawal of international protection status; d) rejection of an application for granting or renewal of a residence permit; e) revocation of a valid residence permit. In these cases, the return decision is an integral part of the basic decision (which rejects the application for international protection; or interrupts the examination of the application for international protection; or revokes the international protection status; or rejects the application for granting or renewal of residence permit; or revokes a valid residence permit). In all the other cases of TCN, who reside illegally in Greek territory, a return decision is issued by the competent police authorities¹⁰⁸. In the event that there is already another return or expulsion decision in force, it is considered that the previous return or expulsion decision is incorporated into the new decision that orders the return¹⁰⁹.

TCNs staying illegally in the Greek territory and holding a valid residence permit or any other permit granting them a right to stay, issued by another MS, are obliged to immediately move to that EU MS. In the event of non-compliance or when the immediate departure of the TCN is imposed for reasons of national security or public order, a return decision is issued by the competent police authorities¹¹⁰.

Against a TCN who has filed a timely application for granting or renewing a residence permit with all the required supporting documents and has received a relevant Certificate of submitting the application, it is not possible to issue a return decision for reasons of illegal residence, until his/her application is finally examined. Likewise, it is not possible to issue a return decision to a TCN for whom a temporary order or decision of an Administrative Court of First Instance has been issued to suspend the execution of an administrative act which has rejected the application for issuance or renewal of residence permit or revoked a residence permit¹¹¹.

When a residence permit is issued for humanitarian or other reasons to a TCN who resides illegally in Greece¹¹² no return decision is issued and, in the event, that it has already been issued, then it is revoked or suspended for a period of time equal to the validity period of the permit¹¹³.

5.4. Special Cases and their Relation with the Obligation to Issue a Return Decision

Intra-corporate transfers

TCNs who hold a valid intra-corporate transferee permit issued by another MS may reside and work in Greece (transposition of Directive 2014/66/EU). When the intra-company transfer permit holder crosses the external borders of Greece, the competent authorities consult the

¹⁰⁷ Law 3907/2011 (Art. 21 para 1)

¹⁰⁸ Law 3907/2011 (Art. 21 para 1)

¹⁰⁹ Law 3907/2011 (Art. 21 para 1)

¹¹⁰ Law 3907/2011 (Art. 21 para 2)

¹¹¹ Law 3907/2011 (Art. 21 para 5)

¹¹² Law 5038/2023 (Art. 134)

¹¹³ Law 3907/2011 (Art. 21 para 4)

Schengen Information System and refuse entry or object to the mobility of persons, who have been registered as undesirable in the Schengen Information System¹¹⁴. In the event that a TCN inter-company transferee, who has moved from Greece to another MS of transfer, stops working in that MS, it is permitted, at the request of the other MS, to return to Greece (as well as his/her family members) without formalities and without delay of the TCN.

Return of long-term residents

The return of a TCN with long-term resident status (transposition of Directive 2003/109/EC) is permitted when there is a present and specifically justified threat to public order or public security¹¹⁵. The return decision cannot be based on invoking reasons of more general fiscal policy¹¹⁶. When examining the reasons justifying the return, the following facts are taken into account: a. The duration of his/her presence in the country; b. the effects on him/her and his/her family members; c. the ties with the country of residence or the absence of ties with his/her country of origin, d. the age of the person concerned¹¹⁷. Additionally, the principle of non-refoulement must be respected¹¹⁸.

Holders of long-term residence permit issued by another MS

Until the TCN who holds a long-term residence permit issued by another MS acquires long-term resident status in Greece, his/her residence permit is not renewed or revoked. The TCN and his/her family members are obliged to leave Greece in the following cases: a. For reasons of public order or public security; b. The TCN no longer holds a long-term residence permit issued by another MS; c. the TCN does not legally reside in the country¹¹⁹. In these events the TCN must immediately return to the first MS that granted him/her long-term resident status.

If the return concerns a beneficiary of international protection with long-term resident status in another MS, the latter is requested to confirm whether the person in question is still entitled to international protection. If a MS submits a relevant request for information, the GAS must respond within 1 month of receipt of the request¹²⁰. In the event that the long-term resident is still entitled to international protection in the other MS, s(he) is returned to that state. By way of exception, the long-term resident may be returned to a country other than the MS that granted him/her international protection, as long as a) it is reasonably considered that s(he) constitutes a risk to the security of the State; or b) constitutes a risk to society due to his/her final conviction for the commission of a particularly serious crime¹²¹.

The TCN can lodge an application for annulment before the Administrative Court against the decision that rejects the application for the granting of a long-term resident residence permit, or revokes the permit, or rejects the application for renewal, or the decision to return¹²².

¹¹⁴ Law 5038/2023 (Art. 55 para 17)

¹¹⁵ Law 5038/2023 (Art. 150 para 1)

¹¹⁶ Law 5038/2023 (Art. 150 para 2)

¹¹⁷ Law 5038/2023 (Art. 150 para 3)

¹¹⁸ Law 5038/2023 (Art. 150 para 7)

¹¹⁹ Law 5038/2023 (Art. 157 para 2)

¹²⁰ Law 5038/2023 (Art. 150 para 4)

¹²¹ Law 5038/2023 (Art. 150 para 5)

¹²² Law 5038/2023 (Art. 151 para 3)

Greece has transposed Directive 2001/20/EC on the mutual recognition of decisions on removal of TCN (by Law 214/2004). The provisions of Law 214/2004 are applied in the following cases¹²³: a) when a removal decision has been issued against a TCN due to a serious and present threat to public order or national security, and this decision has been taken: (aa) due to the conviction of the TCN by the MS of the decision for an offence punishable by a penalty involving deprivation of liberty of at least 1 year; (bb) when there are clear indications that the TCN has committed or intends to commit serious criminal acts on the territory of a MS. After the issuance of a removal decision, which meets the above conditions, any residence permit of the TCN is also revoked¹²⁴. b) When a removal decision has been issued against a TCN due to a violation of the provisions on the entry and stay of TCNs of the country of the decision.

The removal decision must not have been revoked or suspended by the MS of the decision¹²⁵. Against the administrative act of execution of the decision of removal, the TCN under removal is entitled to submit Objections and an appeal¹²⁶.

Dublin Transfers (Application of Regulation (EU) 604/2013)

When another MS has assumed the responsibility of examining an application, the latter is rejected as inadmissible and at the same time a transfer decision is issued¹²⁷. An appeal can be lodged within 15 days which is considered that it is also directed against the relevant transfer decision¹²⁸. The appeal does not have automatic suspensive effect. A specific request must be lodged to that end. Deportation, readmission or return cannot be carried out before a decision is issued on his/her application¹²⁹.

5.5. Voluntary Departure

The return decision may provide for a period of time for voluntary departure, which varies between 7 and 25 days¹³⁰. This period of time in which the TCN can depart voluntarily is automatically granted, without requiring the submission of an application. In the event that the competent authority considers that there is a risk of absconding or the TCN is a risk to public safety, or if the application for legal stay has been rejected as manifestly unfounded or abusive, the competent authorities do not grant a period of voluntary departure¹³¹. The competent authority can impose several obligations to the TCN throughout the set period for the voluntary departure, in order to avoid the risk of absconding¹³². In the event that the TCN violates these obligations the return decision is executed immediately and the granting of a

¹²³ Presidential Decree 214/2004 (Art. 3 para 1)

¹²⁴ Ibid.

¹²⁵ Presidential Decree 214/2004 (Art. 3 para 2)

¹²⁶ Presidential Decree 214/2004 (Art. 4)

¹²⁷ Law 4939/2022 (Art. 89)

¹²⁸ Law 4939/2022 (Art. 97)

¹²⁹ Law 4939/2022 (Art. 110 para 2)

¹³⁰ Law. 3907/2011 (Art. 22 para 1)

¹³¹ Law 3907/2011 (Art. 22 para 4)

¹³² For example, regular appearance before the authorities; a financial guarantee; deposition of documents; obligation to stay in a certain place.

period of voluntary departure or the extension of this period is deemed automatically revoked¹³³.

According to the Directions of the MMA, in the case of the international protection procedure, the body that rejects the application for international protection examines the possibility of granting a period of voluntary departure. If there is a previous deportation decision, it does not grant a deadline for voluntary departure¹³⁴. Authorities may extend the deadline for voluntary departure with a reasoned decision, for a period of time which cannot exceed 120 days¹³⁵ after a relevant application of the TCN.

5.6. Forced Return/ Removal/ Exit

Police authorities are competent to execute return decisions and take all the necessary measures for the execution if¹³⁶ a) no period for voluntary departure has been granted; b) a period for voluntary departure has been granted but the TCN has not complied with the obligation to return within the set deadline. In these cases, no independent removal decision is issued¹³⁷. In the event that a period of voluntary departure has been granted, police execute the return decision only after the expiry of the deadline, unless in the meantime it appears that there is a risk of absconding or the TCN is considered a danger to the public security or public order¹³⁸. In this case, the return decision becomes immediately enforceable and the police issue a declaratory act to the TCN¹³⁹.

In the event that the TCN who is subject to return procedures/expulsion procedures lacks a travel document¹⁴⁰ all necessary actions are taken before the diplomatic/consular authority of the country of origin (or permanent residence or citizenship) of the TCN to issue a travel document. In case that the above-mentioned authorities refuse the provision of a travel document (or there is no diplomatic or consular authority of the specific state in Greece), the Greek Ministry of Foreign Affairs is informed. When the timely issuance of a travel document is not possible, the TCN is provided with a special type of travel document¹⁴¹.

Postponement of removal

The removal is compulsorily postponed¹⁴² in cases where i) the principle of non-refoulement is violated; ii) removal has been suspended. The police may, upon a justified decision, postpone the return, for an appropriate period of time, taking into account the specific circumstances of the individual case, such as TCN's physical state or mental capacity and b) technical reasons, such as the lack of means of transport or the lack of possibility of removal, due to the objective impossibility to identify the TCN¹⁴³. If the removal is postponed,

¹³³ Law 3907/2011 (Art. 37 para 1)

¹³⁴ Ministry of Migration and Asylum (2021) *Instructions for the implementation of Law 4825/2021*, p. 4. Available at: [<https://www.nomotelia.gr/photos/File/395448-21.pdf>]. Accessed: 15/9/2023.

¹³⁵ Law 3907/2011 (Art. 22 para 2)

¹³⁶ Law 3907/2011 (Art. 23 para 1)

¹³⁷ Law 3907/2011 (Art. 23 para 3)

¹³⁸ Law 3907/2011 (Art. 23 para 2)

¹³⁹ Law 3907/2011 (Art. 23 para 3 & Art. 37 para 1)

¹⁴⁰ JMD no. 4000/4/46-α' (Art. 4 para 1)

¹⁴¹ Procedure regulated by PD 124/1997

¹⁴² Law 3907/2011 (Art. 24 para. 1)

¹⁴³ Law 3907/2011 (Art. 24 para. 2)

obligations may impose on the TCN (such as regularly appearing before authorities, depositing an appropriate financial guarantee, filing documents or having to stay in a certain place)¹⁴⁴. The decision that postpones removal consists of a written certification that the return decision cannot be temporarily executed (Certificate of Postponement of Removal). The latter is valid for 6 months and may be renewed upon a new judgement on whether the removal remains impossible.

Within the international protection procedure, in case of submission of a subsequent application until the completion of its examination during the preliminary stage, the execution of any measure of deportation, return or removal in any way is suspended¹⁴⁵. By way of exception, this does not apply in case i) of a first subsequent application, which is rejected as inadmissible; ii) in case of a second subsequent application, after the issuance of a final decision, by which the first subsequent application is deemed inadmissible, or after the issuance of a final decision with which the application is rejected as unfounded. The above-mentioned provision applies only when the determining authority considers that the return decision will not lead to direct or indirect refoulement, in violation of the international and European obligations of the state¹⁴⁶.

5.7. Return of Unaccompanied Minors (UAMS)

Regarding return procedures the best interest of the child must be always taken into consideration¹⁴⁷. Before deciding to issue a return decision to an UAM, assistance must be provided by appropriate bodies¹⁴⁸ (other than the authorities enforcing return)¹⁴⁹ and the competent authorities should ascertain¹⁵⁰ that s(he) will be returned to a member of his/her family, a nominated guardian or adequate reception facilities in the State of return¹⁵¹.

The return of a minor who attends a Greek school of any level of education or whose parents or guardians legally reside in Greece is prohibited¹⁵². It is also prohibited to return a minor on whom reformatory measures have been imposed by a decision of the Juvenile Court.¹⁵³ Contrary to what applies to adults, in the event that the application for international protection of the UAM is rejected, the PAAYPA¹⁵⁴ remains active until the return decision is executed or the UAM becomes adult.

¹⁴⁴ Law 3907/2011 (Art. 24 para. 3)

¹⁴⁵ Law 4939/2022 (Art. 94 para 9)

¹⁴⁶ Law 4939/2022 (Art. 94 para 9)

¹⁴⁷ Law 3907/2011 (Art 20 & Art. 25 para 1)

¹⁴⁸ The competent authority for all the issues concerning the reception and integration of UAMs is the Special Secretariat for the Protection of Unaccompanied Minors (SPUUAM) which operates in the Ministry of Migration and Asylum, under the auspices of the Deputy Minister for Integration. The Secretariat was established with the Presidential Decree 18/2020.

¹⁴⁹ Law 3907/2011 (Art 25 para. 1)

¹⁵⁰ Law 3907/2011 (Art 25 para. 2)

¹⁵¹ The National Strategy for UAMs makes several references on the issue of return of UAMs. Available at: [<https://shorturl.at/cqrFM>]. Accessed: 9/9/2023;

The Guardianship System is regulated by Law 4960/2022 'on the National Guardianship System and Framework of Accommodation of UAMs' entered into force in 2022 replacing former Law 4554/2018 on guardianship (which was never implemented in practice).

¹⁵² Law 3907/2011 (Art. 41 para 1α)

¹⁵³ Law 3907/2011 (Art. 41 para 1ε)

¹⁵⁴ Temporary social security number for asylum seekers which allows them to access services like

5.8. Entry Bans

A ban on entry into Greek territory is imposed by Greek control authorities on TCNs who do not meet the conditions of entry, as defined in the Schengen Border Code¹⁵⁵. In this event, the TCN is issued with a reasoned decision¹⁵⁶ which states the specific reasons for refusal of entry¹⁵⁷.

A TCN who has entered Greece from the transit zone and is not allowed to enter the country of destination, is not accepted for re-entry if s(he) does not meet the present conditions again, since upon his/her return s(he) entered a third, intermediate, country¹⁵⁸.

Entry to Greece is not prohibited for a person who proves to have Greek citizenship or the citizenship of an EU MS, even if s(he) still lacks a passport or other travel document¹⁵⁹.

In the event that upon the entry into Greece of a TCN who is the holder of a residence permit, the Greek control authorities find that there are reasons justifying the revocation of the residence permit or the rejection of a relative pending request, they must immediately notify the competent authority in order to initiate the relevant procedure. In these cases, the entry of the TCN is prohibited until the issuance of a decision, without the authorities withholding the residence permit or the certificate of submission of a request with complete supporting documents¹⁶⁰.

Entry ban within return decision

Return decisions must be accompanied by an entry ban if i) no period for voluntary departure has been granted; ii) the TCN has not complied with the obligation to return. In addition, an entry ban may be imposed in the event that the presence of the TCN poses a risk to public order and security, national security or public health¹⁶¹. In the event that the voluntary departure takes place after the end of the deadline for reasons of force majeure, it is considered that the TCN has fully complied with the return decision¹⁶². The entry ban is imposed irrespective of to his/her right to international protection¹⁶³.

The length of the entry ban must be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed 5 years starting from the day of removal. However, it may exceed 5 years if the TCN represents a serious threat to public policy, public security or national security. Each case must be reviewed ex officio every 3 years¹⁶⁴.

The entry ban is enforced by registration in the List of Undesirable TCNs maintained by the Ministry of Citizen Protection¹⁶⁵.

public health care and work.

¹⁵⁵ Law 5038/2023 (Art. 6 para 1)

¹⁵⁶ The decision has a standardized form, in accordance with Schengen Borders Code.

¹⁵⁷ Law 5038/2023 (Art. 6 para 2)

¹⁵⁸ Law 5038/2023 (Art. 6 para 4)

¹⁵⁹ Law 5038/2023 (Art. 6 para 5)

¹⁶⁰ Law 5038/2023 (Art. 6 para 6)

¹⁶¹ Law 3907/2011 (Art. 26 para 1)

¹⁶² Law 3907/2011 (Art. 38 para 2)

¹⁶³ Law 3907/2011 (Art. 26 para 5)

¹⁶⁴ Law 3907/2011 (Art. 26 para 2)

¹⁶⁵ Law 3907/2011 (Art. 38 para 1) & Law 3386/2005 (Art. 82).

Entry-ban decisions are issued in writing and give reasons in fact and in law as well as information about available legal remedies¹⁶⁶. Against the relative decision, an application for cancellation and application for suspension can be lodged before the Administrative Court.

5.9. Procedural Safeguards

Apart from general rules of administrative law, the Law 3907/2011 stipulates that in return procedures the competent authorities shall take due account of the best interests of the child; family life; the state of health of the specific TCN; and must respect the principle of non-refoulement¹⁶⁷. The return is prohibited¹⁶⁸ when the TCN is i) a minor who attends a Greek school of any level of education or his/her parents or guardians legally reside in Greece; ii) a parent of a minor with custody or maintenance obligation, which s(he) fulfils; iii) a person who is over 80 years of age; iv) a person who has been granted international protection status or is an applicant of such status and his/her application has not been finally determined (subject to Articles 32 and 33 of the 1951 Geneva Convention); v) a minor on whom reformatory measures have been imposed by a decision of the Juvenile Court; vi) an *omogenis*¹⁶⁹ vii) a victim or an essential witness of specific crimes, and comes to file a complaint or report the incident to the police; viii) a pregnant woman during pregnancy and for 6 months after delivery; iv) a victim of domestic violence who comes to file a complaint or report the incident to the police.

Return is not prohibited in above-mentioned cases no. (ii), (iii), (vi) and (viii) in the event that the TCN is considered dangerous to public order or national security or public health¹⁷⁰. The above-mentioned protection applies also to TCNs subject to expulsion pursuant to Law 3386/2005¹⁷¹. Furthermore, police may, upon a justifiable decision, postpone the removal of a TCN taking into account the specific circumstances of each case (physical state, mental capacity etc.)¹⁷².

In Greece, there is no humanitarian status as a special status of protection. The competent authorities (The Minister of Migration and Asylum and the Secretary of Decentralised Administration) may at any time grant an independent residence permit 'for compassionate, humanitarian or other reasons', to a TCN, who resides illegally in the country, in accordance with the relative provisions of the Immigration Code¹⁷³. In the case of the issuance of the above residence permit, no return decision is issued and if the return decision has already been issued, then it is revoked or suspended for a period of time equal to the validity period of the above licence¹⁷⁴. More specifically, according to the Immigration Code, a residence permit for humanitarian reasons could be issued to a TCN upon his/her application in the event that the

¹⁶⁶ Law 3907/2011 (Art. 27 para 1)

¹⁶⁷ Law 3907/2011 (Art. 20 & 24 para 1); Law 4939 (Art. 20 para 1, Art. 73 para 2b, Art. 90, Art. 91(1b), Art. 92 para 4c, Art. 94 para 9, Art. 110 para. 4); Law 5038/2023 (Art. 150 para 7)

¹⁶⁸ Law 3907/2011 (Art. 41 para 1)

¹⁶⁹ 'Omogenis' is the person who has the citizenship of another country but is of Greek descent and associated with strong ties with Greece.

¹⁷⁰ Law 3907/2011 (Art. 41 para 3)

¹⁷¹ Law 3907/2011 (Art. 41 para 4)

¹⁷² Law 3907/2011 (Art. 24 para 2)

¹⁷³ Law 3907/2011 (Art. 21 para 4)

¹⁷⁴ Ibid.

s(he) falls into specific categories¹⁷⁵. Additionally, the new Immigration Code¹⁷⁶ provides that a 10-year residence permit is issued to adult TCNs who entered Greece as UAMs and have successfully completed at least 3 grades of secondary education in Greece before reaching the age of twenty-three. Another category of TCNs who can be issued with a residence permit on the basis of humanitarian reasons is those who can prove seven years of continuous residence in Greece¹⁷⁷.

The necessary form of return decisions

Return decisions and entry ban decisions must be in written form and include sufficient justification¹⁷⁸. They are communicated to the TCN as well as information on available remedies.

The authorities ensure, upon request, the written or oral translation of the main points of the decisions, including information about the available remedies, “in a language that the TCN understands or is considered reasonable that understands”¹⁷⁹. This is not applicable for TCNs who have illegally entered and have not subsequently been granted “permission or the right to remain in Greece”. In this case, the decisions are issued by means of a standardised form¹⁸⁰. Return decisions issued by the police and the Foreigners and Immigration Services of the Decentralised Administrations are written in Greek and contain no translation.

Remedies against decisions ordering return

Against return decisions issued by the police, TCN can file an appeal within 5 days of (of the day of issuance)¹⁸¹. The appeal is submitted to the police department responsible for the administrative measures. The lodging of the appeal suspends the execution of the return/expulsion decision. In case that along with the return/expulsion, detention was ordered, the suspension concerns only the return/expulsion¹⁸². In case that the appeal against the return/expulsion decision is rejected the TCN has the right to appeal before the Administrative Court¹⁸³.

Furthermore, TCNs have the right to appeal against return decisions that are incorporated in decisions to reject the applications for granting or renewing a residence permit, as well as in decisions to revoke a valid residence permit, within an exclusive period of 2 months from the issuance of the decision¹⁸⁴. Legal assistance and representation are provided free of charge

¹⁷⁵ Law 5038/2023 (Art. 134). These categories include, inter alia, victims and material witnesses of criminal acts, victims of domestic violence, victims of crimes with racist characteristics, victims of work accidents, those attending a legally approved treatment program for mental dependence, TCNs who ‘at the risk of their lives, they performed acts of social virtue, giving and solidarity that promote the values of humanity’, TCNs who are suffering from serious health problems. However, for the last category the TCN, in order to apply for humanitarian status, must have already had a residence permit, therefore irregular TCNs are not eligible; Law 5038/2023 (Art. 134 para 1).

¹⁷⁶ Law 5038/2023 (Art. 161 para 1c)

¹⁷⁷ Law 5038/2023 (Art. 134 para 5)

¹⁷⁸ Law 3907/2011 (Art. 27 para 1)

¹⁷⁹ Law 3907/2011 (Art. 27 para 2)

¹⁸⁰ Law 3907/2011 (Art. 27 para 3) & JMD n. 4000/4/46-a/22.7.2009 (Art. 1 para 2)

¹⁸¹ Law 3907/2011 (Art. 28 para 1) and 3386/2005 (Art. 77); See also the section of ‘Detention’ for persons who are issued a return decision as detainees

¹⁸² Law 3386/2005 (Art. 77)

¹⁸³ Law 3068/2002 (Art. 15 para 1)

¹⁸⁴ Law 3907/2011 (Art. 28 para 1)

upon request, in accordance with the general provisions of Law 3226/2004 “on providing legal aid to low-income citizens”¹⁸⁵. Application for annulment against return decisions can be lodged before First Instance Administrative Court¹⁸⁶.

5.10. Detention

TCNs who are subject to return procedures are detained for the preparation of the return procedure¹⁸⁷. Authorities may apply other less restrictive measures if these measures are deemed effective and if the police deem that: a) there is no risk of absconding; or b) the TCN is cooperative and does not hamper the preparation of the return procedure; or c) there are no national security reasons¹⁸⁸. Detention must be imposed for the absolutely necessary period of time for the removal process, which must be executed with due diligence¹⁸⁹. A TCN can be detained up to 6 months¹⁹⁰ but this period can be extended up to 18 months¹⁹¹. In the event that the TCN is arrested to enforce an expulsion order for which s(he) has already been detained and the statutory maximum detention period has been exhausted, s(he) can be detained again but only for the necessary period of time to complete the legal formalities of his removal¹⁹². Asylum seekers can be detained even in the event that they applied for international protection at liberty.

Decision ordering detention

Detention is ordered by a decision¹⁹³ of the police¹⁹⁴. According to the general provisions of Greek administrative law, all the decisions must be written and have to mention the issuing authority and the applicable legal provisions, the date and the authority of issuance, the right to appeal, the body which is responsible for examining the appeal, the deadline for filing an appeal, as well as the consequences of failing to exercise the right to file an appeal¹⁹⁵.

The detainee, as a first mean of defence, has 48 hours to submit objections before the police authorities¹⁹⁶ arguing why s(he) should not be suspected of absconding and s(he) does not constitute a danger for the public order or security¹⁹⁷. As a second mean, a TCN can express his/her Objections against the decision before the judge of the First Instance Administrative Court¹⁹⁸. In case that the Objections are accepted, the judge orders the police to set the

¹⁸⁵ Law 3226/2004 on providing legal aid to low-income citizens.

¹⁸⁶ Law 3068/2002 (Art. 15)

¹⁸⁷ Law 3907/2011 (Art. 30 para 1)

¹⁸⁸ Law 3907/2011 (Art. 30 para 1)

¹⁸⁹ Law 3907/2011 (Art. 30 para 1)

¹⁹⁰ Law 3907/2011 (Art. 30 para 5)

¹⁹¹ Law 3907/2011 (Art. 30 para 6)

¹⁹² JMD no. 4000/4/46-α' (Art. 1 para 1)

¹⁹³ Law 3386/2005 (Art. 76 para 2)

¹⁹⁴ In particular by the police Director and especially for the General police Directorates of Athens and Thessaloniki, by the police Director responsible for TCNs issues or a higher officer appointed by the General police Director.

¹⁹⁵ Law 2690/1999 (Art. 16 para 1)

¹⁹⁶ Law 3907/2011 (Art. 30 para 2) & Law 3386/2005 (Art. 76 para 4-5)

¹⁹⁷ Law 3386/2005 (Art. 76 para 2)

¹⁹⁸ Law 3907/2011 (Art. 30 para 2) & Law 3386/2005 (Art. 76 para 3-5)

detainee free and sets a deadline for departure. This deadline cannot exceed the 30 days, unless there is a reason preventing expulsion¹⁹⁹.

5.11. Emergency Situations

In situations where an exceptionally large number of TCNs subject to return procedures provokes an unforeseen, heavy burden on the capacity of the detention facilities or on its administrative or judicial staff of the country, the relevant authorities may, for as long as the exceptional situation persists, decide to extend the deadlines for judicial review and to take urgent measures regarding the conditions of detention derogating from the relative provisions of law²⁰⁰. When resorting to such exceptional measures, the competent authorities shall inform the European Commission²⁰¹.

Under no circumstances the above-mentioned provisions can be interpreted as allowing Greek authorities to derogate from their general obligation to take all appropriate measures, whether general or particular, in order to ensure fulfilment of their obligations, as arise from the relative legislation²⁰².

5.12. Readmission Process

Greece has signed and ratified more than 18 bilateral readmission agreements with the following countries: Bosnia-Herzegovina, Bulgaria, Croatia, France, Hungary, Italy, Latvia, Lithuania, Malta, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovenia, Switzerland, Turkey and Germany.

In 2022 Greece and Bangladesh signed a Memorandum of Understanding²⁰³. This agreement sets out the conditions of entry and temporary residence of Bangladeshi nationals for the purpose of temporary employment²⁰⁴. The same year Greece and Egypt signed an Agreement²⁰⁵ for the employment of seasonal workers in the agricultural sector.

Readmissions on the basis of EU-Turkey Statement

After the adoption of the EU-Turkey Statement²⁰⁶ a practice of systematic geographical restriction²⁰⁷ is imposed on every newly arrived person (after 20/3/2016) in order to be readmitted to Turkey in case they do not seek international protection or their applications are rejected. The implementation of returns on the basis of EU-Turkey Statement has been suspended since March 2020²⁰⁸ after the border incidents that took place in the Evros region

¹⁹⁹ Law 3386/2005 (Art. 76 para 5)

²⁰⁰ Law 3907/2011 (Art. 33 para 1)

²⁰¹ Law 3907/2011 (Art. 33 para 2)

²⁰² Law 3907/2011 (Art. 33 para 3)

²⁰³ Ratified by Law 4959/2022.

²⁰⁴ European Commission (2023) *Greece: Online platform opened to facilitate applications for residence from Bangladeshi citizens*. Available at:

[<https://shorturl.at/cms35>]. Accessed: 15/10/2023.

²⁰⁵ Ratified by Law 5009/2023

²⁰⁶ European Commission (2016) *EU-Turkey Statement: Questions and Answers*. Available at:

[https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_963]. Accessed: 10/9/2023.

²⁰⁷ The geographical restriction consists of an obligation not to leave the island and of an obligation to reside at the hotspot facility.

²⁰⁸ European Commission (2022) *Communication from the Commission to the Council and the*

in 2020²⁰⁹. The Greek Turkish bilateral readmission Protocol concluded in 2002 is the only legal framework of the Statement with respect to returns²¹⁰ as the parties failed to finalise the legal process aiming to advance the applicability of the provisions EU-Turkey Readmission Agreement (signed on 1.10.2014) on the readmission of TCNs by 1 June 2016²¹¹. However, the implementation of the Bilateral Protocol has been suspended by the Turkish authorities from 2018²¹².

The application of the Safe Third Country concept within the procedure for international protection

Greece considers²¹³ as Safe Third Countries the following states: Turkey (for applicants from Syria, Afghanistan, Pakistan, Bangladesh and Somalia), Albania and North Macedonia. The application of the Safe Third Country concept is extensive²¹⁴ and complaints on violations of a series of provisions of EU and international law have been directly brought before the European Commission the examination of which is still pending²¹⁵.

European Parliament: Sixth Annual Report on the Facility for Refugees in Turkey, p. 2. Available at: [https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-06/COM_2022_243_1_EN_ACT_part1_v3.pdf]. Accessed: 9/10/2023.

²⁰⁹ Teunissen, P. & Koutrolidou, P. (2022) Echoes of Imperialism: Crisis, Conflict and the (Re)configurations of Otherness in the Evros/ Edirne Borderlands. In Lemberg-Pedersen, M., Fett, S.M., Mayblin, L., Sahraoui, N. & Stambøl, E.M. (eds.) *Postcoloniality and Forced Migration. Mobility, Control, Agency*. Bristol University Press.

²¹⁰ European Commission (2016) EU-Turkey Statement: Questions and Answers. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_963]. Accessed: 10/9/2023.

²¹¹ Öztürk, N. O. & Soykan, C. (2019) Third Anniversary of EU-Turkey Statement: A Legal Analysis. Available at: [<https://tr.boell.org/en/2019/10/03/third-anniversary-eu-turkey-statement-legal-analysis>]. Accessed: 10/01/2024

²¹² Apnews (2018) Turkey suspends migrant deal with Greece. Available at: [<https://apnews.com/a8d99534527947279457363a3b072b89/Turkey-suspends-migrant-deal-with-Greece>]. Accessed: 10/01/2024; European Commission (2020). Turkey 2020 Report, p. 49. Available at: [https://neighbourhood-enlargement.ec.europa.eu/system/files/2020-10/turkey_report_2020.pdf]. Accessed: 9/1/2024

²¹³ Pursuant to JMD no. 458568/16.12.2021 'Amendment of no 42799/03.06.2021 Joint Ministerial Decision of the Minister of Foreign Affairs and the Minister of Migration and Asylum 'Designation of third countries as safe and establishment of national list pursuant to Article 86 of Law 4636/2019 (A' 169)' (B'2425)'

²¹⁴ On 2021 GAS dismissed 6.424 asylum applications as inadmissible based on the safe third country concept. Out of this number only 979 decisions concern the border procedure. Information available at: [<https://www.hellenicparliament.gr/UserFiles/67715b2c-ec81-4f0c-ad6a-476a34d732bd/11873945.pdf>]. Accessed: 9/1/2024

²¹⁵ RSA (2022) *Greece arbitrarily deems Turkey a 'safe third country' in flagrant violation of rights*. Available at: [https://rsaegian.org/wp-content/uploads/2022/02/RSA_STC_LegalNote_EN.pdf]. Accessed: 9/1/2024

6. International Cooperation

	Type of Bilateral Agreements and Negotiations	Title	Signatory State/ Target Third Country	Date		Link to the document
				Signature	Entry into force	
1	Standard Readmission agreements signed	Agreement between the Government of the Hellenic Republic and the Council of Ministers of Bosnia-Herzegovina on the readmission of persons residing illegally in the territory of their respective states. Ratified by Law 3547/2007.	Greece / Bosnia-Herzegovina	09/2/2006	1/6/2007	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wFNA1rv4K6ip3dtvSoClrL8SFJZYW49XfPtlI9LGdkF53UIxsx942CdyqxSQYNuqAGCFoIfB9HI6qSYtMQEKEHLwnFqmgJSA5WIsLuV-
2		Protocol between the Government of the Hellenic Republic and the Council of Ministers of Bosnia-Herzegovina on the Implementation of the Agreement between the European Community and Bosnia-Herzegovina on the Readmission of Persons Staying Without Permit. Ratified by Law 4669/2020.	Greece / Bosnia-Herzegovina	24/11/2015	NOT FOUND	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wHuDWr4xouZundtvSoClrL8b5S2mIvi-NjtI9LGdkF53UIxsx942CdyqxSQYNuqAGCFoIfB9HI6qSYtMQEKEHLwnFqmgJSA5WIsLuV-nRwO1oKqSe4BLOTSpEWYhszF8P8UqWb
3		Agreement between the Governments of the Hellenic Republic and the Republic of Bulgaria regarding the readmission of persons whose residence is illegal. Ratified by Law 2406/1996.	Greece / Bulgaria	15/12/1995	NOT FOUND	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wGW8w3YehDyt3dtvSoClrL8sN_Cl5tJ5zV5MXDoLzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJbox1
4		Agreement between the Government of the Hellenic Republic and the Government of the Republic of Croatia regarding the readmission of persons whose residence is illegal	Greece / Croatia	10/3/1995	14/3/1996	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wEqaJsMsZeph3dtvSoClrL8jXotFUXFV2R5MXDoLzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJbox1
5		Agreement between the Government of the Hellenic Republic and the Government of the French Republic for the readmission of persons in an illegal status. Ratified by Law 2917/2001.	Greece / France	15/12/1999	1/1/2004	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wHgzlpqlooT4HdtvSoClrL88VQbDLIsbtp5MXDoLzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJbox1
6		Agreement between the Government of the Hellenic Republic and the Government of the Republic of Hungary on the readmission of persons residing illegally in the territory of their States. Ratified by Law 3321/2005.	Greece / Hungary	29/1/2003	1/5/2005	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wHrZvzjsKBkq3dtvSoClrL8wKsDxGjkYKjtlI9LGdkF53UIxsx942CdyqxSQYNuqAGCFoIfB9HI6qSYtMQEKEHLwnFqmgJSA5WIsLuV-
7		Agreement between the Government of the Hellenic Republic and the Government of the Italian Republic on the readmission of persons in an illegal status. Ratified by Law 2857/2000.	Greece/ Italy	30/4/1999	7/11/2000	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wEtf2Ep4n9LfndtvSoClrL82ipaEXBAV1p5MXDoLzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJbox1

8	Agreement between the Government of the Hellenic Republic and the Government of the Republic of Latvia regarding the readmission of persons whose residence is illegal. Ratified by Law 2861/2001.	Greece / Latvia	17/3/1999	21/12/2001	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wEtf2Ep4n9LfndtvSoClrL8M3utS zAwpPh5MXDoLzQTLWPuYyLzB8V68kn BzLcmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ 5f9cmWyJWelDvWS_18kAEhATUkJbox1
9	Agreement between the Government of the Hellenic Republic and the Government of the Republic of Lithuania regarding the readmission of persons whose residence is illegal. Ratified by Law 2911/2001.	Greece / Lithuania	1/7/1999	1/5/2004	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wHgzlpqlo0T4HdtvSoClrL8WJ4GK x8iICXtHl9LGdkF53UIx942CdyqxSQYNU qAGCFoIfB9HI6qSYtMQEeHLwnFqmgJ SA5WIsLuV-
10	Agreement between the Government of the Hellenic Republic and the Government of Malta on the cooperation of the Ministry of Public Order of the Hellenic Republic and the Ministry of Internal Affairs of Malta in issues of their competence. Ratified by Law 3125/2003.	Greece / Malta	24/5/2001	NOT FOUND	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wFalhF2BrTT7HdtvSoClrL8fss9of yoJlDtl9LGdkF53UIx942CdyqxSQYNUq AGCFoIfB9HI6qSYtMQEeHLwnFqmgJ SA5WIsLuV- nRwO1oKqSe4BLOTSpEWYhszF8P8UqWb
11	Protocol between the Government of the Hellenic Republic and the Government of the Republic of Moldova on the implementation of the Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without a permit, which was signed in Brussels, on October 10, 2007. Ratified by Law 4980/2022.	Greece / Moldova	28/3/2014	NOT FOUND	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wGGrzhDLcpZ3dtvSoClrL8u_1H zLbdDJF5MXDoLzQTLWPuYyLzB8V68k nBzLcmTXKaO6fpVZ6Lx3UnKl3nP8Nxdn J5f9cmWyJWelDvWS_18kAEhATUkJbox1 LldQ163nV9K-- td6SiuRAAJhpAUuggXnLTdbq-K-
12	Protocol between the Government of the Hellenic Republic and the Government of Montenegro on the implementation of the Agreement between the European Community and the Republic of Montenegro on the readmission of persons residing without a permit, which was signed in Brussels on 18 September 2007. Ratified by Law 4862/2021.	Greece / Montenegro	7/3/2019	1/5/2022	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wEzH9d6xfpRXdtvSoClrL81_Y MgeaMm1p5MXDoLzQTLWPuYyLzB8V68k nBzLcmTXKaO6fpVZ6Lx3UnKl3nP8Nxdn J5f9cmWyJWelDvWS_18kAEhATUkJbox1LldQ163nV9K-- td6SiuUKG1rZdaIKweBvUbPttROI-
13	Agreement between the Government of the Hellenic Republic and the Government of the Republic of Poland regarding the readmission of persons deprived of a residence permit, as amended by the exchange of verbal communications of 13.6.1995 and 20.6.1995. Ratified by Law 2384/1996.	Greece / Poland	21/11/1994 Amended by the exchange of verbal communications	5/5/1996	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wGW8w3YEhDyt3dtvSoClrL8b5S 2mlvi- Njtl9LGdkF53UIx942CdyqxSQYNUqAG CFoIfB9HI6qSYtMQEeHLwnFqmgJSA5 WIsLuV- nRwO1oKqSe4BLOTSpEWYhszF8P8UqWb
14	Agreement between the Government of the Hellenic Republic and the Government of Romania regarding the readmission of persons in an illegal status. Ratified by Law 2301/1995.	Greece / Romania	6/6/1994	19/8/1995	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wEqajSmsZeph3dtvSoClrL8_ NSN YUWRl5Htl9LGdkF53UIx942CdyqxSQ YNUqAGCFoIfB9HI6qSYtMQEeHLwnFq mgJSA5WIsLuV-
15	Implementation Protocol between the Government of the Hellenic Republic and the Government of the Russian Federation regarding the implementation of the Readmission Agreement between the Russian Federation and the European Community of May 25, 2006. Ratified by Law 4466/2017.	Greece / Russia	18/12/2012	NOT FOUND	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wEsrjPoJAlxBXdtvSoClrL8ExDiw SImocLtl9LGdkF53UIx942CdyqxSQYNU qAGCFoIfB9HI6qSYtMQEeHLwnFqmgJ SA5WIsLuV- nRwO1oKqSe4BLOTSpEWYhszF8P8UqWb _zFijCXNEskXWBB6e1falbkQ6X8un_FU3

16		Protocol between the Governments of the Hellenic Republic and the Republic of Serbia on the implementation of the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without a permit, which was signed in Brussels on September 18, 2007. Ratified by Law 4861/2021.	Greece / Serbia	11/9/2013	NOT FOUND	http://www.et.gr/idocs-nph/search/pdfViewerForm.html?args=5C7QrtC22wEzH9d6xfVpRXdtvSoClrL8zS83ZvoDVVR5MXDoLzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJbox1LldQ163nV9K--td6SIuaRgWOstjFwnlvHbhaQxsqGxtHVV
17		Agreement between the Government of the Hellenic Republic and the Government of the Republic of Slovenia on the readmission of persons in an illegal status and of the attached Protocol. Ratified by Law 2353/1995.	Greece / Slovenia	6/4/1994	13/1/1996	http://www.et.gr/idocs-nph/search/pdfViewerForm.html?args=5C7QrtC22wEqajsMsZeph3dtvSoClrL8_NSNYUWRl5Htl9LgdkF53Ulxss942CdyqxSQYNUqAGCFoIFB9HI6qSYtMQEKEHLwnFqmgJSA5WislUv-
18		Agreement between the Government of the Hellenic Republic and the Swiss Federal Council for the readmission of persons in an illegal status and of the relevant Implementation Protocol. Ratified by Law 3726/2008.	Greece / Switzerland	28/8/2006	NOT FOUND	http://www.et.gr/idocs-nph/search/pdfViewerForm.html?args=5C7QrtC22wHtyK1ZYNH8HdtvSoClrL8f8yKrgKv77F5MXDoLzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJbox1
19		Protocol for the implementation of Article 8 of the Agreement between the Government of the Hellenic Republic and the Government of the Republic of Turkey on combating crime, especially terrorism, organized crime, illegal drug trafficking and illegal immigration. Ratified by Law 3030/2002.	Greece / Turkey	8/11/2001	5/8/2002	http://www.et.gr/idocs-nph/search/pdfViewerForm.html?args=5C7QrtC22wHghqNAYvmYB3dtvSoClrL8Tq6rbLkT5HR5MXDoLzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJbox1LldQ163nV9K--td6SIuSxvfSjBHR6BH7beimMo8BJRoJG9t
20		Administrative agreement between Germany and Greece ("Seehofer Deal")	Greece / Germany	NOT FOUND	18/8/2018	https://www.fmrw.de/fileadmin/fmrw/media/EU_Asylopolitik/Germany_Greece_Deal_eng.pdf
1	Non-standard readmission arrangements	Agreement between the Governments of the Hellenic Republic and the Republic of Albania on the cooperation of their Ministries of Public Order in issues of their competence. Ratified by Law 2147/1993. (Police cooperation Agreement)	Greece / Albania	17/7/1992	10/2/1995	https://www.e-nomothesia.gr/diethneis-suntheskes/nomos-2147-1993-phek-96a-16-6-1993.html
2		Protocol between the Government of the Hellenic Republic and the Council of Ministers of the Republic of Albania regarding the implementation of the Agreement between the Governments of the Hellenic Republic and the Republic of Albania on the cooperation of their Ministries of Public Order in issues of their competence. Ratified by Law 3962/2011. (Police cooperation Agreement)	Greece / Albania	12/3/2010	NOT FOUND	https://www.e-nomothesia.gr/diethneis-suntheskes/nomos-3962-2011-phek-98a-29-4-2011.html
3		Agreement on the cooperation between the Ministry of Public Order of the Hellenic Republic and the Ministry of Interior of the Republic of Armenia. Ratified by Law 2499/1997. (Police cooperation Agreement)	Greece / Armenia	18/6/1996	NOT FOUND	https://www.e-nomothesia.gr/diethneis-suntheskes/nomos-2499-1997-phek-100a-16-5-1997.html
4		Agreement between the Government of the Hellenic Republic and the Council of Ministers of Bosnia and Herzegovina on cooperation in combating crime, especially terrorism, illegal drug trafficking and organized crime. Ratified by Law 3725/2008. (Police cooperation Agreement)	Greece / Bosnia and Herzegovina	9/2/2006	NOT FOUND	https://www.e-nomothesia.gr/diethneis-suntheskes/nomos-3725-2008-phek-256a-17-12-2008.html

5		Agreement between the Government of the Hellenic Republic and the Government of the Republic of Lithuania on the cooperation of the Ministry of Public Order of the Hellenic Republic and the Ministry of Internal Affairs of the Republic of Lithuania in issues of their competence. Ratified by Law 2426/1996.	Greece / Lithuania	26/6/1995	NOT FOUND	https://www.e-nomothesia.gr/inner.php/diethneis-suntheke/nomos-2426-1996-phek-149a-4-7-1996.html?print=1
6		Agreement between the Government of the Hellenic Republic and the Government of Malta on the cooperation of the Ministry of Public Order of the Hellenic Republic and the Ministry of Internal Affairs of Malta in issues of their competence. Ratified by Law 3125/2003. (Police cooperation Agreement)	Greece / Malta	24/5/2001	NOT FOUND	https://www.e-nomothesia.gr/diethneis-suntheke/nomos-3125-2003-phek-63a-14-3-2003.html
7		Agreement between the Governments of the Hellenic Republic and Romania on the cooperation of the Ministry of Public Order of the Hellenic Republic and the Ministry of the Interior of Romania in issues of their competence. Ratified by Law 2138/1993. (Police cooperation Agreement)	Greece / Romania	6/6/1992	5/11/1994	https://www.e-nomothesia.gr/diethneis-suntheke/nomos-2138-1993-phek-84a-28-5-1993.html
8		Agreement between the Hellenic Republic and the Republic of Turkey for the cooperation of the Ministry of Public Order of the Hellenic Republic and the Ministry of the Interior of the Republic of Turkey in combating crime, especially terrorism, organized crime, illegal drug trafficking and illegal immigration. Ratified by Law 2926/2001. (Police cooperation Agreement)	Greece / Turkey	20/1/2000	17/7/2001	https://www.e-nomothesia.gr/diethneis-suntheke/nomos-2926-2001-phek-139a-27-6-2001.html
9		Agreement/Protocol (according to the media) or Common Declaration (According to the Council of Europe) between the Hellenic Republic and the Republic of Turkey for the readmission of persons in an illegal status	Greece / Turkey	14/5/2010	NOT FOUND	NOT FOUND
1	Deals	Memorandum of Understanding (MoU) between the Government of the Hellenic Republic and the Government of the People's Republic of Bangladesh on Migration and Mobility. Ratified by Law 4959/2022.	Greece / Bangladesh	9/2/2022	NOT FOUND	http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wGGrezhDLcpZ3dtvSoClrL8VngElbqsA6B5MXDoLzQTLWPu9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWjJWdVWS_18kAEhATUkJbox1
2		Agreement between the Government of the Hellenic Republic and the Government of the Arab Republic of Egypt on the employment of seasonal workers in the agricultural sector. Ratified by Law 5009/2023.	Greece / Egypt	22/11/2022	24/1/2023	https://treaties.un.org/doc/Publication/UNTS/No%20Volume/57666/Part/I-57666-08000028060c238.pdf

7. Funding Return and Related Programmes

The MMA provides information pertaining to Return and Related Programmes through its periodic reports. Funding for these programs is allocated via the Asylum and Migration Fund (AMIF), during the programming periods of 2014-2020 and 2021-2027. The primary beneficiaries of Return-related funding are the Hellenic Police and the International Organisation for Migration (IOM) - Mission in Greece. IOM receives funding for implementing Assisted Voluntary Returns and Reintegration (AVRR), reintegration measures, and operating the Hosting Facility for voluntarily returning applicants. The Hellenic Police primarily receives funding for the operation of Pre-Departure Detention Centers (PROKEKA).

Table 4. Funded return programs

Fund	Title	Beneficiary	Project Approval Date	Union Contribution*
AMIF	Improvement of Living Conditions in the Pre-Departure Centers	Hellenic Police	13/10/2016	59,548,925.99 €
AMIF	The implementation of assisted voluntary returns including reintegration measures	International Organization for Migration (IOM)	27/05/2016	24,352,500.00 €
AMIF	The application of Forced Returns of irregular Third Country Nationals	Hellenic Police	14/04/2016	12,152,217.84 €
AMIF	Forced Returns Monitoring and Control System	European Programs Implementation Service (EPIS) of the Hellenic Parliament (HeP)	13/02/2017	200,625.00 €
AMIF	Development of the services provided in the Pre-Departure Detention Centers for Aliens: Medical and Pharmaceutical Care, Psychological Support, Social Support and Interpretation Services	Health Units SA / (AEMY A.E.)	06/10/2017	5,257,480.51 €
AMIF	The implementation of assisted voluntary returns including reintegration measures and the operation of an Open Accommodation Structure for Voluntary Return Applicants in the region of Attica	International Organization for Migration (IOM)	31/08/2019	3,280,515.32 €

AMIF	The implementation of assisted voluntary returns including reintegration measures and the operation of an Open Accommodation Structure for Voluntary Return Applicants in the region of Attica	International Organization for Migration (IOM)	31/08/2019	26,044,484.68 €
AMIF	Funding International Organization for Migration (IOM) - Mission in Greece, for the implementation of the project 'Implementation of assisted voluntary returns and reintegration measures as well as operation of a Hosting Facility for voluntarily returning applicants	International Organization for Migration (IOM)	01/09/2023	39,000,000.00 €
AMIF	Reinforcement of Police Services with personnel for providing guarding and operation services in Pre-Departure Detention Centers	Hellenic Police	29/10/2023	14,739,951.00 €

Source: Ministry of Migration and Asylum (2021) *List of AMIF – ISF Actions, February 2021*.

Available at: [<https://migration.gov.gr/wp-content/uploads/2021/03/Κατάλογος-Δράσεων-TAME-TEA-Φεβρουάριος-2021.pdf>]. Accessed: 15/11/2023 (in Greek);

Ministry of Migration and Asylum (2023) *Approved List - Asylum, Migration and Integration Fund (AMIF) 2021-2027*. Available at: [<https://tamey.gov.gr/amif2021-2027/calls/grant-agreements/?print=pdf>]. Accessed: 15/11/2023 (in Greek).

8. Gaps

The listing of existing legal provisions and institutional arrangements reveals a number of gaps in terms of legal certainty, consistency and guarantees. These gaps can be summarised in the following points:

1. The co-existence of Law 3907/2011 (which transposed the Return Directive) and Law 3386/2005 regarding administrative expulsions in the Greek legal order seems to produce ambiguity regarding the respective scopes of the two laws. Several Greek NGOs emphasise²¹⁶ that the way the Return Directive has been transposed to the Greek legal system enables the administration to bypass the procedures of the Directive and apply the deportation procedures of Law 3386/2005.
2. According to the Return Handbook, irregular entrants who have been apprehended at the borders and who subsequently obtained a right to remain as asylum seeker must not be excluded from the scope of the Directive as 'border cases', even if they become again 'irregular' after the final rejection of the asylum application²¹⁷. In Greece, TCNs irregularly entering Greece at the borders are arrested, detained and an expulsion decision is issued against them in dereliction of the reception and identification process set out in Law 4939/2022²¹⁸. Additionally, CJEU has ruled that the term 'in connection with the irregular crossing' in Article 2(2)(a) of the Directive requires a 'direct temporal and spatial link with that crossing of the border'. It thereby applies to persons 'apprehended or intercepted by the competent authorities at the very time of the irregular crossing of the border or near that border after it has been so crossed'²¹⁹. Subsequently, in the event that a TCN applies for international protection, s(he) obtains an authorisation to stay in the country and his/her expulsion is suspended until the completion of the examination of his/her application. If the application is rejected, the expulsion decision is executed in accordance with the procedures of Law 3386/2005. However, this procedure raises issues of compatibility with Article 2 para. (2) (a) of the Return Directive which clarifies that an exception from the scope of the Directive can only occur if TCNs who were caught irregularly crossing the border were not subsequently granted the right to remain in the country²²⁰.

²¹⁶ RSA, GCR, HIAS, DRC (2021) *Observations on the Draft Law Reformation of procedures for deportations and returns of third-country nationals, issues of residence permits and procedures for granting international protection*. Available at: [<https://shorturl.at/coqTY>]. Accessed: 9/9/2023.

²¹⁷ European Commission (2017) *Return Handbook* p. 96. Available at [<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017H2338>]. Accessed: 17/11/2023.

²¹⁸ Law 4939/2022 (Art 38 et seq.)

²¹⁹ CJEU, Case C-47/15 Affum b Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai, 7 June 2016, para 72; Case C-444/17 Arib, 19 March 2019, para 46.

²²⁰ National Commission for Human Rights (2021) *Observations on Draft Law of Ministry of Migration and Asylum 'Reform of deportation and return procedures of third country nationals, issues of residence permits and procedures for granting international protection and other provisions within the competence of the Ministry of Migration and Asylum and the Ministry of Citizen Protection*. Available at: [https://www.nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/GNCHR_YMA.pdf]. Accessed: 20/11/2023;

Greek Ombudsman (2021) *Comments and observations on the draft law 'Reformation of procedures for deportations and returns of citizens of third countries, etc'*. Available at:

[<https://old.synigoros.gr/resources/130921-sxolia-sn-metanasteytiko.pdf>]. Accessed: 20/11/2023;

UNHCR (2021) *Reform of deportation and return procedures of third country nationals etc*. Available at: [<https://www.refworld.org/docid/61eacbc24.html>]. Accessed: 20/11/2023.

3. The decision rejecting an application for international protection, the decision revoking the status of international protection as well as the decision discontinuing the examination of the request incorporate a return decision²²¹. However, in the event of one of the above-mentioned decisions, the independent Appeals Committees which examine applications for international protection in the second instance, do not examine whether conditions for a postponement of removal are met e.g. due to a risk of *refoulement*. Rather, they maintain the view that the responsibility lies with the police which is the competent authority for the execution of the removal. However, this is a contradictory situation, since the guarantees of the procedure are reduced as the relevant competence from the Appeals Committees (in which judges participate) is transferred to the police officials²²². In addition, this runs counter to the duty of authorities to examine *non-refoulement* considerations before *issuing* a removal order, not just before execution thereof²²³.
4. Decisions discontinuing the examination of applications of international protection due to implicit withdrawal also incorporate a return decision even though the applicant has the right²²⁴ to submit, within 9 months, an application before the GAS asking the continuation of the examination of his/her application. Consequently, as there has not been examination of the asylum application on the merits, the incorporation of the return decision as an integral part of the decisions that interrupts the asylum application can lead to violation of the principle of non-refoulement since the return decision can be executed as long as the applicant has not exercised his/her right to ask for the continuation of the procedure.
5. The deadline for voluntary departure can be extended to a maximum of three months. This period is deemed inadequate to serve the special circumstances for which it is granted and especially the case where the TCN has minor children who attend schools²²⁵. The latter case, often consists the ground for suspensive effect where applicants challenge such removal

²²¹ Law 4939/2022 (Art. 87 para 8 and Art. 100 para 10)

²²² National Commission for Human Rights (2021) *Observations on Draft Law of Ministry of Migration and Asylum 'Reform of deportation and return procedures of third country nationals, issues of residence permits and procedures for granting international protection and other provisions within the competence of the Ministry of Migration and Asylum and the Ministry of Citizen Protection*. Available at: [\[https://www.nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/GNCHR_YMA.pdf\]](https://www.nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/GNCHR_YMA.pdf). Accessed: 20/11/2023;

Greek Ombudsman (2021) *Comments and observations on the draft law 'Reformation of procedures for deportations and returns of citizens of third countries, etc'*. Available at:

[\[https://old.synigoros.gr/resources/130921-sxolia-sn-metanasteytiko.pdf\]](https://old.synigoros.gr/resources/130921-sxolia-sn-metanasteytiko.pdf). Accessed: 20/11/2023;

UNHCR (2021) *Reform of deportation and return procedures of third country nationals etc.*

Available at: [\[https://www.refworld.org/docid/61eacbc24.html\]](https://www.refworld.org/docid/61eacbc24.html). Accessed: 20/11/2023.

²²³ See CJEU C-484 (para 26-28); CJEU-441/19 (para 49)

²²⁴ Law 4939/2022 (Art. 86 para 4)

²²⁵ National Commission for Human Rights (2021) *Observations on Draft Law of Ministry of Migration and Asylum 'Reform of deportation and return procedures of third country nationals, issues of residence permits and procedures for granting international protection and other provisions within the competence of the Ministry of Migration and Asylum and the Ministry of Citizen Protection*. Available at: [\[https://www.nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/GNCHR_YMA.pdf\]](https://www.nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/GNCHR_YMA.pdf). Accessed: 20/11/2023;

Greek Ombudsman (2021) *Comments and observations on the draft law 'Reformation of procedures for deportations and returns of citizens of third countries, etc'*. Available at:

[\[https://old.synigoros.gr/resources/130921-sxolia-sn-metanasteytiko.pdf\]](https://old.synigoros.gr/resources/130921-sxolia-sn-metanasteytiko.pdf). Accessed: 20/11/2023;

UNHCR (2021) *Reform of deportation and return procedures of third country nationals etc..*

Available at: [\[https://www.refworld.org/docid/61eacbc24.html\]](https://www.refworld.org/docid/61eacbc24.html). Accessed: 20/11/2023.

orders in administrative courts²²⁶. In addition, the extension of the deadline for voluntary departure is given after a relevant application of the TCN, which is examined within 15 days. In the event that the competent authority does not respond within this deadline, it is assumed that the request for an extension of the voluntary departure deadline is implicitly rejected²²⁷. However, authorities should reply with a reasoned decision within a prescribed period, so that the TCN can appeal this decision. The option of implicit rejection risks rendering ineffective -or even virtual- the obligation to examine the application²²⁸.

6. The suspension of the implementation of returns to Turkey on the basis of EU-Turkey Statement since March 2020 creates a wide 'grey zone' and exposes thousands of applicants for international protection, including vulnerable persons, to the risk of being in a situation of legal uncertainty, extreme poverty, deprivation of the right to access health care and reception conditions and/or generalised detention, taking into account that removal to Turkey is not feasible. It is worth mentioning that on 3/2/2023 the Plenary of the Greek Council of State with its decision²²⁹ formulated preliminary questions to the CJEU regarding the National List of Safe Third Countries²³⁰, which includes Turkey as a safe third country, for asylum seekers whose applications are rejected as inadmissible. The Council of State submits questions to the CJEU regarding the influence on the legality of the national list of the fact that, for a long period of time (over 20 months), Turkey refuses the readmission of applicants for international protection, while at the same time it is not clear whether the possibility of a change in Turkey's attitude in the near future has been taken into account.
7. NGOs and official actors denounce that the application of the concept of a safe third country by the Greek authorities, has led to the systematic rejection of applications for international protection on the basis of pre-formulated, similar and repeated decisions (template decision), raising serious doubts as to the individual assessment of applications, as required by national law and Directive 2013/32/EU on Asylum Procedures²³¹.

The application of the Safe Third Country Concept at first instance is extensive even though the suspension of the implementation of the EU-Turkey Statement. Furthermore, at second instance, Appeal Committees systematically refrain from taking position on this issue²³². This consists a breach of the Asylum Procedure Directive (Art. 38 para 4). Additionally, in 2021, GAS has decided²³³ that with regards to subsequent applications lodged by applicants arriving from Turkey whose initial claim has been rejected on the basis of the 'safe third

²²⁶ E.g. Decisions no. 397/2023, 323/2023, 370/2022 Administrative Court (First Instance) of Athens, Decision no. 221/2020 Administrative Court (First Instance) of Thessaloniki, Decision no. N195/2019 of the Administrative Court (Second Instance) of Thessaloniki.

²²⁷ Law 3907/2011 (Art. 36 para 1)

²²⁸ Greek Ombudsman (2021) *Comments and observations on the draft law 'Reformation of procedures for deportations and returns of citizens of third countries, etc'*. Available at: [<https://old.synigoros.gr/resources/130921-sxolia-sn-metanasteytiko.pdf>]. Accessed: 20/11/2023.

²²⁹ Council of State 177/2023. Available at: [<https://rb.gy/5gbouw>]. Accessed: 11/1/2024

²³⁰ JMD 458568/15-12-2021. The decision of the Council of State was issued following a request for annulment by the GRC and RSA against the above JMD.

²³¹ National Commission for Human Rights (2021) *Observations on Draft Law of Ministry of Migration and Asylum 'Reform of deportation and return procedures of third country nationals, issues of residence permits and procedures for granting international protection and other provisions within the competence of the Ministry of Migration and Asylum and the Ministry of Citizen Protection*. Available at: [https://www.nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/GNCHR_YMA.pdf]. Accessed: 20/11/2023.

²³² RSA (2022) *Greece arbitrarily deems Turkey a "safe third country" in flagrant violation of rights*. Available at: [https://rsaegean.org/wp-content/uploads/2022/02/RSA_STC_LegalNote_EN.pdf]. Accessed: 9/1/2024.

²³³ GAS (2021) JMD no. 112808. Available at: [<https://rb.gy/6u29a8>]. Accessed: 9/1/2024.

country' concept, new substantial elements shall exclusively bear on the assessment of the initial application based on the law and the EU-Turkey Statement relating to whether or not Turkey – as a transit country for the individual applicant – constitutes a Safe Third Country. Where no new substantial elements arise, the subsequent application must be dismissed as inadmissible. This constitutes a violation of article 40 para 2 of the Asylum Procedure Directive.

8. The JMD n. 4000/4/32-λα' which determines the criteria for the registration of TCNs to the National List of Undesirable TCNs, following the Convention Implementing the Schengen Agreement stipulates that in the National List, among others, are registered TCNs, whose presence on Greek territory constitutes a threat to national security, public safety or public order. Such a threat exists especially when there are clear indications that the TCN has committed a serious criminal act or indications that s(he) has carried out preparatory acts for the commission of such an act²³⁴. For the legality of the registration in the List, both in the event of a conviction and in the event of the existence of nuanced evidence of the commission of a serious criminal act, the decision of the police should take into account all the circumstances of the crime, and contain a specific justification why the presence of the TCN consists a 'threat' to national security, public safety or public order²³⁵. However, the police register all TCNs in the List based on the fact that at some point s(he) entered irregularly Greece from a non-legislated point of entry into the Greek territory and resided illegally in the country. This wide practice raises concerns as to the violation of the principle of non-refoulement and of Art. 3 of the ECHR.
9. The absence of a distinct humanitarian status for persons who do not qualify for international protection but may nevertheless not be returnable leaves several categories of vulnerable TCNs - notably those who face serious health problems - without the necessary protection and therefore this fact can lead to violation of Article 3 of the ECHR.
10. The decision ordering return or deportation is subject to the limitations of respecting the rules protecting fundamental rights. The violation of art. 3 and 8 of the ECHR is more likely in this case. For this reason, before issuing the decisions, authorities must actually examine thoroughly whether there is a risk of such a violation. And in the event that the TCN consist a danger for public order, a real check of the feasibility, necessity and proportionality of the imposition of the return/deportation measure should be carried out by authorities.
11. While the law provides for alternatives to detention of those issued with a return decision and asylum seekers, the Greek authorities refuse to examine such alternatives, even in cases where a deportation decision cannot be implemented²³⁶. Detention is certainly the rule rather than the exception when there is a decision for return or deportation, despite that existing detention conditions severely violate detainees' rights and dignity²³⁷. This is in

²³⁴ JMD n. 4000/4/32-λα' (Art. 1(b))

²³⁵ Hellenic Data Protection Authority (17.10.2012) Opinion n. 3/2012, pp. 227-228. Available at: https://www.dpa.gr/sites/default/files/2020-12/ARXH%20PROSTASIAS%20APOLOGISMOS%202012_%20WEBUSE.PDF. Accessed: 22/11/2023.

²³⁶ Greek Council for Refugees & Oxfam (2021) *Detention as the Default. Joint Agency Briefing Paper*. Available at: <https://reliefweb.int/attachments/58d7775e-5b03-3940-9134-8a3913d4cabe/bp-detention-as-default-greece-asylum-161121-en.pdf>. Accessed: 20/11/2023.

²³⁷ Greek Ombudsman (2022) *Return of Third Country Nationals. Special Report 2021*. Available at: https://old.synigoros.gr/resources/docs/ethsia-ekthesi_2021_eng.pdf. Accessed: 18/11/2023; BVMN [Border Violence Monitoring Network] (2020). *Annual Torture Report*. Available at: <http://borderviolence.eu/app/uploads/Annual-Torture-Report-2020-BVMN.pdf>. Accessed: 20/11/2023.

- sharp contrast with the legal provision that authorities must take into account if suitable detention facilities are available and if decent living conditions for the detainees are secured.
12. In the context of international protection, decisions are notified, inter alia, electronically (by email). However, many applicants do not have real knowledge of using a computer or are illiterate. For this reason, in the case of a negative decision, it is not always ensured that the applicant received knowledge of the decision regarding the asylum application and the return decision²³⁸.
 13. For both detainees subject to removal and asylum seekers, detention on public order grounds is usually not properly justified and there is a lack of a comprehensive individualised procedure for each detention case, despite the legal obligation to do so. Administrative detention is extensively used, based on the invocation of public order and national security grounds²³⁹. In several cases detention is ordered solely for reasons of illegal entry (obviously contrary to the prohibition on detaining asylum seekers on account of irregular entry)²⁴⁰. Furthermore, the national legislation includes an indicative and non-exhaustive list of criteria for the establishment of a risk of absconding. Thus, other criteria not explicitly defined can also be used for determining the existence of such a risk (obviously contrary to the provision of European law that such criteria ‘must be defined by law’)²⁴¹. Furthermore, the legality of detention²⁴², is subject to an automatic judicial review which, however, regulates the extension of detention only and not the detention per se. Concerns have been expressed regarding the effectiveness of this procedure and statistics seem to confirm that the review is undertaken automatically, with no reference to the specificities of each case.²⁴³
 14. Migrants registered with IOM for assisted voluntary return may also be kept in detention. On the one hand, this applies to those who register for AVRR while in detention and remain detained despite their declared willingness and consent to return. On the other hand, it may also apply to those who register for AVRR while at liberty but get arrested afterwards and are held in detention, again despite that AVRR procedures have already started²⁴⁴.

²³⁸ Greek Ombudsman (2021) *Comments and observations on the draft law ‘Reformation of procedures for deportations and returns of citizens of third countries, etc.’*. Available at: [\[https://old.synigoros.gr/resources/130921-sxolia-sn-metanasteytiko.pdf\]](https://old.synigoros.gr/resources/130921-sxolia-sn-metanasteytiko.pdf). Accessed: 20/11/2023.

²³⁹ Greek Ombudsman (2019) *Return of Third Country Nationals. Special Report 2018*. Available at: [\[https://old.synigoros.gr/resources/english-final.pdf\]](https://old.synigoros.gr/resources/english-final.pdf). Accessed: 20/11/2023.

²⁴⁰ AIDA-ECRE (2023) *Country Report Greece 2022*. Available at: [\[https://asylumineurope.org/reports/country/greece/\]](https://asylumineurope.org/reports/country/greece/). Accessed: 20/09/2023.

²⁴¹ Ibid.

²⁴² L. 3907/2011 (Art. 30 para 3)

²⁴³ AIDA-ECRE (2023) *Country Report Greece 2022*. p. 218 et seq. Available at: [\[https://asylumineurope.org/reports/country/greece/\]](https://asylumineurope.org/reports/country/greece/). Accessed: 20/09/2023;

United Nations Human Rights Council (2013) *Report of the Special Rapporteur on the human rights of migrants, Addendum: Mission to Greece*. p. 13. Available at: [\[https://www.refworld.org/docid/51b983ab4.html\]](https://www.refworld.org/docid/51b983ab4.html), Accessed: 12/1/2024.

²⁴⁴ Interview with IOM staff for GAPs project, 18 October 2023.

15. Incidences of alleged push backs are systematically reported. Organizations and bodies as inter alia the Committee for the Prevention of Torture (CPT)²⁴⁵, UNHCR²⁴⁶, IOM²⁴⁷, the UN Special Rapporteur on the human rights of migrants²⁴⁸, the Council of Europe Commissioner for Human Rights²⁴⁹, European Anti-Fraud Office (OLAF)²⁵⁰, FRONTEX²⁵¹ and civil society organisations²⁵² have raised concerns or have been reported the persisting practice of alleged push backs. The Recording Mechanism of Informal Forced Returns has recorded²⁵³, between February 2022 and December 2022, testimonies of 50 incidents of informal forced returns that, according to the alleged victims, occurred from April 2020 to October 2022. According to the testimonies, the total number of alleged victims in these incidents amounts to at least 2,157 people. Among them are 214 women and 205 children, as well as 103 people with special needs, such as people with medical problems, people with disabilities, the elderly, etc. On 7/7/2022 the ECtHR condemned Greece for the deadly shipwreck that had taken place in 2014 off the coast of the island of Farmakonisi²⁵⁴.
16. While participation in AVR is voluntary in the sense that any participant has the right to withdraw at any time, the wider context in which the program operates is one of coercion, since it is also addressed to migrants issued with a return decision and even detainees.

²⁴⁵ CPT (2020) *Council of Europe's anti-torture Committee calls on Greece to reform its immigration detention system and stop pushbacks*. Available at: [<https://www.coe.int/en/web/cpt/-/council-of-europe-s-anti-torture-committee-calls-on-greece-to-reform-its-immigration-detention-system-and-stop-pushbacks>]. Accessed: 11/1/2024

²⁴⁶ UNHCR (2022) *Press Release: UNHCR warns of increasing violence and human rights violations at European borders*. Available at: [<https://www.unhcr.org/news/news-releases/news-comment-unhcr-warns-increasing-violence-and-human-rights-violations>]. Accessed: 10/1/2024

²⁴⁷ IOM (2022) *Concerned about Increasing Deaths on Greece-Turkey Border*. Available at: [<http://tinyurl.com/3sra3bhu>]. Accessed: 11/1/2024; IOM (2020) *IOM Alarmed over Reports of Pushbacks from Greece at EU Border with Turkey*. Available at: [<https://www.iom.int/news/iom-alarmed-over-reports-pushbacks-greece-eu-border-turkey>]. Accessed: 11/1/2024

²⁴⁸ United Nations, General Assembly (2022) *Human Rights Violations at International Borders: Trends, Prevention and Accountability: Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales, A/HRC/50/31, 26 April 2022*. Available at: [<https://daccess-ods.un.org/tmp/3621627.98643112.html>]. Accessed: 19/12/2023.

²⁴⁹ Commissioner for Human Rights (2021) *Greek authorities should investigate allegations of pushbacks and ill-treatment of migrants, ensure an enabling environment for NGOs and improve reception conditions*. Available at [<http://tinyurl.com/ht5byny6>]. Accessed: 11/1/2024

²⁵⁰ OLAF (2021) *Final Report: Case No OC/2021/0451/A1*. Available at: [https://cdn.prod.www.spiegel.de/media/00847a5e-8604-45dc-a0fe-37d920056673/Directorate_A_redacted-2.pdf]. Accessed: 11/1/2024

²⁵¹ Ekathimerini (2023) *Frontex seeks answers from Greece on alleged 'pushbacks' of migrants*. Available at: [<https://www.ekathimerini.com/news/1214437/frontex-seeks-answers-from-greece-on-alleged-pushbacks-of-migrants>]. Accessed: 11/1/2024; Frontex (2022) *Fundamental Rights Officer Annual Report 2021*. Available at:

[https://www.frontex.europa.eu/assets/Images_News/2022/FRO_Report_2021.pdf]. Accessed: 11/1/2024

²⁵² AIDA (2023) *Country Report Greece 2022*. Available at: [<https://asylumineurope.org/reports/country/greece/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/>]. Accessed: 20/09/2023; RSA (2023) *Beyond Farmakonisi*. Available at: [<https://rsaegean.org/en/beyond-farmakonisi>]. Accessed: 10/1/2024; RSA (2022) *Systemic breaches of the rule of law and of the EU asylum acquis at Greece's land and sea borders*. Available at: [https://rsaegean.org/en/greece_cso_briefing_libe]. Accessed: 11/1/2024

²⁵³ Recording Mechanism of Informal Forced Returns (2023) *Recording Mechanism of Informal Forced Returns Annual Report*. Available at: [https://nchr.gr/images/pdf/RecMechanism_fin.pdf]. Accessed: 20/09/2023. (in Greek).

²⁵⁴ ECtHR, *Safi and others v. Greece* (appeal no. 5418/15)

AVRR risks being a ‘facade’ of ‘voluntariness’ for migrants who face ‘the tough dilemma of absconding or departing “voluntarily”’²⁵⁵.

17. A comparison of funding flows²⁵⁶ reveals that AVRR program organised and operated by IOM in Greece has received 53.7 million euros since 2016 from AMIF, which is less than the 77.2 million euros directed from the same Fund to the and other agencies for the implementation of forced returns, or the 121.4 million euros granted in 2020 for the construction cost of three reception centres in the islands of Samos, Kos and Leros²⁵⁷. Moreover, the resources that are given for the design and the implementation of reintegration schemes in AVRR amount to 10% of potential returnees of the program for the current implementation period (2023-2027), in comparison with 25% of returnees in 2016-2019²⁵⁸.
18. Moreover, existing legal inconsistencies are accompanied by poor available data on returns. Important data for Greece are missing in Eurostat and national databases, such as about the number of return decisions issued for applicants of international protection. Other data are of poor quality, as it happens with data about returned TCNs which are completely wrong when cross-tabulated by type of return. In short, the ‘gaps’ (observed) in (relation to) the data can be summarised as follows:
 - a. Between different categories of data, reflecting disparities (a) between administrative procedures towards returns (e.g. order to leave the country upon apprehension) and actual enforcement/implementation of returns, as well as (b) between different nationalities/countries, indicating variations between intergovernmental agreements on return and readmission.
 - b. Between different data sources on returns, e.g. disparities in data from Eurostat and from Greek sources regarding the same categories, or even within the same source, e.g. Eurostat: e.g. annual data table of ‘TCNs returned following an order to leave’ shows different figures from quarterly data table on the same category by type of return (among other variables)
 - c. Between terms/labels describing different types/categories of returns in the data in different years; shifts in terminology are also apparent in official public statements reporting on the data, e.g. ministerial press releases refer to ‘expulsions’ in 2021 but ‘deportations’ in 2022 to describe the very same category of (forced) returns. Data labels are also inconsistent with the legal terminology discussed in the dossier, especially before 2020. These observations may partly point to shifts in systems of recording and reporting on data over the years, alongside (in)consistency between statistical and legal categories and (lack of) convergence with EU terminology (both appear to be less common in recent years).

²⁵⁵ Triandafyllidou, A. & Ricard-Guay, A. (2019) Governing irregular and return migration in the 2020s: European challenges and Asian Pacific perspectives. *Journal of Immigrant & Refugee Studies*, 17(2), 115-127.

²⁵⁶ See Section 7.

²⁵⁷ European Commission (2020) *Migration: Commission and Greece agree joint plan for a new reception centre in Lesbos*. Press release. Available at:

[https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2287]. Accessed: 20/09/2023.

²⁵⁸ IOM Greece (2019) *The Implementation of Assisted Voluntary Returns Including Reintegration Measures (AVRR)*. Final Report. Available at:

[https://greece.iom.int/sites/g/files/tmzbd11086/files/documents/IOM%20Greece%20Implementation%20of%20AVRR_EN.pdf]. Accessed: 20/09/2023.

9. Policy Suggestions

One of the most important aspects of the national legislation on return migration in Greece is the simultaneous existence of different legal frameworks that stipulate divergent procedures and undermine the implementation of the Return Directive. At the same time, the system of return governance consists of several national, supranational and international actors and is overall characterised by complexity both on paper and in practice. As it has been stressed by NGOs²⁵⁹, the disambiguation of legal procedures regarding return and deportation is necessary, especially in terms of their implementation in cases of irregular entry. Greece must retain only the standards of Law 3907/2011 (transposition of the Return Directive) of to provide a persuasive policy basis on the need to maintain a parallel framework under L. 3386/2005. Furthermore, the systematic practice²⁶⁰ of issuing return/deportation decisions to TCNs who have already been subjected to reception and identification procedures and have already expressed their will to apply for international protection actually exclude asylum seekers from the scope of application of the Return Directive. Therefore, police authorities must have clear guidance on their duties, while detention of asylum seekers should not be used by default or mandatory for all arrivals but rather remain the exemption²⁶¹.

While the general responsibility for planning and coordinating return migration policy belongs to the MMA and its semi-autonomous GAS, the police is also a key actor in the system of return migration governance, especially in what concerns administrative expulsions, return decisions, decisions on detention and the management of the detention system. Since the police authorities are organisationally independent from the MMA, it is of crucial importance to ensure their accountability in the implementation of returns and their compliance with basic guarantees.

Detention of migrants for purposes of return is extensively and arbitrarily used in various different cases, even for applicants of international protection and migrants who have registered for assisted voluntary return. The Greek Ombudsman²⁶² has provided several recommendations to substantially improve living conditions and respect to detainees' rights and dignity, including thorough medical examination of all returnees and issue of individual fit-to-travel certificates, ensuring that returnees have been informed of their rights and timely notified of the return operation, the presence of interpreters throughout the operation, sufficient supply of materials etc. The same independent authority notes that a large number of TCNs continue to be held in police stations, due to insufficient pace in detention facilities, and stresses that this is inconsistent with the duty of the Authorities to ensure decent living conditions.

²⁵⁹ RSA, GCR, HIAS, DRC (2021) *Observations on the Draft Law 'Reformation of procedures for deportations and returns of third-country nationals, issues of residence permits and procedures for granting international protection*. Available at: [<https://shorturl.at/coqTY>]. Accessed: 15/11/2023.

²⁶⁰ RSA (2022) *Persisting systematic detention of asylum seekers in Greece*. Available at: [https://rsaegian.org/wp-content/uploads/2022/06/RSA_LN_Detention_EN.pdf]. Accessed: 12/1/2024

²⁶¹ UNHCR (2021) *Reform of deportation and return procedures of third country nationals etc*. Available at: [<https://www.refworld.org/docid/61eacbc24.html>]. Accessed: 20/11/2023

²⁶² The Greek Ombudsman (2022) *Return of Third Country Nationals. Special Report 2021*. Available at: [ethsia-ekthesi-2021-eng.pdf (synigros.gr)]. Accessed: 18/11/2023;
The Greek Ombudsman (2019) *Return of Third Country Nationals. Special Report 2018*. Available at: [<https://old.synigros.gr/resources/english-final.pdf>]. Accessed: 20/11/2023.

However important these improvements may be, the Greek administration has to revise the use of detention which is a non-punitive administrative measure, must be a last ‘resort’ and alternatives to detention have to be implemented. The best interests of the child, family life and state of health of illegally staying TCNs should always be duly considered in the context of return procedures²⁶³.

The AVRR program run by IOM provides the ground for a more humane approach to return migration, with an eye on sustainable reintegration prospects in countries of origin - at least for the limited number of beneficiaries for reintegration. In order to contribute to the establishment of a genuine voluntary alternative, authorities should disassociate assisted voluntary return from detention, at least by releasing those registered for assisted voluntary return. The operation of the Open Centre for AVRR in Athens can be seen as an alternative infrastructure that improves the return process and contributes to sustainable reintegration prospects.

²⁶³ Ibid.

10. Conclusions

Greece has a quite long record of formal, informal, and irregular return migration policies and practices. Informal deportation practices that were taking place during the 1990s, in a period of massive migration from Albania and other Balkan countries, soon crystallised in legal provisions about ‘administrative expulsion’ as a basic tool for combatting and deterring irregular migration. When migration routes changed to include more distant countries of origin to which deportation was not feasible or was taking a long time, a prolonged and summary detention became an intrinsic part of the rationale of expulsion.

The harmonization of the national legislation with European legislation and the Return Directive did not challenge this intrinsic link among returns and detention. On the contrary, it highlighted and intensified the gaps in policy and practice, especially since the older legal framework on administrative expulsions was not abolished and remains complementary to return procedures. Thus, an ambiguity between notions, different legislation, and relevant procedures, remains an integral part of the legal landscape in the country. Additionally, the aforementioned link between detention and expulsion was not challenged even after the recent institutionalisation of returns, a trend which is evident due to the recent establishment of the Directorate of Returns and Withdrawals of the GAS, in parallel with the (re)establishment of the MMA in 2020 as well as the establishment of the position of a National Coordinator of Returns in late 2023. As a result, return and detention seem to be closely tied together in Greece and return migration policies are determined by high levels of coercion.

A similar ambiguity concerns the competent actors and their powers, as the institutional framework is characterised by both the complexity of the involved authorities.

National legislation emphasises forced return and detention, while assisted voluntary return is underdefined in legal terms. This fact, along with prioritisation of funding for forced removals as opposed to assisted return indicate that more attention is given by the authorities to the fulfilment of certain targets of removing irregular migrants and rejected applicants for international protection than to sustainable reintegration as part of a migration trajectory.

The pervasive imposition of detention in returns, as well as the pressure for more ‘efficient’ and rapid return decisions and procedures (especially at the borders), risks to seriously jeopardising the right to asylum as well as the human rights of those who are apprehended, ‘illegalised’ and detained. Furthermore, as the notion – and the practice – of returns to a ‘safe third country’ gains ground, further concerns about the rights of those ‘expulsed’ are repeatedly raised by relevant organisations.

In addition to the above, the illegal yet widespread practice of land and sea pushbacks becomes simultaneously a ‘non-existence’ practice (as it is denied by the government) and an extensively evidenced reality (according to numerous reports and investigations) which de facto violates both international refugee, humanitarian and human rights law and puts people’s lives at serious risk. Thus, both legal and administrative decisions and practices and irregular state practices need to be substantially reconsidered and challenged if respect for human and other rights is to be safeguarded. And this arguably also as a core rule of law priority, as this has pervasive effect on effectiveness of the justice system, civic space, media freedom etc.

Appendices

Annex I: Statistics

STATISTICS: GREECE, Latest Update: 23.12.2023																		
														Alternative 1	Alternative 2			
Year	TCNs found to be illegally present (data in Eurostat)	Asylum applications ²⁶⁴	TCNs refused entry at the border	pushbacks	Dublin returns ²⁶⁵	TCNs ordered to leave	TCNs returned following an order to leave	Third country unaccompanied minors returned following an order to leave	TCNs who have left to the territory by citizenship ²⁶⁶	TCNs returned following an order to leave, by type of return ²⁶⁷				Assisted Voluntary Return (AVR), departed migrants ²⁶⁸	returns-departures (according to the Greek Ministry of Migration & Asylum)			
										assisted 'voluntary' return	assisted forced return	non-assisted 'voluntary' return	Total		forced		'voluntary' ²⁶⁹	IOM (assisted 'voluntary')
															compulsory expulsions ²⁷⁰	border deportation ²⁷¹		
2015	911,470	13,205	6,890		847	104,575	14,390	N/A	N/A	N/A	N/A	N/A	N/A					

²⁶⁴ Disparities (gaps) between Eurostat data and official national sources (Ministry of Migration & asylum)

²⁶⁵ Data show the number of outgoing requests transferred (not requests or decisions on requests), Transfer refer to '(taking charge/taking back) which have been effectively carried out by the reporting Member State (Geo)(=Greece) to another Member State'. (see https://ec.europa.eu/eurostat/cache/metadata/en/migr_dub_esms.htm)

²⁶⁶ There are disparities (gaps) in the data: for 2021, with column J; for 2020 with other Eurostat Tables

(https://ec.europa.eu/eurostat/databrowser/view/migr_eirt_ass_custom_8197816/default/table?lang=en),

(https://ec.europa.eu/eurostat/databrowser/view/migr_eirt_agr/default/table?lang=en), for 2020 (6952)-2021 (6855)-2022 (6985) in other tables

(https://ec.europa.eu/eurostat/databrowser/view/migr_eirt_agr/default/table?lang=en)

²⁶⁷ Slight disparities between totals and sums of 3 types for 2022 & 2023

²⁶⁸ Source: Written communication with IOM Greece for GAPs, 25 October 2023.

²⁶⁹ Voluntary: οικειοθελής. For the years 2019-2020 this category is called "returns" specified as "Based on the simplified readmission procedure from the northern borders of the country".

²⁷⁰ Compulsory expulsions: 'αναγκαστικές απελάσεις'

²⁷¹ Border deportations: 'Επαναπροωθήσεις', literally 're-forwardings'. For the years 2019-2020 this category is specified as "returns in the context of the returns directive (article 22 L. 3907/2011) following a return order with a deadline for voluntary departure, holders of a 78α certificate, withdrawal from an asylum claim.

2016	204,820	51,110	18,145		890	33,790	19,055	N/A	N/A	N/A	N/A	N/A	N/A	16,960 ²⁷²	9,432	3,566	N/A	6,153
2017	68,110	58,660	21,175		4,467	45,765	18,060	N/A	N/A	N/A	N/A	N/A	N/A		9,036	4,403	N/A	5,657
2018	93,365	66,975	14,295		5,447	58,325	12,465	N/A	12,488	N/A	N/A	N/A	N/A		5,776	2,000	N/A	4,968
2019	123,025 ²⁷³	77,285	7,015		2,546	78,880	9,650	N/A	N/A	N/A	N/A	N/A	N/A		3,889	979	1,184	3,854
2020	47,295	40,560	3,145	2,157 ²⁷⁴	1,825	38,540	6,950	N/A	6,083	N/A	N/A	N/A	645 ²⁷⁵	10,920 ²⁷⁶	3,660		926	2,565
2021	38,015	28,355	3,075		1,549	28,815	6,855	15	6,875	2,740	3,145	995	6,880		3,276 ²⁷⁷		1,000	2,737
2022	49,060	37,380	5,450		1,037	33,500	6,985	5	N/A	3,070	2,560	1,390	7,015		2,763		1,397	3,065
2023								5 ²⁷⁸		1,865	1,850	525	4,250 ²⁷⁹		268 ²⁸⁰		669	2497
Data sources:	eurostat	eurostat	eurostat	Recording Mechanism of Infor	eurostat	eurostat	eurostat	eurostat	eurostat	eurostat	eurostat	eurostat		IOM	2020-23: Greek Ministry of Migration & Asylum ²⁸¹			

²⁷² June 2016 - August 2019.

²⁷³ Disparities (gaps) between Eurostat data and official national sources (Hellenic Police) for 2019 (no available data published online after that year).

²⁷⁴ Number of alleged victims in 50 incidents of informal forced returns that occurred from April 2020 to October 2022, according to the testimonies.

²⁷⁵ Second quarter only.

²⁷⁶ September 2019 - August 2023.

²⁷⁷ Data for 2021 are missing from the English version of the website, yet they do appear in the Greek version.

²⁷⁸ First 2 quarters. For 2021 nationalities & types of return are recorded, for 2022-23 such details are not stated.

²⁷⁹ First 3 quarters. Disparities (gaps) with annual data (column J)

²⁸⁰ Data for 2023 cover January to November.

²⁸¹ All data are from the Greek Ministry of Civil Protection: Yet, 2016-19 data are downloaded from the government data repository (also available on the portal for European data), while 2020-2023 data come from the Ministry of Migration & Asylum's website (see above). All data are monthly, yet for 2016-19 annual sums are based on our calculations, while for 2020-23 (see International Protection – Appendix) we use the totals as in the reports (each month's report contains info about all previous months of the same year). The first source contains also 2020 data, which match the second source for that year; similarly, IOM returns for June 2016-August 2019 are consistent with IOM data in Column Q. However, if sums of all 3 types of returns are calculated for 2021 & 2022 quarterly, these do not much Eurostat quarterly data in Appendix 4 on which Column P data are based. The first source breaks down the 'forced' category into 2 sub-categories: 'compulsory expulsions' and 'border deportations'.

Annex II: List of Authorities Involved in the Migration Return Governance (Defined and Authorised by the Law)

Authority (English and original name)	Tier of government	Type of organisation	Area of competence in the fields of return	Link
Ministry of Migration and Asylum - Directorate of Returns and Withdrawals (Υπουργείο Μετανάστευσης και Ασύλου - Διεύθυνση Επιστροφών και Ανακλήσεων)	National	Government	Coordinates, monitors and participates in the planning of the management of readmission, return, deportation or relocation procedures.	https://migration.gov.gr/en/ https://migration.gov.gr/gas/dioikisi/
Ministry of Migration and Asylum – Asylum Service (Υπουργείο Μετανάστευσης και Ασύλου – Υπηρεσία Ασύλου)	National/ Regional	Government	Receives and processes international protection applications; contributes to the formulation of Greek policy on international protection; cooperates with international organisations and EU institutions	https://migration.gov.gr/en/gas/
Ministry of Migration and Asylum - Appeals Authority (Υπουργείο Μετανάστευσης και Ασύλου – Αρχή Προσφυγών)	National	Government	Examines applications for international protection at second instance, issues return decisions	https://migration.gov.gr/en/appeals/
Ministry of Migration and Asylum – General Directorate for the Coordination and Management of Programs on Migration and Internal Affairs (Υπουργείο Μετανάστευσης και Ασύλου – Γενική Διεύθυνση Συντονισμού και Διαχείρισης Προγραμμάτων Μετανάστευσης και Εσωτερικών Υποθέσεων)	National	Government	Responsible for the coordination of the funded actions from AMIF, including those that aim at developing capacities for effective and sustainable return and reducing incentives for irregular migration	https://migration.gov.gr/dg-coordination-management-amif-isf-otherfunds/
Hellenic police - Ministry of Citizen Protection (Ελληνική Αστυνομία - Υπουργείο Προστασίας του Πολίτη)	National/ Regional	Government	Issues return and administrative expulsion decisions, implements removal operations, runs detention facilities.	https://www.astynomia.gr/?lang=en
Department of Analysis and Documentation of the National Coordinating Centre for Border Control and Surveillance (NCCBS) - Ministry of Citizen Protection (Τμήμα Ανάλυσης και	National	Government	Monitors the process of returning migrants	https://www.minocp.gov.gr/ethniko-syntonistikio-kentro-elegchou-kai-epitirisi-synoron-eskees/diarthrosi-eskees/

Τεκμηρίωσης του Εθνικού Συντονιστικού Κέντρου Ελέγχου και Επιτήρησης Συνόρων (ΕΣΚΕΕΣ) - Υπουργείο Προστασίας του Πολίτη)				
Department of International Relations of the National Coordinating Centre for Border Control and Surveillance (NCCBS) - Ministry of Citizen Protection (Τμήμα Διεθνών Σχέσεων του Εθνικού Συντονιστικού Κέντρου Ελέγχου και Επιτήρησης Συνόρων (ΕΣΚΕΕΣ) - Υπουργείο Προστασίας του Πολίτη)	National	Government	Monitors the initiatives of the competent authorities to conclude police cooperation agreements and readmission agreements with the competent authorities of other States and ensure their implementation	https://www.minocp.gov.gr/ethniko-syntonistiko-kentro-elegchou-kai-epitirisi-synoron-eskees/diarthrosi-eskees/
Decentralized Administrations - Foreigners and Immigration Services (Αποκεντρωμένες Διοικήσεις -	Regional	Regional government	Receives and processes applications of TCNs	https://www.ypes.gr/apokentromeni-dioikisi-aytodioikisi/
Frontex	European	Supranational	Organises, coordinates and conducts return operations.	https://www.frontex.europa.eu/
Greek Ombudsman (Συνήγορος του Πολίτη)	National	Independent Authority	Monitors the system of returns to ensure transparency and protection of fundamental rights	https://www.synigoros.gr/en
IOM Greece (Διεθνής Οργανισμός Μετανάστευσης Ελλάδας)	International	International Organisation	Organises and implements AVRR	https://greece.iom.int
Civil society actors (Φορείς της Κοινωνίας των Πολιτών)	International/ National/ Local	NGOs, International Organisations, etc.	Provide health care and medical treatment services in the detention facilities; Mediate to inform the TCN about the return decision; Provide confirmation of the voluntary departure	
Greek National Commission for Human Rights (GNCHR) (Εθνική Επιτροπή για τα Δικαιώματα του Ανθρώπου (ΕΕΔΑ)	National	Independent Authority	Implements a Recording Mechanism of Informal Forced Returns	https://nchr.gr/en/recording-mechanism.html

Source: Authors' own elaboration

Annex III: Overview of the Legal Framework on Return Policy

The Title of the Policy/Legislation in English	The Title in the Original Language	Policy Area	Date/Announced Year	Active Period	Key terms	Type of Legislation	Target Group or Immigrant Category
Law 5038/2023 "Migration Code" & its amendments	Νόμος 5038/2023 «Κώδικας Μετανάστευσης»	irregularity , border management	Published on 1/4/2023	With few exceptions it will come into effect from 31/3/2024. Last Amendment on 13.04.2023 by L. 5043/2023	return; entry ban	Law	irregular migrant, family of irregular migrant
Law 4939/2022 "Ratification of the Code on reception, international protection of third-country nationals and stateless persons, and on temporary protection in cases of mass influx of displaced migrants" & its amendments	Νόμος 4939/2022 «Κύρωση Κώδικα Νομοθεσίας για την υποδοχή, τη διεθνή προστασία πολιτών τρίτων χωρών και ανιθαγενών και την προσωρινή προστασία σε περίπτωση μαζικής εισροής εκτοπισθέντων αλλοδαπών»	general/asylum, pre-removal detention	Published on 10/6/2022	Last Amendment on 22.07.2022 by L. 4960/2022	return; return decision; detention of asylum seekers; Pre-removal detention; Forced Repatriation; Readmission of beneficiaries of temporary protection	Law	general/asylum, refugees, rejected asylum seeker
Law 4825/2021 "Reform of deportation and return procedures of third country nationals, etc."	Νόμος 4825/2021 «Αναμόρφωση διαδικασιών απελάσεων και επιστροφών πολιτών τρίτων χωρών κλπ.»	forced return, border management	Published on 4/9/2021	Last amendment on 18.03.2023 by L. 5034/2023	application of return procedures; Voluntary return; return decision;	law	irregular migrant, rejected asylum seeker
Law 4686/2020 "Improvement of the migration legislation, amendment of L. 4636/2019 (A' 169), 4375/2016 (A' 51), 4251/2014 (A' 80) and other provisions" & its amendments	Ν. 4686/2020 «Βελτίωση της μεταναστευτικής νομοθεσίας, τροποποίηση διατάξεων των νόμων 4636/2019 (Α' 169), 4375/2016 (Α' 51), 4251/2014 (Α' 80) και άλλες διατάξεις»	general/asylum, pre-removal detention	Published on 12/05/2016	Last amendment on 10.06.2022 by L. 4939/2022	return; return decision; detention	Law	general/asylum, refugees, rejected asylum seeker
Law 4636/2019 "on international protection and other provisions" & its amendments	Νόμος 4636/2019 «Περί Διεθνούς Προστασίας και άλλες διατάξεις»	general/asylum, forced return, pre-	Published on 01/11/2019	Abolished by L. 4939/2022 with few exceptions	return; return decision; detention of asylum seekers; pre-removal detention	Law	general/asylum, refugees, rejected asylum seeker

		removal detention					
Law 4540/2018 "Adaptation of Greek legislation to the provisions of Directive 2013/33/EU etc."	Νόμος 4540/2018 «Προσαρμογή της ελληνικής νομοθεσίας προς τις διατάξεις της Οδηγίας 2013/33/ΕΕ κλπ.»	general/as ylum	Published on 22/5/2018	Articles 1-20 were abolished by L. 4636/2019. Last amendment by L. 4939/2022	detention;	Law	general/asylum
Law 4375/2016 "Organisation and functioning of the Asylum Service, Appeals Authority, Reception and Identification Service, etc." & its amendments	Νόμος 4375/2016 «Οργάνωση και λειτουργία Υπηρεσίας Ασύλου, Αρχής Προσφυγών, Υπηρεσίας Υποδοχής και Ταυτοποίησης κλπ.»	general/as ylum	Published on 3/4/2016	Last amendment on 14.12.2022 by L. 5003/2022. Many articles (regarding the transposition of Directive 2013/32/EU) were abolished by Law 4636/2019	return; return decision; detention;	Law	general/asylum, refugees, rejected asylum seeker
Law 4251/2014 "Immigration and Social Integration Code and other provisions" & its amendments.	Νόμος 4251/2014 «Κώδικας Μετανάστευσης και Κοινωνικής Ένταξης και λοιπές διατάξεις»	irregularity	Published on 1/4/2014	It replaced the vast majority of the provisions of L. 3386/2005. From 1/1/2024 is going to be replaced by L. 5038/2023.	return; entry ban	Law	irregular migrant, family of irregular migrant
Law 4052/2012 "Law on the competence of the Ministries of Health and Social Solidarity and of Labor and Social Security for the implementation of the law "Approval of Draft Financial Facility Agreements between the European Financial Stability Fund etc."	Νόμος 4052/2012 «Νόμος αρμοδιότητας Υπουργείων Υγείας και Κοινωνικής Αλληλεγγύης και Εργασίας και Κοινωνικής Ασφάλισης για εφαρμογή του νόμου «Έγκριση των Σχεδίων Συμβάσεων Χρηματοδοτικής Διευκόλυνσης μεταξύ του Ευρωπαϊκού Ταμείου Χρηματοπιστωτικής Σταθερότητας κλπ.»	irregularity	Published on 01/03/2012	Last amendment by L. 5038/2023		Law	
Law 3907/2011 "on the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC etc." & its amendments	Νόμος 3907/2011 «Ίδρυση Υπηρεσίας Ασύλου και Υπηρεσίας Πρώτης Υποδοχής, προσαρμογή της ελληνικής νομοθεσίας προς τις διατάξεις της Οδηγίας 2008/115/ΕΚ»	forced return, pre- removal detention, irregularity	Published on 26/01/2011	Last amendment on 4.9.2021 by L. 4825/2021	return, return decision; removal order; voluntary return; vulnerable persons, entry ban, detention, emergency situations	Law	irregular migrant, rejected asylum seeker

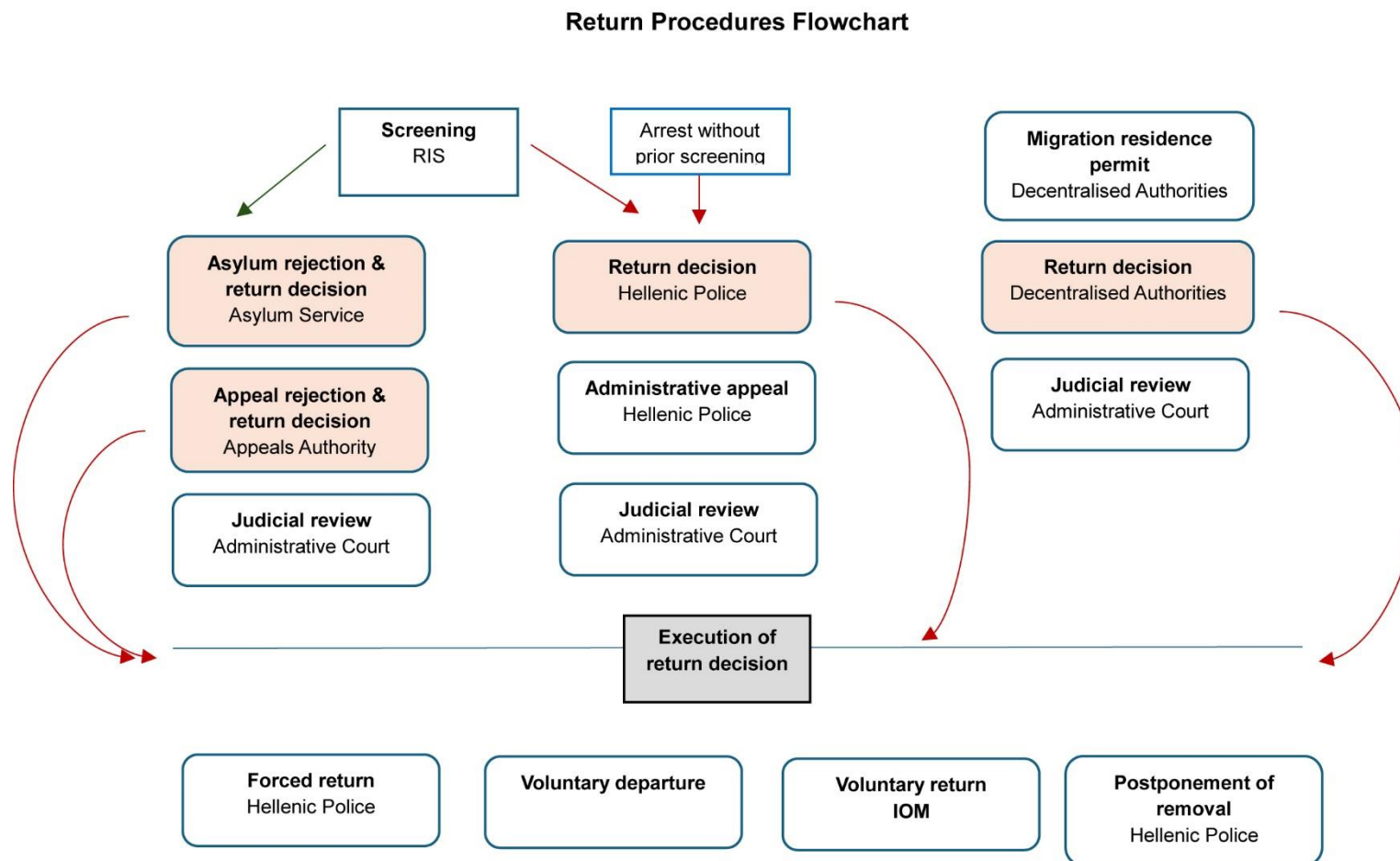
Presidential Decree 106/2007 "Free movement and residence in the Greek territory of citizens of the European Union and their family members" & its amendments	Προεδρικό Διάταγμα 106/2007 «Ελεύθερη κυκλοφορία και διαμονή στην ελληνική επικράτεια των πολιτών της Ευρωπαϊκής Ένωσης και των μελών των οικογενειών τους»	forced return	Published on 21/06/2007	Active	expulsion	Degree	
Law 3386/2005 "Entry, residence and social integration of Third Country Nationals on the Greek territory" & its amendments	Νόμος 3386/2005 «Είσοδος, διαμονή και κοινωνική ένταξη υπηκόων τρίτων χωρών στην Ελληνική Επικράτεια»	forced return, pre-removal detention	Published on 23/08/2005	Abolished by: L. 4251/2014 except for Articles 76, 77, 78, 80, 81, 82, 83, 89(1) - (3) Amended by: Law 4332/2015	detention; expulsion; readmission; illegal entry; illegal exit	Law	irregular migrant
Presidential Decree 124/1997 "Establishment of a travel document (Laissez-Passer) for TCN under removal" & its amendments	Προεδρικό Διάταγμα 124/1997 «Καθιέρωση ταξιδιωτικού εγγράφου (Laissez-Passer) για τους υπό απομάκρυνση αλλοδαπούς υπηκόους τρίτων χωρών».	forced return	Published on 03/06/1997	Active	removal	Decree	irregular migrant
Joint Ministerial Decision no. Οικ. 78391/15.02.2022 "Establishment of a national List of countries of origin considered as safe pursuant to para. 5 of Article 87 of Law 4636/2019"	ΚΥΑ υπ' αριθμ. οικ. 78391/15.02.2022 «Κατάρτιση Εθνικού Καταλόγου χωρών καταγωγής που χαρακτηρίζονται ως ασφαλείς, σύμφωνα με την παρ. 5 του άρθρου 87 του νόμου 4636/2019»	general/asylum	Published on 15/2/2022	Remains valid (Joint Ministerial Decision n. 734214/12.02.2022)	safe countries of origin		general/asylum
Joint Ministerial Decision no. 538695 "Definition of third countries characterized as safe and preparation of a national list as defined in article 91 of Law 4939/2022 (A' 111)""	Κοινή Υπουργική Απόφαση υπ' αριθμ. 538695 «Καθορισμός τρίτων χωρών που χαρακτηρίζονται ως ασφαλείς και κατάρτιση εθνικού καταλόγου κατά τα οριζόμενα στο άρθρο 91 του ν. 4939/2022 (Α' 111)»	general/asylum	Published on 15/12/2023	Remains valid	safe Third countries		general/asylum
Joint Ministerial Decision no. 458568/16.12.2021 "Amendment of no 42799/03.06.2021 Joint Ministerial Decision of the Minister of Foreign Affairs and the Minister of Migration and Asylum "Designation of third countries as safe and establishment of national list pursuant to Article 86 of Law 4636/2019 (A' 169)" (B'2425)"	Κοινή Υπουργική Απόφαση υπ' αριθμ 458568 «Τροποποίηση της υπ' αρ. 42799/03.06.2021 κοινής απόφασης των Υπουργών Εξωτερικών και Μετανάστευσης και Ασύλου «Καθορισμός τρίτων χωρών που χαρακτηρίζονται ως ασφαλείς και κατάρτιση εθνικού καταλόγου κατά τα οριζόμενα στο άρθρο 86 του νόμου 4636/2019 (Α' 169)» (B'2425)»	general/asylum	Published on 16/12/2021	Abolished by Joint Ministerial Decision no. 538695/15.12.2023	safe Third countries		general/asylum

Joint Ministerial Decision no. 42799/7.6.2021 "on designation of third countries as safe and establishment of a national list pursuant to Article 86 of Law 4636/2019"	Κοινή Υπουργική Απόφαση υπ' αριθμ. 42799/7.6.2021 «Καθορισμός τρίτων χωρών που χαρακτηρίζονται ως ασφαλείς και κατάρτιση εθνικού καταλόγου, κατά τα οριζόμενα στο άρθρο 86 του νόμου 4636/2019»	general/asylum	Published on 7/6/2021	Amended by the Joint Ministerial Decision no. 458568 (16.12.2021)	safe Third countries		general/asylum
Joint Ministerial Decision no. 788/29.01.2021 "on the establishment of a national List of countries of origin considered as safe pursuant to para. 5 of Article 87 of Law 4636/2019"	ΚΥΑ υπ' αριθμ. 778/29.01.2021 «Κατάρτιση Εθνικού Καταλόγου χωρών καταγωγής που χαρακτηρίζονται ως ασφαλείς, σύμφωνα με την παρ. 5 του άρθρου 87 του νόμου 4636/2019»	general/asylum	Published on 29/1/2021	Abolished by Joint Ministerial Decision no. 78391/15.02.2022	safe countries of origin		general/asylum
Joint Ministerial Decision no. 1302/31.12.2019 "on the establishment of a National List of countries of origin characterized as safe according to with article 87 par. 5 of Law 4636/2019".	Κοινή Υπουργική Απόφαση υπ' αριθμ. 1302/31.12.2019 «Κατάρτιση Εθνικού Καταλόγου χωρών καταγωγής που χαρακτηρίζονται ως ασφαλείς σύμφωνα με το άρθρο 87 παρ. 5 του νόμου 4636/2019».	general/asylum	Published on 31/12/2019	Replaced by Joint Ministerial Decision no. 788/29.01.2021	safe countries of origin		general/asylum
Joint Ministerial Decision no. 82136/11.02.2022 "Amendment of the joint ministerial decision 8038/23/22-ιγ'/20-01-2015 "Establishment and operation of Pre-removal Detention Centers for aliens and Regulation of their Operation"	ΚΥΑ υπ' αριθμ. 2136/11.02.2022 «Τροποποίηση της υπό στοιχεία 8038/23/22-ιγ'/20-01-2015 κοινής υπουργικής απόφασης «Ίδρυση και λειτουργία Προαναχωρησιακών Κέντρων Κράτησης Αλλοδαπών και Κανονισμός Λειτουργίας αυτών»	pre-removal detention	Published on 11/02/2022	Active	Pre-removal Detention Centers		general/asylum, irregular migrant
Joint Ministerial Decision n. 8038/23/22-ιγ'/21.1.2015 "Establishment and functioning of Pre-removal Centres of Detention of Aliens, and their regulations"	Κοινή Υπουργική Απόφαση υπ' αριθμ. 8038/23/22-ιγ'/21.1.2015 «Ίδρυση και λειτουργία Προαναχωρησιακών Κέντρων Κράτησης Αλλοδαπών και ρυθμίσεις αυτών»	pre-removal detention	Published on 21/1/2015	Amended by Joint Ministerial Decision no. 82136/11.02.2022	Pre-removal Detention Centers		
Presidential Decree 53/2008 "Adaptation of Greek legislation to the provisions of Directive 2004/82/EC of the Council of the European Union of 29 April 2004 (EEL 261/24 of 6.8.2004), on the obligation of carriers to communicate passenger data"	Προεδρικό Διάταγμα 53/2008 «Προσαρμογή της Ελληνικής νομοθεσίας προς τις διατάξεις της Οδηγίας 2004/82/ΕΚ του Συμβουλίου της Ευρωπαϊκής Ένωσης της 29ης Απριλίου 2004 (ΕΕΛ 261/24 της 6.8.2004), σχετικά με την υποχρέωση των αερομεταφορέων να κοινοποιούν τα στοιχεία των επιβατών»		Published on 9/05/2008	Active		Decree	

Presidential Decree 54/2007 "Assistance during the removal by air of nationals of third countries Directive 2003/110/EC"	Προεδρικό Διάταγμα 54/2007 «Συνδρομή κατά τις απομακρύνσεις δια της αεροπορικής οδού υπηκόων τρίτων χωρών Οδηγία 2003/110/EK»	forced return	Published on 13/03/2007	Active	removal	Decree	irregular migrant
Presidential Decree 214/2004 "Adaptation of Greek legislation to Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the removal of third-country nationals"	Προεδρικό Διάταγμα 214/2004 «Προσαρμογή της ελληνικής νομοθεσίας στην Οδηγία 2001/40/EK του Συμβουλίου της 28ης Μαΐου 2001 (ΕΕ L 149) για την αμοιβαία αναγνώριση αποφάσεων απομάκρυνσης υπηκόων τρίτων χωρών»	forced return	Published on 15/10/2004	Active	removal	Decree	irregular migrant
Joint Ministerial Decision no. 4000/4/46-α' /27.07.2009 «on specifying details for the execution of administrative and judicial decisions to deport aliens»	Κοινή Υπουργική Απόφαση υπ' αριθμ. 4000/4/46-α' /27.07.2009 «Καθορισμός λεπτομερειών για την εκτέλεση διοικητικών και δικαστικών αποφάσεων απέλασης αλλοδαπών»	forced return	Published on 27/7/2009	Active			
Joint Ministerial Decision no. 4000/4/32-v' /2017 «on the amendment of no. 4000/4/32-λα' from 05-10-2012 of joint ministerial decision "Definition of the criteria and the procedure for the registration and deletion of aliens from the National List of Undesirable aliens" (B' 2805).	Κοινή Υπουργική Απόφαση υπ' αριθμ. 4000/4/32-v' /2017 «Τροποποίηση της υπ' αριθ. 4000/4/32-λα' από 05-10-2012 κοινής υπουργικής απόφασης «Καθορισμός των κριτηρίων και της διαδικασίας για την εγγραφή και διαγραφή αλλοδαπών από τον Εθνικό Κατάλογο Ανεπιθύμητων Αλλοδαπών»	forced return	Published on 31/03/2017	Active	National List of Undesirable aliens		irregular migrant
Joint Ministerial Decision n. 4000/4/32-λα' "Definition of the criteria and the procedure for the registration and deletion of aliens from the National List of Undesirable Aliens"	Κοινή Υπουργική Απόφαση υπ' αριθμ. 4000/4/32-λα' «Καθορισμός των κριτηρίων και της διαδικασίας για την εγγραφή και διαγραφή αλλοδαπών από τον Εθνικό Κατάλογο Ανεπιθύμητων Αλλοδαπών»	forced return	Published on 17/10/2012	Amended by Joint Ministerial Decision no. 4000/4/32-v' /2017	National List of Undesirable aliens		irregular migrant
Joint Ministerial Decision no. 3/5023/ 15.9.2015 "on the establishment of an Open Accommodation Structure in the Attiko Alsos area of the Municipality of Athens Attica for unforced return applicants"	Κοινή Υπουργική Απόφαση υπ' αριθμ. 3/5023/15.9.2015 «Σύσταση Ανοιχτής Δομής Φιλοξενίας Αιτούντων Εθελούσιας Επιστροφής στην περιοχή Αττικού Άλσους του Δήμου Αθηναίων Αττικής»	assisted return	Published on 15/09/2015	Active	assisted return		N/A

Joint Ministerial Decision 53619/735/7.12.2015 "Determining the terms and conditions for access to the labor market of third-country nationals who remain in the country under a status of postponement of removal"	Κοινή Υπουργική Απόφαση 53619/735/7.12.2015 «Καθορισμός των όρων και των προϋποθέσεων για την πρόσβαση στην αγορά εργασίας πολιτών τρίτων χωρών που παραμένουν στην χώρα υπό καθεστώς αναβολής απομάκρυνσης»	forced return	Published on 7/12/2015	Active	removal		irregular migrant
Law 5078/2023 on "Reform of occupational insurance, streamlining of insurance legislation, pension arrangements, appointment and recruitment system of teachers of the Public Employment Service and other provisions"	Νόμος 5078/2023 «Αναμόρφωση επαγγελματικής ασφάλισης, εξορθολογισμός ασφαλιστικής νομοθεσίας, συνταξιοδοτικές ρυθμίσεις, σύστημα διορισμού και προσλήψεων των εκπαιδευτικών της Δημόσιας Υπηρεσίας Απασχόλησης και λοιπές διατάξεις»	forced return	Published on 20/12/2023	Active	return	Law	N/A
Circular No. 1 "Implementation of provisions of Law 4825/2021"	Εγκύκλιος υπ' αριθμ. 1 «Εφαρμογή διατάξεων του ν. 4825/2021»	forced return	Issued on 12/11/2021	Active	voluntary return, remedies, issuance of decisions	Circular	irregular migrant

Annex IV: Flowchart of the National Return System



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Decentring the Study of Migrant
Returns and Return Policies

Legal and Policy Infrastructures of Returns in Sweden

Country Dossier (WP2)

Authors:

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Abbreviations

EU	European Union
EEA	European Economic Area
ETIAS	European Travel Information and Authorization System
EFTA	European Free Trade Association
NRO	National Return Operations
JRO	Joint Return Operations
NTE	National Transport Unit
CJEU	the Court of Justice of the European Union
UKRI	UK Research and Innovation
ECtHR	the European Court of Human Rights
ECHR	The European Convention on Human Rights
CRC	The UN Convention on the Rights of the Child
SIS	Schengen Information System
WP	Work Package
MSs	Member States
TCN	Third-country National

Executive Summary

This report delineates the legislative, institutional, and procedural frameworks and infrastructures concerning the return of irregular migrants from Sweden. It further explores key policy developments in this field. Covering the period from 2015 to 2023, with some historical retrospectives, the report provides a brief overview of return-related statistics, elucidates the interplay between Swedish national law, EU law, and public international law, and maps the operational infrastructure for return, including the primary return governance actors at the national level. The focus is chiefly on the legislative framework, especially the transposition of the EU Return Directive into Swedish legislation, and recent legislative and policy shifts in the return context. Section 7, on the legislative framework, specifically examines return procedures, approaches to both voluntary and enforced return, procedural safeguards, detention, and the specific requirements for the return of unaccompanied minors and other vulnerable groups. Additionally, the report addresses international cooperation and funding pertaining to return.

Special emphasis is placed on the political developments in the migration sector following the so-called refugee crisis of 2015, when Sweden received a significant number of asylum seekers, and in the context of the 2022 Tidö Agreement. This agreement, a pact between the current liberal-conservative government and its coalition partner, outlines several reforms, notably in migration and integration policy areas.

A principal finding is that although (while) the EU Return Directive and later EU legislation have been incorporated into Swedish law, the Swedish government has, on numerous points, deemed such revisions unnecessary. The government has contended that existing legislation, principally the Aliens Act, already meets or surpasses the requirements of EU law, thereby obviating the need for additional measures to align Swedish law with EU directives on these matters. This includes several definitions listed in Article 3 of the Return Directive (such as ‘irregular stay’ and ‘assisted return’), and the authorised exemption from applying the Return Directive under specific conditions outlined in Articles 2.2 a) and b).

Another significant observation is that while return has long been a priority—at least on paper—in recent years, its urgency has increased. This is demonstrated by the Swedish Government’s directive to the Migration Agency to prioritise returns more than before, enhancing the efficiency of the return process and increasing the number of people actually departing Sweden. The emphasis seems to have shifted from voluntary to forced returns, which is consistent with the general trend of more stringent Swedish migration policy since 2015, which is summed up by the principle “no means no.”

This approach aims to ensure that Sweden does not deviate from the EU’s minimum standards for international protection, asylum procedures, reception conditions, and return measures. The 2022 Tidö Agreement’s reforms further cement this stringent migration stance, reflecting what has been termed a ‘paradigm shift’ in Swedish migration policy.

The report concludes by identifying gaps in the legislative, institutional, and policy frameworks (outlined in Section 9) and proposes several recommendations to the Swedish government and migration authorities, summarized as follows:

- Additional clarification of certain terms and definitions in the Aliens Act is necessary, including ‘illegal/irregular stay’, ‘assisted return’, and ‘practical impediment to return’.
- A more thorough analysis and revision of Swedish law are required to ensure compliance with EU law, particularly concerning detention and rules related to the refusal of entry or expulsion of a foreign national authorized to reside in another EU state.
- For transparency, data on returns and other migration-related issues should be aggregated and made readily accessible.
- Revisions to Swedish law in accordance with EU requirements should not primarily aim to make national legislation as restrictive as possible.
- While trying to avoid sending conflicting messages to migrants by aiming for "no to mean no," efforts must be made to safeguard fundamental rights and incorporate safety-valve provisions for new circumstances.
- Provisional measures should accompany stricter restrictions on granting residence permits, with proper evaluation of their proportionality and long-term impacts.
- Fundamental human rights standards and the principle of proportionality must always be upheld—the state’s interest in pursuing a restrictive migration policy should not override all other considerations.

Keywords: return policy – migration governance –Sweden – Swedish return policy – Swedish migration law – Return Directive

The GAPs Project

GAPs is a Horizon Europe project that aims to conduct a comprehensive multidisciplinary study on the drivers of return policies and the barriers and enablers of international cooperation on return migration. The overall aim of the project is to examine the disconnects and discrepancies between expectations of return policies and their actual outcomes by de-centring the dominant, one-sided understanding of “return policymaking.” To this end, GAPs:

- examine the shortcomings of EU’s return governance;
- analyse enablers and barriers to international cooperation, and
- explore the perspectives of migrants themselves to understand their knowledge, aspirations and experiences with return policies.

GAPs combines its decentring approach with three innovative concepts:

- a focus on return migration infrastructures, which allows the project to analyse governance fissures;
- an analysis of return migration diplomacy to understand how relations between EU Member States and with third countries hinder cooperation on return; and
- a trajectory approach that uses a socio-spatial and temporal lens to understand migrant agency.

GAPs is an interdisciplinary 3-year project (2023-2026), co-coordinated by Uppsala University and the Bonn International Centre for Conflict Studies with 17 partners in 12 countries on 4 continents. GAPs' fieldwork has been conducted in 12 countries: Sweden, Nigeria, Germany, Morocco, the Netherlands, Afghanistan, Poland, Georgia, Turkey, Tunisia, Greece and Iraq.

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1. Introduction

This report aims to provide an overview of Sweden's legal, institutional and policy framework on returns and readmission. It also covers cooperation between Sweden and the European Union (EU) in this field as well as bilateral cooperation between Sweden and other Member States and third countries. The report aims to identify gaps in the legal, institutional and policy frameworks described and, on this basis, provide some brief policy recommendations.

2. Methodology and Material

The report adheres to guidelines jointly developed by the participating researchers in GAPs WP 2. Building on a shared template allows comparative analysis across all participating countries.

Section 1 introduces the aims of the report and **Section 2** outlines the methodology and materials used. **Section 3** provides an overview of statistical data on returns from Sweden. The majority of the statistical data included in this report was obtained through correspondence with the Swedish Migration Agency and Swedish Police Authority, supplemented by data sourced from their websites and from the Eurostat database. While much of the information is available on the Migration Agency and Police Authority websites, the statistical data used in this report has been consolidated into a unified dataset by the Swedish Migration Agency. **Section 4** gives a brief overview of key developments in Swedish migration and protection policy, with a particular focus on matters related to return. **Section 5** briefly outlines the relationship between Swedish law, public international law, and EU law. In **Section 6**, the institutional framework and operational infrastructure for returns is outlined. Sections 4, 5 and 6 relies on legislative materials, preparatory works, case law, secondary literature and information sourced from the Police Authority website and the Migration Agency Handbook. **Section 7**, which aims to provide an account of the Swedish legal framework on return and its relationship with EU law, is based on desk research on the Swedish Aliens Act and other related Swedish legislation on migration, EU law, and the preparatory works of such regulations. These preparatory works include official reports from government inquiries and government bills reflecting the processes of current and previous successive governments leading to the implementation of EU law in national legislation, particularly the Return Directive. **Section 8** discusses the funding of return-related programs, using information from the Migration Agency's website, targeting returnees and others. In the final Section, **Section 9**, we describe the main gaps in the legal and institutional framework identified in the report and make recommendations based on the findings presented. A draft version of the findings was discussed with an expert panel in December 2023 before the finalization of the report. The report has been subject to external review.

3. Statistical Overview

The charts on the following page provide a statistical overview of return and return-related matters in Sweden from 2015 to September 2023. The charts are as follows: **Chart 1.** the number of asylum seeker applications; **Chart 2.** the number of Dublin return cases; **Chart 3.** the number of return decisions resulting from denied asylum applications by the Migration Agency; **Chart 4.** the number of assisted voluntary return cases, **Chart 5.** the number of assisted forced return cases, and **Chart 6.** the number of non-assisted voluntary return cases.

While collecting statistical data for the report, we communicated extensively with the Migration Agency and the Police Authority. The charts are based on information from these two government agencies.¹ The two government agencies' responses to specific questions about statistical data collection procedures in the context of the return process can be summarized as follows:

The Police Authority:

Regarding the stock of irregular migrants in Sweden: The Police Authority states that it is not possible to provide any accurate assessment of the number of irregular migrants present in Swedish territory. The Police Authority, however, still has data on open cases involving individuals without the necessary permits to stay in Sweden and have enforceable decisions against them. This data does not represent a complete count due to various situations, such as cases that have expired without applying for new permits, aliens who entered Sweden irregularly and who have not regularized their status, and many more.

Regarding the number of rejections of entry at the border for third-country foreign nationals: The Police Authority referred to figures available on their website, indicating "polisavvisningar vid yttre gräns," which relates to rejections at the entry to Sweden from non-European Union (EU)/European Economic Area (EEA) countries. These individuals are typically put on return flights. According to the Police Authority, the internal border controls in other Schengen countries consist of random checks only. The statistics reflect the number of rejections at these internal border controls and do not represent the total number of third-country nationals (TCNs) who would be rejected if inspected. Denied entry usually leads to a refusal-of-entry decision.

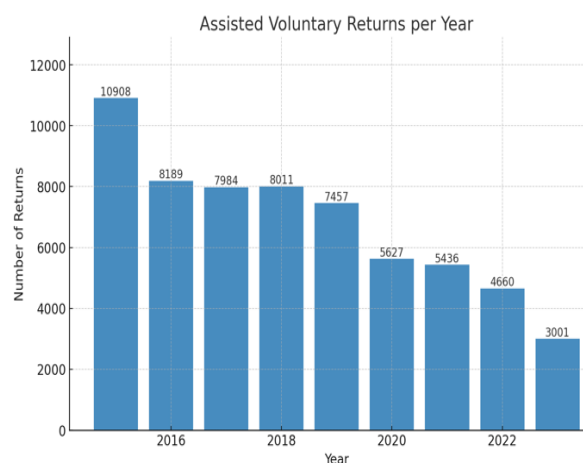
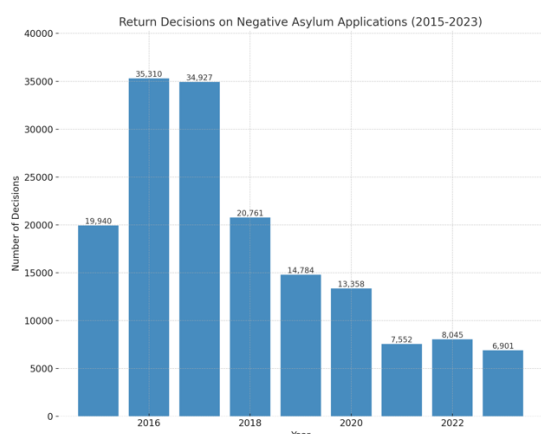
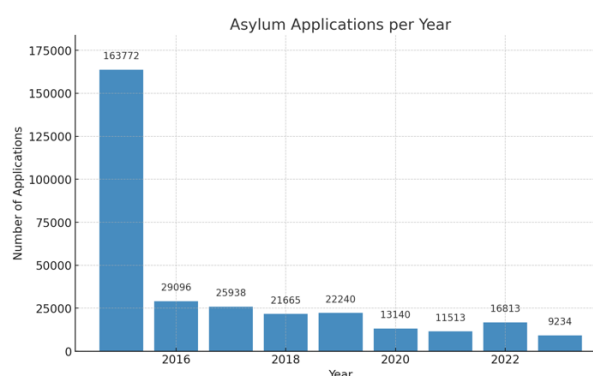
Regarding the number of pushback cases for TCNs with no right to enter Sweden: The term "pushback" is not used in Swedish law. The Police Authority rejects the suggestion that illegal pushbacks are conducted at the Swedish border or within Swedish jurisdiction. (While it is impossible to say with absolute certainty, it should be noted that there are few, if any, reports of illegal pushbacks at Swedish borders.) Foreign citizens who are not eligible for entry will, according to the Police Authority, be denied entry and returned to their country of origin or last departure point.

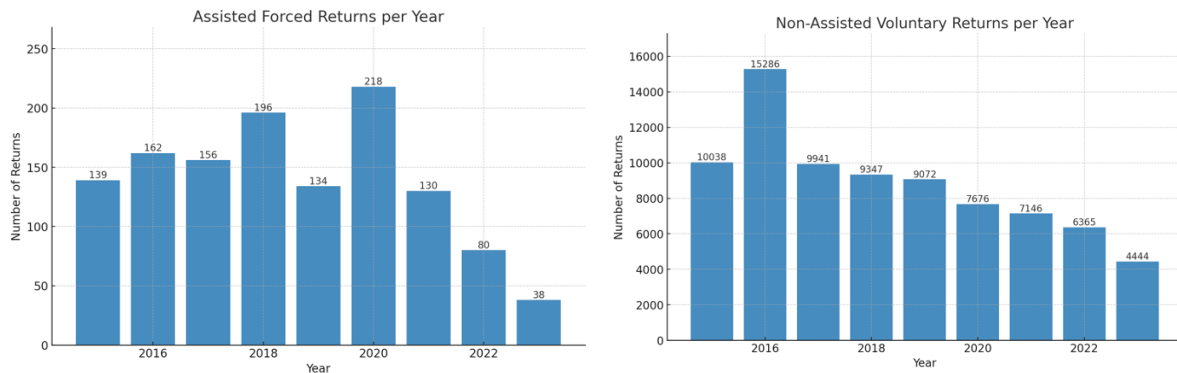
¹ It may be noted that Eurostat data and the data from the Swedish Migration Agency sometimes are not identical. For more information see Eurostat, https://ec.europa.eu/eurostat/cache/metadata/EN/migr_eil_esqrs_se.htm (accessed March 18, 2024).

The Swedish Migration Agency:

On whether existing data on returns and readmissions are disaggregated: The Migration Agency responded that the data is not disaggregated.

The Swedish Migration Agency is the sole authority responsible for collecting this data. Other authorities, such as the Police Authority, are not involved in this process. As per the Swedish Migration Agency's response, the data is not generally collected in a systematic and coherent way.





4. The Political Context of the Swedish Return Regime

4.1 Introduction

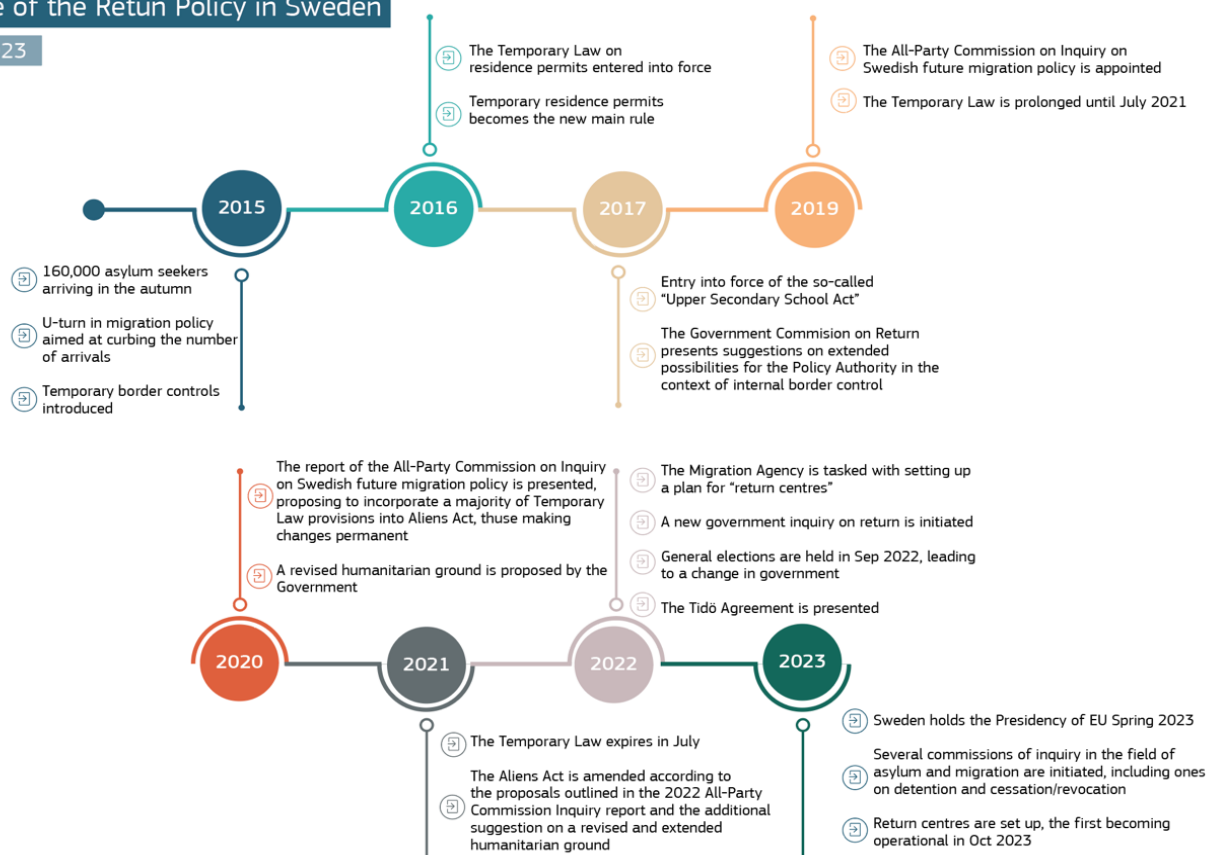
Sweden can generally be characterized as a liberal democracy with a centralized state that, as Malm Lindberg notes, 'generally has a high capacity in implementing policies in different fields'.² To understand the Swedish system, it is essential to note that Swedish government agencies, including the Migration Agency and the Police Authority, are independent and largely autonomous in relation to the government. Although the government can influence how government agencies operate through annual monitoring and evaluations, top-level management appointments, and annual appropriation directives and ordinances, it is not able to interfere with an agency's decision-making regarding the proper application of the law or the appropriate use of its authority.³ Ministerial rule is in other words not allowed in Sweden.

² Henrik Malm Lindberg, "The Tricky Thing of Implementing Migration Policies: Insights from Return Policies in Sweden" in *Migration and Integration in a Post-Pandemic World. Socioeconomic Opportunities and Challenges*, ed. Lin Leopold, Örjan Sjöberg and Karl Wennberg (Springer, 2023), 151-175 (158).

³ For an overview of how Swedish public agencies are governed, see <https://www.government.se/how-sweden-is-governed/public-agencies-and-how-they-are-governed/> (last accessed January 3, 2024).

Timeline of the Return Policy in Sweden

2015 - 2023



4.2 1999-2014: Gradually Increasing Focus on Return

From 1999 to the present, Sweden, known for its extensive welfare state and dedication to social equality, has seen notable changes in its migration policy.⁴

In 1999, the Migration Agency was given primary responsibility for the enforcement of return decisions as well as for persons in detention. Previously, it had mainly been the Police Authority, which had been tasked with the enforcement of returns. This responsibility was now limited to specific categories of return.⁵ The aim of the return policy at the turn of the millennium was for the majority of returns to be voluntary and for the number of forced

⁴ See e.g., Elisabeth Abiri, "The Changing Praxis of 'Generosity': Swedish Refugee Policy during the 1990s," *Journal of Refugee Studies*, Vol. 13, No. 1, March (2000): 11–28; Karin Borevi, "Family Migration Policies and Politics: Understanding the Swedish Exception," *Journal of Family Issues*, Vol. 36, Issue 11, (2015): 1490–1508; Klara Öberg and Maja Sager, "Articulations of Deportability: Changing Migration Policies in Sweden 2015/2016," *Refugee Review*, Vol. 3 (2017): 2–14; Rebecca Thorburn Stern, "Proportionate or Panicky?: On Developments in Swedish and Nordic Asylum Law in Light Of the 2015 'Refugee Crisis,'" in *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis*, ed. Eleni Karageorgiou and Vladislava Stoyanova (Brill Academic Publishers, 2018), 233–262; Malm Lindberg (2023), "The Tricky Thing of Implementing Migration Policies"; Christine M. Jacobsen, Marry-Anne Karlsen, Shahram Khosravi, eds. *Waiting and the Temporalities of Irregular Migration* (Routledge, 2020); Anna Lundberg, "Pushed Out in Limbo – The Every-day Decision-Making about 'Practical Impediments to Enforcement' in the Swedish Management of Return Migration," *Retfærd. Nordisk Juridisk Tidsskrift*, Vol. 3, No. 3, (2020): 13–31.

⁵ See Section 5 of this report.

returns to decrease.⁶ During the early 2000s, the necessity of enforcing return decisions, however, was increasingly emphasised in several Migration Agency appropriation directions.⁷ In 2006, the current Aliens Act⁸ entered into force. Following the September 2006 general elections, a new centre-right coalition came into power in Sweden. During its term of office, migration policies increasingly focused on return efforts rather than reception activities, including enforcement.⁹ An exception, however, was labour migration from third (non-EU) countries, the regulation of which was liberalised in 2008.¹⁰ Around 2010, ambitions regarding return were raised.¹¹ One example is the REVA project ("Rättssäkert och Effektivt Verkställighetsarbete", meaning 'Legally Secure and Efficient Enforcement'). REVA was a government-initiated project operating between 2011 and 2014 that sought to boost the effectiveness of enforcement of deportations of persons staying in Sweden on a long-term basis without possessing the permits necessary for doing so. REVA was a joint operation between the Police Authority, the Prison and Probation Service and the Migration Agency. The project was much debated as it raised concerns about racial profiling, in particular regarding the parts of the project involving the Police Authority.¹²

4.3 2015-2021: The Migration 'Crisis' and its Aftermath

In 2014, a Social Democrat-Green coalition won the general elections. The new government, however, did not lead to any substantial changes to the migration policy.¹³ During the 2015 'migration crisis', Sweden received over 160,000 asylum seekers in a few months.¹⁴ While initially welcoming, public opinion as well as the political debate gradually began to shift towards a more hostile stance. The watershed moment was in November 2015 when temporary border controls and a new restrictive asylum policy were introduced, the aim being to provide Sweden with 'breathing space'.¹⁵ The new policy has been described as a paradigm shift in Swedish migration policy.¹⁶ The new policy was codified mainly through the 2016 so-called "Temporary Law",¹⁷ which was revised in 2019 and ceased to apply in July 2021. The key feature of the Temporary Law, which was to be applied instead of the Aliens Act in cases of overlapping norms, was that it introduced temporary residence permits for refugees and

⁶ Prop. (Government Bill) *Verkställighet och återvändande – en del av asylprocessen*, 1997/98:173.

⁷ Henrik Malm Lindberg, Delmi rapport 2020:1 *De som inte får stanna. Att implementera återvändandepolitik*, 24.

⁸ Swedish Parliament. *Aliens Act*, Svensk författningssamling (SFS) 2005:716.

⁹ Malm Lindberg, "The Tricky Thing of Implementing Migration Policies," 159.

¹⁰ See Catharina Calleman and Petra Herzfeld Olsson, eds., *Arbetskraft från hela världen: Hur blev det med 2008 års reform? Delmi report 2015:9*.

¹¹ Ibid.

¹² See e.g. Stina Fredrika Wassen, "Where Does Securitisation Begin? The Institutionalised Securitisation of Illegal Immigration in Sweden: REVA and the ICFs," *Contemporary Voices: St Andrews Journal of International Relations*, Vol. 1, Issue 1 (2018): 78-103.

¹³ Cf. Jonas Hinnfors, Andrea Spehar and Gregg Bucken-Knapp, "The Missing Factor: Why Social Democracy Can Lead to Restrictive Immigration Policy," *Journal of European Public Policy* Vol.19 Issue 4, (2012): 585-603.

¹⁴ SOU (Swedish Government Official Reports), *Att ta emot människor på flykt. Sverige hösten 2015*, 2017:12.

¹⁵ Ibid.

¹⁶ Thorburn Stern, "Proportionate or Panicky? On Developments in Swedish and Nordic Asylum Law in Light Of the 2015 'Refugee Crisis'."

¹⁷ Swedish Parliament, *Om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige (The Temporary Law)*, Svensk Författningssamling (SFS) 2016:752.

grantees of subsidiary protection status as the new main rule (previously, these categories have been granted permanent residence permits from the beginning), reduced the number of grounds for a residence permit compared to the Aliens Act, including humanitarian grounds, and introduced more restrictive rules on family reunification.¹⁸

Another temporary legislation introduced post-2015 was the so-called Upper Secondary School Act ("Gymnasielagen"). In short, the legislation allowed for young people (under the age of 25) who had been granted a temporary residence permit based on the 2016 Temporary Law for studies on the upper secondary school level to be granted a temporary residence permit for the duration of their studies and an additional six months. Such permits, moreover, under certain circumstances, could be prolonged, for example, to find work or form the basis for a permanent residence permit. The first version of the law (formally part of the Temporary Law) applied until July 2021. When the Temporary Law expired, a new, revised version of the Upper Secondary School Act entered into force.¹⁹ The possibility of being granted a residence permit for upper secondary school-level studies ceased to apply in December 2023. The possibility of prolonging residence permits based on the law or turning them into permanent residence permits will cease to apply in 2024 and 2025.

The government took several initiatives during the 2015-2021 phase to increase the number of returns. Examples include instructing the Migration Agency to work more effectively with returns (voluntary and enforced), including increased and more effective cooperation with The Police Authority and the Prison and Probation Service.²⁰ On the policy and legislative level, several Government Commissions of Inquiry²¹ were initiated addressing issues of relevance for return, some also leading to legislative changes. One of these was the 2017 Government Commission on Return, whose proposals included extended possibilities for The Police Authority to use intrusive measures when carrying out internal border control. The proposals became part of the Aliens Act in 2021 and 2023, respectively.

In 2019, the government appointed an all-party Commission of Inquiry to establish a long-term, sustainable migration policy. It may be noted that return policy was not among the key points on the Commission's agenda. In the spring of 2020, the Swedish National Audit Office presented a report evaluating the implementation of the return policy in the years 2013-2018, pointing to several gaps in the implementation, including a lack of cooperation between government authorities, increasing costs, lack of fulfilment of policy goals, lack of overall perspective and conflicting goals between the requirements of the return operations and other regulations and conditions that partially serve other purposes.²² The report concluded that the

¹⁸ For an overview, see e.g. Prop. (Government Bill) *Tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige* 2015/16:174, and Prop. (Government Bill) *Förlängning av lagen om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige*, 2018/19:128.

¹⁹ Swedish Parliament, *Om uppehållstillstånd för studerande på gymnasial nivå*, (Upper Secondary School Act), Svensk författningssamling (SFS) 2017: 353.

²⁰ Malm Lindberg, "The Tricky Thing of Implementing Migration Policies."

²¹ Government commissions of inquiry (and, occasionally, all-party commissions of inquiry) play an important role in the Swedish legislative process. The report of the inquiry and the thereupon following comments from the consultation bodies provide the basis for the government bill to be presented to the Riksdag. For an overview of the Swedish legislative process see e.g. <https://www.government.se/contentassets/4490fe7afcb040b0822840fa460dd858/the-swedish-law-making-process/> (last accessed December 3, 2023) and Christoffer Wong and Michael Bogdan, eds. *Swedish Legal System*, 2nd ed. (Stockholm, Norstedts Juridik, 2022).

²² Swedish National Audit Office, *Återvändandeverksamheten – resultat, kostnader och effektivitet*, RIR 2020:7.

goals of the return policy, decided by the Riksdag and the government, to a large extent were not satisfactory fulfilled. In September 2020, the all-party Commission of Inquiry presented its report on the future migration policy. Many of its recommendations aimed to make most of the provisions of the Temporary Law permanent.²³ It is interesting to note that although return for years had been a prioritised matter, at least on paper, return policy was only mentioned in passing in the Inquiry's report, in the analysis of the consequences of the proposals

Due to political differences, the all-party Commission of Inquiry did not reach a consensus on several issues, such as humanitarian grounds for residence permits. Later in 2020, the government, as part of an agreement with the Green Party, presented an additional proposal for a revised humanitarian ground, extending the scope of the existing Aliens Act humanitarian ground.²⁴ The proposals were all turned into a Government Bill which, in June 2021, the Riksdag after heated debate adopted as amendments and changes to the 2006 Aliens Act.²⁵

4.4 2022-Present: A New Era?

In June 2022 the government initiated a new Commission on Inquiry focusing on return, aimed at analysing how returns could be made more effective and increasing the possibility of using control measures on aliens in the return process.²⁶ The Inquiry's tasks were extended in August 2023, the official report to be presented in 2024.²⁷ Simultaneously, the government tasked the Migration Agency with analysing the introduction of 'return centres', that is specialised accommodations for individuals who have received an enforceable decision of transfer, deportation, or expulsion.

In September 2022, general elections were held. The election campaign substantially focused on migration and integration, particularly its perceived negative aspects. A centre-right coalition, with the support of the right-wing populist party, the Sweden Democrats, gained the majority. The coalition and its support party – without the support of which the coalition could not have formed a government – in late 2022 presented a comprehensive reform agenda known as the Tidö Agreement, a large part of which is dedicated to migration and immigration.²⁸ Return is mentioned explicitly in the Tidö Agreement as a prioritised field, including increasing the use of detention and other restrictions of the freedom of movement to enforce return decisions.²⁹ The overall focus of the Tidö reforms can be summarised as to

²³ See the Official Report of the Inquiry: *En långsiktigt hållbar migrationspolitik*, SOU 2020:54.

²⁴ Prop. (Government Bill), *Ändrade regler i utlänningslagen*, 2020/21:191.

²⁵ *Ändrade regler i utlänningslagen*, 2020/21: SfU28.

²⁶ Dir. (Terms of Reference) 2022:91 *Åtgärder för att stärka återvändandeverksamheten*. On the function of Commissions of Inquiry in the Swedish legislative process, please see e.g. <https://www.government.se/contentassets/4490fe7afcbo40bo822840fa460dd858/the-swedish-law-making-process/> (last accessed December 13, 2023) and Christoffer Wong and Michael Bogdan, eds., *Swedish Legal System* (Norstedts Juridik, 2022).

²⁷ Dir. (Terms of Reference) 2023:126 *Tilläggsdirektiv till Utredningen om stärkt återvändandeverksamhet* (Ju 2022:12).

²⁸ The Conservative Party/The Liberal Party/The Christian Democrats/The Sweden Democrats, "The Tidö Agreement," 2022, <https://via.tt.se/data/attachments/00551/04f31218-dccc-4e58-a129-09952cae07e7.pdf> (last accessed Januari 2, 2024).

²⁹ *Tidö Agreement* (2022), 33.

make Sweden less accessible as well as less attractive for migrants, asylum seekers in particular, with several detailed suggestions on how this is to be realised. It may be noted that the Tidö Agreement explicitly states that asylum seekers' rights should be limited as much as possible.

Sweden held the Presidency of the Council of the European Union in the first half of 2023. One of the main aims of the Presidency was to bring the work on the EU Pact on Migration and Asylum forward. Also, in 2023, the new government launched several commissions of inquiry to analyse the reforms outlined in the Tidö Agreement and produce proposals for legislative changes to realise the reforms. These commissions of inquiry are, for example, tasked with analysing and proposing new rules on detention³⁰, on cessation and revocation of residence permits,³¹ and on streamlining Swedish asylum law with the minimum standards required by EU asylum law.³² The government aims for the majority of the Tidö reforms to have been made into "hard law" before the general elections scheduled for September 2026. An example of the reforms already put in place at the time of writing is the creation of 'return centres', which the Migration Agency was tasked with in June 2023. The first five centres became operational in October 2023 (accommodating approx. 650 persons).³³ It is not obligatory for a person with an enforceable return decision to relocate to one of the centres, but not doing so may have adverse effects on the right to accommodation in Migration Agency housing.³⁴

5. The Institutional Framework/Operational Infrastructure: Return Governance Actors

Multiple actors play critical roles in Sweden's return governance. This section summarizes the roles of the Migration Agency and the Police Authority, along with descriptions of other actors, their institutional frameworks, and operational infrastructure.

As already mentioned, the Migration Agency, since 1999, holds the primary responsibility for decisions on return, the enforcement of return decisions, and detention. A rejection of an application for a residence permit is usually accompanied by a refusal-of-entry or expulsion order (Aliens Act, Chapter 8, Section 16). When the order has taken legal effect, it is to be enforced, provided there are no impediments to enforcement (see Section 7.2.2 below).³⁵ The persons to whom the refusal-of-entry or expulsion order applies are expected to return on a voluntary basis, if needed with the support of the Swedish Migration Agency.

³⁰ Dir. (Terms of Reference) 2023:119, *Moderna och ändamålsenliga regler för förvar*.

³¹ Dir. (Terms of Reference) 2023:158, *Skärpta krav på hederligt levnadssätt och ökade möjligheter till återkallelse av uppehållstillstånd*.

³² Dir. (Terms of Reference) 2023:137, *Anpassning av det svenska regelverket för beviljande av asyl och asylförfarandet till miniminivån enligt EU-rätten*.

³³ <https://www.migrationsverket.se/Om-Migrationsverket/Pressrum/Nyhetsarkiv/Nyhetsarkiv-2023/2023-10-17-Migrationsverket-startar-atervandandecenter.html> (last accessed December 18, 2023).

³⁴ Ibid.

³⁵ Certain return decisions may however be enforced before they have taken legal effect, such as when it stands clear that an asylum application is obviously unfounded (*Aliens Act*, Chapter 8, Section 19 and Chapter 12, Section 7).

Once there is a refusal-of-entry or expulsion order (or when the alien has withdrawn his/her asylum application), the Migration Agency initiates what is referred to as “the return process”. This process thus starts even before the decision has taken legal effect. The process aims to support individuals who do not possess the necessary permits to remain in Sweden to return voluntarily. The different steps of the return process (routines, etc.) are described in detail in the Migration Agency Handbook on Return,³⁶ an internal Migration Agency document. These steps include the measures to be taken to notify the alien of the decision on rejection of the application for a residence permit, routines for so-called “return information meetings” (“återvändandesamtal”), routines for providing information about Migration Agency return centres (to which failed applicants in Migration Agency housing are to transfer at the latest when the refusal-of-entry or expulsion order has taken legal effect)³⁷, categorization of cases depending on the feasibility of carrying out the refusal-of-entry or expulsion order (“verkställbarhetskategorisering”)³⁸ routines on providing information about financial support upon return and for transferring a case to the Police Authority. The return process at the Migration Agency ends once the alien leaves Sweden, the case is transferred to the Police Authority or when the decision is subject to statutory limitation.

The Migration Agency maintains the responsibility for enforcing the refusal-of-entry or expulsion order (Aliens Act Chapter 12, Section 14, Subsection 1) except when *i*) the case falls within the responsibility of the Swedish Security Service or *ii*) it is the responsibility of the Police Authority (see Section 7.3 below). The Migration Agency may transfer an expulsion or deportation case for enforcement to the Police Authority if the person to be expelled or deported is evading the authorities and cannot be found without the assistance of the Police Authority or if it can be assumed that force will be needed to enforce the decision (Aliens Act Chapter 12 Section 14 Subsection 4).

Deportation and expulsion cases differ regarding coercion between the Police Authority and the Migration Agency. Cases involving police enforcement entail coercion, whereas those managed by the Migration Agency are typically voluntary.

The Police Authority is mandated to apprehend aliens without a legal right to stay in Sweden or when tasked with enforcing return decisions, as long as the return decision remains valid. In cases of unsuccessful enforcement, the Police Authority reports back to the Migration Agency for case reviewing. The statute of limitations lasts four years after the decision becomes legally binding. The Prison and Probation Service plays a role in planning, booking, and executing enforced return journeys on behalf of the police, underscoring the Police Authority’s continued responsibility.

However, the Migration Agency manages detention centres where individuals await enforcement of their return decisions (see Section 7.9 of the report for further information). In Sweden, return enforcement operations fall into National Return Operations (NRO) and Joint Return Operations (JRO). The critical distinction between them is that JROs involve collaborative efforts between two or more EU states who share a chartered flight to carry out

³⁶ Migration Agency, “Handbook on Return” (Handbok för processområde Asyl – Återvändandeprocessen) version 1.0, (last accessed October 18, 2023).

³⁷ Individuals living in private housing are not forced to move to the return centres, but are offered the possibility.

³⁸ This could for example include identifying whether the alien in question is positive towards returning voluntarily.

return enforcement. This collaboration is often driven by cost-effectiveness and security considerations. Frontex substantially covers the costs of JROs, whereas NROs receive partial coverage. It is up to the Swedish authorities to initiate Frontex's involvement. On return journeys, accompanying personnel include members from the Swedish Prison and Probation Service's National Transport Unit (NTE) and The Police Authority. An interpreter, medical staff, and an independent monitor who reports to Frontex and the EU Agency for Fundamental Rights are also part of the operation. According to 2019 statistics, the Police Authority executes approximately two-thirds of return decisions voluntarily, while one-third requires escort personnel.³⁹ Most trips are conducted via regular flights, with some involving chartered flights. In 2017, there were 28 joint return operations in which Sweden acted as an organizer or participant. This number was 30 in 2016 and 29 in 2015.

Table 1: Return Governance Actors

Authority	Tier of government (national, regional, local)	Type of organization	Area of competence in the fields of return (Briefly explain the role)	Link
The Migration Agency (Migrationsverket)	National	Government agency	Voluntary return	https://shorturl.at/hvADM
The Police Authority (Polisen)	National	Government agency	Execution of expulsion and deportation decision with coercion	https://shorturl.at/ktJU2
The Prison and Probation Service (Kriminalvården)	National	Government agency	Execution of expulsion and deportation decision with coercion	N/A
The Security Service	National	Government agency	Return in security cases	https://shorturl.at/jrGIO

³⁹ The Police Authority, "Frågor och svar om verkställighet." Polisen, <https://polisen.se/om-polisen/polisens-arbete/granspolisen/fragor-och-svar-om-verkstallighet/> (accessed October 25, 2023).

6. On the Relationship between Swedish Law, EU Law and Public International Law

6.1 Implementing Public International Law in Sweden

Sweden is customarily perceived as a country in the dualist tradition, that is, one in which international law and national law are considered to be two different legal systems.⁴⁰ In a dualist country, international law must be “translated” into national law to be directly applicable nationally. The methods for implementing public international law into the Swedish legal system vary depending on whether the rule in question is a rule of customary international law or a treaty ratified by Sweden. In the former case, implementation is usually handled through rules of interpretation or presumption rules. In the case of treaties, one often used method is *the affirmation of normative harmony*, which refers to when the Riksdag, concurrent with ratifying a treaty, determines that Sweden satisfies all treaty obligations without necessitating amendments or supplements to national legislation.⁴¹ A second approach is *transformation*, which in the Swedish legal context refers to rewriting and integrating treaty text, or portions thereof, into existing legislation. Transformation is the predominant method for integrating public international law into Swedish jurisprudence.⁴² A third method is *incorporation*, which in Swedish legal tradition refers to when the entire treaty or its pivotal Sections are directly rendered into Swedish law through a specific act of legislation.⁴³ In addition to these methods, the *principle of consistent interpretation* also applies in Swedish law.⁴⁴

Sweden has ratified most of the core UN human rights treaties (see Table 4), as well as the 1951 Refugee Convention and the 1967 Protocol. The preferred method for implementation in these cases has been transformation. As a result, the treaties cannot be directly invoked in Swedish courts. Nevertheless, all treaties ratified by Sweden, given the principle of consistent interpretation, must be considered when interpreting Swedish law. Conflicts between international and national law are usually avoided by applying the abovementioned principle.⁴⁵

Of treaties particularly relevant in the field of asylum and migration law, only the European Convention on Human Rights (ECHR) and the UN Convention on the Rights of the Child (CRC) at the time of writing have been fully incorporated into Swedish law, thus forming part of its statutory corpus. The ECHR enjoys distinct constitutional protection within Swedish law. Chapter 2, Section 19 of the Instrument of Government (one of four fundamental laws forming the Swedish Constitution) states that no law or other provision conflicting with

⁴⁰ Ove Bring, Mark Klamberg, Said Mahmoudi and Pål Wrangé, *Sverige och folkrätten* 6 ed., (Norstedts Juridik, 2020); David Thór Bjorgvinsson, *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis* (Edward Elgar Publishing, 2015); Carl-Henrik Ehrenkrona, “Sveriges internationella avtal och dessas genomförande i svensk lagstiftning – några reflektioner,” *Svensk Juristtidning* (2015): 779.

⁴¹ Ehrenkrona, “Sveriges internationella avtal,” 779.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *ibid.*

⁴⁵ See e.g. Maria Grahns Farley, “Fördragskonform tolkning av MR-traktat,” *Svensk Juristtidning*, No. 5 (2018): 450–463.

Sweden's obligations under the ECHR may be enacted. The CRC, however, does not hold the same status in Swedish law as the ECHR; it instead enjoys the same place in the legal hierarchy as "ordinary law."

Judgments of the European Court of Human Rights (ECtHR) are, as follows by ECHR Article 46, binding on the state in any case in which it is a party. Since the incorporation of the ECHR, the treaty, as well as ECtHR jurisprudence, have progressively exerted a notable influence over the interpretation and application of Swedish law, including migration law.⁴⁶ The Swedish Migration Agency and the migration courts regularly reference ECtHR jurisprudence.⁴⁷ Over the years, several cases of migration-related issues against Sweden have been addressed by the ECtHR and, in certain instances, have led to significant alterations or clarifications in Swedish practice, one example being the much-cited *RC v. Sweden* (2010) on the allocation of the burden of proof.⁴⁸

On the other hand, jurisprudence by monitoring bodies of UN human rights treaties such as the CRC Committee, the Human Rights Committee, and the Committee on Torture is not considered legally binding on Sweden. Such jurisprudence is nevertheless considered to provide authoritative interpretations of the treaties and is, at least to some extent, referred to in case law and preparatory works.⁴⁹ Moreover, the Aliens Act, Chapter 5, Section 4, stipulates that if an international body such as the Human Rights Committee finds that enforcing an expulsion order would be contrary to a Swedish commitment under a convention, a residence permit shall be granted to the person covered by the order, unless there are exceptional grounds against granting a residence permit. In an early judgment, MIG 2006:1, the Migration Court of Appeal declared the UNHCR Handbook to be considered a source of law in Sweden, thus indicating its relatively strong position in Swedish jurisprudence.

6.2 Implementing EU law in Sweden

Following a 1994 referendum, Sweden officially became an EU member state in 1995 after signing an accession agreement in June 1994. The 1994 Act of Accession governs Sweden's membership in the EU. The Instrument of Government, Chapter 10, Section 6, stipulates that the Riksdag may transfer decision-making authority within the framework of the EU corporation, provided it does not affect the fundamental principles by which Sweden is governed. Such transfer presupposes that protection for rights and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under the Instrument of Government and the ECHR. The Riksdag may decide to transfer decision-making powers if at least three-quarters of the members vote and more than half of the members of the Riksdag support the decision. Sweden's status as an EU member state is explicitly stated in the Instrument of Government Chapter 1, Section 10.

The cardinal principle of the primacy of EU law dictates that in a conflict between EU law and national law, EU law takes precedence. This principle has evolved through the

⁴⁶ Rebecca Thorburn Stern, "Folkrätten i svensk migrationsrätt," in *Folkrätten i svensk rätt: Ett nytt decennium*, ed. Anna-Sara Lind, Rebecca Thorburn Stern and Inger Österdahl (Lund: Studentlitteratur 2024, *forthcoming*).

⁴⁷ See e.g. the Migration Court of Appeal judgments MIG 2008:42, MIG 2015:17 and MIG 2018:20.

⁴⁸ European Court of Human Rights, *R.C. v. Sweden*, Appl. No. 41827/07, June 9, 2010.

⁴⁹ Thorburn Stern (2024), *forthcoming*.

jurisprudence of the Court of Justice of the European Union (CJEU) and has been embraced by member states, Sweden included. There is no specific provision in the Swedish Instrument of Government that directly addresses the primacy of EU law.

In Sweden, this implementation of EU law predominantly transpires through adopting new legislation by the Riksdag or the amendment or revision of existing legislation. The latter method has been predominant in migration and asylum law. Legislative acts such as the Qualification Directive (recast)⁵⁰, the Asylum Procedures Directive (recast)⁵¹, the Reception Conditions Directive (recast)⁵² and the Return Directive⁵³ have thus been incorporated into the Swedish Aliens Act. In several cases, such as the Reception Conditions Directive (recast), no actual changes or amendments were, however, considered necessary as the Aliens Act was found already to fulfil the requirements of the Directive. In the case of the Return Directive and the Reception Conditions Directive (recast), there have been discussions as to whether the EU provisions on detention have been sufficiently implemented into Swedish law.⁵⁴ In recent case law, such as MIG 2020:14 and MIG 2021:3, the Migration Court of Appeal has pointed to possible discrepancies between the EU directives and the Swedish Aliens Act and emphasized the importance of upholding the primacy of EU law.

The CJEU's judgments hold pivotal significance for the interpretation of EU law and are binding on Swedish courts when applying EU law. Although there is no explicit provision in the Instrument of Government addressing the CJEU's judgments, Sweden, by its EU membership, is committed to adhering to the EU's legal order, which encompasses the CJEU's case law.

Swedish courts of the last instance have the option, and under certain circumstances the obligation, to request a preliminary ruling from the CJEU.⁵⁵ It may be noted that, despite Sweden having been a member of the EU for nearly 30 years at the time of writing, the number of requests for preliminary rulings, including in the field of asylum and migration law, remains limited.

⁵⁰ Dir. 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) OJ L 337, 20.12.2011, 9–26.

⁵¹ Dir. 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L 180, 29.6.2013, 60–95.

⁵² Dir. 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29.6.2013, 96–116.

⁵³ Dir. 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, 98–107.

⁵⁴ Simon Andersson, "Förvar och principerna för tvång," *Juridisk Tidskrift*, No. 2 (2020): 367–405.

⁵⁵ Cf. the Treaty of the Functioning of the European Union (TFEU), Article 267, and judgments by the Swedish Supreme Court: NJA 2009:66 and NJA 2022:86.

7. The Swedish Legal Framework on Return

7.1 Introduction

The key legal instrument in Swedish migration law, including regarding matters of return, is the 2006 Aliens Act. The Aliens Act is supplemented by the 2006 Aliens Ordinance⁵⁶ and several additional Acts and Ordinances (see Table 7) including the Administrative Act and the Administrative Procedures Act, as well as by EU law and international treaties and customary law in human rights and refugee law.

This Section aims to provide an overview of the Swedish legal framework that governs multiple facets of the return regime. Key objectives include outlining the procedures for issuing deportation and expulsion orders, addressing instances of refusal or return at the border, internal and exit checks, control mechanisms, voluntary departure, re-entry bans, the return of unaccompanied minors, Dublin cases, procedural safeguards within this context, including the principle of non-refoulement, and fundamental conditions related to return detention. Furthermore, we delve into unique cases within the realm of return. The overview also describes the measures undertaken by the Swedish government to implement relevant EU legislation, primarily focusing on the 2008 Return Directive. The EMN considered the Return Directive to be fully implemented into Swedish law in 2017.⁵⁷

7.2 Return-related Definitions in Swedish Law

Several terms and definitions in the Return Directive or the Return Regulation⁵⁸ have not been transformed into the Swedish Aliens Act or other Swedish legislation. Such terms and definitions include third-country nationals, illegal/irregular stay, return, return decision, removal order, risk of absconding, voluntary departure/return, assisted return, and vulnerable persons. In the government bill on the implementation of the EU Return Directive, the government explained this approach by stating that the existing legal framework already aligned with the Directive's requirements on this point, thus making it unnecessary to introduce specific definitions into the Aliens Act (as will be detailed in the following Sections).⁵⁹ It can be added that while the Aliens Act indeed includes a chapter on definitions (Aliens Act Chapter 1 on "The content of the law, certain definitions, and general provisions"), many of its key concepts remain undefined.

Notably, the government held that it was unnecessary to establish a definition for *illegal stay* despite the absence of a Swedish legal provision explicitly outlining what constitutes illegal stay. The government's reason is that "illegal stay" is indirectly defined through the definition of "legal stay" provided by the Aliens Act (that is, if it is not legal, it is illegal).⁶⁰

⁵⁶ Swedish Parliament. *Utlänningsförordning*, Svensk författningssamling (SFS) 2006:97.

⁵⁷ European Migration Network (EMN)/Migrationsverket, *EMN Focussed Study 2017. The Effectiveness of Return in EU Member States: Challenges and Good Practices Linked to EU Rules and Standards – Country Report Sweden*. EMN 2017.

⁵⁸ Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals.

⁵⁹ Prop. (Government Bill) *Genomförande av återvändandedirektivet*. 2011/12:60, 7.

⁶⁰ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 26.

Regarding the definitions of *return* and *removal*, a similar line of reasoning was presented in the government bill.⁶¹ On this point, the government held that this requirement had already been met due to the presence of two forms of removal – rejection, expulsion and/or deportation – within the Aliens Act.⁶² The Aliens Act outlines, rather than defines, the grounds that may constitute a basis for *refusal* and *rejection* decisions (“avvisning”) in Chapter 8 Sections 2-5, as well as for *removal*, *expulsion*, and *deportation* decisions (“utvisning”) in Chapter 8, Section 6. The Aliens Act Chapter 8a specifies the grounds for removal, expulsion, and deportation (utvisning) based on suspected criminality, taking into account the provisions of the Terrorism Offenses Act (2022:666)⁶³ and the Act (2022:700) on the Special Control of Certain Foreigners.⁶⁴ Thus, the Aliens Act Chapters 8 – 8a distinguishes, without providing explicit definitions, between the grounds for removal, expulsion and deportation respectively due to non-criminal and criminal activities.

Swedish law also lacks a definition of *third-country national* (TCN). The legislative amendments introduced in the context of implementing the EU Return Directive and its follow-up did not incorporate such a definition. Instead, the Aliens Act, Chapter 1, provides definitions of an EU Member State, EEA countries and EEA citizens, Schengen member states, Schengen visa, and Schengen convention and the Free Movement Directive⁶⁵.

There is also no definition in Swedish law of “*rejection, refusal, removal, expulsion or deportation decision*”. The legislative amendments introduced in the context of implementing the Return Directive and its follow-up did not incorporate such a definition. Instead, the Aliens Act (Chapter 8, Section 17, Chapter 8 a, Section 10 and Chapter 12, Section 14) and the Act (2022:700) Concerning Special Control of Certain Aliens determine the grounds on which such decisions may be issued, the authorities mandated to issue them, how they may be appealed (the Aliens Act, Chapter 14) and what the decision should contain (the Aliens Act, Chapter 13, Section 10) as detailed in the section (7.3).

Similar arguments were presented in relation to the possible introduction of a definition of *vulnerable individuals* or to specifically address their special needs. The government held that existing provisions in Swedish law already adequately met the requirements of the Return Directive on this matter as the Act (2008:344) on Health and Medical Care for Asylum-seekers and Others⁶⁶ extends access to health care not only to asylum seekers but also to, for example, persons who have been granted temporary protection in Sweden (Section 4, Sub-Section 1). Individuals not covered by the aforementioned Act (including irregular migrants or persons who have absconded in order to avoid deportation)

⁶¹ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 27–29. Cf. The discussion on terminology in Daniel Thym, *European Migration Law* (Oxford: Oxford University Press, 2023), 527, where ‘return’ is described as the overarching category and ‘removal’ as the enforcement component.

⁶² Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/2:60, 29.

⁶³ Swedish Parliament, *Terroristbrottslag*, Svensk författningssamling (SFS) 2022:666.

⁶⁴ Swedish Parliament, *Lag om särskild kontroll av vissa utlännningar*, Svensk författningssamling (SFS) 2022:700.

⁶⁵ Dir. 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

⁶⁶ Swedish Parliament. *Lag om hälso- och sjukvård åt asylsökande m.fl.*, Svensk författningssamling (SFS) 2008:344.

may still receive immediate health care by the Act on Health and Medical Care for Certain Foreign Nationals Residing in Sweden without Necessary Permits⁶⁷ (2013:407), the Health and Medical Care Act (1982:763)⁶⁸, Section 4, and immediate dental care as specified in the Dental Care Act (1985:125)⁶⁹, Section 6. Additionally, the Social Services Act (2001:453)⁷⁰ and the Health Care Act (2017:30)⁷¹ contain provisions aimed at providing additional support to individuals with special needs. The Aliens Act, Chapter 11, Section 5, Sub-Section 1, grants aliens in immigration detention access to health and medical care. Additionally, the Detention Act⁷², Chapter 5, Section 1, ensures access to health care for inmates when deemed necessary by a medical expert.

Swedish law also does not provide a specific definition for *assisted departure or return*. Instead, as suggested by its title, the Ordinance (1984:890) on Supplements for Foreigners' Travel from Sweden for Settlement in Another Country⁷³, governs financial matters related to aliens' return process to their home country with government support, specifying the conditions and responsible authority.

However, specific new provisions or legislative changes were introduced to meet the requirements associated with each of these defined terms and their respective articles in the Return Directive. Regarding *voluntary departure*, the government, rather than introducing a definition, added new provisions to several Chapters of the Aliens Act, notably Chapters 8 and 12, to regulate the deadline for voluntary departure in line with the Return Directive's requirements.⁷⁴

In its government bill on the implementation of the Return Directive,⁷⁵ the government also highlighted the lack of clearly defined criteria for identifying the risk of absconding. In response, a new provision was introduced into the Aliens Act (Chapter 1, Section 15), aligning Swedish law with the requirement in the Return Directive, Article 3.7. Chapter 1, Section 15 outlines specific situations that can be used to determine the risk of absconding.⁷⁶

A concept not explicitly defined in the Aliens Act but which is of relevance in the context of return is what is referred to as the "*option to change tracks*" (spårbyte). This, in sum, refers to the possibility for an asylum seeker whose application for asylum has been denied and the decision of refusal of entry or expulsion has taken legal effect to, in certain circumstances, apply for a work permit without leaving Sweden (Aliens Act Chapter 5, Section 15 a).⁷⁷ A key requirement is that the asylum seekers must have started working during his/her

⁶⁷ Swedish Parliament, *Lag om hälso- och sjukvård till vissa utlänningar som vistas i Sverige utan nödvändiga tillstånd*, Svensk författningssamling (SFS) 2013:407.

⁶⁸ Swedish Parliament, *Hälso- och sjukvårdslag*, Svensk författningssamling (SFS) 1982:763.

⁶⁹ Swedish Parliament, *Tandvårdslag*, Svensk författningssamling (SFS) 1985:125.

⁷⁰ Swedish Parliament, *Socialtjänstlag*, Svensk författningssamling (SFS) 2001:453.

⁷¹ Swedish Parliament, *Hälso- och sjukvårdslag*, Svensk författningssamling (SFS) 2017:30.

⁷² Swedish Parliament, *Häktelag*, Svensk författningssamling (SFS) 2010:611.

⁷³ Swedish Parliament, *Förordning om bidrag till utlänningars resor från Sverige för bosättning i annat land*, Svensk författningssamling (SFS) 1984:890.

⁷⁴ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 30. See Section 7.5 of the report for further details.

⁷⁵ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 37.

⁷⁶ See Section 7.5 of the report for further details.

⁷⁷ This also applies if the asylum seeker has had his/her asylum claims reviewed in the first instance but already has received a decision on refusal of entry or expulsion in another case.

time as an asylum seeker. If a work permit is granted, the person in question will also obtain a residence permit and may remain in Sweden. In February 2024, a government commission of inquiry recommended abolishing the 'option to change tracks'.⁷⁸

7.3 Return at Border (Border Rejection), Exit, Internal Check, and Control

7.3.1 General framework

The Aliens Act and the Aliens Ordinance establish a legal framework encompassing various facets of return procedures, including return at border, exit, and internal checks and controls.

The Aliens Act, Chapter 2 outlines the general conditions governing the entry, visit, residence, and work of aliens in Sweden. To enter Sweden, an alien, as a general rule, needs to present a passport, a visa or, when applicable, a residence permit. Exceptions from these requirements are also outlined in the Aliens Act, Chapter 2. Ultimately, however, it is the border police that decide whether a person is allowed to enter Sweden. A person may be rejected at the border even if she has a valid visa or permit, for example, if she/he does not fulfil other requirements, such as necessary vaccinations, such as COVID-19 during the 2020-2022 pandemic.

An alien staying in Sweden for over three months must have a residence permit (Chapter 2, Section 5). The general rule for entry into Sweden stipulates that a residence permit should be applied for and granted prior to entry (Aliens Act Chapter 5, Section 18, Sub-Section 1). The rule allows for several exceptions, for example, for asylum seekers and prolongation of residence permits (see Chapter 5 Section 18, Sub-Sections 2-3, Chapter 5 Section 18 a, and Chapter 5, Section 19.) The Aliens Ordinance indicates specific situations where an alien is not obligated to obtain short-term residence permission (residence permits or visas) to enter Sweden (Chapter 4, Section 6, and Chapter 3, Section 1).

Numerous legislative amendments to the Aliens Act and other relevant legislation concerning entry and exit have been proposed, ratified and eventually enacted to meet the requirements of recent EU regulations in this domain. For instance, these changes encompass the implementation of the European Travel Information and Authorization System (ETIAS)⁷⁹ as specified in Regulation (EU) 2018/1240.⁸⁰ Another notable example is establishing a unified entry and exit system for electronically recording third-country nationals, particularly those with short-term stays or those refused entry when crossing external borders.⁸¹ Furthermore, another recent addition to the legislative framework is the expanded authority to revoke residence permits outlined in the Aliens Act, Chapter 7.⁸² Other legislative

⁷⁸ SOU (Swedish Government Official Reports) 2024:15 Nya regler för arbetskraftsinvandring m.m.

⁷⁹ Prop. (Government Bill). *Anpassning av svensk rätt till EU:s nya system för reseuppgifter och resetillstånd*, 2022/23:66.

⁸⁰ Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226.

⁸¹ Prop. (Government Bill), *Anpassning av svensk rätt till EU:s nya in- och utresesystem*, 2021/22:81.

⁸² Prop. (Government Bill), *Anpassningar av svensk lag till EU:s förordningar om Schengens informationssystem*, 2020/21:222, 1.

modifications pertaining to the Schengen Information System (SIS) EU regulations and requirements for foreign individuals to furnish fingerprints and undergo photographic procedures for identity verification within the entry and exit system were also introduced into Swedish law.⁸³

7.3.2 Procedural Safeguards in the Context of the Entry and Exit System in Sweden

While implementing the Return Directive, the Swedish government held that Swedish law retains and upholds the EU return regime's procedural safeguards. The safeguards include postponement of removal, limitations on the use of coercive measures, access to emergency healthcare, consideration for vulnerable individuals, detention conditions, and adherence to the fundamental principle of non-refoulement.⁸⁴ One example of an important procedural safeguard is that a return decision may not be enforced until it has taken legal effect. This means for example that if the Migration Agency has rejected an application for a residence permit (a decision combined with a decision on return) and the decision is appealed to a migration court, the decision does not take legal effect during the appeal process. As a result, it cannot be enforced and the applicant as a general rule may remain in Sweden. The government also held that, in several respects, Swedish law surpasses several of the rights and protections for refugees and asylum seekers stipulated in the Refugee Convention, including Article 33.⁸⁵ Furthermore, the government held that there are no regulations that could lead to the separation of family members following decisions on deportation or expulsion.⁸⁶ Whether this is really the case may be debated.

The Aliens Act incorporates various provisions to establish a legal framework that ensures the principle of non-refoulement and related matters. These provisions are mainly located in Chapter 8, which concerns expulsion and deportation, and Chapter 12, which concerns the execution of decisions on expulsion and deportation. As detailed in the 2012 Swedish government bill on the implementation of the Return Directive, it was determined that no new legislative amendments were required in Swedish law to maintain compliance with the non-refoulement principle, including the postponement of removal decisions by Articles 9 and 5 of the EU Return Directive.⁸⁷

The Aliens Act, Chapter 12 Sections 1–3a lists impediments to enforcing deportation and expulsion decisions. For instance, Chapter 12, Section 1 prohibits the enforcement of such decisions in a country where there is a reasonable risk of death, corporal punishment, torture, or other inhuman or degrading treatment. Similarly, Chapter 12, Section 3 a, stipulates that an unaccompanied minor may only be returned if there are arrangements for their reception by a family member, appointed guardian, or a suitable care facility.

⁸³ Ibid, 1.

⁸⁴ This adherence is explicitly stated in the Swedish Prop. (Government Bill) 2011/12:60, 60-62 concerning the implementation of the Return Directive.

⁸⁵ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 63.

⁸⁶ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 61.

⁸⁷ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 42–43, 60–63.

The Aliens Act mandates the Migration Agency, under Chapter 8, Section 17, to assess asylum applications in the context of deportation enforcement. Chapter 12, Section 18, allows for residence permits in cases of new circumstances that impede the execution of deportation or expulsion, in line with the Aliens Act Chapter 12, Sections 1, 2, 3 and 3a (so-called “political” impediments to the enforcement of a return decision, as Chapter 1-3a) address different aspects of the principle of non-refoulement). Chapter 12 also provides for non-execution of the return decision if the intended receiving country refuses to accept the individual or if medical or other exceptional reasons deem execution inappropriate (Chapter 12, Section 18, Sub-Sections 2 and 3, on practical and medical impediments to enforcement). Furthermore, the Migration Agency may, under Chapter 12, Section 18, Sub-Section 4, suspend deportation and expulsion decisions for re-examination of new facts. If permanent impediments arise, the Aliens Act Chapter 12, Sections 19 and 19a provides, under certain circumstances, for a new residence permit review. Execution of expulsion or deportation decisions is deferred until the Migration Agency or appellate instance concludes this new review. The Aliens Act (Chapter 11, Section 6), the Criminal Code⁸⁸ (Chapter 24, Section 2), and the Police Act⁸⁹ (Section 10), which effectively restricts the use of force during the implementation of coercive measures. It aims to ensure that return procedures are proportional and avoid excessive use of force in compliance with the Return Directive, Article 8.4. Additionally, the government has highlighted the role of various entities in overseeing and protecting the rights of aliens.⁹⁰ These include the administrative courts, the Parliamentary Ombudsman (Justitieombudsmannen), the Chancellor of Justice (Justitiekanslern), the Swedish Migration Agency’s application Ombudsman, and various NGOs, all of which provide avenues for aliens seeking redress. It should also be mentioned that in most relevant cases, Sweden does not utilize the exemptions to implement the Return Directive allowed for member states under the Directive’s Article 2.2 a-b. There are certain exceptions: time limits for voluntary return in the case of denied entry do not apply for individuals mentioned in the Return Directive Article 2.2 a. Also, time limits do not apply to persons who have been issued a return decision by a court as part of their sentence in a criminal trial (the Return Directive Article 2.2 b).⁹¹ The exception in Article 2.2 b is also utilized to permit the Swedish government to make certain decisions concerning detention.

7.4 Regular Procedure to Issue a Return Decision

The regulations about regular procedures for issuing return decisions and their consequences, including re-entry bans and voluntary deportation to Sweden, are primarily established in the Aliens Act and, when applicable, the Act (2022:700) Concerning Special Control of Certain Aliens. The latter Act addresses aliens considered to pose threats to national security. The Migration Agency has the authority to issue expulsion or removal and deportation-related decisions (Chapter 12, Section 14 and Chapter 8, Section 17), which may be appealed to the Migration Court (Chapter 14).⁹² The Police Authority can also, under certain circumstances,

⁸⁸ Swedish Parliament. *Brottsbalken*, Svensk författningssamling (SFS) 1962: 700.

⁸⁹ Swedish Parliament. *Polislag*, Svensk författningssamling (SFS) 1984: 387.

⁹⁰ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 41.

⁹¹ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 33.

⁹² The Migration Agency’s decisions can be appealed to the Migration Courts. The Migration Courts serve as the first instance and are located at four administrative courts in Sweden, namely Stockholm, Malmö, Gothenburg, and Luleå. The final instance for these cases is the Migration Court of Appeal,

issue such decisions (Chapter 12, Section 14 and Chapter 8, Section 17), which may be appealed to the Migration Agency or a Migration Court (Chapter 14). In addition, decisions regarding expulsion due to criminal activity fall under the jurisdiction of the court responsible for the criminal case (Aliens Act, Chapter 8a, Section 10).

The Aliens Act also defines the area of responsibility of the Police Authority concerning the enforcement of expulsion and deportation decisions. This responsibility encompasses the execution of the Police Authority's expulsion and deportation decisions and court decisions for deportation due to criminal activities (Aliens Act, Chapter 12, Section 14). Additionally, it involves enforcing a decision of expulsion and deportation if the alien, after the decision has been enforced once, is found to have returned to Sweden (Chapter 12, Section 23). The Aliens Act, Chapter 8, specifies the various grounds for expulsion and deportation, stating that an alien lacking the necessary permit to stay in Sweden should be expelled or deported, while Chapter 12 details the different aspects of enforcement of expulsion and deportation decisions. For instance, crime or suspected criminality according to the Terrorist Crimes Act (2022:666) and considerations for Sweden's security that can be found in the Act (2022:700) on Special Control of Certain Aliens are stated as grounds for expulsion in the Aliens Act (Chapter 8, Section 1, Sub-Sections 1, 2 and 3). The Security Service enforces expulsion and deportation decisions related to security cases as specified in the Aliens Act (Chapter 12, Section 14) and defined in it (Chapter 1, Section 7).

The Aliens Act outlines the circumstances under which decisions on immediate enforcement can be implemented (Chapter 8, Section 19) and provides instructions for enforcement procedures (Chapter 8, Section 20). It also details when a decision on deportation or expulsion shall be considered executed (Chapter 12, Sections 21 and 22) and when enforcement of a decision has not ceased or is still applicable (Chapter 12, Section 23).

An expulsion and deportation decision must include specific information and be structured as follows: The Aliens Act (Chapter 13, Section 10) mandates that a decision must be in writing and provide the rationale for the decision, especially when it concerns matters such as re-entry bans, expulsions, and deportations. This provision was integrated into the Aliens Act in 2012 to comply with the requirements of Articles 12 and 15.2 of the EU Return Directive.⁹³ In fact, the Administrative Procedure Act (2017:900)⁹⁴ in its Section 20 specifies also that a decision by an authority in any matter involving individual rights shall state the grounds on which it is based. This decision should also outline the potential penalties for violating the re-entry ban as indicated in the Aliens Act (Chapter 8a, Section 10, Sub-Section 2). Additionally, the decision should contain instructions regarding enforcement measures that may be applicable based on the specific circumstances of the individual case, as stipulated in the Aliens Act (Chapter 8, Section 20). Furthermore, the Aliens Act (Chapter 8, Section 27) specifies that certain decisions must be included with expulsion and deportation decisions. This requirement applies even if the affected individual did not initially raise the issues covered by these decisions, or if the issues were not addressed in earlier stages. This includes, for instance, situations like the deportation or expulsion of a child under the age of 16 who is under the custody of an alien subject to return.

which is situated at the Administrative Court of Appeal in Stockholm. For more information, please see the Swedish Courts' website for more information www.domstol.se.

⁹³ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 57.

⁹⁴ Swedish Parliament. *Förvaltningslag*, Svensk författningssamling (SFS) 2017:900.

7.5 Special Cases and their Relation with the Obligation to Issue a Return Decision

7.5.1 Irregular aliens covered by existing bilateral agreements between Member States and holders of a return decision issued by another Member State

Sweden has established several readmission agreements with other EU member states.⁹⁵ Consequently, the Swedish government concluded that Article 6.3 of the Return Directive does not necessitate any legislative amendments within Swedish law.⁹⁶ This conclusion was based on the premise that Article 6.3 grants each member state the option to abstain from issuing a return decision to a third-country national who is residing illegally on its territory. This option is applicable if another Member State readmits that individual under bilateral agreements or arrangements that were in effect when the Directive came into force.⁹⁷ The rationale behind this decision stems from the understanding that these agreements do not supersede the rules of the Aliens Act about decisions on expulsion or deportation. Therefore, there is no requirement to invoke the option of exemption from the obligation to render a decision on deportation or expulsion in this context by Article 6.3.⁹⁸ Consequently, this reasoning is applicable to cases involving individuals holding a return decision issued by another EU member state.

7.5.2 Irregular aliens benefitting from humanitarian (or other) permit/authorisation or subject to a pending procedure renewing a permit/authorisation

The Aliens Act encompasses legislative provisions pertinent to aliens present in Sweden under irregular conditions or without a valid residence permit. This scenario extends to individuals engaged in the renewal of their permits or those benefitting from humanitarian or alternative forms of authorization, as delineated in Articles 6.4 and 6.5 of the Return Directive.⁹⁹

Diverse clauses within the Aliens Act articulate that any decision regarding deportation or expulsion becomes null or unenforceable when the individual possesses a valid residence permit. This is particularly relevant for aliens who, subsequent to being issued a deportation order, are subsequently granted a residence permit. The Aliens Act (Chapter 5, Sections 18 and 19) implicitly affords a right to foreign nationals who have filed for an extension of their residence permits to legally reside in Sweden for the duration of the processing period of their application.¹⁰⁰ Consequently, such individuals are exempt from expulsion or deportation during this interim. The government, thus, in the government bill on the implementation of

⁹⁵ See Section 7.11 of this report.

⁹⁶ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 29.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 28.

¹⁰⁰ Ibid.

the EU Return Directive, interpreted these sections as complying with the Directive's mandate for the revocation or temporary postponement of return decisions upon the issuance of a residence permit.¹⁰¹

Moreover, as is also emphasized in the government bill, under Article 6.4 all Member States are vested with the prerogative to issue a residence permit or any alternative authorisation for residency at any given juncture. This discretion is manifest in the Aliens Act, particularly in Chapter 12, Section 18, which stipulates the potential for an alien to be granted a residence permit under new circumstances that pertain to the execution of a legally binding decision on expulsion or deportation or in instances where such a decision is subject to suspension.

7.5.3 Irregular aliens which can be transferred to another Member State under Dublin rules (or under readmission rules)

The Aliens Act, Chapter 1, Section 9, specifies that the regulations regarding expulsion and deportation decisions, as outlined in the Act, also apply to Dublin transfer decisions directed to the responsible Member State.¹⁰² The Aliens Act, Chapter 5, Section 1 b stipulates in which cases an asylum application may be rejected, and under which conditions. The provision implements the Asylum Procedures Directive (recast), Article 33.2 a.¹⁰³ The Aliens Act, Chapter 5, Section 1 c, Sub-section 1 stipulates that transfer decisions for asylum seekers are conducted in compliance with the Dublin Regulation, extending to EU member states as well as Iceland, Norway, Switzerland, and Liechtenstein. Chapter 5, Section 1 c, Sub-Section 2 stipulates that an asylum application shall be rejected in the case of a Dublin transfer. The provision implements the Asylum Procedures Directive (recast), Article 33.1. If the applicant claims a need for international protection concerning the state responsible for the asylum application due to the Dublin Regulation, the Migration Court of Appeal has concluded that what is to be assessed is if the transfer may constitute a violation of the principle of non-refoulement (see MIG 2010:21 and MIG 2016:16).

The Aliens Act, Chapter 12, Section 9 a, stipulates that if a decision on transferring an alien following the Dublin Regulation has been appealed, and during the period of appeal, a request for the suspension of the decision has been made, the transfer decision shall not be executed until a migration court has examined the issue of suspension. This applies only the first time the foreign national requests suspension. A decision to deny such a request for suspension must be duly justified.¹⁰⁴

Swedish case law has had a significant impact on the application of the Dublin Regulation. An example is the judgment of the Migration Court of Appeal, MIG 2006:4, which established that once a transfer decision has been made under the Dublin Regulation, there is

¹⁰¹ Ibid.

¹⁰² Cf. Prop. (Government Bill) *Ändringar i utlänningslagen med anledning av den omarbetade Dublinförordningens ikraftträdande*, 2013/14:197; Prop. (Government Bill) *Ytterligare anpassning av svensk rätt till Dublinförordningen*, 2016/17:150. and Prop. (Government Bill) *Genomförande av skyddsgrundsdirektivet och asylprocedurdirektivet*, 2009/10:31, 216.

¹⁰³ Prop. (Government Bill), *Ändringar i utlänningslagen med anledning av den omarbetade Dublinförordningens ikraftträdande*, 2013/14:197.

¹⁰⁴ Prop. (Government Bill), *Ytterligare anpassning av svensk rätt till Dublinförordningen*, 2016/17:150.

no possibility to review the asylum application in Sweden. A second example is the judgment of the Migration Court of Appeal, MIG 2014:29, which determined that the provisions on legal aid in the Aliens Act (Chapter 18, Section 1) could be applied to cases concerning transfer issues under the Dublin Regulation if the need for legal assistance is deemed necessary.

7.5.4 Irregular aliens with a right to stay in another Member State

In late 2016, the Swedish government proposed legislative amendments to the Aliens Act to, to a more considerable extent, align Swedish migration law with the Return Directive and the Directive governing the status of third-country nationals as Permanent Residents.¹⁰⁵ The proposals resulted in the introduction of new provisions into the Aliens Act. The Aliens Act Chapter 8, Section 6 a addresses the expulsion and deportation of individuals who meet the following criteria: (1) are not EEA nationals or family members of EEA nationals, (2) possess a residence permit from another EU state, but (3) do not meet the requirements for staying in Sweden under the Aliens Act, Chapter 8, and (4) are subject to deportation or expulsion from Sweden under the same Chapter of the Aliens Act. The provisions outlined in the Return Directive, Article 6.2, made this legislative amendment necessary. Notably, during discussions on Sweden's implementation of the Return Directive, the European Commission pointed out in a memorandum the absence of specific regulations governing the expulsion and deportation procedures for the category of aliens addressed here.¹⁰⁶ These persons are to, following the first subsection of the Aliens Act Chapter 8, Section 6 a, to be instructed by the deciding authority to voluntarily proceed to the other EU state within a reasonable time. The instruction may not be appealed because it is considered a decision in favour of the alien (it is not enforceable). The deciding authority may only determine the issue of removal or expulsion if the foreign national has not complied with such an instruction. The Aliens Act Chapter 8, Section 6 a, Sub-section 2 however stipulates that the first subsection does not apply in the following cases:

1. The Migration Agency rejects or denies an application for a residence permit which, according to the provisions of this Act or any other legislation, may be granted after entry into Sweden.
2. The alien is denied entry into the country.
3. The alien is intercepted in the act of illegally crossing an external border.
4. The alien poses a risk to public order and security.
5. It is deemed probable that the alien would not comply with the instruction.

In April 2023, the CJEU in the case C-629/22 (which concerned Sweden and the validity of the Aliens Act Chapter 8, Section 6 a, subsection 2) found that the Return Directive, Article 6.2, requires states to provide irregular aliens with the possibility to return to the member state in which they hold a residence permit before the national authorities issue a decision on return.¹⁰⁷ The CJEU, in the judgment, concludes (without saying so explicitly) that the Aliens

¹⁰⁵Prop. (Government Bill), *Uppföljning av återvändandenedirektivet och direktivet om varaktigt bosatta tredjelandsmedborgares ställning*, 2016/17:61.

¹⁰⁶ Ibid, 14.

¹⁰⁷ CJEU, C-629/22, ECLI:EU:C:2023:365.

Act Chapter 8, Section 6 a, subsection 2 does not fully comply with the Return Directive, Article 6.2. So far, however, the legislation remains unchanged.

7.6 Voluntary Departure

The relevant regulations concerning voluntary return and the consequence of their non-compliance, which is “re-entry bans”, have undergone multiple legislative amendments in the Aliens Act since the implementation of the Return Directive in May 2012, particularly the deadline of the voluntary return. This aspect aligns with the legislative change required by the EU Return Directive, Article 7. The matter of voluntary return was acknowledged as central due to its impact on the execution of other articles within the Return Directive and eventually on the entire return regime by the Swedish government.¹⁰⁸ Consequently, the Aliens Act establishes a general rule (Chapter 8, Section 21, Sub-Section 1) concerning the inclusion of a deadline for voluntary departure and re-entry bans in expulsion or deportation decisions, along with exceptional rules (Chapter 8, Section 21, Sub-Section 2) in some instances and situations where this voluntary departure deadline cannot be given in the expulsion or deportation decisions. Accordingly, a decision of expulsion or deportation must include a timeframe within which the alien must leave Sweden voluntarily (Chapter 8, Section 21, Sub-Section 1) as a general rule. The voluntary departure deadline can be set for up to two weeks in the case of expulsion and four weeks in the case of deportation by the Aliens Act regulations (Chapter 8, Section 21, Sub-Section 1). The Migration Court of Appeal in MIG 2021:13 declared that no coercive measures may be taken against a foreign national to ensure the enforcement of a removal order while the period for voluntary departure is running.

For EEA citizens or their family members who have travelled in Sweden, different rules apply to the voluntary return deadline or departure. The Aliens Act states that an EEA citizen or their family members shall be granted no earlier than four weeks from the day the EEA citizen or family member received the decision unless there are exceptional reasons for implementing the decision (Chapter 12, Section 15, Sub-Section 3). This provision aligns with the requirement of Article 30.3 in the Citizen's Rights Directive (2004/38/EC).¹⁰⁹

The deadline for voluntary departure can be extended if special reasons exist (Chapter 8, Section 21, Sub-Section 1). This provision corresponds with the Return Directive, Article 7.2, which provides several examples of specific circumstances in individual cases, “such as the length of stay, the existence of children attending school, and the existence of other family and social ties”.¹¹⁰ However, the Swedish government determined that the circumstances warranting an extension of the voluntary departure deadline should not be specified in the new provision, as an extension should be possible if required.¹¹¹

This extension for the voluntary return deadline is determined by the Migration Agency or the Policy Authority (Chapter 12, Section 14b). Additionally, the Aliens Act (Chapter 8, Section 21, Sub-Section 2) lists specific situations where a voluntary return deadline need not be included in deportation and expulsion decisions based on five grounds: i) there is a risk that alien will abscond; ii) the alien poses a threat to public order and security; iii) a deportation

¹⁰⁸Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 31.

¹⁰⁹ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 33.

¹¹⁰ Ibid.

¹¹¹ Ibid.

decision denies the alien entry into the country; iv) the alien is intercepted while illegally crossing an external border and is subsequently deported or v) the alien is deported by the Migration Agency with immediate execution.

These grounds correspond with the Return Directive, Article 7.4.¹¹² The concept of a "risk of absconding" was recognized as central in this context as it impacts the implementation of several articles in the Return Directive, including voluntary return, re-entry bans, and detention, and eventually the main objective of precise whole implementation of the Return Directive.¹¹³ As a result a provision was incorporated into the Aliens Act (Chapter 1, Section 15) specifying its meaning or circumstances as follows:

‘If, in the application of this Act, an assessment is made as to whether there is a risk of an alien absconding, considerations may only be given if he or she:

- has previously evaded authorities,
- has declared an intention not to leave the country after an expulsion decision,
- has used a false identity,
- has not cooperated in clarifying their identity, thereby hindering the examination of their residence permit application,
- has knowingly provided false information or withheld material information,
- has violated an announced re-entry ban in the past,
- has been convicted of a crime punishable by imprisonment or
- has been expelled by a general court based on criminal grounds.’

On the matter of financial support in the context of return, the special Ordinance (1984:890) addresses financial support for an alien's travel from Sweden to resettle in another country. This ordinance designates the Migration Agency to determine government grants for the following categories:

Aliens granted residence permits in Sweden based on government transfer;

Aliens granted residence permits in Sweden for protection reasons, per the Aliens Act, Chapter 5);

Aliens granted residence permits in Sweden due to their connection to those in the previous categories 1 or 2, not eligible for assistance under Swedish law.

Sections 3 and 5 of this Ordinance specify that this grant is disbursed when the recipient departs Sweden, provided they lack the means for the journey and can show they will be received in their intended settlement country.

An alien whose asylum application has been rejected or who has withdrawn their asylum application may also, under certain circumstances, apply for financial (cash) support to help re-establish in the country of return.¹¹⁴ The process and conditions are regulated by the Ordinance (2008:778) on re-establishment support for certain aliens. The cash support is

¹¹² Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 37.

¹¹³ Ibid.

¹¹⁴ For more information on to which countries the support applies, see <https://www.migrationsverket.se/Privatpersoner/Lamna-Sverige/Avslag-pa-ansokan-om-asyl/Stod-till-ateretablering/Kontantstod.html> (last accessed Januari 2, 2024).

made available to the alien in the country of return. There is also a possibility to apply for reintegration measures in the context of the European collaboration programme Joint Reintegration Service (JRS).¹¹⁵

7.7 Return of Unaccompanied Minors

The Aliens Act, Chapter 1, Section 1 a) states that "child" for the purpose of the Act refers to a person below the age of 18. The Aliens Act Chapter 1, Section 10 and Chapter 1, Section 11 implement two fundamental principles of the Convention on the Rights of the Child into the Act: the best-interests principle and the right to be heard. The two provisions were introduced in the Aliens Act in 1997 as part of the efforts to transform key parts of the CRC into Swedish law.¹¹⁶ The Aliens Act, Chapter 1, Section 10 mandates the consideration of a child's health, development, and overall best interests in all cases related to children and is based on Articles 3.1 and 6 of the CRC.¹¹⁷ The Aliens Act Chapter 10, Section 11 mandates that when assessing questions related to a residence permit under the Aliens Act, and when the decision impacts a child, the child must be heard unless it is deemed inappropriate. Account must be taken of what the child has said to the extent warranted by the age and maturity of the child. Chapter 1, Section 11 is based on Article 12 of the CRC. Both Chapter 1, Section 10 and Chapter 1, Section 11 apply in deportation and expulsion cases. Moreover, it may be noted that the right to oral proceedings in asylum cases, as outlined in the Aliens Act, Chapter 13, Section 1, applies to adults and children alike. When implementing the Asylum Procedures Directive (recast) into Swedish law, the government concluded that there was no need for legislative amendments to specifically require child-oriented interviews with minors, given the fact that the right to be heard as well as the best-interests principle were already included in the Aliens Act.¹¹⁸

While the Aliens Act does not contain a specific definition of unaccompanied minors (UAMs), it is recognized in Swedish migration law that UAMs are entitled to special protection.¹¹⁹ The "Reception of Asylum Seekers and Others Act" stipulates that special conditions apply to UAMs, for example regarding housing.¹²⁰ Moreover, the Unaccompanied Minors Guardian Act (2005:429) states that the interests of UAMs are to be protected through the appointment of a special guardian ("*god man*"). The special guardian acts instead of the child's parents or legal guardian and thus has a different role than the child's legal representative. Following the Aliens Act, Chapter 18, Section 1 a, a public legal counsel shall always be appointed to a child seeking asylum in Sweden if the child does not have a legal guardian in Sweden. The same applies to children appealing a negative decision on asylum or on impediments of enforcement. The right to public legal counsel also applies to children who

¹¹⁵ Ibid.

¹¹⁶ Prop. (Government Bill), *Svensk migrationspolitik i globalt perspektiv*, 1996/97:25. See also Section 4 of the report.

¹¹⁷ The Migration Court of Appeal has discussed the interpretation and implementation of the best interests-principle in several judgments, including MIG 2020:24 and MIG 2021:18.

¹¹⁸ Genomförande av det omarbetade asylprocedurdirektivet, Prop. (Government Bill) 2016/17:17, 50.

¹¹⁹ The Aliens Act however refers to this group in various terms, such as the reference to "children who have arrived in Sweden separated from their parents or another adult having effectively taken the parent's place, or if the child has been abandoned after arrival" in the Aliens Act, Chapter 5, Section 3. The matter of age assessments, in order to determine whether a person claiming to be a child actually is below the age of 18, is addressed in the Aliens Act Chapter 13, Sections 17 and 18, and in the Aliens Ordinance, Chapter 4, Section 21 d.

¹²⁰ Section 1 b of the Reception of Asylum Seekers and Others Act.

have been assigned a special guardian according to the Unaccompanied Minors Guardian Act (2005:429).¹²¹

The Aliens Act, in addition to the overarching provisions pertaining to the right to be heard and the best interests principle in Chapter 1 of the Act, also includes specific provisions addressing the rights of unaccompanied minors in the context of return.¹²² Chapter 12, Section 3 a establishes that a decision to deport or expel an unaccompanied minor cannot be enforced unless the enforcing authority ensures that the child will be received by a family member, an appointed guardian, or a reception unit well-equipped to care for children. If these requirements are not met, the return decision cannot be enforced – there is what is referred to as a practical impediment to the enforcement of the decision (see Section 7.2.2 above). In these cases, the UAM will usually be granted a temporary residence permit valid until he or she turns 18 based on the Aliens Act Chapter 5, Section 11. The Migration Court of Appeal in MIG 2015:23 emphasized that the Migration Agency has a special responsibility for unaccompanied minors, including in the return process, and that the Migration Agency has the primary responsibility for ensuring that the reception conditions in the country of origin are adequate, even though the child is expected to contribute to the process.¹²³ Also in MIG 2015:23, the Migration Court of Appeal on the matter of re-entry bans held that, as the child in question was found to have contributed to the return process as best she could, the requirements for not applying a re-entry ban (as stipulated in the Aliens Act Chapter 12, Section 15 a) were fulfilled.

While the Aliens Act and adjacent legislation on paper provide for safeguarding the special needs of UAMs in Sweden, this, as has been continuously pointed out by NGO-s and migration scholars, has not always translated into practice.¹²⁴

The 2016 introduction of temporary residence permits in combination with the increased focus on return, while simultaneously remaining to be difficult to enforce return decisions, has resulted in many non-citizens, including UAMs or young adults, becoming stuck in legal limbo, often living under challenging economic and social circumstances.¹²⁵ In addition, the normalization of an immigration-critical (or immigration-hostile) discourse has contributed to their difficult situation and to justifying repeal of legislation aimed at safeguarding their rights (such as the Upper Secondary School Act and humanitarian grounds in the Aliens Act Chapter 5 Section 6, Sub-Section 2).¹²⁶

¹²¹ Migration Court of Appeal judgment MIG 2015:23.

¹²² See also CJEU, C-484/22, February 15, 2023, ECLI:EU: C:2023:122.

¹²³ See also CJEU, C-C-441/19, January 14, 2021; ECLI:EU:C:2021:9.

¹²⁴ Barnombudsmannen, *Barn på flykt. Barns och ungas röster om mottagandet av ensamkommande* (Stockholm, Barnombudsmannen, 2017); Swedish Red Cross, *Mitt liv räknas – den humanitära situationen för ensamkommande unga* (Stockholm, Svenska Röda Korset, 2020); Daniel Hedlund, *Drawing the Limits. Unaccompanied Minors in Swedish Asylum Policy and Procedure*, dissertation (Stockholm, Stockholm University, 2016); Marianne Garvik and Marco Valenta, “Seeking Asylum in Scandinavia: A Comparative Analysis of Recent Restrictive Policy Responses Towards Unaccompanied Afghan Minors in Denmark, Sweden and Norway,” *Comparative Migration Studies*, Vol. 9, Issue 1 (2021): 1-22.

¹²⁵ Garvik and Valenta, *Seeking Asylum in Scandinavia: A Comparative Analysis of Recent Restrictive Policy Responses Towards Unaccompanied Afghan Minors in Denmark, Sweden and Norway*.

¹²⁶ Amber Horning, Sara V. Jordenö and Nicole Savoie, “Double-Edged Risk: Unaccompanied Minor Refugees (UMRs) in Sweden and Their Search for Safety,” *Journal of Refugee Studies*, Vol. 33, No. 2, June (2020): 390–415.

7.8 Re-Entry Bans

To implement the provisions on entry bans from the Return Directive into Swedish law, numerous revisions and amendments have been made to the Aliens Act.¹²⁷ These amendments tie the regulation of entry bans closely to the regulation of timeframes for voluntary return, as discussed in Section 7.5. According to the Aliens Act (Chapter 8, Section 23), if it proves impossible to set a timeframe for voluntary departure the decision on expulsion by the Police Authority and the decisions on rejection, expulsion, or deportation by the Migration Agency must include a re-entry ban. This is unless specific circumstances relating to the individual's situation warrant otherwise. This requirement is contingent upon the absence of conditions for setting a voluntary departure deadline based on the five criteria detailed in the Aliens Act (Chapter 8, Section 21, Sub-Section 2).

The Aliens Act, Chapter 8, Section 24 mandates that the duration of an entry ban based on Chapter 8, Section 23 typically should not surpass five years, except in cases where the individual poses a significant risk to public order and security, which may justify a longer ban. For aliens who fail to comply with an expulsion or deportation decision and remain in Sweden past the voluntary departure period, the re-entry ban is set to one year (Chapter 12, Section 15a). In early February 2024, a Government Inquiry suggested that the duration of entry-bans based on Chapter 12, Section 15 a should be based on an individual assessment of the case in question, something which might lead to longer entry bans for this category.¹²⁸ It is also suggested that it should be specifically stated in the Aliens Act that a re-entry ban not issued by a general court shall commence on the day the alien leaves the territory of the Member States or, if the decision on expulsion or deportation is to be enforced to a Member State, on the day the he or she exits Sweden.¹²⁹ Should these proposals become law, they are to enter into force in 2025.

The Aliens Act differentiates between re-entry bans resulting from criminal conduct (Chapter 8a) and those due to non-criminal reasons (Chapter 8). In the context of criminal activities, the duration of a re-entry ban may be specified or indefinite, as outlined in the Aliens Act (Chapter 8a, Section 11, Sub-Section 1). Recent legislative updates to the Aliens Act and the Penal Code have facilitated the deportation of individuals who commit crimes and have introduced stricter regulations on deportation for criminal activities.¹³⁰ These amendments, effective from 1 August 2022, have extended the length of re-entry bans, which now commence on the day of departure.

Notably, specific rules apply to re-entry bans for EEA citizens and their family members. Only decisions concerning public order or security can result in a re-entry ban for an EEA citizen or their relative, in accordance with the Aliens Act (Chapter 8, Section 23). This provision, adopted in 2006, aligns with Article 15.1 and 3 of the EU Free Movement Directive,

¹²⁷ Cf. Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60; Prop. (Government Bill), *Uppföljning av återvändandedirektivet och direktivet om varaktigt bosatta tredjelandsmedborgares ställning*, 2016/17:61 and Prop. (Government Bill), *Utvisning på grund av brott – ett skärpt regelverk*, 2021/22:224.

¹²⁸ Preskription av avlägsnandebeslut och vissa frågor om återreseförbud, SOU 2024:10 (Chapter 6.3).

¹²⁹ Ibid.

¹³⁰ Prop. (Government Bill), *Utvisning på grund av brott – ett skärpt regelverk*, 2021/22:224.

highlighting the necessity to avoid imposing re-entry bans on EU citizens and their family members for reasons beyond public order or security.¹³¹

Furthermore, the Aliens Act (Chapter 8, Section 26, Subsection 1) allows for the Migration Agency, the Migration Court, and the Migration Court of Appeal to wholly or partially revoke a re-entry ban if special circumstances indicate the ban is no longer appropriate. The government bill on the implementation of the Return Directive provides examples, such as considerations of the best interests of children, which could warrant the lifting of a re-entry ban. The legislation also offers a mechanism for the affected individual or the Migration Agency to request the lifting of a ban (Chapter 8, Section 26, Sub-Sections 2 and 3). The Aliens Act links the enforceability of expulsion or deportation decisions to the imposition of re-entry bans, specifying that a re-entry ban cannot be notified if the execution of an expulsion or deportation decision is hindered by a stay of execution, an application for a residence permit, or a re-evaluation request (Chapter 12, Section 15a, Sub-Section 2).

7.9 Procedural Safeguards in the Context of Return Enforcement

The Swedish return regime includes several procedural safeguards, demonstrated throughout this report. However, some aspects of this procedural safeguard regime remain to be summarized in this section. When first implementing the EU Return Directive, the government concluded that legislative amendments were unnecessary since the existing provisions in Swedish law met the criteria set out in the Directive Articles 12.1, 12.2, 12.3, 13.3, and 13.4.¹³² For instance, when dealing with individuals who do not speak Swedish, it is incumbent upon an authority to engage an interpreter if necessary, ensuring that documents are translated to enable the person to exercise their rights, as stipulated in the Administrative Act (FL 2017:900) Section 13. Moreover, both the Administrative Court Procedure Act (FPL, 1971:291) Section 50¹³³ and the Act of Judicial Procedure (RB 1942:740) Section 5, Sub-Section 6 guarantee linguistic assistance by appointing an interpreter when needed if a party, witness, or any other individual to be heard in court does not speak Swedish. These provisions regarding interpreters also encompass the translation of documents, encompassing both incoming documents and those prepared by the Migration Agency.

The Aliens Act provides a mechanism for offering public legal aid in the form of public legal counsel in certain situations or under particular conditions for aliens. These situations encompass cases involving deportation and expulsion decisions. Importantly, this legal assistance is provided without charge and is not subject to means-testing, meaning that foreign nationals are not obligated to reimburse any associated costs.¹³⁴ It should also be highlighted that the right to legal representation under the Aliens Act extends more broadly than the right to legal aid stipulated by the Asylum Procedures Directive. This expanded scope is due to the presumption rule outlined in the Aliens Act Chapter 18, Section 1. As a result of this rule, a legal counsel is appointed in nearly all cases of expulsion, deportation, and

¹³¹ Gerhard Wikrén and Håkan Sandesjö, *Utlänningslagen med kommentarer*, 13A ed. JUNO (digital edition).

¹³² Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 59.

¹³³ Swedish Parliament. *Förvaltningsprocesslag*, Svenska författningssamling (SFS) 1971:291

¹³⁴ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 68.

enforcement proceedings involving the detention of an alien.¹³⁵ It follows by Chapter 18, Section 1 that the appointment of a legal counsel is mandatory, except when it can be reasonably assumed that there is no need for legal assistance.

7.10 Basic Conditions for Return Enforcement Detention in Sweden

(Immigration) detention (*förvar*) and the less restrictive measure of supervision (*uppsikt*) are regulated in the Aliens Act. Chapters 10 and 11 of the Aliens Act outline the conditions under which these coercive measures may be used (Chapter 10) and the minimum standards according to which a detainee is to be treated (Chapter 11). The Act (2022:700) on special control of certain Aliens regulates detention in security cases. The Aliens Act Chapter 1 Section 8 stipulates that the Aliens Act ‘shall be applied to ensure an alien’s freedom is not restricted more than is necessary in each individual case’. The proportionality principle expressed here also applies to detention and supervision.¹³⁶ As a consequence of the proportionality principle, detention should only be used in cases where supervision is not considered sufficient.¹³⁷ The conditions for putting a person under supervision are outlined in the Aliens Act Chapter 10, Sections 6 and 7. The Migration Court of Appeal in MIG 2020:2 established that for supervision to be used instead of detention, there must be a basis for detention according to the Aliens Act, which is compatible with EU law. Chapter 1, Section 8 and Chapter 10, Section 6 combined are found to fulfil the requirement of using alternative sufficient but less intrusive measures as specified in the Return Directive, Article 15.1. Sweden, however, has been repeatedly criticized for not using detention as a last resort, but rather as a first choice.¹³⁸

It is noteworthy that although the grounds for detention in EU directives such as the Return Directive, Reception Conditions Directive, and the Asylum Procedures Directive target different categories of third-country nationals and thus differ, the same distinction is not made in the Aliens Act Chapter 10; these rules apply to all third-country nationals. The Migration Court of Appeal in MIG 2020:2 emphasized that while the Swedish regulations on detention form the basis for detention, they must be interpreted and applied in a manner compatible with EU law. It can be added that the same applies to the ECHR, Article 5.1 f in particular, and also the EU Charter on Fundamental Rights.

The Aliens Act, Chapter 10, Section 1 regulates the circumstances under which an adult may be detained. Chapter 10, Section 1, Sub-Section 3 outlines the requirements for a person to be detained for return: that is, either to prepare for the enforcement of a return decision or actual enforcement of such a decision (*verkställighetsförvar*). When the Return Directive was implemented into Swedish law in 2012, the primary conditions for detention for removal in the Aliens Act were modified in order to align with the requirements of the Directive, Articles 15 and 16 in particular.¹³⁹ Revisions included specifying under which circumstances a person can be detained for this purpose (see Chapter 10, Section 1, Sub-Section 4). These are now limited to when there may otherwise be a risk that the alien engages in criminal activities

¹³⁵ Ibid.

¹³⁶ Andersson, ”Förvar och principerna för tvång,” *Juridisk Tidskrift*, No.2 (2020): 367–405.

¹³⁷ On supervision, see *the Aliens Act* Chapter 10, Sections 6 to 8.

¹³⁸ CCPR/C/SWE/CO/7, p. 33; CAT/C/SWE/CO/6-7, p. 10.

¹³⁹ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 70.

within Sweden, will evade the authorities, go into hiding or otherwise obstruct the execution of the return decision.¹⁴⁰ While “otherwise engaging in criminal activities” is not one of the grounds for detention listed in Article 15.1 of the Return Directive, the Swedish position is that the wording of Article 15.1 is not exhaustive and thus allows for additional grounds to be included in national legislation.¹⁴¹

In order to align the Aliens Act with the Return Directive's Articles 15.1, 15.5, and 15.6, new time limitations for detention were introduced in the Aliens Act in 2012.¹⁴² Consequently, the Aliens Act Chapter 10, Section 4, Sub-Section 2 stipulates that an alien aged 18 or older should not be detained for enforcement purposes for more than two months unless compelling reasons warrant a longer duration. Even if there are compelling reasons, the alien must not be detained for more than three months unless enforcement is likely to take longer due to the alien's non-cooperation or the time needed to obtain necessary documents, in which case the detention should not exceed twelve months. However, the three and twelve-month time limits do not apply if the foreign national has been expelled by a criminal court due to criminal offences, in which case detention may be more prolonged.¹⁴³ Article 2.2 b of the Return Directive allows for such exceptions.¹⁴⁴

Children may also be taken into detention or put under supervision for return. The Aliens Act Chapter 10, Section 2, Sub-Section 1 stipulates that a child may be detained under the following circumstances: if it is probable that the child will be expelled by the Police Authority or deported with immediate effect by the Migration Agency or if it concerns preparing or executing the enforcement of such a decision, there is a clear risk that the child will otherwise abscond, thereby jeopardizing enforcement that should not be delayed, and it is insufficient for the child to be placed under supervision. In addition, a child may be put in detention to prepare or enforce a return decision in cases other than those above if previous attempts to enforce the decision have proven insufficient to place the child under supervision (see the Aliens Act Chapter 10, Section 2, Sub-Section 2). Under the Aliens Act Chapter 10, Section 5, a child may not be detained for more than 72 hours or, if exceptional grounds apply, for another 72 hours. Chapter 10, Section 3 stipulates that a child must not be separated from both of its guardians by detaining either the child or the guardian. A child who does not have a guardian in Sweden may only be detained for exceptional reasons – in other words, UAMs may be put in detention, but only under very particular circumstances.

Not all of the provisions on detention of the Return Directive have been implemented into the Aliens Act. This is as the government, in the process of implementing the Return Directive into Swedish legislation, concluded that existing national legislation already met many of the requirements outlined in the Return Directive Articles 15, 16, and 17.¹⁴⁵ Such requirements include the EU provisions on review of detention decisions, immediate release, decision-making authorities and conditions of detention.¹⁴⁶

¹⁴⁰ Andersson, “Förvar och principerna för tvång.”

¹⁴¹ Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 69–72. See also the discussion in Andersson, “Förvar och principerna för tvång,” 374–375.

¹⁴² Prop. (Government Bill), *Genomförande av återvändandedirektivet*, 2011/12:60, 74–75.

¹⁴³ Ibid, 74.

¹⁴⁴ Ibid, 76.

¹⁴⁵ Ibid, 69–71.

¹⁴⁶ Ibid, 69–71.

Detention-related decisions can, as stipulated in the Aliens Act Chapter 10, Sections 12-17, be made by the Police Authority, the Migration Agency, the Security Police, the Migration Courts, and the Migration Court of Appeal. In security cases, the Swedish government may also make decisions on detention as provided for in the Act (2022:700) on special control of certain Aliens, which regulates detention in security cases. As follows by the Aliens Act Chapter 16, Section 4, detention cases shall be expedited. There is, however, no specific time limit set for this matter.¹⁴⁷

Decisions by the Migration Agency, the Police Authority and the Security Police can be appealed to a Migration Court (the Aliens Act Chapter 14 Section 9). No time limits apply to such appeals. Additionally, the Aliens Act Chapter 10, Section 9, Sub-Section 1 specifies that a decision on detention shall be re-evaluated within two weeks from the commencement of enforcement. If the alien is detained due to an expulsion or deportation decision, a new review shall be conducted continuously within two months of enforcement's commencement. Chapter 10, Section 9, Sub-Section 4 stipulates that a detention decision should be immediately revoked if there are no longer sufficient grounds for the decision.

The Migration Agency is responsible for enforcing decisions on detention (the Aliens Act Chapter 10, Section 18). It may, for this purpose, request assistance from the Policy Authority. Detention shall, as stated in the Aliens Act Chapter 11, Section 2, take place in facilities designated explicitly for the purpose. The Migration Agency is responsible for these facilities. In late 2023 the Migration Agency had a total capacity for detaining approximately 567 individuals. This capacity is distributed across six locations: Gävle, Flen, Ljungbyhed, Märsta, Mölndal, and Åstorp. The capacity for detaining individuals is expected to increase in the coming years with capacity for approximately another 200 individuals.¹⁴⁸

The Migration Agency may, however, decide that an alien taken into detention is placed in a penitentiary, remand centre, or police custody (the Aliens Act Chapter 10 Section 20). This may be the case when a criminal court expels the alien due to criminal offences or when special reasons apply. In any case, the regulations of the Aliens Act, Chapter 11 on the conditions of detention apply, as well as relevant provisions of the Detention Act (as stated in the Aliens Act Chapter 11, Section 2).¹⁴⁹

Chapter 11, Section 1 of the Aliens Act emphasizes humane treatment and respect for the dignity of the detained individual. The detainee must be informed of their rights, and activities related to detention should be designed to infringe minimally on their privacy and rights (as stipulated in the Return Directive Article 16.5). The Migration Agency is responsible for treating and supervising detainees (Chapter 11, Section 2). Chapter 11, Section 3 states that detainees should have activities, recreation, physical exercise, and outdoor time opportunities. Children in detention should have access to play and age-appropriate activities. Whether this is the case in practice has been questioned, for example, in a 2018 report by the Swedish Red Cross.¹⁵⁰ The conditions in Swedish detention centres on several occasions have been criticized, including by the Parliamentary Ombudsmen, for not living up to the standards established by the Aliens Act, Chapter 11, Section 1. Examples of misconduct has included

¹⁴⁷ Ibid, 77.

¹⁴⁸ Migrationsverket, Skrivelse, drn 1.1.1.2-2023-17747, Redovisning av uppdragen i regleringsbrevet för 2022 och 2023 om plan för ökad förvarskapacitet och ytterligare förvarplatser.

¹⁴⁹ See also the Detention Act, Chapter 2, Section 2.

¹⁵⁰ Swedish Red Cross, *Barn i förvar – en undersökning av Svenska Röda Korset*, Swedish Red Cross 2018.

access to health care for detainees, the conduct of employees towards detainees, and unlawful body searches.¹⁵¹

Under certain conditions, detainees may, according to Chapter 11, Section 4, receive visits and correspondence. They may also be separated from other detainees (Chapter 11, Section 7). Chapter 11, Section 7 mandates that families in detention be offered separate accommodation. All decisions regarding the treatment of detainees can typically be appealed.

7.11 Emergency situations

The Swedish government has opted not to pursue legislative amendments to implement the provisions in Article 18 of the Return Directive. Article 18 allows for exceptions in implementing certain detention-related provisions, particularly in scenarios involving exceptionally high numbers of third-country nationals subject to deportation or expulsion decisions.¹⁵² The first option under Article 18 permits the extension of time limits for judicial reviews in detention cases, as outlined in Article 15.2. However, the Swedish government found that Swedish law already had this possibility or flexibility in its legal framework. This was specifically evident in the Aliens Act (Chapter 4, Section 16), which addressed the need for expeditious handling of detention cases, though without specifying a particular time limit.¹⁵³ The second option in Article 18 pertains to taking emergency measures regarding detention conditions, allowing deviations from the provisions in Article 16.1 related to access to legal representatives, family members, and relevant organizations. However, the Aliens Act, specifically Chapter 11, Section 2, Sub-Section 1, already provides the flexibility to address situations envisioned in Article 18 of the directive concerning the requirements of Article 16.1.¹⁵⁴ Additionally, the government has opted not to exercise the third option or exception in Article 18, which relates to deviations from the requirement in Article 17.2 regarding family detention with separate accommodation ensuring sufficient privacy. Consequently, the Aliens Act (Chapter 11, Section 2, Sub-Section 1) continues to mandate that detained aliens be housed in specially designated premises. This includes facilities established by the Migration Agency in reception centres or other locations, as well as facilities provided or arranged by the Migration Agency, such as hotel rooms.¹⁵⁵

¹⁵¹ Cf. Justitieombudsmannen (Riksdagens ombudsmän, the Parliamentary Ombudsmen), OPCAT Inspection Protocol No. O 3-2023, Inspection 17-18 January 2023 of the Migration Agency detention centre in Mölndal; Justitieombudsmannen (Riksdagens ombudsmän, the Parliamentary Ombudsmen), Decision No. 9303-2022, 12 December, 2023, Justitieombudsmannen (Riksdagens ombudsmän, the Parliamentary Ombudsmen), Decision No. 1432-2018, 3 December 2019; Justitieombudsmannen (Riksdagens ombudsmän, the Parliamentary Ombudsmen), Decision No. 6090-2009, May 19, 2011.

¹⁵² Prop. (Government Bill). *Genomförande av återvändandedirektivet*, 12:60, 78–81.

¹⁵³ Ibid, 78.

¹⁵⁴ Ibid, 81.

¹⁵⁵ Ibid.

7.12 Readmission Process and International Cooperation

Sweden entered into 15 bilateral readmission agreements with various countries, both within and outside the EU, starting with Germany in 1956 (see Table no. 6).¹⁵⁶ These countries include Iraq, Bulgaria, Cyprus, Estonia, France, Kosovo, Croatia, Estonia, Latvia, Lithuania, Romania, Switzerland, Germany, and Vietnam. Furthermore, from 2008 to 2022, Sweden has been a party to 18 EU and bilateral agreements, extending to countries such as Ukraine, Turkey, Sri Lanka, Serbia, Russia, Pakistan, Montenegro, Moldova, North Macedonia, Macao, Cape Verde, Hong Kong, Georgia, Bosnia, Belarus, Azerbaijan, Armenia, and Albania.

8. Funding (Budget) and Programmes Related to Return

According to information published on the Swedish Migration Agency's website, the available funding (budget) and financial support and programs related to the return process are as follows:

Table 2: Funding (Budget) and Programmes Related to Return

Link	Cash support for re-establishment	Other form of Support	Link
https://tinyurl.com/49bv44f2	Adult: 30000 SEK	Reception on arrival at the airport in your country of origin	https://tinyurl.com/y6wtyatt
	Child: 15000 SEK	Temporary accommodation in your country of origin	
	Family: 75000 SEK	Allowance for setting up your own business in your country of origin	
	Post-arrival Support for the three days: 615 EUR	Help with getting onto the job market in your country of origin	
		Education (including vocational training)	
		Job advice	
		Support in contact with the authorities in your country of origin	
		Legal advice	
		Medical care	

¹⁵⁶ Swedish Migration Agency, Planeringsavdelningen/Norrköping, Enheten för statistik och analys, email Correspondence with Philip Engman, statistician, in September and November 2023 (on file with the authors).

9. Gaps in the Return Regime and Policy Recommendations

9.1. Introductory Remarks

The concept of “gaps” may have several different meanings. It may, for example, refer to a gap in the implementation of laws and policies (an implementation gap), a gap between public discourse and policy on paper (a discursive gap) or the difference between the implemented policies and their effect on, for example, migration (an efficacy gap).¹⁵⁷ The consequences of the gaps may also be perceived as positive or negative depending on whom you ask: for the failed asylum seeker, an implementation gap between a restrictive return policy and its implementation in practice may be perceived as a positive thing as it may postpone or delay the enforcement of a deportation decision. In contrast, the same lack of implementation may be harmful from the point of view of the policymaker whose credibility relies on enforcing a restrictive return regime. In this section, we list various gaps in the legal, institutional and international cooperation frameworks in the Swedish return field, which we have identified during the research carried out for this report, as well as recommendations on how to bridge or counteract the gaps.

9.2. Legal Gaps

A. Lack of definitions of the concepts identified in the Return Directive, Article 3 in particular

The Swedish Aliens Act does not specifically include several of the definitions lined up in the Return Directive, Article 3, such as “irregular stay”, “return”, “removal”, “rejection, refusal, removal, expulsion or deportation decision”, “vulnerable individuals” or “assisted return”. In the 2011 government bill on the implementation of the Return Directive into Swedish law, the government held that introducing the definitions into the Aliens Act was not necessary as the existing legal framework (the Aliens Act and related legislation, for example, on the right to health care for asylum seekers) already aligned with the Directive’s requirements on this point. It may be noted that the Aliens Act indeed includes some definitions (see the Aliens Act, Chapter 1) but not a complete list of all the concepts used in the Act. In the case of the Return Directive, some definitions, or at least descriptions, indeed have been incorporated into the Aliens Act – Chapter 1, Section 15 on the risk of absconding being one example – but in general the meaning of the concepts is to be understood either indirectly (as in “illegal/irregular stay” being the opposite to “legal stay”), or through reading the grounds on which a decision on for example refusal-of-entry/rejection, or on expulsion may be taken. While there may be logic in not making an already comprehensive Aliens Act even heavier with definitions and instead referring to the definitions stated in the Return Directive itself, the lack of definitions may

¹⁵⁷ Malm Lindberg, “The Tricky Thing of Implementing Migration Policies: Insights from Return Policies in Sweden,” 157.

create legal uncertainty on which rules apply and their content. In other words, the more unclear the legal status is, the less stable it becomes, making access to rights precarious.

Recommendation 1: incorporate the definitions outlined in the Return Directive, Article 3, in the Aliens Act.

B. Unclearities regarding what constitutes "a practical impediment" to enforcing a return decision and when such an impediment should be taken into account

The Aliens Act, Chapter 8, Section 7 requires that in the assessment of whether a decision on refusal-of-entry or expulsion may be taken, the prevalence of impediments to enforcement as described in the Aliens Act Chapter 12, as well as other possible impediments to enforcement, must be taken into account (see also Chapter 8 Section 15 on EEA citizens and Chapter 8 a Section 3 on expulsion due to criminal activity). If such impediments exist, a residence permit typically should be granted. The impediments to enforcement may be related to the risk of non-refoulement (Aliens Act Chapter 12, Section 1-3 a), be of a practical nature (for example, that the person will not be allowed entry or cannot get travel documents), or of a medical nature. Chapter 12 Section 18 addresses the situation *after* a return decision has taken legal effect, when certain impediments to the enforcement of a decision on refusal of entry or expulsion may, even if they have occurred after the decision has taken legal effect, lead to a residence permit being granted. Such impediments include, following Chapter 12, Section 18, Subsection 2, *i*) the risk of non-refoulement, *ii*) when there is reason to assume that the receiving country will not allow the alien entry and *iii*) medical reasons and "other particular reasons". The second impediment mentioned here is referred to by the term practical impediments to enforcing a return decision. While not explicitly stated in the Aliens Act, the preparatory works underline that the difficulties in such a situation to implement the decision must, according to the government, not in any part be due to the individual's refusal to cooperate in the implementation.¹⁵⁸

It can be noted that although the term "practical impediments" is not included in the Aliens Act, it is nevertheless a well-established term used in preparatory works by the migration authorities and in case law. The gap identified here has several aspects: *i*) that the term as such is not included in the Aliens Act may lead to unclearities as to when the prevalence of such impediments must be taken into account, *ii*) the lack of definition of what constitutes a practical impediment to enforcement may cause uncertainty as to what constitutes such an impediment and *iii*) it is, as has been pointed out in a 2017 report of a Government Inquiry on practical impediments to enforcement, somewhat unclear what is required of the alien in order to be considered to have sufficiently participated in the implementation of the decision.

Recommendation 2: The Aliens Act should include a definition of what may constitute "a practical impediment" to enforcing a return decision.

We do not formulate any recommendation stating that what is required for an alien to be considered not having participated in or contributed to implementing the return decision should be specified in the Aliens Act. However, it would be helpful if the Migration Court of

¹⁵⁸ Prop. (Government Bill), *Ny instans- och processordning i utlännings- och medborgarskapsärenden* 2004/05:170, 299.

Appeal addressed the issue and clarified what expectations can be placed on the individual in these cases.

C. The provisions on detention in the Aliens Act do not sufficiently align with EU law

There are grounds on which a person can be held in detention in the Reception Directive (recast), the Asylum Procedures Directive (recast), the Return Directive and the Dublin Regulation (recast). The various grounds for detention differ in the different directives, and thus also for the various categories of TCNs. The conditions for detention in the context of return are specified in the Return Directive, Article 15. However, the rules on detention in the Aliens Act do not distinguish between different TCNs, and the rules in the Aliens Act, Chapter 10, Section 1 apply to all categories. The differences between the EU Directives and Swedish law may cause problems. For example, it is consistent with the wording in Chapter 10, Section 1, to detain an asylum seeker on the grounds of probability. However, as the Migration Court of Appeal has pointed out in MIG 2020:14 and 2021:3, such detention must comply with the Reception Directive Article 8.3 for it to be legal. While the Migration Court of Appeal in MIG 2020:2 made clear that the provisions on detention in the Aliens Act must be interpreted and implemented in line with EU law, it may be argued that the lack of specificity in the Aliens Act may lead to decisions on detention that do not have a solid legal ground in an EU law perspective. It is interesting to note that the Government Inquiry on detention established in August 2023 (dir. 2023:119) while being instructed to analyze the compatibility of Swedish law and EU law on detention, including detention for the purpose of enforcing a return decision, seems to focus mainly on exploring additional grounds for detention in EU law compared to Swedish law, and not specifically look into whether Swedish law needs adjusting in order to adhere to minimum standards as established by the Directives.

Recommendation 3: Further analysis is needed to establish whether Swedish law on detention is consistent with minimum standards established in EU law.

D. The rules pertaining to the refusal-of-entry or expulsion of an alien who has permission to reside in another EU state does not fully align with EU law

In April of 2023, the CJEU in the case C-629/22¹⁵⁹ (which concerned Sweden and the validity of the Aliens Act Chapter 8, Section 6 a, subsection 2), found that the Return Directive, Article 6.2, requires states to allow irregular aliens with the possibility to return to the member state in which they hold a residence permit to do so before the national authorities issue a decision on return. The CJEU concludes that

the Return Directive, Article 6(2) must be interpreted as meaning that the competent authorities of a Member State are required to permit a third-country national staying illegally on the territory of that Member State who holds a valid residence permit or other authorization offering a right to stay issued by another Member State to go to that other Member State before they adopt, if the circumstances so require, a return

¹⁵⁹ CJEU, C-629/22, ECLI:EU: C:2023:365.

decision in respect of such a national, even though those authorities consider it likely that that national will not comply with a request to go to that other Member State.¹⁶⁰

The CJEU moreover held that

an interpretation of Article 6(2) to the effect that that provision permits the competent authorities of the Member States to adopt a return decision where it is 'likely' that the third-country national concerned will not comply with a request to go immediately to the territory of the Member State which issued him or her with a valid residence permit or other authorization offering a right of residence would amount to establishing a derogation which is not provided for in Article 6(2) and would therefore deprive that provision of its practical effect.¹⁶¹

The CJEU case concerned Sweden and the implementation of the Aliens Act, Chapter 8 Section 6 a, subsections 1-2, which implements the Return Directive Article 6.2 but also allows for derogation from the duty to instruct an alien to leave the country and, also, from refraining from issuing a return decision if, for example, there are reasonable grounds to assume that such an instruction would not be adhered to (subsection 2, item 5). As pointed out by the CJEU, the Swedish provision seems to offer more leeway for the state to decide when to allow the alien to leave the country without being the subject of a return decision. This decision may have additional adverse effects for the individual if combined with an entry ban. The CJEU ruling so far, from what we have been able to establish, has yet to lead to any changes in the guidance provided by the Migration Agency or in case law, and certainly not on the legislative level.

Recommendation 4: The Migration Agency and the Police Authority should draft guidelines on the implementation of the Aliens Act, Chapter 8, Section 6 a, to ensure compliance with the CJEU case law.

9.3. Policy Gaps

E. Mixed messages – does “no” always mean “no”?

It is a clearly stated aim in Swedish migration policy that an individual present on Swedish territory without the necessary permits to be there is to leave the country, preferably voluntarily. “A no needs to mean no”, as the Minister of Migration Maria Malmer Stenergard repeatedly has stated, for the system to function or to remain credible and predictable (both essential in a legal certainty perspective).¹⁶² At the same time, the nature of migration law, asylum law in particular, which in essence concerns assessing future risk, means that a “no” needs to take into account the fact that new circumstances might arise that presents obstacles towards enforcing a return decision (new information about persecution, for example), or prevent such a decision from being taken in the first place (such as humanitarian grounds, or family ties).

¹⁶⁰ Ibid, 27.

¹⁶¹ Ibid, 26.

¹⁶² Cf. Moderaterna (the Conservative Party) <https://moderaterna.se/nyhet/atta-forslag-att-fler-ska-utvisas-ett-nej-ska-vara-ett-nej/> (last accessed January 4, 2024) and Swedish Radio (Sveriges Radio), <https://sverigesradio.se/artikel/regeringen-infor-atervandandecenter-vill-oka-atervandringen> (last accessed January 4, 2024).

In later years, Swedish migration policy has been criticized for sending “mixed messages” to asylum seekers. The critique refers to the state, on the one hand emphasizing that “no means no” and allocating resources to increase the number of returns, and on the other hand allowing for asylum seekers to “change track” from asylum to work permits, for practical impediments to enforcement of return decisions (such as the receiving state not issuing travel documents) to generate temporary residence permits (thus prolonging the stay in Sweden), and for return decisions not to be enforced before the limitation period is over, allowing for a new application to be submitted and the process to start anew, to mention just a few examples.¹⁶³ The point made by critics is that this creates uncertainty as well as false hopes, and may lead to the system not functioning the way it is intended, thus losing legitimacy, as well as unnecessary suffering among failed asylum seekers and other migrants. While the present Government and its support party strongly emphasize the “no means no-approach”, examples including proposals on abolishing both the “track change-option” and limitation times¹⁶⁴, there is a danger that a single-minded focus on restrictive measures might increase the risk for fundamental rights such as protection from persecution and the right to family life to be overridden.

Recommendation 5: The Government should ensure that, while seeking to fulfil the goal “no needs to mean no,” fundamental rights are safeguarded and that return-related legislation includes safety-valve clauses.

F. Compliance of many of the proposed reforms in the 2022 Tidö Agreement with the fundamental human rights of migrants

The 2022 Tidö Agreement between the Conservative/Liberal Government and its populist right-wing support party, the Sweden Democrats, contains a considerable amount of proposals for reforms of Swedish migration policy. The reforms, including those on the matter of return, have a common denominator – the aim to make Swedish migration policy more restrictive and to make Sweden less attractive to asylum seekers and other categories of migrants – migration policy as a deterrence measure. Return-related proposals include (but are not limited to) abolishing or considerably prolonging limitation periods for the validity of return decisions, prolonging the validity of an entry ban, increasing focus on finding people staying irregularly in Sweden and providing the Police Authority with an increased mandate to do so, increase the number of places in detention centres, discharging the possibility for people having been granted asylum to be granted a permanent residence permit, increased focus on the cessation of residence permits, severely increase the number of people opting for “voluntary repatriation”, use development aid as a tool to increase returns and counteract irregular migration and deny people staying irregularly in Sweden any access to financial support from municipalities. The human rights perspective and the perspective of the migrant are all but absent from the reform agenda, which, among many other concerns, raises doubt as to the proposal’s compatibility with Sweden’s human rights obligations and the Swedish Constitution. A majority of the proposals are now being analyzed by government inquiries or

¹⁶³ This was one of the points raised by the expert panel in the GAPs Work Package 2 roundtable on Swedish return policy, held 20 December 2023.

¹⁶⁴ Dir. 2023:126, Tilläggsdirektiv till utredningen om stärkt återvändandeverksamhet (Ju 2022:12).

prepared by the Ministry of Justice, and the aim is for as many as possible to be implemented before the September 2026 general elections.

Recommendation 6: We urge the Government to keep in mind that even a restrictive migration policy must take into account and respect the fundamental human rights also of irregular migrants present on the territory and that Sweden's binding legal obligations in the field of human rights and refugee law are minimum standards that must be adhered to. We also urge the Government to consider the proportionality of the reforms outlined in the Tidö Agreement and their effects on the integration of migrants into Swedish society.

G. Internal immigration control and the risk of racial profiling

One of the measures suggested in the Tidö Agreement in the context of return is an increased focus on identifying and finding people staying irregularly in Sweden. One of the measures suggested to achieve this goal is an extended mandate for the Police Authority regarding internal immigration control. Historically, an increased focus on random identity checks, for example, on public transport (the REVA project of the early 2010s), has raised questions about racial profiling and targeting of individuals of a particular category. While such profiling is prohibited, concerns may be raised as to whether such practices may resurface in light of the pressure put on the Police Authority to intensify the identification of irregular migrants in Sweden.

Recommendation 7: For the Police Authority to make it a top priority racial profiling does not take place when conducting internal immigration control, and for the Government, when extending the Police Authority's mandate in this respect, to be explicit that racial profiling must be avoided at all costs.

H. Sudden changes in conditions for residence permits

Recently, several of the grounds on which a person may be eligible for a residence permit have been questioned, and some have also changed. Many of these changes have entered into force without there being any provisional regulations, meaning that conditions may change from one day to another and that a person during, for example, the asylum process or the process of prolonging a residence permit based on employment, no longer is eligible for said permit. One example is the humanitarian ground "particularly distressing circumstances" in the Aliens Act Chapter 5, Section 6, subsection 2, which was abolished and ceased to apply on 1 December 2023. The remaining humanitarian ground, "severely distressing circumstances", raises the bar. Fewer individuals will likely be able to be granted a residence permit on this basis.

A second example is the minimum salary required for a person to be granted a work-based residence permit in Sweden, which, as of 1 November 2023, was increased from 13,000 SEK to 27,360 SEK. The new rules do not apply to individuals who already have a permit but will affect them once their work permit needs prolongation. It also applies to individuals who had submitted their applications but had yet to receive a decision when the change entered into force. The substantial raise in the minimum wage is intended to ensure that aliens working in Sweden may support themselves, but it has been criticized for being unnecessarily high, thus risking that people working in, for example, the service sector will not be able to meet these

conditions when their current permit expires and end up either returning to their countries of origin, leaving Swedish businesses, the health care sector and other sectors without the necessary workforce, or remaining in Sweden as irregular migrants. The lack of provisional measures sharpens the blow.

Recommendation 8: Provisional measures must be included when introducing stricter measures limiting the possibility of being granted a residence permit. Moreover, the proportionality and long-term effects of the proposed measures must be properly evaluated. Restrictive rules cannot be a means in itself.

9.4. Institutional gaps

I. The lack of updated, easily accessible statistical data on returns

One of the main obstacles when drafting this report was collecting reliable data on the number of enforced return decisions, voluntary returns and forced returns. While the Migration Agency is the government authority responsible for data collection on migration-related matters, including return, data is not easily accessible or presented in a systematic and disaggregated way, making external evaluation of return policies and practices complicated, contributing to unclarity to prevail and the dissemination of disinformation.

Recommendation 7: The Government should instruct the Migration Agency to present accurate, updated, disaggregated, and easily accessible statistical data on return on its website.

J. Implementing the legal framework in practice

The legal framework for return, of which we have tried to provide an overview in this report, in theory, is relatively well-functioning: there are procedural guarantees, the right to appeal both a denial of a residence permit (and the return decision accompanying it) and detention decisions, general clauses are emphasizing the principle of proportionality (cf. the Aliens Act Chapter 1, Section 8) and the child rights perspective to mention a few examples. At the same time, there have over the years been numerous accounts and reports of people being held in immigration detention on a long-term basis without clear legal grounds, on the difficult situation in many detention centres, not least for young people, on attempts to execute return decisions to countries to which the person to be returned has very weak, if any, ties, and on the child-rights perspective often having to step back in favour of upholding a restrictive migration policy. This is a cause for concern, perhaps even more so in the current climate in Swedish migration policy and the paradigm shift towards a more restrictive position.

Recommendation 9: Echoing previous recommendations on legal certainty, respect for fundamental human rights, and proportionality, we call upon those tasked with implementing the legislation, irrespective of its restrictiveness, to safeguard respect for human rights, human dignity, and to refrain from equating irregularity with illegality.

10 Appendices

Table 3: Conventions within the framework of the Council of Europe that Sweden has ratified ¹⁶⁵

Name of the treaty	Time of signing	Time of ratification
Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005)	28/11/1950	04/02/1952
Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 009)	20/03/1952	22/06/1953
European Social Charter (ETS No. 035)	18/10/1961	17/12/1962
Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (ETS No. 046)	16/09/1963	13/06/1964
Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (ETS No. 114)	28/04/1983	09/02/1984
Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 117)	22/11/1984	08/11/1985
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126)	26/11/1987	21/06/1988
Additional Protocol to the European Social Charter (ETS No. 128)	05/05/1988	05/05/1989
Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (ETS No. 158)	09/11/1995	01/07/1998
European Social Charter (revised) (ETS No. 163)	03/05/1996	29/05/1998
Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177)	04/11/2000	01/04/2005

¹⁶⁵ Please see for more information the Council of Europe's website <https://shorturl.at/aceqE>

Source: Council of Europe

Table 4. Ratification Status for Sweden of International Human Rights Treaties and Refugee Law Instruments¹⁶⁶

Treaty Names	Treaty Name Abbreviation	Signature date	Ratification date, Accession (a), Succession (b) date
Convention Relating to the Status of Refugees		28 July 1951	26 October 1954
Protocol Relating to the Status of Refugees			4 October 1967
Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	CAT	4 February 1985	8 January 1986
Optional Protocol of the Convention against Torture	CAT-OP	26 June 2003	14 September 2005
International Covenant on Civil and Political Rights	CCPR	29 September 1967	6 December 1971
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty	CCPR-OP2-DP	13 February 1990	11 May 1990
Convention for the Protection of All Persons from Enforced Disappearance	CED	6 February 2007	
Convention on the Elimination of All Forms of Discrimination against Women	CEDAW	7 March 1980	2 July 1980
International Convention on the Elimination of All Forms of Racial Discrimination	CERD	5 May 1966	6 December 1971
International Covenant on Economic, Social and Cultural Rights	CESCR	29 September 1967	6 December 1971

¹⁶⁶ For more information see the United Nations, United Nations Treaty Database, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=168&Lang=E N (accessed 18 March 2024).

Convention on the Rights of the Child	CRC	26 January 1990	29 June 1990
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	CRC-OP-AC	8 June 2000	20 February 2003
Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	CRC-OP-SC	8 September 2000	19 January 2007
Convention on the Rights of Persons with Disabilities	CRPD	30 March 2007	15 December 2008

Source: UN Treaty body database

Table 5. Acceptance of Individual Complaints Procedures for Sweden¹⁶⁷

Treaty Names	Treaty Name Abbreviation	Acceptance of Individual Complaints procedures	Date of Acceptance/ non-acceptance
Optional Protocol to the International Covenant on Civil and Political Rights	CCPR-OP1	Yes	06 Dec 1971
Individual complaints procedure under the International Convention on the Elimination of All Forms of Racial Discrimination	CERD, Art.14	Yes	06 Dec 1971
Individual complaints procedure under the Convention against Torture	CAT, Art.22	Yes	08 Jan 1986
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	CEDAW-OP	Yes	24 Apr 2003
Optional protocol to the Convention on the Rights of Persons with Disabilities	CRPD-OP	Yes	15 Dec 2008

Source: UN Treaty Body Database

¹⁶⁷ Ibid.

Table 6: EU and Bilateral Readmission Agreements

Countries	EU and Bilateral readmission agreements	Entered into force	"EU source/Swedish Official Gazette."	Link
Albania	EU	2006-05-01	2005/371/EG EUT L 124/22	På engelska
Armenia	EU	2014-01-01	2013/629/EU EUT L 289/13	På engelska
Azerbaijan	EU	2014-09-01	2014/239/EU EUT L 128/17	På engelska
Belarus	EU	2020-07-01	2020/751/EU EUT L 181/3	På engelska
Bosnia	EU	2008-01-01	2007/820/EG EUT L 334/66	På engelska
Georgia	EU	2011-03-01	2011/118/EU EUT L 52/47	På engelska
Hong Kong	EU	2004-06-01	2004/80/EG EUT L 17/25	På engelska
Cape Verde	EU	2014-12-01	2013/522/EU EUT L 282/15	På engelska
Macao	EU	2004-06-01	2004/424/EG EUT L 143/99	På engelska
Macedonia	EU	2008-01-01	2007/817/EG EUT L 334/7	På engelska
Moldavia	EU	2008-01-01	2007/826/EG EUT L 334/149	På engelska
Montenegro	EU	2008-01-01	2007/818/EG EUT L 334/26	På engelska
Pakistan	EU	2010-10-07	2010/649/EU EUT L 287/52	På engelska
Russia	EU	2007-06-01	2007/341/EG EUT L 129/40	På engelska
Serbia	EU	2008-01-01	2007/819/EG EUT L 334/46	På engelska
Sri Lanka	EU	2005-05-01	2005/372/EG EUT L 124/43	På engelska
Turkey	EU	2014-05-07	2014/252/EU EUT L 134/3	På engelska
Ukraine	EU	2008-01-01	2007/849/EG EUT L 332/48	På engelska
Iraq	Bilateral	2008-02-18	SÖ 2008:10	
Bulgaria	Bilateral	2005-08-01	SÖ 1999:6	
Cyprus	Bilateral	2006-02-17	SÖ 2006:26	
Estonia	Bilateral	1997-05-02	SÖ 1997:27	
France	Bilateral	1991-06-29	SÖ 1991:16	
Kosovo	Bilateral	2012-01-01	SÖ 2012:3	
Croatia	Bilateral	2003-04-06	SÖ 2003:6	
Latvia	Bilateral	1997-05-01	SÖ 1997:10	
Lithuania	Bilateral	1997-05-24	SÖ 1997:1	
Poland	Bilateral	1999-04-09	SÖ 1999:2	

Romania	Bilateral	2002-02-10	SÖ 2002:5	
Switzerland	Bilateral	2003-01-09	SÖ 2003:48	
Slovakia	Bilateral	2005-04-05	SÖ 2005:2	
Germany	Bilateral	1954-06-01	SÖ 1954:80	
Vietnam	Bilateral	2008-12-31	SÖ 2008:36	

Source: The Migration Agency

Table 7: Legislative Framework of Return Regime in Sweden

The Title of the Policy/Legislation in English	The Title in the Original Language	Policy Type/Area	Date/Announced Year	Level of Legislation	Type of Legislation or Administrative Action	Department or Agencies or National Law Enforcement mentioned in the Policy/Legislation (Optional)
The Aliens Act (SFS 2005:716)	Utlänningslag (SFS 2005:716)	assisted return, border management, forced return, general/asylum, pre-removal detention, other	2005 (entry into force 2006)	National	Act	Migration Agency, Migration Courts, Migration Court of Appeal, Police Authority
The Aliens Ordinance (SFS 2006:97)	Utlänningsförordning (SFS 2006:97)	general/asylum, forced return, border management	2006	National	Decree	Migration Agency, Migration Courts, Migration Court of Appeal

Act (2022:700) on special control of certain foreigners	Lag (2022:700) om särskild kontroll av vissa utlänningar	other, pre-removal detention	2022	National	Act	Security Police, Migration Agency, Migration Court of Appeal, the Government
The Act on residence permits for students at upper secondary level (2017:353)	Lag (2017:353) om uppehållstillstånd för studerande på gymnasial nivå	general/asylum, other	2017	National	Act	Migration Agency, Migration Courts, Migration Court of Appeal
the Administrative Procedure Act (2017:900).	Förvaltningslag (2017:900)	general/asylum, other, forced return, assisted return	2017	National	Act	Migration Courts, Migration Courts of Appeal
The temporary Act (2016:752) on temporary restrictions on the possibility of obtaining residence permits in Sweden."	den tillfälliga lagen (Lag (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige	general/asylum, assisted return, forced return, other, irregularity, pre-removal detention	2016-2021 July	National	Act	Migration Agency, Migration Courts, Migration Court of Appeal
The Unaccompanied Minors Guardian Act (2005:429)	Lag (2005:429) om god man för ensamkommande barn	general/asylum	2005	National	Act	Migration Agency, Migration Courts, Migration

						Court of Appeal
Reception of Asylum Seekers Act (LMA) (1994:137)	Lag (1994:137) om mottagande av asylsökande m.fl. (LMA)	general/asylum, other	1994	National	Act	Migration Agency
Ordinance on Reception of Asylum Seekers and others (1994:361)	Förordning (1994:361) om mottagande av asylsökande m.fl.	general/asylum, pre-removal detention, other	1994	National	Decree	Migration Agency
Act on health care for asylum seekers and others. (2008:344)	Lag (2008:344) om hälso- och sjukvård åt asylsökande m.fl.	general/asylum, pre-removal detention, forced return	2008	National	Act	Migration Agency
Ordinance on health care for asylum seekers etc. (2008:347)	Förordning (2008:347) om hälso- och sjukvård åt asylsökande m.fl.	general/asylum, other	2008	National	Decree	Migration Agency
Ordinance on state compensation for healthcare for asylum seekers. (1996:1357)	Förordning (1996:1357) om statlig ersättning för hälso- och sjukvård till asylsökande	general/asylum	1997	National	Decree	Migration Agency
Ordinance on re-establishment support for certain	Förordning (2008:778) om återetableringssstöd för vissa utlänningar	assisted return, other	2008	National	Decree	Migration Agency

foreigners (2008:778)						
Act (2021:1187) with supplementary provisions to the EU's regulations on the Schengen Information System.	Lag (2021:1187) med kompletterande bestämmelser till EU:s förordningar om Schengens informationssystem	other	2021 (entry into force 2023)		Act	Migration Agency
The Detention Act (2010:611)	Häkteslag (2010:611)	forced return, irregularity , assisted return	2010	National	Act	Police Authority
the Act of judicial procedure (RB 1942:740)	Rättegångsbalk (1942:740)	forced return	1942	National	Act	Migration Courts, Migration Courts of Appeal
Act (2018:1693) on the police's processing of personal data within the scope of the Criminal Data Act	Lag (2018:1693) om polisens behandling av personuppgifter inom brottsdatabasens område	forced return	2018	National	Act	Police Authority

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Decentring the Study of Migrant
Returns and Return Policies

Legal and Policy Infrastructures of Returns in Poland

Country Dossier (WP2)

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List of Abbreviations

AMIF	Asylum, Migration and Integration Fund
AVR	assisted voluntary return
CJEU	Court of Justice of the European Union
CROs	collecting return operations
Dz.U.	Journal of Laws of the Republic of Poland (in Polish: <i>Dziennik Ustaw Rzeczypospolitej Polskiej</i>)
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
Frontex	European Border and Coast Guard Agency
IOM	International Organisation for Migration
ISF	Internal Security Fund
JROs	joint return operations
MENA	Middle East and North Africa
NGOs	non-governmental organisations
SIENA	Secure Information Exchange Network Application
SIRENE	Supplementary Information Request at the National Entries
SIS	Schengen Information System
TEU	Treaty on European Union
UAMs	unaccompanied minors
UN	United Nations
UNHCR	Office of the United Nations High Commissioner for Refugees

Summary

In this report on Poland's return policy, developed under Horizon Europe GAPs project, we analysed the legal, institutional, and infrastructure framework of the country's return procedures for foreigners covering the years 2015-2023 (in some cases also early 2024). We also included selected statistics regarding the scope of this report. The report discusses the relationship of EU law to Polish law, Poland's compliance with EU law and the implementation of judgments of European tribunals. Included also is a reference to cooperation between national institutions and organisations, as well as international cooperation. Based on the professional experience of the project team members, we were able to include their practical knowledge and expertise related to the provision of legal support and services to foreigners in Poland.

We identified important gaps regarding Poland's return policy, including among others:

- improper implementation of the EU Return Directive through, among others, not providing procedural safeguards and access to free legal assistance;
- establishing the Border Guard as the only body conducting return obligation proceedings, both in the first and second instances, shortening the period for filing an appeal, and abolishing the suspensive effect of filing a complaint to court;
- lack of qualified guardians in return proceedings concerning unaccompanied minors;
- carrying out pushbacks, which have intensified since 2021 in connection with the humanitarian crisis on the Polish-Belarusian border; despite numerous ECtHR judgments, pushbacks are carried out;
- automated use of detention, including the detention of children and the possibility of long-term detention;
- failure to ensure sufficient transparency in monitoring the implementation of return decisions.

The rights of foreigners have been drastically limited in Poland since 2021, along with the humanitarian crisis on the Polish-Belarusian border. Further, Poland has very effective enforcement of return decisions (77% for the period of 2022 and Q1-3 of 2023), according to data provided by Eurostat. In this context, we identified multiple gaps that may lead to the exceptional performance of the Polish return policy.

We observed that the 2008 EU Return Directive was improperly being implemented, and that Poland is not honouring some of the Court of Justice of the European Union judgements. We also reported on pushbacks as illegal practices at the Polish land borders.

As Poland effectively enforces return decisions, migrants' rights should be protected. Moreover, the humanitarian crisis has had a significant impact on the relations between the Border Guard and civil society organisations working for foreigners, as well as on the inhabitants of border regions and Polish society. Gaps in the legal framework are also linked with improper implementation of the EU Return Directive. Foreigners have limited access to legal remedies, including appeals. Foreigners against whom return proceedings have been initiated are not entitled to free legal assistance. They may seek help from NGOs providing free assistance to foreigners, which depends on funding, but it is not certain whether their

case can be dealt with in a comprehensive manner (i.e., full representation before the authorities) due to the large number of people in need of help.

The reform of the Act on foreigners of 2023 has significantly changed return proceedings, accelerating the procedures and sharply limiting migrants' rights (shortening the deadline for filing an appeal against the decision to oblige them to return, abolishing the suspensive effect of a complaint filed with the court). The most important change, however, is the transfer of the return obligation proceedings entirely to the Border Guard. For the procedures started before April 7, 2023, the appeal body continues to be the Head of the Office for Foreigners. As is evident from our legal practice (some of the co-authors are law practitioners on a daily basis), the time of examining appeals against return decisions in Poland was (in cases started before April 2023) very long (even 2-3 years). We do not have data on the duration of current appeal procedures. The inspectors (migration officers) applied the provisions regarding, among others, integration into Polish society or the special interest of a foreigner. There are no statistics on appeal proceedings conducted under the new rules. The Border Guard, the body that currently deals comprehensively with return proceedings, is not effectively controlled by external stakeholders or courts, which raises doubts as to the correctness of the decision control in appeal proceedings.

There is no particular support for vulnerable persons regulated by Polish law. Foreigners who are in the return procedure (with the exception of those being released from detention and directed to stay in the Fundacja Dialog facility) have neither access to medical assistance, psychologists, and interpreters nor the right to work. There are also no accommodation facilities provided, except the detention centres. Unaccompanied minor foreigners against whom return obligation proceedings have been initiated are not always properly represented. In practice, finding curators is difficult because there is a lack of qualified personnel who understand return and asylum-related procedures. Poland does not seem to promote effective monitoring of the return operations of forced removal due to the lack of funding for the institutions who carry out these duties (NGOs) and too late informing them about the planned returns.

In 2021-2022, the number of people staying in detention centres increased significantly due to the humanitarian crisis on the Polish-Belarusian border. The former government of the right-wing parties' coalition led by the Law and Justice (in Polish: *Prawo i Sprawiedliwość*) established temporary detention centres where conditions were assessed by the Ombudsman (among others) and found to be not satisfying. Foreigners staying in overcrowded centres initiated numerous protests.

The policy of pushbacks on the border was put in effect almost 10 years ago. Since mid-2021, the number of foreigners trying to cross the Polish-Belarusian border (including irregular border crossings) has increased. The number of people trying to enter Poland (who were physically pushed by Belarusian border guards onto Polish territory) and later pushed back by the Polish border guards has increased. The Polish border guards refused to accept international protection requests from those people and pushed them back to the Belarusian side multiple times.

As a result of the 2023 parliamentary elections, a new government was formed by a coalition, which includes broad political forces from the Centre-Right to the Left and is acting in a reserved manner when it comes to the rapid changes of the policy on the Polish-

Belarusian border. The Prime Minister, Donald Tusk, repeatedly emphasised the need to 'protect the border'. Currently, the government is working on a new national migration strategy, as well as the issue of pushbacks. Maciej Duszczek, the vice-minister of the Interior, announced the launching of search-and-rescue teams of the Border Guard; however, he stated that he has no plans to stop pushbacks for now.

Our report also formulates policy recommendations based on our desk research and the expertise of some of us as practitioners dealing with legal support for foreigners in Poland with the goal to respect human rights. First of all, we suggest introducing legal changes such as eliminating detention of children in return procedures, restoring the 14-day period for filing an appeal against the return decision and amending the Act on foreigners, under which it will not be possible to initiate return proceedings against a foreigner who has already submitted an application for a temporary residence permit and who has a family life in Poland. Secondly, we recommend enabling and providing funds for the Ombudsman to monitor the enforcement of the return decision as well as increasing the use of alternatives to detention in return procedures. Last but not least, our suggestions include increasing cooperation between the Border Guard and NGOs dealing with counteracting human trafficking, especially in the case of unaccompanied minors and establishing at least three open centres or allocating places in existing centres open to foreigners for people who have no place of residence and are waiting for a decision or return.

The GAPS Project

GAPs is a Horizon Europe project that aims to conduct a comprehensive multidisciplinary study of the drivers of return policies and the barriers to and enablers of international cooperation on return migration. The overall aim of the project is to examine the disconnects and discrepancies between expectations of return policies and their actual outcomes by decentring the dominant, one-sided understanding of “return policymaking.” To this end, GAPs:

- examines the shortcomings of the EU’s return governance,
- analyses enablers of and barriers to international cooperation, and
- explores the perspectives of migrants themselves to understand their knowledge, aspirations and experiences with return policies.

GAPs combines its approach with three innovative concepts:

- a focus on return migration infrastructures, which allows the project to analyse governance gaps;
- an analysis of return migration diplomacy to understand how relations between EU member states and with third countries hinder cooperation on return; and
- a trajectory approach, which uses a socio-spatial and temporal lens to understand migrant agency.

GAPs is a three-year interdisciplinary research project (2023–2026), coordinated by Uppsala University and the Bonn International Centre for Conflict Studies (BICC) with 17 partners in 12 countries on four continents. GAPs’ fieldwork has been conducted in 12 countries: Sweden, Nigeria, Germany, Morocco, the Netherlands, Afghanistan, Poland, Georgia, Turkey, Tunisia, Greece and Iraq.

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1. Statistical Overview Regarding Returns and Readmissions at the National Level

The whole data table on return-related statistics, which mainly draws from the Eurostat database, is included in **Annex I**. Besides Eurostat statistics, quite rich statistical data on returns are available at the national level from sources published by or obtained from the Border Guard and the Office for Foreigners. The data on readmissions and returns are not disaggregated and are collected separately by the Border Guard and the Office for Foreigners. Some of the data are collected and published in a systematic and coherent way, but not all of them.

The Border Guard publishes quarterly statistics on the number of foreign citizens returned (literally in the report they are ‘handed over’)¹ based – as indicated by the Border Guard – on Readmission [agreements and clauses – authors], Dublin III Regulation², national administrative decisions obliging them to leave the territory of the Republic of Poland and other agreements, along with the details on the country of citizenship. Also, the data about pushbacks (officially called a ‘return to the border line’) were being published day-by-day by the Border Guard on social media (mostly Twitter³) and aggregated data were provided to one of the NGOs upon the procedure of obtaining access to public information⁴. The Office for Foreigners publishes yearly data on foreign citizens in relation to those who received decisions obliging them to leave the territory of Poland as well as decisions on refusal of entry, along with the details on the country of citizenship and gender. Also, the Office for Foreigners counts the number of people for whom it provided assisted voluntary return, but these data are not publicly accessible (they can be obtained upon the procedure of obtaining access to public information).

From 2015 until the outbreak of the Covid-19 pandemic, the number of irregular migrants found to be present in Poland was increasing – rising from 12,557 persons in 2015 to 26,625 in 2019. The year 2020 marked a reversal of the trend, and from then until 2022, the numbers dropped: from 9,823 to 7,166. Similarly, the number of foreigners ordered to leave was the highest in 2018 and 2019 (more than 29,000 annually), growing each year since 2015, in line with the figures on Dublin returns. During the time the state of Covid-19 epidemic emergency⁵, these figures dropped from 12,003 persons in 2020 to 8,412 in 2022. Also, the biggest number of foreigners utilised voluntary return in 2017 and 2018 (yet, the numbers are rather small, 507

¹ Straż Graniczna, Statystyki SG, accessed March 29, 2024, <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html>.

² Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

³ The X account of the Border Guard, https://twitter.com/Straż_Graniczna.

⁴ Joanna Klimowicz. Nie 47 tys. wywozek ludzi do Białorusi, a ponad 50 tysięcy. Autopoprawka Straży Granicznej. Gazeta Wyborcza. Last modified January 1, 2024, <https://bialystok.wyborcza.pl/bialystok/7,35241,29314977,nie-47-tys-wywozek-ludzi-do-bialorusi-a-ponad-50-tysiecy.html>.

⁵ The state of epidemic emergency has been officially called off on 1 July 2023 and it had various consequences on extension of legality of the stay of foreigners in Poland. See more: <https://www.gov.pl/web/udsc-en/revocation-of-the-state-of-epidemic-emergency--consequences-for-the-legal-situation-of-foreigners>, accessed March 26, 2024.

and 450, respectively). During the epidemic emergency, these figures dropped, reaching only 100 in 2022, then increasing to 183 in 2023.

The main nationality of third country nationals ordered to leave in the years 2015-2021 were Ukrainians. 2022 and 2023 marked a change in this matter, as at the first place were citizens of Georgia. Ukraine occupied the second place in 2022 and, interestingly, sixth in 2023 (as of 30 November) which can be explained by the Russian invasion on this country. However, the invasion did not cancel the returns thoroughly as there were still 435 Ukrainians returned in 2023. Other four main nationalities returned between 1 January and 30 November of 2023 were Belarusians, Moldovans, Russians and Turks. In 2022, the third place was occupied by citizens of Iraq and in 2021 the second which can be explained by the humanitarian crisis on the Polish-Belarusian border (ongoing since August 2021) within which Iraqis were considerable foreigners entering Poland irregularly (lack of exact data on this matter but some estimations are accessible⁶). In 2015-2017 among the five most numerous nationalities returned were Vietnamese who form a considerable community in Poland since the time of Poland-Vietnam cooperation under communist rule. In general, the first five places on this list are occupied by the citizens of Poland's eastern neighbours as well as Georgia and Moldova.

However, other statistics do not match these trends. For instance, the number of asylum applications was the highest in the beginning of the studied period (more than 12,000 applications per year in 2015 and 2016). Then, it started to drop and was less than 3,000 in 2020, mainly due to the pandemic restrictions. Since then, it increased to 9,993 in 2022. The number of foreigners refused entry on the border does not manifest any regularity: the highest figure was reached in 2016 (almost 104,00) while the lowest was in 2022 (28,272).

Interestingly, there is a steadily growing trend of Polish nationals readmitted to Poland. In 2015, it was only 17 persons, the number exceeded 100 in 2017, while it was 500 persons in 2020. The data from 2023 (collected until 30 November) indicate that as many as 683 Polish nationals were readmitted.

The statistics on Dublin returns show contradictory trends. While the number of Dublin returnees to Poland decreased considerably (from over 1,400 in 2016 and 2017 to less than 250 in the pandemic years 2020-2021), the number of foreigners returned from Poland increased. However, the figures of Dublin transfers from Poland are much smaller – not exceeding 100 per year (with the exception in 2021). The highest number of foreigners returned from Poland through Dublin procedures was noted in 2021 (120 persons), however also the years 2018, 2022 and 2023 were marked by the relatively high numbers – exceeding 80 per year. In turn, the lowest number was at the beginning of the research period: only 9 in 2016. Also, a decrease in the pandemic year of 2020 can be observed when compared to 2019 and 2021.

Some of the data is not accessible. As the Border Guard answered to the request for provision of the statistics, this institution is not collecting the specific data on return decisions issued upon negative asylum applications. The data on third country unaccompanied minors returned following an order to leave are accessible only concerning the years 2022 and 2023 – there was only one such case per year in this period.

⁶ M. Krępa. Traktowanie osób migrujących na granicy polsko-białoruskiej jako przemoc systemowa. In K. Fiałkowska, K. Łukasiewicz (eds.). Raport z realizacji projektu „Wyjść z Cienia. Wsparcie pokrzywdzonych z nienawiści”. Warsaw: Association for Legal Intervention. 2022, pp. 63–72.

The detailed data are presented in the charts below.

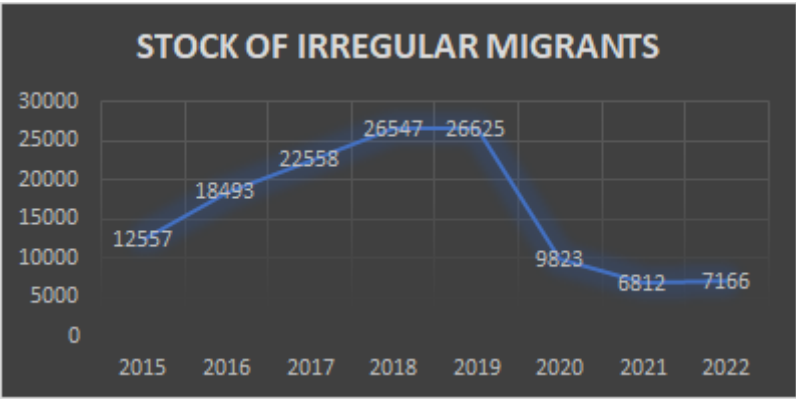


Figure 1: Stock of irregular migrants

Source: The Border Guard, Statystyki SG, <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html>, accessed March 19, 2024.

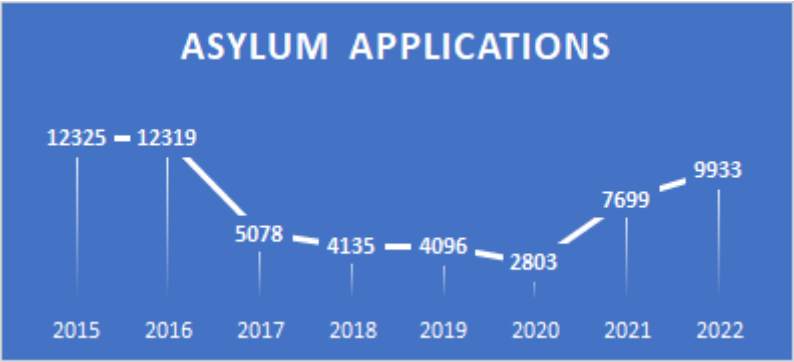


Figure 2: Asylum applications (for the purpose of comparison between the countries, this data concerns number of applicants, as in Poland several persons can be included in one application if they are family)

Source: The Office for Foreigners, Zestawienia roczne, <https://www.gov.pl/web/udsc/zestawienia-roczne>, accessed 19 March 2024.

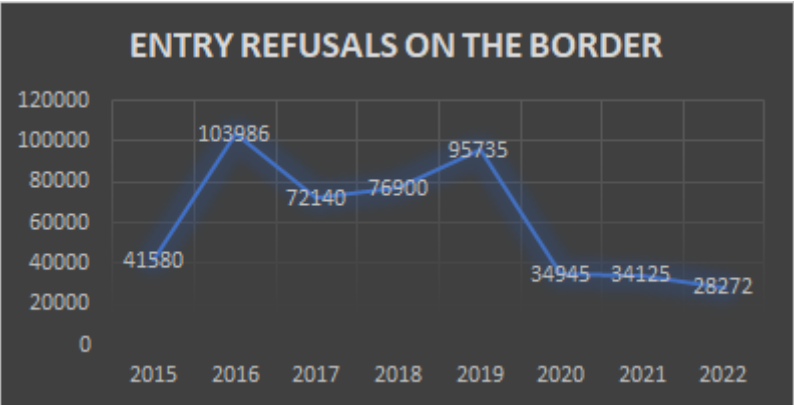


Figure 3: Entry refusals on the border

Source: The Office for Foreigners, Zestawienia roczne, <https://www.gov.pl/web/udsc/zestawienia-roczne>, accessed 19 March 2024.

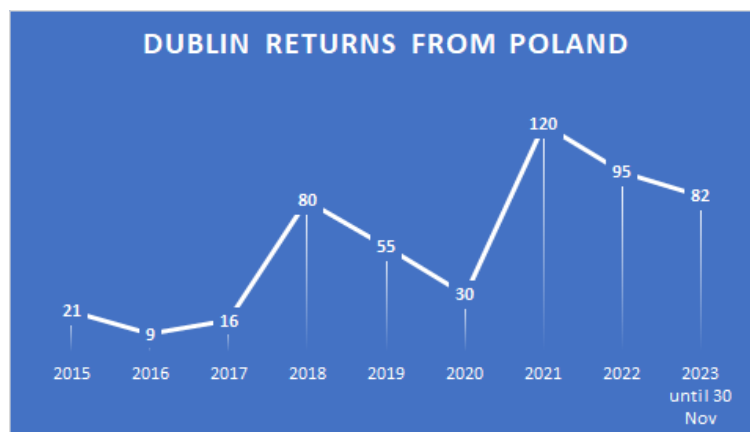


Figure 4: Dublin returns from Poland

Source: The Office for Foreigners, Raporty miesięczne, <https://www.gov.pl/web/udsc/miesieczny-raport-z-dzialalnosci-urzedu>, accessed 19 March 2024.

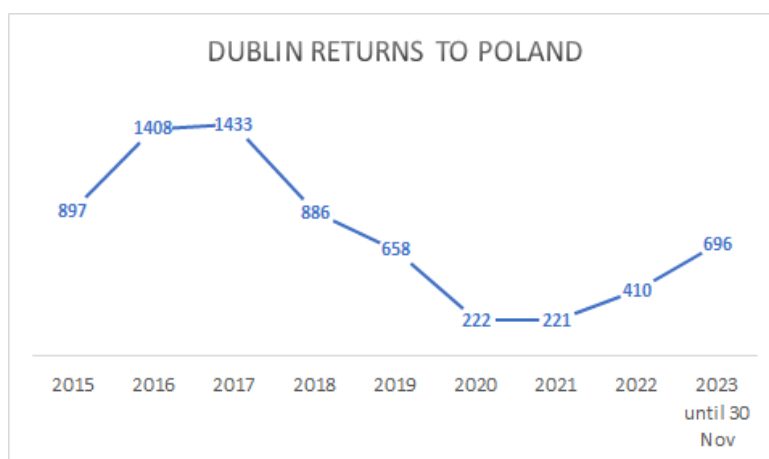


Figure 5: Dublin returns to Poland

Source: The Office for Foreigners, Raporty miesięczne, <https://www.gov.pl/web/udsc/miesieczny-raport-z-dzialalnosci-urzedu>, accessed 19 March 2024.



Figure 6: Orders to leave

Source: The Office for Foreigners, Zestawienia roczne, <https://www.gov.pl/web/udsc/zestawienia-roczne>, accessed 19 March 2024.

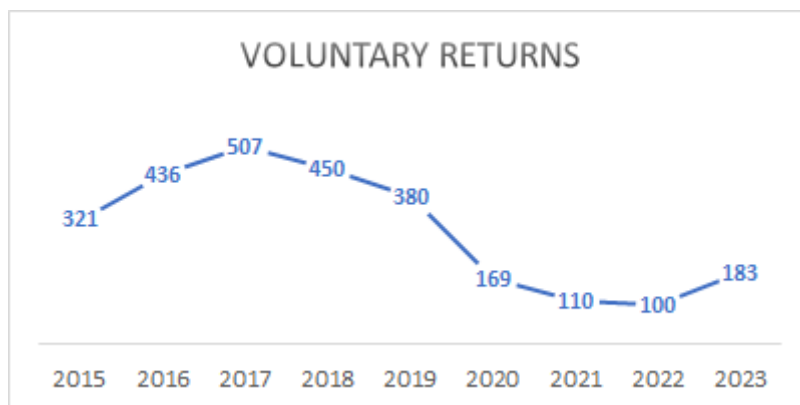


Figure 7: Voluntary returns

Source: The Border Guard (statistics obtained upon request).

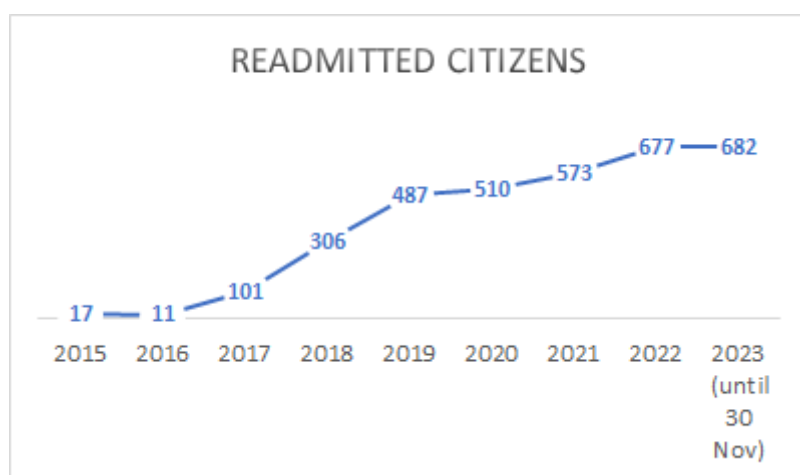


Figure 8: Readmitted Polish citizens

Source: The Border Guard (statistics obtained upon request).

2. The Political Context

From 2012 to the present, the Polish authorities have been trying to design and adopt a government policy on migration. In 2012, the document ‘Polish Migration Policy: Current State of Play and Proposed Actions’ was adopted by the Council of Ministers. In 2016, this document was invalidated. Since then, numerous documents, project outlines, and projects regarding migration policy have been developed, including a draft resolution of the Council of Ministers on the adoption of the document ‘Poland’s Migration Policy – Directions of Action 2021-2022’, which was withdrawn in the fourth quarter of 2022⁷. The attempts to adopt a comprehensive migration strategy/policy failed officially due to ‘the fact of rapid changes taking place in Poland’s environment, affecting the characteristics of migration movements’ such as the actions of the Belarusian authorities and the war in Ukraine⁸. The main reasons for the failure were the lack of defined goals and assumptions of migration policy and the differences between the declarations and the actions taken to implement them. The topic of the national migration strategy is back after the recent parliamentary elections (October 2023). The current government has started working on a new migration policy for 2025-2030⁹.

The Return Directive was implemented into Polish law only in 2013 with the introduction of the new Act on foreigners¹⁰. The year 2015 was important for Polish migration policy due to the national parliamentary elections and the migration-management crisis in Europe. The elected right-wing, national conservative party Law and Justice (in Polish: *Prawo i Sprawiedliwość*) took a negative attitude towards accepting asylum seekers under the EU temporary relocation scheme planned for 2015-2017. Between 2015 and 2023, numerous reforms in the field of return policy were introduced. The tightening of return regulations occurred mainly in 2021-2023, directly related to the humanitarian crisis on the Polish-Belarusian border that started in mid-2021¹¹. The changes introduced were aimed mainly by allowing pushbacks, enforcing return decision more quickly, and restricting access to international protection¹². The Polish authorities evacuated also Afghan collaborators of the Polish military contingent and Polish diplomacy. Out of 1,718 Afghan applicants for international protection in 2021 about 1,100 were evacuated from Afghanistan by Polish

⁷ S. Łodziński and M. Szonert. Polityka migracyjna “bez polityki”. Antynomie tworzenia polityki migracyjnej w Polsce w okresie 2016-2022, CMR Working Papers No 130 (188). 2023.

⁸ Kancelaria Prezesa Rady Ministrów, Draft resolution of the Council of Ministers on the adoption of the document “Migration policy of Poland—directions of action 2021-2022”. Accessed January 8, 2024. <https://www.gov.pl/web/premier/projekt-uchwaly-rady-ministrow-w-sprawie-przyjecia-dokumentu-polityka-migracyjna-polski-kierunki-dzialan-2021-2023>.

⁹ Ministry of the Interior and Administration, Harmonogram prac nad stworzeniem kompleksowej, odpowiedzialnej i bezpiecznej strategii migracyjnej Polski na lata 2025-2030. Accessed March 4, 2024. <https://www.gov.pl/web/mswia/harmonogram-prac-nad-stworzeniem-kompleksowej-odpowiedzialnej-i-bezpiecznej-strategii-migracyjnej-polski-na-lata-2025-2030>.

¹⁰ Act of December 12, 2013, on foreigners, Dz. U. 2013 item 1650.

¹¹ In fact, the Border Guard data confirm that Belarus has suspended the readmission cooperation with Poland in October 2020, dismantling the existing on Belarussian side of the border post-Soviet “systiema”. The Rule of Law Institute study shows that before the winter season in October-November 2020 the initial small groups of migrants were apprehended on this border and Belarus has not agreed to accept them back under readmission agreement. T. Sieniow, Migrants have the right to have rights – dostęp do ochrony międzynarodowej, Raport FIPP 1/2022, Lublin 2022, p. 10. Accessed January 26, 2024. <https://panstwoprawa.org/wp-content/uploads/2023/01/Dostęp-do-ochrony-międzynarodowej.pdf>

¹², G. Baranowska, Pushbacks in Poland: Grounding the Practice in Domestic Law in 2021, XLI Polish Yearbook Of International Law 2021. Accessed January 26, 2024. <https://journals.pan.pl/dlibra/publication/142346/edition/125552/content>.

authorities and received a special treatment with the fast-track asylum procedures¹³. The remaining part came irregularly mostly via Belarus and were detained. The double standards in receiving asylum seekers became more evident after 24 February 2022, when the Polish authorities facilitated access to Polish territory to virtually everyone trying to flee Ukraine. Poland accepted about 30% of all Ukrainian forced migrants¹⁴. The government introduced temporary protection for the newcomers¹⁵ and other temporary solutions for Ukrainians who were already living in Poland.

¹³ The Office for Foreigners. Informacja dot. afgańskich współpracowników i ich rodzin ewakuowanych z Kabulu. Accessed February 8, 2024. <https://www.gov.pl/web/udsc/informacja-dot-afganskich-wspolpracownikow-i-ich-rodzin-ewakuowanych-z-kabulu>.

¹⁴ Council of the European Union. Infographic - Refugees from Ukraine in the EU. Last updated January 22, 2024. Accessed January 26, 2024. <https://www.consilium.europa.eu/pl/infographics/ukraine-refugees-eu/>.

¹⁵ European Union applied the temporary protection mechanism for the first time (March 2022). Currently, EU has extended the temporary protection of Ukrainian citizens to March 2025. See more: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en. Accessed January 26, 2024. However special law on the aid to the citizens of Ukraine has been amended by Polish Sejm on February 9, 2024, to provide for preferential treatment of Ukrainian citizens fleeing Ukraine after February 24, 2022, only until June 30, 2024. (ustawa z dnia 9 lutego 2024 r. o zmianie ustawy o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa, ustawy o podatku dochodowym od osób fizycznych oraz ustawy o podatku dochodowym od osób prawnych). By June 2024 polish government will have to decide what will be the social status of beneficiaries of temporary protection in Poland.

3. Relationship Between National Law/EU Law/Public International Law

Taking into account the turbulence over the general position of EU law in the Polish legal system, it should be said that since 1 May 2004 (accession to the European Union), EU law has taken precedence over national law. EU legal regulations are applied directly (including the Eurodac Regulation¹⁶ and the Dublin III Regulation¹⁷), and the directives are transposed into national law (mainly into the Act on foreigners¹⁸ or Act on granting protection to foreigners within the territory of the Republic of Poland¹⁹).

The unique status of the EU law in Polish legal order is decided by the provisions of the 1997 Polish Constitution²⁰. Article 91 of the Constitution stipulates that a ratified international agreement after promulgation thereof in the *Journal of Laws of the Republic of Poland* (in Polish: *Dziennik Ustaw Rzeczypospolitej Polskiej, Dz.U.*), shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute. Moreover, an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. To facilitate Poland's membership in the EU, art. 91.3. of the Constitution provides that the laws established by an international organisation (if the agreement establishing this organisation has been ratified by Poland) shall be applied directly and have precedence in the event of a conflict of laws. This specific character of secondary EU law differs from other international law instruments, which require transposition into the Polish legal system in the form of ratification (see the discussion below).

Until 2015, the relationship between national and EU law had been (as it is the case in many other EU Member States) a matter of a delicate dialogue between the Court of Justice of the European Union (CJEU) and the Polish Constitutional Tribunal. In the past the Constitutional Tribunal engaged largely in a union-friendly interpretation²¹ of the Polish

¹⁶ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast).

¹⁷ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

¹⁸ Directives relating to the matter of return and readmission are transposed into the Act on foreigners, i.a., Directive 2008/115/EC of 16 December 2008 on common standards and procedures applicable by Member States in the return of illegally staying third-country national, Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions expelling third-country nationals, Council Directive 2003/110/EU of 25 November 2003 on assistance in cases of transit for the purposes of deportation by air.

¹⁹ Act of June 13, 2003 on granting protection to foreigners in the territory of the Republic of Poland, Dz.U. 2003 nr 128 item 1176.

²⁰ Constitution of the Republic of Poland of April 2, 1997, Dz.U. 1997 nr 78 item 483.

²¹ Comprehensive analysis of the shift from union-friendly to a hostile interpretation is included in the European Parliament's LIBE Committee study, *The Primacy of EU Law and the Polish Constitutional Law Judgment*. December 2022. Available at

Constitution, ensuring the general application and validity of EU law. The non-confrontational approach ended after the Law and Justice government attempted to introduce controversial reforms of the Polish judiciary²². Moreover, the ruling party in the end of 2015 violated the Polish Constitution²³ by appointing new jurists in the place of those already selected by the previous parliament (but not appointed by the President). Since the end of 2015, the majority of the members of the Constitutional Tribunal were considered to be politically declared supporters of the Law and Justice party. The Polish Constitutional Tribunal since then constantly questioned well-established principles of EU law. And this institution became an internal organ to certify compliance with the constitution of governmental actions questionable from an EU law point of view. The illegality of these actions was so evident that the European Court of Human Rights (ECtHR) declared that this composition of the Constitutional Tribunal violated the right to a fair trial and to a tribunal established by law (art. 6.1. ECHR)²⁴.

As a consequence, the Polish Constitutional Tribunal controversially held some provisions of the Treaty on European Union (TEU)²⁵ and art. 6 (1) ECHR²⁶ as incompatible with the Polish Constitution. In its judgement of 10 March 2022 (K 7/21), the Constitutional Tribunal found the provision of the European Convention on Human Rights (ECHR) guaranteeing everyone the right to a fair and public hearing within a reasonable time by an independent and impartial court established by law to be contrary to the Constitution of the Republic of Poland (art. 6(1) ECHR – Law to a fair trial). It ruled that ‘Article 6(1), first sentence, of the Convention for the

[https://www.europarl.europa.eu/RegData/etudes/STUD/2022/734568/IPOL_STU\(2022\)734568_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/734568/IPOL_STU(2022)734568_EN.pdf).

²² These reforms have raised serious doubts about their conformity with the EU law, which has been underlined by the CJEU on multiple occasions: Case C-619/18, *Commission v Poland* (Independence of the Supreme Court), 24 June 2019, EU:C:2019:531; Case C-192/18, *Commission v Poland* (Independence of Ordinary Courts), 5 November 2019, EU:C:2019:924; Case C-791/19, *Commission v Poland*, 15 July 2021, EU:C:2021:596. Joined Cases C-585/18, C-624/18; C-625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, EU:C:2019:982; Case C-824/18, A.B. and Others (Appointment of Judges to the Supreme Court – Actions), 2 March 2021, EU:C:2021:153.

²³ Constitutional Tribunal Judgment of 3 December 2015, K 34/15.

²⁴ The ECtHR, in its judgement of 7 May 2021, in the case of *Xero Flor w Polsce sp. z o.o. v. Poland* (application no. 4907/18) saw ‘no reason to disagree with the Constitutional Court’s findings that there had been irregularities amounting to manifest breaches of domestic law in the appointment of those judges’. It found that the actions of the legislature and executive, in particular ‘the authorities’ failure to abide by the relevant Constitutional Court judgments, was linked to their challenging—with a view to usurping—the Constitutional Court’s role as the ultimate interpreter of the Constitution and the constitutionality of the law’. It thus considered that the applicant company had been denied its right to a ‘tribunal established by law’ owing to the irregularities in the appointment of Judge M.M. specifically.

²⁵ On 7 October 2021, the Constitutional Tribunal ruled that some provisions of the Treaty of the European Union (TEU) are unconstitutional (Judgement K 3/21). The CT found that an understanding of art. 1 read in conjunction with art. 4 (3) TEU, which required or authorised Polish adjudicative bodies to issue decisions that disregarded the Polish Constitution or to apply laws that contravened the Polish Constitution, to be in breach of Arts. 2, 7, 8 (1) in conjunction with 8 (2), 90 (1) and 91 (2), as well as 178 (1) of the Polish Constitution. Second, the CT interpreted art. 19 (1), second paragraph, read in conjunction with art. 4 (3) TEU requiring or authorising Polish adjudicative bodies to apply laws which were previously declared unconstitutional by the Constitutional Tribunal to be in breach of Arts. 2, 7, 8 (1) in conjunction with 8 (2) and 91 (2), 90 (1), 178 (1) as well as 190 (1) of the Polish Constitution. Third, the CT considered art. 19 (1), second paragraph, read in conjunction with art. 2 TEU, allowing Polish courts to review the independence of judges appointed directly by the President of the Republic or by request of the National Council of the Judiciary, to be incompatible with Arts. 8 (1) in conjunction with 8 (2), 90 (1), 91 (2), 144 (3) 17 as well as 186 (1) of the Polish Constitution.

²⁶ The case K7/21, accessed March 6. 2024, <https://trybunal.gov.pl/s/k-7-21>.

Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950, subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284, as amended) insofar as: (...) is incompatible with Article 188, paragraphs 1 and 2, and with Article 190, paragraph 1, of the Constitution’.

It is expected that after Law and Justice lost power in the 15 October 2023 elections that the influence of the politicians on the Constitutional Tribunal would diminish. The process of reinstating the rule of law in Poland after eight years of ignoring the judgements of the CJEU and ECtHR will be long and difficult. Any legislative or constitutional changes promised before the 2023 parliamentary elections by the new governmental coalition will require collaboration with the President, who is not willing to admit to committing a constitutional delict in the past.

Poland ratified acts of international law regarding human rights and refugee law in most of the second half of the 20th century. The Convention relating to the Status of Refugees (1951)²⁷ is directly applied in the process of granting international protection. The other most frequently used legal act is the Convention on the Rights of the Child²⁸. Other international law documents (including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²⁹) are often ignored when considering individual return or readmission cases. Poland generally implements judgments of international and European tribunals. Every year, the Plenipotentiary of the Minister of Foreign Affairs for proceedings before the European Court of Human Rights presents a report on the execution of judgments by Poland. At the time of preparation of the report, results for 2022 were not yet available. From 2011 to 2021, as few as 31 (2020) and as many as 357 (2014) judgments were executed annually. Since 2014, there has been a significant downward trend in the execution of judgments—in 2021, 35 judgments were executed. Currently, 97 cases are in the execution phase. The number of judgments against Poland also changed; for comparison, in 2011, 71 judgments were issued, and in 2012, as many as 72 judgments were issued. The least number of judgments was issued in 2019 – only 12. In 2021, 23 judgments were handed down³⁰. Considering the number of judgments issued, their implementation and ‘in implementation’, Poland executes judgments with a delay. Implementing judgments regarding access to the international protection procedure is also delayed³¹.

Poland joined the Council of Europe on 26 November 1991. The European Convention on the Protection of Human Rights and Fundamental Freedoms came into force on 19 January 1993, when Poland filed ratification documents to the Council of Europe.

Poland has signed and/or ratified the following UN human rights treaties:

- International Convention on the Elimination of All Forms of Racial Discrimination (signed: 1966, ratified: 1968), reservation art. 22;
- International Covenant on Civil and Political Rights (signed: 1967, ratified: 1977), no reservations;

²⁷ Dz.U. 1991, No. 119, items 515 and 517.

²⁸ Dz.U. 1991 No. 120 item 526.

²⁹ Dz.U. 1989 No. 63 item 378.

³⁰ Ministry of Foreign Affairs. Raporty rządu na temat wykonywania orzeczeń ETPC. Accessed January 8, 2024. <https://www.gov.pl/web/dyplomacja/raporty-roczne-rzadu-na-temat-wykonywania-orzeczen-etpc>.

³¹ J. Barcik. Wykonywanie wyroków Europejskiego Trybunału Praw Człowieka przez Polskę. Justitia 2 no. 12 (2013). Accessed January 8, 2024. <https://www.kwartalnikiustitia.pl/wykonywanie-wyrokow-europejskiego-trybunalu-praw-czlowieka-przez-polske,5011>.

- International Covenant on Economic, Social and Cultural Rights (signed: 1967, ratified: 1977), no reservations;
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed: 1986, ratified: 1989), no reservations;
- Convention on the Rights to the Child (signed: 1990, ratified: 1991), reservation art. 7 and art. 38;
- Optional Protocol to the International Covenant on Civil and Political Rights (signed: 2000, ratified: 2014), no reservations;
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed: 2004, ratified: 2005), no reservations;
- International Convention for the Protection of All Persons from Enforced Disappearance (signed: 2013, ratification: none).

Poland did not sign and refused the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

The status of public international law in domestic Polish law is commonly qualified as a monist system³². Pursuant to art. 9 of the 1997 Constitution: 'The Republic of Poland respects international law binding on it'. Based on art. 87 of the Constitution, only ratified international agreements are a source of generally applicable law³³; without ceasing to be a source of international law, they become a source of national law. There is a dispute as to whether the norm of customary international law is considered a source of binding law. Consequently, compliance with international law agreements will manifest mainly in their transposition into the Polish legal order. The Constitution states that the sources of generally applicable law in Poland are: the Constitution, statute (act of Parliament, in Polish: *ustawa*), ratified international agreements, and governmental ordinances (in Polish: *rozporządzenie*).

Moreover, Poland may, on the basis of an international agreement, delegate to an international organisation or an international body the competence of state organs in certain matters (art. 90 of the Constitution)³⁴. The most important international acts regarding human rights and refugee law, i.e., the Convention relating to the Status of Refugees or Convention on the Child Rights, are ratified and incorporated directly into national law through publication in the official legislative journal.

³² M. Borski. Miejsce umów międzynarodowych w porządku prawnym Rzeczypospolitej Polskiej. *Roczniki Administracji i Prawa : teoria i praktyka*, Rok XIV t. II (2014) , pp. 17-32.

³³ Pursuant to art. 87 of the Constitution of the Republic of Poland, only ratified international agreements are a source of generally applicable law. International agreements are ratified and announced by the President. The ratification procedure is regulated in detail in the Act of 14 April 2000 on international agreements. According to its provisions, the choice of the method of ratification of an international agreement is decided by the Council of Ministers, adopting a resolution to submit the agreement to the President for ratification. Under the above resolution, the Minister of Foreign Affairs submits the agreement together with the ratification document to the President for ratification, provided that in the case of an agreement meeting the conditions arising from art. 89 section 1 of the Constitution or art. 90 of the Constitution, obtaining prior consent for its ratification is necessary.

³⁴ A law giving consent to the ratification of this international agreement shall be passed by the Sejm (Parliament) by a two-thirds majority vote in the presence of at least half of the statutory number of deputies and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of senators. The consent to ratifying such an agreement may be passed in a nationwide referendum following the provisions of art. 125 of the Constitution. The resolution on the choice of the mode of consent to ratification shall be adopted by the Sejm by an absolute majority of votes in the presence of at least half of the statutory number of deputies.

On 21 January 2021, Polish authorities sent information to the Council of Europe on implementing individual measures. The very first judgement regarding the refusal of access to the international protection procedure in Poland is worth mentioning. In the case of *M.K. and Others v. Poland* (applications no. 40503/17, 42902/17 and 43643/17), the ECtHR ruled that Poland had violated art. 3 of the ECHR (prohibition of torture and other inhuman, degrading treatment in Chechnya), art. 4 of Protocol No. 4 to the Convention on the grounds of collective expulsion of foreigners, art. 13 of the Convention (the right to effective remedy), and art. 34 of the ECHR. On 8 December 2021, an action plan to implement the judgement was sent³⁵. The Committee of ministers of the Council of Europe will return to the question of implementing this judgement in March 2024.

³⁵ Opinion of the Helsinki Foundation for Human Rights, Accessed January 26, 2024. <https://hfhr.pl/upload/2023/03/helsinki-foundation-for-human-rights-opinion-mk-and-others-vs-poland.pdf>.

4. Institutional Framework and Operational Infrastructure

Migration and border policy comes under the Ministry of the Interior and Administration (Department of International Affairs and Migration). The main authority responsible for return policy and readmission is the Border Guard. An additional authority in charge of organising voluntary return assistance is the Head of the Office for Foreigners. As a result of legislative changes in March 2023, the Border Guard took over the overall competence for processing return cases at the two-instance level.

The Border Guard is responsible for receiving applications for international protection. Also, the same authority – the Border Guard – is responsible for the return and readmission process. The Border Guard also deals with arrests and detention centres for foreigners. The detention centres are fully managed by the Border Guard posts (or units) on whose territory they are located. A foreigner is placed in a detention centre at the request of the territorially competent commanding officer of the Border Guard post (unit). The detention centre is located on the territory of the border guard post or unit. It has its own manager, a Border Guard officer. The Border Guard may decide to apply alternative measures to detention, also to foreigners who have been issued with a decision to oblige the foreigner to return (more: section 5).

As a rule, control of the legality of stay is carried out by the Border Guard and the Police. The Head of the Office for Foreigners and the Voivodes³⁶ may conduct control of the legality of stay to the extent necessary for their proceedings concerning foreigners. Control of the legality of stay may also be carried out by the Head of the Customs and Fiscal Office to the extent specified in separate ordinances. The Act on foreigners obliges all state authorities (governmental and self-governmental administration) to cooperate with the authorities carrying out control of the legality of stay. Tasks related to performing control of the legality of stay, issuing decisions on the obligation to return and readmission are specified in the Act on foreigners and implementing acts.

The Border Guard, in accordance with its territorial competence, carries out control of the legality of stay. Also, in accordance with its territorial competence, it accepts foreigners for readmission. Territorial competence depends on the choice of the way of transfer of foreigners—by land or by air. The tasks of the Border Guard officers, including the way of execution of a forced return, are specified in the ordinances implementing the Act on foreigners.

In the Board for Foreigners of the Border Guard Headquarters, there is the Division III for the Organisation of Voluntary Returns and Dublin Proceedings, which undertakes activities related to the implementation, supervision, and monitoring of assistance to foreigners in their voluntary return from Poland.

According to his/her territorial competence, the Border Guard post's commanding officer issues a decision to oblige the foreigner to return or to accept the foreigner under a readmission agreement. The role of the Head of the Office for Foreigners was significantly reduced in March

³⁶ It is 'a one-person body of the local-government administration and the constitutional representative of the council of ministers in the voivodship' – see Encyklopedia Administracji Publicznej, Faculty of Political Science and International Studies, University of Warsaw, accessed March 25, 2024, <http://encyklopediaap.uw.edu.pl/index.php/Voivode>.

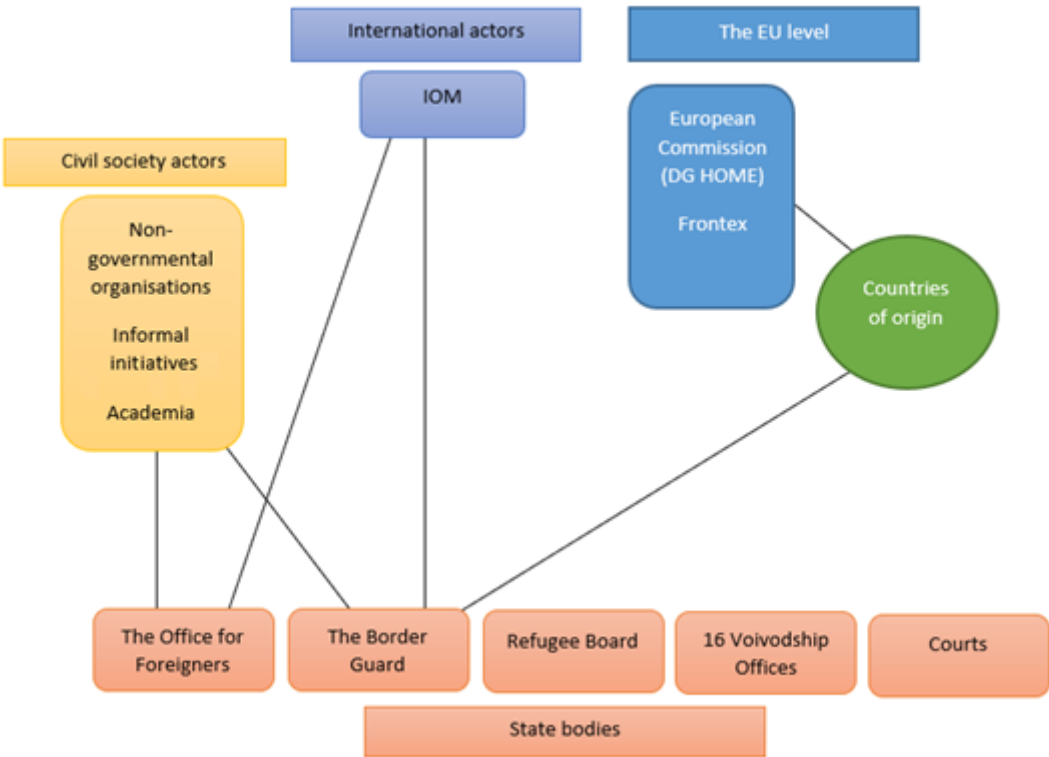
2023. As a result of the reform of the Act on foreigners in April 2023, the Border Guard is now entirely in charge of the proceedings to oblige a foreigner to return. Before the change, the Head of the Office for Foreigners conducted the appeal proceedings.

As a rule, the return of a foreigner is ordered by the relevant Border Guard post. In the case of a declaration of voluntary return – the Commander-in-Chief of the Border Guard organises assistance in voluntary return. The Act on foreigners provides for the possibility to outsource the organisation of voluntary return to another entity. Currently, this entity has been the International Organisation for Migration (IOM) since 2005 on the basis of an agreement between the Minister of the Interior and Administration and the IOM of 12 July 2005. This agreement clearly defines the tasks of the Minister, the IOM and the mode of the cooperation.

IOM is the only entity cooperating in the organisation of voluntary returns of foreigners. The Act on foreigners specifies that the Commander-in-Chief of the Border Guard may commission the organisation of a voluntary return by the IOM.

Figure 9: Flowchart of Return Migration Infrastructure in Poland

Source: Own elaboration.



5. The National Legal Framework/Return Infrastructure

5.1. Definitions and Concepts

To describe the national legal framework regarding returns, the following frequently occurring terms should be analysed. They are defined in the acts of parliament, incorporated from international/EU law, or adopted for the purpose of public statistics (e.g., Poland's Central Statistical Office or Eurostat):

- Third-country nationals – anyone who does not possess Polish citizenship (Act on foreigners art.3 point 2) or an EU Member State citizenship;
- Illegal/irregular stay – there is no legal definition of this term in Polish legislation. The stay of a foreigner should be considered illegal when it is inconsistent with the provisions regulating the stay of foreigners in the territory of the Republic of Poland, including the Act on foreigners and the Act of 13 June 2003 on granting protection to foreigners in the territory of the Republic of Poland³⁷). An irregular stay is considered a situation in which a foreigner does not have a document entitling him/her to a legal stay in the country's territory, which means the lack of a visa, residence card, or overstay under visa-free travel. Irregular stay also results from entering the territory of Poland without proper documents of entry; however, there is a discrepancy in interpretation (between the government and NGOs) on how this rule applies to migrants pushed to Poland by Belarusian forces regarding the principle of non-refoulement. Also, the art. 3 point 2 of the Return Directive defines 'illegal stay';
- International protection – protection of asylum seekers granted in the form of refugee status (based on the 1951 Geneva Convention), or subsidiary protection introduced to the national law by the 2011 EU Qualification Directive³⁸. It should be noted that 'asylum' (in Polish: *azyl*) in Poland is a separate kind of protection stemming only from domestic law and rarely applied³⁹;
- Return – the return of a foreigner to his/her country of origin, transit country, or other third country to which he/she decided to return and by which he/she was accepted (following the Act on foreigners art. 3 point 12);

³⁷ Dz. U. 2003 No. 128 item 1176.

³⁸ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

³⁹ For more, see: M. Szulecka, M. Pachocka and K. Sobczak-Szelc. Poland—Country Report: Legal and Policy Framework of Migration Governance. Working Paper Series. Global Migration: Consequences and Responses, no. 2018/09. doi: 10.5281/zenodo.1418583; M. Pachocka and K. Sobczak-Szelc. Refugee Protection Poland Country Report. RESPOND Working Papers. Global Migration: Consequences and Responses. Paper 2020/35, January 2020.

- Return decision (in Polish: *decyzja o zobowiązaniu do powrotu*) – a decision issued by the competent commander of the Border Guard post or unit (Division Commander, in Polish: *Komendant Oddziału*);
- Removal order – there is no legal definition of this term in Polish legislation; however, the Act on entrance, stay and exit of the citizens of the Member States of the European Union and family members (Act on citizens of the EU⁴⁰) in art. 65p stipulates the grounds for the expulsion from the territory of Poland of EU citizens or family members who are not EU citizens and do not have the right of residence. Moreover, art. 303b of the Act on foreigners allows the Border Guard commander to issue an order to leave (in Polish: *nakaz opuszczenia*) the territory of the Republic of Poland to the foreigner apprehended immediately after crossing the border irregularly;
- Risk of absconding – there is no legal definition, but the Act on foreigners (art. 315(3)) indicates factors to assess the ‘probability of absconding’ by a foreigner: It shall be taken into account, in particular, whether the foreigner:
 - a) has declared his/her non-compliance with the obligations arising from the receipt of the decision on the foreigner’s obligation to return, or
 - b) is not in possession of documents proving his/her identity, or
 - c) has crossed or attempted to cross the border in violation of the law, or
 - d) has entered the territory of the Republic of Poland within the period of validity of an entry to the list of foreigners whose stay on the territory of the Republic of Poland is undesirable, or to the Schengen Information System for the purpose of refusing entry and stay;
- Voluntary departure – the Act of 9 March 2023 amending the Act on foreigners and certain other acts has changed the statutory term ‘voluntary return’ to ‘voluntary departure’. Currently, following art. 315(1) of the Act on foreigners: ‘The decision on the obligation of the foreigner to return shall specify the period of voluntary departure, which shall be from 8 to 30 days, counted from the day of delivery of the decision’.
- Assisted return – is organised by the Commander-in-Chief of the Border Guard. The Act on foreigners specifies who can benefit from assisted return (based on art. 334 of the Act on foreigners), to whom to apply and the deadline for submission of this application. Foreigners who are eligible to apply may receive multiple types of decisions, among others:
 - a) a decision to oblige a foreigner to return with a deadline for voluntary departure,
 - b) a decision to oblige a foreigner to return subject to compulsory execution and who, due to the circumstances referred to in art. 400 of the Act on foreigners, has not been placed in a detention centre or in respect of whom an arrest for foreigners has not been applied or who has been released from a detention centre or an arrest for foreigners when it has been established that the circumstances referred to in art. 400 of the Act on foreigners apply, and in the case referred to in art. 406(1)(3) of the Act on foreigners,

⁴⁰ Act of July 14, 2006, on entry into, stay in and departure from the territory of the Republic of Poland territory of citizens of the European Union Member States and their family members, Dz. U. Nr 144 item 1043.

- c) foreigner who has been issued a decision to refuse refugee status or subsidiary protection or a decision to declare an application for international protection inadmissible,
- d) foreigner who has been issued a decision to discontinue the proceedings on granting international protection,
- e) foreigner whose application for granting international protection was left without consideration for formal reasons,
- f) foreigner staying on the territory of the Republic of Poland on the basis of a certificate referred to in art. 170 of the Act on foreigners (certificate confirming the presumption that the foreigner is a victim of trafficking in human beings) or on the basis of a temporary residence permit referred to in art. 176 of the Act on foreigners.

Assistance in voluntary return shall be granted upon the foreigner's application. The foreigner submits the application for assistance in voluntary return to the Commander-in-Chief of the Border Guard through indicated authorities: the commanding officer of the Border Guard division (Division Commander) or the commanding officer of the Border Guard post or the Head of the Office for Foreigners⁴¹;

- Vulnerable persons – there is no clear legal definition of vulnerable persons in the Act on foreigners, but the Act on protection in art. 68(1)⁴² mentions persons that may require special treatment, and these are:
 - a) minors,
 - b) disabled persons,
 - c) elderly persons,
 - d) pregnant women,
 - e) single parents,
 - f) victims of human trafficking,
 - g) seriously ill persons,
 - h) mentally disordered persons,
 - i) victims of torture,
 - j) victims of psychological, physical and sexual violence, as well as violence due to gender, sexual orientation and gender identity;

Vulnerable persons may require special assistance: medical assistance or social assistance (e.g., special time and space arrangements for the interview as well as the presence of a psychologist, reception conditions adjusted to special needs, etc., based on the Act on protection [arts. 68 and 69]). Some vulnerable persons (mentally disordered persons, victims of torture, victims of psychological, physical and sexual violence, as well as violence due to gender, sexual orientation, and/or gender identity) shall stay outside of the detention centre while waiting to be returned.

⁴¹ The Office for Foreigners is included in these proceedings under specific conditions: in the case referred to in art. 334 of the Act on foreigners, section 2 points (3) and (4), if the foreigner benefits from social assistance and medical care referred to in art. 70 section 1 of the Act on granting protection to foreigners within the territory of the Republic of Poland of 13 June 2003, or the entity referred to in section 8.

⁴² For more see: K. Sobczak-Szelc, M. Pachocka, K. Pędziwiatr, J. Szalańska and M. Szulecka. From Reception to Integration of Asylum Seekers and Refugees in Poland. Routledge. 2022. Chs. 2.3.

Figure 10: Timeline of Return Policies in Poland

Source: Own elaboration.

TIMELINE OF RETURN POLICIES: POLAND										
RETURN POLICIES							OTHER MIGRATION RELATED POLICIES			
Transposition of the return directive	Multiple ordinances regarding formal part of the return of the migrant and stay in the detention camp • Ordinance of the Minister of the Interior of 19 August 2014 on the method of recording in a foreigner's travel document the decision to refuse entry to the territory of the Republic of Poland • Ordinance of the Minister of the Interior of 23 July 2014 on the template of a fingerprint card on which fingerprints are taken from a foreigner in the event of an obligation for the foreigner to return and when the foreigner crossed the border contrary to the law	Introduction of the calculator of the cost of the return process	no changes	Amendment of the Ordinance of the Minister of Interior of 24 April 2015 on the guarded centres and detention centres for foreigners	Ordinance of the Minister of the Interior and Administration of 20 July 2018 on the costs related to the execution of the decision obliging a foreigner to return	Ordinance of the Minister of the Interior and Administration of 21 March 2019 on the template of an application for placement of a foreigner in a detention camp or for applying for a detention center for foreigners and a template of an application for extending the period of stay of a foreigner in a detention center or arrest	Amendment of the Ordinance of the Minister of Interior of 24 April 2015 on the guarded centres and detention centres for foreigners	Readmission agreement with Belarus was "ineffective" since Autumn 2020, when Belarusian border authorities stopped to honor readmission requests from Poland.	Admission of Ukrainian refugees (Act of 12 March 2022 on assistance to citizens of Ukraine in connection with an armed conflict on the territory of this country)	Change of the appeal body - Commander-in-Chief of the Border Guard.
Act of 12 December 2013 on foreigners		Ordinance of the Minister of Interior of 24 April 2015 on the guarded centres and detention centres for foreigners					Temporary ordinances (COVID-19) regarding the entrance to Poland, extension of visas and residence permits card, extension of deadlines to leave the territory of Poland after issuance of return decision (voluntary return), extension of deadlines to leave the territory of Poland after issuance of final negative decision	• Amendment to the Act on foreigners introduces art. 303b which allows the issue of the obligation to leave Poland (not return process) in cases of illegal border crossing • Amendment of the ordinance on the temporary suspension or restriction of border traffic at specific border crossings • Several amendments of the Ordinance of the Minister of Interior of 24 April 2015 on the guarded centres and detention centres for foreigners		Multiple amendments to the Act on Foreigners - shortened time for submitting an appeal against the decision to oblige a foreigner to return (from 14 to 7 days)
2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
							Covid-19 Pandemic	beginning of the humanitarian crisis on the Polish-Belarusian border	full-scale war in Ukraine	

5.2. Return at the Border

Poland's borders with Russia, Belarus, and Ukraine are the external Schengen borders. For many years the main gateway for citizens of post-Soviet Union states seeking protection in the European Union has been a train connection between Brest (Belarus) and Terespol (Poland). This connection has been used most often by the Chechens fleeing persecution of Kadyrov's regime or non-state actors⁴³. According to Polish law, asylum applications are registered by the Border Guard and after this initial phase they are being transferred to the Office for Foreigners competent to examine asylum seekers' requests. Despite the lack of statutory competence, the Border Guard officers at the external border in Terespol for many years were involved in the

⁴³ In years 2003-2017 there were 91,500 Chechens filing application for refugee status (international protection) and 69 thousand of them have not waited for the examination of their requests and moved to other EU states, Monika Porończuk, Czczeni mnożą się Morawieckiemu w oczach. Przeszacował ich liczbę sześciokrotnie, OKO Press, 21 of June 2018, <https://oko.press/czczeni-mnoza-sie-morawieckiemu-w-oczach-przeszacowal-ich-liczbe-szesciokrotnie>, accessed 26 March, 2024.

quasi-examination of foreigners' claims and were the restricting foreigner's access to international protection⁴⁴.

As a rule, a foreigner may enter Poland under the visa-free regime (with a biometric passport and not extending the maximum period of stay) or holding a valid visa or residence card. If a foreigner does not have one of the above-mentioned documents, he/she will generally not be able to enter. The Act on foreigners specifies the reasons for refusing entry⁴⁵ as not having the right to enter or not meeting the entry conditions on a visa.

The Schengen Border Code⁴⁶ and the Act on foreigners⁴⁷ provide for exceptions for the foreigners who do not satisfy the entry conditions; application for international protection or receipt of a short-entry permit (valid for 15 days) issued by the Commander of the Border Guard Post (obtaining consent of the Commander-in-Chief of the Border Guard) to enter Polish territory on humanitarian grounds, on grounds of national interest or because of international obligations.

Collective expulsions in Terespol until 2020

Frontex data shows that the number of refusals of entry to the EU has doubled between 2015 and 2016 and that this is clearly the result of the refusals issued at the Polish-Belarusian border⁴⁸. The Helsinki Foundation for Human Rights reported that the place of issuance of around 75% of all refusals of entry in the EU in 2016 was the Polish-Belarusian border which is an increase of 213% since 2015⁴⁹.

This change of attitude in 2016 has been confirmed by the previous Polish Minister of the Interior, Mariusz Błaszczak. It is obvious in this case that the Polish authorities were reinforcing security at the expense of individuals' rights. The anti-immigration sentiments were reflected in the administrative statements of the Minister who called the situation in Terespol 'an attempt to open another route for the influx of Muslims to Europe,' and claimed that 'as long as I am interior minister and as long as Law and Justice party is in power, we will not put Poland in danger of terrorism'⁵⁰. Since 2016 the situation at the border has changed but rather not improved at all. However, in mid-March 2020, due to coronavirus legislation, the arrivals by a 'refugee train' from Brest to Terespol have been completely stopped. Until 2020 the main border crossing through which forced migrants⁵¹ tried to enter Poland was the

⁴⁴ M. Kowalski, Wnioski o ochronę międzynarodową składane na granicy – uwagi na tle środków tymczasowych zarządzonych wobec Polski przez Europejski Trybunał Praw Człowieka, Europejski Przegląd Sądowy 3/2018, s. 11-17

⁴⁵ Art. 28 of the Act on foreigners.

⁴⁶ Art. 3 and art. 6. 5c of the Schengen Border Code.

⁴⁷ Art. 32.1 of the Act on foreigners.

⁴⁸ Frontex Annual Risk Analysis 2017, available at

https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf.

⁴⁹ Helsinki Foundation for Human Rights, "Access to asylum procedure at Poland's external borders. Current situation and challenges for the future", Warsaw, April 2019, p. 10. https://hfhr.pl/upload/2022/01/doste-p-do-procedury-azylowej-na-polskich-granicach-zewnetrznych_-obecna-sytuacja-i-wyzwania-na-przyszlosc11T, accessed 26 March 2024.

⁵⁰ This policy statement has been widely discussed also in Russian media: Fleeing Chechen Refugees Stranded on Polish-Belarus Border, The Moscow Times, Aug. 31, 2016, <https://www.themoscowtimes.com/2016/08/31/chechens-running-from-kadyrov-stuck-on-polish-border-a55165>.

⁵¹ See the definition proposed by Pachocka and Wach (2023).

border crossing in Terespol⁵². The Brest-Terespol train connection between Belarus and Poland was suspended on 15 March 2020, and has not been reopened since then (currently Terespol is the only active border crossing point for travellers in vehicles at the Polish-Belarusian border). In practice, the legal pathways to apply for international protection at the Polish-Belarusian border have been greatly reduced.

For many years (even before 2015), Polish NGOs and lawyers have been alerting that passengers of the train from Brest were collectively expelled despite their declared willingness to apply for international protection⁵³. Before lodging their application, they were forced to return to Belarus many times⁵⁴ receiving refusal of entry decisions on the basis of the lack of visa⁵⁵. In the rare cases when foreigners have managed to file an appeal against the decision and even sought judicial review in administrative court the Border Guard, decisions were sometimes overturned but these judgements were normally issued long after the asylum seekers' attempts to cross the border⁵⁶.

The report prepared by the Association of Legal Intervention 'At the Border'⁵⁷ drew attention to the long-standing practice of refusing to accept applications for international protection by the Border Guard at the border crossing point in Terespol. Already in 2016, the report stated that for many years, NGOs have been approached by foreigners who were refused entry to Poland despite their willingness to apply for international protection. The peak of refusals of entry happened in July 2016 during the NATO Summit in Warsaw and the World Youth Day in Cracow. Hundreds of applicants were taking the train from Brest and Terespol

⁵² A. Chrzanowska, P. Mickiewicz, K. Słubik, J. Subko and A. Trylińska. At the border. Report on monitoring of access to the procedure for granting international protection at border crossings in Terespol, Medyka, and Warszawa-Okecie Airport, Analyses, Reports, Evaluations, No. 2/2016, Warsaw: Association for Legal Intervention. Accessed January 26, 2024. <https://interwencjaprawna.pl/wp-content/uploads/2020/04/at-the-border.pdf>; M. Górczyńska and M. Szczepanik. A road to nowhere: The account of a monitoring visit at the Brześć-Terespol border crossing between Poland and Belarus. Helsinki Foundation for Human Rights 2016. Accessed January 26, 2024. <https://www.hfhr.pl/wp-content/uploads/2016/11/raport-droga-donikad-EN-web.pdf>; M. Szczepanik. Border Politics and Practices of Resistance on the Eastern Side of 'Fortress Europe': The Case of Chechen Asylum Seekers at the Belarusian-Polish Border. Central and Eastern European Migration Review. Vol. 7, No. 2. 2018. pp. 69–89; J. Białas, M. Górczyńska and D. Witko. Access to asylum procedure at Poland's external borders. Current situation and challenges for the future (English summary), Warsaw: Helsinki Foundation for Human Rights 2019; M. Pachocka and K. Sobczak-Szelc. Refugee Protection Poland Country Report. RESPOND Working Papers. Global Migration: Consequences and Responses. Paper 2020/35, January 2020.

⁵³ T. Sieniow, Migrants have the right to have rights – dostęp do ochrony międzynarodowej, Raport FIPP 1/2022, Lublin 2022, p. 15. Accessed January 26, 2024. <https://panstwowpraw.org/wp-content/uploads/2023/01/Raport-II-detencja.pdf>.

⁵⁴ In the exemplary case Tomasz Sieniow has intervened to support Chechen applicants trying to cross this border on the train 72 times before their application has been registered on the 17th of September 2019 (Intervention letter of the Rule of Law Institute to the Commander of the Border Guard Post in Terespol of 16 September 2019, Sygn. IPP-TS-4/9/2019).

⁵⁵ Stowarzyszenie Interwencji Prawnej. Czeczeni w niebezpieczeństwie przez odmowę dostępu do procedury uchodźczej. 2018. Accessed January 26, 2024. <https://interwencjaprawna.pl/czeczeni-w-niebezpieczenstwie-przez-odmowe-dostepu-do-procedury-uchodzcej/>; Rzecznik Praw Obywatelskich. ETPC negatywnie ocenił praktykę polskich służb w sprawach osób poszukujących w Polsce ochrony międzynarodowej. 2020. Accessed January 26, 2024. <https://bip.brpo.gov.pl/pl/content/rpo-negatywna-ocena-etpc-braku-dostepu-do-procedur-uchodzcyh>.

⁵⁶ Judgement of the Provincial Administrative Court in Warsaw of 2 June 2017 (sygn. Akt IV Sa/Wa 3021/16) overturning the decision of the Commander-in Chief of the Border Guard and the Commander of the BG Post in Terespol of 3 September 2016 no. NA-TR/29014/D-ODW/2016 on the refusal of entry.

⁵⁷ A. Chrzanowska et al. op. cit.

every day just to be refused entry and try again the following morning. This border practice has been condemned by ECtHR in 2020, in *M.K. and Others v. Poland*⁵⁸ in which the Court found that Poland had violated, among others, art. 3 of the ECHR due to the denial of access to the refugee procedure, which exposed foreigners to the risk of inhuman and degrading treatment or punishment, and due to the ill-treatment of foreigners during border checks⁵⁹. The ECtHR ruled also that the actions of the Border Guard led to the collective expulsion of foreigners due to issuing decisions refusing entry at the border despite submitting declarations for international protection. Similar judgements were issued in other ‘Terespole cases’: *D.A. and Others v. Poland*⁶⁰, *A.I. and Others v. Poland*⁶¹, *A.B. and Others v. Poland*⁶², *T.Z. and Others v. Poland*⁶³.

In the opinion of the NGOs monitoring the situation at the Terespol border crossing point, despite the suspension of the train connection between Belarus and Poland, the situation of asylum seekers has not improved, and the judgement should not be considered implemented⁶⁴. The main reasons for this conclusion are practices performed by the Border Guard at the Polish-Belarusian border but also legal provisions enabling the Border Guard to:

1. return foreigners to Belarus when no decision on a refusal of entry being issued (such practice has been reported in the previous communication of NGOs⁶⁵);
2. return persons who received a decision ordering an immediate removal based on art. 303b of the Act on foreigners;
3. expel to Belarus under the Ordinance of the Ministry of the Interior and Administration of 20 August 2021 (Ordinance of August 2021);
4. push back to Belarus foreigners without any identification nor decision being issued (which is still being reported at the Polish-Belarusian border).

Pushbacks and border rejections based on the 2020 Minister of the Interior and Administration Ordinance

After suspending train connection between Brest and Terespol there were generally two routes left for the citizens of Russia and other post-Soviet states to seek protection in Poland. The first was stimulated by the Belarusian regime encouraging migrants to cross the border

⁵⁸ *M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17, 23 July 2020.

⁵⁹ Rzecznik Praw Obywatelskich. Ograniczony dostęp migrantów do procedury uchodźczej w Polsce. Informacje RPO dla Specjalnego Sprawozdawcy ONZ. 2021. Accessed January 26, 2024. <https://bip.brpo.gov.pl/pl/content/ograniczony-dostep-migrantow-do-procedury-uchodzczej-informacje-rpo-dla-sprawozdawcy-onz>.

⁶⁰ *D.A. and Others v. Poland*, no. 51246/17, 21 July 2021.

⁶¹ *A.I. and Others v. Poland*, no. 39028/17, 30 June 2022.

⁶² *A.B. and Others v. Poland*, no. 42907/17, 30 June 2022.

⁶³ *T.Z. and Others v. Poland*, no. 41764/17, 13 October 2022.

⁶⁴ Communication of the Association for Legal Intervention of 12 February 2024 on the execution of the *M.K. and Others v. Poland* judgment. Accessed March 1, 2024 https://interwencjaprawna.pl/wp-content/uploads/2021/01/CoE-M.K.-and-Others-vs-Poland-execution_communication-SIP_March-2024.pdf.

⁶⁵ Communication of the Association for Legal Intervention and the Rule of Law Institute of 27 February 2023 on the execution of the *M.K. and Others v. Poland* judgement. Accessed March 1, 2024 <https://rm.coe.int/0900001680aa7979>.

irregularly by the forest⁶⁶. The other was to reach Poland via one of the land border crossing points by car. During the on-going humanitarian crisis on the Polish-Belarusian border on 10 February 2023 Poland has limited the number of open crossing points available for passenger transport only to Terespol⁶⁷. This meant that persons seeking protection could only access the Polish territory via Belarus in private vehicles (since 17 September 2023 due to implementation of EU sanctions on imported Russian cars) not registered in the Russian Federation.

During the Covid-19 state of emergency, Poland, on 15 March 2020, suspended not only train connections between Brest and Terespol but also personal traffic on external and internal Schengen borders. The Ordinance of the Minister of the Interior and Administration of 13 March 2020⁶⁸ has introduced a catalogue of persons eligible to cross Polish borders. Generally speaking, it provided a list (more and more casuistic over time) of exceptions to the denial of entry to Poland. The Ordinance has been amended 34 times in less than four years and became a legal basis for the unique approach to refusals of entry during and after the state of emergency has been called off. The crucial amendment entered into force on 21 August 2021⁶⁹. Since the entry into force of this amendment, foreigners (who did not fall into the enumerated list of persons eligible to cross the border) were instructed about the obligation to immediately leave the territory of the Republic of Poland if they came to the open border crossing point (§3 point 2a of the 13 March 2020 Ordinance). It is worth mentioning that the instruction about the obligation to leave the territory was not a decision on the refusal of entry. The Ordinance, however, has also referred to the situation of the persons disclosed at these border crossings where border traffic has been since March 2020 suspended or restricted and even outside the territorial scope of the border crossing (despite the title of the Ordinance concerning the border crossings). According to the amended version of §3 point 2b of the 13 March 2020 Ordinance such persons shall be returned to the state border line. The new term used in the Ordinance reflects the factual and legal suspension of the readmission agreement with Belarus, which has discontinued its earlier cooperation and allowed for a simplified readmission of its citizens and other foreigners arriving to Poland from Belarus' territory.

During the years when 'instruction about the obligation to leave the territory' became the option, the number of refusals of entry issued by the Border Guard in Terespol dropped. It seems like the right of access to the territory and the principle of non-refoulement are at risk. Asylum seekers arriving to Terespol by train who were subject to collective expulsions were all given the refusal of entry decisions in writing. They could (and sometimes did) seek administrative and judicial review of these refusals. According to §3 point 2a of the 13 March 2020 Ordinance, foreigners arriving to the Polish border crossing point from Belarus are now only orally instructed to leave the territory of the Republic of Poland and cannot use any remedies against these factual refusals. The post-21 August 2021 practice observations show

⁶⁶ The Polish BG statistical data shows that in 2020 there were 53 Russian citizens stopped when crossing Polish-Belarusian border outside of the border crossing points as compared to just one in 2019, see: Straż Graniczna, Informacja Statystyczna za 2020 r. Accessed March 4, 2024, <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html>.

⁶⁷ Ordinance of the Minister of the Interior and Administration of February 9, 2023 amending the ordinance on the temporary suspension or restriction of border traffic at specific border crossings, Dz.U. 2023 item. 275.

⁶⁸ Ordinance of the Minister of the Interior and Administration of March 13, 2020, on the temporary suspension or restriction of border traffic at specific border crossings, Dz.U. 2020, item 435.

⁶⁹ Ordinance of The Minister of the Interior and Administration of August 20, 2021, amending the ordinance on the temporary suspension or restriction of border traffic at specific border crossings, Dz.U. 2021, item, 1536.

that they cannot even prove their arrival to the Polish Border Guard post, because the Polish border authorities do not stamp their passports⁷⁰.

Pushbacks on Polish-Belarusian green border: Return to the state border line and administrative order about leaving the territory of the Republic of Poland

The first signals that Belarus will respond to sanctions imposed by the European Union (following forged presidential elections and repressions against political opponents⁷¹) may be traced back to October 2020. The Border Guard data⁷² confirm that Belarus has in fact suspended the readmission cooperation with Poland in October 2020, dismantling the existing on the Belarussian side of the border post-Soviet security barriers called 'sistema'. This led to an unprecedented number of irregular crossings of this border to then very secure fragment of the state border reported by the Border Guard in October-December 2020. Among 122 foreigners stopped while illegally crossing the border in 2020 were 53 citizens of Russia and 23 of Afghanistan. In 2021, Belarus started to issue visas to so-called high-migration risk countries (Iraq and Syria), facilitating irregular arrivals to the territory of the EU. The following year, the number of foreigners entering Belarus has decreased while illegally crossing the border has grown to 2,744. Many more were apprehended inside Poland and during their attempt to leave Poland and enter Germany. In 2021, the number of foreigners trying to cross the Polish-Belarusian border has increased (including irregular border crossings). The number of people trying to enter Poland (who were physically pushed by Belarusian border guards onto Polish territory) and later pushed back by the Polish border guards has increased. Independent reports show that the Polish border guards refused to accept international protection requests from those people and pushed them back to the Belarusian side multiple times⁷³. While it is

⁷⁰ The Rule of Law Institute and the Association for Legal Intervention submission of the 27 of February 2023 to the Committee of Ministers of the Council of Europe includes the following observation of the border practice in Terespol: "Between July 2022 and February 2023, RLI assisted with submitting 70 applications for international protection (covering 219 persons) in Terespol. In most of these cases applicants were earlier "unofficially" returned to Belarus by the Polish Border Guard officers, who did not even put a stamp in the foreigners' passports. Decisions on a refusal of entry were issued only in cases of the third-country nationals with the SIS entry ban or foreigners using forged travel documents. Many of the asylum applicants entering Poland during this period had prima facie evidence of being victims of torture (related to forced mobilisation). Nevertheless, to access Polish territory, they often needed three or four entry attempts. RLI is also aware of a Chechen single mother with 8 children asking for international protection in Terespol, who was pushed back to Belarus at least 8 times between 13 October 2022 and 21 December 2022. Experience of this family is not different from dozens of other cases reported to RLI in the second half of 2022. Our daily border observation during this period shows that usually the Border Guard in Terespol was accepting only 1-2 asylum applications per day", Communication of the Association for Legal Intervention and the Rule of Law Institute on the execution of the M.K and Others v. Poland judgement available at <https://rm.coe.int/0900001680aa7979>.

⁷¹ J. Evans. Belarus dictator threatens to 'flood EU with drugs and migrants'. The Week [online, last update: 28 May 2021]. Accessed January 26, 2024. <https://theweek.com/news/world-news/europe/952979/belarus-dictator-threatens-flood-eu-with-drugs-migrants-avoid-sanctions>; Reuters (2021). How Belarus became a gateway to the EU for Middle East migrants. [online, last update: 9 November 2021]. <https://www.reuters.com/world/how-belarus-became-gateway-eu-middle-east-migrants-2021-11-09/>.

⁷² The Polish BG statistical data shows that in October-December 2020 there were 111 foreigners stopped when crossing Polish-Belarusian border outside of the border crossing points as compared to just nine persons during the first 9 months of 2020, Straż Graniczna, Informacja Statystyczna za 2020 r. Accessed March 1, 2024. <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html>.

⁷³ Grupa Granica. Humanitarian crisis at the Polish-Belarusian border (K. Byłów, Trans.; W. Klaus, Ed.). 2021. Accessed January 26, 2024. <https://www.grupagranica.pl/files/Grupa-Graniczka-Report-Humanitarian-crisis-at-the-Polish-Belarusian-border.pdf>, Human Rights Watch. Die here or go to Poland: Belarus' and Poland's shared responsibility for border abuses. 2021. Accessed January 26, 2024.

not known the true number of people who have died since mid-2021 due to the restricted access to the asylum procedures in Poland and the practice of pushbacks, there are at least 54 confirmed deaths on both sides of the border⁷⁴.

Poland's response to the instrumentalisation of migration by Lukashenka started with the deployment of additional Border Guard officers and the units of the Army and Police in the border area. From the growing number of asylum seekers in detention, the conclusion may be drawn that the government, for security reasons, decided to place to detention virtually every foreigner who managed to cross the border. Poland has expanded its detention capacity from 384 places in January 2021 to 2,168 in November 2021, and the total number of foreigners detained has grown from 837 in 2020 to 4,052 foreigners, including over 500 children in 2021⁷⁵.

Despite creating extra detention space by mid-August 2021, the Border Guard units started to have problems with finding places in detention for apprehended migrants. Although many were instructed not to apply for international protection in Poland, readmission to Belarus was no longer an option since 28 June 2021, when Belarus announced that it would suspend the readmission agreement with the EU⁷⁶. This seems to be a turning point in the Polish reaction to irregular migration from the territory of Belarus. On 20 August 2021, the 13 March 2020 Ordinance amendment was introduced, becoming a legal basis for returning migrants to the state border line (pushbacks). Moreover, on 2 September 2021, a state of emergency was introduced in parts of the Lubelskie and Podlaskie voivodeships immediately adjacent to the border with Belarus. In the area covered by this order, non-residents were forbidden to enter.

The Polish government was aware that these provisions added to the Border Ordinance on 20 August 2021 lacked⁷⁷ a delegation in the Act on foreigners and were in breach of many international obligations. It was confirmed on 18 January 2024 by the Provincial Administrative Court in Białystok⁷⁸. The court found, with reference to previous judgments on pushbacks, that the Border Guard's reliance on the Ordinance of the Ministry of the Interior and Administration of 20 August 2021 on the temporary suspension or restriction of border

https://www.hrw.org/sites/default/files/media_2021/11/eca_migrant1121_web_0.pdf; Amnesty International. Poland: Cruelty not compassion, at Europe's other borders. 2022. Accessed January 26, 2024. <https://www.amnesty.org/en/wp-content/uploads/2022/04/EUR3754602022ENGLISH.pdf>; K. Czarnota and M. Górczyńska (with Białas, J., Jagura, J., Szuleka, M. and Witko, D.). Gdzie prawo nie sięga: Raport Helsińskiej Fundacji Praw Człowieka z monitoringu sytuacji na polsko-białoruskiej granicy, Helsińska Fundacja Praw Człowieka 2022. Accessed January 26, 2024. https://www.hfhr.pl/wp-content/uploads/2022/06/Raport_Gdzie_Prawo_Nie_Siega-HFPC-30062022.pdf.

⁷⁴ M. Chołodowski. Tajemnicza śmierć Egipcjanina. Już co najmniej 50 ofiar na granicy polsko-białoruskiej. Gazeta Wyborcza [online, last update: 01.01.2023]. Accessed January 26, 2024. <https://bialystok.wyborcza.pl/bialystok/7,35241,30048590,kryzys-na-granicy-na-granicy-polsko-bialoruskiej-juz-co-najmniej.html>.

⁷⁵ T. Sieniow, Migrants have the right to have rights - detencja cudzoziemców. Lublin. 2022, p. 42 and 62. Accessed January 26, 2024, <https://panstwowoprawa.org/publikacje/>.

⁷⁶ Council of the EU Press release of the 9th of November 2021, available at <https://www.consilium.europa.eu/en/press/press-releases/2021/11/09/belarus-council-suspends-visa-facilitation-provisions-for-officials-of-the-belarus-regime/>

⁷⁷ The illegality of pushbacks based on the ministerial Ordinance has been declared by many courts' rulings, i.e. Judgement of the Provincial Administrative Court in Białystok of 15 September 2022 (II SA/Bk 492/22).

⁷⁸ As concluded by Regional Court in Hajnówka (Sąd Rejonowy w Bielsku Podlaskim VII Zamiejscowy Wydział Karny w Hajnówce) in its judgment of 28 March 2022 (VII Kp 203/21), see also Judgement of the Provincial Administrative Court in Białystok of 18 January 2024 (II SA/Bk 664/23).

traffic at certain border crossing points as the legal basis for the act of returning to the border line is invalid and violates art. 92 (1) of the Constitution, which sets out the procedure for issuing ordinances. The court also found that the Ordinance is incompatible with EU law, international agreements and applicable national legislation⁷⁹.

In order to remedy the situation of illegality, the Parliament, on 14 October 2021, adopted amendments to the Act on foreigners⁸⁰. According to the added art. 303b of the Act on foreigners, a foreigner may be issued an administrative order to leave the territory of Poland if he/she is apprehended immediately after crossing the border contrary to the law. This statutory provision became a new legal basis for border rejections and pushbacks. The case law concerning the interpretation of this provision imposes on the Border Guard organs a duty to document the procedures leading to the issuance of the order to leave the territory with proper diligence and respecting the principle of non-refoulement⁸¹.

The duty of the Border Guard officers conducting this procedure is also to provide information about the right to file an international protection application. This last duty interpreted by the courts seems to contradict the Polish legislator's intention. On 14 October 2021, Polish Sejm limited the right to seek asylum in Poland, changing art. 33 of the Act on granting protection to the foreigners on the territory of the Republic of Poland. According to the new provision of art. 33 (1a), the Head of the Office of Foreigners may leave without consideration an application for international protection that was submitted by a foreigner apprehended immediately after crossing the border contrary to the provisions of law, unless the foreigner came directly from the territory where his life or freedom was threatened by persecution or risk of causing serious harm, and presented credible reasons for illegal entry into the territory of the Republic of Poland and submitted an application for international protection immediately after crossing the border. In the Belarusian context, this provision may become a way of limiting the scope of protection against the refoulement (including the chain refoulement) and is not in line with the well-established UNHCR doctrine concerning the right of reaching the territory of the safe state via a short stay in the transit stay⁸².

The Polish authorities implemented the measures introduced in relative secrecy. Access to public information regarding 'activities carried out in the area covered by a state of emergency in connection with protecting the state border and preventing and counteracting illegal migration' was restricted. Due to the expiry of the deadlines for the possible extension of the state of emergency provided for in the Constitution, a no-entry zone was introduced in the same area (made possible by an amendment to the Act on the protection of the state border) on 2 March 2022. These restrictions were lifted only after 30 June 2022. According to various sources of persons actively providing support to migrants in need at the border, migrants were left without any assistance (including shelter, food, water, or medical assistance) while the Polish Border Guard continued to push them back. There were reports about issuing orders to

⁷⁹ See the case report published by the Helsinki Foundation of Human Rights <https://hfhr.pl/en/news/the-border-guard-cannot-effectively-invoke-a-ministerial-regulation-as-a-legal-basis-for-pushbacks->.

⁸⁰ Act of 14 October 2021 amending the Act on foreigners and certain other acts, Dz. u. 2021 item 1918.

⁸¹ Judgement of the Provincial Administrative Court in Warsaw of 27 April 2022 (sygn. akt IV SA/Wa 471/22); Judgement of the Supreme Administrative Court of 10 May 2023 (II OSK 1735/22); Judgement of the Supreme Administrative Court of 9 January 2024 (II OS K 165/23).

⁸² E. Feller, V. Türk, F. Nicholson (eds), *Refugee Protection in International Law*, Cambridge 2003, p. 187-188.

leave the territory of Poland to the injured foreigners, including taking patients from the hospital. In the opinion of the activists working within NGO collective of Border Group (Grupa Granica), the Polish Border Guard and the Army used intimidation, threats to use firearms, use of gas, destruction of smartphones and sim cards, and deliberate deception⁸³. In July 2022, the Polish government constructed the first physical barrier on the Polish-Belarusian border (approx. 187 km long). Through late 2023, many people were trying to enter from the Belarusian side every day and asking for international protection in Poland or travelling to other EU countries to seek protection there. According to the information provided by the Border Guard, migrants are not asking for international protection and are not willing to wait for their claims to be examined in Poland. It is hard to find reliable data on the proportion of migrants declaring their willingness to apply for international protection at the Polish-Belarusian border.

According to the Helsinki Foundation of Human Rights information note on legal developments regarding pushbacks⁸⁴, between October 2021 and December 2022, the ECtHR granted nearly 100 interim measures under Rule 39 of the Court's Rules of Procedure, ordering the Polish authorities to refrain from returning the applicants to Belarus, considering that this could constitute a violation of art. 3 of the European Convention on Human Rights⁸⁵.

Although Poland has welcomed Ukrainian forced migrants since 24 February 2022, some of them complain of difficulties in entering back to Poland (after visiting their country during the time of war). Based on the Act of 12 March 2022 on assistance to Ukrainian citizens in connection with the armed conflict on the territory of this state⁸⁶, every Ukrainian citizen who is a holder of temporary protection needs to use the online system DIIA.pl⁸⁷ to re-enter Poland. Also, if the holder of the temporary protection stays in Ukraine for longer than 30 days, his/her protection in Poland will be cancelled. Many Ukrainian beneficiaries of the Polish form of temporary protection have complained that, despite staying in Ukraine for fewer than 30 days, they could not return to Poland. According to the position of the Border Guard, this happens if Ukrainian citizens do not declare they want to be covered by temporary protection when re-entering Poland. UNHCR and NGOs are monitoring the situation.

The Penal Code and bilateral agreements concluded by Poland regulate the extradition of foreigners from Polish territory. The obstacles to extradition are specified in the Penal Code. Submitting an application for international protection or having a residence permit are not listed in this group. In practice, the extradition judgment is not enforced before the foreigner's claim for international protection is fully examined. The Authors of this report were informed by one of the experts that there were incidents when the court refused to extradite the person, but the same person was deported based on the return decision.

⁸³ Grupa Granica. Humanitarian crisis at the Polish-Belarusian border op. cit.; K. Czarnota and M. Górczyńska. Gdzie prawo nie sięga: Raport Helsińskiej Fundacji Praw Człowieka z monitoringu sytuacji na polsko-białoruskiej granicy, op. cit.

⁸⁴ Helsinki Foundation for Human Rights, Legal brief on judgements in cases involving expedited returns of migrants to Belarus, December 2022. Accessed March 4, 2024, <https://bit.ly/3L2vWAZ>.

⁸⁵ AIDA/ECRE Country Report: Access to the territory and push back. Accessed March 4, 2024. https://asylumineurope.org/reports/country/poland/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/#_ftn14.

⁸⁶ Act of 12 March 2022 on assistance to citizens of Ukraine in connection with an armed conflict on the territory of this country, Dz. U. 2022 item. 583.

⁸⁷ Stowarzyszenie Interwencji Prawnej. Diia—an electronic document for war refugees from Ukraine. 2023. Accessed January 26, 2024. <https://ukraina.interwencjaprawna.pl/diia-an-electronic-document-for-war-refugees-from-ukraine/>.

5.3. Obligation to Issue a Return Decision

A foreigner staying in the Schengen area is subject to passport control. If, during the inspection, it is revealed that the foreigner was staying illegally in the territory of the Republic of Poland, the Border Guard officer generally initiates proceedings to oblige him/her to return (leave Poland) and impose an entry ban. The reasons for initiating return obligation proceedings are broad, i.e. staying for a purpose inconsistent with the declared one⁸⁸. If, during passport control at the airport or land border, a Border Guard officer finds that the foreigner may have been staying in Poland illegally, he/she is subjected to a second-line check. The officer prepares an inspection report. If justified conditions are met, the officer prepares and initiates proceedings to oblige the foreigner to return. The foreigner is interrogated to verify the circumstances in which the length of the permitted stay was violated. The decision to oblige the foreigner to return, along with the entry ban, is issued after the procedures are completed, even if the foreigner has left the country⁸⁹ (airport). The decision is not delivered to the foreigner's foreign address but is included in the case file in Poland (unless the foreigner leaves a Polish correspondence address). Based on the professional experience of the project team members, we know that a foreigner applying via email for a duplicate of a decision usually receives a scan of it relatively fast (the maximum deadline is 30 days). If the foreigner leaves the border by land, the decision on the obligation to leave and the entry ban are issued immediately. Some Border Guard posts initiate return proceedings and issue return decisions on the same day.

5.4. Special Cases and their Relation with the Obligation to Issue a Return Decision

Holders of a return decision issued by another Member State

Chapter 5 of the Act on foreigners sets out the conditions for implementing a decision imposing the return obligation issued by another Member State. Arts. 380-393 of the Act on foreigners specify in detail the conditions for implementing the decision, the possible withdrawal of residence titles held in Poland and the costs of implementing the decision. The Commander-in-Chief of the Border Guard verifies the feasibility of the final decision on the return obligation via the SIRENE Office⁹⁰. It can also be done by using other available means of cooperation and exchange of information with the authorities of the Member State that issued the decision on the return obligation and the Member State that granted the residence permit to the foreigner.

Irregularly staying third-country national holding a right to stay in another Member State

If a third-country national does not apply for a residence permit within 90 days, then in case he/she will apply, his/her application will be rejected because of irregular stay. Then, after

⁸⁸ Art. 302 of the Act on foreigners.

⁸⁹ Art. 302 of the Act on foreigners.

⁹⁰ European Commission. SIRENE cooperation. n.d. Accessed January 26, 2024. https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-information-system/sirene-cooperation_en; Policja. Co to jest Biuro SIRENE? n.d. Accessed January 26, 2024. <https://policja.pl/pol/sirene/biuro-sirene/7842,Co-to-jest-BIURO-SIRENE.html>.

receiving the final decision, he/she will have 30 days to leave the territory of Poland without any consequences⁹¹.

Pursuant to art. 314 of the Act on foreigners, return obligation proceedings shall not be initiated, or the proceedings initiated shall be discontinued, if the foreigner has a residence permit or another permit entitling him/her to stay granted by another country applying EU Return Directive and this is not opposed for reasons of state defence or security or protection of public safety and order. Proceedings will be initiated if the foreigner – after being instructed on the obligation to leave the territory of the Republic of Poland immediately – fails to do so. The authority competent to issue a decision obliging the foreigner to return, i.e., the Border Guard, records the instruction in the appropriate register. The instruction is given in writing in a language understandable to the foreigner. There are no control mechanisms regarding departure after warning. In practice, if the foreigner's stay is rechecked, proceedings will be initiated against him/her to oblige him/her to return. Information is exchanged via SIRENE or other sources, including liaison officers.

Irregularly staying third-country national benefitting from humanitarian (or other) permit/authorisation

The Act on foreigners allows foreigners with an irregular stay to apply for any type of temporary stay⁹². However, in most cases, he/she will receive a refusal decision due to irregular stay⁹³. The exception is a temporary residence permit on the basis of marriage to a Polish citizen or due to respect for family life or respect for children's rights or family reunification⁹⁴. A foreigner may also submit an application due to the so-called special circumstances requiring his/her short-term stay⁹⁵.

After initiating the proceedings for the obligation to return, in the course of the proceedings, the authority considers the conditions for granting a residence permit for humanitarian reasons or a tolerated stay permit (if there are circumstances preventing the granting of a residence permit for humanitarian reasons). If the proceedings for granting a residence permit for humanitarian reasons or tolerated stay were initiated after the decision on the obligation to return was issued, the return decision shall not be executed. A foreigner is refused a residence permit for humanitarian reasons or a tolerated stay permit if his/her stay on the territory of the Republic of Poland may threaten the state's defence or security or the protection of public safety and order⁹⁶.

No regulations prevent the initiation of return obligation proceedings during ongoing proceedings for granting a temporary residence permit. The Voivode or the Head of the Office for Foreigners may control the legality of stay to the extent necessary for these authorities to conduct proceedings. Voivodeship offices and Border Guard posts cooperate in controlling the legality of stay. Therefore, the mere submission of an application for residence exposes the foreigner to the initiation of proceedings for the obligation to return⁹⁷. Moreover, during the

⁹¹ Art. 299 point 6(1) of the Act on foreigners.

⁹² There is no prohibition to submit such an application.

⁹³ Art. 100 (1 point 9) of the Act on foreigners.

⁹⁴ Art. 98 of the Act on foreigners.

⁹⁵ Art. 181 of the Act on foreigners.

⁹⁶ Art. 158, 159, 161, 187, 351 of the Act on foreigners.

⁹⁷ Also, in practice, in some cases, employees of voivodeship offices, when submitting an application for stay or correcting formal deficiencies in the application by appearing in person, contact the Border

proceedings for granting a residence permit, the inspector handling the case directs an inquiry to the following state agencies: the Police, the Internal Security Agency, and the Border Guard. This is the moment when these agencies can check the legality of the stay and, if the conditions are met, initiate proceedings for an obligation to return.

It is worth mentioning the example of the Masovian Voivodeship Office based in Warsaw, where the Border Guard has its own room. As learnt from the participatory observation and the professional activity of the project team members, Border Guard officers conduct random checks on the legality of the stay of foreigners visiting the Office and if the purpose of the visa issuance matches the reason for the stay mentioned in the application form. Officers walk along the corridor. If a foreigner is waiting to submit fingerprints or a residence application and if he/she is checked beforehand by the Border Guard, he/she cannot complete the stay legalisation procedure because he/she is apprehended from the Office⁹⁸. If necessary, direct coercive measures are used, e.g., handcuffs. This practice is used in some other voivodeship offices (e.g., Lublin). For this reason, foreigners without legal stay are afraid to appear in person at the Office to submit an application for residence or leave fingerprints.

A decision on the obligation to return may be issued to a foreigner waiting for a residence permit decision. If a positive decision granting a residence permit is received, the return obligation proceedings are discontinued (unless the return decision has previously become final).

Special rules in legal migration directives on readmission between Member States in cases of intra-EU mobility

There are no special rules regarding apprehensions and return of holders of EU Blue Cards⁹⁹. Pursuant to the Act on foreigners (art. 127-139), return obligation proceedings are not initiated, and initiated proceedings are discontinued in some, indicated cases, for example, if the person is temporarily delegated to provide services in the territory of the Republic of Poland, if the decision would be issued due to the lack of a valid visa or residence permit or as a result of crossing or attempting to cross the border contrary to the law. Proceedings for the obligation to return in a situation where the foreigner exceeds the period of 180 days entitling him/her to stay without the need for a visa shall not be initiated in relation to:

- a foreigner who stays in the territory of the Republic of Poland in connection with the use of short-term mobility of a managerial employee, specialist or employee undergoing an internship as part of an intra-corporate transfer under specified conditions;
- a foreigner who stays in the territory of the Republic of Poland in connection with the use of student mobility under specified conditions;
- a foreigner who stays in the territory of the Republic of Poland in connection with using the short-term mobility of a scientist under specified conditions and a member of the scientist's family using the short-term mobility of a member of the scientist's family under specified conditions.

Guard and ask them to come to the office to check the legality of the stay. In some cases, officers arrive directly after submitting the application to the foreigner's home address.

⁹⁸ There is no legal basis for this practice.

⁹⁹ Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC was not implemented yet into Polish law.

Suppose the decision to oblige a foreigner to return is issued to a foreigner who stayed in the territory of the Republic of Poland based on a temporary residence permit in connection with having a long-term EU resident permit in another EU country. In that case, the decision to oblige the foreigner to return indicates the destination country, the EU Member State, where the foreigner has a long-term EU resident permit.

5.5. Voluntary Return

The period of voluntary return is defined by law (art. 315, Act on foreigners). Under the amendment of the Act on foreigners from March 2023, it ranges from 8 to 30 days (before the reform, the minimum period for voluntary return was 15 days) counted from the date of delivery of the decision. The deadline to return depends on the discretion of the Border Guards. The foreigner has a right to depart to the country of return before the expiration of the deadline specified in the decision. The application for assisted voluntary return (AVR) must be submitted within the deadline specified in the Act that applies to a given case, which may be 5 or 7 days, or in the case of a deadline for voluntary return – a deadline not exceeding it.

The authority responsible for AVR is the Commander-in-Chief of the Border Guard. The IOM performs tasks assigned to them by the Border Guard. Foreigners who want to use AVR must submit an application for assistance within a specified period, depending on the decision issued, i.e., between 5 days and the time of voluntary departure specified in the decision. The Act on foreigners contains a closed list of foreigners who may benefit from assistance in voluntary return (art. 334 par 2). It applies to the specific cases:

- a decision was issued imposing the obligation to return, specifying the date of voluntary departure;
- a decision obliging him/her to return was issued and is subject to compulsory execution and who, due to a threat to his/her health or life or his psychophysical condition, justifies the presumption that he/she has been subjected to violence or other circumstances, but has not been placed in a detention centre or has not been subjected to detention foreigners;
- a decision was issued to refuse to grant refugee status or to grant subsidiary protection or a decision to recognise an application for international protection as inadmissible;
- a decision was issued to discontinue the proceedings for granting international protection;
- the application for international protection was left without examination for formal reasons;
- staying in the territory of the Republic of Poland on the basis of a certificate confirming the existence of the presumption that he/she is a victim of trafficking in human beings, or staying on the basis of a temporary residence permit for victims of trafficking in human beings.

According to the Act on foreigners, the proceedings to oblige a foreigner to return may be discontinued in part relating to determining the date of voluntary departure if the decision to oblige the foreigner to return is issued to a foreigner who voluntarily crosses the border, leaving the territory of the Schengen countries. It is possible to extend the deadline for voluntary departure once, up to a maximum of 1 year. The foreigner should request an extension. The circumstances justifying an extension are listed in the Act. These are: the obligation to appear in person before the Polish public authority or his/her presence on the Polish territory is required by the interests of or due to exceptional personal situation of a foreigner (particularly because of the length of his/her stay, family or social ties or the need of continuing education

by a minor child of foreigner)¹⁰⁰. The deadline for voluntary return is not set if there is a risk of absconding or if it is required to defend or protect public security and order.

If the foreigner does not leave within the deadline for voluntary return, the decision waiving the ban on re-entry into the territory of the Republic of Poland and other Schengen countries additionally rules on this ban and determines its period in the event that the foreigner, within the period of voluntary departure: will not leave the territory of the Schengen countries; crosses or attempts to cross the border contrary to the law¹⁰¹.

Neither the Act on foreigners nor the Agreement between the Minister of the Interior and Administration of the Republic of Poland and the International Organisation for Migration on the co-operation in the field of voluntary returns of foreigners leaving the territory of the Republic of Poland regulates the issue of voluntary return monitoring.

5.6. Forced Return/Removal/Exit

The return decision is issued by the Border Guard. Foreigners have a right to appeal within 7 days against the decision. The Commander-in-Chief of the Border Guard issues the second-instance decision (the final decision). The returnee has a right to submit a complaint to the Voivodeship Administrative Court, but since April 2023, filing a complaint no longer produces a suspensory effect¹⁰².

Enforcement of the return decision shall be suspended if a foreigner files for international protection or, in his/her case, the procedure for granting a humanitarian or tolerated stay is launched by the Border Guard. The Border Guard initiates proceedings (humanitarian or tolerated stay) ex officio. A foreigner may submit an application to initiate proceedings, but this does not mean automatic initiation. These procedures may be initiated following the application of the foreigner, the Commissioner for Human Rights (Ombudsman) or the Commissioner for the Rights of the Child. NGOs specialising in protecting migrants' rights can also petition to initiate proceedings leading to granting humanitarian stay, but in their case, the Border Guard does not have a duty to launch the procedure.

Poland is cooperating with Frontex in collecting return operations (CROs) or joint return operations (JROs) organised by Frontex¹⁰³. The Agency's return operations may be monitored by Polish return monitors appointed by NGOs in cooperation with the Border Guard and Frontex. The Border Guard mostly uses commercial flights, but some charter flights are organised, and Polish authorities may participate in Frontex operations.

Four Polish NGOs have a right to monitor the forced return: The Helsinki Foundation for Human Rights, The Rule of Law Institute Foundation, The Halina Nieć Legal Aid Centre, and The MultiOcalenie Foundation¹⁰⁴. The monitoring organisations are, in principle, notified a

¹⁰⁰ Art. 316 par. 1 of the Act on foreigners.

¹⁰¹ Art. 329 of the Act on foreigners.

¹⁰² Art. 321 of the Act on foreigners.

¹⁰³ ICMPD. Human Rights Monitoring of Forced Returns in Europe Forced-Return Monitoring Projects – Cooperation with the European Border and Coast Guard Agency, the European Union Agency for Fundamental Rights and Member States. 2021. Accessed January 26, 2024. https://www.icmpd.org/content/download/56831/file/FReM%20III_Final%20Publication_Quart_WEB.pdf.

¹⁰⁴ Fundamental Rights Agency. Forced return monitoring systems - 2022 update. Accessed January 26, 2024. <https://fra.europa.eu/en/publication/2022/forced-return-monitoring-systems-2022-update>.

minimum of 7 days before the planned return operation and can submit interest to participate in the monitoring mission. Representatives of some of those NGOs complain that they do not receive information on monitoring. No state funding is available to cover the monitoring costs, so most operations are organised by the NGOs on an ad hoc basis, a couple of times a year, and the monitoring is conducted mostly only during the Warsaw airport phase of the operation¹⁰⁵. Within two weeks after the operation, the monitoring institution has the duty to submit a monitoring report to the Commander-in-Chief of the Border Guard. The monitors may evaluate the treatment of the returnee (dignity and safety), the behaviour of the escorts, and means of restraint. However, in operations concerning individual returnees, the NGOs are not invited to the phase of the procedure started in the detention centres, where the fitness for travel and medical examinations are supposed to be performed¹⁰⁶.

5.7. Return of Unaccompanied Minors

The return decision issued to a minor foreigner shall be enforced if the child is provided with the care of parents, other adults, or care institutions in the country to which he/she was obliged to return. The care should be provided in accordance with the standards set out in the Convention on the Rights of the Child. The child can return as well if the return takes place under the care of the statutory representative, or the child will be handed over to his/her statutory representative or a representative of the country's competent authorities to which the return will take place.

The child will get his/her official representative within the return process and, who should represent the child's best interest. In practice, there are multiple obstacles. There is a lack of qualified representatives. For several years (until 2016), there was a list of employees of NGOs whom the Border Guard could contact regarding the establishment of guardianship of an unaccompanied minor¹⁰⁷. Persons who are available at the moment are appointed as curators. There are no regulations regarding the requirements that candidates for curators must meet. According to the experience of the authors of this report, curators were appointed between court employees and border guard officers due to a lack of people. There are difficulties in communicating with unaccompanied minors due to the lack of free availability of an interpreter. The interpreter is available only during the interview with the Border Guard. If a curator wants to communicate with a child, he/she needs to find an interpreter of his/her own. Employees of NGOs were looking for translators, i.e. among their volunteers or friends. In practice, even if the decision on the obligation to return is issued to the unaccompanied minor, it is not executed due to the absconding of the minor¹⁰⁸.

¹⁰⁵ On 11 August 2023 a member of the Polish GAPs project team participated in the first-ever monitoring of a land return operation from the detention centre in Kętrzyn to the Bezledy border crossing point (Russian Federation. Kaliningrad District).

¹⁰⁶ Ordinance of the Minister of the Interior and Administration of April 18, 2014, regarding the presence of representatives of non-governmental organisations in the course of activities related to bringing a foreigner to the border or to the airport or sea port of the country to which he is brought, Dz. U. 2014 item 534.

¹⁰⁷ In 2016, funding for non-governmental organisations decreased significantly. The list has stopped functioning.

¹⁰⁸ Art. 397, Act on foreigners; A. Trylińska. Małoletni bez opieki ubiegający się o ochronę międzynarodową. Rola kuratora [Unaccompanied minor asylum seeker. The role of the curator]. *Studia Prawnicze* 1(213) 2018. Accessed March 4, 2024. <https://czasopisma.inp.pan.pl/index.php/sp/article/view/394>.

A very important problem is the issue of examining the age of minors. The age of the minor is determined based on an x-ray of the wrist. This test is imprecise (the error may be up to 2-3 years). Therefore, it sometimes happens that unaccompanied minors are placed in detention centres with adult foreigners. This problem became especially visible during the ongoing humanitarian crisis on the Polish-Belarusian border and overcrowded detention centres.

Officially, the Convention on the Rights of the Child is fully recognised in Poland. In practice, the Convention is not always respected. The Convention is often violated in return proceedings and in cases regarding the detention of children. NGOs indicate that the biggest problem is the lack of attention paid to the child's best interest¹⁰⁹.

5.8. Entry Bans

According to art. 318 of the Act on foreigners, the entry ban (to Poland and Schengen zone) is a part of the decision on the obligation to return. After amendments to the Act on foreigners following the Polish-Belarusian border crisis, the entry ban is also a part of the order to leave the territory of the Republic of Poland following the irregular entry¹¹⁰. A person against whom an entry ban has been issued in the form of an order to leave has the right to appeal, but the appeal does not suspend enforcement of the order.

An entry ban is generally the prohibition of re-entry, issued based on the decision obliging return. The Act on foreigners specifies the circumstances when the entry ban may be waived, or the entry ban into the territory of the Republic of Poland may be narrowed¹¹¹.

The entry ban, depending on circumstances¹¹², may be issued for a period of 6 months to a maximum of 10 years. Issuing an entry ban for a period exceeding 5 years (up to 10 years) may be justified by reasons of state defence, state security, protecting public order, the interest of the Republic of Poland¹¹³, or grounds for believing that the foreigner might be involved in terrorist or espionage activities¹¹⁴.

The authority that issued the decision in the first instance obliging the foreigner to return may withdraw the prohibition referred to in art. 318 of the Act on foreigners at the request of the foreigner. If the foreigner demonstrates that he/she has fulfilled the obligations arising from the decision obliging the foreigner to return or his/her re-entry into the territory of the Republic of Poland or other Schengen countries is to take place due to justified circumstances, especially for humanitarian reasons or has been granted assistance for voluntary return, as referred to in art. 334 of the Act on foreigners. - entry ban will be waived. In practice, the entry

¹⁰⁹ In 2023 there were a couple of incidents concerning the repatriation of Ukrainian orphan children from Poland to the territory of Ukraine. It has raised concerns of Polish stakeholders providing temporary care to them, but the return of minors has been demanded by the Ukrainian authorities. See: Alternative report to the Committee on the Rights of the Child, August 2020 r., p. 7-8, accessed March 6, 2024, na: <https://interwencjaprawna.pl/wp-content/uploads/2020/09/RAPORT-ALTERNATYWNY-WERSJA-POLSKA.pdf>.

¹¹⁰ Art. 303b of the Act on foreigners.

¹¹¹ Art. 320 of the Act on foreigners.

¹¹² Art. 319 of the Act on foreigners.

¹¹³ Art. 302(1)(9) of the Act on foreigners.

¹¹⁴ Art. 329a of the Act on foreigners.

ban is usually waived at the request of the foreigner after half of the time of the specified ban has passed¹¹⁵.

When considering the application to withdraw the ban referred to in art. 318, the authority, takes into account in particular: the circumstances in which the decision obliging the foreigner to return was issued and circumstances due to which the foreigner is to re-enter into the territory of the Republic of Poland or other Schengen countries.

In the return decision, which specifies the deadline for voluntary departure or in which the procedure to oblige the foreigner to return is discontinued, in part concerning determining the deadline for voluntary departure under art. 315 section 4b of the Act on foreigners, the ruling on the ban on re-entry into the territory of the Republic of Poland and other Schengen countries may be waived if the evidence or circumstances available to the authority indicate a high probability that the foreigner, in the event of re-entry into the territory of the Republic of Poland, will comply with the legal order, including legal provisions specifying the principles and conditions of entry of foreigners into the territory of the Republic of Poland, their passage through this territory, their stay there and their departure from it. The decision waiving the ban on re-entry into the territory of the Republic of Poland and other Schengen countries shall additionally rule on this ban and specify its period in the event that the foreigner, within the period of voluntary departure: 1) does not leave the territory of the Schengen countries; 2) crosses or attempts to cross the border contrary to the law.

The legal entry of the foreigner to Polish/Schengen territory during the validity of the entry ban is possible only on humanitarian grounds. If a foreigner re-enters the country during his/her entry ban, he/she will receive a decision to return with a longer period of the entry ban.

5.9. Procedural Safeguards

Generally, procedural safeguards are guaranteed in the Act on foreigners and the Code of Administrative Procedure applicable in all immigration procedures. An administrative process to oblige the foreigner to return is initiated by the local unit of the Border Guard. The officer interrogates the foreigner before the issuance of the return decision. It is conducted with the assistance of an interpreter arranged by the Border Guard (if necessary). A foreigner has the right to see the case file before the issuance of a decision and submit motions and requests¹¹⁶. This right is somewhat limited in practice. The foreigner is not able to see the files located in different units. The Border Guard unit responsible for the return procedure is determined territorially, based on where the legality of the foreigner's stay was checked. Sometimes, the responsible office is hundreds of kilometres away, and the deadline to see the case file is too short. Moreover, foreigners in the detention centre are not allowed to leave only to see the case file, and it is rather exceptional to be represented by an attorney.

The return decision is issued in Polish in writing. It includes reasons for the decision and information concerning the remedies. Sometimes, the information on legal remedies is translated into a language that the foreigner understands¹¹⁷. Unlike in international protection

¹¹⁵ See, art 320 sec. 2, point 4 of the Act on foreigners.

¹¹⁶ Art. 10 of the Code of Administrative Procedure.

¹¹⁷ According to the study presented on 14 December 2023 by the Rule of Law Institute at the UNHCR-organised seminar on legal assistance to refugees and migrants, in return procedures in the years 2016-

procedures, the state guarantees no free legal assistance in return cases (improper implementation of art. 13 of the EU Return Directive)¹¹⁸.

Under special circumstances (for instance, the need for a child to finish school) mentioned in the Act on foreigners (art. 316), it is possible to postpone return up to one-year maximum only once in case the foreigner does not submit an appeal. Submission of the appeal prolongs the process for a couple of months. There are still two appeals systems. The first one regards the cases initiated before April 2023 when the Head of the Office for Foreigners conducts the appeal proceedings. The other system concerns cases when foreigners may appeal against the return decision with which they disagree. The appeal proceeding is considered by the Commander-in-Chief of the Border Guard (authority of the second instance), who issues the final administrative decision. A foreigner has a right to appeal it to the Voivodeship Administrative Court in Warsaw. Due to recent changes in the Act on foreigners (March 2023), the submission of the claim will not suspend the return process.

Form of decisions, translation, written confirmation

The return decision is issued and delivered to the foreigner in most cases. At land borders, foreigners leaving Poland after staying in the country without legal title will receive a decision before they leave the territory of Poland. In case of exit by plane after the interrogation of the returnee, the decision may be issued and posted by mail to the Polish address provided by the foreigner or left in the case file¹¹⁹. It is possible to receive a decision scan after a request is sent by email. This decision has not been fully translated (just the title and entry ban)¹²⁰.

The decisions issued in Poland are in writing, and, in most cases, they include written translations of information about the legal basis, the country of return, and the length of the entry ban. As indicated above, the information about the legal remedies is not always translated. If the foreigner is detained, the detention centre personnel should provide an oral translation of the decision, but it might be difficult outside the more popular foreign languages. If the decision is delivered in person, the returnee shall sign the confirmation of receiving the decision. Due to rumours, some foreigners refuse to sign the confirmation to receive the decision. They believe the decision will not be valid if they do not sign it. Some foreigners refuse to sign anything written in Polish, being afraid that they might consent to deportation. This might be reasonable since, in practice, foreigners are often asked to sign a declaration (in Polish) of waiving their right to appeal¹²¹. In such a situation, a Border Guard officer writes a

2020 just 39% of examined decisions (sample of 100 cases) included a translation of the information about legal remedies.

¹¹⁸ In fact, the state-funded legal aid is available upon request before the administrative Court, but only 80 foreigners out of 60,000 obliged to return in 2019-2022 were granted this assistance. Since there is no suspensory effect during the 30 days for filing a complaint against second-instance Border Guard return decision it may not be considered an effective legal remedy [the data provided by the study presented by the Rule of Law Institute: <https://www.linkedin.com/pulse/do-migrants-return-procedures-have-right-rights-15th-tomasz-sieniow-jdm5f%3FtrackingId=b6lCQIbQR22PLqijFeNNvQ%253D%253D/?trackingId=b6lCQIbQR22PLqijFeNNvQ%3D%3D>, accessed 19 March, 2024.

¹¹⁹ It is worth noting that the return process, starting at the airport, is usually completed after the foreigner leaves Poland (unless the foreigner is detained and does not want to be returned to the country of origin).

¹²⁰ Art. 327 of the Act on foreigners.

¹²¹ Only in the first half of 2023 in the Division of the Border Guards, 272 first-instance return decisions out of 592 became enforceable immediately after the foreigners declared that they were waiving their right to appeal [data provided by the Podlaski Division Border Guard in the correspondence PD-OI-

short note about the refusal of signature (the second officer cosigns it as a witness). Some detainees report that Border Guard officers try to convince them not to submit an appeal as an ineffective way of preventing deportation. Some foreigners, once they receive the decision to return, sign the form where they waive their right to submit an appeal. Such a decision becomes effective immediately. It is not sure if they understand what they have signed or at least can take such a decision when they receive a decision—sometimes after many hours of an interview. Sometimes, they sign the resignation from appeal, and just a few hours later, after consultation with a lawyer, they want to appeal against the decision. Some persons, despite translation, do not understand what it means to submit an appeal and the consequences of not doing it. It is worth mentioning that some foreigners feel pressured or forced to sign a resignation from the appeal.

There are also two additional contexts where we may examine the remedies against the ‘decisions related to return’ (in Polish: *postanowienie o opuszczeniu*). The first one concerns the orders to leave the territory of Poland issued by the Border Guard in a situation of apprehension immediately after irregularly crossing the border. They are enforced immediately, and challenging these decisions does not suspend their enforcement. According to the data provided by the Border Guard, in just the first half of 2023, 1,010 of these orders were issued against 1,015 foreigners (5 children). In none of these situations, despite available remedies (art. 303(b.1.) of the Act on foreigners guarantees the right to appeal to the Commander-in-Chief of the Border Guard), were the foreigners able to file appeals¹²². A second context relates to the border crossing point with Belarus in Terespol, where asylum seekers in the past were issued a standardised form of refusal of entry based on the lack of a visa¹²³. Since the pandemic, they have been returned without any indication of their attempt to cross the Polish border. The claims of asylum seekers were repeatedly ignored, and they were not even-handed a standardised form with the refusal of entry decision against which they could file an appeal¹²⁴.

Access to linguistic assistance, free legal aid, representation

The authority conducting the proceedings to issue a decision obliging a foreigner to return informs the foreigner about NGOs providing assistance to foreigners¹²⁵, including legal support. This information is provided in writing, although the contact information is sometimes not precise (old contact details, non-existing organisations or the entities not

V.0180.26.2023 of 31.10.2023]. The Podlaski Division controls the border with Belarus, where all of the crossing points were closed, so these waivers were not signed by the Belarusian citizens willing to be returned immediately to the country of origin.

¹²² Data provided by the Podlaski Division Border Guard to the Rule of Law Institute in the correspondence PD-OI-V.0180.26.2023 of 31.10.2023.

¹²³ *M.K. and Others v. Poland* (applications no. 40503/17, 42902/17 and 43643/17).

¹²⁴ An example case: the requests of a family fleeing mobilisation to the Russian Army fighting in Ukraine was received in December 2022 only after the 10th attempt to cross the border (international protection case DPU.420.6410.2022). On the first nine attempts, there are only stamps of the border service of Belarus in the family’s passports. The foreigners have never received a written refusal of entry despite three months of attempts to legally cross the border and request for international protection according to the arts. 3 and 4 of the Border Schengen Code. In practice, they were always coerced to turn the van around and go back to Belarus.

¹²⁵ Urząd do Spraw Cudzoziemców. Bezpłatna pomoc prawna. nd. Accessed January 26, 2024. <https://www.gov.pl/web/udsc/bezpłatna-pomoc-prawna>.

providing help to returnees). In practice, the access to free legal help is also limited due to the small number of lawyers in NGOs.

Access to interpreters is provided by the state during the initial interview. During the later stages of the procedure, all correspondence and evidence provided in the return case must be sent to the Border Guard in Polish. Evidence in the foreigner's original language must be accompanied by a sworn translation paid for by the foreigner.

The foreigner has a right to be represented in this administrative procedure by a proxy, who does not have to be an attorney or even a person with a law degree. The foreigner covers the costs of this representation. It is possible to get free legal advice from organisations supporting migrants, but there is a high probability that they will not be able to handle the case. During the last four years, only the Voivodeship Administrative Court in Warsaw has granted free legal aid in only 80 cases of complaints against final return decisions. During this time, 60,000 foreigners were obliged to return. This may not be considered an effective legal remedy. The petition for granting free legal aid before the court is a rather complicated legal form that requires a thorough understanding of the Polish language and law, so it is unlikely that the foreigner will fill out this motion without the help of a Polish lawyer.

Safeguards pending return

The Commander-in-Chief of the Border Guard provides foreigners with help in their voluntary return. The assistance includes medical care, travel costs, accommodation, and meals before the return¹²⁶. There is no information about the family unity rule. Access to psychological care is limited. Foreigners placed in detention centres have access to a psychologist hired by the Border Guard.

Situations of protracted irregularity ('non-removability') and the rights of non-removable persons

In a situation in which, during the return procedure, the Border Guard discovers that the decision on the obligation of return may not be issued against irregularly staying foreigners due to the protection of the rights of the foreigner, he/she may be granted a humanitarian stay¹²⁷, or when the decision is not enforceable, the foreigner may be granted a tolerated stay. (art. 351 of the Act on foreigners).

The conformity of the return procedures/policies with the non-refoulement principle

There are two types of residency that may be granted to non-returnable people: a residence permit on humanitarian grounds¹²⁸ and consent for a tolerated stay¹²⁹. Chapter 3 of the Act on foreigners states that a residence permit for humanitarian reasons may be granted if the foreigner may be expelled only to a state in which (within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms): a) his/her right to life, liberty and security of person would be at risk, or b) he/she would be liable to be subjected to torture or to inhuman or degrading treatment or punishment, or c) he/she would be liable to be forced

¹²⁶ Art. 335 of the Act on foreigners.

¹²⁷ Art. 348 of the Act on foreigners.

¹²⁸ Art. 348 of the Act on foreigners.

¹²⁹ Art. 351 of the Act on foreigners.

to work, or d) he/she would be deprived of the right to a fair trial or punished without legal basis. This permit can also be granted if the return would violate the foreigner's right to family or private life, or the child's rights, as defined in the Convention on the Rights of the Child, to the extent that it would significantly endanger his/her psychophysical development.

Based on art. 351 of the Act on foreigners, a permit for a tolerated stay on the territory of the Republic of Poland shall be granted to a foreigner under the circumstances listed above (a-d), or if the return is impracticable for reasons beyond the control of Poland. Also, the return can be decided to be inadmissible by a court or the Minister of Justice.

The foreigner's stay in the return procedure is considered illegal. A person waiting for the decision or the final decision does not have the right to work or state-funded accommodation and food. Access to state-funded medical care is available only if the foreigner is detained or in emergency cases. Since the appeal procedure against the return decision could last even a couple of years (old rules, there is no data about the current system), foreigners during this time tend to file applications for international protection, having access to some life-saving services of the state. Most universities will consider foreigners ineligible to study while awaiting the final decision on their return.

According to art. 400a of the Act on foreigners, the Commander-in-Chief of the Border Guard shall provide assistance to foreigners who must not be detained due to the fact that their detention may be detrimental to their health or life or who are presumed to be victims of violence¹³⁰. So, individuals with this alternative to detention (especially after they were released from the detention centre) are eligible for social, medical, and psychological assistance. In the past (2020), the Border Guard subcontracted an NGO (Fundacja Dialog) to assist this most vulnerable group¹³¹. The majority of foreigners (also vulnerable) in the return procedures are not eligible for this assistance¹³². The persons with vulnerabilities (single parents, pregnant women, persons with disabilities) use repeated asylum procedures when they are covered by medical insurance and can use accommodation facilities available for asylum seekers. Lack of assistance is often an argument for fleeing to another EU Member State.

There is a particular solution for people with special needs, including medical assistance, which is provided within the help in the voluntary return. They may receive medicines or additional needed medical exams before the return. Based on the professional experience of the project team members, we know that there are some cases of ill persons who were obliged to return without the assistance of a doctor. Generally, Poland lacks a support system for persons with vulnerabilities during the return procedures. If this is available in detention centres, it contradicts the principle of not detaining vulnerable migrants.

5.10. Detention

There are six detention centres for foreigners in Poland. They are used to detain both asylum seekers and foreigners awaiting their return. Detention centres are located on the

¹³⁰ Art. 400 of the Act on foreigners specifies these two categories of foreigners who are non-detainable.

¹³¹ Assistance covers i.a.: food, shelter, medical and psychological assistance.

¹³² Fundacja Dialog, Pomoc instytucjonalna cudzoziemcom. Accessed March 4, 2024. <https://fundacjdialog.pl/projekt-fami/pomoc-instytucjonalna-cudzoziemcom/>.

premises of Border Guard¹³³ units or divisions in Biała Podlaska, Białystok, Kętrzyn, Krosno Odrzańskie, Lesznowola, and Przemyśl. During the period of the intense humanitarian crisis on the Polish-Belarusian border in 2021, an additional temporary detention centre for foreigners was established in Wędrzyn (August 2021 - August 2022), located on the premises of a military training ground. During 2021-2022, the buildings of two (open) reception centres for refugees in Czerwony Bór and Biała Podlaska were also used as additional detention facilities¹³⁴. The only existing detention centre for male foreigners is located in Przemyśl, next to the detention centre for foreigners at the Bieszczadzki Division of the Border Guard seat.

Detention is legally possible only based on a local court order issued on the motion of the Border Guard. A foreigner has a right to submit an appeal against the court order on placing him/her in detention or extending detention. This may be done within 7 days from the day of receiving the translation of the court order. In practice, the review procedure typically lasts about a month, but there are also cases when the higher court has not managed to review the detention order within 60 or 90 days (the period of detention). Only a few courts have experience in detention cases. Most judges automatically accept the Border Guard's requests to place or extend detention. Detention cases are dealt with quickly (a couple of minutes), often without the participation of a representative or a foreigner. In most cases, the courts do not consider the foreigner's situation individually and are unfamiliar with the asylum regulations. It is relatively rare to be represented by a lawyer in these procedures because of the isolation of the foreigner. It happens, though, that the courts appoint, upon request (public) defence lawyers (penal procedure code is applicable), who represent foreigners in detention appeal procedures. Since the basis for detention is the application of the Act on foreigners, not many attorneys can apply this law. The representation is then rather ineffective. Unlike general practitioners (advocates or legal advisors), the NGOs specialising in asylum and migration law are better prepared to argue against administrative detention. However, there are few NGO lawyers admitted to practising in criminal courts as defence attorneys, so they normally prepare complaints to the court that the detained foreigners themselves are signing. During the humanitarian crisis at the Polish-Belarusian border in 2021, courts burdened with requests for placement and extension of stay did not inform attorneys of court dates or informed them so late (e.g., 30 minutes before the hearing) that an attorney could not reach them¹³⁵.

The foreigner can also file a motion to be released from the detention centre. This motion is examined by the Commander of the Border Guard unit/division responsible for the detention centre. If the release is not granted, the detainee has a right to file an appeal against it to the local court.

In the return context, a foreigner shall be detained for the reasons specified in art. 398a of the Act on foreigners. According to this provision, a foreigner is placed in a detention centre if:

¹³³ There was no discussion in Poland about the privatisation of detention facilities for foreigners, which is the case of open reception centres for asylum seekers.

¹³⁴ More about the practices of detention during the 2021 crisis: T. Sieniow. Migrants have the right to have rights - detencja cudzoziemców. Lublin. 2022. Accessed January 26, 2024 <https://panstwowprawa.org/publikacje/>.

¹³⁵ Straż Graniczna. Nowoczesny budynek mieszkalny dla cudzoziemców w Lesznowoli. 2022. Accessed January 26, 2024. <https://www.strazgraniczna.pl/pl/aktualnosci/10746,Nowoczesny-budynek-mieszkalny-dla-cudzoziemcow-w-Lesznowoli.html>.

- there is a probability that a decision to oblige the foreigner to return without specifying a deadline for voluntary departure has been issued and this is due to a circumstance¹³⁶ referred to in art. 315(2)(2) of the Act on foreigners,
or
- a decision to oblige the foreigner to return without specifying a deadline for voluntary departure has been issued and there is a need to secure its enforcement and the issuance of this decision is due to a circumstance referred to in art. 315(2)(2),
or
- there is a need to secure the transfer of the foreigner to a third country on the basis of an international agreement on the transfer and reception of persons and his immediate transfer to that country is not possible,
or
- at least one of the cases referred to in art. 398(1) has occurred¹³⁷ and: a) the application of the measures referred to in art. 398(2) (alternatives to detention) is not possible, b) the foreigner fails to comply with the obligations set out in the decision to apply to him/her the alternatives to detention referred to in art. 398(2).

According to art. 315(2) of the Act on foreigners, the decision obliging the foreigner to return without a possibility of a voluntary departure (not specifying the deadline for voluntary departure), shall be issued when: 1) there is a risk of the foreigner's absconding or 2) this is required for reasons of national defence or state security or the protection of public security and public order.

The risk of absconding is established, taking into account whether the foreigner: 1) has declared non-compliance with obligations arising from the receipt of a decision obliging a foreigner to return, or 2) does not possess any documents confirming his/her identity, or 3) has crossed or has attempted to cross the border illegally, or 4) entered the territory of the Republic of Poland during the period of validity of the entry in the list of foreigners whose stay in the territory of the Republic of Poland is undesirable, or in the Schengen Information System for the purpose of refusing entry and stay (art. 315.3. of the Act on foreigners).

It must be stressed that even if there is a risk of absconding, the legislator has imposed on the Border Guard and the courts the consideration of first imposing the measures alternative to detention (art. 398 of the Act on foreigners). The catalogue of available alternatives includes: 1) reporting at specified intervals to the Border Guard body indicated in the decision, 2) paying cash security (bail) in the amount specified in the decision, not lower than twice the minimum wage provided for in provisions on minimum wages, 3) depositing the travel document with the authority indicated in the decision, 4) residing at the place indicated in the decision (art. 398.3. of the Act on foreigners). Theoretically, detention should be considered only when the application of the alternatives is not possible or the foreigner has failed to comply with them (art. 398a.4. of the Act on foreigners). In practice, though, the courts consider the risk of absconding as an argument against applying these alternative measures.

¹³⁶ 'Reasons of national defence or state security or the protection of public security and public order'.

¹³⁷ Act on foreigners.

Detention should safeguard the smooth adoption of the return decision and facilitate the enforcement of it. It starts with the Border Guard motion to the district court to place a foreigner in a detention centre for foreigners or in the arrest for foreigners (a detention facility with the stricter regime used for foreigners who do not respect the rules of the detention centre). The district court decides to place the foreigner in a detention centre for up to 90 days. A foreigner participates in the initial court hearing when the court decides to place him/her in detention. This is usually the only moment when the foreigner sees a judge during his/her detention – a period lasting a maximum of 24 months (including a maximum of 18 months during the return procedure and 6 months if he/she lodges an application for international protection). There is no legal duty of the foreigner's presence in any subsequent court hearings and in practice, the foreigner is not brought to the court even if he/she expresses the will to participate in the court's hearing deciding about prolonging the detention.

The stay in a detention centre for the purpose of return can last up to 18 months (the maximum period according to EU Return Directive). The court reviews the necessity of continuing the detention every 90 days when the court examines the Border Guard motion for the subsequent extension. Pursuant to art. 403 point 3a of the Act on foreigners, after a 6-month stay in a detention centre, the stay may be extended for a specified period, not longer than another 12 months, if there is a justified assumption that the period of enforcement of the decision obliging the foreigner to return will be extended, and when: 1) a foreigner who has been issued a decision obliging the foreigner to return does not cooperate with the Border Guard authority in the implementation of this decision, or 2) the execution of the decision obliging the foreigner to return is temporarily impossible due to delays in obtaining the documents necessary for this purpose from third countries. This means the maximum stay period can be as long as 18 months. In practice, this stay may be even longer, because, in accordance with art. 403 point 4 of the Act on foreigners the periods referred to in section 1-3a, the period of stay of a foreigner in a detention centre or a detention centre for foreigners in connection with the application for international protection submitted by him/her (maximum 6 months) is not included.

Detention conditions are stipulated in the Act on foreigners (art. 410-427) and in the Ministry of the Interior Ordinance¹³⁸. The technical conditions generally meet European standards, but at the peak of the 2021 border crisis, the Minister of the Interior and Administration¹³⁹ reduced the space per detained person in the detention centre from 4m² to 2m². This was much below ECtHR standards for penitentiary facilities. The ad hoc detention facility for men at the Wędrzyn military training ground has not met any standards and was finally closed in August 2022. It was sometimes described as 'the Polish Guantanamo'¹⁴⁰.

The detention centres for foreigners are not penitentiary facilities for convicted individuals or ones awaiting a criminal trial. Foreigners waiting for deportation are placed together with asylum seekers in detention centres dedicated to foreigners, but the character of this detention and the conditions of deprivation of liberty are not much different from punitive detention.

¹³⁸ Ordinance of the Minister of the Interior of April 24, 2015, on detention centres and detention centres for foreigners, Dz. U. 2023, item 719.

¹³⁹ Ordinance of the Minister of the Interior and Administration of August 13, 2021, amending the ordinance on detention centres and detention centres for foreigners, Dz. U. 2021, item 1482.

¹⁴⁰ Amnesty International. Witamy w Guantanamo. Okrutne traktowanie na granicy polsko-białoruskiej i w ośrodkach dla cudzoziemców. 2022. Accessed January 26, 2024. <https://www.amnesty.org.pl/okrutne-traktowanie-na-granicy-polsko-bialoruskiej-i-w-osrodkach-dla-cudzoziemcow>.

The detention centres are also used to detain foreigners after they are released from prison and before their deportation to their country of origin. Very often, the residence status of the convicted foreigners expires during their imprisonment. So, they continue to be detained based on immigration, not criminal law.

Poland is infamous for detaining families and children. Numerous judgments of the European Court for Human Rights confirm it¹⁴¹. Pursuant to art. 397(3) of the Act on foreigners, an unaccompanied minor who has attained the age of 15 may be placed in a detention centre. Accompanied minors are placed in detention together with their guardians. All family members should be placed in detention together, usually in the same room. However, during the 2021 crisis, there were many situations when bigger families were divided, and adult children ended up in detention centres different from those of their parents and siblings. There were also cases of dividing spouses. Six existing detention centres in Poland have specific profiles. As a rule, they either are used for single men only or for families, single women, and unaccompanied minors. The number of detention centres for families, women, and UAMs is changing every year. During the peak of the humanitarian crisis at the Polish-Belarusian border, families and children were placed in all but one detention centre (Krosno Odrzańskie/Wędrzyn). In October 2023, there was only one detention centre for families, single women, and unaccompanied minors: the detention centre for foreigners in Lesznowola. The profiles of detention centres have changed over the years. Many detention centres were not suitable for families with children. The detention centre for families with children in Lesznowola has a well-developed infrastructure adapted to families with children since 2022.

The rights, obligations, and restrictions towards foreigners are defined in detail in the Act on foreigners and the ordinance¹⁴² of the Minister of the Interior and regulations of individual centres¹⁴³. The regulations vary and are not generally available (one should request their content from the Border Guard). Upon admission to the detention facility, the foreigner signs that he/she has familiarised himself/herself with the regulations (art. 411 of the Act on foreigners). A foreigner admitted to a detention centre or arrest for foreigners is instructed in a language which he/she understands about the rights and obligations and is familiarised with the regulations governing the stay in a detention centre or arrest for foreigners. The foreigner confirms the instruction with his/her own signature.

Based on the Act on foreigners (art. 410-427), a foreigner placed in a detention centre or arrest for foreigners has the right to contact Polish state authorities, a diplomatic representation or a consular post of a foreign state, non-governmental or international organisations providing assistance to foreigners, and his/her representative. Also, these foreigners are entitled to social assistance and medical care. They can access the internet at the computer workstations and a library and are allowed to meet relatives in specially designated rooms, with the consent of the Border Guard. Foreigners in detention have a right to take at least a two-hour walk in the open air daily unless otherwise prescribed by a doctor. Finally, they can have contact with other foreigners in custody, with the permission of an officer on duty in the custody, at a specified place and time, and play day-room games at a time and place

¹⁴¹ *Bistieva and Others v. Poland*, Application no. 75157/14; *Bilalova and others v. Poland*, Application no. 23685/14; *A.B. and Others v. Poland* Application no. 15845/15 i 56300/15; *Nikoghosyan and Others v. Poland*, Application no. 14743/17.

¹⁴² Ordinance of the Minister of the Interior of April 24, 2015, on detention centres and detention centres for foreigners, Dz. U. 2023, 719.

¹⁴³ A model regulation of the detention centre is published as an appendix to the Ordinance of the Minister of the Interior of 24 April 2015.

specified by an officer on duty in the custody. The regulations also stipulate more detailed rights, such as using sports equipment or buying tobacco and newspapers. In practice, the most burdensome restriction for foreigners is the prohibition of having telephones with an image-recording function.

The incidents of medical and psychological problems after long detention are very common in Poland¹⁴⁴. On many occasions, foreigners undergoing detention are transferred back and forth from the detention centre for foreigners in Przemyśl to the psychiatric hospital in Jarosław. Some incidents of suicide or the death of foreigners in detention have been reported¹⁴⁵. The detention of pregnant women sometimes leads to miscarriages¹⁴⁶.

5.11. Emergency Situations

As a result of the humanitarian crisis on the Polish-Belarusian border, the Minister of the Interior and Administration issued the Ordinance of 13 August 2021 amending the ordinance on arrests and detention centres for foreigners¹⁴⁷. Poland has referred to the emergency situation¹⁴⁸ as justifying the derogation of the established space standard per a detained foreigner in the detention centre for foreigners. According to §11 point 1a of the Ordinance, if it is necessary to place a large number of foreigners in a detention centre or arrest at the same time, and in the absence of vacancies in rooms for foreigners or residential cells, a foreigner may be placed in detention, for a specified period of time. In August 2021, the Polish Border Guard not only started using the military training ground in Wędrzyn as an ad hoc detention centre for men but also announced it would use 'registration centres' in Połowce and Dubicze Cerkiewne for the short-term detention of foreigners apprehended while crossing the border¹⁴⁹.

5.12. International Cooperation

Readmission agreements are initiated and negotiated at the level of the Border Guard Headquarters in cooperation with representatives of the Ministry of the Interior and the

¹⁴⁴ Rzecznik Praw Obywatelskich. Sytuacja cudzoziemców w ośrodkach strzeżonych w dobie kryzysu na granicy Polski i Białorusi. June 2022. Accessed January 26, 2024. <https://bip.brpo.gov.pl/pl/content/kmpt-cudzoziemcy-strzezone-osrodki-raport>.

¹⁴⁵ A. Gorczyca, D. Maliszewski. Zagadkowa śmierć w ośrodku dla uchodźców. Rodzina dowiedziała się od dziennikarza. *Gazeta Wyborcza* 12.04.2023. Accessed January 26, 2024. <https://rzeszow.wyborcza.pl/rzeszow/7,34962,29656134,w-strzezonym-osrodku-dla-uchodzcow-zmarl-28-letni-syryjczyk.html>.

¹⁴⁶ *V.M. and Others v. Poland*, Application no. 40002/22.

¹⁴⁷ Ordinance of 24 April 2015.

¹⁴⁸ According to Article 18.1. of the Directive 2008/115, in situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article 15(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2).

¹⁴⁹ *Dziennika Gazeta Prawna*. Straż Graniczna: Uruchamiamy nowe ośrodki dla cudzoziemców. 19 August 2021. Accessed January 26, 2024. <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8228840,osrodki-cudzoziemcy-staz-graniczna.html>.

Ministry of Foreign Affairs¹⁵⁰. Poland has signed over 35 readmission agreements, including recent ones with Armenia and Vietnam. Some agreements concern just readmission. Some agreements are international agreements with a readmission clause. However, the readmission agreement with Belarus was suspended in October 2021¹⁵¹.

¹⁵⁰ Instytut na Rzecz Państwa Prawa. Acquis Return. Doświadczenia implementacji i rozwój polityki powrotowej Unii Europejskiej. 2015. Accessed January 26, 2024. <https://panstwoprawa.org/wp-content/uploads/2015/10/Acquis-return.pdf>.

¹⁵¹ See the Annex.

6. Funding Return (Budget) and Related Programmes

The return policy is co-financed from EU funds and Norway funds in majority. The single return process is financed from the state funds (through the Border Guard). Foreigners placed in detention centres finance their stay there during the return process (from their private budget). The Polish IOM office is financed by among others EU funds, Polish government, Polish-Switzerland cooperation program and Norway funds.

The Act on foreigners determines which entities finance the return procedure. These are mostly state funds (through the Border Guard) and private funds of the foreigner. Pursuant to the Act on foreigners, the Border Guard is responsible for financing assistance in voluntary return and organising forced return. Moreover, the Commander of the Border Guard unit or the commanding officer of the Border Guard post is competent for the compulsory execution of the decision obliging a foreigner to return, and if the foreigner is staying in a detention centre or a detention centre for foreigners – the Border Guard authority to which this centre or detention centre is subordinate, determines, by way of decision, the amount of the costs referred to the cost of stay in the detention centre and return, and entities obliged to cover these costs. As a rule, these costs are borne by the foreigner, but they may also be borne by the entity inviting or entrusting the job or internship to a foreigner.

The EU funds used in return policy include the Asylum, Migration and Integration Fund (AMIF) and the Internal Security Fund (ISF)¹⁵². The ISF can finance, e.g., the development of the Schengen Information System (SIS), the Secure Information Exchange Network Application (SIENA) system or transborder control. Under the AMIF, the return procedure costs about EUR 8 million, averaging EUR 4 million; return and expulsion cost more than EUR 8 million; vulnerable persons and UAMs are about EUR 3 million; and there is about EUR 8 million for measures to prevent irregular migration¹⁵³.

¹⁵² Department of European Funds of the Ministry of the Interior and Administration. Fundusz Bezpieczeństwa Wewnętrznego 2021-2027. n.d. Accessed February 8, 2024. <https://www.gov.pl/web/dfe-mswia/program-funduszu-bezpieczenstwa-wewnetrznego-2021-2027>.

¹⁵³ Ministry of the Interior and Administration. Fundusz Azylu Migracji i Integracji 2021-2027. n.d. Accessed January 26, 2024. <https://www.gov.pl/web/dfe-mswia>.

7. Gaps

Based on our research and analysis, we have identified several gaps in Poland's return policy in a few working areas of the legal and institutional framework and infrastructure. In addition, a significant gap is limited public access to comprehensive databases regarding returns and readmissions. After a request, some data can be received from the public institutions (Border Guard, Office for Foreigners). In addition, the Return Directive is improperly implemented. Poland is also not honouring some CJEU judgements.

Legal gaps

Gaps in the legal framework are linked with improper implementation of the Return Directive. Foreigners have limited access to legal remedies, including appeals. A foreigner against whom return proceedings have been initiated is not entitled to free legal assistance. He/she may seek help from NGOs providing free assistance to foreigners, which depends on received state funding, but it is not certain whether they will be able to deal with his/her case in a comprehensive manner (i.e., full representation before the authority) due to the large number of people in need of help. Moreover, some foreigners indicate that Border Guard officers discourage them from appealing and suggest the foreigner sign a waiver of the right to appeal (suggesting the pointlessness of filing an appeal). The reform of the Act on foreigners of 2023 has significantly changed return proceedings, accelerating the proceedings and sharply limiting migrants' rights (shortening the deadline for filing an appeal against the decision to oblige them to return, abolishing the suspensive effect of a complaint filed with the court). The most important change, however, is the transfer of the return obligation proceedings entirely to the Border Guard. For the procedures started before 7 April 2023, the appeal body continues to be the Head of the Office for Foreigners. The time of examining appeals against return decisions in Poland was (in cases started before April 2023) very long (even 2-3 years). The inspectors applied the provisions regarding, among others, integration in Polish society or the special interest of a foreigner. There are no statistics on appeal proceedings conducted under the new rules. It should be noted that Poland has not decided to establish special immigration courts responsible only for migration and asylum matters. All complaints in these matters go to the same court: the Voivodeship Administrative Court in Warsaw, which deals with all administrative cases.

Border Guard officers are stationed permanently in some voivodeship offices and randomly check foreigners applying for temporary residence. This practice is incomprehensible, especially since foreigners who are staying illegally and may receive a positive decision as a result of initiated proceedings are often spouses of Polish citizens, foreigners leading a family life, or having a child in Poland.

There is no particular support for vulnerable foreigners regulated by Polish law. It must be noted that foreigners in the return process (except for some of them being released from detention and directed to stay in the Fundacja Dialog facility) do not have access to medical assistance, psychologists, interpreters, or the right to work. There are also no accommodation facilities provided, except the detention centres. Vulnerable persons placed in the detention centre may leave it due to poor physical or mental health (reasonable suspicion of being subjected to torture) and be placed in the only facility in Poland run by an NGO (Fundacja Dialog) where they can wait for their return. The Polish authorities abuse the use of detention, which can last up to two years (in the case of a foreigner whose application for international

protection was not approved and proceedings for return obligation were later initiated). Detention should be used as a measure of last resort¹⁵⁴, not only during the pre-return period but also during the entire proceedings (in some cases). The chances of a foreigner leaving the detention centre are low if proceedings obliging him/her to return have been initiated. Various district courts issue decisions regarding the application of detention or its extension. Courts do not conduct their own evidentiary proceedings and do not consider applications submitted by foreigners. This was especially visible in 2021-2022 during the peak of the humanitarian crisis on the Polish-Belarusian border. This includes cases of the detention of foreigners applying for international protection who are placed in a detention centre under the pretext of a lack of financial resources or lack of a place of residence and when¹⁵⁵, according to the law, a person applying for international protection is covered by social assistance and receives monthly benefits and can live in an open reception centre for foreigners.

Unaccompanied minor foreigners against whom return obligation proceedings have been initiated must have a representative (curators) in the case. In practice, finding curators is difficult because there is a lack of qualified personnel knowing immigration and asylum procedures. It is not uncommon for Border Guard officers (not involved in the return procedure) or court staff to become a curator. This raises some questions about a conflict of interest. There was a list of NGO employees expressing readiness to become curators for some time. However, these declarations could not be kept when the government limited EU funding of these organisations after 2016.

Poland does not seem to promote effective monitoring of the return operations. Indeed, identifying four NGOs to perform these tasks may seem like a policy choice promoting transparency. However, since it is not accompanied by any financial incentives (it is not a delegated task supported by subsidies or grants), the monitoring is a facade, probably masking unwillingness to be monitored.

Institutional gaps

The number of authorities and other bodies involved in returns is strictly limited. These are mainly the Border Guard, the IOM, and four NGOs allowed to run the monitoring.

The Border Guard is the body that deals comprehensively with return proceedings but is not effectively controlled by external stakeholders or courts, which raises doubts about the correctness of the decision control in appeal proceedings.

After prior training, NGO employees have the right to monitor returns (currently, there are four organisations). However, there is no independent body monitoring the return. The Ombudsman applied for such a right, but his request was not accepted¹⁵⁶.

¹⁵⁴ Stowarzyszenie Interwencji Prawnej, Prawa cudzoziemców w Polsce w 2020 roku. Accessed March 6, 2024. https://interwencjaprawna.pl/wp-content/uploads/2021/01/raport_SIP_w_dzialaniu_2020.pdf.

¹⁵⁵ Numerous judgments regarding unfair detention. i.a. Court of Appeal in Warsaw (judgement of March 1, 2023, II AKa 487/21), The Supreme Court in its judgement of April 12, 2023, II KK 149/22.

¹⁵⁶ Rzecznik Praw Obywatelskich. Rzecznik powinien monitorować deportacje cudzoziemców. Marcin Wiącek prosi MSWiA o wyjaśnienia. 2022. Accessed January 26, 2024. <https://bip.brpo.gov.pl/pl/content/rpo-deportacje-cudzoziemcow-monitoring-mswia>.

In practice, sometimes, the information about the enforcement of some return decisions is provided to the monitoring NGOs too late, thus making monitoring impossible (information provided a couple of minutes before the return).

Infrastructure gaps

There are also no accommodation facilities provided for foreigners subject to return proceedings, except the detention centre and only one facility for returnees released from detention run by an NGO (financed by Border Guard funds). Foreigners awaiting a decision to oblige them to return (or granting them a humanitarian stay) or for their case to be considered after submitting an appeal are not guaranteed a place to stay. The argument of not having a place of residence is often used by the court in cases of an extension of stay in detention centres. Therefore, foreigners waiting to return from the IOM are provided with accommodation in Warsaw.

In 2021-2022, the number of people staying in detention centres increased significantly due to the humanitarian crisis on the Polish-Belarusian border. Temporary detention centres were established, including the infamous centre in Wędrzyn¹⁵⁷. This centre was established on the territory of a military base. Foreigners staying at the centre heard gunshots every day. This centre did not meet basic conditions of stay, including sanitary conditions. Foreigners remained crammed into a very small area. For several months, NGO representatives (lawyers) could not visit the foreigners staying there. The centre was monitored by national bodies¹⁵⁸. The foreigners staying there were frequently protesting and on one occasion there were serious riots¹⁵⁹. The centre was closed on 19 August 2022¹⁶⁰.

Implementation of the Return Directive

The Return Directive has not been implemented properly in Poland. Undoubtedly, the returnees have been deprived of access to effective legal remedies. The Act on foreigners does not provide for free legal assistance, apart from generally available assistance provided by NGOs offering free assistance to foreigners. Moreover, a complaint to the court no longer has a suspensive effect, which means that the only independent body will not have time to issue a judgement before the return. The deadline for filing an administrative appeal has been shortened to 7 days, which prevents the effective implementation of this right. In case of issued return decisions, entry bans are applied automatically.

¹⁵⁷ Najwyższa Izba Kontroli, Wystąpienie pokontrolne zmienione zgodnie z treścią uchwały nr KPK-KPO.443.045.2022 Zespołu Orzekającego Komisji Rozstrzygającej w Najwyższej Izbie Kontroli z dnia 18 maja 2022 r. D/21/506 – Przygotowanie organów państwa na wypadek masowego napływu cudzoziemców do Polski. 2021. Accessed January 26, 2024. Retrieved from <https://bip.nik.gov.pl>.

¹⁵⁸ Rzecznik Praw Obywatelskich. Ośrodek dla cudzoziemców w Wędrzynie nie spełnia standardów ochrony ich praw. Wnioski po trzeciej wizytacji BRPO. 2022. Accessed January 26, 2024. <https://bip.brpo.gov.pl/pl/content/rpo-wedrzyn-cudzoziemcy-osrodek-standardy>.

¹⁵⁹ Rzecznik Praw Obywatelskich. Bunt w ośrodku dla cudzoziemców w Wędrzynie. Straż Graniczna podała szczegóły. 2021. Accessed January 26, 2024. <https://bip.brpo.gov.pl/pl/content/rpo-kmpt-bunt-cudzoziemcy-wedrzyn-sg-pytania>.

¹⁶⁰ Polska Agencja Prasowa. Straż Graniczna: zamknęliśmy wszystkie dodatkowe ośrodki strzeżone dla cudzoziemców. 2022. Accessed January 26, 2024. <https://www.pap.pl/aktualnosci/news%2C1426073%2Cstraz-graniczna-zamknelismy-wszystkie-dodatkowe-osrodki-strzezone-dla>.

Pushbacks

The policy of pushbacks on border crossing point Terespol, which the European Court of Human Rights has condemned, should be scrutinised and the pushbacks practices should be ended. The 2021-2023 amendments to the Act on foreigners reducing the procedural safeguards in access to protection, allowing for expulsion without access to effective legal remedies, seem to contradict the Border Schengen Code, the Return Directive, and the EU Charter of Fundamental Rights¹⁶¹. Introducing some procedural safeguards in the Act on foreigners has no real consequence for foreigners irregularly crossing the border. It is worth mentioning that judgments of the European Court for Human Rights confirmed that there were numerous violations of art. 3 of the ECHR (applicants' treatment by the Polish authorities during border checks exposing them to the risk of inhuman and degrading treatment in the countries of origin, and repeating instances of collective expulsions at the Terespol/Brześć crossing point).

¹⁶¹ Numerous judgments of Polish courts stating that pushback acts are illegal, i.a. Provincial Administrative Court in Białystok (ref no. II SA/Bk 492/22), judgement of the Provincial Administrative Court in Warsaw of April 26, 2022, ref. no. IV SA/Wa 420/22, judgement of the Provincial Administrative Court in Warsaw of April 27, 2022, ref. no. IV SA/Wa 471/22, judgement of the Provincial Administrative Court in Warsaw of 20/05/2022, ref. no. IV SA/Wa 615/22, judgement of the Provincial Administrative Court in Warsaw of May 27, 2022, ref. no. IV SA/Wa 772/22, Supreme Administrative Court: ref. no. II OSK 165/23, II OSK 2749/22, II OSK 2750/22, II OSK 2751/22.

8. Policy Suggestions

Poland's return policy has become more and more restrictive over the years. Considering several gaps regarding the return governance in the country, we have formulated some recommendations in this field, including legal, institutional and infrastructure ones.

Legal policy suggestions

They include:

- restoring the 14-day period for filing an appeal against the return decision;
- restoring the effect of suspending the execution of the return decision as a result of submitting a complaint to the court;
- fully implement the Return Directive to introduce a system of state-funded legal assistance in return appeal procedures (similar to the one available in asylum appeal procedures);
- broadening access to translation and interpretation services to underprivileged foreigners who are not able to afford providing sworn translations of their crucial evidence;
- considering the transfer of competences of the appeal body to different authorities then Border Guard meeting the criteria of art. 13 of the Return Directive ('competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence');
- introducing an amendment to the Act on foreigners, under which it will not be possible to initiate return proceedings against a foreigner who has already submitted an application for a temporary residence permit and leads family life in Poland with a Polish citizen, an EU citizen or a foreigner;
- introduction of mandatory professional representation before district courts in matters relating to placement and extension of stay in a detention centre;
- assessment of the health and psychological condition of a foreigner staying in detention before each court session on placement or extension of stay in detention; the assessment should be made by independent specialists not employed/paid by the Border Guard;
- enabling the Ombudsman Office to monitor the enforcement of the return decision and provide necessary funds for that;
- greater transparency in the scope of monitoring of return operations, including observing the law obliging the Border Guard to inform monitoring bodies in advance;
- conducting training for judges issuing decisions on placing and extending the detention of a foreigner and judges of the District Administrative Court in Warsaw on the Return Directive guarantees;
- repeal of the Ordinance amending the ordinance on the temporary suspension or restriction of border traffic at specific border crossings being a basis of by-passing Schengen Border Code and the Return Directive obligations¹⁶²;
- regulating the situation of people belonging to vulnerable groups in terms of special assistance also when they appeal the return decision;
- taking steps to shorten and eliminate detention of children in return procedures (especially unaccompanied minors);

¹⁶² Dz.U. 2022, item 423.

- creating a state-financed system of support to unaccompanied minors who are facing return (special reception facility being an alternative to detention, a list of curators for unaccompanied minors, training, reimbursement of travel costs);
- increasing use of alternatives to detention in return procedures;
- regulating the situation of access to medical services and psychological care for all foreigners in the lengthy return procedures.

Institutional policy suggestions

They encompass:

- increasing cooperation with Frontex (including extending Frontex's mandate to monitor national detention and return practices);
- increasing the transparency of the national return operations by allowing monitoring by Frontex, the Ombudsman, next to current monitoring NGOs;
- increasing cooperation between the Border Guard, the Office for Foreigners and NGOs, the Ombudsman for Children and the Ombudsman restoring the abandoned (in 2016) practice of annual consultative forums;
- introducing the state funding of return operations' monitoring;
- dissemination among foreigners considering a voluntary return an accurate knowledge about it and post-return reintegration support by the IOM or Frontex partners;
- creating an interinstitutional council or advisory body responsible for oversight of compliance with EU and national safeguards in return proceedings; it should include representatives of public institutions and international and non-governmental organisations.

Infrastructure policy suggestions

They include:

- making sure that the construction of the barrier on the Polish-Belarusian border (or Polish-Russian border) next to state sovereignty over its territory takes into account imperatives of human security and does not violate state obligations in the fields of respecting the principle of non-refoulement and guaranteeing access to asylum procedures;
- making sure that the national reception facilities for foreigners are sufficient to host not only asylum seekers but also returnees; considering extending the eligible group of residents of reception centres for asylum seekers to the foreigners awaiting judicial decisions on refusal of granting them international protection and to the foreigners whose return procedures have been initiated (who are currently forced to file consecutive asylum applications just to receive shelter and medical assistance during their return procedures).

9. Conclusions

This report on Poland's return governance analyses the law and practice and should be treated as a guideline that will enable changes to be made to improve compliance with migrants' rights while respecting the law of the receiving country. The report analyses the legal, institutional and infrastructure frameworks regarding the return proceedings from Poland for foreigners. The report covers the years 2015-2023 (and 2024 in some contexts).

The Authors of the report presented in detail the legal regulations and practices in the field of return proceedings. The procedures regarding the principles of return proceedings and the execution of decisions were explained. The report discussed the relationship of EU law to Polish law, Poland's compliance with EU law and the implementation of judgments of European tribunals. Reference was made to cooperation between national institutions and organisations as well as international cooperation. The Authors also elaborated on the detention policy and migrants' rights in this context. The report indicated specific examples of practices that raise doubts as to their legality. The report identified several legal gaps (including those in the field of the implementation of the Return Directive) as well as institutional and infrastructural ones. The Authors pointed to changes in the national law that were and are inconsistent with the Return Directive. The report also presented pushbacks as illegal practices at the Polish land borders.

Even though Poland is very effective in the enforcement of return decisions (70%), migrants' rights need to be protected. Indeed, one of the reasons for this result has been the possibility of returning migrants with irregular stay via land borders (with Ukraine, Belarus or the Russian Federation). Restrictive changes in the law since 2021, which began with the humanitarian crisis on the Polish-Belarusian border, have limited the rights of foreigners (reducing the procedural safeguards against arbitrary expulsion).

The humanitarian crisis has had a significant impact on the relations between the Border Guard and organisations working for foreigners, as well as on the inhabitants of border regions and Polish society. It is hard to accept the policy of pushbacks on the Polish-Belarusian border that has been condemned by the European Court of Human Rights and the new amendments to the Act on foreigners reducing the procedural safeguards against arbitrary expulsion without access to effective judicial remedies.

10. Appendices

Table 1. Standard Readmission agreements signed

Title	Signatory State/Target Third Country	Date		Link to the document
		Signature	Entry into force	
Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation	Albania (EU)	2005	2006	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22005A0517%2802%29
Agreement between the European Union and the Republic of Armenia on the readmission of persons residing without authorisation	Armenia (EU)	2013	2014	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22013A1031(02)
Agreement between the Government of the Republic of Poland and the Federal Government of the Republic of Austria on the reception of persons staying without permission	Austria	2002	2005	https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20060510373
Agreement between the European Union and the Republic of Azerbaijan on the readmission of persons residing without authorisation	Azerbaijan (EU)	2014	2014	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22014A0430%2801%29
Agreement between the European Union and the Republic of Belarus on the readmission of persons residing without authorisation	Belarus (EU)	2020	2020 (suspended by Belarus 2021)	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22020A0609%2801%29
Agreement between the European Community and Bosnia and Herzegovina on the readmission of persons residing without authorisation - Joint Declarations	Bosnia and Herzegovina (EU)	2007	2008	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22007A1219%2804%29
Agreement between the Government of the Republic of Poland and the Government of the Republic of Bulgaria on the transfer and reception of persons staying without permission	Bulgaria	1993	1994	
Agreement between the European Union and the Republic of Cape Verde on the readmission of persons residing without authorisation	Cape Verde (EU)	2013	2014	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22013A1024%2802%29
Agreement between the Government of the Republic of Poland and the Government of the Republic of Croatia on the transfer and reception of persons staying without permission	Croatia	1994	1995	
Agreement between the Government of the Republic of Poland and the Government of the Czech Republic on the transfer of persons across a common state border	Czechia	1993	1993	
Agreement between the Government of the Republic of Poland and the Government of the Republic of Greece on the transfer and reception of persons staying without permission	Greece	1994	1996	
Agreement between the European Union and Georgia on the readmission of persons residing without authorisation	Georgia (EU)	2010	2011	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22011A0225%2803%29

Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation	Hong Kong (EU)	2001	2004	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22004A0124%2801%29
Agreement between the Government of the Republic of Poland and the Government of the Republic of Hungary on the transfer and reception of persons staying without permission	Hungary	1994	1995	
Agreement between the Government of the Republic of Poland and the Government of Ireland on the transfer and reception of persons staying in the territories of their countries without authorization	Ireland	2001	2002	https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP20020310498
Agreement between the Government of the Republic of Poland and the Government of the Republic of Kazakhstan on the readmission of persons	Kazakhstan	2016	2017	https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20170001623
Agreement between the Government of the Republic of Poland and the Government of the Republic of Latvia on the transfer and reception of persons staying without permission	Latvia	2006	2007	https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20080150093
Agreement between the Government of the Republic of Poland and the Government of the Republic of Lithuania on the transfer and reception of persons	Lithuania	1998	2000	https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP20060900940
Agreement between the European Community and the Macao Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation	Macao (EU)	2003	2004	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22004A0430%2801%29
Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorisation	Moldova (EU)	2007	2008	https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22007A1219%2810%29
Agreement between the European Community and the Republic of Montenegro on the readmission of persons residing without authorisation	Montenegro (EU)	2007	2008	https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22007A1219(02)
Agreement between the European Community and the former Yugoslav Republic of Macedonia on the readmission of persons residing without authorisation	North Macedonia (EU)	2007	2008	https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22007A1219%2801%29
Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation	Pakistan (EU)	2009	2010	https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A22010A1104%2802%29
Agreement between the European Community and the Russian Federation on readmission	Russia (EU)	2006	2007	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22007A0517%2803%29
Agreement between the Government of the Republic of Poland and the Government of Romania on the mutual transfer of persons staying without authorization in the territory of one of the countries of the Contracting Parties	Romania	1993	1994	
Agreement between the European Community and the Republic of Serbia on the	Serbia (EU)	2007	2008	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22007A1219%2803%29

readmission of persons residing without authorisation				
Agreement between the Government of the Republic of Poland and the Government of the Republic of Slovakia on the transfer of persons across a common state border	Slovakia	1993	1993	
Agreement between the Government of the Republic of Poland and the Government of the Republic of Slovenia on the transfer and reception of persons staying without permission	Slovenia	1996	1998	https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP20070340388
Agreement between the Republic of Poland and the Kingdom of Spain on the admission of persons staying without permission	Spain	2002	2003	https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20042282300/O/D20042300.pdf
Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of persons residing without authorisation	Sri Lanka (EU)	2004	2005	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22005A0517%2803%29
Agreement between the government of the Republic of Poland and the government of the Kingdom of Sweden on the admission of persons staying without permission	Sweden	1998	1999	
Agreement between the Government of the Republic of Poland and the Federal Council of the Swiss Confederation on the transfer and reception of persons staying without permission	Switzerland	2005	2006	https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20061621147
Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation	Turkey (EU)	2013	2014	https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A22014A0507%2801%29
Agreement between the European Community and Ukraine on the readmission of persons	Ukraine	1993 (2007 EU)	1994 (2008 EU)	https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22007A1218%2801%29
Agreement between the Government of the Republic of Poland and the Government of the Socialist Republic of Vietnam on the transfer and admission of citizens of both States	Vietnam	2004	2005	https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20051561306

Source: The Border Guard (statistics obtained upon request).

Table 2. EU migration partnerships including a clause on the readmission/removal of irregular foreigners

Title	Signatory State/Target Third Country	Date			Link to the document
		Signature	Entry force	into	
Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed at Cotonou on 23 June 2000	African, Caribbean and Pacific countries (ACP)	2002	2003		https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22000A1215%2801%29
Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part	Algeria	2002	2005		https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22005A1010%2801%29

Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Andean Community and its Member Countries (Bolivia, Colombia, Ecuador, Peru and Venezuela), of the other part	Andean Community (Bolivia, Colombia, Ecuador, Peru)	2003	pending	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016JC0004
Framework agreement EU-Australia	Australia	2003	pending	https://eur-lex.europa.eu/EN/legal-content/summary/framework-agreement-eu-australia.html
Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part	Egypt	2001	2004	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22004A0930%2803%29
Cooperation Agreement between the European Community and the Kingdom of Cambodia	Cambodia	1997	1999	https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A21999A1019%2801%29
Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part	Canada	2016	pending	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.329.01.0045.01.ENG
Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part	Chile	2002	2005	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22002A1230%2801%29
Memorandum of Understanding between the European Community and the National Tourism Administration of the People's Republic of China on visas and other matters relating to tour groups from the People's Republic of China	China	2004	2004	https://home-affairs.ec.europa.eu/memorandum-understanding-between-european-community-and-national-tourism-administration-peoples_en
EU-Central America political dialogue and cooperation agreement	Costa Rica	2003	2014	https://eur-lex.europa.eu/EN/legal-content/summary/eu-central-america-political-dialogue-and-cooperation-agreement.html
Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part	Cuba	2016	pending	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22016A1213%2801%29
EU-Central America political dialogue and cooperation agreement	Guatemala	2012	pending	https://eur-lex.europa.eu/EN/legal-content/summary/eu-central-america-political-dialogue-and-cooperation-agreement.html
EU-Central America political dialogue and cooperation agreement	Honduras	2012	pending	https://eur-lex.europa.eu/EN/legal-content/summary/eu-central-america-political-dialogue-and-cooperation-agreement.html
Framework Agreement on Comprehensive Partnership and cooperation between the European Community and its Member States, of the one part, and the Republic of Indonesia, of the other part	Indonesia	2009	2014	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52013PC0230
Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part	Iraq	2012	2018	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22012A0731%2801%29
EU-Japan Strategic Partnership Agreement	Japan	2018	pending	https://eur-lex.europa.eu/EN/legal-content/summary/eu-japan-strategic-partnership-agreement.html
Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part	Jordan	1997	2002	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22005A1026%2802%29
Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part	Kazakhstan	2015	2020	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22016A0204%2801%29
Framework Agreement between the European Union and the Republic of Korea	South Korea	2010	2014	https://eur-lex.europa.eu/EN/legal-content/summary/framework-agreement-between-the-european-union-and-the-republic-of-korea.html
Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo*, of the other part	Kosovo	2015	2016	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22016A0316%2801%29
Cooperation Agreement between the European Community and the Lao People's Democratic Republic	Laos	1997	1997	https://ec.europa.eu/assets/near/neighbourhood-enlargement/cvista/mt/21997a1205(01)-mt.doc
Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part	Liban	2002	2006	https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22006A0530%2801%29

Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and Mongolia, of the other part	Mongolia	2013	2017	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22017A1209(01)
Partnership Agreement on Relations and Cooperation between the European Union and its Member States, of the one part, and New Zealand, of the other part	New Zealand	2016	pending	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22016A1129%2801%29
EU-Central America political dialogue and cooperation agreement	Nicaragua	2012	pending	https://eur-lex.europa.eu/EN/legal-content/summary/eu-central-america-political-dialogue-and-cooperation-agreement.html
EU-Central America political dialogue and cooperation agreement	Panama	2012	pending	https://eur-lex.europa.eu/EN/legal-content/summary/eu-central-america-political-dialogue-and-cooperation-agreement.html
Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines	Philippines	2012	2018	https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22017A1222%2801%29
EU-Central America political dialogue and cooperation agreement	El Salvador	2012	pending	https://eur-lex.europa.eu/EN/legal-content/summary/eu-central-america-political-dialogue-and-cooperation-agreement.html
Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part	Singapore	2018	2020	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014PC0070
Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Tajikistan, of the other part	Tajikistan	2004	2010	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22009A1229%2801%29
Proposal for a Council and Commission Decision on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States and Turkmenistan	Turkmenistan	1998	pending	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:51997PC0693
Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Uzbekistan, of the other part, to take account of the accession of the Republic of Croatia to the European Union	Uzbekistan	1996	1999	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22017A0916%2801%29
Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part	Vietnam	2012	2016	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22016A1203%2802%29

Source: The Border Guard (statistics obtained upon request).

Table 3. Deals

Title	Signatory State/Target Third Country	Date			Link to the document
		Signature	Entry into force		
Joint Declaration on Migration Cooperation between Afghanistan and the EU	Afghanistan	2021	2021 (suspended the same year by Afghanistan)		https://www.eeas.europa.eu/eeas/eu-afghanistan-joint-declaration-migration-cooperation_en?s=234
EU-Bangladesh Standard Operating Procedures for the identification and return of persons without a residence permit	Bangladesh	2017	2017		https://arts.unimelb.edu.au/__data/assets/pdf_file/0009/3409830/Bangladesh-1.pdf
Admission procedure for the return of Ethiopians from European Union Member States	Ethiopia	2018	2018		https://www.statewatch.org/media/documents/news/2018/jan/eu-council-regugees-return-ethiopians-15762-17.pdf
Good practices between the Government of the Republic of The Gambia and the European Union in carrying out effective identification and return of unauthorized persons	Gambia	2018	2018		

EU-Guinea: Code of Good Practice for the Efficient Handling of Returns	Guinea	2017	2017	
Joint document of the Government of the Republic of Côte d'Ivoire and the European Union on procedures for the identification and readmission of immigrants suspected of being Côte d'Ivoire nationals illegally staying in the European Union	Cote d'Ivoire	2018	2018	

Source: The Border Guard (statistics obtained upon request).

Table 4. Ongoing standard readmission agreement negotiations

No.	Country	State of play
1.	Philippines	Permission was sought to start the negotiation process
2.	Kyrgyzstan	The first round of contract negotiations June 12-16, 2023
3.	Tajikistan	The first round of contract negotiations May 8-12, 2023
4.	Uzbekistan	The first round of contract negotiations May 22-26, 2023

Source: The Border Guard (statistics obtained upon request).

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Act of 12 March 2022 on assistance to citizens of Ukraine in connection with an armed conflict on the territory of this country, Dz. U. 2022 item. 58.

Act of 14 July 2006 on entry into, stay in and departure from the territory of the Republic of Poland territory of citizens of the European Union Member States and their family members, Dz. U. Nr 144 item 1043.

Act of 14 October 2021 amending the Act on foreigners and certain other acts, Dz. u. 2021 item 1918.

Act of December 12, 2013 on foreigners, Dz. U. 2013 item 1650.

Act of June 13, 2003 on granting protection to foreigners in the territory of the Republic of Poland, Dz.U. 2003 nr 128 item 1176.

Constitution of the Republic of Poland of April 2, 1997, Dz.U. 1997 nr 78 item 483.

Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC was not implemented yet into Polish law.

Directive 2008/115/EC of 16 December 2008 on common standards and procedures applicable by Member States in the return of illegally staying third-country national, Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions expelling third-country nationals, Council Directive 2003/110/EU of 25 November 2003 on assistance in cases of transit for the purposes of deportation by air.

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

Ordinance of the Minister of the Interior and Administration of April 18, 2014, regarding the presence of representatives of non-governmental organisations in the course of activities related to bringing a foreigner to the border or to the airport or sea port of the country to which he is brought, Dz. U. 2014 item 534.

Ordinance of The Minister of the Interior and Administration of August 20, 2021, amending the ordinance on the temporary suspension or restriction of border traffic at specific border crossings, Dz.U. 2021, item, 1536.

Ordinance of the Minister of the Interior and Administration of February 9, 2023 amending the ordinance on the temporary suspension or restriction of border traffic at specific border crossings, Dz.U. 2023 item. 275.

Ordinance of the Minister of the Interior and Administration of March 13, 2020, on the temporary suspension or restriction of border traffic at specific border crossings, Dz.U. 2020, item 435.

Ordinance of the Minister of the Interior of April 24, 2015, on detention centres and detention centres for foreigners, Dz. U. 2023, item 719.

Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Ordinance (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Ordinance (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast).

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Annex I: Statistics

Year	Stock of irregular migrants and/or # TCNs found to be illegally present (data in Eurostat)	# Asylum applications	# TCNs/foreign nationals* refused entry at the border	# pushbacks (if available) (unofficial data by NGOs also acceptable; please indicate the data source)	# Dublin returns	# TCNs/foreign nationals* ordered to leave	# Third country unaccompanied minors returned following an order to leave	# assisted 'voluntary' return	# Readmitted citizens
2015	12 557	12 325	41 580 (EU-13)		21 (from PL); 897 (to PL)	13 797	NA	321	17
2016	18 493	12 319	103 986 (UK-1; EU-12)		9 (from PL); 1408 (to PL)	20 252	NA	436	11
2017	22 558	5 078	72 140 (EU-6)		16 (from PL); 1433 (to PL)	24 882	NA	507	101
2018	26 547	4 135	76 900 (EU-17)		80 (from PL); 886 (to PL)	29 733	NA	450	306
2019	26 625	4 096	95 735 (UK-3; EU-35)		55 (from PL); 685 (to PL)	29 072	NA	380	487
2020	9 823	2 803	34 945 (Swiss-1; EU-11)		30 (from PL); 222 (to PL)	12 003	NA	169	510
2021	6 812	7 699	34 125 (UK-15; EU-7)	at least 50 000 cases between August 2021 and the end of 2022	120 (from PL); 221 (to PL)	10 177	NA	110	573
2022	7 166	9 933	28 272 (UK-55; Swiss-1; EU-220)		95 (from PL); 410 (to PL)	8 412	1	100	677
2023					82 (to PL), 696 (to PL) until 30 November		1 until 30 November	183	682 (until 30 Nov)
Data sources:	Border Guard	Office for Foreigners	Office for Foreigners	Border Guard	Office for Foreigners	Office for Foreigners	Border Guard (obtained upon request)		

Source: Own elaboration based on available data sets and data received upon request.

Annex II: List of Authorities Involved in the Migration Return Governance

Authority (English and Polish)	Type of organisation	Area of competence in the fields of return	Link
Ministry of the Interior and Administration – Department of International Affairs and Migration <i>Ministerstwo Spraw Wewnętrznych i Administracji – Departament Spraw Międzynarodowych i Migracji</i>	governmental	Developing and coordinating migration policy, coordination of European and international cooperation, internal security policy coordination.	https://www.gov.pl/web/mswia/departament-spraw-miedzynarodowych-i-migracji
Ministry of the Interior and Administration – Department of Public Order <i>Ministerstwo Spraw Wewnętrznych i Administracji – Departament Porządku Publicznego</i>	governmental	Responsible for overseeing Police and Border Guard. Competence in the field of strategic analysis and public order.	https://www.gov.pl/web/mswia/departament-porzadku-publicznego
Border Guard Headquarters – Board for Foreigners <i>Komenda Główna Straży Granicznej – Zarząd do Spraw Cudzoziemców</i>	governmental	Responsible (since 7 April 2023) for examining of appeals against return decisions. Organizing and coordinating activities related to the forced return of foreigners, the transfer of foreigners under the Dublin III Regulation and voluntary returns. Supervising the operations of local divisions and units of the Border Guard related to the foreigners and detention centers for foreigners. Conducting appeal proceedings against decisions of the Border Guard authorities (the decision to refuse entry to the territory of the Republic of Poland, determining the amount of costs related to the issuance and execution of the decision obliging to return, imposing a penalty on the carrier, withdrawing or invalidating a visa).	https://strazgraniczna.pl/pl/straz-graniczna/struktura-sg/komenda-glowna-sg/komorki-organizacyjne-k/zarząd-do-spraw-cudzoziemcow-Komendy-Główny-Straży-Granicznej.html

		Preparing positions for complaints filed by foreigners before the European Court of Human Rights. Cooperation with European Union bodies and agencies, in particular with the European Commission and Frontex. Cooperation with UNHCR and NGOs. Cooperation with the authorities of the USA in the exchange of border and migration information related to border security and legalization of stay. Obtaining and using foreign funds to perform administrative activities towards foreigners. Preparing cyclical and periodic statistical, information and analytical materials in the area of illegal migration, in particular in the field of migration movements of foreigners as well as returns of foreigners. Developing ICT solutions to improve the implementation of activities performed towards foreigners by the Border Guard authorities. 24/7 implementation of tasks and powers related to the management and operation of the return alert (Article 3) of the Schengen Information System.	
Border Guard Divisions and local Units <i>Oddziały i Placówki Straży Granicznej</i>	governmental	Organizational units of the Border Guard in the field of return migration governance are responsible for conducting the immigration procedure and issuing return decisions and decisions on humanitarian or tolerated stay. They are responsible for registering requests for international protection. In the structures of divisions or local units of the BG operate six detention centres for foreigners. The border guard officers are assisting detained migrants in voluntary returns.	www.strazgraniczna.pl
Border Guard Detention Centres for Foreigners <i>Strzeżone Ośrodki dla Cudzoziemców Straży Granicznej</i>	governmental	Six places of administrative detention of foreigners (asylum seekers and returnees). They are located in the seats of BG Divisions (Krosno Odrzańskie, Białystok, Kętrzyn and Przemyśl) or local BG Units (Biała Podlaska and Lesznowola). In these detention facilities migrants stay during return proceedings and during the time before return. The border guard officers (return assistants) are assisting detained migrants in voluntary returns.	www.strazgraniczna.pl
Office for Foreigners <i>Urząd do Spraw Cudzoziemców</i>	governmental	Examines appeals against decisions of voivodes in matters of legalization of stay - residence permits for foreigners, visas and invitations, registration of stay and	https://www.gov.pl/web/udsc

		permanent residence rights of European Union citizens and their family members, and controls voivodes in this respect; conducts visa consultations and exchanges data between Member States on visas; handles matters related to granting and depriving foreigners of protection – international protection (refugee status, subsidiary protection), asylum, temporary protection and conducts ‘Dublin’ proceedings; provides social and medical assistance to foreigners applying for international protection; runs IT systems. In return context the Office for Foreigners was responsible for examining appeals against BG return decisions (in procedures started until 6 April 2023).	
Commissioner for Human Rights (Ombudsman) <i>Rzecznik Praw Obywatelskich</i>	Independent Authority	Within the equal treatment team of the Commissioner’s office there is a unit responsible generally for the rights of the foreigners in Poland. Commissioner may join or initiate legal procedure concerning foreigners. Commissioner is a national body responsible for National Preventive Mechanisms. Thus Commissioner is visiting detention facilities and prepares relevant reports on the treatment of detainees. One of the competences of the Commissioner is to initiate the procedure leading to issuing the returnee by the Border Guard the consent on humanitarian stay.	https://bip.brpo.gov.pl/en
Commissioner for the Right of the Child <i>Rzecznik Praw Dziecka</i>	Independent Authority	Independent authority intervening in the legal proceedings concerning (migrant) children. In practice is able to demand information about minors access to territory (protection), denying entry, detention or other matters when rights of the child may be endangered. One of the competences of the Commissioner is to initiate the procedure leading to issuing the returnee by the Border Guard the consent on humanitarian stay (to protect human rights of children).	https://brpd.gov.pl
General Courts (criminal divisions of District and Regional Courts) <i>Sądy powszechne (wydziały karne w</i>	governmental	Place foreigners in detention based on the border guard motions. Decide about extension of detention. Appoint curators in cases of UAMs in return procedures. Examine motions for compensation in case of arbitrary detention.	

<i>Sądach Rejonowych i Okręgowych)</i>			
Administrative Courts (Provincial Administrative Court in Warsaw and Supreme Administrative Court) Sądy administracyjne (Wojewódzki Sąd Administracyjny w Warszawie i Naczelny Sąd Administracyjny)	governmental	Judicial review of return decisions after a returnee submits a complaint against them. The administrative courts may suspend enforcement of return decisions until the final judgment is issued.	www.warszawa.wsa.gov.pl www.nsa.gov.pl
The European Border and Coast Guard Agency (Frontex)	international (EU)	Return and reintegration of foreigners is one of the activities of Frontex. In practice Frontex supports the Border Guard in organizing return operations. Next to joint and collective flights, it may also finance operations organized on the commercial flights. Frontex Fundamental Rights Officer may monitor compliance of Frontex officers operation with Fundamental Rights.	www.frontex.europa.eu/
International Organisation for Migration (IOM) Poland	international	Organises and implements AVR. Delegates cultural assistants in the detention facilities.	https://poland.iom.int/pl
NGOs authorised to participate in return operations monitoring	non-governmental	Four Polish NGOs have a right to monitor the forced return: The Helsinki Foundation for Human Rights, The Rule of Law Institute Foundation, The Halina Nieć Legal Aid Centre, and The MultiOcalenie Foundation. Despite the authorisation and training of monitors by the Border Guard, the monitoring institutions do not receive funding to perform monitoring mandate.	www.panstwoprawa.org https://hfhr.pl/en https://www.pomocprawna.org/ https://www.multiocalenie.org.pl/
Other civil society actors	non-governmental	The Border Guard when initiating the return procedures is providing the foreigner with the short list of organizations assisting migrants in Poland. This list includes Caritas services in different parts of Poland (specializing in humanitarian aid). The main task of other organizations is predominately integration and psychological support (Ocalenie Foundation, MultiOcalenie Foundation, Foundation 'Civic Perspective'). Finally the list includes four organizations that are providing legal aid to foreigners (The Helsinki Foundation for Human Rights, The Rule of Law Institute Foundation, The Halina Nieć Legal Aid Centre, Association for Legal Intervention). The list of the	various websites

		providers of integration assistance should be extended to other civic society actors: Polish Migration Forum, Nomada Association, Polish Humanitarian Action, Volunteers Centre in Lublin.	

Source: Own elaboration.

Annex III: Overview of the Legal Framework on Return Policy

The title of the policy/legislation in English	The title in the original language	Policy Type/Area	Date AnnouncedYear	Active Period (note down if it is expired or repealed)	Description of Policy or short Overview
Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland	Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej (t.j. Dz. U. z 2023 r. poz. 1504.)	protection	13 June 2003	Amendments - last 2023	Regulations regarding granting international and national protection to foreigners
Act of 12 December 2013 on foreigners	Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach	border management, residence	12 December 2013	Amendments - last 2023	Regulations regarding entrance and residence of foreigners in Poland
Ordinance of the Minister of the Interior of 24 April 2015 on the guarded centres and detention centres for foreigners	Rozporządzenie Ministra Spraw Wewnętrznych z dnia 24 kwietnia 2015 r. w sprawie strzeżonych ośrodków i aresztów dla cudzoziemców	detention	24 April 2015	Amendments - last 2021	Regulations regarding: conditions to be met by guarded centers and detention centers for foreigners; organizational and order regulations for the stay of foreigners in a guarded center and detention center for foreigners; conditions for receiving meals and drinks by foreigners placed in a guarded center or detained in a detention center for foreigners and the value of a daily food standard
Ordinance of the Minister of the Interior and Administration of July 20, 2018 on the costs related to the execution of the decision obliging a foreigner to return	Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 20 lipca 2018 r. w sprawie kosztów związanych z wykonaniem decyzji o zobowiązaniu cudzoziemca do powrotu		20 July 2018	Active	The ordinance specifies: a detailed method of calculating the costs associated with bringing a foreigner to the border or to the airport or sea port of the country to which he is brought; the amount of the flat-rate daily costs of a foreigner's stay in: a) a room of the Border Guard or Police intended for detained persons, b) a guarded center or arrest for foreigners.
Ordinance of the Minister of the Interior and Administration of 21 March 2019 on the template of an application for placement of a foreigner in a detention camp or for applying for a detention center for foreigners and a template of an application for extending the period of stay of a foreigner in a detention center or arrest	Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 21 marca 2019 r. w sprawie wzoru wniosku o umieszczenie cudzoziemca w strzeżonym ośrodku albo o zastosowanie wobec niego aresztu dla cudzoziemców oraz wzoru wniosku o przedłużenie okresu pobytu cudzoziemca w strzeżonym ośrodku albo areszcie	technicalities	21 March 2019	Active	The ordinance regulates document templates
Act of March 12, 2022 on assistance to citizens of Ukraine in connection with an armed conflict on the territory of this country	Ustawa z dnia 12 marca 2022 r. o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa	Ukrainian Crisis	12 March 2022	Amendments - last 2023	The Act specifies specific rules for legalizing the stay of citizens Ukrainians who came to the territory of the Republic of Poland from the territory of Ukraine in connection with hostilities carried out on the territory of this country, and citizens of Ukraine holding the Pole's Card who, together with their immediate family, arrived on the territory of the Republic of Poland due to these hostilities

Source: Own elaboration.

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Decentring the Study of Migrant
Returns and Return Policies

Legal and Policy Infrastructures of Returns in the Netherlands

Country Dossier (WP2)

Authors

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List of abbreviations

AMIF	Asylum, Migration and Integration Fund	
AVIM	Aliens Police	Vreemdelingen Politie
AZC	Asylum Seekers Reception Centre	Asielzoekers Centrum
CJEU	Court of Justice of the European Union	
COA	Central Agency for the Reception of Asylum Seekers	Centraal Orgaan voor opvang van Asielzoekers
DGM	Directorate General for Migration	Directoraat Generaal Migratie
DJI	Judicial Institutions Service	Dienst Justitiële Inrichtingen
DV&O	The Transport and Support Service	Dienst Vervoer en Ondersteuning
ERRIN	European Return and Reintegration Network	
E&S	The Dutch Information System “Implementation and Detection”	Executie & Signalering
ECHR	European Convention on Human Rights	
ECtHR	European Court of Human Rights	
INS	Immigration and Naturalisation Service	Immigratie en Naturalisatie Dienst (IND)
IOM	International Organisation of Migration	
KMar	Royal Military Police	Koninklijke Marechaussee
MS	Member State	
NP	National Police	Nationale Politie
REAN	Return and Emigration Assistance from the Netherlands	
R&DS	Repatriation and Departure Service	Dienst Terugkeer en Vertrek (DT&V)
RvS	Council of the State	Raad van State
TCN	Third-country national	Derdelander
The Minister	The Minister of Justice and Security	
UAM	Unaccompanied Minor	Alleenstaande minderjarige vreemdeling (Amv)
VB	The Aliens Decree of 2000	Vreemdelingenbesluit
VC	The Aliens Act Implementation Guidelines	Vreemdelingencirculaire
VV	Regulation for Aliens 2000	Voorschrift Vreemdelingen
VW	The Aliens Act of 2000	Vreemdelingenwet
ZHP	Sea Port Police	Zeehaven Politie

Summary

This report has mapped out the legislative, institutional and procedural frameworks and infrastructures concerned with returning the unauthorised migrants from the Netherlands. A focus on the period 2015-2023 was maintained. An overview on the return statistics is provided. Furthermore, the policy and legislative developments were tracked down. The relation between the Dutch national legislation, the European and international law has been explained. The procedures regarding return both at the border and from within the national territory, return of the unaccompanied minors, forced and voluntary return have been explained in detail in section 4. In addition to special cases regarding the obligation to return, entry bans, detention and safeguards. The institutional framework has been outlined where the organisations and involved actors in implementing returns were enlisted as well as the dynamics of their collaboration within the so-called “Migration Chain”. The report has included the readmission efforts of the Netherlands both with EU and non-EU countries, regarding the readmission of the undesirable and the unauthorised migrants in sections 4 and 6. Additionally, the fundings allocated to the return efforts and programs are included under section 7. Finally, the gaps in the legislative, institutional and international cooperation frameworks were highlighted under section 8.

It is concluded that, there has been an increased interest in return enforcement in the last two decades during which the return policy became a priority on the Dutch migration agenda. At the same time, the policy discretion in this area was increasingly constrained with the adoption of the EU Return Directive in 2008, and the CJEU caselaw developed since then. Regarding relevant issues, the Dutch policy tends to implement the EU obligations in a very limited way, for instance regarding the principle of detention as a measure of last resort, including the narrow judicial scrutiny of detention measures, and the detention regime, which does not reflect the nature of immigration detention as an administrative measure. Thus, the immigration detention policy is at odds with the principles of necessity and proportionality. Although regarding the return of unaccompanied minors, the Dutch policies have been found in violation of the Return Directive. The Dutch government still seeks or stretches the limits of that judgment by retaining a different treatment between UAMs of 15 years old and those who are younger than 15. Also, by leaving room for a legal limbo after the issuance of a return decision to UAMs. This renders the Dutch policy and its latest amendments non-compliant with the EU legislation and principles, in particular, the principal of the best interest of the child. The active role of national courts, however, has brought these gaps to light with preliminary questions, and enforced improvements.

Litigation by NGOs has led to shelter, healthcare and basic needs for rejected asylum seekers who stay irregularly at the Dutch territory. They had filed collective complaints on the basis of the European Social Charter, after the Dutch government had decided in 2001 to withdraw all support to rejected asylum seekers who had exhausted their judicial means, and at the same time introduced the so-called Linking Act, which excluded irregular migrants from public services. Since the decisions of the European Committee on Social and Economic Rights that this policy is against the ESH and the principle of human dignity, the government offers shelter to them, however on a temporary basis and under the condition that they cooperate with their return. Individual regularisation of rejected asylum seekers or other irregular migrants who face obstacles to be returned, takes place scarcely, and the last group regularisation for rejected asylum seekers happened in 2007, followed by a regularisation specifically for irregular

children in 2013 (with a review of those who initially were rejected in 2019).¹ The lack of regularisation leaves many irregular migrants in legal limbo, homeless, and deprived of basic care, provisions and rights.² Also in this case, the government implemented the ECSEER decision, but partially. Since these decisions, the Dutch government has refused to ratify any optional protocol to human rights treaties, impeding NGOs and lawyers to invoke human rights obligations towards the state.

Based on these findings, this report proposes the following policy recommendations to the Dutch migration authorities, which also serve as points of attention for the European Commission while supervising the Netherlands' compliance with the Union Law:

- I- Better implementation of the Return Directive and the EU case law by adhering to the principles of necessity and proportionality, anchoring the best interest of the child and respecting the fundamental rights of migrants.
- II- Structurally practice less coercive enforcement measures instead of using detention to avoid absconding. Detention must be a measure of last resort and implemented for the shortest term possible and only if no other measures are possible. Also, migrants must have the opportunity to be heard before the decision of detention and its extension.
- III- Detention must be held as an administrative measure where the restrictions and duration are reduced to the minimum while taking into consideration the needs and vulnerabilities of the migrants held in detention.
- IV- The protection of the child's rights and best interest should be emphasised in the national legislation (Aliens Act, Decree and Implementation Guidelines). Clear guidelines and criteria on the assessment of the availability of adequate reception for unaccompanied minors in the countries of return must be provided and uncertainty must be avoided.
- V- There must be independent bodies that monitor the return and detention practices. The recent intention to transfer the National Prevention Mechanism to the National Institute for Human Rights is strongly encouraged.
- VI- Given the success of the LVV scheme, the government should consider renewing the agreement with the Dutch Municipalities Association (VNG) and turn it into an improved and sustainable structure.
- VII- Finally, there will always be immigrants who cannot be returned: no return policy can guarantee a 100% success rate. Instead of leaving those who cannot be returned in a legal and humanitarian limbo, which is currently the case, they should be entitled to a residence permit. The current threshold for in-country applications on this ground is far too high and regularisations are rare in the Dutch context. In sum, the absence of options for legal residence renders the overall migration management policy ineffective.

Keywords: return, deportation, detention, unaccompanied minors, return policy, return migration governance.

¹ "Generaal pardon," Amnesty Int., <https://www.amnesty.nl/encyclopedie/generaal-pardon>; Kamerbrief over uitvoering motie Van Dijk, March 14, 2022, <https://www.rijksoverheid.nl/documenten/kamerstukken/2022/03/14/tk-uitvoering-motie-van-dijk-sp>.

² See also the publication of Lisa Berntsen, Tesseltje de Lange and Conny Rijken, *Migranten zonder verblijfsvergunning: Rechten en sociaaleconomische positie in Nederland* (Amsterdam: Amsterdam University Press, 2022), www.aup.nl/en/book/9789462989740/migranten-zonder-verblijfsvergunning.

The GAPs Project

GAPs is a Horizon Europe project that aims to conduct a comprehensive multidisciplinary study on the drivers of return policies and the barriers and enablers of international cooperation on return migration. The overall aim of the project is to examine the disconnects and discrepancies between expectations of return policies and their actual outcomes by de-centring the dominant, one-sided understanding of “return policymaking.” To this end, GAPs:

- examine the shortcomings of EU’s return governance;
- analyse enablers and barriers to international cooperation, and
- explore the perspectives of migrants themselves to understand their knowledge, aspirations and experiences with return policies.

GAPs combines its decentring approach with three innovative concepts:

- a focus on return migration infrastructures, which allows the project to analyse governance fissures;
- an analysis of return migration diplomacy to understand how relations between EU Member States and with third countries hinder cooperation on return; and
- a trajectory approach that uses a socio-spatial and temporal lens to understand migrant agency.

GAPs is an interdisciplinary 3-year project (2023-2026), co-coordinated by Uppsala University and the Bonn International Centre for Conflict Studies with 17 partners in 12 countries on 4 continents. GAPs' fieldwork has been conducted in 12 countries: Sweden, Nigeria, Germany, Morocco, the Netherlands, Afghanistan, Poland, Georgia, Turkey, Tunisia, Greece and Iraq.

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1. Statistical Overview regarding Returns and Readmissions at the National Level

In the Netherlands, the statistics on return and readmissions are provided by the Repatriation and Departure Service (DT&V). The statistics are generated through the aggregate numbers of returns provided by the cooperating organisations working on the asylum procedure, reception and return of the migrants who do not or no longer have the right to stay in the Netherlands.* The existing data are disaggregated into two categories of return, namely the demonstrated departures from the Netherlands and the category of people that are assumed to have left the country. The category of demonstrated returns include both forced and assisted/voluntary returns. The ones that are assumed to have returned are TCNs who have left on their own, without supervision. As they are not registered anymore, the authorities tend to report that they have departed ‘independently’.

The data on the demonstrated returns are also disaggregated based on the nationality of the returnees and country of return which can be a non-EU country or a MS under the Dublin regulation.³ Forced return is counted by the DT&V through aggregating the numbers of returns from the immigration and criminal detention. Independent return is calculated through aggregating the numbers of migrants who have received basic departure or reintegration support from the IOM or from one of the NGOs working on returns.⁴

Furthermore, there are data available on the top five nationalities that return from the Netherlands and on the return numbers from migration detention. These data are publicly accessible on the DT&V [website](#). It is important to mention there are great variances between the return statistics provided by the DT&V and those provided by the European Migration Network which draws on statistics provided by Eurostat. Also, the statistics provided in EMN reports and factsheets do not match the statistics provided by the Eurostat for the years 2015, 2016 and 2017 specially the numbers of migrants refused entry at the borders, found to be illegally staying, ordered to leave and returned following an order to leave. In addition to that, in the years 2016, 2017 and 2018 the EMN provides different forced return figures than the DT&V, EMN provides 5520, 5510 and 5470 for these three years,⁵ while the DT&V provides 2220, 3390 and 2650.

* IND, DT&V, COA, KMar, IOM, NP, Aliens Police, DJI, DVO.

³ Ministerie van Justitie en Veiligheid, “Instroom- en vertrekcijfers,” *Dienst Terugkeer en Vertrek*, August 1, 2023, <https://www.dienstterugkeerenvertrek.nl/over-dtv/cijfers>.

⁴ Ibid

⁵ European Migration Network, “The Netherlands EMN country factsheet, main developments in migration and international protection including latest statistics,” *European Commission* (2018), 8.

2. The Political Context/Framework

This section focuses on the policy developments since 2015. However, it is of great importance to outline the policy context and general framework starting with the Aliens Act 2000, by which the government departed from its policy to continue offering rejected asylum seekers reception facilities as long as they cooperated with their return. This policy had been introduced in 1997, which led to a procedure aiming to receive travel documents from the embassy of the country of origin. The rejected asylum seeker was under the obligation to cooperate with the immigration authorities to receive a *laissez passer* to return.

In case the immigration authorities concluded that he/she insufficiently cooperated, the person would no longer be entitled to reception facilities.⁶ As in the same period, the government introduced the Benefit Entitlement Act, (often called the Linking Act, referring to the Dutch term *Koppelingswet*), which conditioned entitlement to social rights to legal residence, these rejected asylum seekers ended up in the streets without any access to services, except education for minors, necessary health care and legal aid.⁷ The deprivation from reception facilities led to initiatives from churches and civil society organisations offering shelter to those rejected asylum seekers and contesting that they had not cooperated with their return. This was followed by a parliamentary debate about the criteria determining the actual cooperation, leading to the instalment of an independent committee tasked to review the criteria for non-cooperation.⁸

In 1999 the government introduced a new policy, based on the principle that rejected asylum seekers must take their own responsibility to return and that it is therefore not the responsibility to assess the level of cooperation.⁹ According to the government, the interaction between the returnee and the embassy is a 'black box', which makes the attitude of the returnee difficult to verify. In the new reasoning of the government, rejected asylum seekers have in principle always the possibility to return. Since then, reception facilities automatically end 28 days after the decision in appeal, or in case no appeal has been submitted, 28 days after the rejection decision. This new exclusion policy is called the 'no-fault policy', referring to the exception made for migrants who prove that they cannot return due to external, objective circumstances. For instance, if authorities of their state of residence are not responsible, or in case of a failed state. As the risk of refoulement has already been assessed in the asylum procedure, these criteria don't play a role at this stage. Migrants who can prove such objective obstacles would keep their entitlement to reception and would be issued a temporary residence permit. If after three years they would still be unable to return, their permit would become permanent. However, a residence permit has only been issued in very few cases, mainly to stateless people, for instance stateless Palestinians. In 2005, this criterion was extended to migrants with a nationality, who could prove the existence of objective obstacles to return.¹⁰

⁶ Letter of 3 June 1997, Notitie over het terugkeerbeleid, *Kamerstukken II* 1996/97, 25386, no. 1.

⁷ Staatsblad, 1998, no. 203. See also Joanne van der Leun, "Excluding illegal migrants in The Netherlands: Between national policies and local implementation," *West European Politics*, no. 29:2 (2006): 310-326, <https://doi.org/10.1080/01402380500512650>.

⁸ *Handelingen II* 1996/97, p. 655-685; for the final advice see *Kamerstukken I* 1997/98, 19637, no. 322.

⁹ Letter of the Secretary of Justice of 6 July 1999, Notitie over het terugkeerbeleid, *Kamerstukken II* 1998/99, 26646, no. 1.

¹⁰ *Kamerstukken II* 2010/13, 29344, no. 109.

Since the so-called no-fault policy, most rejected asylum seekers were forced to leave the reception centres in which they resided, without an alternative accommodation at their disposal. These practices, which were heavily contested by parts of society, led to local initiatives by civil society and municipalities developing alternative housing and support to them.¹¹ Two main developments have significantly reduced the number of people without shelter. The first happened in 2007, when a newly elected coalition of Christian Democrats (CDA), Social Democrats (PvdA) and a small Christian party (CU) agreed to regularise rejected asylum seekers who already filed an asylum application before the entry into force of the Aliens Act 2000.¹²

This decision was coupled with the aim to reach an agreement with municipalities to dismantle their local shelters and to refrain from accommodating rejected asylum seekers under the Aliens Act 2000. The second development was the outcome of a collective complaint filed in 2008 by the Dutch department of Defence for Children with the European Committee on Social Rights, a Council of Europe body that supervises compliance by Member States with the European Social Charter.¹³

In its decision of October 2009, the Committee concluded that the policy to deprive children from all basic needs, was a violation of Articles 31(2) and 17(1) of the European Social Charter, and that the Dutch government has to provide adequate shelter and basic care to children who are unlawfully present in the Netherlands.¹⁴ As Dutch courts recognised this decision and ordered the government to implement it, the government appealed to the highest civic court. The *Gerechtshof* ruled in 2011 that depriving children of basic needs is inhuman and unlawful and that children, with their parents, have to be provided with adequate shelter and care.¹⁵ This ruling was confirmed by 2012 the *Hoge Raad* decision.¹⁶ Since then, the government provided closed family centres (*gezinslocaties*) for rejected asylum seeker families and children, with the aim to return them.¹⁷ According to the DT&V, detention for families with minor children is considered as a “last resort and might not last for longer than two weeks”.¹⁸

A complaint to the ECSR* by the Conference of European Churches (CEC) followed in January 2013, requesting the provision of these basic needs for adults. In October 2013, the European Committee invited the Dutch government to take immediate measures to ensure that basic needs (shelter, clothes and food) are met for undocumented migrants.¹⁹ In its decision on the merits, the ECSR decided that denying irregular migrants the right to necessary food, water, clothing and shelter constitutes a breach of the right to human dignity. According to the ECSR,

¹¹ Katie Kuschminder and Talitha Dubow, “Moral Exclusion, Dehumanisation, and Continued Resistance to Return: Experiences of Refused Afghan Asylum Seekers in the Netherlands,” *Geopolitics*, no. 28:3 (2023): 1057-1078, <https://doi.org/10.1080/14650045.2022.2055462>.

¹² Coalition agreement Christen Democratisch Appel (CDA), Partij van de Arbeid (PvdA) en ChristenUnie (CU), “Samen werken, samen leven,” 7 February 2007, p. 43.

¹³ ECSR, 14 January 2008, Complaint: Defence for Children International (DCI) v. the Netherlands, compliant no. 47/2008.

¹⁴ ECSR, 20 October 2009, Decision on the merits: Defence for Children International (DCI) v. The Netherlands, compliant no. 47/2008, www.coe.int.

¹⁵ *Kamerstukken II* 2010/11, 29344, no. 79.

¹⁶ HR 21 September 2012, no. 11/01153, ECLI:NL:HR:2012:BW5328.

¹⁷ *Kamerstukken II* 2011/12, 29344, no. 85.

¹⁸ European Migration Network. “Annual Policy Report 2015 Migration and Asylum in the Netherlands,” (June 2016): 71.

* European Committee of Social Rights.

¹⁹ ECSR, 25 October 2013, Decision on Immediate Measures: Conference of European Churches (CEC) v. the Netherlands, compliant no. 90/2013.

the equal treatment provision regarding social and medical assistance of Article 13(4) of the RESC* (which refers to lawfully present migrants), is also applicable to migrants in an irregular situation. It concluded that the right to shelter, as enshrined in Article 31(2) RESC must unconditionally apply to adult migrants in an irregular situation, “even when they are requested to leave the country”.²⁰ The highest administrative court ruled in December 2014 that, based on the ECSR decision, municipalities are obliged to offer adequate shelter (bed, bread and bath) to irregular migrants.²¹

The government decided to finance the implementation of this ruling by the municipalities. The Council of Europe Committee of Ministers’ resolution upheld the validity of the ECSR, but also echoed the concerns expressed by the Dutch government that, as irregular migrants are explicitly excluded from the scope of the Charter, ECSR’s ‘unwarranted interpretation’ could discourage Member States from accepting the collective right of complaint.²² The Dutch government decided to only partially implement the decision, by providing reception facilities to irregular migrants, but under the condition that they cooperate on their return. In April 2015, the governing coalition parties, the conservative liberals (VVD) and social democrats (PvdA), finally reached an agreement to implement the ECSR decision by providing reception facilities to irregular migrants, but for a limited period and under the condition that they cooperate on their return.²³ These two restrictions were not in accordance with the ECSR’s decision and the national case-law. This policy measure was confirmed in the 2017 coalition agreement of the conservative liberals (VVD), Christian democrats (CDA), social liberals (D66) and the Christian party (CU), where the number of the LVV’s was extended to eight facilities, and the reception was offered under the condition of cooperation with return.²⁴ It led to an agreement between the Ministry of Justice and Security and the Dutch Association of Municipalities (VNG) in 2018 and was implemented as a pilot project from 2019 until 2022.²⁵ The evaluation report of the LVV-project, concluded that for 60 percent of the irregular migrants hosted and supported in these facilities a (semi-) sustainable solution was found in the form of legal residence, return or migration to another country.²⁶

The evaluation makes clear the high burden of proof for meeting the objective ‘no-fault’ criterion impedes a solution for rejected asylum seekers. Another political development impedes a solution for this category of irregular migrants as well, which is the decision to abolish the possibility for the Secretary of State for Immigration to make use of his ‘discretionary competence’ to regularise a person on humanitarian grounds, who had

* Revised European Social Charter.

²⁰ ECSR, 1 July 2014, Decision on the merits: Conference of European Churches (CEC) v. the Netherlands, complaint no. 90/2013, report to the Committee of Ministers, published 10 November 2014.

²¹ CRvB 17 December 2014, ECLI:NL:CRVB:2014:4178.

²² ECSR, 15 April 2015, Resolution CM/ResCHS(2015)5 of the Committee of Ministers: Conference of European Churches (CEC) v. the Netherlands, complaint no. 90/2013.

²³ Ibid.

²⁴ Coalition Agreement VVD, CDA, D66 and Christen Unie, “Vertrouwen in de Toekomst,” 2017-2021, 10 October 2017, <https://www.rijksoverheid.nl/documenten/publicaties/2017/10/10/regeerakkoord-2017-vertrouwen-in-de-toekomst>.

²⁵ European Migration Network. “Annual Policy Report 2018 Migration and Asylum in the Netherlands,” (April 2019).

²⁶ Annemieke Mack, Laura Buimer, Johanneke Rog, Miranda Witvliet, “Eindevaluatie Landelijke Vreemdelingenvoorziening,” *Regioplan*, (October 2022).

exhausted all legal remedies to achieve legal residence.²⁷ The Advisory Board for Migration Affairs advised the government to re-introduce this competence, however without any result.²⁸ Yet, many of the group of approximately 90 failed asylum seekers who lived in Amsterdam and had organised themselves in the 'We are here' group did eventually get a residence permit on individual humanitarian grounds.²⁹

Criminalisation of irregular stay as a deterrence measure, has often been the topic of proposals and discussions in the political arena. In 1999, as part of a new return policy, irregular migrants who repeatedly had not complied with their reporting obligation, could be subjected to an entry ban.³⁰ The consequence of the entry ban is that they cannot (re)gain legal residence (unless the length of the entry ban does not exceed 2 years) and that remaining on the Dutch territory can be penalised with a fine of 3900 euros or imprisonment of six months maximum.³¹ In 2010, the coalition agreement of a right-wing government (a minority government of CDA and VVD, supported by the populist party PVV) included the announcement to criminalise irregular stay in general.³² This led to a legislative proposal submitted to the parliament in 2013 (by the centre-left coalition (VVD and PvdA), formed in 2012.³³ The bill was criticised by the Advisory Department of the Council of State, and led to heightened resistance within the coalition party of the social-democrats. One year later, it was withdrawn as a result of a package deal within the coalition.³⁴

In 2015, the government proposed a uniform regime for the immigration detention in the context of forced returns, through the Repatriation and Detention of Aliens Act.³⁵ This bill aimed to finally implement the obligation of the Return Directive by enshrining the principle that detention is a measure of last resort and by ensuring that the regime of immigration detention (which was still prison-like in the Netherlands) is proportionate, reflecting the nature of administrative detention. It included for instance the obligation to take into account vulnerabilities of the TCNs. However, this legislative proposal is still pending in the Senate, because of severe criticism which reflects doubts about conformity with the Return Directive.³⁶ This criticism is concerned with the lack of safeguards, including to ensure that detention is used as a measure of last resort and to protect vulnerable people (including children), the lack of alternatives to detention and of a tailor-made approach, as well as the broad interpretation of the risk of absconding.³⁷ Experts also criticised the proposed regime of immigration

²⁷ Regeling van de Staatssecretaris van Justitie en Veiligheid van 26 April 2019, no. 2570168, houdende wijziging van het Voorschrift Vreemdelingen 2000 (honderddrieënzestigste wijziging), *StcR.* 2019, nr. 24697, April 30, 2019.

²⁸ Adviescommissie voor Vreemdelingenzaken, "Wetadvies: Afschaffing van de algemene discretionaire bevoegdheid," (July 2019).

²⁹ See for instance Tom Kieft, "Woordvoerder krijgt na 16 jaar verblijfsvergunning," *Het Parool*, July 18, 2018, <https://www.parool.nl/nieuws/we-are-here-woordvoerder-krijgt-na-16-jaar-verblijfsvergunning~b7a7df8c/?referrer=https://www.google.com/>; <http://wijzijnhier.org/>.

³⁰ Letter of the Secretary of Justice of 6 July 1999, Notitie over het terugkeerbeleid, *Kamerstukken II* 1998/99, 26646, no. 1.

³¹ See Articles 67 (1) sub a and 108 Aliens Act 2000.

³² *Kamerstukken II* 2010/11, 32 417, no. 15.

³³ Coalition agreement VVD-PvdA, "Bruggen Slaan", 29 October 2012, <https://www.rijksoverheid.nl/documenten/rapporten/2012/10/29/regeerakkoord>; See the legislative proposal *Kamerstukken II* 2012/12, 33512, no. 2.

³⁴ *Kamerstukken II* 2013/14, 33512, no. 3 and 13.

³⁵ *Kamerstukken II* 2015/2016, 34309, no. 2.

³⁶ *Kamerstukken II* 2015/2016, 34309, no. 2.

³⁷ See *Kamerstukken I* 2018/2019, 34309, nos. B, D, and E; see also Annemarie Busser, Revijara Oosterhuis and Tineke Strik, "Vreemdelingendetentie (I): Detentie-omstandigheden onder huidig

detention, which implied that returnees would start their detention in a very restrictive regime, where they could be awarded with more freedoms if they show ‘good behaviour’. According to experts the regime does not sufficiently reflect the administrative nature of the detention, by using excessive restrictions of the liberties of detainees and by the possibility for the director of the detention centre to isolate people on very broad grounds.

Based on this criticism and other new developments, the government announced in 2019 that it would propose amendments to the legislative proposal.³⁸ As a consequence, the Senate decided to further await the proposed amendments, among them an amendment to the rules towards immigrants causing nuisance and hindrance which has been submitted to the parliament in June 2020.³⁹ In February 2023, the government informed the Senate again that it intended to submit another amendment to the legislative proposal, regarding measures to be made in case of security incidents in detention, for instance by exceeding the maximum period of isolation, and regarding a legal ground for immigration detention for categories not falling under EU law. The government therefore requested further postponement of the adoption of the initial legislative proposal (which had already been submitted in 2015).⁴⁰

In 2022, the VC was amended regarding the return of UAMs whose asylum application had been rejected, but where their access to adequate reception facilities in the country of origin was not yet verified. Through this amendment UAMs were provided with a legal right to stay in the Netherlands pending the period of the investigation.⁴¹ This amendment was the result of the CJEU ruling in the T.Q. case, in which the Court ruled that the differentiation made in the Dutch return practices and rules between UAMs younger than 15 and UAMs aged 15 or older, was in breach of Article 10 of the Return Directive.⁴² The EU Return Directive prescribes that before taking a return decision for an UAM, the MS shall determine whether the child is returned to a family member, a nominated guardian or adequate reception facilities in the country of origin (Article 10(2)). In the Dutch Aliens Circular, this was only investigated for children who are younger than fifteen years old (see VC B8/6). For an UAM whose asylum claim had been rejected and who is aged 15 or older at the date of applying for asylum, a return decision was taken without the verification of adequate reception. In practice, children were often not returned until they reached adulthood. This left them in a legal vacuum, with no perspective to integrate at all.⁴³ The CJEU ruled that this distinction based on age was not in line with the Return Directive. To offer children perspective for the future, the MS needs to determine whether there is adequate protection in the country of origin for each UAM (para. 57). If not, the child must be granted legal residence. The Court denounced the legal vacuum that the Dutch policy leaves and emphasised that Member States have only two options: either to issue a return decision and enforce it, in case of available adequate reception in the country of origin. Or make use of Article 6(4) Returns Directive and allow for residence. In its ruling, the Court refers to the best interests of the child, as enshrined in Article 24(2) CFR and Article 5(a) EU Returns Directive, emphasising that a long period of insecurity harms the interests of

regime en onder wetsvoorstel getoetst aan internationale normen,” *A&MR*, no. 8 (2019) and Annemarie Busser, Revijara Oosterhuis and Tineke Strik, “Vreemdelingendetentie (II): Gronden getoetst aan wetsvoorstel en aan Europees en internationaal recht,” *A&MR*, no. 9 (2019).

³⁸ *Kamerstukken I* 2018/2019, 34309, no. I.

³⁹ *Kamerstukken II* 2019/2020, 35501. See also *Kamerstukken I* 2021/22, 34309 / 35501, no. M.

⁴⁰ *Kamerstukken I* 2022/2023, 34309, no. N.

⁴¹ European Migration Network, “Annual Report on Migration and Asylum 2022,” July 2023.

⁴² CJEU 14 January 2021, C-441/19, ECLI:EU:C:2021:9 (TQ v Staatssecretaris van Justitie en Veiligheid).

⁴³ Ministerie van Justitie en Veiligheid, “Buiten schuld,” (July 19, 2020).

the child. For a further explanation on the policies towards UAMs whose asylum claims were rejected, see section 4.7 of this report.

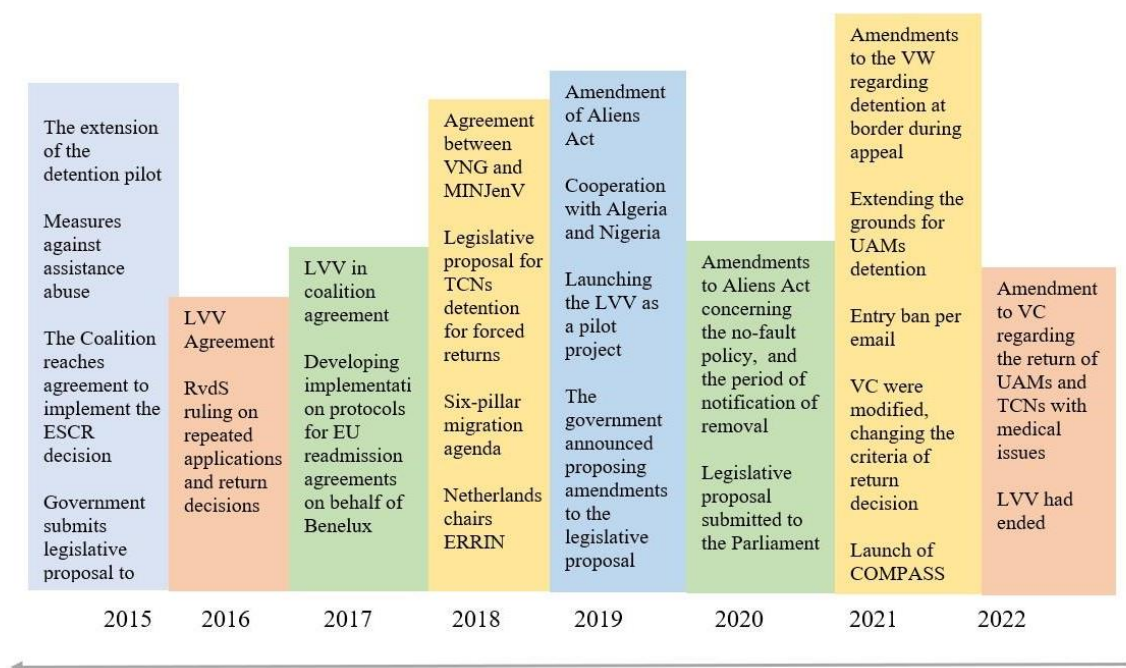


Figure (1) Return Policy Developments Timeline

3. Relationship between national law/EU law/public international law

The Netherlands has a moderately monist legal system that is characterised by relative openness towards international law which means that the national and international legal orders are complementary, and that national authorities are bound by the national and international obligations and international law can be invoked before national courts, also, that treaties automatically become binding for the state and constitute a part of the national legal order.⁴⁴ Article 93 of the Dutch constitution provides that international law becomes part of the national legal order when it enters into force.⁴⁵ Article 94 prohibits the application of national legislation if it conflicts with treaties' provisions.⁴⁶ Both articles provide for the direct effect and primacy of international law. These provisions not only refer to international law but also to the binding decisions of international organisations, including the ECtHR and the CJEU.⁴⁷ Furthermore, a yearly report is provided by the minister of foreign affairs to the parliament on the judgements made against the Netherlands and against the state parties which might affect the Dutch legal system.⁴⁸

The Netherlands has signed and ratified 12 human rights treaties, and the United Nations treaties such as the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (ICRC), International Covenant on Civil and Political Rights (ICPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1951 Refugee Convention (RC) and its 1967 Protocol and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (ICRPD). It is important to mention that the Netherlands has not signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW).⁴⁹ The Netherlands has ratified the optional protocols to the CAT (OPCAT), the ICPR and CEDAW. However, the OPCAT is only applicable at the European territory of the Kingdom of the Netherlands, not on the islands overseas.

The government signed the optional protocols to the ICESCR and the ICRC (on a communications procedure) in 2009, but it remained reluctant to ratify these protocols,

⁴⁴ European Commission for Democracy Through Law (Venice Commission), "Comments on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts," (Council of Europe, September 30, 2014), accessed August 1, 2023.

⁴⁵ European Commission for Democracy Through Law (Venice Commission), "Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts," (Council of Europe, December 8, 2014), accessed August 1, 2023.

⁴⁶ The Constitution of the Kingdom of the Netherlands 2002
<https://www.rechtspraak.nl/SiteCollectionDocuments/Constitution-NL.pdf>.

⁴⁷ European Commission for Democracy Through Law, "Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts," (Council of Europe, December 8, 2014), accessed August 1, 2023.

⁴⁸ See for the latest report "Jaarbericht 2022. Procesvertegenwoordiging Hof van Justitie van de EU: Inbreng van de Nederlandse regering," Ministerie van Buitenlandse Zaken, 1 May 2023,
<https://ecer.minbuza.nl/ecer/hof-van-justitie/jaarverslagen-procesvoering-nederland.html>.

⁴⁹ OHCHR, "View the Ratification Status by Country or by Treaty," United Nations Human Rights Treaty Bodies, accessed August 3, 2023,
https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=123&Lang=EN.

despite several calls from the Senate to do so.⁵⁰ The Dutch government even failed to sign the optional protocol to the ICRPD. As a result, citizens or NGOs are not able to file a complaint if in their view, the Dutch policy breaches the obligations stemming from the convention concerned. This reluctance seems to be related to the decisions of the supervisory committee to the European Social Charter (ECSE), in response to collective complaints on the exclusion of basic rights regarding irregular migrants (see further chapter 2).⁵¹ Apart from the lack of collective complaints, the supervisory committees of the treaties provide evaluations with recommendations, which have a non-binding but authoritative status. The government either implements them, or argues why it doesn't. In addition to the UN instruments, the Council of Europe has a number of binding or normative instruments, of which the most relevant is the European Convention of Human Rights (ECHR) with the right of individual complaints at the ECtHR. The Committee against Torture (CAT), which acts based on the ECHR and the prison rules, monitors the situation of people deprived of their liberty, including in transit zones or immigration detention centres. Its recommendations are taken seriously, but are not binding. The ECSE, monitoring the application of the European Social Charter, is also part of the normative framework of the Council of Europe.

Treaty provisions that are self-executing, can be applied directly by the court. As an EU Member State, the Netherlands is not allowed to take measures that conflict with or fail to satisfy the obligations arising from the EU treaties and laws.⁵² EU Directives have to be transposed through national legislation, but during the transposition period, the state is not allowed to change its policy in a way that contradicts the EU directive. Self-executing provisions can be invoked from the moment that the directive has entered into force. EU Regulations are immediately binding and invocable, as they need not to be transposed into national law. Concerning EU law, the Netherlands transposed the Return Directive end of 2011, exceeding the deadline for implementation with one year.⁵³ The EU legal instruments on return, asylum and legal migration are transposed into national legislation through amendments of the Aliens Act (*Vreemdelingenwet*, Vw) or Aliens Decree (*Vreemdelingenbesluit*, Vb). Further detailed guidelines are laid down in the Aliens Circular (*Vreemdelingen-circulaire*, Vc).

⁵⁰ Motion Strik c.s. adopted 18 March 2014, *Kamerstukken I* 2013–2014, 33750, no. VI, M.

⁵¹ ECSE, 20 October 2009, Decision on the merits: Defence for Children International (DCI) v. The Netherlands, complaint no. 47/2008, www.coe.int. ECSE, 1 July 2014, Decision on the merits: Conference of European Churches (CEC) v. the Netherlands, complaint no. 90/2013, report to the Committee of Ministers, published 10 November 2014.

⁵² Netherlands Court of Audit <https://english.rekenkamer.nl/publications/frequently-asked-questions/european-union/how-do-the-netherlands-comply-with-eu-law>.

⁵³ Staatsblad 2011, no. 663.

4. The Institutional Framework

In the field of migration governance in the Netherlands there are multiple organisations cooperating on managing admissions, reception and return. Also, on developing and coordinating policies and their implementation.⁵⁴ These organisations exist on the national and local levels and their cooperation is known as the “Migration Chain”.⁵⁵ There are two migration chains in which organisations collaborate, the small chain consists of the IND, DT&V and COA, which are the bodies that focus exclusively on admission, reception and return of foreign nationals and have close collaboration and consultation moments during the return procedures and removability checks,⁵⁶ while the large chain is more diverse and consists of governmental, intergovernmental, and non-governmental organisations that have a role in the return process such as the IOM.

The main organisation responsible for conducting the returns is the DT&V which has various partners with whom there is close collaboration, for example, the DT&V receives case files from the IND, AVIM and KMar, while the collaboration with the COA entails that COA focuses on removing the factors hindering the departure and prepare the individuals for the “future”.⁵⁷ In addition to that, there is the DJI and its support department DV&O, the first is responsible for implementing the detention of TCNs in case the DT&V or a public prosecutor issues a detention order while the second is responsible for providing the logistical support. This includes transport to the detention facility or to the airport from which the TCN would be removed whether on a regular commercial flight that is booked by a contracted travel agent or on a state charter flight coordinated by Frontex and other MSs. The KMar provides escorts to accompany the returnee in case of forced removal. In the wider migration chain there is the Ministry of Foreign Affairs which is a major partner to the DT&V and the vital point of contact between the Dutch government, foreign governments and international organisations as it is responsible for creating and negotiating return and readmission agreements with the countries of origin and funding the readmission and reintegration activities of the IOM and DT&V.

In the field of assisted returns, IOM is the main partner to DT&V. The DT&V refers to individuals who want to return voluntarily or require and are eligible for return assistance to the IOM which is subsidised by the Ministry of Justice and Security, Ministry of Foreign Affairs and the EU. There are also various NGOs that work on the return and readmission of TCN such as Goedwerk Foundation, Solid Road, Stichting Wereldwijd, Stichting ROS and the Dutch Council for Refugees.⁵⁸

In case of returning UAMs, the Guardianship Organisation (NIDOS) is the main contact point for the DT&V, while the Dutch Council for Refugees helps in providing information and in drawing a return plan and connect the returnees to partner organisations where they can receive support in their countries of origin.⁵⁹ To a lesser extent the Association of Dutch Municipalities is also a partner to the DT&V and collaborates on providing relevant information for the implementation of the return policy and to whether migrants are departing

⁵⁴ Ministerie van Justitie en Veiligheid, “Samen regelen we terugkeer,” Migratieketen, June 27, 2018, <https://magazines.rijksoverheid.nl/jenv/migratieketen/2018/01/samen-regelen-we-terugkeer>.

⁵⁵ See Appendix III

⁵⁶ Repatriation and Departure Service corporate brochure, “The Repatriation and Departure Service the professional implementer of the return policy,” Ministry of Justice and Security, 2020, p. 22.

⁵⁷ COA, “Reception Centres for Return”.

⁵⁸ “Refugee Help – Return to Nigeria,” n.d.

⁵⁹ Ibid.

the Netherlands or ending up homeless. This cooperation is managed by the Migration Chain Management Directorate (DRM) which falls under the Directorate General for Migration within the Ministry of Justice and Security. The DRM focuses on enabling the organisations in the migration chain to quickly and accurately implement the provisions of the VW and migration policies.⁶⁰ Furthermore, the DRM formulates clear and feasible goals and agreements to achieve them, monitor their implementation and their effects on the whole chain.⁶¹

DT&V, COA and Police work together in asylum seekers centres and have regular consultation meetings (LKO) where they discuss matters such as signals of human trafficking or smuggling, nuisance causing behaviour, changes in the policy and mutual cooperation. Such consultations can also be aimed at designing and coordinating a departure strategy or discussing specific files. The IND is often included in such consultations while NIDOS, VWN or the municipality can be invited if relevant. In case one of the organisations indicates the inability to implement the supposed strategy or if implementation fails, scaling up to the Regional Coordination Consultation (RAO) would take place.⁶² The RAO is a periodic consultation meeting per region which can be one or two provinces, between the department manager of the DT&V, team chief AVIM, COA regional manager and a senior IND employee. More parties can be invited to the RAO such as IOM or NIDOS if needed, such consultations aim to solve the bottlenecks facing the LKOs.⁶³ However, complex issues that might have publicity or political impact are referred by the RAO to the Asylum Council that consists of representatives from IND, KMar, DT&V, COA, National Police, Migration Chain, DMB and connected to a chain marine.⁶⁴ Furthermore, calamities or incidents such as attempted suicide or threat of self-harm must be reported to the Chain-wide Calamity Team.⁶⁵

⁶⁰ Ministerie van Algemene Zaken, “Directoraat-Generaal Migratie (DGM),” Ministerie Van Justitie En Veiligheid | Rijksoverheid.nl, March 17, 2023, <https://www.rijksoverheid.nl/ministeries/ministerie-van-justitie-en-veiligheid/organisatie/organogram/directoraat-generaal-migratie-dgm>.

⁶¹ Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, “Carolien Posthumus afdelingshoofd Ketensturing bij JenV,” Nieuwsbericht | Algemene Bestuursdienst, October 7, 2021, <https://www.algemenebestuursdienst.nl/actueel/nieuws/2021/10/07/carolien-posthumus-afdelingshoofd-ketensturing-bij-jenv>.

⁶² Ministerie van Justitie en Veiligheid, “Lokaal Ketenoverleg (LKO),” Over DT&V | Dienst Terugkeer En Vertrek, October 27, 2021, <https://www.dienstterugkeerenvertrek.nl/over-dtv/leidraad-terugkeer-en-vertrek/overlegvormen/lokaal-ketenoverleg-lko>.

⁶³ Ibid., “Regionaal afstemmingsoverleg (RAO),” Over DT&V | Dienst Terugkeer En Vertrek, September 28, 2021, <https://www.dienstterugkeerenvertrek.nl/over-dtv/leidraad-terugkeer-en-vertrek/overlegvormen/regionaal-afstemmingsoverleg-rao>.

⁶⁴ Ibid., “Deelberaad Asiel (DA),” Over DT&V | Dienst Terugkeer En Vertrek, September 28, 2021, <https://www.dienstterugkeerenvertrek.nl/over-dtv/leidraad-terugkeer-en-vertrek/overlegvormen/da>.

⁶⁵ Ibid., “Calamiteiten en incidenten,” Over DT&V | Dienst Terugkeer En Vertrek, September 28, 2021, <https://www.dienstterugkeerenvertrek.nl/over-dtv/leidraad-terugkeer-en-vertrek/knelpunten-en-oplossingen/calamiteiten-en-incidenten>.

4.1 List of Authorities Involved in the Return Migration Governance as Defined and Authorised by the Law

Authority (English and original name)	Tier of government (national, regional, local)	Type of organisation	Area of competence in the fields of return (Briefly explain the role)	Link
Immigration and Naturalisation Service INS Immigratie en Naturalisatie Dienst IND	National	Governmental	Issuing/ postponing/ lifting of return decisions and entry bans Granting residence permit	https://ind.nl/en
Return and Departure Service R&DS Dienst Terugkeer en Vertrek	National	Governmental	Removal, support in obtaining travel documents	https://english.dienstterugkeerenvertrek.nl/
Custodial Institutions Agency Dienst Justitiële Inrichtingen DJI	National	Governmental	Migrant detention	https://www.dji.nl/
Transport and Support Service Dienst Vervoer en Ondersteuning DV&O	National	Governmental	Transport	https://www.dji.nl/over-dji/organisatie-dji/landelijke-diensten/dienst-vervoer-en-ondersteuning/organisatie-dvo
Royal Military Police Koninklijke Marechaussee KMar	National	Governmental	Apprehension, detention, issuance of return orders and escorting	https://www.defensie.nl/organisatie/marechaussee
National Police/ Aliens Police AVIM	National	Governmental	Apprehension and issuance of return orders	https://www.politie.nl/
Seaport Police Zeehaven Politie ZHP	National	Governmental	Apprehension and issuance of return orders	
Centraal Orgaan Opvang Asielzoekers COA	National	Governmental	Housing, counselling and coordinating with DT&V and police	https://www.coa.nl/en
The Guardianship Organisation NIDOS	National	Governmental	Guardianship and contact point for DT&V	https://werkenbijnidos.nl/

Table (1) Authorities Involved in Return Migration Governance

5. The National Legal Framework Regarding Return

5.1. Definitions and Concepts

Return decision: decision in which the Minister informs a foreign national in writing that he/she has no right to stay and has to leave the EU territory within a certain period of time. In the same decision, it is provided that, in case of the rejection of an asylum claim, he/she has to leave the reception centre.⁶⁶

Departure: boarding a ship or aircraft intended for departure from the Netherlands.⁶⁷

Voluntary Departure period: a period between 0 and 28 days after the end of the lawful residence or after the rejection of the residence application or appeal within which the TCN has to leave the Netherlands on his/her own initiative. If the person complies with this obligation, no entry ban will be imposed.⁶⁸

Entry ban: a decision that the person concerned is not allowed to re-enter the EU territory for a certain amount of time. If a voluntary departure term was granted, but the person has not complied with it, an entry ban will be imposed. If no voluntary departure term is granted, the return decision also encompasses an entry ban.⁶⁹

Expulsion: the deportation of the TCN that takes place by handing him/her over to the border authorities, and placing him/her on board of an aircraft or ship of the same carrier that has transported him/her to the Netherlands, directly or with stopover in a country where he/she is granted entry.⁷⁰

Foreigner: anyone who does not have Dutch nationality and who must not be treated as a Dutch national based on a statutory provision. This definition encompasses both Union citizens and third country nationals.⁷¹ The Dutch legislation and authorities use the term 'aliens'.

Independent departure: departure by a person which is registered or proven, without the use of force.

Unauthorised departure: 'assumed departure' (as it was not observed) to unknown destination (met onbekende bestemming MOB).

Third-country nationals: non-EU and non-community citizens/ Persons who have nationality of a third state.

Irregular stay of a third-country national: a TCN is staying irregularly in the Netherlands if this person does not fulfil, or no longer fulfils the conditions of entry as set out in Art. 5 of the Regulation (EU) 2016/399 (Schengen Borders Code) or other conditions for entry, stay or residence, and if there are no obstacles to return or a pending application for residence permit.⁷² Although Article 1 of the Return Directive uses the term 'illegally staying',

⁶⁶ Ibid.; Article 62 and 62a Aliens Act 2000.

⁶⁷ Article 4.1 (2) Aliens Decree 2000.

⁶⁸ Article 62 Aliens Act 2000.

⁶⁹ Articles 7 (4) and 45 (8) Aliens Act 2000.

⁷⁰ Implementation Guidelines A, section A3, subsection 6.

⁷¹ Article 1 Aliens Act 2000.

⁷² Ibid. Article 8 Aliens Act 2000.

we prefer the term irregular, which refers to something that does not conform to a set of rules or standards, but may not necessarily be illegal. Furthermore, illegal implies an action or behaviour considered as a criminal offense which is punishable, while irregular refers to a person (staying without authorisation).⁷³

Voluntary departure: the foreign national must leave the Netherlands of his own accord within the departure period.⁷⁴

Safe third country of origin:* based on Aliens Regulation 2000 Article 3.37F, a country is considered safe if there are legal provisions in a democratic system where on a lasting basis there is no persecution, torture, inhuman or degrading treatment, punishment, nor threats of indiscriminate violence. Additionally, the degree of protection against persecution or ill-treatment by means of law, regulations, respect for international human rights obligations, non-refoulement and the legal remedies against violations of rights or freedoms.

Vulnerable persons: (not explicitly named vulnerable) unaccompanied minors, foreign nationals for whom it is not possible to travel in view of the state of health, and foreign nationals who are victims of or witnesses reporting human trafficking.⁷⁵

5.2 Return at the Border

While transposing the Return Directive, the Dutch government chose to use the optional clause of Article 2(2)(a) of the directive and to exclude application of the directive at the borders. As a justification, the government reasoned that Article 13 of the Schengen Border Code is already applicable, offering ground for a refusal of entry, for which the reasons are communicated to the TCN. Adding the Return Directive would imply the obligation to also issue a return decision. Furthermore, the Dutch Aliens Act offers refusal of entry as a legal ground for detaining a TCN, which is absent in the Return Directive. Regarding the duration of this border detention, the Netherlands does apply the Return Directive. This detention ground is only applied at the Schiphol airport. That means that TCNs who arrive at the Dutch territory by crossing the land border and express their wish to apply for asylum, are referred to an open reception centre where their asylum claim is registered. Other irregular TCNs who are detected or apprehended at the territory, are issued a return decision according to the Return Directive.

According to Article 6 of the Aliens Act, the Dutch authorities may hold foreign nationals who have been denied entry at the airport in immigration detention in preparation for their removal. If a foreign national is refused entry or apprehended at the border or if a foreign national enters the Netherlands without a valid travel document or without the required financial means or in case of posing a threat to the public order or security they would be placed in a closed area designated by the border control authorities that is secured against absconding. This measure amounts to de-facto border detention, as foreigners stay on the Dutch territory where the so-called fiction of non-entry applies to them. In case the TCN applies for a residence permit or asylum, they have to remain in the place designated by the border control officer as

⁷³ <https://thecontentauthority.com/blog/illegal-vs-irregular>.

⁷⁴ Ibid. Article 27b Aliens Act 2000.

* The Aliens Decree enlists the EEA, Albania, Algeria, Andorra, Armenia, Australia, Bosnia and Herzegovina, Brazil, Canada, Georgia, Ghana, India, Jamaica, Japan, Kosovo, Morocco, Monaco, Mongolia, Montenegro, New Zealand, North Macedonia, Ukraine, San Marino, Senegal, Serbia, Togo, Trinidad and Tobago, Tunisia, Vatican City, United States, Switzerland as safe countries of origin.

⁷⁵ Article 17 Aliens Act 2000.

part of the procedure as long as there is no decision yet on the lodged application. The maximum duration of the asylum border procedure and detention is four weeks, in line with Article 43(2) Directive 2013/32.⁷⁶ In case further investigation is needed, the TCN would be placed in an open reception centre (AZC).⁷⁷

If the asylum request is rejected during the border procedure, the detention of TCNs will be prolonged during the appeal procedure. Rejected asylum seekers have one week to appeal, after which the court has to take a decision within four weeks. In 2020, amendments were made to the Aliens Act which created a legal basis for continuing detention at the border during the (further) appeal procedure of those whose entry was denied or asylum application rejected.⁷⁸ If the asylum seeker fails to appeal, or after the court has taken a negative decision in appeal, the detention will be prolonged on the basis of the Return Directive. On that legal basis, the maximum total duration of the border detention can last up to 18 months from the moment of the negative decision in appeal. Mostly, migrants are detained for a period less than 3 months at the border and on the territory, yet, there are migrants who have been detained for longer than 6 months.⁷⁹ Families with minor children who apply for asylum, are immediately subject to a screening procedure, after which they are relocated to an open reception centre. The asylum border procedure is not applicable to UAMs neither to people who need special procedural safeguards related to their traumatised experiences in the past, and asylum seekers for whom detention is ‘disproportionally cumbersome’.

5.3 Regular Procedure to Issue a Return Decision

A TCN detected or apprehended while irregularly staying in the Netherlands, can be issued a return decision immediately if he or she does not apply for legal residence. When the TCN lodges an application for legal residence and this application is rejected, the negative decision implies a return decision at the same time. Since 7 March 2023, when issuing a return decision, the government enters an alert for the return decision into the Schengen Information System (SIS) which is visible to border authorities and police in the Schengen countries until the foreign national leaves the EU. The return decision is an administrative decision that is issued by the IND, the Aliens Police, ZHP or the Kmar, and includes the departure term that the TCN needs to comply with. If the TCN fails to meet this term, he/she might be subject to forced removal and could receive an entry ban, which applies to the whole EU and EEA territory. As a rule, the entry ban has a duration of two years, but in case of a serious threat to the public order or national security, the duration can be up to twenty years. Prior to the imposition of an entry ban, the TCN needs to be heard to assess the individual circumstances, to ensure that

⁷⁶ “Border Procedure (Border and Transit Zones),” Asylum Information Database | European Council on Refugees and Exiles, April 11, 2023,

<https://asylumineurope.org/reports/country/netherlands/asylum-procedure/procedures/border-procedure-border-and-transit-zones/>.

⁷⁷ Ministerie van Justitie en Veiligheid, “Border Detention: Return of Foreign Citizens,” Government.nl, August 2, 2022, <https://www.government.nl/topics/return-of-foreign-citizens/border-detention>.

⁷⁸ Staatsblad 2020, 136.

⁷⁹ “Duration of Detention,” Asylum Information Database | European Council on Refugees and Exiles, April 12, 2023, <https://asylumineurope.org/reports/country/netherlands/detention-asylum-seekers/legal-framework-detention/duration-detention/#:~:text=The%20majority%20of%20persons%20are,%2C%20see%20AIDA%202020%20U%20update>.

humanitarian reasons are taken into account in deciding whether or not to impose an entry ban, and if so, with which duration.

In principle, the TCN is granted a voluntary departure term of 28 days, but the Minister can decide to shorten or completely refrain from it. The latter is for instance applicable in case of a risk of absconding or if the TCN poses a threat to public order, policy or national security or has committed a criminal offence. In the latter case the return decision is usually accompanied with an entry ban (see section 4.8 for the exact conditions and criteria). An entry ban cannot be issued without issuing a return order and is only issued to non-EU/EEA nationals. A return decision is also issued when the IND revokes a residence permit or refuses to renew an expiring one.

Thus, a return decision has more legal consequences at the same time: it is a formal decision that the stay is irregular, it implies an order to leave the country within a voluntary departure term (provided for in the decision). If no voluntary departure term is granted, the return decision includes an entry ban. In case of a previous application, the decision includes the rejection of that application. Furthermore the return decision offers the possibility to appeal the decision, and it grants the authorities the competence to enter a place without permission of the owner in order to enforce the decision.⁸⁰ In the specific situation of a rejected asylum claim, the return decision also implies the obligation to leave the reception facilities within the same period.⁸¹ In case of an appeal against the rejection, the term for departure and for leaving the reception facilities is extended until 28 days after the judicial decision in appeal. The appeal against the rejection/return decision in the first instance has automatic suspensive effect, but regarding an appeal in the second instance, the court decides on the suspensive effect based on a request for an interim measure. In case of inadmissibility as another (Member) State is responsible based on the Dublin Regulation, the decision serves as a transfer decision as well, but it does not lead to irregular stay.⁸² It also offers the asylum seekers a voluntary departure term, and if this is not complied with, the transfer will be enforced. As a consequence of the CJEU judgement in *Gnandi*, all effects of the return decision are suspended as long as the appeal procedure is pending, and the asylum seeker is allowed to await this procedure.⁸³

⁸⁰ Article 27 Aliens Act 2000.

⁸¹ Article 45 Aliens Act 2000.

⁸² Article 44a Aliens Act 2000.

⁸³ CJEU 19 June 2018, C-181/16, ECLI:EU:C:2018:465 (*Gnandi*) and CJEU 5 July 2018, C-269/18 PPU, ECLI:EU:C:2018:544 (C).

5.4 Special Cases and their relation with the Obligation to Issue a Return Decision

Inapplicability of apprehension measures

- I. The Aliens Act 2000 Article 50(1) authorises the Dutch police to stop persons in order to check their identity, nationality, and residence status if there is a reasonable suspicion of irregular residence.⁸⁴ However, based on Article 12(b) of the General Law on Entry of 2010, police entry to spaces intended for religious services or for meetings of philosophical nature for the purpose of arrest or apprehension is not allowed during the religious service or the reflection meeting except in the case of red-handed detection.⁸⁵ Under Article 6.5(2-3) of the Aliens Decree 2000, an entry ban will not be issued or will be lifted in case that the TCN is a victim of human trafficking, smuggling, domestic violence, honour-related violence or a witness eligible for reflection time for reporting human trafficking or smuggling. In case that the TCN is involved in procedures before the ICC or other international courts*, the departure term would be extended if the foreigner's presence is necessary.

Apprehension during exit check

- II. In case the Police or KMar finds a TCN at the border during an exit check and the IND provides that the TCN has been staying in the Netherlands irregularly due to the lack of a valid residence permit or due to that the TCN has not applied for a residence permit in the first place, he/she will receive a return decision. It is possible to lodge an objection to the IND or appeal to the court against the decision.⁸⁶

Return decision from another EU MS

- III. If the authorities detect or apprehend a TCN who holds return decision from another EU MS, he or she can be transferred to that country in case of a bilateral agreement without an additional return decision to be taken. In other cases, the Dutch authorities have to issue a return decision based on Dutch law, before they can give effect to such decision, such as a detention measure. Normally, a TCN who is apprehended in the Netherlands due to irregular residence would be issued a return decision and in case of receiving more than one return decision (including in another MS), the TCN would be

⁸⁴ Ruben Timmerman, Arjen Leerkes, Richard Staring, and Nicola Delvino. "'Free In, Free Out': Exploring Dutch Firewall Protections for Irregular Migrant Victims of Crime," *European Journal of Migration and Law* 22, 3 (2020): 427-455, doi: <https://doi.org/10.1163/15718166-12340082>.

⁸⁵ Article 12 Algemene Wet op het Binnentreden.

* The Special Tribunal for Lebanon, the International Yugoslavia Tribunal, the Special Court for Sierra Leone, the Kosovo Relocated Specialist Judicial Institution, or the International Residual Mechanism for Criminal Tribunals.

⁸⁶ Immigratie en Naturalisatiedienst, "Return Decision".

issued an entry ban.⁸⁷ Furthermore, in case the TCN has received a return decision from a MS that enters an alert in the SIS, if he/she is found at the border, the border control officer imposes an entry ban based on Implementation Guidelines of the Aliens Act section A2 subsection 12.4.

Stay during appeal or pending renewal

- IV. In case a TCN is awaiting the outcome of an application for the issuance or renewal of a residence permit, or of appeal in first instance, he/she is allowed to reside in the Netherlands. An appeal in second instance does not have automatic suspensive effect, but the court has to decide on the request for an interim measure by the applicant. However, due to the judgement in *Gnandi*, in the case of an asylum procedure, all effects of the return decision are suspended as long as the appeal procedure is pending, and the asylum seeker is allowed to await this procedure.⁸⁸ As a safeguard in case of a pending residence permit renewal, the foreign national receives a residence endorsement sticker in his/her passport which provides that the foreign national is allowed to reside in the Netherlands during the procedure. In case of delayed decisions or renewal procedures it is possible to receive a second residence endorsement sticker if the first has expired. The validity of the sticker depends on the individual situation with a maximum of six months.⁸⁹

Return decision to TCNs holding residence permit in another EU MS

- V. Under the Article 62a of the Aliens Act, the Minister issues a return decision unless the TCN is in possession of a valid residence permit or another authorisation to stay issued by another MS. In this case the TCN is instructed to enter the territory of the responsible MS immediately, however, in case of non-compliance or if immediate departure is required in the interest of national security or public order, a return decision will be issued.⁹⁰ Furthermore, if a TCN has a valid residence permit in one of but has not complied with the conditions and obligations stated in Article 12 of the Aliens Act concerning means of subsistence, employment, threatening public order or national security, he/she shall be expelled by the officer charged of border control who submits an alert request to the IND.⁹¹ In case the TCN who holds a residence permit from another MS is to be issued a return decision that entails a strict entry ban, consultation procedure has to take place between the authority issuing the return decision (IND, KMar, ZHP, the police) and the MS that has issued the residence

⁸⁷ Immigratie en Naturalisatiedienst, “Entry Ban”.

⁸⁸ CJEU 19 June 2018, C-181/16, ECLI:EU:C:2018:465 (*Gnandi*).

⁸⁹ Immigratie en Naturalisatiedienst, “Appointment Residence Endorsement Sticker,” IND, July 4, 2023, <https://ind.nl/en/appointment-residence-endorsement-sticker#:~:text=A%20residence%20endorsement%20sticker%20is,to%20apply%20for%20a%20stick>er. Accessed August 6, 2023.

⁹⁰ Article 62a Aliens Act; Aliens Circular 2000 VC(A), section A3, subsection 2.

⁹¹ Aliens Circular 2000 VC(A), section A2, subsection 12.2.

permit.⁹² Upon consultation the MS having issued the residence permit might withdraw it and the TCN would receive a return decision and an entry ban with a SIS notification.

Readmission Agreements concerning TCNs declared undesirable

- VI. Concerning TCNs who are declared undesirable, and irregularly staying TCNs, there are various readmission agreements between the Netherlands and other MSs. The agreement between the Netherlands, Belgium and Luxembourg established in 1960 concerning the External Borders of the Benelux Territory stipulates in Article 9 that each of the three countries take back the so called TCNs who are declared undesirable, who entered the territory of the other contracting state from their territory. Furthermore, Article 10 entails that an undesirable foreigner in any of the three states is undesirable in all the Benelux territory.⁹³ Additionally, the Netherlands as part of the Benelux has readmission agreement with Germany established in 1966,⁹⁴ and readmission agreement with France in 1964 which entails that the Benelux countries shall take back foreigners whom France wants to expel and that France takes back foreigners whom the Benelux countries want to expel without formalities or diplomatic intervention.⁹⁵ Similarly with Austria in 1965,⁹⁶ Slovenia in 1992,⁹⁷ Poland in 1991, Romania in 1995,⁹⁸ Armenia in 2009 (readmission agreement however not without formalities).⁹⁹ Provisions concerning admitting and taking back foreign nationals under such agreements are enlisted in the VC, section A3 (6.5).

Transfers under the Dublin regulation

⁹² Aliens Circular 2000 VC(C), section A3, subsection 2.

⁹³ Overeenkomst tussen het Koninkrijk België, het Groothertogdom Luxemburg en het Koninkrijk der Nederlanden, inzake de verlegging van de personencontrole naar de buitengrenzen van het Beneluxgebied, September 14, 2022.

⁹⁴ Overeenkomst tussen de Regering van de Bondsrepubliek Duitsland enerzijds en de Regeringen van het Koninkrijk België, het Groothertogdom Luxemburg en het Koninkrijk der Nederlanden anderzijds, inzake het overnemen van personen aan de grens - BWBV0004479," July 1, 1966.

⁹⁵ Overeenkomst tussen de Regeringen van het Koninkrijk der Nederlanden, het Koninkrijk België en het Groothertogdom Luxemburg enerzijds, en de Regering van de Franse Republiek anderzijds, inzake het overnemen van personen aan de gemeenschappelijke grens van het grondgebied van de Beneluxlanden en Frankrijk - BWBV0004480, May 16, 1964.

⁹⁶ Overeenkomst tussen de Bondsregering van de Republiek Oostenrijk, enerzijds, en de Regeringen van het Koninkrijk België, het Groothertogdom Luxemburg en het Koninkrijk der Nederlanden, anderzijds, betreffende de overname van personen aan de grens - BWBV0004481," April 1, 1965.

⁹⁷ Overeenkomst tussen de Regeringen van het Koninkrijk der Nederlanden, het Koninkrijk België en het Groothertogdom Luxemburg, enerzijds, en de Regering van de Republiek Slovenië, anderzijds, betreffende de overname van onregelmatig binnengekomen of verblijvende personen - BWBV0001062, November 16, 1992,

⁹⁸ "Internationale Overeenkomsten," *SDU* 8 (January 1994).

⁹⁹ Tractatenblad 2009, 124. Officiële bekendmakingen September 16, 2009. Overeenkomst tussen de Benelux-Staten (het Koninkrijk België, het Groothertogdom Luxemburg, het Koninkrijk der Nederlanden) en de Republiek Armenië betreffende de overname van onregelmatig verblijvende personen (met Uitvoeringsprotocol) Brussel, June 3, 2009.

- VII. In principle, the Return Directive is not applicable if the Dublin Regulation applies, as this Regulation has its own system for transfers. If an irregularly staying TCN can be transferred to another MS under the Dublin rules, there are two scenarios; the first is that a MS has entered a return decision alert in the SIS; in that case the Netherlands may proceed with a removal procedure, after having issued a return decision based on Dutch law. The second scenario is if a TCN is apprehended in the Netherlands while having a pending asylum procedure in another MS. In that case the take back notification or transfer under the Dublin Regulation will be triggered. According to Article 62(b) of the Aliens Act, the written notification to the TCN on his/her transfer to the responsible MS, counts as the transfer decision. When a transfer decision is issued, the TCN must leave the Netherlands of own volition within four weeks, however, the Minister may shorten the departure term.¹⁰⁰ If the person has not left the Netherlands within the departure term, he/she transferred by force.¹⁰¹

Non-removability

- VIII. If the TCN cannot be removed from the Netherlands due to humanitarian reasons such as medical treatment, reporting, witnessing or being a victim of human trafficking, war outbreak in the country of return or other reasons due to no-fault, the concerned TCN would be granted a residence permit on humanitarian or no-fault grounds.¹⁰²

5.5 Voluntary Departure and Voluntary Return

Article 60(1) of VW provides that after the end of the lawful residence the TCN should leave the Netherlands voluntarily within four weeks. However, under subsection (4) of the same Article it is possible that the Minister shortens the departure term in the interest of the expulsion of the foreigner, for instance if there is a risk of absconding, or if there is a threat to public policy or national security.¹⁰³

Previously, the Dutch policy which stipulated that immigration authorities automatically refrained from a voluntary departure period if the TCN was suspected or convicted for a criminal offence, was in violation of Article 7(4) Return Directive according to the CJEU ruling on 11 June 2015.¹⁰⁴ This provision in the Directive includes the possibility to refrain from or reduce the period of voluntary departure in case of a threat to public order, public or national security, but this has to be conducted on a case-by-case basis, taking into consideration a person's fundamental rights and circumstances. A threat to public policy has to be interpreted as genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The Court also made clear that the proportionality principle requires first the assessment if reduction of the term is necessary and sufficient, as reduction prevails over completely refraining from the voluntary departure term. Refraining has more far-reaching

¹⁰⁰ Article 62c Aliens Act 2000.

¹⁰¹ Article 63 Aliens Act 2000.

¹⁰² Immigratie en Naturalisatiedienst, "Other Residence Permits," IND, January 16, 2023, <https://ind.nl/en/residence-permits/other-residence-permits/other-residence-permits>. Accessed August 7, 2023.

¹⁰³ See Article 62(2) sub c, Aliens Act 2000.

¹⁰⁴ HvJ EU, 11 May 2015, C-554/13, ECLI:EU:C:2015:377 (*Zh. v. O*); HvJ EU, 12 February 2015, C-554/13, ECLI:EU:C:2015:94 (*Zh. v. O*).

consequences, for instance the immediate imposition of an entry ban. Since this judgement, the decision making regarding the voluntary departure term includes an individual assessment.

The Dutch authorities can also shorten or refrain from a voluntary departure term in case of a risk of absconding, if the application for legal residence has been rejected as manifestly unfounded or if the applicant has submitted incorrect or incomplete information.¹⁰⁵ The latter ground is ambiguous, as the Directive only allows 'fraudulent applications', while incorrect or incomplete information can also be submitted without the intention to mislead authorities.

The Minister has the competence by Article 62(3) VW to extend the departure term granted to the foreigner based on the individual circumstances. Based on the Article 6.3 of the VV, the departure period can be extended to a maximum of 90 days or maximum of 6 months in case the foreigner's presence is mandatory in the Netherlands for implementing procedures before ICC or other courts.* This Article also provides that the extension decision of the departure period takes into consideration the presence of social and family ties as well as the presence of school-going children.¹⁰⁶ The TCN has to return to the country of origin or to a third country where he/she has the right to reside. Foreign nationals who do not comply with the departure term are issued an entry ban and might be subject to forced return and detention in case of apprehension. In case no voluntary departure term is granted, an entry ban is immediately issued, potentially followed by forced removal.

The DT&V is responsible for the return of the unlawfully residing foreigners whether this return is coerced or assisted. The Aliens Act makes a distinction between independent departure, where the TCN leaves the country without being forced to (most of the time within the voluntary departure term), expulsion, where the TCN is forcefully returned, and unauthorised departure, which means that the person has disappeared and assumed to have left the country (see section 4.1). In case of an independent return, the departure is registered/observed, but in the case of unauthorised departure, the person is registered as 'departed with destination unknown'.

There are various organisations in the Netherlands involved in AVR(R) programs such as the IOM, the Dutch Council for refugees and other NGOs that cooperate with the IOM and DT&V. The VC includes clauses concerning the provision of return assistance to foreign nationals through IOM to return independently from the Netherlands and the eligibility to receive this assistance.¹⁰⁷ There are also provisions regarding the collaboration between the governmental organisations (DT&V, IND, KMar, ZHP) and IOM, where the IND has to consult the DT&V on granting or withholding the permission for the foreign national to leave with the assistance of IOM. Generally, the DT&V provides return assistance based on specific conditions such as that the TCN does not have a pending asylum or residence permit application or in case the TCN has tried to leave the Netherlands and failed due to lacking travel documents, in this case DT&V can provide mediation to obtain the required documents such as a Laissez-Passer.¹⁰⁸ In 2015

¹⁰⁵ Article 62(2) sub a and b Aliens Act 2000. See also Article 7(4) Return Directive 2008/115/EC.

* The Special Tribunal for Lebanon, the International Yugoslavia Tribunal, the Special Court for Sierra Leone, the Kosovo Relocated Specialist Judicial Institution, or the International Residual Mechanism for Criminal Tribunals.

¹⁰⁶ Article 6.3 (4) Aliens Act 2000.

¹⁰⁷ Aliens Circular 2000 VC(A), section A3, subsection 5.

¹⁰⁸ Ministerie van Justitie en Veiligheid, "Hulp van DT&V," Ondersteuning Bij Terugkeer | Dienst Terugkeer En Vertrek, August 4, 2023, <https://www.dienstterugkeerenvertrek.nl/ondersteuning-bij-terugkeer/hulp-van-dtv>. Accessed August 7, 2023.

and 2016, the government has restricted the financial support for departure and reintegration, inter alia by abolishing the additional support granted to nationals from visa-exempted countries. The argument for the latter decision was that it served to prevent abuse by migrants who travelled visa-free just to benefit from this return-related financial support.

There is qualitative as well as quantitative evidence to support the idea that issuing a return decision without imposing an entry ban yet, can encourage persons to leave the Netherlands.¹⁰⁹ The quantitative data indicate that individuals who received a return decision in 2013 had a two times smaller chance of being found (apprehended) in the Netherlands within a year than individuals who received a return decision in 2012. This could mean that, in 2013, a higher number of illegally residing foreigners left after the return decision was issued, in order to avoid an entry ban. This interpretation assumes that foreigners who received a return decision in 2013 were more aware of the risks of an entry ban than foreigners who received a return decision in 2012, the year that the entry ban was introduced. (The Netherlands was late to implement the Return Directive and the entry ban was introduced quite quickly, and without much publicity, in order to meet the deadline set by the EU; it therefore seems probable that a relatively large number of migrants initially did not know what the entry ban meant).

Such a deterrent effect does not seem to occur once an entry ban has been imposed. There are no indications (quantitative or qualitative) that illegally residing foreigners with an entry ban leave the Netherlands voluntarily to avoid the criminal sanction that comes with the violation of the entry ban. Thus, the tendency to impose entry bans with some restraint makes sense in that respect. These observations also suggest that the deterrent effect of the entry ban itself is stronger than the deterrent effect of criminalising violations of the entry ban (in other words: some irregularly staying TCNs are keen to avoid the entry ban, but once an entry ban has been imposed, they seem unimpressed by the criminal sanctions that may follow).¹¹⁰

5.6 Forced Return

Based on the Article 63(1) VW, if the TCN fails to leave the Netherlands on his/her own initiative within the departure period indicated in the return order, he/she might be subject to forced removal. In the Netherlands, there is an obligation to specify the country of removal/destination of return. In 2021, an amendment was made to the VW by which the return decision has to include the country that the foreign national should return to.¹¹¹

Forced Return in collaboration with FRONTEX is most commonly conducted by air through commercial or dedicated charter flights.¹¹² However, in the Netherlands it is also possible to conduct return through seagoing vessels, in this case KMar sends removal order to the concerned carrier which is known as form M30.¹¹³ The Netherlands collaborates with FRONTEX not only in the implementation of forced returns through joint operations and

¹⁰⁹ WODC-rapport, “Het lot van het inreisverbod: Een onderzoek naar de uitvoeringspraktijk en gepercipieerde effecten van de Terugkeerrichtlijn in Nederland,” Memorandum 2014-2.

¹¹⁰ WODC-rapport, “Het lot van het inreisverbod: Een onderzoek naar de uitvoeringspraktijk en gepercipieerde effecten van de Terugkeerrichtlijn in Nederland, Memorandum 2014-2, para. 4.2.1.

¹¹¹ European Migration Network, “Annual Report on Migration and Asylum 2022.” July 2023.

¹¹² Frontex “Return Operations,” n.d., <https://frontex.europa.eu/return-and-reintegration/return-operations/>. Accessed August 8, 2023.

¹¹³ Ministerie van Justitie en Veiligheid, “Sample Model M30,” Publication | Repatriation and Departure Service, August 11, 2020, <https://english.dienstterugkeerenvertrek.nl/duty-to-return/documents/publications/2016/09/12/sample-model-m30-aanwijzing-terugvoerverplichting-maritime-border>. Accessed August 8, 2023.

charter flights that are organised by FRONTEX or by another MS, but also in the field of voluntary return. In 2020 the first collaboration took place in a joint operation to return 50 individuals voluntarily from Belgium, France, Germany and the Netherlands to Iraq.¹¹⁴

In case the TCN indicates having health issues, a medical examination would be carried out before departure to determine whether the individual is fit to travel. If there is an indication of medical circumstances that may hinder deportation, the DT&V invites a doctor to examine the individual and determine his/her medical fitness. If there are no deterring medical circumstances, the individual would be declared fit to fly.¹¹⁵ If the TCN cooperates on return and yet cannot be returned due to no fault of their own such as lack of cooperation on the side of the origin country in issuing the necessary travel documents, the IND would issue a no-fault residence permit.¹¹⁶ Also, in case of war outbreaks or natural disaster in the destination of return, the IND is entitled to issue a temporary residence permit.¹¹⁷

According to Article 64 VW, removal is postponed if the TCN is physically unable to travel. However, a Dutch court wanted to inquire from the CJEU if in cases of serious illness, a return decision or removal order can be issued if there is no adequate treatment in the country of return, and what criteria apply in such cases. The CJEU ruled on the 22 November 2022 that Article 5 of the Return Directive, reads in conjunction with Articles 1, 4 and 19(2) of the Charter, thus, prohibits a Member State to issue a return decision or a removal order regarding a TCN who suffers from a serious illness, if there is a serious risk of rapid, significant and permanent increase in his pain.¹¹⁸ Any requirement on a strict period within which this increase is likely to happen, is prohibited, but the severity threshold of Article 4 of the Charter must be reached. Therefore, only assessing whether a person is able to travel is not sufficient.

The coercive measures in use are not explicitly specified in the forced return operations from 1 January 2013 on. However, those in use are the metal handcuffs, Velcro straps, bite/spit mask, French body belt.¹¹⁹ There are at least two escorts per returnee and a medical staff on board of the flight. The Justice and Security Inspectorate which is an “independent system”, is responsible for monitoring the forced return activities and for monitoring the performed tasks within the migration chain which consists of multiple organisations among others the IND, DT&V, and Kmar.¹²⁰ This is stated by the Regulation on the Supervision of the Return of Foreign nationals 2013.¹²¹

¹¹⁴ Frontex, “Frontex Assists in First Joint Voluntary Return with a Charter Flight,” n.d., <https://frontex.europa.eu/media-centre/news/news-release/frontex-assists-in-first-joint-voluntary-return-with-a-charter-flight-WqednO>.

¹¹⁵ Dienst Terugkeer en Vertrek, “Dan Zet Je Ze Toch Gewoon Uit Een Kijkje Achter de Schermen Bij de Dienst Terugkeer En Vertrek,” Ministerie van Justitie en Veiligheid, January 2018.

¹¹⁶ Ministerie van Justitie en Veiligheid, “Buiten schuld,” Het Terugkeerproces | Dienst Terugkeer En Vertrek, July 29, 2020, <https://www.dienstterugkeerenvertrek.nl/het-terugkeerproces/bijzondere-omstandigheden/buiten-schuld>. Accessed August 8, 2023.

¹¹⁷ Ministerie van Justitie en Veiligheid, “How We Work,” The Return Process | Repatriation and Departure Service, July 18, 2023, <https://english.dienstterugkeerenvertrek.nl/the-return-process/how-we-work>. Accessed August 9, 2023.

¹¹⁸ CJEU 22 November 2022, C-69/21, ECLI:EU:C:2022:913 (X. / Stscr. (NL)).

¹¹⁹ Fondazione ISMU (2019), Monitoring of forced return in Europe. Strategies, critical issues and best practices, National Guarantor for the rights of persons detained or deprived of liberty.

¹²⁰ Ministerie van Justitie en Veiligheid, “Migratie,” Toezichtgebieden | Inspectie Justitie En Veiligheid, April 5, 2022, <https://www.inspectie-jenv.nl/toezichtgebieden/migratie>. Accessed August 9, 2023.

¹²¹ Aliens Return Monitoring Regulation (Regeling toezicht terugkeer vreemdelingen) Law Gazette (Staatscourant) of 23 December 2013, no. 35638.

5.7 Return of Unaccompanied Minors (UAMS)

After in January 2021 the CJEU had ruled in *T.Q.* that the Dutch authorities are not allowed to issue a return decision if the UAM cannot be returned nor to make a distinction between minors younger and minors older than 15 (see Chapter 2), the Secretary of State refrained from issuing a return decision towards UAMs until the end of that year.¹²² Since then, a new policy was introduced, granting UAMs with a rejected asylum claim an official postponement of departure as long as a return decision cannot be issued due to further investigations on adequate protection in the country of origin/return. This policy was already used for TCNs who cannot be deported if that would lead to a medical emergency situation.¹²³ The new policy does not end the distinction between minors younger and older than 15 as only for the first group, the authorities have to investigate whether there is adequate protection in the country of origin. This investigation is only based on information about the applicant's family during his/her asylum procedure. Furthermore, by granting postponement of departure, the Secretary of State refuses to issue a return decision not because of the perspective of granting a lawful residence, as Article 6(4) of the Return Directive refers to, but to wait until the UAM reaches the age of 18.

The new policy implies the continuation of 'tolerating residence' until the age of eighteen, however now without issuing a return decision. The stay does not become irregular, but solely granting postponement of departure, without clear rules on assessing adequate reception in the country of origin, is at odds with the Court's ruling. The Court ruled that an in-depth assessment of the situation of the UAM is necessary to determine what is in the best interests of the child and to comply with the requirements of the Returns Directive. Furthermore, the Dutch policy does not allow for a hearing of the UAM on the possible reception in the country of origin. This is explicitly required by the Court in *T.Q.* (see para. 59). So, despite the CJEU's emphasis on the need to take the best interest of the child into account, the new policy still violates this principle.

According to scholars, the amendment is a clear attempt to implement the Court's ruling in the most minimalist way.¹²⁴ In June 2022, the Judicial Department of the Council of State, the highest administrative judiciary body, concluded that the new policy is not a correct implementation of the *T.Q.* judgement, as it violates Article 10 Return Directive and Article 24(2) Charter of Fundamental rights.¹²⁵ According to the Council of State, the authorities must proceed as early and quickly as possible with investigating the existence of adequate protection in the country of origin, which should already start during the asylum procedure. In response to this judgement, the Secretary of State decided in July 2022 to start with the investigation

¹²² CJEU 14 January 2021, C-441/19, ECLI:EU:C:2021:9 (*T.Q. v. State Secretary of Justice and Security*).

This policy was condemned in several national judgements as a wrongful implementation of the *T.Q.* judgement, see. i.a. Rb. Den Haag, nevenzittingsplaats Den Bosch, 15 February 2021, ECLI:NL:RBDHA:2021:1103.

¹²³ The legal basis for that policy was Article 64 Aliens Act 2000. Ministerie van Justitie en Veiligheid, "Unaccompanied Minor Aliens (AMV)," Asylum Policy | Government.nl, August 30, 2023, <https://www.government.nl/topics/asylum-policy/unaccompanied-minor-foreign-nationals-umfns>. Accessed September 1, 2023

¹²⁴ Mark Klaassen, "No Perspective for Unaccompanied Minors: The Wrong Implementation of *T.Q.*," Leiden Law Blog, January 14, 2022, <https://www.leidenlawblog.nl/articles/no-perspective-for-unaccompanied-minors-the-wrong-implementation-of-t-q>; Carolus Grütters, "Hoe het belang van het kind wederom niet wordt geaccepteerd: Curieuze aanpassing AMV-beleid vanwege arresten *T.Q.* en *Westerwaldkreis*," *A&MR*, no. 2 (2022): 70-76.

¹²⁵ ABRvS, 8 juni 2022, ECLI:NL:RVS:2022:1530.

during the asylum procedure, but in case of no clear outcome at the moment of rejection, one year would be granted to the Repatriation and Departure Service to finalise the investigation.¹²⁶ If after one year there is no adequate protection identified, despite the full cooperation of the minor, a residence permit will be granted. In case of a lack of cooperation, or disappearance by the minor, the assessment will stop and no residence permit will be granted.

In an analysis of the judgement and response by the government, it is regretted that the interests of the child still has not been put at the centre of the procedure and investigation. As main problematic elements, scholars mention the strict interpretation of ‘full cooperation’ requiring that the minor gives plausible declarations on his identity and nationality (which can easily be challenged by the authorities), and the lack of clear consequences if during that additional year of investigation the minor turns eighteen.¹²⁷ Also, it is only after three years of holding temporary ‘no-fault’ residence permit that the holder is entitled to a permanent status. Moreover, it is still unclear what the consequences are in respect of this entitlement for the minor who turns eighteen during these three years.

5.8 Entry bans

If the TCN has failed to leave the Netherlands independently within the granted departure term, or if the TCN has been ordered to leave the Netherlands immediately without being granted a departure term, or if the TCN has received more than one return decision, an entry ban would be issued. Article 6.5a of the Aliens Decree (AD) provides the criteria for the duration of the entry ban. In regular cases, the duration of an entry ban is a maximum of two years, however, a shorter duration of less than a year is enforced if the TCN has exceeded the free period after the expiry of the lawful residence by more than three days and less than 90 days. The duration of the entry ban can be extended to no longer than three years in case that the foreign national has been sentenced to prison for a period less than six months. This extension can be up to five years in case of a custodial punishment for six months or longer, of fraud, of a repetitive issuance of a return decision or in case the TCN is found on the territory in violation of an entry ban. The maximum duration is ten years if the TCN poses a threat to public order or safety, such as being convicted for a violent or opium crime, sentenced or imprisonment for a crime longer than six years, or has committed crime against peace, humanity or war crime. In case the Minister takes the view that the TCN poses threat to the national security, the maximum duration of the entry ban is twenty years.¹²⁸

The Minister may lift the entry ban on request of the TCN, if he/she proves to have met the obligation to leave the Netherlands, or after a stay outside the Netherlands for at least half of the duration of the entry ban, without having committed a crime. The Minister may lift the entry ban temporarily in very exceptional and urgent cases, under strict conditions.¹²⁹ Under Article 108 Aliens Act violating the entry ban by travelling to or residing in the Netherlands is a criminal offence, and can lead to a prison sentence of six months maximum or a fine of few thousand euros.¹³⁰ This is also seen as an indirect criminalisation of irregular stay.

¹²⁶ *Kamerstukken II 2022/2023*, 29344, no. 152.

¹²⁷ S, Kok, “ABRvS 8 juni 2022, ECLI:NL:RVS:2022:1530. Duidelijker kader, maar onzekerheid blijft. Toelatings- en terugkeerprocedures voor alleenstaande minderjarige vreemdelingen,” *A&MR*, no. 8 (2022).

¹²⁸ Article 6.5a subsections 1-6 Aliens Decree 2000.

¹²⁹ Article 6.5c Aliens Decree 2000.

¹³⁰ See also the Aliens Circular 2000 VC(A), section A2, subsection 12.4.

An entry ban is issued as a separate/independent decision or as a decision that would amend the already issued return decision.¹³¹ Not only the IND can issue an entry ban but also the Aliens Police, ZHP and KMar.¹³² The contents, the legal consequences and the possible legal action against the entry ban are communicated in verbal or written form to the foreigner in a language that they understand. Since 2021 it is possible to send the TCN an entry ban per email after they have left the Netherlands, however only the officer of the IND is authorised to issue, amend or lift the entry ban.¹³³ The entry ban is calculated from the date on which the foreign national has demonstrably left the Netherlands.¹³⁴

5.9 Procedural Safeguards

When an asylum or other type of residence application is rejected the IND issues, on behalf of the Secretary of State of the Ministry of Justice and Security, a comprehensive decision, this decision contains the negative outcome on the application accompanied by the return decision by which the foreign national is obliged to leave the Netherlands normally within a departure term of 28 days. Decisions are sent to the TCN in a written form to the last known address or to his/her legal representative. The foreign national can appeal the IND's decision to the district administrative court, which outcome can be awaited in the Netherlands.

In case the court confirms the rejection, an appeal in second instance can be submitted (by the applicant or the Secretary of State) at the Council of State. As an automatic suspensive effect in second instances appeal is absent, the TCN can request the Council of State to rule that he/she is allowed to await the outcome. If the TCN believes that the upheld decision is in violation of the European Convention on Human rights, he/she can submit a complaint with the European Court of Human Rights, and request for an interim measure on the basis of Article 39 ECHR in order to await this procedure.¹³⁵ Also, based on the CJEU's ruling in *Gnandi*, all effects of the return decision are suspended as long as the TCN is allowed to stay in the Netherlands during a pending procedure.¹³⁶

The DT&V which is responsible for implementing the return decisions, conducts removability checks in various moments and consults with the IND on whether the foreign national is still required to leave the Netherlands.¹³⁷ During the return procedures, the TCN concerned is obliged to leave the Netherlands independently within the granted departure term, or, if the departure term has expired, the TCN is subject to forced removal and an entry ban. However, when a TCN has exhausted all legal means to stay in the Netherlands and cannot be removed due to no fault of his/her own, such as lack of cooperation from the country of return on the issuance of documents, the DT&V could request the IND to grant the TCN on behalf of the Secretary of State a no-fault residence permit.¹³⁸ In case of medical circumstances that prevent the removal of the TCN or a family member, or if the TCN is a victim, witness of or has reported

¹³¹ Article 66a Aliens Act 2000.

¹³² Immigratie en Naturalisatiedienst, "Entry Ban," IND, August 1, 2023, <https://ind.nl/en/entry-ban#when-do-you-get-an-entry-ban>. Accessed August 5, 2023.

¹³³ European Migration Network, "Annual Report on Migration and Asylum 2022." July 2023.

¹³⁴ Article 66a Aliens Act 2000.

¹³⁵ "Beroepsprocedure na algemene asielaanvraag," De Rechtspraak, n.d., . Accessed August 10, 2023.

¹³⁶ CJEU 19 June 2018, C-181/16, ECLI:EU:C:2018:465 (*Gnandi*) and CJEU 5 July 2018, C-269/18 PPU, ECLI:EU:C:2018:544 (C).

¹³⁷ Repatriation and Departure Service corporate brochure, "The Repatriation and Departure Service the professional implementer of the return policy," Ministry of Justice and Security, 2020, p. 22.

¹³⁸ Immigratie en Naturalisatiedienst, "Unaccompanied Minors," IND, March 13, 2023, <https://ind.nl/en/about-us/background-articles/unaccompanied-minors>.

human trafficking, the return will be postponed, in some cases followed by the granting of a residence permit based on humanitarian grounds.

Pending return individuals are provided accommodation in freedom limiting locations for 12 weeks in case of cooperating on returns. Families are also provided accommodation in closed family locations and it is possible to detain them. In case of families with minor school-going children, return might be postponed till the youngest child reaches the age of 18.¹³⁹ Moreover, children may not be separated from their parents and detaining families and UAMs should not last longer than two weeks unless there is resistance against the removal or delay in obtaining the required documents.¹⁴⁰ The detention decision is reported within four weeks to the court which conducts a judicial review to determine the lawfulness of the decision. Also, the decision to extend the detention period is reviewed by the court to assess its necessity and proportionality.

The national policy guidelines for the application of the Aliens Act include safeguards to the TCN in case of being detained at the border, the border officer charged with border control or aliens supervision has to inform the foreign national about their rights to receive assistance from a legal counsel, diplomatic or consular representation in the Netherlands, the right to appeal against the detention and the right to notify third parties (e.g. spouse, family) about the detention as well as the foreigner's right to appeal against the detention.¹⁴¹

Furthermore, the detained TCN has the right to contact emergency services, relatives, diplomatic and consular representation as well as the right to be assisted by a lawyer and has the right to be questioned in his/her language through an interpreter.

However, because an interview prior to a (prolonged) detention measure was not conducted in the Netherlands, the Council of State asked the CJEU if that practice was in line with the right to be heard. The Court answered that the right to be heard of Article 15(2) of the Return Directive (also enshrined in Article 41(2) sub a of the Charter), implies the possibility for the returnee to express his views or arguments prior to the decision to impose or prolong a detention measure.¹⁴² The right to be heard before the adoption of a return decision implies that the competent national authorities must enable the person concerned to express his point of view on the detailed arrangements for his return, such as the period allowed for departure and whether return is to be voluntary or coerced.¹⁴³ The CJEU ruled that the right to be heard requires an interview prior to a decision to detain or prolong the detention, and that the court can lift the detention in case of a breach of this obligation, however if respect for the right to be heard would have influenced the decision on detention.

The IND performs a check on removability and possible ongoing asylum procedures (or potential refoulement risks) in two different steps in the return procedure; the first is before the TCN is conferred with their diplomatic representation for issuing a laissez-passer and the second is before the departure. If the TCN applies for asylum just before departure, a specialised IND team assesses the presence of new facts or elements. Additionally, there are

¹³⁹ Immigratie en Naturalisatiedienst, "Other Residence Permits," IND, January 16, 2023, <https://ind.nl/en/residence-permits/other-residence-permits/other-residence-permits>.

¹⁴⁰ Aliens Circular 2000 VC(A), section A5, subsection 2.4 and C.

¹⁴¹ Aliens Circular 2000 VC(A), section A2, subsection 2.5.

¹⁴² CJEU 10 September 2013, C-383/13 PPU, ECLI:EU:C:2013:533, (*G and R*).

¹⁴³ See also the judgment in HvJ EU 11-12-2014, C-249/13, ECLI:EU:C:2014:2431, par. 51 (*Boudjlida*).

postponements and temporary permits in case of medical circumstances.¹⁴⁴ If a TCN holds a residence permit in another MS based on international protection, the IND, KMar, police and ZHP ensure that the return decision will not be enforced as it contradicts the international obligation of prohibiting the *refoulement*.¹⁴⁵

5.10 Detention

Legal grounds

In the Dutch context, immigration detention is considered as an administrative measure rather than a punishment that should be used as a last resort. In line with Article 15 Return Directive, it is only allowed when there is a real prospective of expulsion, and when there is a risk of absconding to evade removal.¹⁴⁶ The authorities need to conduct the return procedure with due diligence.¹⁴⁷ Detention decisions are issued by DT&V officers or by assistant public prosecutors from the Ministry of Justice and Security.¹⁴⁸ Immigration detention can also be imposed on asylum seekers if this is necessary for identification, prevention of absconding, or if the applicant poses a risk to public order or national security.¹⁴⁹ Detention can be imposed for a maximum period of six months, which can be extended with twelve months if the return, despite due diligence procedures, requires more time due to a lack of cooperation by the migrant or the lack of necessary documentation from third countries.¹⁵⁰ However, a real perspective of return needs to exist and the documentation has to be expected within a short term.

In order to respect the principle of last resort and necessity, less far-reaching measures must be assessed and available. The Aliens Act provides the legal infrastructure to restrict the freedom of a TCN who is residing unlawfully in the Netherlands and for designating a place and space that would be secured against unauthorised departure.¹⁵¹ Freedom-restriction can imply the obligation for the TCN to report daily to the centre and to cooperate fully with the authorities to establish his/her identity and nationality.¹⁵² Other ways to keep persons under supervision is the obligation to pay a deposit, which is refunded upon return, seizure of travel documents or the reporting obligation which means that the foreign national has to report to the aliens police or to the asylum seekers centre on weekly or daily basis or even the ban on

¹⁴⁴ European Migration Network, “Ad-Hoc Query on The Return Directive (2008/115/EC) and the Obligation to Respect the Non-*Refoulement* Principle in the Return Procedure,” (European Commission, August 13, 2018).

¹⁴⁵ Aliens Circular 2000 VC(A), section A3, subsection 2.

¹⁴⁶ Ministerie van Justitie en Veiligheid, “Aliens Detention,” Return of Foreign Citizens | Government.nl, April 13, 2023, <https://www.government.nl/topics/return-of-foreign-citizens/aliens-detention>. Accessed August 11, 2023.

¹⁴⁷ See for the criteria on immigration detention Article 59 Aliens Act 2000.

¹⁴⁸ Ministerie van Justitie en Veiligheid, “Aliens Detention,” Return of Foreign Citizens | Government.nl, April 13, 2023, <https://www.government.nl/topics/return-of-foreign-citizens/aliens-detention>. Accessed August 11, 2023.

¹⁴⁹ Article 59b Aliens Act 2000.

¹⁵⁰ Article 59 (6) Aliens Act 2000.

¹⁵¹ Articles 54 and 56 Aliens Act 2000.

¹⁵² Aliens Circular 2000, VC(A), section A2, subsection 10.3 and 10.4. Ministerie van Justitie en Veiligheid, “Pre-Departure Accommodation,” The Return Process | Repatriation and Departure Service, August 10, 2020, <https://english.dienstterugkeerenvertrek.nl/the-return-process/predeparture-accommodation>. Accessed August 14, 2023

leaving the borders of the municipality.¹⁵³ The Dutch context lacks criteria based on which an option or alternative for detention is implemented, the detention's necessity and proportionality depends on the individual situation and circumstances, the possibility of return and the TCN's level of cooperation which are considered as factors in the balancing of interests.¹⁵⁴ However, in practice, during the assessment if a detention measure is necessary and proportionate, these alternatives are normally not considered sufficient. They are only seriously considered if detention doesn't seem to be adequate due to vulnerability of the TCN. The Council of State adopts the same reasoning (see further 8.1.1).¹⁵⁵ The government takes the view that detention is more effective than limited freedom restrictions.¹⁵⁶ This is at odds with the EU principle of proportionality, reflected in the Return Directive which prioritises the least coercive measure.

The Dutch law has structured the judicial procedure for challenging the detention of a TCN in such a way that it prohibits the courts from carrying out an *ex officio* review and assessment of all aspects of lawfulness of detention, and from ordering, when it finds out that the detention is unlawful, that the unlawful detention be ended and the TCN be released immediately. Since the Mahdi judgment of 2014 (a Belgian case), this limited scrutiny is under discussion in the Netherlands (see paragraph 8.1.1). The Council of State referred a preliminary question to the CJEU in December 2020, if the court must review the lawfulness of a detention measure *ex officio*. While the Council of State only referred to Article 5 ECHR, a lower court has supplemented these questions to seek clarification if the Dutch policy complies with Article 47 of the Charter. Furthermore, the district court wanted to know whether the court not only has the power to review the lawfulness of detention *ex officio*, but also the obligation to do so.

The Court ruled that Article 15 (2) and (3) Return Directive, read in conjunction with Articles 6 and 47 CFR, imply the competence for the judicial authority to raise on its own motion any failure to comply with a condition governing lawfulness. Even if it has not been invoked by the person concerned. This is based on the facts brought to the court's attention (including at the hearings).¹⁵⁷

Children in detention

For families with minor children and unaccompanied minors, the authorities must assess (and motivate if a detention measure is imposed) if detention would not be a disproportionate burden. In addition, unaccompanied minors can only be detained if there is a weighty interest for the authorities to keep the minor at their disposal.¹⁵⁸ Since 2011, UAMs can only be detained if they are subject to a criminal procedure, if their departure can be realised within two weeks, if they have violated an obligation to report or have disappeared earlier, or if they are refused

¹⁵³ Aliens Circular 2000, VC(A), section A2, subsection 10.3 and 10.4; Ministerie van Algemene Zaken, "Forced Return," August 2, 2022.

¹⁵⁴ Immigration and Naturalisation Service the Netherlands, "Information on Procedural Elements and Rights of Applicants Subject to a Dublin Transfer to the Netherlands," (European Union Agency for Asylum, April 12, 2023) p.12.

¹⁵⁵ Annemarie Busser, Revijara Oosterhuis and Tineke Strik, "Vreemdelingendetentie (II): Gronden getoetst aan wetsvoorstel en aan Europees en internationaal recht," *A&MR*, no. 9 (2019), http://www.stichtinglos.nl/sites/default/files/los/vreemdelingendetentie_ii_brusser_oosterhuis_strik.pdf.

¹⁵⁶ *Kamerstukken II* 2018/2019, 19637 no. 2473.

¹⁵⁷ CJEU 8 November 2022, joined cases C-704/20 and C-39/21, ECLI:EU:C:2022:858 (*C, B and X*).

¹⁵⁸ *Kamerstukken II* 2010/11, 27062, no. 68.

entry at the external border, as long as their age has not yet been verified.¹⁵⁹ Yet, while normally the maximum duration of detention of families with minor children doesn't exceed fourteen days, the average detention duration for UAMs turns out to be slightly longer.¹⁶⁰ According to the Ministry, this is related to the fact that most detained UAMs were detected irregularly, without having applied for asylum. As the preparation for return can only start after apprehension, the maximum duration in these cases is four weeks. After the maximum duration, UAMs are referred to the association responsible for their guardianship (NIDOS), which takes care for a proper accommodation and support.

Usually, families with children and unaccompanied minors are held in family accommodations or freedom restricting locations instead of detention, and are moved to a closed family centre if deemed necessary.¹⁶¹ However, it is possible to hold a family with children in a detention centre. Detaining families should not be longer than two weeks before their removal, yet, it can be extended in case of resistance, waiting for obtaining travel documents or lodging a new asylum application. It is also possible to detain one parent in the case of a family with minor children, while the other family members remain in restrictive accommodation centre.¹⁶²

Detention Regime

Immigration detention is held in separate facilities than the punitive prisons; there are three locations in the Netherlands for detaining foreigners which are Zeist, Schiphol and Rotterdam. Pre-removal detention is held in DJI facilities which are built and operated through a public private partnership (PPP) between the government and one or more private companies. Detainees have the right to have a lawyer free of charge, access to communication through telephone either in their rooms or in the common areas to be used at their own expense. Also, detainees can receive visitors according to the rules of the centre. However, the offer of activities is very limited, and due to limited staff, detainees have to stay on their cells for the vast period of time.¹⁶³

The national Ombudsman has directed criticism to the conditions of immigrant detention concluding that it is an inappropriate regime that seriously jeopardises respect for the immigrants' fundamental rights and that in practice it is not used as a last resort. Also, in some cases immigration detention is more strict than penal detention.¹⁶⁴ The Ombudsman expressed particular concern towards the frequent use of the measure of solitary confinement (also as a sanction for two weeks on the refusal to share a cell with another person), the lack of privacy and the lack of daily activities.

¹⁵⁹ *Kamerstukken II* 2010/11, 27062, no. 68.

¹⁶⁰ *Kamerstukken II* 2018/2019, 19637 and 27062, no. 2473. In 2018 the average duration was three weeks.

¹⁶¹ COA, "Reception Centres for Return," <https://www.coa.nl/en/reception-centres-return>. Accessed August 14, 2023.

¹⁶² Ministerie van Justitie en Veiligheid, "Pre-Departure Accommodation," August 10, 2020.

¹⁶³ Annemarie Busser, Revijara Oosterhuis and Tineke Strik, "Vreemdelingendetentie (I): Detentie-omstandigheden onder huidig regime en onder wetsvoorstel getoetst aan internationale normen," *A&MR*, no. 8

(2019), <https://www.stichtinglos.nl/sites/default/files/los/140919%20A%26MR8%20artikel%20Vreemdelingendetentie.pdf>.

¹⁶⁴ De Nationale Ombudsman, "Immigration Detention: penal regime or step towards deportation? About respecting human rights in immigration detention," August 7, 2012, https://www.nationaleombudsman.nl/uploads/report_2012105_immigration_detention.pdf.

5.11 Emergency Situations

The Netherlands has transposed Article 18 of the Return Directive concerning the emergency situations which the state might adopt. Speedy reviews take place in case of Dublin cases where the concerned TCN has a pending application, decision or protection in another Member state and applies for asylum in the Netherlands also, if the TCN applies for a last-minute asylum procedure. Families awaiting their removal are held in restrictive accommodation. It is possible to detain families, however, family detention may not be longer than two weeks unless there is resistance or that the family has applied for a new application for residence permit.¹⁶⁵ Furthermore, TCNs who are found without a residence permit or have never applied for a permit and apprehended by the KMar or the police, or might abscond are placed in aliens detention, while those who do not leave the Netherlands within the granted departure term are placed in freedom-limiting locations (VBL) where they are allowed to leave the centres but are obliged to report to the centre on a daily basis and to cooperate fully in the investigation of their identity and nationality.¹⁶⁶

5.12 Readmission Process

In the period from 2015 till September 2023, the Netherlands was part of six readmission agreements and implementing protocols held between the Benelux countries, Serbia, Georgia, Kazakhstan, Armenia, Ukraine, Bosnia and Herzegovina. These agreements were either concluded or have entered into force from 2015 on (see section 6).

¹⁶⁵ Ministerie van Justitie en Veiligheid, “Pre-Departure Accommodation,” August 10, 2020.

¹⁶⁶ Ibid.

6. International Cooperation

	Type of Bilateral Agreements and Negotiations	Title	Signatory State/Target Third Country	Date		Link to document & media coverage
				Signature	Entry into force	
1	Standard Readmission agreements signed ¹⁶⁷					
1.1	Protocol to EU Readmission Agreement Benelux-third countries ¹⁶⁸	Protocol between the Governments of the States of the Benelux (the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands) and the Government of the Republic of Serbia on the implementation of the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation	Serbia	25/01/2013	01/02/2019	https://wetten.verheid.nl/BWBVoo06121/2019-02-01#Verdrag_1
1.2	Protocol to EU Readmission Agreement Benelux-third countries ¹⁶⁹	Protocol between the States of the Benelux (the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands) and Georgia on the implementation of the Agreement between the European Union and Georgia on the readmission of persons residing without authorisation	Georgia	05/09/2013	01/06/2018	https://wetten.verheid.nl/BWBVoo06294/2018-06-01
1.3	Agreement Benelux – third country ¹⁷⁰	Agreement between the States of the Benelux (the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands) and the Republic of Kazakhstan on readmission, and its implementing protocol	Kazakhstan	02/03/2014	01/06/2017	https://wetten.verheid.nl/BWBVoo06473/2017-06-01
1.4	Protocol to EU Readmission Agreement Benelux-third countries ¹⁷¹	Protocol between the Republic of Armenia and the States of the Benelux (the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands) implementing the Agreement between the European Union	Armenia	20/06/2018	01/09/2023	https://wetten.verheid.nl/BWBVoo06769/2018-06-20

		and the Republic of Armenia on the readmission of persons residing without authorisation				
1.5	Implementing protocol European readmission agreement ¹⁷²	Implementing Protocol between the Benelux States (The Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands) and Ukraine to the Agreement between the European Community and Ukraine on the Readmission of Persons	Ukraine	17/12/2018	01/09/2023	https://wetten.overheid.nl/BWBV0006809/2018-12-17
1.6	Implementing protocol European readmission agreement ¹⁷³	Protocol between The States of the Benelux (the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands) and Bosnia and Herzegovina implementing the agreement between the European Community and Bosnia and Herzegovina on the readmission of persons residing without authorisation	Bosnia and Herzegovina	05/12/2013	01/08/2021	https://wetten.overheid.nl/BWBV0006319/2021-08-01
2	Ongoing standard readmission agreement negotiations					
2.1	Implementing protocol European readmission agreement ¹⁷⁴	Protocol between the States of the Benelux (the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands) and Sri Lanka on the implementation of the agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of persons residing without authorisation	Sri Lanka			

¹⁶⁷ European Migration Network, “Bilateral Readmission Agreements,” September 2022.

¹⁶⁸ European Migration Network, “Inventory on Bilateral Readmission Agreements signed by or entered into force in EU Member States in 2014-2021,”.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

2.2	Cooperation on migration with Niger*		Niger	01/02/2023	Further details about the cooperation shall be available at the end of the year	https://www.government.nl/documents/media-articles/2023/02/01/joint-press-communique-working-visit-niger-liesje-schreinemacher-eric-van-der-burg https://www.government.nl/latest/news/2023/02/01/the-netherlands-and-niger-to-strengthen-cooperation-on-migration#:~:text=The%20Netherlands%20and%20Niger%20to%20strengthen%20cooperation%20on%20migration,-News%20item%20%7C%2001&text=The%20Netherlands%20and%20Niger%20plan,management%20and%20combating%20people%20smuggling.
3	Non-standard readmission arrangements					
3.1	Police cooperation agreement ¹⁷⁵		Italy	14/03/2000		

* The Dutch Cooperation with Niger is temporarily suspended on 4th August 2023
<https://www.government.nl/latest/news/2023/08/04/the-netherlands-suspends-direct-cooperation-with-nigerien-government>

¹⁷⁵ Jean-Pierre Cassarino “The Netherlands’ Bilateral Agreements Linked to Readmission,” December 11, 2017, <https://www.jeanpierrecassarino.com/datasets/ra/nl/>

3.2	Memorandum of understanding ¹⁷⁶	Tripartite Memorandum of Understanding (the MoU) between the Islamic Transitional State of Afghanistan, the Government of the Netherlands and the United Nations High Commissioner for Refugees (UNHCR).	Afghanistan UNHCR	18/03/2003		https://zoek.officielebekendmakingen.nl/kst-19637-732-b1.pdf
3.3	Memorandum of understanding ¹⁷⁷		Somalia	01/07/2009		https://www.hrw.org/news/2010/07/22/netherlands-do-not-deport-somalis
4	Migration partnerships, including a clause on the readmission/ removal of irregular foreigners					
4.1	COMPASS	The global Cooperation on Migration and Partnerships for Sustainable Solutions	Afghanistan, Algeria, Chad, Egypt, Ethiopia, Iraq, Lebanon, Libya, Mali, Morocco, Niger, Nigeria, Sudan, Tunisia	01/01/2021		
5	Deals/ Statements					
5.1	Migration deal (action plan)	Non-interference in the Moroccan internal affairs (human rights situation) in exchange for cooperation on returns through providing travel documents for the Moroccans whom the Netherlands wants to expel	Morocco	July 2021 Made public in December 2022		https://nos.nl/collectie/13941/artikel/2477440-marokkodeal-over-overlastgevende-asielzoekers-heeft-nog-weinig-effect https://nos.nl/artikel/2479780-gewortelde-marokkanen-uitgezet-na-43-jaar-in-nederland-geboeid-op-vliegtuig

¹⁷⁶ Ibid.¹⁷⁷ Ibid.

5.2	Strengthening cooperation on migration	Ministerial meetings to discuss (among other things) the consolidation of migration cooperation	Morocco	11/05/2022 21/02/2023	https://www.linkedin.com/posts/eric-van-der-burg_marokko-is-een-belangrijke-partner-voor-nederland-activity-7033802872513253376-rW_t/ https://www.government.nl/documents/diplomatic-statements/2022/05/11/communiqu�-morocco-the-netherlands#:~:text=The%20two%20countries%20are%20strengthening,the%20spirit%20of%20constructive%20engagement. https://nos.nl/artikel/2464725-staatssecretaris-van-der-burg-overlegt-in-marokko-over-terugkeer-asielzoekers https://www.rtlnieuws.nl/nieuws/nederland/artikel/5367208/marokko-nederland-asiel-staatssecretaris-asielzoekers
5.3	Joint Statement of Ministers	Agreeing on containing the secondary movements through among other things swift return procedures	Belgium, France, Germany, UK	08/12/2022	https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2022/12/08/joint-statement/JOINT+STATEMENT+v+8-12.pdf

Table (2) International Cooperation

7. Funding of Return and Related Programmes

Program	Responsible organisations	Target countries/regions	Funding
COMPASS ¹⁷⁸	IOM and the Ministry of Foreign Affairs of the Netherlands	Afghanistan, Algeria, Chad, Egypt, Ethiopia, Iraq, Lebanon, Libya, Mali, Morocco, Niger, Nigeria, Sudan, Tunisia	55 € million (1 January 2021- 31 December 2023)
Return and Emigration Assistance from the Netherlands (REAN) Assisted Voluntary Return and Reintegration (AVRR)*	IOM	List of targeted/eligible nationalities	2018: 53,69\$ million ¹⁷⁹ 2019: 53,17\$ million ¹⁸⁰ 2020: 33, 18\$ million ¹⁸¹ 2021: 64,95\$ million ¹⁸² 2022: 57,91\$ million ¹⁸³
EU Trust Funds for Africa EU-IOM Joint Initiative	IOM	North Africa, Horn of Africa Sahel/Lake Chad	2016: 9 € million ¹⁸⁴ 2017: 23.362 € million ¹⁸⁵ 2018: 26.362 € million ¹⁸⁶ 2019: 26.362 € million ¹⁸⁷ 2020: 29.362 € million ¹⁸⁸ 2021: 26.362 € million ¹⁸⁹ 2022: 29.362 € million ¹⁹⁰

¹⁷⁸ IOM, “COMPASS Guiding Safe Migration,”

https://www.iom.int/sites/g/files/tmzbd1486/files/documents/compass-leaflet_en.pdf.

* Data about the exact contributed amounts for these programs are not available. The amounts in the funding section are the earmarked contributions from the Dutch government to the IOM.

¹⁷⁹ IOM Migration Resource Allocation Committee, “2018 Annual Report on the Use of the Unearmarked Funding,” (IOM, 2019).

¹⁸⁰ IOM Migration Resource Allocation Committee, “2019 Annual Report on the Use of the Unearmarked Funding,” (IOM, 2020).

¹⁸¹ IOM Migration Resource Allocation Committee, “2020 Annual Report on the Use of the Unearmarked Funding,” (IOM, 2021).

¹⁸² IOM, “2021 Annual Report on Unearmarked Funding.”

¹⁸³ IOM, “2022 Annual Report on Unearmarked Funding.”

¹⁸⁴ European Commission, “2016 Annual Report The Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa”.

¹⁸⁵ European Commission, “2017 Annual Report The Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa”.

¹⁸⁶ European Commission “2018 Annual Report The Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa”.

¹⁸⁷ European Commission “2019 Annual Report The Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa”.

¹⁸⁸ European Commission “2020 Annual Report The Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa”.

¹⁸⁹ European Commission “2021 Annual Report The Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa”.

¹⁹⁰ European Commission “2022 Annual Report The Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa”.

			Total: 170.172 € million
ERRIN	DT&V, Ministry of Justice and Security*		n/a
Migration Management Diploma Program (MMDP)	UNU-MERIT and Maastricht University	Cape Verde, Moldova, Georgia, Armenia, Morocco, Azerbaijan, Tunisia, Jordan, Belarus, Ethiopia, Nigeria, India, Western Balkans, Turkey, the EU's Southern and Eastern neighbourhood, Sub-Saharan Africa, South-Asia	September 2023-February 2025 543,978 € million ¹⁹¹

Table (3) Funding of Return and Related Programs

* Frontex Joint Reintegration Program and ICMPD Return and Reintegration Facility (RRF) have taken over the return and reintegration operations of the ERRIN per 1 July 2022
<https://returnnetwork.eu/2022/06/07/errin-closing-conference/>

¹⁹¹ ICMPD, "Migration Partnership Facility, Capacity Building for Migration Management. Migration Management Diploma Programme (MMDP) and Moving the Migration Policy Agenda Forward (MMPAF) Programme," <https://www.migrationpartnershipfacility.eu/mpf-projects/50-migration-management-diploma-programme-mmdp-and-moving-the-migration-policy-agenda-forward-mmpaf-programme/preview>, 2023. accessed January 5, 2024.

8. Gaps

This section lists and explains the various gaps in the legal, institutional and international cooperation frameworks in the Dutch return field.

8.1 Gaps in the legal framework

8.1.1 The scope of judicial review (for the prolongation) of detention

Dutch courts are restricted in their scrutiny of detention measures or their prolongation. For a long time, they were supposed to conduct a marginal scrutiny and leave the actual assessment of the facts and the personal interests to the administrative authorities, and were not allowed to replace the administrative decision with their own decision. In the *Mahdi* case, the CJEU clarified in 2014 that the judicial authority ruling on an application for extension of detention must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by the TCN.¹⁹² Also, the authority must be able to consider any other element that is relevant for its decision should it deem this necessary. The judicial authority dealing with an application for extension of the detention must be allowed to decide, on a case-by-case basis, on the merits of whether the detention of the TCN should be extended, and whether it can be replaced with a less coercive measure or whether the TCN concerned should be released. In 2015 the Council of State concluded that the concept of marginal judicial scrutiny is not in line with the *Mahdi* judgement.¹⁹³ Since then, the *Mahdi* judgement has not only reinforced the competences of the judiciary, but also forced administrative authorities to increase the intensity of the individual assessment prior to the decision to impose or prolong a detention measure. Yet, the judicial competences only became in line with EU law after the CJEU had ruled in 2022 on a preliminary request from the Council of State, that judicial authorities must scrutinise any (un)lawfulness of a detention order ex officio.¹⁹⁴

8.1.2 Immigration detention not in compliance with the Directive

Apart from the scope of judicial scrutiny, courts still refrain from assessing in all cases if a less far-reaching measure could suffice to ensure return. This assessment is only conducted in situations where the TCN may not be fit for detention, because of certain vulnerabilities of that person. One could argue that the principles of proportionality and necessity always require such assessment. The Council of State seems to adopt the approach that detention is always necessary and therefore justified in case of a risk of absconding, which does not align with the principle of detention as a last resort.¹⁹⁵ The law and practice of immigration detention in the

¹⁹² CJEU 5 June 2014, C-146/14 PPU, ECLI:EU:C:2014:1320 (*Mahdi*).

¹⁹³ ABRvS 23 January 2015, ECLI:NL:RVS:2015:232.

¹⁹⁴ CJEU 8 November 2022, joined cases C-704/20 and C-39/21, ECLI:EU:C:2022:858 (*C, B and X*).

¹⁹⁵ Annemarie Busser, Revijara Oosterhuis and Tineke Strik, "Vreemdelingendetentie (II): Gronden getoetst aan wetsvoorstel en aan Europees en internationaal recht," *A&MR*, no. 9 (2019).

Galina Cornelisse, "Van Magna Carta naar *Mahdi*," *A&MR*, nos. 6/7 (2015); Wouter van der Spek, "Rechtsbescherming bij inbewaringstelling en detentie van asielzoekers: Gebreken op alle fronten," *A&MR*, no. 4 (2018).

Netherlands is not a proper implementation of the Return Directive in respect to the concept of proportionality and the principle of using detention as a last resort.¹⁹⁶ This also holds true for the regime of immigration detention. Where Member States have to avoid prison-like situations and reflect the nature of immigration detention in the regime and the rights of detainees, the regime of administrative detention in the Netherlands is even more restrictive than the regime of penal detention, according to the National Ombudsman. It therefore concluded that the policy does not satisfy the administrative nature nor the principle of proportionality.¹⁹⁷ The Ombudsman expressed particular concern towards the frequent use of the measure of solitary confinement (also as a sanction for two weeks on the refusal to share a cell with another person), the lack of privacy and the lack of daily activities.

A proposal for a new law, already pending before the parliament since 2015, which was intended to align the detention regime with the principles of the Return Directive, received heavy criticism, as the TCN would be placed in detention in a very strict regime from the start, and would be able to obtain the ‘award’ of certain programmes and privileges afterwards.¹⁹⁸ The broadened grounds for solitary confinement and other restrictive measures would still imply a frequent use and a risk of arbitrariness. This proposal was adopted by the House of the Representatives in June 2018. However, the consideration of this bill is suspended until the bill announced by the State Secretary has reached the Senate.

8.1.3 No-fault residence permit for unremovable TCNs

By observing the legal framework in the Netherlands regarding returns, various protection gaps can be noticed. The first is concerned with the fact that the migration authorities seldomly do grant residence permits in case of unremovable TCNs. Even if TCNs cannot be removed due to no fault of their own they do not easily receive a so called ‘no fault’ residence permit although the law stipulates that they should be granted residence permit in such circumstances. The threshold for obtaining a ‘no-fault’ residence permit is very high, for instance because of the requirement of authentic documents on identity and nationality and a high burden of proof of the impossibility to return. Furthermore, a person must always have cooperated with the authorities to effectively return. Statistics show that only a minority of 13,5% of the no-fault residence permit applications achieved positive outcomes in the period 2008-2012.¹⁹⁹ The last few years, approximately 20 no-fault residence permits have been issued per year, while the number of applications was three times higher.²⁰⁰

¹⁹⁶ Amnesty International, “The Netherlands: the detention of the irregular migrants and asylum-seekers,” June 2008,

<https://www.amnesty.nl/content/uploads/2017/01/eur350022008eng.pdf?x56589>.

¹⁹⁷ De Nationale Ombudsman, “Immigration Detention: penal regime or step towards deportation? About respecting human rights in immigration detention,” August 7, 2012,

https://www.nationaleombudsman.nl/uploads/report_2012105_immigration_detention.pdf.

¹⁹⁸ “Wet terugkeer en vreemdelingenbewaring (34.309),” Eerste Kamer Der Staten-Generaal, n.d., https://www.eerstekamer.nl/wetsvoorstel/34309_wet_terugkeer_en.

¹⁹⁹ See Appendix IV

²⁰⁰ Ministerie van Justitie en Veiligheid, “Wat houdt bemiddeling in het kader van ‘buitenschuld’ in?,” *Leg Mij Nou Eens Uit. VreemdelingenVisie*, July 6, 2023, <https://www.vreemdelingenvisie.nl/vreemdelingenvisie/2023/07/buiten-schuld-vergunning>.

8.1.4 Residence permit to unaccompanied minors

Similarly, in the case of UAMs whose asylum or residence permit applications are rejected, there is a gap in the implementation of the Directive because they only receive notice of a postponement of the obligation to return till they reach the age of 18. However, UAMs do not receive residence permits although the Return Directive in its Article 6(4) mentions that the MS concerned may decide to grant an autonomous residence permit or other authorisation offering a right to stay and that the issued return order shall be suspended for the duration of validity of the residence permit or other authorisation offering a right to stay (see section 4.7). The age distinction made by the Netherlands, the postponement of return instead of granting a residence permit and the CJEU ruling in T.Q.,²⁰¹ mentioned in section 4.7 make clear that the Dutch policy concerning the UAMs does not comply with the Return Directive Article 5(a), 6(1), 4, 8(1) and 10, where Article 5(a) stipulates that when implementing return the Member state shall take the best interest of the child in account and respect the obligation of non-refoulement, and Article 10 stipulates that before issuing a return decision to the UAM, assistance should be granted by the appropriate bodies while taking into consideration the best interest of the child and that before the removal of UAM from the Member State's territory there shall be investigation concerning the reception facilities in the country of return.

8.1.5 The application of the Return Directive in Dublin cases

Another element in the Dutch legal framework which causes protection gaps, is the flexibility for the immigration authorities to choose between the applying the Dublin Regulation and the Return Directive, in case of a TCN who has a pending asylum procedure in another MS. If the authorities decide not to initiate a tack back procedure under the Dublin Regulation, but instead apply the Return Directive, they issue a return decision (and entry ban) and proceed with the forced return procedure. The Dutch Council of State has ruled that in case the Dublin Regulation applies, the State Secretary of Justice and Security is not allowed to take all measures under the Return Directive.²⁰²

8.2 Gaps in the institutional framework

8.2.1 The lack of an independent monitoring (and advocacy) body

The Netherlands lacks an independent monitoring body. In 2013 the Regulation on the Supervision of the Return of Foreign Nationals provided that the return activities (including detention) in the Netherlands conducted are monitored by the Inspectorate of Justice and Security which is the coordinator and a part of the National Prevention Mechanism (NPM). The NMP, which has its office at the Ministry of Justice and Security, is installed as one of the obligations for signatories to the Optional Protocol to the Convention Against Torture (see Article 4 (2) OPCAT), meant to monitor, raise awareness and advocate for the implementation of the CAT. The National Ombudsman resigned as an observer to the NPM in 2014, arguing

²⁰¹ CJEU 14 January 2021, C-441/19, ECLI:EU:C:2021:9 (TQ v. State Secretary of Justice and Security),

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=236422&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4249070>.

²⁰² ABRvS 29 June 2018, ECLI:NL:RVS:2018:2173, case no. 201800622/1/V3.

that the NPM is not sufficiently independent and poorly functioning.²⁰³ However, this resignation did not lead to any reform in the monitoring of asylum and return activities.²⁰⁴ In 2016, the subcommittee (SPT) of the OPCAT criticised the lack of independence of the Dutch NPM. It urged the Dutch government to change its policies, so far without result.²⁰⁵ In 2022, a study (commissioned by the Ministry of Justice and Security) has been published for the preparation to appoint the National Institute for Human Rights as the NPM.²⁰⁶ This Institute has been mandated with the NPM task as of 2024, for which the recruitment procedure was still pending in February 2024.²⁰⁷

8.2.2 The LVV agreement

The Ministry of Justice and Security has made an agreement with the VNG about the LVV scheme which was implemented as a pilot project from 2019 till 2022 entailing that five municipalities would provide basic provisions and that other municipalities would close their shelters. Although the high burden of proof related to the no-fault residence permit confronted by the LVVs, the scheme was successful in finding a sustainable solution to 60% of the TCNs hosted in the facilities either by obtaining a no-fault residence permit or through return. However, the agreement had a temporary nature and was not renewed which has led to a policy vacuum as this impedes the possibility to find a sustainable solution for the irregular and non-removable migrants. Moreover, it increases the vulnerabilities of this category of people due to homelessness and lack of basic provisions. In doing so, the Dutch government still refuses to fully comply with the decisions of the European Committee on Social Rights, that undocumented migrants must be offered shelter and basic needs without further conditions. Instead, the government requires that the person concerned cooperates with his/her return to be eligible for shelter.

8.2.3 Lack of municipal cooperation on evacuations

The evacuation order of TCNs who no longer have the right to stay demanding them to leave the reception centre is based on a national decision from the IND and DT&V, while the evacuation itself is implemented by the local police which follows the municipal authority. However, some municipalities and their local police refuse to implement evacuations, arguing it is not in compliance with their duty to take care of their inhabitants, or that the consequential homelessness may lead to public policy problems. Municipalities are thus confronted with local problems caused by implementing the national policy. This does not only prove the need

²⁰³ Press statement National Ombudsman, September 2014, <https://www.nationaleombudsman.nl/nieuws/nieuwsbericht/2014/nationale-ombudsman-trekt-zich-terug-uit-npm>.

²⁰⁴ "Preventing Torture in Closed Institutions: Dutch NPM Needs to Become More Effective and Fully Independent," Netherlands Helsinki Committee, November 23, 2021, <https://www.nhc.nl/preventing-torture-in-closed-institutions-dutch-npm-needs-to-become-more-effective-and-fully-independent/>.

²⁰⁵ Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Kingdom of the Netherlands, United Nations, 16 March 2016.

²⁰⁶ Ministerie van Justitie en Veiligheid, "Meer dan de som der delen? Verkenning NPM," Rapport Berenschot, March 30, 2022. Rijksoverheid.nl, September 28, 2023, <https://www.rijksoverheid.nl/documenten/rapporten/2023/09/27/tk-bijlge-rapport-berenschot-verkenning-npm-bij-crm>.

²⁰⁷ <https://www.mensenrechten.nl/over-ons/werken-bij-het-college/vacature-collegelid/toelichting>.

for decoupling between the national and local level where a solution for the national government is a problem for the local one, but also hinders the implementation of evacuations and return.

8.3 Gaps in the international cooperation framework

Although the Dutch government prioritises extending the cooperation on return and readmission with the countries of origin, there is a significant gap in this cooperation framework. This relates partly to a reluctance of some countries of origin to conclude a readmission agreement, as illustrated by the lengthy, thorny and deferred negotiations with countries like Algeria, Morocco and Turkey.²⁰⁸ The cooperation between the Netherlands and Morocco is a good example, where Morocco has been refusing to readmit its citizens. In the so-called ‘action plan’ that the Dutch and Moroccan government signed in July 2021, they promise not to interfere any longer in internal affairs of the other country. The Netherlands also promised to inform the Morocco on its funding of NGOs of Moroccan citizens.²⁰⁹ After a rather low return rate in 2022, Morocco readmitted around 250 Moroccans in 2023. The commitments in the action plan reveal that the Dutch government is prepared to silence itself on human rights violations in Morocco in exchange for cooperation on returns of irregular migrants. Moreover, in practice this cooperation is not necessarily directed towards returning Moroccan nationals whose application for residence has been rejected, but also those who are born and rooted in Dutch society, and whose removal is therefore highly controversial.²¹⁰ In addition, the cooperation on readmission with autocratic governments do not only come at the cost of human rights, but are also unsuccessful due to the political instability that hinders the achievement of policy goals. This is manifest in the case of the readmission negotiations between the Netherlands and Niger.

²⁰⁸ Jean-Pierre Cassarino, *Informalizing EU Readmission Policy* (Routledge eBooks, 2017), 83–98, <https://doi.org/10.4324/9781315645629-7>.

²⁰⁹ Actieplan Nederland Marokko, 8 July 2021, <https://open.overheid.nl/documenten/ronl-061c5bb902f31a461b8b646930120c6620906a5b/pdf>.

²¹⁰ Samira Jadir and Reinalda Start, “Gewortelde Marokkanen uitgezet: na 43 jaar in Nederland geboeid op vliegtuig,” *NOS*, June 21, 2023, <https://nos.nl/artikel/2479780-gewortelde-marokkanen-uitgezet-na-43-jaar-in-nederland-geboeid-op-vliegtuig>.

9. Policy Recommendations

Based on these findings, this report proposes the following policy recommendations to the Dutch migration authorities, which also serve as points of attention for the European Commission while supervising the Netherlands' compliance with Union Law:

- I- Better implementation of the Return Directive and the EU case law by adhering to the principles of necessity and proportionality, anchoring the best interest of the child, and respecting the fundamental rights of migrants.
- II- Structurally practice less coercive enforcement measures instead of using detention to avoid absconding. Detention must be a measure of last resort and implemented for the shortest term possible and only if no other measures are possible. Also, migrants must have the opportunity to be heard before the decision of detention and its extension.
- III- Detention must be held as an administrative measure where the restrictions and duration are reduced to the minimum while taking into consideration the needs and vulnerabilities of the migrants held in detention.
- IV- The protection of the child's rights and best interest should be emphasised in the national legislation (Aliens Act, Decree and Implementation Guidelines). Clear guidelines and criteria on the assessment of the availability of adequate reception for unaccompanied minors in the countries of return must be provided and uncertainty must be avoided.
- V- There must be independent bodies that monitor the return and detention practices. The recent intention to transfer the National Prevention Mechanism to the National Institute for Human Rights is to be strongly encouraged.
- VI- Given the success of the LVV scheme, the government should consider renewing the agreement with the Dutch Municipalities Association (VNG) and turn it into an improved and sustainable structure.
- VII- Finally, there will always be immigrants who cannot be returned: no return policy can guarantee a 100% success rate. Instead of leaving those who cannot be returned in a legal and humanitarian limbo, which is currently the case, they should be entitled to a residence permit. The current threshold for in-country applications on this ground is far too high and regularisations are rare in the Dutch context. In sum, the absence of options for legal residence renders the overall migration management policy ineffective.

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11. Annexes

11.1 Return statistics

Year	TCNs found to be illegally present	Asylum applications	TCNs refused entry at the border	Dublin returns	The categories included here are based on available Eurostat data			ALTERNATIVE					
					TCNs ordered to leave		TCNs returned following an order to leave (annual data) *	TCNs returned following an order to leave, by type of return			Related alternative national category of official (annual) data on return		
					Total ordered to leave	Return decisions issued for		assisted return	non-assisted voluntary	forced return	Independent departure ²¹¹	Independent without supervision	Total
2015	3150	44970	2295	n/a	19015	19015	8385	n/a	n/a	1850	3320	5070	10240
2016	2760	20945	2700	n/a	25310	25310	11890	4640	6470	2220	6760	8100	17080
2017	2120	18210	2410	n/a	20750	20750	8195	1530	2810	3390	3400	10170	16960
2018	2790	24025	2555	1850	17935	17935	8830	2150	3480	2650	3610	8620	14880
2019	3565	25200	2900	2420	25435	25435	11055	3040	n/a	2760	4460	9660	16880
2020	3640	15255	1980	1280	21100	21100	8715	2550	n/a	1650	2630	6880	11160
2021	5010	26525	3745	850	17300	17300	2540	2233	n/a	1630	2100	5600	12090
2022	5510	37025	3070	970	15740	15740	975	2478	n/a	1850	2450	4310	8610
Data sources	Eurostat	Eurostat	Eurostat	DT&V ²¹²	Eurostat	Eurostat	Eurostat	EMN for 2016/ 2017.	EMN Factsheet	DT&V	DT&V	DT&V	

* See appendix I for top five nationalities of return.

²¹¹ Years 2015, 2016 and 2017 are retrieved from EMN reports that build on the DT&V statistics while 2018-2022 are retrieved directly from the DT&V. There are inconsistencies in the EMN reports concerning the naming of this category of returns. In 2016 it is named “voluntary departure” in 2017 “independent return” and in 2018 “assisted voluntary departure”.

11.2 Overview of the Legal Framework on Return Policy

The Title of the Legislation in English	The Title in the Original Language	Policy Area	Year Announced	Description of Policy	Key terms for search function	Level of Legislation	Type of Legislation or Administrative Action	Target Group	Web Links to	Web links to Source in
Aliens Act	Vreemdelingenwet	Access Stay Enforcement Departure Deportation Entry ban Remedies	2000 - today		Illegal entry Illegal stay Detention Deportation	National	Act	Regular Refugees Illegal Rejectees	https://www.asylumlawdatabase.eu/sites/default/files/asylumlawdatabase/nl/vreemdelingenwet/2000-2023-2-10-01/	https://www.asylumlawdatabase.eu/sites/default/files/asylumlawdatabase/nl/vreemdelingenwet/2000-2023-2-10-01/
Aliens Decree	Vreemdelingenbesluit	Access Stay Border Control Surveillance Freedom-restriction Departure Deportation Transfer Entry ban Undesirability Remedies	2000 - today		Asylum residence permit Border control Schengen border code Supervision Custodial measures	National	Decree	Regular Refugees Illegal Rejectees	https://wetten.overheid.nl/BWBR0011825/2023-01-01/#Hoofdstuk4	https://wetten.overheid.nl/BWBR0011825/2023-01-01/#Hoofdstuk4

²¹² Ministerie van Justitie en Veiligheid, “Instroom- en vertrekcijfers,” Over DT&V, *Dienst Terugkeer en Vertrek*, August 1, 2023, <https://www.dienstterugkeerenvertrek.nl/over-dtv/cijfers>.

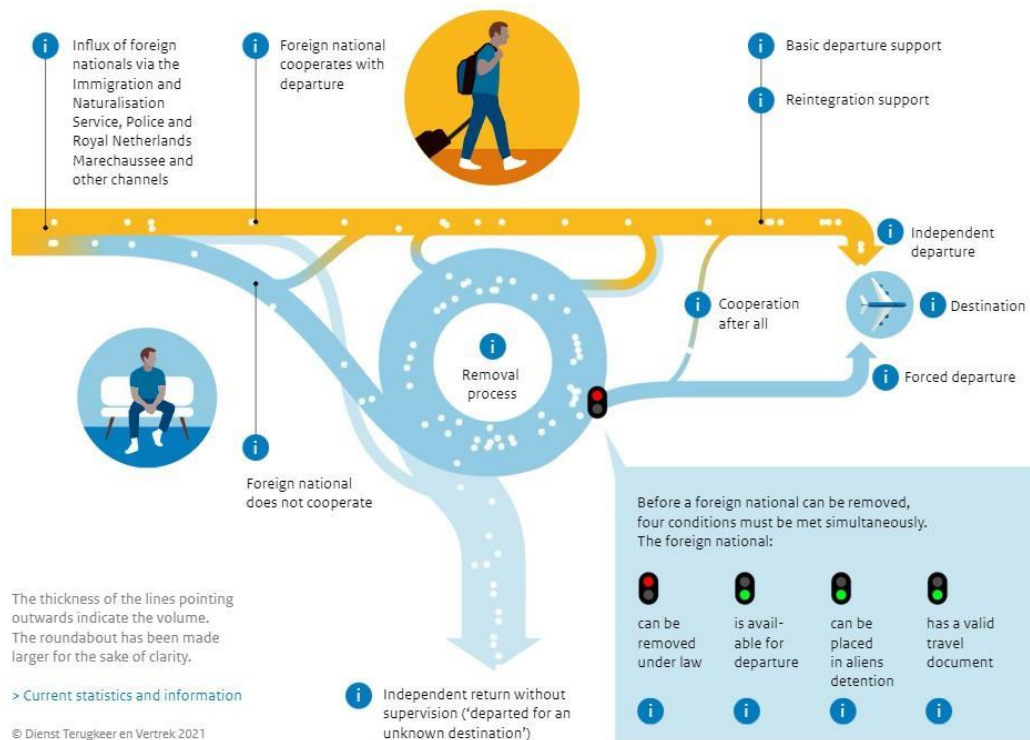
Aliens Circular A	Vreemdelin gencirculair e A	Access Supervision Departure Eviction Entry ban Undesirability Freedom-restriction Identification	2000 - 2021			National	Guidelines	Regular Refugees Illegal Rejectees	https://wetten.overheid.nl/BWBR0012287/2021-01-01
Aliens Circular B	Vreemdelin gencirculair e B	Regular stay Humanitarian residence Special stay	2000 - 2021			National	Guidelines	Regular Refugees	https://wetten.overheid.nl/BWBR0012289/2021-01-01
Aliens Circular C	Vreemdelin gencirculair e C	Asylum Country-specific policy Temporary asylum permit	2000 - 2021			National	Guidelines	Refugees	https://wetten.overheid.nl/BWBR0012288/2021-01-14#Circulaire.divisieC3_Circulaire.divisie3
Aliens Regulation	Voorschrift Vreemdelingen	Access Stay Surveillance Border control Freedom-restriction Departure Eviction	2000 - today		Safe countries of origin	National	Regulation		https://wetten.overheid.nl/BWBR0012002/2023-07-01

Border Accommodation Regime	Reglement Regime Grenslogies	Border Control Supervision Irregular	2001 - today			National	Regulation		https://wetten.overheid.nl/BWBR0005848/2001-04-01
Regulation on the Supervision of the Return of Foreign nationals			2013						
The Repatriation and Detention of Aliens Act			2018			National	Act		
Central Agency for the Reception of Asylum Seekers Act	Wet Centraal Orgaan opvang asielzoekers	Reception Refugees Asylum seeker	2020 - today		Reception Accommodation Supervision	National	Act	Refugees Asylum seekers	https://wetten.overheid.nl/BWBR0006685/2020-01-01
Decree of the State Secretary for Justice and Security amending the Aliens Act Implementation Guidelines 2000	Besluit van de Staatssecretaris van Justitie en Veiligheid houdende wijziging van de Vreemdelingen-circulaire 2000	UAMs Return decision Postponement of departure Adequate reception facilities	2022 - today		Return of UAMs Postponing return TQ case	National	Decree	UAMs Asylum seekers	https://zoek.officielebekendmakingen.nl/stcrt-2022-53.html

11.3 Flowchart of the national return system

The return process

The aim is for foreign nationals without legal stay in the Netherlands to have them demonstrably leave the country, preferably independently (voluntarily).



Source: Repatriation and Departure Service (2021). "the return process" available at: <https://english.dienstterugkeerenvertrek.nl/the-return-process>

Appendix I

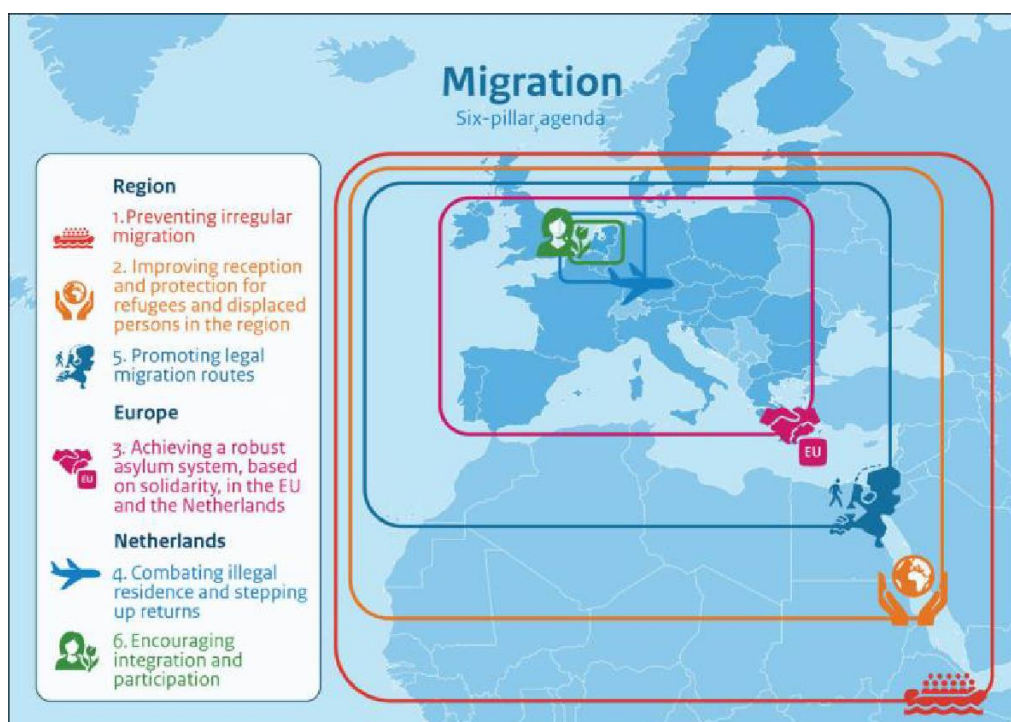
Top nationalities return from DT&V statistics

Year	2015	2016	2017	2018	2019	2020	2021	2022
1	n/a	n/a	n/a	Albania	Morocco	Nigeria	Morocco	Morocco
2	n/a	n/a	n/a	Morocco	Nigeria	Morocco	Algeria	Algeria
3	n/a	n/a	n/a	Iraq	Moldavia	Algeria	Nigeria	Nigeria
4	n/a	n/a	n/a	Afghanistan	Algeria	Syria	Albania	Syria
5	n/a	n/a	n/a	Algeria	Iraq	Iraq	Syria	Ukraine

Source: Ministerie van Justitie en Veiligheid, “Instroom- en vertrekcijfers,” Over DT&V | Dienst Terugkeer En Vertrek, November 1, 2023, <https://www.dienstterugkeerenvertrek.nl/over-dtv/cijfers>.

Appendix II

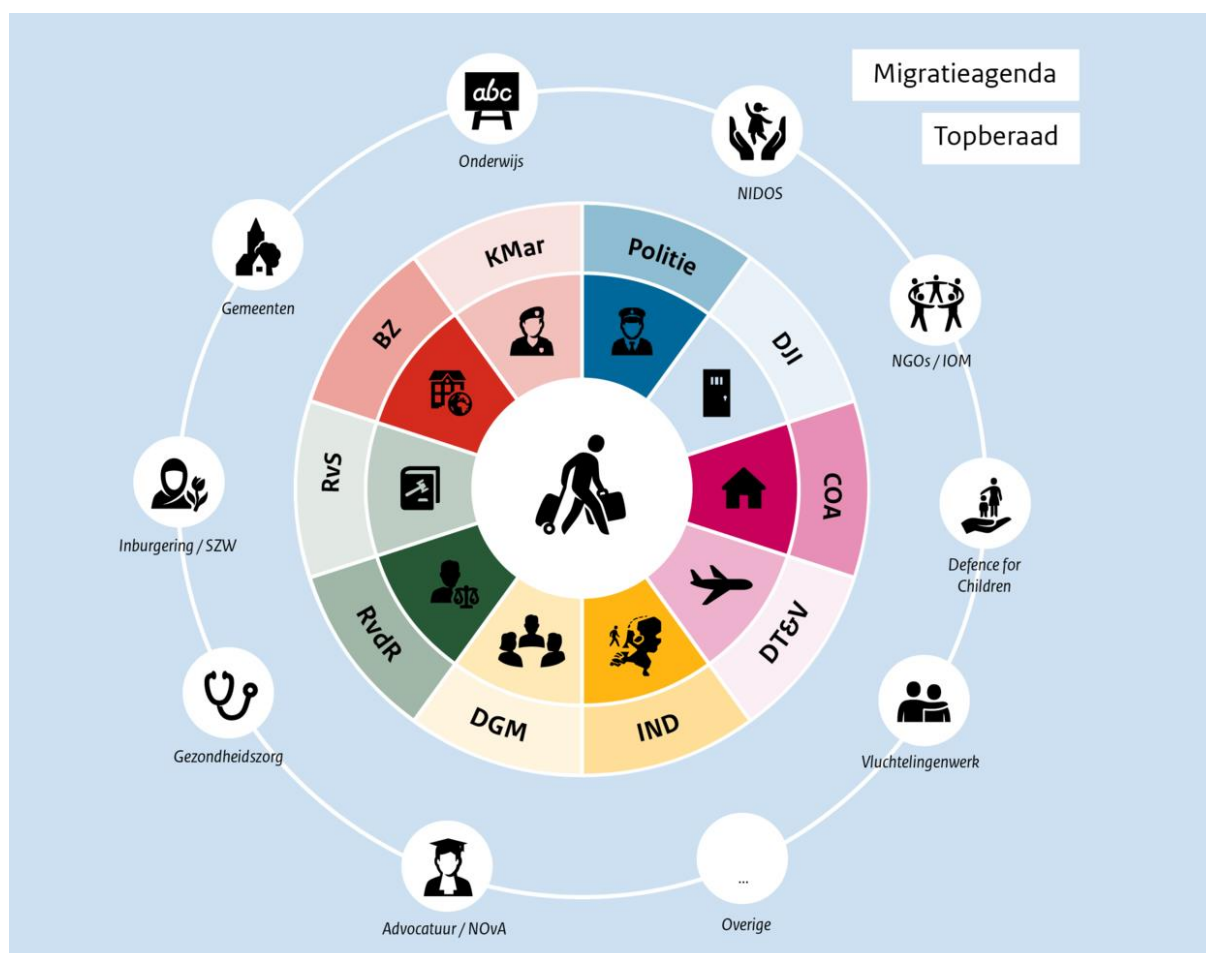
Integrated Migration Approach



Source: Ministerie van Justitie en Veiligheid, “Kabinet presenteert integrale migratieagenda,” Nieuwsbericht | Rijksoverheid.nl, July 10, 2018, <https://www.rijksoverheid.nl/actueel/nieuws/2018/03/30/migratiebeleid-toekomstbestendig>.

Appendix III

Migration Chain partners



Source: Ministerie van Justitie en Veiligheid, "Samenwerking in de keten," Migratieketen, June 28, 2018, <https://magazines.rijksoverheid.nl/jenv/migratieketen/2018/01/samenwerking-in-de-keten>.

Appendix IV

No-fault permit statistics

	2008	2009	2010	2011	2012	2013 t/m juni
Aanvragen «buiten schuld»	460	550	470	290	240	90

Bron: IND. Afgerond op tientallen.

Het aantal verblijfsvergunningen dat in de afgelopen jaren op grond van «buiten schuld» is verleend (in eerste aanleg en na bezwaar) wordt weergegeven in de volgende tabel:

	2008	2009	2010	2011	2012	2013 t/m juni
Inwilligingen «buiten schuld»	70	70	60	30	40	10

Bron: IND. Afgerond op tientallen.

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University of Glasgow (UK, Associated Partner)

COUNTRY SNAPSHOT

**Legal and Policy Infrastructures of
Returns in France**

D2.1

Neva Övünç ÖZTÜRK, Hakan ÜNAYSwedish Research Institute in Istanbul**1. The Political Context / Framework**

France is a popular destination for immigrants, and immigration has been a significant issue in its political discourse for a long time. Following the ‘European migration crisis’ of 2015, Eduard Philippe (Prime Minister at the time) has made a ‘credible removal policy’ a condition of ‘migratory deterrence’. Thus, it is asserted that expulsions gained a symbolic dimension, which is reassuring the public of the government’s ability to deal with the immigration ‘problem’.¹ In France, the possibility of expelling foreigners was included in the penal Code back in 1832, but it was only in 1849 that prefects (administrative authorities) were given the power to deport them to their country of origin forcibly. Since then, the reasons for

expelling foreigners haven’t changed much. The main reasons for expulsion are still related to being a threat to public order, the job market, and the social system. Hence, forced removal is initiated with the necessity to maintain social protection, which is suspected of being benefitted by illegal foreigners without contributing to it. Therefore, the expulsion of foreigners meets both a security imperative and a need to maintain social protection in the general French policies.²

As the number of Syrian asylum seekers in Europe rose in 2015, France was governed by President François Hollande of the Socialist Party. The National Assembly had a left-wing majority. While Hollande intended to restore a more “empathetic and

¹ Le Courant, Stefan. “Expulser et menacer d’expulsion, les deux facettes d’un même gouvernement? Les politiques de gestion de la migration irrégulière en France”, *L’Année sociologique*, vol. 68, no. 1, 2018, pp. 211-232

² Ibid., p. 212.

serene” image of immigration than his right-wing predecessor, Nicolas Sarkozy, his guiding principle remained no less firm. On the one hand, hundreds of texts such as decrees, orders, and circulars have been published relating to immigration, asylum, reception, and support for foreign nationals, some with more impact than others on the future of migrants in France.³ In addition, two new laws directly affecting the Code on the Entry and Residence of Foreigners and the Right of Asylum (CESEDA) were issued in the wake of the events of 2015. Obviously, not all of these texts had a direct impact on the people who had to deal with the situation in 2015. In addition, several were aimed solely at managing, improving, and making the services offered to forced migrants more effective. For example, two decrees were issued on October 20 2015, one designating the prefects competent to register asylum applications and the other setting the model form for the declaration of domiciliation for asylum seekers. However, many of these texts aimed to improve control of forced migrants, particularly on entry to France and in temporary accommodation, or attempt to facilitate their return to their countries of origin.

Furthermore, in 2016, the Ministry of the Interior issued a circular that ordered prefects to strictly enforce the Dublin Regulation. This meant that people who were seeking asylum were expelled more quickly to the countries responsible. The circular also instructed the prefects to use various methods of coercion to achieve this goal. As a result, a large number of people were subjected to the “Dublin” process,

with over 45,000 individuals affected in 2018 alone. This number accounted for more than one-third of all asylum applications that were registered in France during that year.⁴

Under President Emmanuel Macron’s administration, there has been an emphasis on maintaining a balance between “humanity and firmness,” occasionally adopting restrictive measures, possibly in response to challenges from the far right.⁵ French immigration legislation has become much more complex over the years, reflecting a gradual tightening of immigration law against the backdrop of the rise of the far right, although the immediate and structured mobilisation in relation to Ukrainian asylum seekers in 2022 seems to be the exception to this.⁶ For instance, the 2018 immigration law, known as the Collomb Law, increased the maximum detention period for unauthorised migrants to 90 days, shortened the asylum application deadline, and enhanced the potential for deporting rejected asylum seekers. However, the law also facilitated the entry and stay of international students and highly qualified workers, expanded family reunification options, and introduced a four-year residence permit for stateless individuals and beneficiaries of subsidiary protection.⁷ It is stated that this approach reflects the precarious search for a balance between those in favour of more humane measures and the pressure exerted by the far-right, with a candidate such as Zemmour even going so far as to propose holding a referendum to achieve “zero

³ Martel, Ariane, “Instrumentalisation du concept d’identité nationale et politiques migratoires en Europe Une analyse comparée entre l’exil syrien (2015) et l’exil ukrainien (2022) en Allemagne, en France et au Danemark”, (Essai de maîtrise) Université Laval, École supérieure d’études internationales, 2023.

⁴ Martel, Ariane, Ibid., p. 35.

⁵ Boubtane, Ekrame, “France Reckons with Immigration Amid Reality of Rising Far Right, Migration Policy Institute”, May 5, 2022, <https://www.migrationpolicy.org/article/france-immigration-rising-far-right> (Accessed 22.04.2024).

⁶ Martel, A., Ibid., pp. 36-37.

⁷ Boubtane, E., Ibid.; Martel, A., p. 37.

immigration”.⁸ In 2019, the government implemented regulations to limit healthcare access for asylum seekers and unauthorised immigrants in an effort to control immigration. On the other hand, the government also expressed a willingness to assist migrants rescued in the Mediterranean and adopted a more open employment-based immigration policy to address labour market needs.⁹

This somewhat ‘precarious search for a balance’ trend is also reflected in the most recent law of 2024 regarding immigration, as it aims to ‘control immigration and improve integration’.¹⁰ On February 1, 2023, the draft law entitled “Controlling Immigration and Improving Integration” was submitted to the French Council of Ministers and finally approved by the Mixed Commission on December 19, 2023, with ‘additions and trimming’. France’s new immigration law became effective on January 27, 2024, less than a week after at least 75,000 people participated in protests against it across the country.¹¹ These protests were sparked by the opinion that the new law goes against French values and that it is closely associated with the far-right approach of the Marine Le Pen party, considering that it aims to make it easier for France to deport foreigners who are considered undesirable and also makes it harder for foreigners to access social welfare¹². The final version of the law was significantly shorter than the one approved

in December, as almost half of the 86 articles were struck out by the Constitutional Council following a ruling on January 25. Following the deliberations, the nine-member Council ruled that 35 measures, many of which had been added to the draft law by right-wing parties, could not be included on the grounds that they were either too far removed from the law’s initial intent or unconstitutional. Despite the fact that a significant part of the draft law had been struck out by the Constitutional Council, Interior Minister Gérald Darmanin gave an upbeat assessment of it, saying, “Never has a law provided so many means for expelling delinquents and so many requirements for the integration of foreigners”.¹³ In fact, the new law asserted that it represented a hardening of the immigration rules. Foreigners legally in France could now be deported with criminal convictions. Even those who came to France before they were 13 or those who have lived in France for more than 20 years could be expelled if they are given substantial jail terms and deemed to be a “grave threat to public order”¹⁴. On the other hand, an article on the regularisation of undocumented workers in industries facing shortages was also kept in the text¹⁵.

As for the scope and the procedure of return¹⁶, the decision on removal or the obligation to leave French territory (QQTF) is taken by the prefect (by the prefect of

⁸ Boubtane, E., Ibid.

⁹ Ibid.

¹⁰ Martel, A., pp. 38-39.

¹¹ ECRE, “France: New Immigration Law Adopted Despite Constitutional Council Rejecting Almost Half of Its Articles”, 2 February 2024; <https://ecre.org/16309-2/> (Accessed 22.04.2024).

¹² Arbërie Shabani, “Nationwide Protest in France Call on Macron Not to Sign New Immigration Law, Schengen Visa News”, 23 January 2024, <https://www.schengenvisainfo.com/news/nationwide-protest-in-france-call-on-macron-not-to-sign-new-immigration-law/> (Accessed 22.04.2024).

¹³ ECRE, Ibid.

¹⁴ Kirby, Paul, “France set to tighten immigration law after court scraps some measures”, BBC News, 26.01.2024, <https://www.bbc.com/news/world-europe-68103950> (Accessed 22.04.2024).

¹⁵ Le Monde, French immigration bill signed into law by Macron, 27 January 2024, https://www.lemonde.fr/en/immigration/article/2024/01/27/french-immigration-law-promulgated-by-macron_6470074_144.html.

¹⁶ The information regarding return and expulsion procedures provided here is mostly based on the context published on the French administration’s official website, <https://www.service-public.fr>. Information might not be up to date.

police in Paris). As a rule, it obliges the Third Country National (TCN) to leave France by her/his own means within 30 days. This is the voluntary departure term applied in the French system. The voluntary departure term may be extended if the TCN's situation justifies it (e.g. length of stay in France, schooling of children). During this period, the prefect may require the TCN to appear up to 3 times a week in the prefecture or at the police station or gendarmerie. If the TCN does not leave after this period, s/he can be placed in a detention centre or under house arrest, and an entry ban will be issued. In limited situations, QQTF can also require the TCN to leave the territory without delay, i.e. within 48 hours from the notification of the decision. QQTF is issued if:

- the TCN entered France irregularly (or in the Schengen area) and had no residence permit,
- s/he entered France regularly but stayed there beyond the validity of her/his visa (or if visa exemption applies, stayed more than three months after entering France),
- her/his residence permit has not been renewed or has been withdrawn if the residence permit application is refused,
- s/he has not applied for renewal of their residence permit and have remained in France after its expiry,
- the TCN was an asylum seeker and her/his application for protection has been permanently rejected,
- s/he has been found to be a threat to public order and have been residing in France for less than three months,
- s/he worked without a work permit and have resided in France for less than three months.

If the TCN has been found to be a threat to public order or refused a residence permit for fraud or because her/his

application was manifestly unfounded, or if there is a risk of absconding, voluntary departure term is not issued, and the decision obliges the TCN to leave without delay. The QQTF can be challenged by lodging an appeal with the administrative court that has territorial jurisdiction over the prefecture that made the decision. If the TCN is detained, the appeal is filed with the administrative court on which the place of detention or house arrest depends. If the TCN has limited financial resources, s/he can be subjected to legal aid. If a TCN can provide a valid reason that they cannot leave the country, they may be put under house arrest. This can be done as long as there is a reasonable chance that they will be removed from the country. The house arrest can last for up to six months and can be renewed once. There is no specific law attached to this legal regime. The competent authority will issue the house arrest order, depending on the nature of the removal order, whether it is issued by the Prefect or the Minister.¹⁷ (EMN France 2020, 10).

Assisted voluntary return is available and encouraged. The French Office for Immigration and Integration (OFII) organises the return assistance. TCNs who are in an irregular situation in France, who have applied for asylum and do not wish to pursue it, or who have received an OQTF are eligible for voluntary return assistance. Nationals of 28 countries (Armenia, Benin, Burkina Faso, Cameroon, Congo Brazzaville, Congo DRC, Ivory Coast, Gabon, Georgia, Guinea Conakry, Haiti, Mali, Morocco, Mauritius, Senegal, Togo, Tunisia, Kosovo, Afghanistan, Bangladesh, Ethiopia, India, Iraq, Nepal, Nigeria, Pakistan,

¹⁷ EMN France, "Responses to long-term irregularly staying migrants: practices and challenges in France", November 2020, <https://home-affairs.ec.europa.eu/system/files/2022->

[04/emn_france_lt_irregular_migrant_en_final.pdf](#) (Accessed 22.04.2024).

Russia, Somalia) are also eligible for reintegration assistance¹⁸

2. Statistical Overview¹⁹ Regarding Returns and Readmissions at the National Level

Year	Stock of irregular migrants and/or # TCNs found to be illegally present (data in Eurostat)	# Asylum applications	# TCNs/foreign nationals refused entry at the border	# TCNs/foreign nationals ordered to leave Total #	# TCNs/foreign nationals* returned following an order to leave (annual data)
2015	109.720	80.075	10.860	79.950	12.195
2016	91.985	85.726	8.580	81.000	10.930
2017	115.085	100.755	10.215	84.675	12.720
2018	105.880	123.625	9.515	105.560	15.445
2019	120.455	132.826	9.880	123.845	15.615
2020	103.915	96.424	4.240	108.395	6.930
2021	117.255	103.164	8.210	125.450	6.290
2022	115.120	154.597	9.180	135.645	8.640

This table provides a statistical overview of returns and readmissions at the national level from 2015 to 2022. It includes data on the stock of irregular migrants or third-country nationals (TCNs) found to be

illegally present, the number of asylum applications, TCNs/foreign nationals refused entry at the border, TCNs/foreign nationals ordered to leave, and TCNs/foreign nationals returned following

¹⁸ Information regarding voluntary return assistance provided here is based on the context published on OFII's official website: <https://www.ofii.fr/procedure/retourner-dans-son-pays/#partie1> (Accessed 22.04.2024).

¹⁹ For the statistics used in the table, see: Eurostat, "Asylum applicants by type, citizenship, age and sex - monthly data", https://ec.europa.eu/eurostat/databrowser/view/migr_asyappctzm_custom_11401687/default/table?lang=en (Accessed 14.05.2024); Eurostat, "Third country nationals found to be illegally present - annual data (rounded)", https://ec.europa.eu/eurostat/databrowser/view/MIGR_EIPRE_custom_5273350/bookmark/table?lang=en&bookmarkId=aa6a64c1-96bf-45e6-af40-2cafo2dfcdb1 (Accessed 22.04.2024); Eurostat, "Third country nationals refused entry at the external borders - annual data (rounded)", https://ec.europa.eu/eurostat/databrowser/view/MIGR_EIRFS/default/table?lang=en (Accessed 22.04.2024); Eurostat, "Third country nationals ordered to leave - annual data (rounded)", https://ec.europa.eu/eurostat/databrowser/view/MIGR_EIORD/default/table?lang=en (Accessed 22.04.2024); Eurostat, "Third country nationals returned following an order to leave - annual data (rounded)", https://ec.europa.eu/eurostat/databrowser/view/MIGR_EIRTN/default/table?lang=en&category=migr.migr_man.migr_eil (Accessed 22.04.2024).

an order to leave. The data show fluctuations in the number of irregular migrants and asylum applications over the years. For example, asylum applications peaked in 2019 with 132,826 applications and reached a low in 2020 with 96,424.

Similarly, the number of TCNs ordered to leave and those returned following an order also varied, with the highest number of returns (15,615) in 2019 and a significant drop to 6,290 in 2021.

3. General Legal Framework

The Title of the Policy/Legislation in English	The Title in the Original Language	Policy Type/Area	Date/Announced Year	Active Period	Description of Policy or Short Overview
The Code of Entry and Stay of Foreigners and Rights of Refugees	Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA)	forced return, general/asylum, irregularity, pre-removal detention, assisted return, border management	2004	The last modification was made by Law No. 2024-42 of January 26, 2024	Integrates the main legislative and regulatory provisions relating to foreigners in France, namely: entry into the territory (entry requirements and holding area); residence (residence permit, residence conditions and voluntary return assistance); family reunification; expulsion measures (administrative detention, deportation and expulsion); and right to asylum.
Civil Code	Code Civil	other	1804	Many amendments were made to this Code. The last modification was made by LAW No. 2024-233 on March 18, 2024. This amendment is irrelevant to return and related matters	Integrates texts relating to the status of persons, property and relations between private parties. The Civil Code integrates particular rules that govern nationality matters.

Code of Administrative Justice	Code de justice administrative	other	2000	The last modification was made by Decree No. 2024-167 of March 1, 2024. This modification is not directly related to return and connected matters.	This Code applies to the Council of State, administrative courts of appeal, and administrative courts, and it provides the rules regarding the judgements.
Code of Social Action and Families	Code de l'action sociale et des familles	other	2000	The last modification was made by Decree No. 2024-166 of February 29, 2024. This modification is not related to return or connected matters.	The Code includes rules that govern children, the elderly, and people with disabilities, as well as social institutions, including but not limited to migrants.
2024 Law No. 2024-42 of January 26, 2024 to control immigration, improve integration	LOI n° 2024-42 du 26 janvier 2024 pour contrôler l'immigration, améliorer l'intégration	forced return, irregularity, general/asylum, pre-removal detention	26.01.24	Active	The law provides provisions for the exceptional regularisation of undocumented workers in professions in tension, "talent" residence cards for foreign doctors, measures on integration and asylum, facilitated removal in the event of severe offences, and increases in the duration of house arrest used for migration control.
2018 Law for a controlled immigration, an effective right of asylum and a successful integration	LOI n° 2018-778 du 10 septembre 2018 pour une immigration maîtrisée, un droit d'asile effectif et une intégration réussie	forced return, general/asylum, irregularity, pre-removal detention	10.09.2018	Active	The law provides provisions aiming the reduction of deadlines for examining asylum applications, fight against irregular immigration and better integration of foreigners:
2018 Law enabling the effective implementation of the European asylum system	LOI n° 2018-187 du 20 mars 2018 permettant une bonne application du régime d'asile européen	pre-removal detention	20.03.2018	Active	The law aims to facilitate the detention of migrants seeking asylum under the "Dublin" procedure.

2016 Law on the right of foreigners in France	LOI n° 2016-274 du 7 mars 2016 relative au droit des étrangers en France	irregularity, general/asylum	7.03.2016	Active	The law had three objectives: better welcome and integration, making France more attractive to foreign talent, and better fighting against irregular immigration.
The circular of 17/11/2022 on the execution of orders to leave French territory and the strengthening of retention capacities	Instruction du 17 novembre 2022 "exécution des obligations de quitter le territoire français (OQTF) et renforcement de nos capacités de rétention"	forced return, irregularity, pre-removal detention	17.12.2022	Active	The instruction aims to strictly apply the obligations to leave French territory (OQTF) and have some detention-related provisions.

This table outlines the general legal framework concerning policies and legislation related to returns and readmissions in France. It includes several significant laws and codes such as the Code of Entry and Stay of Foreigners and Rights of Refugees (CESEDA), the Civil Code, the Code of Administrative Justice, and the Code of Social Action and Families. For example, CESEDA integrates the main legislative and regulatory provisions regarding foreigners in France, covering aspects like entry requirements, residence permits, family reunification, and expulsion measures, along with the right to asylum.

Additionally, the table features recent and specific laws such as the 2024 Law No. 2024-42, aimed at controlling immigration and improving integration. This law provides provisions for the regularization of undocumented workers in certain professions, issuing "talent" residence cards for foreign doctors, and enhancing measures on integration and asylum. It also facilitates the removal of individuals in the event of severe offenses and increases the duration of house arrest for migration control. Other notable entries include the 2018 laws aimed at effective asylum processing and integration, and the 2022 circular on executing orders to leave French territory, which emphasizes strict enforcement of expulsion orders and includes detention-related provisions.

4. Institutional Framework

Authority (English and original name)	Tier of government (national, regional, local)	Type of organisation	Area of competence in the fields of return (Briefly explain the role)	Link
Ministry of Interior	National	Government	Coordinates, monitors, and participates in the planning of the management of readmission, return, deportation or relocation procedures.	https://www.interieur.gouv.fr
The French Office of Immigration and Integration (OFII)	National/ Regional	Government	OFII's missions include family immigration, the reception and integration of immigrants, assistance for return and reintegration, accompaniment of asylum seekers, the implementation of the "sick foreigners" reform since 2016 and professional immigration	https://www.ofii.fr/nos-missions/
French Office for the Protection of Refugees and Stateless Persons (OFPRA)	National/ Regional	Government	OFPRA's missions include mission to investigate applications for international protection on the basis of the Geneva Conventions of July 28, 1951, and New York of September 28 1954 and Cesda; mission of legal and administrative protection for statutory refugees, statutory stateless persons and beneficiaries of subsidiary protection; advisory mission as part of the border asylum procedure; and a mission to give an opinion to the Minister of the Interior on whether or not an application for authorisation to enter	https://www.ofpra.gouv.fr

			French territory for asylum is manifestly unfounded.	
Police	National/ Regional	Government	Issues return, and administrative expulsion decisions implement removal operations.	https://www.interieur.gouv.fr
Courts	Regional	Regional/State	Decides about removal.	https://www.service-public.fr/particuliers/vosdroits/F2025?lang=en
National Court of Asylum Law (CNDA)	National	National	The National Court of Asylum, competent to hear decisions relating to asylum applications, is a specialised administrative court ruling on first and last-resort appeals against decisions of the French Office for the Protection of Refugees and Stateless Persons (OFPRA).	http://www.cnda.fr/English

This table provides a comprehensive overview of the legal framework governing returns and readmissions in France. It includes major laws and regulations such as the Code of Entry and Stay of Foreigners and Rights of Refugees (CESEDA), the Civil Code, and the Code of Administrative Justice. Each law is described in terms of its scope and application, covering aspects like immigration control, asylum, family reunification, and expulsion measures. Notable entries include recent legislation like the 2024 Law No. 2024-42, which aims to control immigration, enhance

integration, and facilitate the removal of undocumented workers. Additionally, the table highlights the roles of various authorities, including the Ministry of Interior, the French Office of Immigration and Integration (OFII), and the French Office for the Protection of Refugees and Stateless Persons (OFPRA), in managing immigration and asylum processes. These laws and institutions collectively form the backbone of France's approach to handling migration, ensuring both regulatory compliance and humanitarian considerations.

5. International Cooperation²⁰

AFRICA

- [France-Gabon Agreement of February 24, 2010](#), relating to exchanges of young professionals NOR: MAE/J/10/10868/D__
- [France Cameroon Agreement of May 21, 2009](#), relating to the concerted management of migratory flows and inclusive development (together six annexes), signed in Yaoundé on May 21, 2009 __
- [France - Burkina-Faso Agreement](#) relating to the concerted management of migratory flows and inclusive development (6 annexes) signed in Ouagadougou on January 10, 2009__
- [France - Cape Verde Agreement](#) relating to the concerted management of migratory flows and inclusive development (three annexes together) signed in Paris, November 24, 2008__
- [France - Mauritius Agreements: movement and readmission](#) Relating to [stay and circular migration of professionals](#) (two annexes together), signed in Paris, September 23, 2008 Agreement relating to [cooperation in matters of internal security](#) signed in Paris June 13, 2008 __
- [France - Mauritius: Decree No. 2008-17 of January 3, 2008](#), publishing the Agreement between the Government of the French Republic and the Government of the Republic of Mauritius aimed at facilitating the movement of Mauritian nationals in Reunion, signed in Port-Louis on April 2, 2007, NOR: MAE/J/0773795/D__
- [France-Mauritius: Decree No. 2008-16 of January 3, 2008](#), publishing the Agreement between the Government of the French Republic and the Government of the Republic of Mauritius relating to the readmission and transit of persons in an irregular situation, signed in Port-Louis on April 2, 2007, NOR: MAE/J/0773783/D__
- [France-Benin Agreement](#) relating to the concerted management of migratory flows and co-development, signed in Cotonou on November 28, 2007, entered into force on March 1st 2010 __
- [France-Congo Agreement](#) relating to the concerted management of migratory flows and co-development, signed in Brazzaville on October 25, 2007, and entered into force on August 1, 2009. NOR : MAE/J/09/16108/D__
- [France-Gabon Agreement](#) relating to the concerted management of migratory flows and co-development, signed in Libreville on July 5, 2007, and entered into force on September 1st 2008 __
- [France-Senegal Agreement](#) relating to the concerted management of migratory flows, signed in Dakar on September 23, 2006, and [Amendment of February 25, 2008](#), entered into force on August 1, 2009. __
- [Franco-Togolese convention](#) relating to the movement and residence of people, signed on June 13, 1996, in Lomé (published by decree no. 2001-1268 of December 20, 2001, OJ of December 28) __
- [Franco-Togolese establishment agreement](#) signed in Lomé on June 13, 1996, published by decree no. 2001-1325 of December 21, 2001, and entered into force on December 1, 2001. NOR: MAE/J/01/30086/D__
- [Circular of April 7, 2010](#), relating to the implementation of the provisions relating to admission to stay and work of the Franco-Beninese Agreement relating to the concerted management of migratory flows and co-development of November 28, 2007, NOR: IMI/M/10/00107/C__
- [Circular of January 15, 2010](#) Implementation of the provisions of the Franco-Senegalese Agreement relating to stay and work NOR: IMI/M/09/00083/C__
- [Franco-Algerian Agreement of December 27, 1968](#), relating to the movement, employment and stay of Algerian nationals and their families (JO of March 22, 1969)

²⁰ The list of the international cooperation is taken from the following link:
<https://www.gisti.org/spip.php?rubrique135#contenu>

- **Memorandum of understanding between Algeria and France** issuance of consular passes (unpublished)
- **Circular of September 6, 2002** Entry into force of the 2nd amendment to the modified Franco-Tunisian Agreement of March 17, 1988, and **3rd amendment to the modified Franco-Algerian Agreement** of December 27, 1968, NOR: INT/D/02/00169/C
- **Circular of July 18, 1994** movement, stay and readmission of Algerians NOR: INT/D/94/00207/C (BO Int. n° 3, 1994) Ministry of the Interior.
- **Circular of March 14, 1986**, relating to the conditions of movement, employment and stay in France for Algerian nationals and their families
- **Information note of February 24, 1997**, relating to the issuance of provisional work authorisations to Algerians, followed by the information note relating to the consequences of the Mert ruling (CE) on the issuance of work authorisations DPM/DM2-3/ 97/140 (BO MTAS-MATVI n° 97/10 of April 16, 1997)
- **France-Tunisia framework agreement of April 28, 2008**, relating to the concerted management of migration and inclusive development between the Government of the French Republic and the Government of the Tunisian Republic, signed in Tunis on April 28, 2008, entered into force with its protocols on ^{July} 12009 **Text of the NOR agreement and protocols**: MAE/J/09/16069/D
- **Franco-Tunisian Agreement of March 17, 1988 amended** on matters of residence and work. (JO of February 11, 89)
- **Amendment to the Franco-Tunisian Agreement of March 17, 1988** made in Tunis on September 8, 2000, published by decree No. 2003-976 of October 8, 2003, and entered into force on November 1, 2003. It modifies the amendment of December 19 1991, to the Franco-Tunisian Agreement on residence and work. NOR: MAE/J/03/30092/D
- **Circular of April 6 2011** Residence authorisations issued to third-country nationals by Schengen Member States NOR: IOC/K/11/00748/C
- **Circular of July 31, 2009**, relating to the Franco-Tunisian framework agreement relating to the concerted management of migration and inclusive development as well as the Franco-Tunisian protocol relating to the concerted management of migration and the Franco-Tunisian protocol on development solidarity, of April 28, 2008. Implementation of the provisions relating to admission to stay and work NOR: IMI/M/09/00076/C
- **Circular of September 6, 2002** Entry into force of the 2nd amendment to the modified Franco-Tunisian Agreement of March 17, 1988, and **3rd amendment to the modified Franco-Algerian Agreement** of December 27, 1968, NOR: INT/D/02/00169/C
- **Circular of April 19, 1996**, relating to the movement, stay and readmission of Tunisians NOR: INT/D/96/00062/C Ministry of the Interior.
- **Circular of March 9, 1994**, relating to the movement, stay and readmission of Tunisians NOR: INT/94/00090/C (unpublished) Ministry of the Interior.

AMERICA

- **France-Brazil: Decree No. 2014-1052 of September 15, 2014**, publishing the Agreement in the form of an exchange of letters between the Government of the French Republic and the Government of the Federative Republic of Brazil concerning the establishment of a cross-border movement regime for the benefit of residents of the border area between the State of Amapa and the Guyana region (together an annexe), signed in Brasilia on March 26, 2014 and in Paris on April 28, 2014 NOR: MAEJ/1420305 /D _
- **France-Brazil: Decree No. 2008-71 of January 22, 2008**, publishing the partnership and cooperation agreement between the Government of the French Republic and the Government of the Federative Republic of Brazil in matters of public security, signed in Brasilia March 12, 1997, NOR: MAE/J/0765447/D _
- **France-Brazil: Decree No. 2007-1518 of October 22, 2007**, publishing the Agreement between the Government of the French Republic and the Government of the Federative Republic of Brazil relating to the construction of a road bridge over the Oyapock River connecting French Guiana and the State of Amapá, signed in Paris on July 15, 2005, NOR: MAE/J/0767958/D _

- [**France-Dominique: Decree No. 2007-413 of March 23, 2007**](#), publishing the Agreement between the Government of the French Republic and the Government of the Commonwealth of Dominica aimed at facilitating the movement of Dominican nationals in the French departments of America, done in Basse-Terre (Guadeloupe) on March 9, 2006, NOR: MAE/J/0730032/D__
- [**France-Dominique: Decree No. 2007-412 of March 23, 2007**](#) publishing the Agreement between the Government of the French Republic and the Government of the Commonwealth of Dominica relating to the readmission and transit of persons in an irregular situation, made in Basse -Terre (Guadeloupe) March 9, 2006 NOR: MAE/J/0730031/D__
- [**France - Saint Lucia: Decree No. 2006-431 of April 12, 2006**](#), publishing the Agreement between the Government of the French Republic and the Government of Saint Lucia relating to the readmission of persons in an irregular situation, signed in Castries on April 23, 2005 (1) NOR: MAE/J/0630041/D__
- [**France - Saint Lucia: Decree No. 2006-432 of April 12, 2006**](#), publishing the Agreement between the Government of the French Republic and the Government of Saint Lucia aimed at facilitating the movement of Saint Lucian nationals in the French departments of America, signed in Castries on April 23, 2005, NOR: MAE/J/0630042/D__
- [**France-Brazil: Decree No. 2001-760 of August 28, 2001**](#), publishing the Agreement between the Government of the French Republic and the Government of the Federative Republic of Brazil relating to the readmission of persons in an irregular situation, signed in Paris on May 28, 1996, NOR: MAE/J/0130052__
- [**France-Guatemala: Decree No. 2000-316 of April 5, 2000**](#) publishing the Agreement between the Government of the French Republic and the Government of the Republic of Guatemala relating to the readmission of persons in an irregular situation, signed in Guatemala on November 11 1998, NOR: MAE/J/0030025/D (JO of April 8, 2000)__
- [**France-Panama: Decree No. 2000-313 of March 31, 2000**](#), publishing the Agreement between the Government of the French Republic and the Government of the Republic of Panama relating to the readmission of persons in an irregular situation, signed in Panama on April 30 1999 NOR: MAE/J/0030028/D (OJ of April 8, 2000)__
- [**France-Venezuela: Decree No. 99-1235 of December 29, 1999**](#), publishing the Agreement between the Government of the French Republic and the Government of the Republic of Venezuela relating to the readmission of persons in an irregular situation, signed in Caracas on January 25 1999 NOR: MAE/J/99/30074/D (JO of January 5, 2000)__
- [**France-Salvador: Decree No. 99-429 of May 20, 1999**](#), publishing the Agreement between the Government of the French Republic and the Government of the Republic of El Salvador relating to the readmission of persons in an irregular situation, signed in San Salvador on June 26, 1998, NOR: MAE/J/99/30034/D (JO of May 28, 1999)__
- [**France-Uruguay: Decree No. 98-953 of October 21, 1998**](#), publishing the Agreement between the Government of the French Republic and the Government of the Eastern Republic of Uruguay relating to the readmission of persons in an irregular situation, signed in Paris on November 5, 1996, NOR: MAE/J/98/30086/D (JO of October 28, 1998)__
- [**France-Mexico: Decree No. 98-827 of September 9, 1998**](#), publishing the cooperation agreement between the Government of the French Republic and the Government of the United Mexican States relating to the readmission of persons (together an annexe), signed in Paris on October 6, 1997, NOR: MAE/J/98/30073/D (JO of September 16, 1998)__
- [**France-Chile: Decree No. 98-353 of May 4, 1998**](#), publishing the Agreement between the Government of the French Republic and the Government of the Republic of Chile relating to the readmission of persons in an irregular situation, signed in Santiago on June 23 1995 NOR: MAE/J/98/30038/D (JO of May 12, 1998)__

EUROPE

- [**Treaty between France and the United Kingdom on strengthening cooperation for the coordinated management of their common border**](#) signed at Sandhurst on

January 18, 2018, entered into force on February 1, 2018, published by decree no. 2018-263 of April 11 2018 NOR: EAE/J/18/03750/D__

- [France-Kosovo Readmission Agreement of December 9, 2009](#), relating to the readmission of persons residing illegally (together two annexes), signed in Pristina on December 2, 2009, and its implementation protocol (together two annexes), signed in Pristina on September 19 2011 __
- [Franco-Serbian Implementation Protocol of November 18, 2009](#), Protocol between the Government of the French Republic and the Government of the Republic of Serbia on the application of [the Agreement between the European Community and the Republic of Serbia](#) concerning the readmission of persons staying illegally signed on September 18, 2007, in Brussels (two annexes together) __
- [Neighborhood convention between France and the Principality of Monaco of May 18, 1963](#) __
- [Convention of establishment between France and the Republic of San Marino of January 15, 1954](#) __
- [Law No. 99-982 of December 1, 1999](#), authorising the approval of an agreement between the Government of the French Republic and the Swiss Federal Council relating to the readmission of persons in an irregular situation. The text of the Agreement will be published subsequently in the OJ NOR: MAE/X/99/00022/L (OJ of December 2, 1999) __
- [Law No. 99-472 of June 8, 1999](#), authorising the ratification of an agreement between the French Republic and the Italian Republic relating to the readmission of persons in an irregular situation (together an annexe) NOR: MAE/X/98/00009/L (JO of June 9, 1999) __
- [Decree No. 2011-450 of April 22, 2011](#), publishing the Agreement between the Government of the French Republic and the Government of the Russian Federation on professional migration (together six annexes), signed in Rambouillet on November 27, 2009, NOR: MAE/J/11/02770/D__
- [Convention between the French Republic, the Kingdom of Spain and the Principality of Andorra of December 4, 2000](#), relating to the entry, movement, stay and establishment of their nationals [published by Decree No. 2003- 739 of July 30, 2003, NOR: MAE/J/0330054/D] __
- [Decree No. 2000-287 of March 28, 2000](#), publishing the Agreement between the Government of the French Republic and the Swiss Federal Council relating to the readmission of persons in an irregular situation, signed in Berne on October 28, 1998, NOR: MAE/J /00/30022/D (OJ of April 4, 2000) __
- [Decree No. 2000-62 of January 24, 2000](#), publishing the Agreement between the Government of the French Republic and the Government of the Republic of Lithuania relating to the readmission of persons in an irregular situation, signed in Vilnius on December 4, 1998, NOR: MAE/J/00/30006/D (OJ of January 27, 2000) __
- [Decree No. 99-454 of May 28, 1999](#), publishing the Agreement between the Government of the French Republic and the Government of the Republic of Estonia relating to the readmission of persons in an irregular situation, signed in Tallinn on December 15, 1998, NOR: MAE/J/99/30044/D (JO of June 4, 1999) __
- [Decree No. 99-63 of January 25, 1999](#), publishing the Agreement between the Government of the French Republic and the Government of the Republic of Hungary relating to the care of people at the border, signed in Paris on December 16, 1996, NOR: MAE/J/99/30007/D (JO of January 30, 1999) __
- [Decree No. 98-628 of July 17, 1998](#) publishing the Agreement between the Government of the French Republic and the Government of the Republic of Latvia relating to the readmission of persons in an irregular situation (together an annex), signed in Riga on December 5, 1997 NOR: MAE/J/98/30062/D (JO of July 24, 1998) __

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Decentring the Study of Migrant
Returns and Return Policies

Legal and Policy Infrastructures of Returns in Italy

Country Snapshot

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List of Abbreviations

AMIF	Asylum, Migration and Integration Fund
AR	Assisted Return
AVR	Assisted voluntary return
AVRR	Assisted Voluntary Return and Reintegration
CIE	Centres for Identification and Expulsion
CPTA	Centres for Temporary Stay and Assistance
DEPMI	La Dimensione Esterna della Politica di Migrazione Italiana
ECHR	European Court of Human Rights
EMN	European Migration Network
EU	The European Union
EURAs	EU's Readmission Agreements
FRONTEX	The European Border and Coast Guard Agency
IOM	International Organization for Migration
MoI	Ministry of the Interior
NAR	Non- Assisted Return
NGO	Non-governmental organisation
OECD	Organisation for Economic Cooperation and Development
OTL	Order to Leave
PSASR	Protection System for Asylum Seekers and Refugees
TCN	The Third-Country National
UNHCR	The United Nations High Commissioner for Refugees

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Summary

Work Package 2 (WP2) of the GAPs Project, “Legal and Policy Frameworks of Returns in the EU”, focuses on the legal, institutional and policy frameworks regarding the return and readmission policies at the European Union (EU) level and in the five selected EU member consortium countries (Sweden, Poland, Germany, Greece, and Netherlands) as well as the related gaps. In addition, three country snapshots of the non-consortium EU Member States (Italy, France, and Hungary) are provided.

This snapshot of Italy provides an in-depth examination of the legal, institutional, and policy frameworks governing migrant returns and readmissions in Italy. The snapshot contextualises Italy’s position as a primary entry point for migrants in the Mediterranean, driven by migratory pressures from North Africa and the Middle East. Over recent decades, Italy’s approach to migration management has evolved in response to changing patterns, domestic politics, and international pressures. Italy’s migration policy has undergone significant transformations since the 1990s. Key legislative milestones include:

- **1990s- Foundation of Modern Migration Policy:** The foundation of modern migration policy began with the Turco-Napolitano Law (1998), focusing on controlling irregular immigration and establishing detention centres for migrants.
- **2000s- Strengthening Legal Frameworks and the European Union Alignment:** The Bossi-Fini Law (2002) introduced stricter immigration controls, linking residence permits to employment. This period also saw the alignment of Italy’s policies with the EU standards, including the implementation of the European Return Directive (2008/115/EC).
- **2010s- Responding to the Migration Crisis:** Italy faced unprecedented migratory pressures due to conflicts in the Middle East and North Africa, leading to legislative measures like the Minniti-Orlando Decree (2017) to expedite asylum procedures and enhance deportations. Bilateral agreements with North African countries, particularly Libya, were crucial during this period.
- **2020s and Present- Multiple Challenges and Return Focus:** Recent developments include the Salvini Decrees (2018-2019), which tightened migration control and abolished humanitarian protection status, extending detention periods to facilitate deportations.

Italy’s return and readmission policy involves multiple institutional actors, including the Ministry of the Interior, the Central Directorate of Immigration and the Border Police. These entities coordinate various aspects of the return process, from planning and monitoring to executing deportations and managing detention centres.

International cooperation plays a pivotal role in Italy’s return policy. Italy has established numerous bilateral agreements with countries of origin and transit to facilitate readmissions. The collaboration with those countries, although controversial due to human rights concerns, has been instrumental in controlling irregular migration flows. Italy’s return policy has faced significant human rights scrutiny, particularly concerning its agreements with Libya. The European Court of Human Rights ruling in “Hirsi Jamaa and Others v. Italy” (2012) underscored the state’s obligations to protect individuals from refoulement and highlighted the challenges Italy faces in balancing migration control with human rights commitments.

In conclusion, Italy’s return and readmission policy reflects a complex interplay of legislative developments, institutional coordination, and international cooperation shaped by the country’s strategic geographic position and the broader European context. The snapshot underscores the ongoing challenges and evolving nature of migration management in Italy.

Keywords: Return policy, readmission policy, Italy, migrant returns, migration management

The GAPs Project

GAPs is a Horizon Europe project that aims to conduct a comprehensive multidisciplinary study on the drivers of return policies and the barriers and enablers of international cooperation on return migration. The project aims to examine the disconnects and discrepancies between expectations of return policies and their actual outcomes by decentring the dominant, one-sided understanding of “return policy-making”. To this end, GAPs:

- Examines the shortcomings of the EU’s return governance;
- Analyses enablers and barriers to international cooperation and;
- Explores the perspectives of migrants themselves to understand their knowledge, aspirations and experiences with return policies.

GAPs combines its decentring approach with three innovative concepts:

- A focus on return migration infrastructures, which allows the project to analyse governance fissures;
- An analysis of return migration diplomacy to understand how relations between EU MSs and third countries hinder cooperation on return and;
- A trajectory approach that uses a socio-spatial and temporal lens to understand migrant agency.

GAPs is a three-year interdisciplinary project (2023–2026) coordinated by Uppsala University and the Bonn International Centre for Conflict Studies with 17 partners in 12 countries on four continents. The 12 countries in which fieldwork has been conducted are Sweden, Nigeria, Germany, Morocco, the Netherlands, Afghanistan, Poland, Georgia, Türkiye, Tunisia, Greece and Iraq.

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1. Introduction

Italy's strategic position in the Mediterranean has made it a central entry point for migrants and asylum seekers aiming to reach Europe. Over the past decades, Italy has faced significant migratory movements, particularly from North Africa and the Middle East. These changing migratory patterns, domestic political dynamics, and international pressures have prompted the development of comprehensive migration policies, including various mechanisms, procedures and practices for returning migrants to their countries of origin or transit.

This snapshot highlights the critical turning points and current practices in Italy's return and readmission policy. The snapshot approaches Italy's selected policy in this framework by tracing the most recent relevant statistical figures, evaluating the migration return policy through key legislative and policy changes (policy framework), and mapping the legal and institutional framework and international cooperation.

2. Statistical Overview

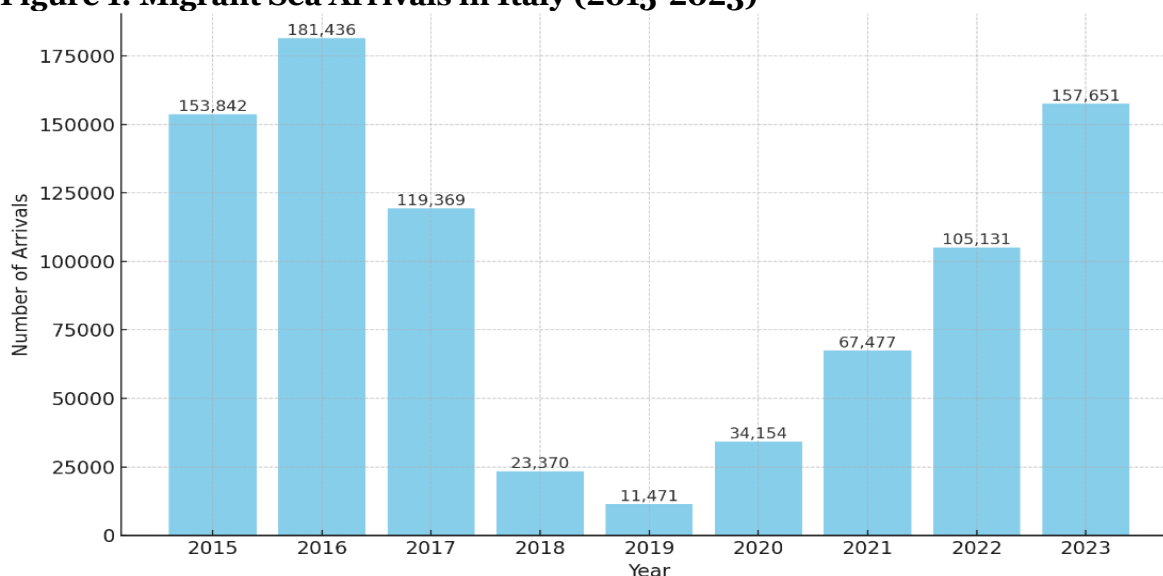
This part delves into the quantitative dimensions of Italy's return and readmission policy, a critical component of the country's immigration management strategy. The statistical analysis presented herein provides a comprehensive overview of the trends and outcomes associated with these policies, highlighting the shifts in approach and their impacts on migration patterns.

2.1. Sea Arrivals

In 2023, 157,651 refugees and migrants reached Italy via sea in 3,592 separate landings, marking the fourth consecutive year of increasing arrivals and a 50 per cent rise compared to the previous year.

Notably, 2023 ranked as the third-highest year for sea arrivals since 1998, following 2014 (170,100) and 2016 (181,436) peaks. To respond to the situation, the Government of Italy declared a state of emergency in April 2023 and expanded its reception capacity.

Figure 1: Migrant Sea Arrivals in Italy (2015-2023)



Source: [UNHCR Operational Data Portal, Mediterranean Situation, Italy Sea Arrivals](#)

The majority of the sea crossings (62%) departed from Tunisia (97,667 persons; 2,796 disembarkations), followed by 33% from Libya (51,986 persons; 652 disembarkations), 5% from Türkiye (7,153 persons; 92 disembarkations).

In 2023, 62 different nationalities were registered by Italian authorities at disembarkation sites, with the top five countries of origin being Guinea (12%), Tunisia (11%), Cote d'Ivoire (10%), Bangladesh (8%) and Egypt (7%). In 2023, most West African nationals reached Italy from Tunisia (Tunisians accounting for only 18% of the departures from that country), while Asians and North and East African nationals typically crossed the Central Mediterranean from Libya. On the Libya-sea route, the top five countries of origin were Bangladesh, Egypt, the Syrian Arab Republic, Pakistan, and Eritrea, with Asian nationals and Syrians mostly travelling to Libya via air through Benghazi and moving onwards to Tripolitania for embarkation. On the Türkiye-Italy route, the main nationalities were Afghan, Iranian, Iraqi and Pakistani.

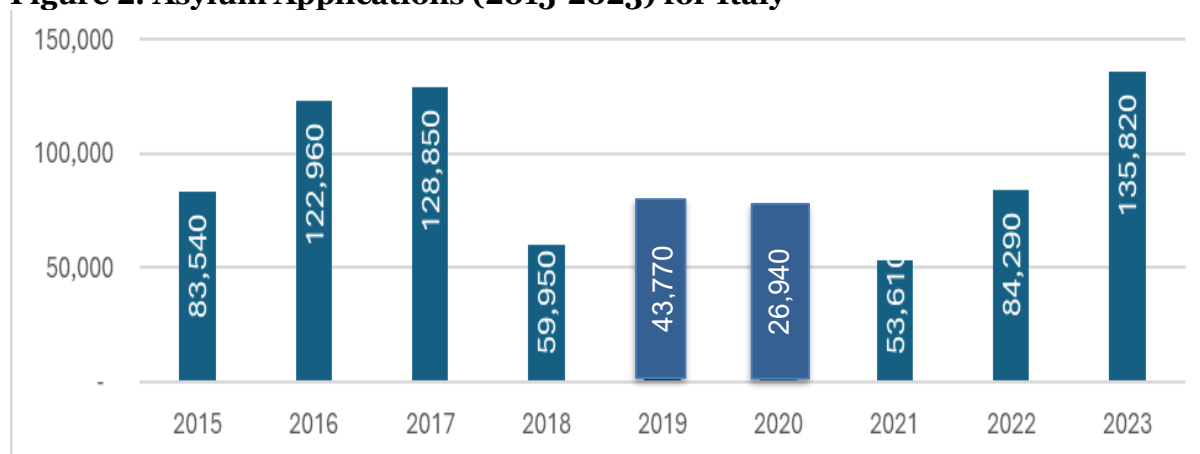
Table 1: Italy Sea Arrivals based on Nationality (2020-2023)

Year	Top 3 country of embarkation	Number of migrants arrived in Italy	Top 3 nationalities
2020	Tunisia	14.568	Tunisia, Côte d'Ivoire, Guinea
2020	Libya	13.012	Bangladesh, Sudan, Morocco
2020	Turkey	4.190	Pakistan, Afghanistan, Iraq
2021	Tunisia	31.556	Tunisia, Côte d'Ivoire, Guinea
2021	Libya	20.218	Bangladesh, Egypt, Eritrea
2021	Turkey	12.916	Iran, Iraq, Afghanistan
2022	Tunisia	32.371	Tunisia, Côte d'Ivoire, Guinea
2022	Libya	53.310	Egypt, Bangladesh, Syria
2022	Turkey	16.205	Afghanistan, Iran, Egypt
2023	Tunisia	97.667	Guinea, Tunisia, Côte d'Ivoire
2023	Libya	51.986	Bangladesh, Egypt, Syria
2023	Turkey	7.153	Afghanistan, Iran, Iraq

Source: Italy Sea Arrivals Dashboard, [Dec 2023](#), [Dec 2022](#), [Dec 2021](#), [Dec 2020](#)

2.2. Asylum Applications

The trend in asylum applications from 2015 to 2023 exhibits notable fluctuations, with a peak in 2017 (128,850 applications) followed by a sharp decrease until 2020. However, there has been a rebound from 2021 onwards, culminating in 135,820 applications in 2023. This increase reflects the growing numbers of arrivals and the complex geopolitical situations, especially in Libya, Tunisia and Türkiye. The data indicates a heightened demand for international protection in Italy, underscoring the ongoing challenges in migration management and the necessity for robust asylum systems.

Figure 2: Asylum Applications (2015-2023) for Italy

Source: Eurostat, [Asylum applicants annual aggregated data](#), 8 March 2024

2.3. General Data on Irregular Migration

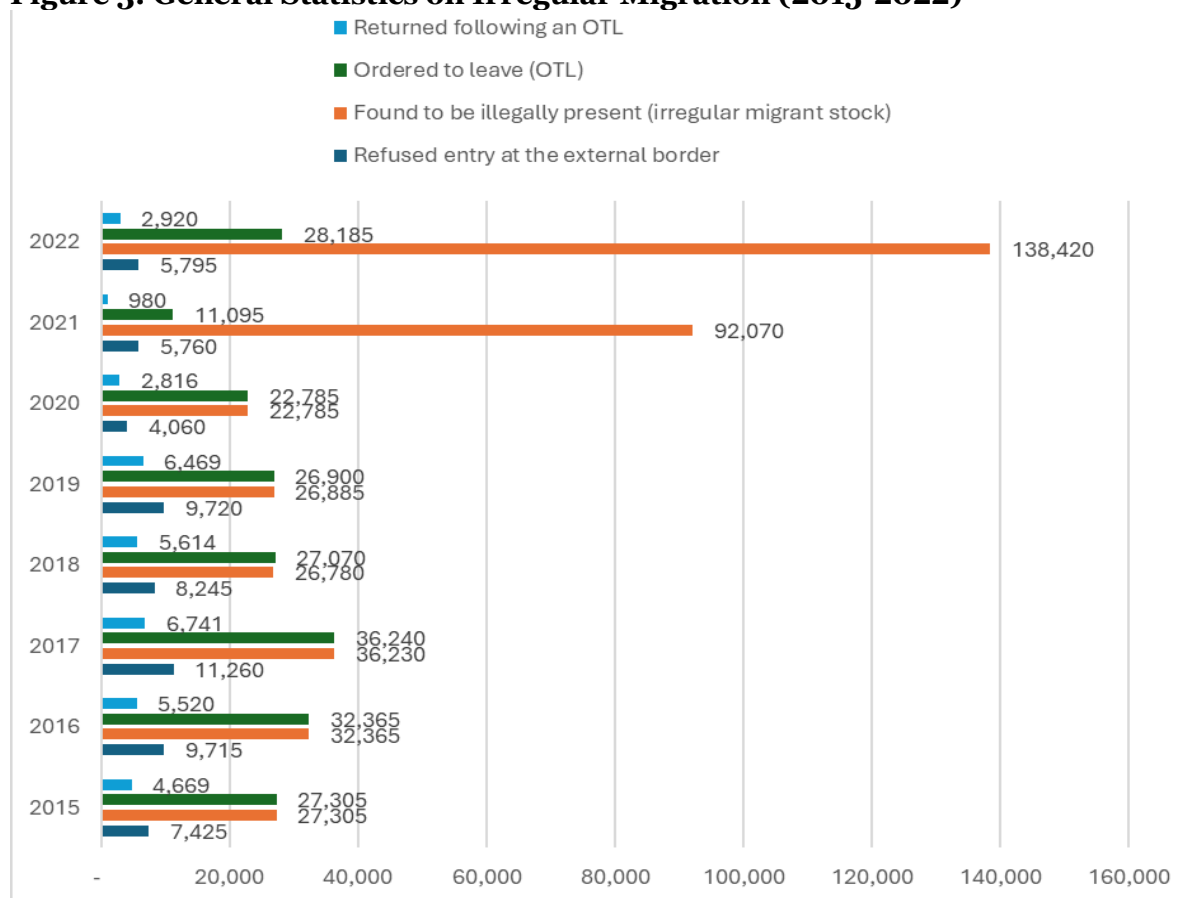
The number of third-country nationals (TCNs) refused entry at Italy's external borders showed some variation, with a noticeable peak in 2017 (11,260). After 2017, the figures fluctuated slightly but remained below the peak, with 2022 witnessing 5,795 refusals, a modest increase from the previous year (2021: 5,760).

The stock of TCNs found to be illegally present in Italy saw a significant increase over the period, particularly notable between 2020 (22,785) and 2021 (92,070), more than quadrupling. This upward trend continued into 2022, reaching 138,420, marking the highest level in the observed period.

The number of "Order to Leave (OTL)" is issued followed a generally increasing trend, with a dip in 2020 (22,785) before a sharp decrease in OTL issuance in 2021 (11,095). However, there was a dramatic increase in OTLs in 2022 (28,185), indicating a more aggressive stance on ordering irregular migrants to leave.

Conversely, the number of TCNs returned following an OTL remained significantly lower than the number of OTLs issued, indicating a gap in the enforcement or execution of these orders. For example, in 2022, 2,920 individuals were returned following an OTL, which is a small fraction of the total OTLs issued that year (28,185).

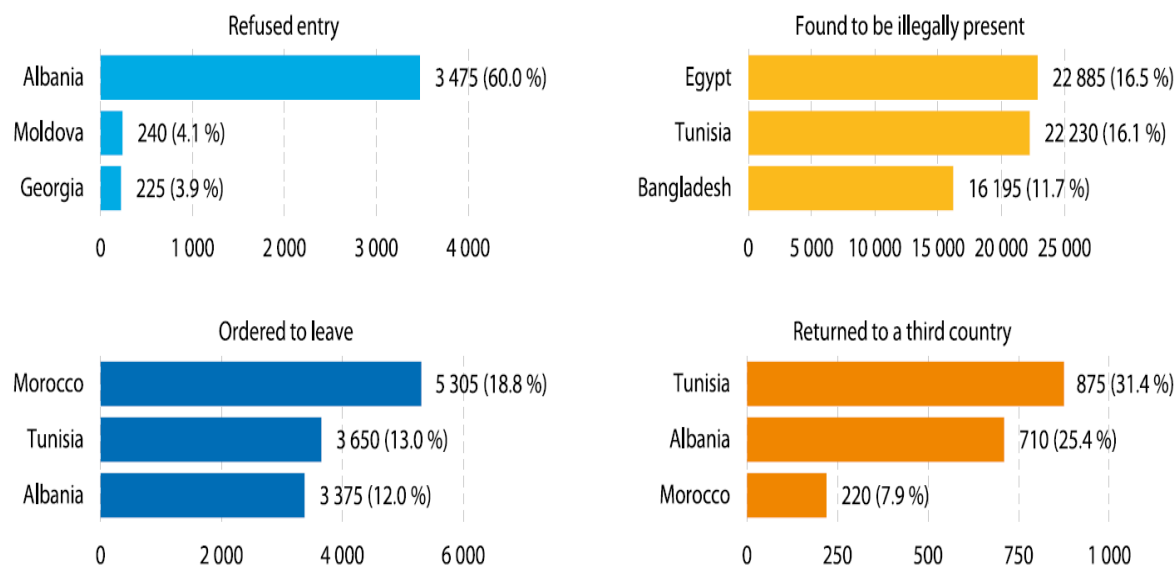
The number of forced returns generally showed a slight upward trend, with occasional fluctuations. The highest number of forced returns within the period was in 2019 (6,035), with a slight decrease observed in the following years. In 2023, there were 3,270 forced returns, which is higher than the figures for 2020 and 2021 but still below the peak.

Figure 3: General Statistics on Irregular Migration (2015-2022)

Source: Eurostat, [Enforcement of Immigration Legislation Data](#) (8 March 2024)

The following figure displays several key statistics related to migration enforcement in Italy. It provides data on four categories: refused entry, ordered to leave, found to be illegally present, and returned to a third country. Figure 4 illustrates the migration enforcement actions taken by Italy, highlighting the countries with the most significant numbers in each category. Albania, Tunisia, and Morocco are frequently mentioned across multiple categories, indicating that individuals from these countries are prominently affected by these enforcement measures.

Figure 4: Top 3 countries of citizenship of third-country nationals subject to immigration law enforcement, 2022 Absolute numbers (and the shares in the respective totals)



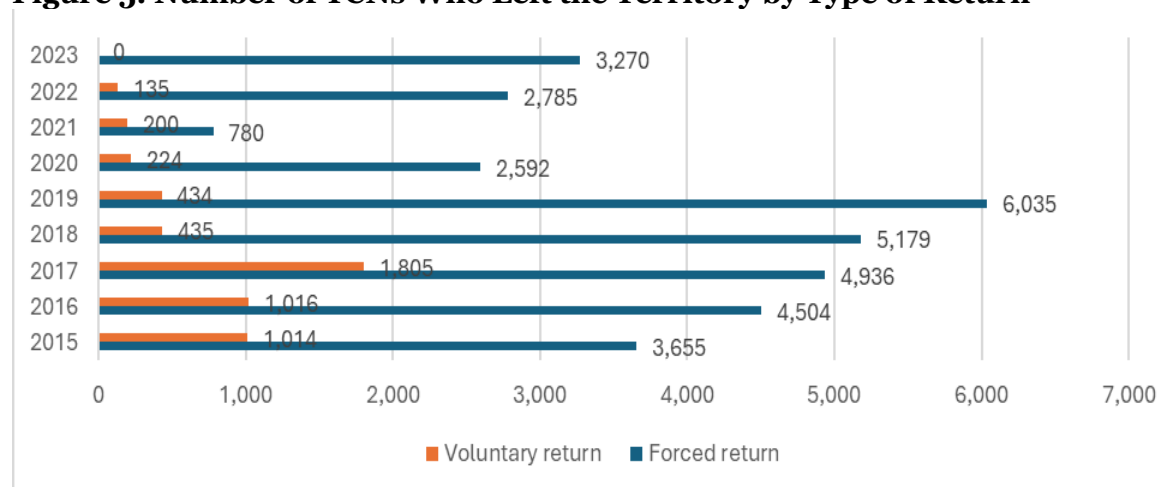
Source: Eurostat. (2022). Italy EMN Country Factsheet. Available at: https://www.emnitalyncp.it/wp-content/uploads/2023/09/EMN_Factsheets2022_IT_o.pdf (p. 16) (Accessed 4 April 2024).

2.4. Forced vs. Voluntary Returns

Voluntary returns have varied significantly over the years, reaching a peak in 2017 (1,805) before dropping to notably low levels in subsequent years, culminating in no voluntary returns recorded in 2023.

This drastic reduction in voluntary returns over the years suggests a shift in the dynamics of return migration, with fewer migrants opting for or being able to take this route.

Figure 5: Number of TCNs Who Left the Territory by Type of Return

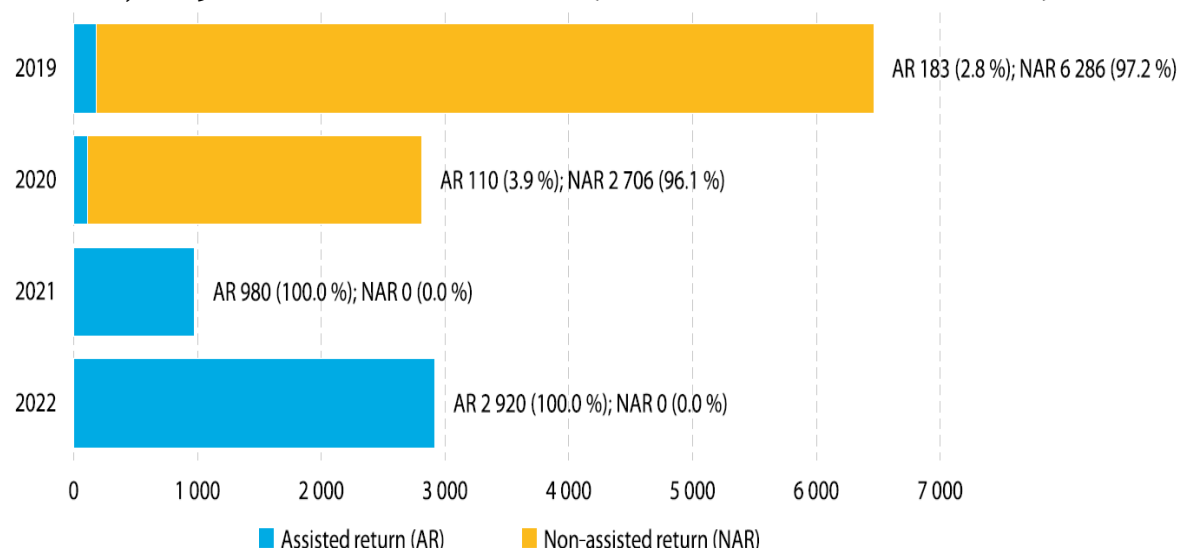


Source: Eurostat, [Enforcement of Immigration Legislation Data](#) (8 March 2024)

Figure 5 illustrates the number of third-country nationals who left Italy between 2019 and 2022, categorised by the assistance they received during their return. Assisted Return (AR)

and Non-Assisted Return (NAR) are the two types of returns presented. The figure demonstrates a transition in Italy's return policy from predominantly non-assisted returns in 2019 and 2020 to exclusively assisted returns in 2021 and 2022. This shift reflects an increased emphasis on providing support to migrants during the return process, potentially indicating changes in policy priorities, enhanced collaboration with international organisations like the International Organization for Migration (IOM), and greater allocation of resources to assist returning migrants.

Figure 6: Third-country nationals who left the territory, by type of assistance received, 2019–2022 Absolute number (and the share within the total)



Source: Eurostat. (2022). Italy EMN Country Factsheet. Available at: https://www.emnitalyncp.it/wp-content/uploads/2023/09/EMN_Factsheets2022_IT_o.pdf (p. 16) (Accessed 4 April 2024).

3. Policy and Legal Framework

3.1. Policy Developments (1990s-2023)

Over the past three decades, Italy has undergone significant transformations in its approach to managing migration, particularly concerning the return and readmission of irregular migrants. This timeline offers a comprehensive overview of the key legislative measures, bilateral agreements, and policy shifts that have shaped Italy's return and readmission framework from 1990 to the present. The timeline highlights Italy's evolving strategies in response to changing migration patterns, international obligations, and domestic political dynamics by chronicling these developments.

3.1.1. The 1990s: Foundation of Modern Migration Policy

The early 1990s marked the beginning of substantial legislative efforts to manage immigration in Italy. The Martelli Law (Law No. 39, 1990)¹ was one of the first comprehensive migration laws, introducing measures to regulate immigration and establishing the basis for asylum procedures. The Law also set the stage for return policies by addressing the need for legal and

¹ LEGGE 28 Febbraio 1990, N. 39, Available at: <https://www.gazzettaufficiale.it/eli/id/1990/02/28/090G0075/sg> (Accessed 1 April 2024).

administrative mechanisms to deport irregular migrants. In 1998, the Turco-Napolitano law (Law No. 40/1998)² became the main guideline for public policy on migration in Italy regarding programming migratory flows, tackling illegal immigration, and promoting a broad series of rights for integrating regular migrants.

In 1997, the Dublin System, also known as the Dublin Regulation, started for Italy by implementing the Dublin Convention³ (signed in 1990, came into force in 1997) in 1997, then updated with the Dublin Regulation⁴. It was designed to determine which European Union (EU) Member State (MS) is responsible for examining an application for asylum seekers has significant implications for Italy, particularly in the context of returns. Once an asylum seeker is transferred to Italy under the Dublin Regulation, Italy is responsible for processing the application and, if necessary, arranging for the individual's return to their country of origin. This includes cases where the asylum claim is rejected or the individual does not qualify for international protection.

In this period, Italy's external migration policy focused on the most critical source, transit or border countries. In this framework, the first readmission agreements⁵ are signed with main source countries. 1997 Readmission Agreement: Italy and Albania signed a Readmission Agreement in 1997, with Italy returning approximately 44% of Albanians ordered to leave.⁶ Regarding readmission and return, the first agreement (Exchange of notes between Italy and Tunisia concerning the entry and readmission of persons in an irregular situation)⁷ with Tunisia was established in 1998, regulating entries and implementing return and readmission procedures for irregular migrants. This political document established a framework to regulate entries and implement return and readmission procedures for irregular migrants. Italy offered preferential treatment for Tunisian nationals regarding annual entry quotas.⁸ Italy provided technical and financial assistance to support Tunisia's efforts against irregular migration and funded the creation of detention centres in Tunisia. In exchange, annual quotas for regular entry of Tunisian workers into Italy were established. Italy and Morocco also signed

²LEGGE 6 Marzo 1998, N. 40, Available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1998:40> (Accessed 1 April 2024).

³ Signed in 1990 and came into force in 1997. No longer valid, replaced by the Council Regulation (EC) No 343/2003 of 18 February 2003, then by the Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013.

⁴ The Dublin Regulation has undergone several revisions. The original Dublin Convention was replaced by the Dublin II Regulation in 2003 and later by the Dublin III Regulation in 2013, which is currently in force. Dublin III/ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604> (Accessed 4 March 2024).

⁵ To excess the official text of those agreements are not available however, the full list of the agreements are provided as a part of Annex III and IV. The New Pact on Migration and Asylum introduces reforms to the Dublin System aimed at improving efficiency and fairness. It includes a solidarity mechanism to redistribute asylum seekers more equitably across EU Member States and streamline return procedures.

⁶ Iole Fontana, Matilde Rosina and Sahizer Samuk Carignani, 2022, "La Dimensione Esterna della Politica di Migrazione Italiana (DEPMI)", *The Siracusa International Institute for Criminal Justice and Human Rights*, Available at: https://www.esteri.it/wp-content/uploads/2022/11/The-Siracusa-Institute_DEPMI.pdf (Accessed 1 February 2024), p. 25.

⁷ Scambio Di Note Concernente L'ingresso e la Riammissione Delle Persone in Posizione Irregolare

⁸ Fontana et al., 2022, p. 50.

a Readmission Agreement⁹ in 1998, which included provisions for the readmission of irregular migrants.¹⁰

In terms of return policies, the participation of Italy in the Schengen System in 1997 is also important due to the abolishment of the internal borders and the specific return provisions of Article 23, paragraphs 3&4 of the Schengen Agreement.¹¹

3.1.2. The 2000s: Strengthening Legal Frameworks and the European Union Alignment

Intensification of agreements, particularly with North African countries, focusing on combating irregular migration was important for this period, along with implementing EU directives and intensifying bilateral agreements with North African countries, notably Libya, focusing on migration control.¹² The turn of the millennium saw Italy aligning its migration policies with the EU standards while tightening migration controls. The Bossi-Fini Law (Law No. 189/ 2002)¹³ tightened immigration controls and introduced stringent measures to deport irregular migrants, linking residence permits to employment contracts. This Law can be seen as a partial revision of the Turco-Napolitano Law (1998) in terms of controlling irregular immigration with measures to limit the possibilities of entrance into Italy, criminalisation of irregular migrants and introduction of the Centres¹⁴ for Identification and Expulsion (CIE).¹⁵ Italy also created the European Return Directive (2008/115/EC)¹⁶ to harmonise return procedures across the EU MSs during this period. This directive emphasised voluntary return as a priority while ensuring humane treatment for all returnees.

This period mainly refers to stricter controls and bilateral agreements with the source countries. The external dimension of the return policy continued in this decade with several critical bilateral agreements, cooperation documents, and a memorandum of understanding. In 2000, the Italy-Algeria Readmission Agreement was signed and entered into force in 2008; Italy and Pakistan adopted an Agreement for the Readmission of migrants in irregular positions in 2000, which became operative despite the lack of a formal signature by Pakistan; the Migration Agreement was signed between Italy and Nigeria and entered into force in 2011;

⁹ Agreement on expulsion of citizens and transit for removal (*Accordo sull'espulsione dei cittadini e sul transito per allontanamento*).

¹⁰ Ibid., p. 123.

¹¹ EMN, 2022, Return Migration in Italy Report, Available at: https://home-affairs.ec.europa.eu/system/files/2020-09/7a_it_emn_ncp_return_country_study_finalen_version_en.pdf, p. 25 (Accessed 3 March 2024).

¹² Ibid., p. 5-6.

¹³ LEGGE 30 Luglio 2002, N. 189, Available at: <https://www.gazzettaufficiale.it/eli/id/2002/08/26/002G0219/sg> (Accessed 4 March 2024).

¹⁴ Centres for Temporary Stay and Assistance (CPTAs), established by Law No. 40/1998, for detaining irregular migrants pending expulsion, were renamed Centres for Identification and Expulsion (CIEs) by Law No. 189/2002 and later, Law No. 46/2017 renamed them as Detention Centres for Repatriation (CPRs), extending detention from 30 to 90 days, and finally to 180 days under Decree Law No. 113/2018.

¹⁵ OECD, 2019, "Working Together for Local Integration of Migrants and Refugees in Rome, OECD Regional Development Studies", *OECD Publishing*, Paris, <https://doi.org/10.1787/ca4d491e-en>. (Accessed 30 March 2024).

¹⁶ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115> (Accessed 3 February 2024).

in 2002 the Readmission Agreement was signed with Moldova and the Readmission and Return Agreement between Italy-Egypt¹⁷ was signed in 2007 and still in place.¹⁸

Although Italy and Libya had no formal readmission agreement during this period, various agreements and joint initiatives have been crucial and controversial, reflecting complex dynamics in regional security, migration management, and human rights. The first notable agreement is the 2008 Treaty of Friendship, Partnership, and Cooperation between Italy and Libya¹⁹, which included provisions for joint efforts to combat irregular migration, with Italy pledging substantial financial support for border security and migration control in Libya. Again, as not being a readmission agreement, the Police Cooperation Agreement between Italy and Turkey was signed in 2001, including the return issue.²⁰ Finally, at the end of this period, a New Memorandum²¹ signed between Italy and Tunisia in 2009 aimed to relaunch cooperation on readmission and expedite identification procedures, resulting in a steady increase in returned migrants.

3.1.3. The 2010s: Responding to the Migration Crisis

The 2010s brought unprecedented migratory pressures due to conflicts in the Middle East and North Africa. Italy's geographical position made it a primary entry point for many migrants and asylum seekers. During this period, the development of the legal framework and operational agreements continued. Italy strengthens external border control and readmission agreements within the EU framework, facing challenges in human rights and international cooperation. In parallel to these developments, Italy implemented several legislative measures, such as the Minniti-Orlando Decree (Law No. 46 of 2017)²². This Law aimed to expedite asylum procedures and enhance the efficiency of deportations. The most important institutional dimension regarding forced removals is the establishment of new detention centres (Centri di Permanenza per il Rimpatrio) that are specifically designed to facilitate the return of irregular migrants.

The Arab Spring significantly affects migration flows, leading to adjustments in Italy's policy approach. During this period, the bilateral agreement with the source countries continued, and Italy signed several bilateral agreements with countries of origin and transit, particularly in North Africa. These agreements aimed to improve cooperation on readmission and provided financial aid to enhance border control and manage migration flows. For example, in 2011, the Italy-Tunisia Agreement was signed, which includes provisions for the deportation of Tunisian nationals found to be in Italy in irregular situations. In addition, Italy signed a cooperation agreement with Niger to enhance border security and manage migration flows. The agreement includes Italian support for training Nigerien security forces and providing resources for border management. In 2016, the Italy-Sudan Agreement was signed, which also aims to improve the identification processes for Sudanese nationals in Italy.

¹⁷ The full text of the Agreement is Available at: <https://atrio.esteri.it/Search/Allegati/48977> (Accessed 28 March 2024).

¹⁸ Fontana et al., 2022, p. 47, 66, 70, 111-112, 135, 143.

¹⁹ Il Trattato di amicizia, partenariato e cooperazione tra Italia e Libia, Available at: <http://briguglio.asgi.it/immigrazione-e-asilo/2011/aprile/trattato-italia-libia-2008.pdf> (Accessed 4 March 2024).

²⁰ Ibid., p. 161.

²¹ Full text is available at: <https://www.regioni.it/news/2011/04/06/immigrazione-siglato-laccordo-tra-italia-e-tunisia-48788/> (Accessed 28 April 2024).

²² LEGGE 17 Febbraio 2017, N. 13, Available at: <https://www.ritesai.it/wp-content/uploads/2017/01/immigrazione-il-testo-coordinato-del-decreto-minniti.pdf> (Accessed 4 March 2024).

Among them, the collaboration with Libya was particularly notable, and the Treaty of 2008 was further solidified with a Memorandum of Understanding (MoU)²³ signed in 2017. This agreement focused on enhancing cooperation to stem the irregular migrants departing from Libya. Key components included Italy's support for the Libyan Coast Guard in intercepting and returning migrants and financial aid for Libyan detention centres and migration control efforts. The Italy-Libya collaboration has faced substantial scrutiny and criticism regarding human rights abuses in Libyan detention centres. Regarding its role and the violations in these centres, Italy was accused of outsourcing migration control to Libya.

During this period, one important development was the 2015 European Refugee Crisis. Due to its strategic geographical location in the Mediterranean, Italy became one of the primary entry points. In terms of the return aspect, Italy increased efforts to identify and return individuals who did not meet the criteria for asylum. This involved strengthening the capacity of immigration authorities to process returns efficiently. With support from the EU, the Italian government invested in improving identification and documentation processes to facilitate returns. In this framework, Italy negotiated several bilateral agreements with countries of origin and transit to facilitate the readmission of their nationals. It worked closely with EU agencies such as Frontex (European Border and Coast Guard Agency) to enhance return operations.

Another impact of the 2015 crisis can be seen in the focus on voluntary return programmes, and Italy promoted voluntary return programs. These programs, often implemented in collaboration with the IOM, provided financial incentives and reintegration support to encourage migrants to return voluntarily to their home countries. The period also witnessed debates on the effectiveness and human rights implications of return and readmission practices, with Italy navigating challenges related to international law and migrant rights.

Regarding the human rights implications, in 2012, the European Court of Human Rights (ECHR) ruling in “Hirsi Jamaa and Others v. Italy (Application no. 27765/09)”²⁴ appears as a landmark case in the realm of international human rights law, specifically concerning the rights of migrants and asylum seekers. It is a case decided by the ECHR that involved a group of 24 Somali and Eritrean nationals who were intercepted at sea by Italian authorities and subsequently returned to Libya without being allowed to apply for asylum or challenge their deportation. In terms of impact and significance, this ruling of the ECHR set a significant precedent in international human rights law, emphasising the obligations of states under the ECHR to protect individuals from refoulement (return to a country where they may face harm).

Finally, this period ended with a new national legal development, the Salvini Decrees, formally known as “Decreto-Legge n.113/2018”²⁵ and “Decreto-Legge n. 53/2019”²⁶. They refer to a set of legislative measures introduced by Matteo Salvini, Italy's Minister of the Interior, in 2018. These decrees significantly altered Italy's immigration and asylum policies, emphasising security and stricter migration control. In terms of return, they abolished the “humanitarian protection” status, which was a form of protection granted to migrants who did not qualify for refugee status but could not be returned to their home countries for humanitarian reasons. This status was replaced with more limited forms of protection. Also, the maximum period for

²³ The full text in English is available at: <https://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf> (Accessed 27 February 2024).

²⁴ ECtHR - Hirsi Jamaa and Others v Italy [GC], Application No. 27765/09, Available at: <https://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509> (Accessed 4 April 2024).

²⁵ DECRETO-LEGGE 4 Ottobre 2018, N. 113, Available at: <https://www.gazzettaufficiale.it/eli/id/2018/10/04/18G00140/sg> (Accessed 28 April 2024).

²⁶ DECRETO-LEGGE 14 Giugno 2019, N. 53, Available at: <https://www.gazzettaufficiale.it/eli/id/2019/06/14/19G00063/sg> (Accessed 28 April 2024).

migrants to be detained in repatriation centres was increased from 90 to 180 days, aiming to facilitate deportations. The decrees introduced restrictions on asylum seekers' access to reception centres (Protection System for Asylum Seekers and Refugees/ SPRAR). The decrees have been seen as part of a broader trend towards the securitisation of migration in Italy and the EU.

3.1.4. The 2020s and Present: Multiple Challenges and Return Focus

The early 2020s saw significant shifts due to the COVID-19 pandemic, which impacted migration flows and return operations. Italy's return migration policy had to adapt to new health and safety measures. During this period, the major policy trend focused on voluntary returns and international cooperation. Regarding the national legal framework, the Lamorgese Decree²⁷ (Decree-Law No. 130 of 2020) revised aspects of the Minniti-Orlando Decree (2017) to improve the protection of migrants' rights while maintaining effective return mechanisms. It aimed to strike a balance between security concerns and humanitarian considerations.

In terms of international cooperation and the external dimension of Italy's migration policy, in 2020, a new informal collaboration deal to restore and accelerate return practices was adopted between Italy and Tunisia.²⁸ Finally, on 4 August 2021, the Italian Parliament authorised the financing of Italy's support to the Libyan Coast Guard again.²⁹ These developments can be seen as parallel to the EU-Turkey Statement (2016)³⁰, which are political, governmental and sometimes even unwritten deals that allow the authorities to escape the political control of their parliaments and constitutional control of such arrangements.³¹

Italy also aligned with the New Pact on Migration and Asylum proposed by the European Commission in 2020³². The Pact emphasised a comprehensive approach to migration management, including stronger cooperation on return and reintegration efforts at the EU level. In 2023, the political agreement was achieved for the Pact, and the European Parliament voted on it in April 2024, while as of April 2024, it was adopted by the Council of the EU. The return dimension of the New Pact on Migration and Asylum focuses on enhancing the efficiency and effectiveness of returning migrants who do not have the legal right to stay in the EU in their countries of origin. Key elements can be summarised as simplifying and expediting return procedures to ensure timely and effective returns, strengthening coordination among EU MSs, enhancing cooperation with third countries to facilitate readmissions, promoting voluntary return programs, and providing reintegration support to ensure sustainable returns. Italy, due to its geographical position as a primary entry point for migrants, plays a crucial role in the implementation of the Pact, particularly concerning the return dimension.

²⁷ DECRETO-LEGGE 21 Ottobre 2020, N. 130, Available at: <https://www.gazzettaufficiale.it/eli/id/2020/10/21/20G00154/sg> (Accessed 26 April 2024).

²⁸ Fontana et al., 2022, p. 155

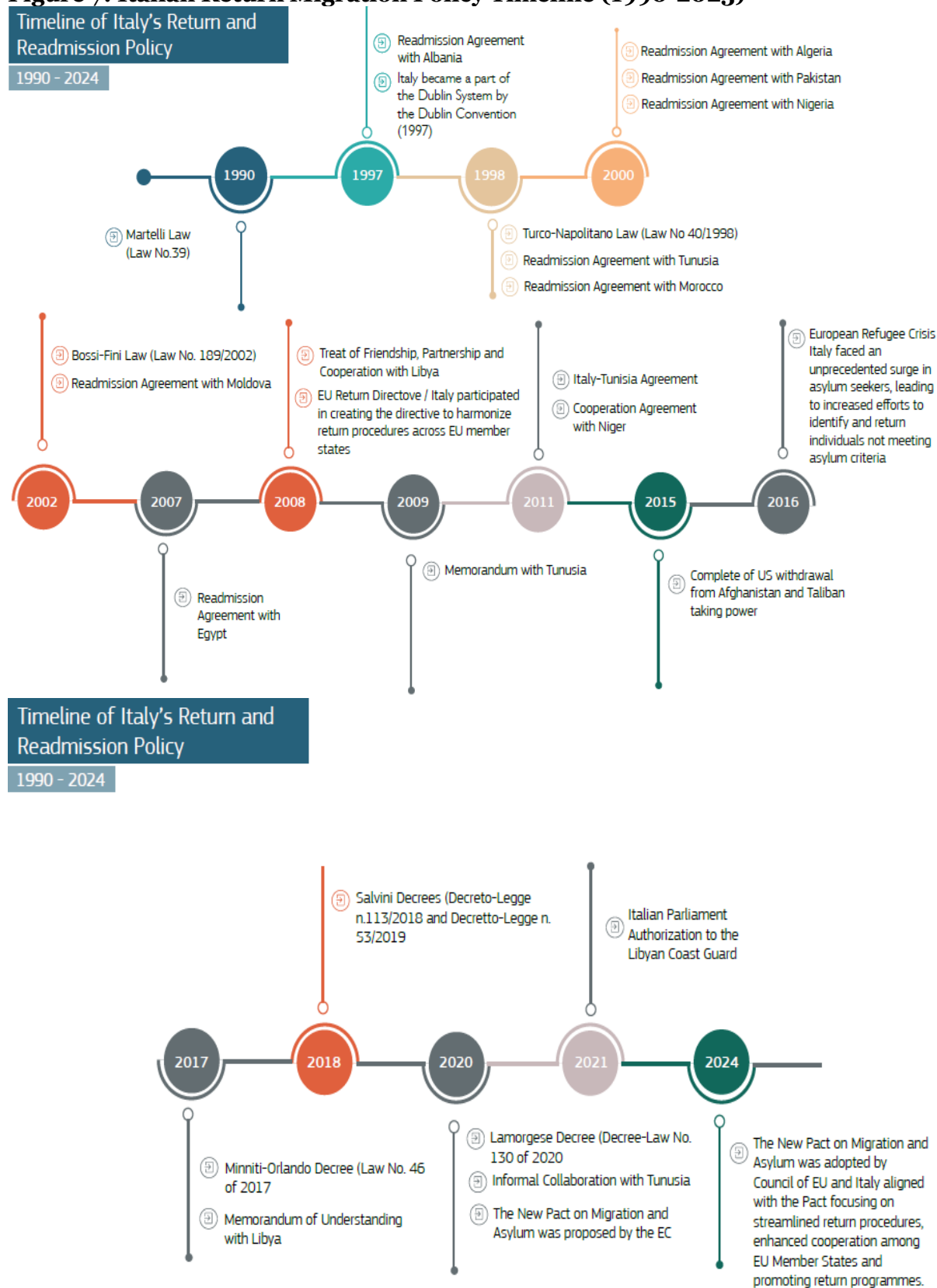
²⁹ OpinioJuris, "The Memorandum of Understanding between Italy and Libya: Does It Create Human Rights Obligations on the Part of Italy?", 5 August 2021, Available at: <https://opiniojuris.org/2021/08/05/the-memorandum-of-understanding-between-italy-and-libya-does-it-create-human-rights-obligations-on-the-part-of-italy/> (Accessed 4 May 2024).

³⁰ The EU-Turkey Statement, Available at: <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> (Accessed 2 May 2024).

³¹ EuroMed Rights, 2021, "The Policy of Forced Returns Between Italy and Tunisia", p. 7, Available at: https://euromedrights.org/wp-content/uploads/2021/04/EN_Chapter-4-Italy-Tunisia-1.pdf (Accessed 4 May 2024).

³² Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions on A New Pact on Migration and Asylum, Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0609> (Accessed 4 April 2024).

As seen from the 1990-2023 journey of Italy's return and readmission policy, particularly over the past three decades, Italy's return migration policy has evolved significantly, influenced by national priorities, EU directives, and global migration trends. From the foundational laws of the 1990s to the contemporary adjustments necessitated by the COVID-19 pandemic, Italy has continually refined its legal and administrative frameworks to manage return migration effectively. The ongoing challenge for Italy remains to balance the enforcement of return policies with the protection of migrants' rights, ensuring humane and fair treatment in all procedures.

Figure 7: Italian Return Migration Policy Timeline (1990-2023)

Source: Design by the authors

3.2. Legal Framework for Forced Removals and Voluntary Returns

Although there is no agreed definition or legal term, pushbacks are generally considered a form of illegal return policy tool due to their violation of international and EU Law, particularly the principle of non-refoulement. Pushbacks can be seen as “a form of forced/coerced return, and they involve actions for migrants who have already crossed the border, but also towards people who are present near or at the border, attempting to cross it”.³³ Briefly, pushbacks aim to prevent the person from entering the country and requesting international protection as one type of coercive return disguised in practices or “a return before arrival”.³⁴ Similarly, the GAPs Project classifies “pushbacks” as one of the types of return governing mechanisms, which appears as strict border controls at the first arrivals as formal policy instruments and physical pushbacks practised at the borders and impede admission and asylum claims.³⁵ However, since pushbacks are mainly disguised in practices, it is impossible to find the official legal framework regarding the type of coercive returns; therefore, only forced removals (expulsion) and assisted voluntary returns will be briefly mentioned here for this snapshot.

3.2.1. Forced Removal (Expulsion) Process as A Part of the Forced Return Type of Return Policies in Italy

Italian Law distinguishes between three different types of expulsion of foreign citizens:

- 1) Administrative expulsion, ordered by the Ministry of the Interior (Article 13 of Legislative Decree 286/98);
- 2) Administrative expulsion, ordered by the Prefect (Article 13 Subsection 2 of Legislative Decree 286/98);
- 3) Expulsion as a security measure (Article 15 of Legislative Decree 286/98).

As for the **administrative expulsion ordered by the Ministry of the Interior**, it is applied when a foreigner (both Italian resident or not) constitutes a danger to public order or the security of the state.

In case of the **administrative expulsion applied by the Prefect**, the circumstances that lead to the application of the above measure against the foreigner are the following:

- Irregular entry to the Italian territory;
- Not applying for a residence permit within eight days of entering regularly in Italy;
- Not applying for the renewal of the residence permit within 60 days after its expiration;
- In case the valid residence permit is cancelled or revoked,
- When a foreigner, holder of a valid residence permit, is suspected of living with money that derives from the commission of associative crimes and he/she is unable to prove the legitimate sources of the income;
- When a foreigner, holder of a residence permit, is suspected of belonging to mafia-type associations,
- In case the expulsion decree has already been issued to the foreigner and he/she has not left Italy within 15 days of its notification,

³³ EuromedRights, Ibid.

³⁴ Ibid.

³⁵ Sahin-Mencütek, Z. Triandafyllidou, A., Barthoma, S., Nimmer, M., Rottmann, S., Öztürk, N. and R. Istaiteyeh, 2023, “Framework paper on the concepts and typologies on returns, combined with four conceptual notes in Global Migration: Consequences and Responses”, Vol. 1: 78, Uppsala: Acta Universitatis Upsaliensis. DOI: 10.5281/zenodo.10021239

- Finally, once expelled, the foreigner returns to Italy before the period specified in the expulsion order (excluding those who have obtained the “special authorisation to re-entry” from the Ministry of the Interior).

The third type of **expulsion** - considered a **security measure** - is applied by the Judicial Authority after a criminal conviction when the foreigner is considered socially dangerous by the Judge.

When an expulsion order is applied, the foreigner is accompanied by the police directly to the border or to a temporary detention centre.

The accompaniment to the detention centres occurs when a foreigner does not possess an identification document, in case it is impossible to accompany him/her to the border due to health problems, or when the accompaniment isn't possible due to organisational reasons of the Judicial Police.

Having the expulsion decree precludes the foreigner from re-entering Italy for 3-5 years (with some motivated exceptions upon a “special authorisation” from the Italian Minister of the Interior).

The Law specifies some categories of foreigners to whom the expulsion decree does not apply:

- When the person in question can be persecuted in his own country for reasons of sex, race, language, religion, citizenship, political opinions, personal and social conditions;
- When there is a danger that the foreigner can be sent to another country where he/she can suffer from the same kind of persecution.

In other cases, the expulsion may be ordered exclusively by the Ministry of the Interior - this restriction regards in particular:

- Minors under 18 years of age, excluding their right to follow the parent or caregiver expelled from the Italian territory;
- Holders of the residence card;
- Foreigners who permanently live with relatives up to the fourth degree or the spouse of Italian Nationality;
- Pregnant women or in the six months following the birth of the child.

3.2.2. Assisted Voluntary Returns and Reintegration Programmes

Assisted voluntary return (AVR) programmes are a key component of Italy's migration management strategy. These programmes aim to facilitate the return of migrants who voluntarily return to their home countries.

The legal basis for assisted returns in Italy is primarily outlined in the Consolidated Immigration Act (Legislative Decree No. 286/1998), which has been amended multiple times to align with EU regulations and directives. The AVR programmes are designed to provide a humane and dignified return process, including pre-departure counselling, logistical support, and reintegration assistance in the country of origin. There are three key legislative instruments for the AVR programmes.³⁶

- Legislative Decree No. 286/1998 (Consolidated Immigration Act)
- Decree-Law No. 113/2018 introduced stricter measures for immigration control, including aspects related to returns.
- Decree-Law No. 130/2020**, which aimed to revise aspects of the 2018 law to

³⁶ AIDA, 2022, “AIDA Country report: Italy”. Available at: https://asylumineurope.org/wp-content/uploads/2023/05/AIDA-IT_2022-Update.pdf (Accessed 22.04.2024).

balance security concerns with humanitarian considerations

The Ministry of the Interior oversees the implementation of AVR programs, often in partnership with the IOM. The programs are funded by both national resources and the European Union's Asylum, Migration and Integration Fund (AMIF).

Recent developments in Italy's AVR policy have focused on improving the efficiency and effectiveness of the return process. However, challenges remain, including ensuring adequate support for reintegration and addressing the legal and procedural complexities that migrants face.

Annex 1 reflects Italy's most important legal documents regarding the return and readmission policy.

4. Institutional Framework: Actors in Italy's Return and Readmission Policy

The institutional framework and the actors involved in Italy's return and readmission policy form a complex network of legal provisions, governmental bodies, and international organisations. Central to the implementation of the return and readmission policy in Italy, various actors operate at multiple levels of governance, from national authorities to international organisations and non-governmental entities. Each actor plays a distinct yet interrelated role in ensuring that the processes of return and readmission are carried out effectively, humanely, and in accordance with legal frameworks.

At the national level, the Ministry of the Interior (MoI) stands as the principal authority overseeing the return and readmission policy. This Ministry is responsible for issuing expulsion orders and coordinating with other governmental bodies to ensure compliance with Italy's immigration laws. As regional representatives of the Ministry, prefectures execute these orders and manage the administrative procedures related to returns. Additionally, judicial authorities are involved in cases where expulsions are mandated as security measures following criminal convictions, thereby linking the return policy to the broader judicial system. The Ministry oversees the Department for Civil Liberties and Immigration, coordinating with other agencies and ensuring compliance with legal standards.³⁷

Border Police (Polizia di Frontiera) is responsible for monitoring Italy's borders and ensuring the enforcement of immigration laws. It plays a critical role in identifying and processing individuals who are subject to return or readmission.³⁸ On the other hand, as the Provincial Policy Office, *Questura* handles the registration and processing of asylum applications within Italy, which also involves executing deportation orders and facilitating the voluntary return of migrants.³⁹

International cooperation is a critical component of Italy's return and readmission policy. The IOM collaborates closely with the Italian government to facilitate voluntary return and reintegration programs, providing logistical support and assistance to migrants. This partnership exemplifies the transnational dimension of migration management, highlighting the importance of coordinated efforts across borders.

³⁷ AIDA, Ibid.

³⁸ Ibid.

³⁹ Ibid.

Non-governmental organisations (NGOs) also play a vital role in the return and readmission process. These organisations offer legal assistance, advocacy, and support services to migrants, ensuring that their rights are protected throughout the return procedure. NGOs often act as watchdogs, monitoring the implementation of return policies and advocating for the humane treatment of migrants.

Furthermore, the EU, such as Frontex, provide operational support and funding for return operations. These agencies ensure that Italy's return and readmission practices align with EU standards and regulations, facilitating a harmonised approach to migration management across member states.

Annexe 2 reflects the related actors briefly explaining their roles with their official institutional websites.

5. International Cooperation Regarding Return and Readmission

Over the past decades, Italy has engaged in numerous bilateral and multilateral agreements, collaborating with various countries and international organisations to facilitate the return of irregular migrants. These agreements often include provisions for the identification, documentation, and repatriation of irregular migrants and commitments from the countries involved to readmit their nationals.

Italy's return and readmission policy is also supported by its active participation in the EU initiatives and frameworks, which provide a coordinated approach to migration management across member states. As part of the EU, Italy benefits from the EU's Readmission Agreements (EURAs), which the European Commission negotiates with third countries. The EU Asylum, Migration and Integration Fund (AMIF) supports Italy's efforts in managing migration, including funding for Assisted Voluntary Return and Reintegration (AVRR) programmes. Also, the IOM facilitates the voluntary return of migrants and provides reintegration assistance to ensure sustainable returns.

Italy's use of bilateral agreements with major immigrant-sending countries has been instrumental in promoting

Annex 3 and **Annex 4** provide the bilateral agreements linked to readmission and the readmission agreements.

6. Annexes

Annex 1: Legal Framework on Returns

Title of the Policy/Legislation in English	The Title in the Original Language and link to the document	Policy Area	Date/Announced Year	Active Period	Key terms	Type of Legislation	Target Group or Immigrant Category
Legislative Decree no. 286/1998 on “Consolidated Act on provisions concerning the Immigration regulations and foreign national conditions norms”	Decreto legislativo 25 luglio 1998, n. 286 “Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero” Link: https://www.gazzettaufficiale.it/eli/id/1998/08/18/098G0348/sg	general/immigration, asylum	Published on 18/08/1998	Active from 2/9/1998 Last Amendment on 30/12/2023	illegal entry; illegal stay; return; return decision; removal order; expulsion, forced repatriation; entry ban	Decree-Law	immigrant, irregular migrant, asylum seeker, refugee, rejected asylum seeker
Presidential Decree no. 394/1999 on “Regulation on norms implementing the consolidated act on provisions concerning the immigration regulations and foreign national conditions norms”	Decreto del Presidente della Repubblica del 31 agosto 1999, n. 394 su “Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero” Link: https://www.gazzettaufficiale.it/eli/id/1999/11/03/099G0265/sg	general/immigration, border management	Published on 03/11/1999	Active from 18/11/1999 Last Amendment on 30/12/2023	illegal entry; illegal stay; return; return decision; expulsion, forced repatriation, pre-removal detention; entry ban	Decree	immigrant, irregular migrant, asylum seeker, rejected asylum seeker
Law no. 189 of 30 July 2002 on “Modification to the legislation on immigration and asylum”	Legge 30 luglio 2002, n. 189 sulla “Modifica alla normativa in materia di immigrazione e di asilo” Link: https://www.gazzettaufficiale.it/eli/gu/2002/08/26/199/so/173/sg/pdf	general/immigration, border management	Published on 26/08/2002	Active from 10/09/2002 Last Amendment on 23/02/2005	illegal entry; illegal stay; return; return decision; expulsion, forced repatriation, pre-removal detention; entry ban	Law	immigrant, irregular migrant, asylum seeker, rejected asylum seeker

Legislative Decree no. 251/2007 on “Implementation of Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted”	Decreto legislativo 19 novembre 2007, n. 251 su “Attuazione della direttiva 2004/83/CE recante norme minime sull’attribuzione, a cittadini di Paesi terzi o apolidi, della qualifica del rifugiato o di persona altrimenti bisognosa di protezione internazionale, nonché norme minime sul contenuto della protezione riconosciuta” Link: https://www.gazzettaufficiale.it/eli/id/2008/01/04/007Go259/sg	general/asylum	Published on 04/01/2008	Active from 19/1/2008 Last Amendment on 05/05/2023	return policy, voluntary repatriation	Qualification Decree	asylum seeker, refugees, rejected asylum seeker
Legislative Decree no. 25 of 28 January 2008 on “Implementation of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.”	Decreto legislativo del 28 gennaio 2008, n. 25 su “Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello status di rifugiato” Link: https://www.gazzettaufficiale.it/eli/id/2008/02/16/008Go044/sg	general/asylum, border management, repatriation	Published on 16/02/2008	Active from 02/03/2008 Last Amendment on 04/12/2023	return procedures; return decision; removal order; expulsion, forced repatriation; entry ban	Legislative Decree	general/asylum seeker, irregular migrant
Decree-Law no. 89 of June 23, 2011 on “Urgent provisions for the completion of the implementation of Directive 2004/38/EC on the free movement of EU citizens and the transposition of Directive 2008/115/EC on the repatriation of irregular third-country nationals”	Decreto-legge del 23 giugno 2011, n. 89 su “Disposizioni urgenti per il completamento dell’attuazione della direttiva 2004/38/CE sulla libera circolazione dei cittadini comunitari e per il recepimento della direttiva 2008/115/CE sul rimpatrio dei cittadini di Paesi terzi irregolari” Link: https://www.gazzettaufficiale.it/gazzetta/serie_generale/caricaDettaglio?dataPubblicazioneGazzetta=2011-06-23&numeroGazzetta=144	general/immigration, repatriation, border management	Published on 23/06/2011	Active from 24/06/2011 Amended and converted in Law no. 129 on 02/08/2011	expulsion; application of return procedures; forced repatriation; voluntary repatriation; entry ban	Decree-Law, then Law	irregular migrant rejected asylum seeker

Decree of October 27, 2011 on "Guidelines for the implementation of voluntary and assisted repatriation programs, referred to in Article 14-ter, of Legislative Decree No. 286 of July 25, 1998, introduced by Article 3, paragraph 1, letter e), of Decree-Law No. 89 of June 23, 2011, converted, with amendments, by Law No. 129 of August 2, 2011	Decreto del 27 ottobre 2011 su "Linee guida per l'attuazione dei programmi di rimpatrio volontario e assistito, di cui all'articolo 14-ter, del decreto legislativo 25 luglio 1998, n. 286, introdotto dall'articolo 3, comma 1, lett. e), del decreto-legge 23 giugno 2011, n.89, convertito, con modificazioni, dalla legge 2 agosto 2011, n. 129 Link: https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2011-12-31&atto.codiceRedazionale=11A16541	return procedures, voluntary and assisted return	Published on 31/12/2011	Active from 01/01/2012 Amended and converted in Law no. 129 on 02/08/2011	voluntary and assisted repatriation, repatriation procedure, expulsion, vulnerable migrants, human traffic victims,	Decree, then Law	irregular migrant, rejected asylum seeker, vulnerable migrant - human traffic victim
Presidential Decree no. 21/2015 on "Regulation on the procedures for the recognition and revocation of international protection"	Decreto del Presidente della Repubblica del 12 gennaio 2015 su "Regolamento relativo alle procedure per il riconoscimento e la revoca della protezione internazionale a norma dell'articolo 38, comma 1, del decreto legislativo 28 gennaio 2008, n. 25" Link: https://www.gazzettaufficiale.it/eli/id/2015/03/05/15G00029/sg	general/asylum, forced return, pre-removal detention	Published on 05/03/2015	Active from 20/03/2015 Last Amendment on 04/10/2018	return; return decision; detention of asylum seekers; pre-removal detention	Presidential Decree	irregular migrant, asylum seeker, rejected asylum seeker
Law no. 47 of 7 April 2017 on "Provisions on protection measures for unaccompanied foreign minors"	Legge n. 47 del 7 aprile 2017 su "Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati" Link: https://www.gazzettaufficiale.it/eli/id/2017/04/21/17G00062/sg	general/immigration, asylum	Published on 21/04/2017	Active from 06/05/2017 Last Amendment on 16/01/2018	non-refoulement; voluntary and assisted repatriation; repatriation procedure; expulsion; minors human traffic victims	Law	unaccompanied migrant minor, migrant minor asylum seeker

Decree-Law no. 113 of 4 October 2018 on “Urgent provisions on international protection and immigration, public security, as well as measures for the functionality of the Ministry of the Interior and the organisation and functioning of the National Agency for the administration and destination of assets seized and confiscated from organised crime”	Decreto-legge del 4 ottobre 2018, n. 113 su “Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata” Link: https://www.gazzettaufficiale.it/eli/id/2018/10/04/18G00140/sg	general/immigration, asylum, border management, public order and safety	Published on 04/10/2018	Active from 05/10/2018 Amended and converted in Law no. 132 on 01/12/2018 Last Amendment on 21/06/2023	pre-removal detention; asylum seekers detention; expulsion; return ban; entry ban; Schengen; Dublin procedure; repatriation; safe countries of origin	Decree-Law, then Law	irregular migrant, asylum seeker, rejected asylum seeker
Decree-Law no. 53 of 14 June 2019 on “Urgent provisions on public order and safety”	Decreto-Legge del 14 giugno 2019, n. 53 su “Disposizioni urgenti in materia di ordine e sicurezza pubblica” Link: https://www.gazzettaufficiale.it/eli/id/2019/06/14/19G00063/sg	public order and safety	Published on 14/06/2019	Active from 15/06/2019 Amended and converted in Law no. 77 on 08/08/2019 Last Amendment on 30/12/2020	illegal immigration	Decree-Law, then Law	irregular migrant
Ministry of Foreign Affairs and International Cooperation decree of October 4, 2019 on “Identification of safe countries of origin, pursuant to Article 2-bis of Legislative Decree No. 25 of January 28, 2008”	Decreto del Ministero degli Affari Esteri e della Cooperazione Internazionale del 4 ottobre 2019 su “Individuazione dei Paesi di origine sicuri, ai sensi dell'articolo 2-bis del decreto legislativo 28 gennaio 2008, n. 25” Link: https://www.gazzettaufficiale.it/eli/id/2019/10/07/19A06239/sg	asylum, immigration, border management, safe countries of origin	Published on 07/10/2019	Active from 23/10/2019	safe countries of origin	Decree	irregular migrant, asylum seeker, rejected asylum seeker

National Commission for the Right to Asylum Circular no. 8864 of 28 October 2019- Safe countries of origin list Article 2 bis LD 25/2008: accelerated procedure Articles 28, 28 bis, 28 ter	Circolare della Commissione Nazionale per il diritto di asilo, Prot. 886 del 28 Ottobre 2019, Lista dei paesi di origine sicuri ex art. 2 bis d.lgs 25/2008; applicazione delle procedure accelerate ex art. 28, 28 bis 28 ter	asylum, immigrants, border management, safe countries of origin	Issued on 28/10/2019	Active	safe countries of origin, expulsion	Circular	irregular migrant, asylum seeker, rejected asylum seeker
Decree-Law no. 130 of 21 October 2020 on "Urgent provisions on immigration, international and complementary protection, amendments to Articles 131-bis, 391-bis, 391-ter and 588 of the Criminal Code, as well as measures on the prohibition of access to public establishments, on combating the distorted use of the web and on the discipline of the National Guarantor of the rights of persons deprived of their liberty"	Decreto-legge del 21 ottobre 2020, n. 130 su "Disposizioni urgenti in materia di immigrazione, protezione internazionale e complementare, modifiche agli articoli 131-bis, 391-bis, 391-ter e 588 del codice penale, nonché misure in materia di divieto di accesso agli esercizi pubblici ed ai locali di pubblico trattenimento, di contrasto all'utilizzo distorto del web e di disciplina del Garante nazionale dei diritti delle persone private della libertà personale" Link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto-legge:2020:130	general/immigration, asylum, border management, public order and safety	Published on 21/10/2020	Active from 22/10/2020 Amended and converted in Law no. 173 on 18/12/2020 Last Amendment on 02/03/2023	illegal immigration, illegal entry; asylum seekers detention; illegal stay; return; return decision; removal order; expulsion, pre-removal detention, forced repatriation; entry ban	Decree-Law, then Law	irregular migrant, asylum seeker, rejected asylum seeker, vulnerable migrant
Decree Law no. 20/2023 on "Urgent provisions on the legal entry of foreign workers and fight against irregular migration"	Decreto Legge 20/2023 su "Disposizioni urgenti in materia di flussi di ingresso legale dei lavoratori stranieri e di prevenzione e contrasto all'immigrazione irregolare" Link: https://www.gazzettaufficiale.it/eli/id/2023/03/10/23G00030/sig	general/immigration, illegal immigrants, forced return, border management	Published on 10/03/2023	Active from 11/03/2023 Amended and converted in Law no. 50 on 05/05/2023	application of return procedures; forced repatriation; pre-removal detention	Law	irregular migrant, rejected asylum seeker

Decree-Law no. 124 of September 19, 2023 on “Urgent provisions on cohesion policies, for the relaunch of the economy in the areas of southern Italy, and on immigration”	Decreto-legge del 19 settembre 2023 n. 124 sulle “Disposizioni urgenti in materia di politiche di coesione, per il rilancio dell'economia nelle aree del Mezzogiorno del Paese, nonché in materia di immigrazione” Link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2023;124	pre-removal detention	Published on 19/09/2023	Active from 20/09/2023 Amended and converted in Law no. 162 on 13/11/2023	expulsion, application of return procedures; forced repatriation; pre-removal detention;	Decree-Law, then Law	irregular migrant, rejected asylum seeker

Source: From different sources, this table prepared by the authors

Annex 2: Actors Related Returns and Readmissions

Authority (English and original name)	Type of government	Type of organisation	Area of competence in the fields of return	Link
Ministry of the Interior (Ministero dell'Interno)	National	Government	Coordinates, monitors, and participates in the planning of the management of readmission, return, deportation or relocation procedures	https://www.interno.gov.it/it
Central Directorate of Immigration and the Border Police of the Ministry of the Interior (Direzione centrale dell'immigrazione e della polizia delle frontiere del Ministero dell'Interno)	National	Government	Organises operations of readmission via charter flights, coordinates the escort, the participation of police medical and nursing staff, as well as obtains the consent of the state of destination and of any transit countries so as to complete the operation	https://www.interno.gov.it/it/ministero/dipartimenti/dipartimento-pubblica-sicurezza/direzione-centrale-dellimmigrazione-e-polizia-frontiere
Justice of the Peace (Giudice di Pace)	National	Government	Provides authorisation in cases of expulsion order with compulsory accompaniment; measures restricting personal liberty to ensure the execution of voluntary departure; measures ordering detention at a repatriation centre and the order of immediate removal from Italy	https://gdp.giustizia.it/
Frontex	European	Supranational	Organises, coordinates and conducts return operations	https://www.frontex.europa.eu/
IOM Italy (Organizzazione Internazionale per le Migrazioni in Italia)	International	International organisation	Organises and implements AVRR	https://italy.iom.int/it
Civil society actors (Attori della società civile)	International/ National/ Local	NGOs, International Organisations, etc.	Provide health care and medical treatment services in the detention facilities; Mediate to inform the TCN about the return decision; Provide confirmation of the voluntary departure.	

Source: From different sources, this table prepared by the authors

Annex 3: Bilateral Readmission Agreements of Italy

The title of readmission agreement in English	The title of the readmission agreement in the Original Language	Date of signature	Signatory States
Agreement between Italy and Macedonia for the readmission of persons whose entry and/or stay is contrary to the legislation in force between the two countries	Accordo tra Italia e Macedonia per la riammissione delle persone il cui ingresso e/o soggiorno sia contrario alla normativa vigente tra i due Paesi	26.02.1997	Italy - Republic of Macedonia
Agreement between Italy and Georgia on the readmission of persons	Accordo tra Italia e Georgia sulla riammissione delle persone	15.05.1997	Italy - Georgia
Agreement between Italy and Albania on the readmission of persons at the border, with Executive Protocol	Accordo tra Italia e Albania sulla riammissione delle persone alla frontiera, con Protocollo esecutivo	18.11.1997	Italy-Albania
Exchange of Notes between Italy and Tunisia on the readmission of persons residing without authorisation	Scambio di Note tra Italia e Tunisia sulla riammissione delle persone in posizione irregolare	6.08.1998	Italy-Tunisia
Agreement between Italy and Marocco on the readmission	Accordo tra Italia e Marocco sulla riammissione	27.07.1998	Italy-Morocco
Agreement on readmission and police cooperation between Italy and Tunisia	Accordo relativo alla riammissione e alla cooperazione di polizia tra Italia e Tunisia	13.12.2003	Italy-Tunisia
Cooperation Agreement on Bilateral Labour Migration Flows and Efficient Management of Migration Flows and Prevention of Illegal Migration	Accordo di cooperazione in materia di flussi migratori bilaterali per motivi di lavoro e gestione in modo efficiente dei flussi migratori e prevenzione della migrazione illegale	28.11.2005	Italy - Egypt
Technical arrangements for joint maritime patrols by an Italian-Libyan operational nucleus under Libyan command, carried out by six Italian Guardia di Finanza vessels.	Accordi tecnici di pattugliamento marittimo congiunto da parte di un nucleo operativo italo-libico, a comando libico, effettuato da sei navi della Guardia di finanza italiane	December 2007	Italy - Libya
Cooperation Agreement between Italy and Libya finalising and completing Italian-Libyan cooperation	Accordo di cooperazione tra Italia e Libia che perfeziona e porta a compimento la cooperazione italo-libica	30.08.2008	Italy-Libya
Memorandum of understanding between Italy and Ghana on readmission	Memorandum d'intesa tra Italia e Ghana sulla riammissione	08.02.2010	Italy-Ghana
Memorandum of understanding between Italy and Niger on readmission	Memorandum d'intesa tra Italia e Niger sulla riammissione	09.02.2010	Italy-Niger
Memorandum of understanding between Italy and Senegal on readmission	Memorandum d'intesa tra Italia e Senegal sulla riammissione	28.07.2010	Italy-Senegal
Memorandum of understanding between Italy and Nigeria on readmission	Memorandum d'intesa tra Italia e Nigeria sulla riammissione	12.06.2011	Italy-Nigeria
Memorandum of understanding between the Public Security Department of the Italian Interior Ministry and the national police of the Sudanese Interior Ministry	Protocollo d'intesa tra il dipartimento di pubblica sicurezza del ministero dell'interno italiano e la polizia nazionale del ministero dell'Interno sudanese per la lotta alla criminalità, la gestione delle frontiere e dei flussi migratori e per il rimpatrio.	03.08.2016	Italy-Sudan

for the fight against criminality, management of frontiers, and migration flows and repatriation Link: https://www.asgi.it/wp-content/uploads/2017/10/English-Translation-Memorandum-of-Understanding-Sudan-Italy-SL-Clinic-UniTO.pdf			
Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and reinforcing the security of borders between the State of Libya and the Italian Republic. Link: https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf	Memorandum d'intesa sulla cooperazione nei settori dello sviluppo, della lotta all'immigrazione clandestina, al traffico di esseri umani e al contrabbando di carburante e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana	02.02. 2017	Italy- Libya
The agreement between Italy and Tunisia to 'strengthen border control'	L'intesa tra Italia e Tunisia per "rafforzare il controllo delle frontiere"	2020	Italy-Tunisia

Source: From different sources, this table prepared by the author

Annex 4: Italy's Bilateral Agreements Linked to Readmission

Countries	Type of Agreement, Date
Region	EU& Iceland, Norway, Switzerland and the UK
Austria	V 01/04/1998
Bulgaria	V 25/12/1998
Croatia	V 01/06/1998
Cyprus	V 22/05/2003; CP V 04/01/2006
Czechia	CP V 15/12/1999
Estonia	V 03/03/1999
France	V 01/12/1999
Greece	CP V 10/01/2000; V 18/04/2001
Hungary	CP V 17/04/1998, V 10/04/1999
Latvia	V 07/11/1997
Lithuania	V 24/02/1999
Malta	V 29/11/2002
The Netherlands	CP V 14/03/2000
Poland	V 01/05/2001
Romania	V 01/02/1998
Slovakia	V 01/01/1999; CP V 06/11/2002
Slovenia	V 01/09/1997
Spain	V 01/02/2001
Switzerland	V 01/05/2000
Region	Eastern Europe and the Balkans
Albania	IP V 03/12/2008
Bosnia-Herzegovina	V 12/05/2004; IP V 13/09/2018
Georgia	S 15/05/1997; IP N
Kosovo	V 10/02/2015
Moldova	V 01/05/2004; IP S 12/05/2015
Montenegro	ME S, 09/12/1999; IP V 10/02/2015
North Macedonia	V 23/10/1997; IP V 13/04/2019
Russia	ME S, 20/01/2006; IP V 08/07/2011
Serbia	S 01/04/2005; IP S 13/11/2009
Ukraine	IP N
Region	North African Countries
Algeria	S 24/02/2000; V 18/10/2006; CP S 22/11/1999 V 28/01/2008; Declaration S 18/07/2022; CP S 01/02/2024
Libya	AA S 13/12/2000; AA S 03/07/2003; ME S, 18/01/2006; CP S 29/12/2007; ME S, 17/06/2011; EL S, 03/04/2012; ME S, 02/02/2017
Morocco	S 27/07/1998
Tunisia	EL S 06/08/1998; CP S 13/12/2003, AA S 28/01/2009; ME S 05/04/2011
Region	Other Mediterranean Countries
Egypt	CP V 18/06/2000; V 25/04/2008
Turkey	CP V 09/02/2001, N
Cote d'Ivoire	EL S 08/02/2018; S 01/10/2018 (JWF); ME S 31/01/2020
Djibouti	ME S 27/06/2012
Ethiopia	S 05/02/2018 (Admission procedures)

Countries	Type of Agreement, Date
Ghana	ME S 08/02/2010
Guinea	S 27/07/2017 (Good Practices Procedure on identification and return)
Niger	ME S 09/02/2010
Nigeria	V 12/06/2011 (migration agreement); ME S 01/03/2017; S SOPs 27/03/2019
Senegal	ME S 28/07/2010; ME S 16/05/2018
Sudan	ME S 03/08/2016
The Gambia	CP S 29/07/2010; ME S 06/06/2015; ME S 26/10/2017; S 01/05/2018 (Good Practices Procedure on identification and return)
Region	Latin America and the Caribbean
Colombia	N
Ecuador	N
Mexico	CP V 10/07/2002
Peru	ME S 12/10/2004
Region	Asia and Oceania
Afghanistan	S 03/10/2016 (Best practice procedure on identification and return)
Bangladesh	S 30/09/2017 (SOPs)
India	CP V 21/01/2000; N
Iran	N
Uzbekistan	CP V 17/08/2001
Pakistan	S 03/2000
Philippines	V 28/02/2004
Sri Lanka	EL, V 24/09/2001; IP N

Source: Cassarino, Jean-Pierre (2024). "Italy's Bilateral Agreements Linked to Readmission", Available at: <https://www.jeanpierrecassarino.com/datasets/ra/it/> (Accessed 1 March 2024) (This address requires registration to the platform and permission from J. P. Cassarino).

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COUNTRY SNAPSHOT

Legal and Policy Infrastructures of Returns in Hungary

D2.1

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1. Statistical Overview Regarding Returns and Readmissions at the National Level

Two authorities collect data regarding Returns and Readmissions in Hungary – the National Directorate-General for Aliens Policing (NDGAP; in Hungarian: *Országos*

Idegenrendészeti Főigazgatóság, OIF) and the Ministry of the Interior. There is open but limited access to certain data.

Year	Stock of irregular migrants (# TCNs found to be illegally present) (data in Eurostat)	# Asylum applications	# TCNs/foreign nationals* refused entry at the border	# pushbacks (if available) (unofficial data by NGOs also acceptable; please indicate the data source)	# TCNs/foreign nationals* ordered to leave – Total
2015	424055	177135	11505		2603
2016	41560	29432	9905		3274
2017	25730	3397	14010		1057
2018	18915	671	15050		824
2019	36440	500	14240		976
2020	89370	117	36500		1169
2021	134140	40	34650		1532
2022	222515	46	15780	158565	1478
Data sources:	Eurostat	NDGAP/OIF	Eurostat	AIDA	NDGAP/OIF

2. General Legal Framework¹

Hungary has one of the most restrictive immigration laws in the European Union. Act II of 2007 on the entry and stay of third-country nationals was amended several times. The new immigration law was supposed to enter into force on 1 January 2024 with a two-month grace period. The application of the new regulations entered into force on 2 March 2024, but the implementation rules (executive decrees and detailed provisions) have not yet been announced². The NDGAP was closed during January and February 2024. During this interim period, no new application could be submitted. The NDGAP resumed decision-making operations in March 2024. To ease the transition, all residence cards expiring before March will be automatically renewed until the end of April 2024. Act XC of 2023 introduced major changes in the immigration law in Hungary. The government introduced new purposes for stay in Hungary while eliminating some previous purposes for stay. The new rules are stricter than before 2024, for example, regarding new types of work permits, immediate return of migrants, so-called ‘golden visa’, and limited categories of migrants who can proceed with family reunification.

The main rules and principles of the Hungarian return procedure can be found in:

- Act XC of 2023 on general rules for admission and right of residence of third-country nationals (hereinafter: Act on foreigners),
- Act VI of 2018 to amend certain laws on measures to combat illegal immigration,

- Act XX of 2017 amending certain acts to tighten the procedures conducted on the border,
- Government Decree no. 114/2007 (V. 24.) on the implementation of Act II of 2007 on the entry and stay of third-country nationals (related to the Act II of 2007) (valid till 29 February 2024),
- Act II of 2007 on the entry and stay of third-country nationals (valid till 29 February 2024).

As a rule, two authorities may issue a decision on return (art. 97 of Act XC on foreigners): the court or the police. The court imposes an obligation to leave the country on a foreigner who has committed a crime – as a punishment or after serving a prison sentence. The Act provides for a limited group of foreigners who are expelled in this way. Act XC on foreigners stipulates reasons for the issuance of the return decision to a foreigner, that is who performed work without the required work permit, or the permit required by this Act, whose entry and stay violates or endangers national security, public safety or public order, or whose entry and stay harms or endangers public health. A foreigner whose residence permit application was rejected has 30 days to leave the country. Hungary does not provide free of charge legal assistance to foreigners but aids with legal advice (with an interpreter if necessary³). Foreigners can use legal assistance at their own expense and have a right to appoint a legal representative in immigration police procedures related to deportation. However, a foreigner may, upon request, use the free legal assistance specified in the law to challenge the decision to order

¹ Nemzeti Jogszabálytár, 2023. évi XC. törvény, <https://njt.hu/jogszabaly/2023-90-00-00>.

² European Commission, European Website on Integration, *Hungary: New immigration law affects residence permits*, accessed March 18, 2024, https://migrant-integration.ec.europa.eu/news/hungary-new-immigration-law-affects-residence-permits_en.

³ Art. 219 of Act XC on foreigners.

deportation by the immigration police in an administrative court⁴. It is important to note there is no appeal against the decision ordering expulsion⁵. Foreigners can submit a complaint to the administrative court within 8 days. The court decides on the claim within 15 days from the date of receipt of the complaint at the court. The court puts down the verdict in writing within 3 working days and communicates it electronically to the immigration enforcement authority. The Hungarian law does not provide a path for further legal

remedies against the administrative court's judgment. The Act on foreigners does not specify obstacles to return. However, Act no. LXXX of 2007, Act on Asylum⁶ specifies obstacles to return, i.e., it may not be ordered or carried out to the territory of a country which is not considered a safe country of origin or a safe third country for the person concerned, and there is no safe third country which would receive him/her. In case there is no safe country of return, the foreigner can be granted a humanitarian stay.

Overview of the Legal Framework on Return Policy (Legislation Mapping)

The Title of the Policy/Legislation in English	The Title in the Original Language	Policy Type/Area	Date/Announced Year	Active Period (note down if it is expired or repealed)	Description of Policy or Short Overview	Key terms for search function (readmission, removal criteria, alternatives to detention etc.)	Level of Legislation	Type of Legislation or Administrative Action	Target Group or Immigrant Category	If the policy is origin country or nationality specific, note down the country name (e.g. Iraq) or nationality name (e.g. Palestinian)	Department or Agencies or National Law Enforcement involved in the Policy/Legislation (Optional)	Web Links to Source in English	Web links to Source in Original Language
Fundamental Law of Hungary; 25 April 2011	Magyarország Alaptörvénye, 2011. április 25.	fundamental law	2011	from 2011 to now		fundamental rights	National	Fundamental Act	Humans	no	no	https://www.parlament.hu/documents/125505/138409/Fundamental-law/73811993-c377-428d-9808-ee03d6fb8178	
Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (Third-Country Nationals Act or TCN Act)	2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról	regular and irregular immigration	2007	from 2007 to 29/02/2024 (many amendments)	legalization of stay of non-EU, types of residence permit, deny of it	deportation	National	Act	Economic migrants	no	no	https://thb.kormany.hu/download/9/ec/a0000/10_Act%20II%20of%202007%20and%20Government%20Decree%20114_2007.pdf	
Act XC of 2023 on General Rules for Admission and Right of Residence of Third-Country Nationals		regular and irregular immigration	2024	March 1st, 2024+ now	legalization of stay		national						
Government Decree 114/2007 on the Implementation of Third-Country Nationals Act (TCN)		regular and irregular immigration	2007	from 2007 to 29/02/2024	legalization of stay		National	Decree	Economic migrants	no	no	https://thb.kormany.hu/download/9/ec/a0000/10_Act%20II%20of%202007%20and%20Government%20Decree%20114_2007.pdf	https://ec.europa.eu/migrant-integration/library-document/government-decree-1142007-v-24-implementation-act-ii-2007-

⁴ Art. 220 of Act XC on foreigners.

⁵ Art. 101 of Act XC on foreigners.

⁶ Art. 45 of Act no. LXXX of 2007, Act on Asylum.

													entry-and-stay-third-o_en https://www.refworld.org/docid/5da701504.html
Act LXXX of 2007 on Asylum (Asylum Act)	2007. évi LXXX. törvény a menekültügyi jogokról	asylum	2007	from 2007 to now (many amendments)			National	Act	Asylum seekers, refugees	no	no	2007. évi LXXX. törvény - Nemzeti Jogszabálytár (njt.hu)	https://www.ecoi.net/en/file/local/1333572/1930_1400659917_5371cb504.pdf
Act LXXXIX of 2007 on the State Border	2007. évi LXXXIX. törvény az államhatárról	Illegal immigration / Asylum	2007	from 2007			National	Act	Irregular immigrants / Asylum seekers	no	no	https://njt.hu/jogszabaly/2007-89-00-00	
Bill No. T/333 amending certain laws relating to measures to combat illegal immigration		Illegal immigration					National	Decree	Irregular immigrants	no	no		https://helsinkih.hu/wp-content/uploads/T333-ENG.pdf
269/2015. (IX. 15) Government Decree announcing a crisis situation caused by mass immigration and establishing the rules related to the declaration, maintenance and termination of the crisis situation		Migration management	2015				National	Act	Asylum seekers, irregular migrants	no	no		https://www.ecoi.net/en/file/local/1304414/1930_1442909015_55f90f614.pdf
Government Decree 276/2011 (XII. 20.)		Migration management	2011				National	Decree		no	no		
Government Decree 409/2012 (XII. 28.) Korm		Migration management	2013				National	Decree		no	no		
Government Decree 411/2017 (XII. 15.) Korm		migration management	2018				National	Decree		no	no		
36/2024. (II. 29.) Government decree amending emergency government decrees in connection with the law on the general rules for the entry and residence of third-country nationals	36/2024. (II. 29.) Korm. rendelet A harmadik országbeli állampolgárok beutazása és tartózkodására vonatkozó általános szabályokról szóló törvényvel összefüggésben veszélyhelyzeti kormányrendeletek módosításáról	migrants	2024				National	Decree		no	no		

Source: Own elaboration.

3. Institutional Framework

The authority responsible for policymaking in the field of immigration is the Ministry of the Interior. Within its structure, the body responsible for matters of immigration and asylum is the National Directorate-General for Aliens Policing (NDGAP)⁷. The Head of the NDGAP is the only authority dealing with administrative duties related to visas, residence permits, asylum, and citizenship. The NDGAP is also responsible for running

managing migration, works in close partnership with the Police, military and civil security services. The Police have responsibility for border control, removal, return procedures and monitoring detention. The courts impose an obligation to leave the country on a foreigner who has committed a crime – as a punishment or after serving a sentence in prison. The courts also examine the complaints against the return decisions

List of Authorities Involved in the Migration Return Governance

Authority	Tier of government (national, regional, local)	Type of organisation	Area of competence in the fields of return (Briefly explain the role)	Link
Ministry of the Interior	National	Government	Coordinates, monitors and participates in the planning of the management of readmission, return, deportation or relocation procedures.	https://2010-2014.kormany.hu/en/ministry-of-interior
National Directorate-General for Aliens Policing	National	Government	Processes temporary and permanent residence permits, runs detention centers.	http://www.bmbah.hu/index.php?lang=en
Regional Directorate	Regional	Government	Process temporary residence permits in the region.	-
Directorate of Refugee Affairs	National	Government	Process asylum cases.	http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=521&Itemid=728&lang=en
Police	National/Regional	Government	Issues return and administrative expulsion decisions, implements removal operations.	https://www.astynomia.gr/?lang=en
Courts	Regional	Regional government	Decides about removal.	https://www.ypes.gr/apokentromeni-dioikisi-aytodioikisi/
IOM Hungary	International	International Organization	Organizes and implements AVRR.	https://hungary.iom.int/

Source: Own elaboration.

detention centres. The NDGAP, in

⁷ Sections 1, 2 and 4 of the Government Decree no. 126/2019 (V.30.) on the appointment of the aliens policing body and its powers.

4. International Cooperation

List of Readmission Agreements and Return-Related Legal or Policy Documents/Tools

	Type of Agreements Negotiations	Bilateral and	Title	Signatory State/Target Country	Third Country	Date	
						Signature	Entry into force
1	Standard Readmission agreements signed						
1.1.			Agreement between the Swiss Federal Council and the Government of the Republic of Hungary about the takeover and handing over people at the state border	Hungary/Switzerland		4.02.1994	08.06.1995
1.4			Act V of 1996	Hungary/Austria		08.10.1992	20.04.1995
1.5			Act VII. of 1996	Hungary/Czech		1995	05.08.1996
1.6			Act XX of 2005	Hungary/Greece		-	01.05.2005
1.8			Act XXVIII of 2002	Hungary/Latvia			04.05.2002
1.9			Act VII of 2004	Hungary/Slovakia		-	13.11.2004
1.10			Act LXXXI of 1999	Hungary/Slovenia			30.06.1999
1.11			Agreement between the Government of the Republic of Poland and the Government of the Republic of Hungary on the transfer and reception at the state border of persons staying without permission	Poland/Hungary		25.11.1994	05.08.1995
1.13			Act LXXVII of 1999	Hungary/Bulgaria			1999
1.14			Act XXXV of 2003	Hungary/Croatia		-	15.11.2001
1.15			Act LX of 2002	Hungary/Romania			30.11.2002
1.18				Hungary//Bosnia and Herzegovina		18.09.2007	1.01.2008
				Hungary/Montenegro		18.09.2007	1.01.2008
1.19				Hungary/Russia		25.05.2006	1.06.2007
1.20				Hungary/Georgia		22.10.2010	2.03.2011
1.21				Hungary/Pakistan		26.10.2009	1.10.2010
1.22				Hungary/Albania		14.04.2005	1.05.2006
			Act LXXXVII of 2012	Hungary/Kosovo		15.05.2012	09.08.2012
1.23				Hungary/Armenia		19.04.2013	1.01.2014/
1.24				Hungary/Azerbaijan		28.02.2014	1.09.2014
1.25			Agreement between the European Union and the Republic of Belarus on the readmission of persons residing without ~~authorisation~~	Hungary/Belarus		8.01.2020	1.07.2020
1.26				Hungary/North Macedonia		18.09.2007	1.01.2008
1.27				Hungary/Moldova		10.10.2007	1.01.2008
1.28				Hungary/Serbia		18.09.2007	1.01.2008
1.29				Hungary/Turkey		16.12.2013	1.10.2014
1.30				Hungary/Cape Verde		18.04.2013	1.12.2014
1.31				Hungary/Hongkong		27.11.2001	1.03.2004
1.32				Hungary/Makao		13.10.2003	1.06.2004
1.33				Hungary/Ukraine		18.06.2007	1.08.2008
1.34			Act XXXIII of 2006	Hungary/France		-	30.09.1998

Source: Own elaboration.

5. Memorandum of Understanding between Austria, Serbia and Hungary⁸

Austria, Serbia and Hungary signed on 16 November 2022, the memorandum of understanding on enhancing trilateral cooperation in effectively combating illegal immigration. The memorandum is a short 4-page document. Countries agreed on cooperation in the following areas:

- protection of the Serbia-North Macedonia border (focusing on migrant smuggling, human trafficking, and other forms of organised crime and terrorism),
- Austria and Hungary would contribute to the protection of the above-mentioned border by deploying personnel, sharing knowledge, innovative technic border controls and education and training,
- Austria and Hungary would support Serbia in the process of returning migrants to their country of origin with respect to national and international

legislation (i.a., cooperation in the organisation of return flights),

- Austria and Hungary appreciate that Serbia will finish the visa exemption regime with Burundi, Tunisia and India (already finished by the end of 2022),
- Austria and Hungary would consider further support in the field of border protection and prevent migrant smuggling through the border of Serbia with high migration pressure (i.a., additional human resource support),
- Austria and Hungary would invite the EU to provide additional support to Serbia (i.a., financial) to protect the border.

On 7 July 2023, Austria, Hungary, and Serbia signed a Memorandum of Understanding on strengthening trilateral cooperation in areas of effective fighting illegal migration, which is a continuation of the above Memorandum⁹.

⁸ Magyarország Kormánya, *Memorandum of understanding between Hungary, the Republic of Austria and the Republic of Serbia*, accessed March 18, 2024, <https://cdn.kormany.hu/uploads/sheets/4/40/401/401caa8f29ba9d15b989ae2be2b7ed9.pdf>.

⁹ Влада Србије, *Strengthening cooperation with Austria, Hungary in fight against illegal migration*, accessed March 18, 2024, <https://www.srbija.gov.rs/vest/en/209541/strengthening-cooperation-with-austria-hungary-in-fight-against-illegal-migration.php>.

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D2.2 Working papers

1. Readmission Agreements and the Evolving Landscape of the Externalized EU Return Policies: The Case of Turkey
2. Externalisation of EU Migration Policies: The Case of Cooperation in the Georgian Citizens' Returns from Poland
3. Procedures of irregularisation in Greece: spatial, carceral and temporal aspects



Decentring the Study of Migrant
Returns and Return Policies

Readmission Agreements and the Evolving Landscape of the Externalized EU Return Policies: The Case of Turkey

Working Paper (WP2)

Authors:

N. Ela GÖKALP ARAS

Swedish Research Institute in Istanbul (SRII)

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List of Abbreviations

AVRR	Assisted Voluntary Return and Reintegration
DGMM	Directorate General of Migration Management
EC	European Commission
EP	European Parliament
EURA	European Union Readmission Agreements
EUTRA	EU-Turkey Readmission Agreement
EUTS	EU-Turkey Statement
FRIT	Facility for Refugees in Turkey
GAM	Global Approach to Migration
GAMM	Global Approach to Migration and Mobility
ICMPD	International Centre for Migration Policy Development
IGO	Intergovernmental Organisation
IOM	International Organization for Migration
JAP	Joint Action Plan
MFA	Ministry of Foreign Affairs
MPF	Migration Partnership Framework
MSs	Member States
NGO	Non-Governmental Organisation
N-AVRR	National Assisted Voluntary Return and Reintegration
PF	Partnership Framework
PMM	Presidency of Migration Management
RAs	Readmission Agreements
RPTG	Readmission Protocol of Turkey and Greece
TCNs	Third-Country Nationals
TCs	Third Countries
UNHCR	United Nations High Commissioner for Refugees

Abstract

As the European Union (EU) becomes one of the most popular immigration destinations globally, boosting removal rates has become a political priority. In response to the European humanitarian refugee crisis in 2015, a new generation and informal readmission tools were devised to mollify the growing concerns of the EU Member States and address weaknesses in existing readmission agreements supported by externalisation and differentiated integration. The EU return policy is analysed from a non-EU perspective, shedding much-needed light on third countries' cost-benefit calculations reflecting the macro and meso-level analyses. The paper questions how the EU-Turkey Readmission Agreement (2013) and the EU-Turkey Statement (2016) shape migration management and return policies between the EU and Turkey and the practical and legal implications of their implementation and suspension. Taking Turkey as a case study, the analysis focuses on two critical readmission instruments, namely the Agreement and the Statement and assesses the EU's return and external policy instruments from a de-centring approach. It draws on longitudinal research based on both desk research and fieldwork conducted in three stages (July 2010–March 2013, June 2018–October 2019, January– July 2024) in several provinces of Turkey, including Ankara, Edirne, Izmir and Istanbul.

Keywords: EU return policy, the EU–Turkey Readmission Agreement, the EU–Turkey Statement, externalisation, external differentiated integration, informalisation

1. Introduction¹

For the last three decades, controlling irregular migration has been a priority for the European Union (EU) and its Member States (MSs). It has also become a central pillar of the external dimension of EU cooperation in justice and home affairs. The emergence of the European refugee humanitarian crisis in 2015 brought asylum and forced migration into the spotlight due to the increasing number of arrivals. In 2015 over 1.8 million irregular crossings at EU borders were recorded (Frontex 2017, 18). Addressing irregular migration and increasing the return rates became top priorities at the EU level. The 2015 crisis was instrumentalised in justifying controversial policies regarding irregular migration.

A pivotal component of the EU's strategy has been the externalisation of migration control, which involves shifting the responsibility of managing migration flows to non-EU countries through various agreements and partnerships. Among these, return and readmission policies play a crucial role. The EU readmission agreements (EURAs) aim to facilitate and accelerate the readmission of third-country nationals (TCNs) who reside without authorisation in EU countries, including rejected asylum seekers. Since 2015, traditionally formalised structured agreements have increasingly incorporated informal mechanisms. This shift towards informality reflects a broader trend of differentiated externalisation, where the EU tailors its migration management strategies to the specific contexts and capacities of third countries (TCs).

The paper analyses the EU return policy changes explicitly focusing on readmission agreements (RAs) in three periods: 1990–2003, 2004–2014 and 2015–present. The selected Turkey case offers a compelling case study for understanding the dynamics of the EU's return policy and readmission. Turkey exemplifies TCs' capacities and strategies to resist the EU's externalisation efforts and ability to resist and leverage externalisation, particularly return policy and readmission tools.

Regarding the return policy and readmission dimension, the EU-Turkey Readmission Agreement (EUTRA, 2013) is classified as a part of the second period, and the EU-Turkey Statement (2016) was the flagship of the new generation readmission tool. The paper assesses the EU's return and external policy instruments in this framework and analyses TCs' perceptions and strategies to resist EU externalisation efforts with a de-centring approach. Taking Turkey as a case study, the analysis focuses on two critical readmission instruments: the EUTRA and the EUTS.

The paper argues that the EU's return policy started considering the TCs' demands and expectations due to the non-functioning EURAs and adopting external differentiated integration since the 2015-16 European refugee crisis. Accordingly, the EU has adopted more tailor-made, informal, flexible, and differentiated externalisation strategies than formal and standardised cooperation with TCs (Cherubini, 2017; Spijkerboer, 2017; Vitiello, 2020).

There has been continuing political and societal debate and intensive research on RAs (Boswell 2003; Cassarino 2007; Kruse and Trauner 2008; Coleman 2009; Wolff 2014; Cortinovis 2018;

¹ The Author would like to thank the GAPs Co-Coordinator – Prof. Dr. Önver Andreas Cetrez and Soner Barthoma (Uppsala University, UU) and Dr. Zeynep Şahin Mencütek (Bonn International Centre for Conflict Studies, BICC) for their guidance and helpful comments in the preparation of this paper. Special thanks go to two experts who, at our kind request, prepared internal reviews of the paper, allowing us to refine and substantially improve it. These are: Dr. Şahin Mencütek (BICC) and Dr. Fatma Yılmaz-Elmas (GAPs Horizon Project Research Fellow). Also, for the initial version of the paper, invaluable feedback and suggestions were received from two external reviewers – Prof. Dr. Suna Gülfer İhlamur-Öner (Marmara University) and Lea Müller-Funk (University for Continuing Education Krems). I also highly appreciate the format-based support from Hakan Ünay (Swedish Research Institute of Istanbul, SRII).

Carrera et al. 2019). The EUTRA and the EUTS have been intensively analysed from a legal perspective (Göçmen 2014; Eisele 2019; Carrera et al. 2019; Gatti and Ott 2019). While some scholars questioned whether the EUTS is an international agreement or a political statement (Heijer and Spijkerboer 2016; Arribas 2017; Peers 2017), some focused on the EUTS's incompatibility with international and European refugee law and human rights law standards (Amnesty International 2017; Öztürk and Soykan 2019; İneli-Ciğer and Ulusoy 2020; Ovacık et al. 2024). Nevertheless, the multi-level dynamics of the EU's relations with neighbouring countries and the capacity of agencies that EU externalisation policy targets remain underexplored. Also, there has been little comparative research on the EUTRA and EUTS together and none that offers longitudinal and concrete empirical data to advance our knowledge in the field.

This study draws from primary and secondary sources, as well as desk and multi-sited fieldwork conducted in three stages as longitudinal research. The fieldwork component was conducted in two tranches (July 2010–March 2013, June 2018–October 2019 and January–July 2024) in several provinces of Turkey (Ankara, Edirne, İzmir and İstanbul)². In total, 96 meso-level interviews were conducted for the first tranche, 41 in the second and 20 for the third tranche.³ The interviewees include high-level state officers, representatives and experts of ministries, directorates, and law enforcement agencies, which have a role in border management and the readmission process, institutions related to EU–Turkey relations, and intergovernmental organisations (IGOs) and NGOs.

This longitudinal case study enhances our understanding of readmission arrangements and externalisation policies by showcasing Turkey's strategic use of conditionality in EU negotiations. It contributes to the broader discourse on EU migration policy by elucidating the evolving externalisation strategies and addressing the macro and meso-level perspectives of relevant actors involved in the EUTRA and the EUTS processes and implementation through comprehensive fieldwork.

2. Conceptual and Theoretical Framework: Externalisation and External Differentiated Integration

The EU strives to develop strong partnerships with neighbouring countries irrespective of their potential for EU membership, aiming to foster stability and prosperity in these regions and within the EU. In this regard, by the 2000s, the “externalisation” concept emerged as a broader notion that captured the idea of EU influence beyond its territory through the export of EU forms of political organisation and governance to states not necessarily subject to prospective EU membership (Olsen 2002, Lavenex and Uçarer 2004). The concept implies that TCs adopt parts of the EU acquis in their national legal framework without being offered membership (Rijpma and Cremona 2007; Lavenex and Schimmelfennig 2009).

In the migration and asylum policy domain and from a critical point of view, externalisation aims to prevent irregular migrants, including asylum seekers, from entering the legal

² The field studies were conducted respectively as part of the doctoral research of the author (completed with A Multi-Level and Multi-Sited Analysis of the European Union's Immigration and Asylum Policy Concerning Irregular Migration and Its Implications for Turkey” dissertation, <http://etd.lib.metu.edu.tr/upload/12616581/index.pdf>), (completed with the and the following two EU funded research projects, called “RESPOND: Multilevel Governance of Mass Migration in Europe and Beyond Project (Horizon2020)” (<https://www.respondmigration.com/>) and “GAPs: De-centring the Study of Migrant Returns and Readmission Policies in Europe and Beyond” (<https://www.returnmigration.eu/>).

³ Not all the interviews provided direct focus on the article's focus, but they provided important insights regarding the implementation processes. All necessary ethics approvals by the Middle East Technical University (PhD. research, İstanbul Bilgi University (RESPOND Project) and Özyeğin University (GAPs Project) are provided.

jurisdictions of the EU or to render such migrants legally inadmissible without considering the individual merits of their protection claims (Frelick et al. 2016). The “containment” (Aleinikoff 1992) refers to “instruments and arrangements aimed at preventing access, reducing admission and increasing the expulsion of asylum seekers to countries of transit or origin as including restrictive visa requirements, carrier sanctions, the use of the ‘safe third country’ concepts, readmission agreements and arrangements” (Tan and Vedsted-Hansen 2021, 7).

One of the key elements of this policy is to convince the TCs to export the EU’s policies; thus, “conditionality”, a “bargaining strategy of reinforcement by reward, under which the EU provides external incentives for a target government to comply with its conditions” (Schimmelfennig and Sedelmeier 2004, 670). For the countries with membership prospects, the full membership can be seen as an essential innovation, but regardless of the membership dimension, the size and reliability of the reward are significant against the cost of compliance (Schimmelfennig and Sedelmeier 2005). Conditionality is also related to the bargaining power of the EU and the TCs concerning the degree of mutual dependence. From a decentralised perspective, recent studies focus on the bargaining and even “coercive” power or diplomacy of the TCs (Teitelbaum 1984; Greenhill 2010; Tsourapas, 2017; Gokalp Aras 2019a, 2019b) or framing as “reversed conditionality” (Cassarino 2007; Janvier 2023).

RAs have been the cornerstone of the EU’s externalisation policies. Analysis of the content, negotiation and implementation of RAs is typically framed as part of the EU’s ‘burden-shifting’ in its cooperation with TCs (Boswell 2003; Coleman 2009). This cooperation aims to control borders to block arrivals, but where this is not possible, to help transit and source countries outside of EU borders in readmitting migrants and managing the reception of asylum seekers (Geddes 2005; Thym 2013; Triandafyllidou and Dimitriadi 2014).

The Syrian mass migration and subsequent humanitarian refugee crisis in Europe gave more weight to external cooperation. This development started a new phase of EU externalisation when the crisis-driven ‘the state of exception became the new normal’, and the EU embarked on a differentiated integration policy to the needed flexibility to provide itself, the MS, and the TCs to overcome policy deadlocks within the EU (Gökalp Aras 2021).

Differentiated integration is a flexible form of integration frames that MS and non-EU states converge at different speeds in different EU policy areas with ‘ins’ and ‘outs, encompasses ‘all forms of participation below the threshold of full membership’ (Lavenex and Krizic 2019, 3). External differentiation integration refers to some TCs selectively joining existing EU arrangements or regulatory structures in specific policy areas such as the internal market or the Schengen Area (ibid.). It allows TCs to “opt-out” and “opt-in” to policy proposals in the external area, which offers these countries a degree of agency that had hitherto been lacking. The external differentiated integration approach also includes incentives for TCs to join initiatives in specific sectors ‘exporting’ models devised in the EU to control and prevent unwanted population movements (Holzinger and Tosun 2019, 643).

Externalisation has generally foregrounded the powerful position of the EU vis-à-vis relatively weak target countries. Thus, as a part of the externalisation and return policy, RAs bring ‘unbalanced reciprocities and different benefits for the EU and the signatory countries’ (Cassarino 2010a, 2010b). However, as the EUTRA and the EUTS show, rather than being a passive policy receiver, Ankara has geared its policy decisions in this field towards the rational achievement of strategic aims, which means that instrumental considerations have been front and centre. Turkey has continuously tried to resist EU conditionality, the ‘carrots’ of which have been prospective membership, visa liberalisation, and financial aid to address the asymmetric burdens born by Ankara (Rumelili 2004; Özçürümez and Şenses 2011; Tolay 2012). The unprecedented waves of migration toward European shores have also opened opportunities to Turkey and other source and transit countries, which has been central to shifts in the EU’s return policy and related tools.

3. EU Readmission Agreements: Origins, Objectives and Changes

The EU's readmission policy can be analysed from 1990 to 2003, 2004 to 2014, and 2015 to the present. The efforts to tackle irregular migration via return and readmission initiatives started in the 1990s in EU policy-making. In the first period (1990–2003), the critical developments were the Schengen Agreement (1985), which abolished internal borders and the Dublin Convention (1990) with its “safe third-country rule”. The first-generation agreements were readmission clauses included in trade and cooperation agreements between the European Community and TCs rather than formal RAs (Cortinovis 2018, 4; Coleman 2009).

In the second period (2004–2014), cooperation with the TCs intensified, and from 2004, the European Neighbourhood Policy (ENP) emerged as a framework for externalisation and return policies. The first formal RA was signed in 2004, launching the second generation of EURAs. Since then, the EU has completed 18 RAs⁴, including with Turkey, in 2013. In December 2005, the European Commission published its Global Approach to Migration (expanded as GAMM in 2011), which addresses irregular migration and human trafficking and manages migration and asylum through cooperation with TCs. In response, the Mobility Partnerships (MPs) were introduced by the EC in 2007 as the standard framework for migration cooperation with TCs (European Commission 2007). The GAMM (European Commission 2011) resulted in MPs with several countries' political agreements encompassing various issues, including readmission cooperation.⁵

The last period (2015–present) reflects the impact of the European humanitarian refugee crisis. TCs have become directly involved in EU policy-making. In this period, external differentiated integration has become more visible in addressing obstacles during the negotiation and implementation stages of EURAs (Cassarino 2007; Coleman 2009; Carrera 2016). The EURAs have proven ineffective, with return rates falling short of expectations. Alternative cooperation methods for readmissions have emerged in response to the European humanitarian refugee crisis. These methods include administrative arrangements, bilateral deals, and memoranda of understanding, which substitute formal readmission agreements. Informal, non-binding formats like standard operating procedures facilitate swift returns when formal agreements cannot be promptly concluded or implemented (Cassarino and Giuffré 2017; Cortinovis 2018, 3). Unlike formal treaties, they belong to soft law, creating expectations for compliance and conditionality, where cooperation on readmission is linked to benefits or sanctions, such as visa facilitation or restrictions.

The period started with the EU Action Plan on Return (European Commission 2015), which recognised that an effective return system for the readmission of irregular migrants should be prioritised concerning TCs. Then, the EC published a new communication for the new partnership framework (PF) with TCs under the European Agenda on Migration in 2016 (European Commission 2016a). This communication foregrounded tailor-made arrangements to address each case: “coherent EU and Member State coordination on readmission where the paramount priority is to achieve fast and operational returns, and not necessarily formal readmission agreements” (ibid., 7). Since then, numerous partnerships and informal deals,

⁴ EUTRAs as of July 2024: Hong Kong SAR (2004), Macao (2004), Sri Lanka (2005), Albania (2006), Russia (2007), Ukraine (2008), North Macedonia (2008), Bosnia & Herzegovina (2008), Montenegro (2008), Serbia (2008), Moldova (2008), Pakistan (2010), Georgia (2011), Armenia (2014), Azerbaijan (2014), Turkey (2014), Cape Verde (2014) and Belarus. In addition to these agreements, legally non-binding readmission arrangements have also been concluded with: Afghanistan, Guinea, Bangladesh, Ethiopia, The Gambia, Ivory Coast (European Commission 2020d).

⁵ Notably Moldova (2008), Capo Verde (2008), Georgia (2009), Armenia (2011), Azerbaijan (2013), Morocco (2013), Tunisia (2014), Jordan (2014), and Belarus (2016).

mainly political agreements covering various issues, including readmission cooperation, have been concluded at the EU level.⁶

On the other hand, the MSs have also been increasingly using these non-standard readmission agreements. As of July 2024, 344 bilateral agreements, both including standard and non-standard, were concluded that were linked to readmission states with non-EU countries, from the EEC-12 (which was only 23) to the EU-27, January 2023 (Cassarino et al. 2023, 22).

In 2016, the Resolution of the European Parliament (EP) was adopted to increase the efficiency of readmissions and to ensure the coherence of returns at a European level that requires the adoption of new EU readmission agreements, which should take preference over bilateral agreements between MSs and TCs” (European Parliament 2016). The EC introduced the Migration Partnership Framework (MPF) communication in the same year, which included enriched instruments and resources (European Commission 2016c).

In March 2017, the EC’s new communication stressed the logic behind this period, “well-designed, flexible and streamlined instruments to address migration challenges” (European Commission 2017a, 8). In the same year, a Renewed Action Plan on Returns (European Commission 2017b) was introduced that presents recommendations on making returns more effective by working with TCs to solve the challenges of readmission. In 2018, the EC proposed a new EU Return Directive (European Commission 2018) to recast the Return Directive, but have yet to culminate in a finalised piece of legislation (Gökalp Aras et al. 2024).

In 2020, the EC’s new communication, the EU Pact on Migration and Asylum (the Pact), was introduced (European Commission 2020a) and adopted in 2023 by the EP and the Council. One of the critical components of this Pact is the return, which gives political priority to enhancing return rates and managing migration more efficiently. Considering existing problems in finalising and implementing RAs, the Pact emphasises that the EU should mobilise all its potential policies, tools, instruments and incentives to enhance cooperation on readmission (ibid.).

Adopting Regulation 2021/947 in June 2021 established the Neighbourhood, Development and International Cooperation Instrument, calling for a “leverage-based approach” to migration. This strategic shift reflects a move from a normative to a more flexible approach in the EU’s readmission policy but also potentially jeopardises the initial project of consolidating a European common readmission policy in line with EU treaties and international law (Carrera 2016).

The most important characteristic of the new and ongoing period regarding readmission tools and third generation of agreements is “informality” (Cassarino 2007, Tan and Vedsted-Hansen 2021, EuromedRights 2021, Gökalp Aras 2021, Poli 2023, Frasca and Roman 2023, Cassarino et al. 2023, Demirbas and Miliou 2024). Cardwell and Dickson (2023, 3122) define “formal informality” as “the appearance of formality, insofar as resembling familiar or established tools (Regulations, Directives, international agreements), but lacking the procedural safeguards, transparency and classification provided by law and legal processes. In particular, due to the third country’s resistance, reversed conditionality and coercive migration diplomacy, there has been an increasing reliance on informal agreements favouring flexibility for both parties and allowing easier negotiations (Euromedrights 2021).

⁶ Since 2015 three Common Agendas on Migration and Mobility were signed with Nigeria (2015), Ethiopia (2015), and India (2016). Also other forms of agreements were elaborated, such as a Joint Communiqué (Côte d’Ivoire (2016), Mali (2016), Joint Migration Declaration (Ghana (2016), Niger (2016)), Standard Operating Procedures (Mali (2016), Bangladesh (2017), and Good Practices (Ghana (2017), Guinea (2017), the Gambia (2018), Admission Procedures for the Return (Ethiopia (2018), EU Turkey Statement (2016), Joint Way Forward (Afghanistan (2016), the Memorandum of Understanding (MoU) with Tunisia (2023) and the Joint Declaration on the Strategic and Comprehensive Partnership with Egypt (2024).

Tan and Vedsted-Hansen (2021) provide a typology for the EU's new arrangements by arguing that the informalisation of the new generation of return instruments is strategically "designed to avoid the triggering of substantive EU law, thus potentially placing EU activities beyond the pale of EU law", which weakens transparency and accountability with the increased number of actors in implementation (Ibid., 57, 58). Casarrino et al. (2023) provide a more systematic typology under "The EU's Readmission System's Hybridity" that classifies two types of agreements: formal and informal. The non-standard informal ones are "secret agreements not ratified by national parliaments", "informal agreements that can feed into repressive practices and human rights abuses", and "documents may include clauses regarding cooperation on other matters" (ranging from trade or military cooperation to defence, energy security, etc.) (Ibid., 12). This hybrid system, driven by different intentions and factors, is more complex, with TCs now aware of interdependencies and using migration issues as coercive foreign policy tools.

The driving forces behind this hybrid system with more informalisation are often justified both by the EU and also the MSs as the need for "more effectiveness", "practical cooperation", and "to sustain a modicum of international cooperation despite uncertainties" as well as avoiding longer and complicated ratification procedure (Ibid., 23, 25). They are often embedded in broader frameworks of cooperation that include trade, security, and development aid, offering various incentives to TCs (Cassarino et al. 2024).

The rise of informal readmission agreements between the EU and TCs has brought various challenges and consequences. This flexibility allows TCs to express their interests and bypass ratification processes, but it results in a lack of parliamentary oversight in the field of readmission, posing a democratic challenge to the rule of law (Strik 2019; Ott 2020). Additionally, these informal agreements lead to uncertainties in implementation and migrant rights, raising human rights concerns and legal uncertainties (European Ombudsman, 2022). Despite their utility, informal agreements raise concerns about transparency, accountability, and compliance with international human rights standards. Finally, the tools used by the EU do not add significant effectiveness compared to formal readmission agreements due to lack of legal binding, limited accountability, variability in implementation, dependence on the political climate, operational challenges, and lack of monitoring and evaluation (Stutz and Trauner 2021), as the EUTS also sees it. But still, they might sometimes be more effective in facilitating returns than formal agreements, such as bypassing some of the bureaucratic and legal hurdles associated with formal EURAs.

4. The Readmission Aspect in EU–Turkey Relations

A readmission agreement between the EU and Turkey has been on Brussels' agenda since the late 1990s. The first round of negotiations opened in May 2005 but was broken off the following year. Negotiations later resumed and continued in fits and starts until 16 December 2013, when the EUTRA was signed pending ratification (in 2014). Turkey sought visa exemption from the EU countries as part of the deal. However, the MSs' resistance to implementing visa liberalisation saw the EU offer Turkey visa facilitation as an interim remedy, which Ankara saw as insufficient. The EU detailed a list of additional incentives short of full liberalisation in the Roadmap towards a Visa-Free Regime with Turkey in 2013 (European Commission 2016b). Turkey prepared its conditions in the Annotated Roadmap (MFA 2013).

Following the ratification of the EUTRA (2014), the number of entries at the EU border peaked. This development created another shift in EU-Turkey relations and a search on both sides for new cooperation tools since the EUTRA was not a sufficient mechanism to handle mass population movements. Because the provision for the readmission of TCNs will be applicable as of 1 October 2017. The response to the Syrian mass migration first started with the EU–Turkey Joint Action Plan (JAP) in 2015, which focused on cooperation in accelerating

procedures for the readmission of irregular migrants who were not in need of international protection. Then, the EU–Turkey Statement (or EUTS)—an informal readmission tool—was signed on 18 March 2016 (European Council 2016).

The legal status was intensively discussed when the Council and Turkey agreed on the EUTS. However, the Court of Justice of the European Union by the Case T-192/16 (EDAL 2016) in 2017, as well as its decision regarding the appeal (CURIA 2018), showed that the EUTS is not seen as an international agreement under international law but non-binding soft law instruments. Also, at the national level, the EUTS was approached as a political statement, not an agreement, and thus was not submitted to the Turkish Parliament for approval as an international agreement; but a Directive on 5 April 2016 requesting the full support of all governmental bodies and local authorities to support the Presidency of Migration Management/ PMM (former Directorate/ DGMM) for implementation of the Statement under “Combating with Irregular Migration” heading (Presidency 2016).

As a crisis-driven readmission tool, the EUTS is directly connected to Syrians, and as a flexible form of readmission tool, it has different articles regarding the EU-Turkey relations from an external differentiated integration perspective. Regarding return and readmissions, Turkey agreed to accept all irregular migrants and asylum seekers whose applications were declared inadmissible, crossing from Turkey to the Greek islands on 20 March 2016 (Article 1) by the EUTS. The EUTS’s readmission-related commitments are also included in Arts 3 and 4 of the EUTRA. In this regard, the EUTS stepped within the terrain of the EU’s readmission competence, and the authorities were determined as the Council and the EP (Article 218 TFEU/ The Treaty of Lisbon, 2007).

The EUTS also created a mechanism for the return of Syrians via the ‘one-to-one’ formula. Accordingly, for every Syrian returned to Turkey from the Greek islands, another Syrian would be resettled in the EU (Article 2). Since the EUTS is not an international agreement but a bilateral statement, it needed a legal basis: the 2002 Readmission Protocol of Turkey and Greece (RPTG)⁷. The Protocol introduced the notion of a ‘safe third country’. Drawing on the Protocol, the EUTS paved the way for the immediate return of Syrian refugees arriving on the Greek islands because it defined Turkey as a ‘safe third country’⁸. However, Turkey’s “safe third country” position is criticised for several reasons: human rights violations that are reflected by the decisions of the European Court of Human Rights (ECtHR), lack of legal protections, substandard conditions, political and social instability and international criticism regarding Turkey’s handling of asylum and migration, citing arbitrary detention, forced returns, and inadequate protection mechanisms (Ovacık et al. 2024). In particular, because its legal framework fails to provide adequate protection for non-Syrians, and the temporary protection regime for Syrians lacks the legal guarantees of the Geneva Convention (Yılmaz-Elmaz 2020).

The EUTS also mentions upgrading the customs union between Turkey and the EU and ‘re-energising the accession process’ for Turkey to obtain full membership. Incentives, such as capacity-building support and financial aid, were also included, with an additional €3 billion added to the amount agreed under the JAP. It has often been perceived as a blueprint for future cooperation models with other source and transit countries (Lehner 2019; Carrera et al. 2019; Gökalp-Aras 2019).

Although the Statement was mainly approached as an offer from the EU, both sides were willing to sign the EUTS. In particular, it suited Turkey’s changing strategy vis-à-vis migration and asylum-related issues after 2015 as Ankara’s demands—such as visa exemption, the customs union, and the accession process—were included. Naci Koru, who served as the Deputy Minister of Foreign Affairs (2012–2016) when the EUTS was being negotiated,

⁷ For the full text of the Protocol: <http://www.madde14.org/images/8/88/YunTurgerikabul.pdf>

⁸ The concept is based on the expresses the principle that refugees should seek asylum in the first safe country they are able to reach.

describes Turkey's negotiating proposal to the EU over the Statement as a 'game-changer' (Koru 2021a; GAR 2021):

We did not have to readmit Syrians, even if we had bilateral agreements. At this stage, the Statement was a game-changer. We offered to readmit Syrians and the other TCNs if they entered any of the five [nominated] Greek islands through Turkey. We knew that the EU would accept our offer right away. We thought those living in Turkey could continue living there after we readmitted them. However, if they had come from other countries—for example, Morocco—we agreed to return them to wherever they had come from (Koru 2021b).

In agreeing to readmit Syrians and other nationalities, Turkey's demands were visa exemption, financial support, revision of the customs union and a reset in EU–Turkey relations. According to the EUTRA, readmission for TCNs was suspended until 1 October 2017. Thus, the EUTS accelerated the readmission of TCNs, and on 4 April 2016, Turkey accepted the first readmitted group from Greece as a part of the EUTS (AIDA 2021). The RPTG was used as the legal basis for readmissions in implementing the EUTS until the EUTRA became applicable for TCNs in 2017. However, Turkey suspended the RPTG unilaterally on 6 June 2018 in response to a decision by a Greek court to release eight former Turkish soldiers who had fled the country a day after the 15 July 2016 coup attempt (TRT 2018).

In addition, after 1 October 2017, the EUTRA could not be used for TCNs, only for Turkish citizens, due to the administrative measures taken by Turkey based on delays regarding the visa exemption process. On 22 July 2019, the Turkish government publicly announced the suspension of the EUTRA in response to the EU sanctioning Turkey's gas drilling operations in Cypriot waters. However, Prime Minister Cavusoglu stated that 'this was not only due to the EU's recent sanctions. The decision was also taken because the EU still had not introduced the agreed-on visa-free regime for Turkish citizens (Euractiv 2019). He added that "the readmission agreement and visa-free deal [must] be put into effect simultaneously" (Daily Sabah 2019). In parallel, the EU's official websites indicated that the EUTS was still operating (European Commission 2020b; EASO 2020).

In 2016, Turkey began to hint that it might open its borders if the EU failed to meet its demands. This 'coercive migration diplomacy' remained strictly rhetorical until 28 February 2020, when Turkish authorities opened the border and allowed thousands of migrants and asylum seekers to walk into Greece. This came in response to attacks against the Turkish military in Idlib, Syria, threatening to send waves of new Syrian migrants into Turkey (Reuters 2020). Significantly, neither the EU nor Turkey repudiated the EUTS as this new crisis unfolded. While the EU offered financial support to both Greece and Turkey, Ankara's actions came in for strong criticism. However, on 9 March 2020, Turkish President Erdoğan, EU Council President Michel and EU Commission President von der Leyen reaffirmed that the EUTS remained valid and that the remaining outstanding provisions would be completed (Milliyet 2020).

Throughout March 2020, immigrants and refugees from various countries, including Syria, continued to gather at land and sea border areas on the Turkish side, including Edirne, Çanakkale, and İzmir. They were confronted with severe humanitarian tragedies and human rights violations in attempting to cross into Europe. By 28 March, Turkish state actors had begun to round up most of these migrants and distribute them to satellite cities inside Turkey. When the crisis ended on 27 March, the EU Commission Spokesman Peter Stano stated, "Negotiations and evaluations regarding the EU–Turkey Statement [would] continue" (Anadolu Agency 2020). Against this backdrop, the new EU Pact (2020) explicitly mentions Turkey as the reference case and foregrounds the importance of the EUTS as a model.

5. Turkey's Approach Towards Readmissions and Returns

The findings of the first fieldwork conducted in 2010–2013 (İzmir, Edirne and Ankara) confirm Turkey's conditionality, reservations and critical approach to the EUTS. The results reflect the significant problems regarding EUTRAs and the Turkey case. The respondents repeatedly mentioned the risks that Turkey might become a migration “buffer zone” or “dumping ground” for the EU.

Respondents assessed Turkey's request for visa liberation as a fair demand that had successfully elevated the EUTRA as a negotiation leverage point. Also, the majority of respondents emphasised burden-sharing problems with both the EU and Greece, challenges in implementing RAs and Turkey's lack of capacity to expel migrants:

If Turkey signs this Agreement [EUTRA], we must accept those who have been apprehended in Greece. They will insist that all those illegal migrants come from Turkey. Every migrant will be given a simple line to repeat over and over: ‘I came from Turkey’. After taking these migrations back from Greece, how is Turkey supposed to return them to their origin countries without readmission agreements with those countries? This [return] is too costly for Turkey to implement (Interview with a local journalist, 2012, Edirne).

The following quote details Turkey's complex implementation of the RPTG and, more importantly, the further implementation of the EUTS.

I do not think that Turkey will sign the Agreement [EUTRA]. Even if it is signed, it will be impossible to implement. We already have a protocol with Greece, but it has not been appropriately implemented. For example, if there are 100,000 units [migrants], we only accept 3,000 units, and only if there is sufficient evidence that they came from Turkey. The readmission agreement is a part of the bargaining process, and I do not think it can go beyond this (interview with a high-level public officer, 2013, Ankara).

The respondents who had a role in implementation provided a more precise picture of existing practices and problems and the possible future of the RPTG and the EUTRA. Most law enforcement officers emphasised the problems Turkey faced after readmission, particularly the economic burden of sending them to their country of origin and the lack of readmission agreements with those countries. A high-level Ministry of Foreign Affairs bureaucrat stated that “Turkey does not apply this Protocol [the RPTG] and will continue not to. Turkey will likely sign the readmission agreement with the EU, but it does not mean we will implement it” (interview with a high-level MFA officer, 2013, Ankara). Indeed, a few months after these interviews, the EUTRA was signed and then ratified, but as mentioned, Turkey has not implemented the provisions relating to third-country nationals despite these entering into force in October 2017 (European Commission 2020c).

The second fieldwork revealed continuity in Turkey's conditional approach and implementation challenges. The crisis-driven EUTS emerged as a more flexible, tailor-made deal compared to the standard EURAs, addressing the immediate demands of both sides. The respondents highlighted Turkey's conditionality and the potential implementation problems regarding the Agreement. Following the 2015 crisis, both sides could reach a consensus for the EUTS, a crisis-driven, more flexible and tailor-made deal responding to both sides' demands.

An NGO representative, who has been highly active in the field and provided regular support during the implementation of the EUTS, summarised the EUTS, its underlying rationale, and the implementation process from the perspective of both their organisation and their viewpoint.

In 2015-16, following Merkel's announcement, the influx wasn't only for Syrians. While 6,000 Iranians used to come annually, in 2016-17, these numbers reached 60,000. Therefore, the EU and Turkey wanted to convey the message: "If you try to go to Europe through irregular means, we will send you back. But if you stay in Turkey and apply, we will take you". This was accepted for a while. However, from the second half of 2018, it stopped functioning due to the length of these waiting periods, the inefficacy of the one-for-one formula, and the unequal distribution of this responsibility among EU member states (interview with the representative of an NGO, 2018, Ankara).

The fieldwork showed that the readmission and return, specifically the EUTS and its implementation, became highly politicised and centralised. During the second fieldwork, Turkey was still under a state of emergency following the attempted coup d'état on 15 July 2016, and the field of migration and asylum had already been intensively centralised and securitised. The respondents stated the impact of the domestic policy through the coup attempt on 15 July 2016 in Turkey and the Fethullah Gülen Terrorist Organisation (FETO) operations,

From our side [Turkey], there are no pushbacks, but Greece does. In particular, after the terrorist incidents [FETO], it needs to be reported if a bird flies over the sea. If someone crosses the border from the sea and does not stop, everybody [the coast guards] will face a severe problem (interview with the representative of an IGO, 2018, İzmir).

During the second fieldwork, the non-state meso level actors were excluded from the implementation of the EUTS due to the increased securitisation. Turkey's increasing concerns regarding securitisation and the visible domestic and foreign policy nexus regarding return policy appear to be significant observations in the field. Including the return and readmissions, the entire process has been centrally conducted as a closed box without proper oversight or monitoring.

The February-March 2020 events (known as Pazarkule) at the Turkey-Greece border meant the 'de facto' end of the EUTS, and the readmissions were stopped. Turkish Foreign Ministry Spokesperson stated that due to the COVID-19 outbreak worldwide and to protect public health, the EU temporarily suspended the important element of the EUTS resettlement program. For the same reason, Turkey also temporarily stopped the readmission process for refugees and reported this to the Greek authorities. The last readmission was completed in March 2020 with 23 readmissions (UNHCR 2020), confirmed by NGOs, IGOs and the EU representatives as part of the second tranche of fieldwork.

Data gathered during fieldwork's first and second parts reflect important continuities in Turkey's demands, particularly regarding the visa exemption. However, the impact of Syrian mass migration was most apparent in the second tranche of fieldwork. A critical theme that appears in particular for the second fieldwork is that the EUTS and EUTRA became parts of high politics, and securitisation increased due to domestic policy changes. Turkey has been emphasising its expectations from the EUTS, such as renewal of and also to continue operating while considering the other dimensions, such as accession perspective, updating the Customs Union, visa liberalisation, development of migration cooperation, cooperation in the fight against terrorism, high-level dialogue and operation of established institutional mechanisms (Kaymakçı 2022). Regarding the future of the EUTS, the permanent representative of Turkey to the EU, Faruk Kaymakçı, stated that a review is needed to reflect Turkey's emerging requirements and revise the financial component. He added that financial aid should be re-calculated according to current data—today, 4.7 million Syrian and non-Syrian migrants live in Turkey—and that the new agreement should be expanded to include other nationalities (ibid.). However, the future of the EUTS remains an essential and highly discussed question. Since March 2016, 2,139 returns have been completed under its terms (PMM 2021), and during the third fieldwork, the renewal of the EUTS is still expected, while the number of border crossings has started to increase again.

6. Current Situation, Practices, and Future Projections

As of the date this paper was written, the EUTS has completed its eighth year. Although Turkey suspended the implementation of the returns component in March 2020 and stopped readmissions of TCNs from Greece, the EUTS's effects and the expectations regarding its renewal remain prominent in both the political agenda and academic studies. Despite the suspension of the return component in March 2020 by Turkey, the EU kept its two promises regarding financial support (through the Facility of Refugees in Turkey/ FRIT as 6 billion) and the 1:1 resettlement scheme (to resettle a Syrian from Turkey to the EU for every Syrian being returned to Turkey from Greek islands), and still implementing. As of 4 July 2024, 67.441 Syrians have been resettled under the 1:1 resettlement scheme since 2016, while representing still a small proportion of the total number of Syrians is 3.1 million (PMM 2024).

As of 2017, the EU stopped reporting, especially for the EUTS, but the 7th evaluation report of the EC regarding the FRIT provides updates. Accordingly, the "One-for-One" resettlement scheme under the Statement continued, resettling 37,397 Syrian refugees from Turkey to the EU between April 2016 and February 2023. Since 2016, 2,140 migrants have been returned from the Greek islands to Turkey. However, Turkish authorities have maintained their March 2020 suspension of return operations, and no returns have occurred since then despite repeated requests from Greek authorities and the EC (European Commission 2023b, 3-4).

The EC's report (ibid.) emphasises the significant efforts of Turkey to host and address the needs of more than four million refugees and mentions that "The Statement continued to deliver results in 2022". The report also highlights the increasing number of irregular arrivals and their importance and reminds us of Turkey's suspension of returns from Greek islands.

However, from both sides, publicly available data is limited. We do not know how many returned persons could apply or have been rejected for international protection in Turkey, what are the selection criteria for the 1:1 settlement scheme, whether the EUTRA could be implemented for the Turkish nationals or the TCNs, details about the EUTRA's and the EUTS's suspension remain unclear, including the provisions of the Implementing Protocol between Turkey and Bulgaria (Ovacik et al. 2024).

There is no progress regarding visa liberalisation, full membership, the Customs Union or the Voluntary Humanitarian Admission Scheme (Ibid.). The 7th EC Report mentioned the precondition for the Scheme, which "sustainably reduced irregular crossings between Turkey and the EU" (European Commission 2023, 4). It seems the renewed priorities must be rediscussed as incentives for those who have lost their credibility and to strengthen relations and cooperation.

Despite these unclear dimensions, the third fieldwork provided important preliminary findings for the EUTRA and the EUTS. The number of interviews conducted with state actors is still limited. However, from the selected cities and the related meso level actors, there are significant findings for the practices during implementing the return component until March 2020 and future protections.

During the third and the most recent fieldwork (January-July 2024), the main focus of the meso level and mainly non-state or IGO respondents was on the EUTS, with its potential renewal, foresight regarding new conditions for its renewal and its implications in Turkey. The most important finding regarding the consequences of suspension is the increased pushbacks and informal returns. One of the most significant impacts of the EUTS's suspension has been increased informal returns, commonly called pushbacks. Greece, facing a substantial accumulation of migrants at its borders, has resorted to unofficial pushback practices. These actions, while not legally sanctioned, reflect the practical challenges and political tensions

surrounding the management of migration flows. While Greece's actions can be categorised as pushbacks, the term might not fully capture the nature of Turkey's response. Pushbacks typically imply the immediate expulsion of individuals attempting to cross the border. The respondents, mainly the NGO representatives and locals at the border cities, villages and critical border-crossing points, generally claimed that despite suspending the return component, Greece continued its action with pushback.

In contrast, the field study suggests that Turkey's actions involve not only expelling individuals but also facilitating their passage back towards Greece, a practice that might be more accurately described as "push-through"⁹, which became publicly visible in 2020 (known as Pazarkule events) at the Turkey-Greece borders. However, according to the high number of respondents, including from the border villages, this action was started before Pazarkule and intensively continues after and now as being shifted from the Turkey-Greece border to the Turkey-Bulgaria border continues. It is also stated that Greece significantly stopped pushbacks to Turkey but now to Bulgaria, which also explains the changing location for Turkey's claimed "push-through" actions. In the context of Turkey's response to these pushbacks, "push-through" seems to be a more fitting term as capturing the idea that Turkey is not just returning individuals to their point of entry but is actively facilitating their movement back across the border into Greece. This proactive engagement goes beyond preventing entry and involves a deliberate effort to send individuals back through the border, reflecting a coordinated and systematic approach. Using "push-through" can help to differentiate between the more passive act of pushback and the active role that Turkey appears to be taking in ensuring these individuals are returned to Greece. This term emphasises the ongoing cycle of returns and highlights the dynamic and reciprocal nature of the migration management practices between the two countries. The following quotes from the NGO representatives' interviews highlight pushbacks, non-refoulement violations, and critiques for the EU and MSs.

Actually, Greece discovered that unofficially conducting pushbacks was a practical and economical approach after the EUTS. They also realised that the enforcement power of the EU, EU criteria, principles, UN resolutions, and the European Convention on Human Rights was ineffective. Turkey can respond to the questions and criticisms with, "Well, we learned this from Greece,". It would be understandable. (interview with the representative of an NGO, 2024, Ankara).

Another NGO representative highlighted the reasons why the EUTS could not be implemented and how hypocrisy can arise when EU interests are at stake, particularly regarding human rights violations.

The EUTS was not implemented and remained with only around 30,000 admissions. One of the reasons for this lack of implementation is the Greek authorities' limited capacity, but pushbacks reduced their migrant stock to Turkey. This situation is convenient for Greece and aligns with the broader EU perspective, which often prioritises EU interests before discussing human rights. For instance, when Süleyman Soylu said, "Since 2019, we have stopped 2,560,000 people at the border," it essentially means that we have violated non-refoulement. Of course, this is also understood by the EU and human rights defenders within the EU. But it means the EU borders are protected (interview with the representative of an NGO, 2024, Ankara).

⁹ The author believes that, in the context of Turkey's response to these pushbacks, "push-through" seems to be a more fitting term as capturing the idea that Turkey is not just returning individuals to their point of entry but is actively facilitating their movement back across the border into Greece. This proactive engagement goes beyond the mere act of preventing entry and involves a deliberate effort to send individuals back through the border, reflecting a coordinated and systematic approach. Using "push-through" can help to differentiate between the more passive act of pushbacks and the active role that Turkey appears to be taking in ensuring these individuals are returned to Greece. This term emphasizes the ongoing cycle of returns and highlights the dynamic and reciprocal nature of the migration management practices between the two countries.

Regarding the pushback and push-through by Greece and Turkey, the following quote from a border village in Edirne shows the situation after Pazarkule and in recent days.

Greece has been pushing them to our side for a long time. They come in all conditions, injured, beaten. Sometimes, we find bodies, too, as fish have eaten their legs or they have decayed. There were many in 2020 at Pazarkule. It continued for 6-7 months after the pandemic arrived badly. The governor's office provided clothes, thermal blankets, and food supplies. The smugglers are well-known here; as Greece pushes and deports them, we send [sallyoruz¹⁰] them off from here. I'm a boatman, and there were weeks when I sent off 4-5 busloads. The military was already there, infantry soldiers. Before and after Pazarkule, even commandos and special forces came too; sometimes, they gathered here (village) in large numbers. In the village square, for example, I say 400, and you say 500 people. It has decreased a bit lately, but the village square was full just last week. Greece pushes them from there, and we send [sallyoruz] them off from here (interview with a local and human smuggler, 2024, Edirne).

During the fieldwork, another significant finding was the foresight and perceptions about the renewal of the EUTS. While the state actors highlighted Turkey's expectation for the EU to support its cross-border development activities and expand the safe zone in the Northwest of Syria for returns in parallel to the second fieldwork's findings. It was stated that non-state actors believe the 1:1 formula could be applied more effectively this time with Greece and that the EU and Turkey are in new and significant cooperation regarding returns. There is an expectation that the EU's financial and capacity support for Turkey's evolving and increasingly visible national return mechanism will be included in the renewed EUTS.

Under the framework of the EU-Turkey Statement, the new agreement will likely establish a special positioning between Greece and Turkey regarding the Readmission Agreement and the new Statement. This policy will likely develop primarily through the one-for-one formula directly between Greece and Turkey (interview with the representative of an NGO, 2024, Ankara).

The following two quotes provide an understanding of Turkey's expectations for the EU in general regarding the return policy and, in particular, for the new conditions of the renewal of the EUTS.

After our military operations, we approached those regions entirely from a humanitarian perspective and made many investments. Gaziantep University has a School of Health Sciences in the area. We established an industrial zone in Çobanbey, and even last week, an international fair was held with the participation of businesspeople from various Arab countries. We have hospitals and health services in the region. We are creating educational and job opportunities. However, the region needs more investment. The EU and other Western countries need to support these safe zones. In Gaziantep alone, the number of people I am concerned with is greater than the number of refugees in Europe (interview with the state official, 2024, Gaziantep).¹¹

We [Turkey] requested that the ESSN (Emergency Social Safety Net)¹² support from the EU not be cut off when people return to Syria, and the EU did not accept our offer. These safe areas need to receive more investment, and development in the region needs to be encouraged (interview with the state official, 2024, Gaziantep).¹³

¹⁰ The term "sallyoruz" [in Turkish language] actually means facilitating illegal border crossings. This is how it is expressed locally. For Greece, the term "deportation" is predominantly used.

¹¹ This interview was conducted by Umutcan Yüksel, a researcher from the SRII team and his consent for using this quotation was obtained.

¹² The ESSN is the largest humanitarian cash programme that assisting over 1.5 million refugees, primarily individuals living under temporary and international protection in Turkey.

¹³ See #8.

Regarding the financial dimension of the JAP and the EUTS, the following quote highlights the unfair share of responsibilities and miscalculations and assumptions of Turkey.

In the Netherlands, the cost of one person to the state is 65 Euros per day. The annual cost for this person is approximately 23,650 Euros. For 1 million people per year, this amounts to 23 billion Euros. When we talk about a population of 4 million in Turkey at that time, this is roughly 100 billion Euros for one year. However, the amount offered to Turkey by the EU was 3+3 billion Euros. Turkey's biggest mistake is not doing these kinds of analyses and not sitting at the negotiation table. They act as if Turkey is obliged to host these people anyway (interview with the representative of an NGO, 2024, Ankara).

Regarding the practices during the initial implementation of the return component of the EUTS, the interviewed limited legal practitioners who had cases of the returnees as a part of the EUTS stated that although the readmissions were operated only at a town called Dikili (close to İzmir, Turkey), later, there were two main removal centres (RCs) were used. It is noted that as of 1 April 2016, initially, individuals were transferred from Greece's Lesbos Island to Dikili and were placed in Edirne and Kırklareli, which are two Turkish provinces. Pehlivan köy Removal Centre was specifically opened following the EUTS. There were logistical and procedural issues in implementing the EUTS, including the dual issuance of deportation orders by different administrative bodies, which led to legal challenges. For example, initial deportation orders by the İzmir Provincial Directorate of Migration Management were followed by additional orders by the Kırklareli Governorship, leading to court cases and subsequent annulments due to procedural violations. The process saw a significant involvement of administrative and judicial bodies, and despite initial procedural setbacks, the practice continued with the transfer of individuals to return centres in a remote province such as Kayseri by mid-2017.

The respondents highlighted multiple instances of human rights violations, which were reported by them during the process, including forced deportations and inadequate consideration of asylum claims. Many individuals, particularly non-Syrians like Bangladeshis, Myanmarese, and Pakistanis, were subject to rapid deportations without adequate legal recourse. Specific cases highlight the lack of effective legal oversight and the potential for abuse, such as forcing individuals to sign voluntary return forms under duress and inadequate protection for those at risk of persecution.

The findings for this initial period showed that the EUTS had faced numerous operational challenges, including the capacity limitations of Greek authorities to process returns, the bureaucratic complexity of the system, and the mixed effectiveness of implementation across different regions. The practices under the EUTS often involved significant variations in the treatment and processing of migrants depending on their nationality and specific circumstances.

Those legal practitioners and lawyers have also emphasised the pushback practices as a significant issue, which often involve the use of force and intimidation, and there are documented cases of severe mistreatment of migrants at the borders. It is stated that there have been systemic pushbacks from both Bulgaria and Greece, with different practices observed, such as the involvement of third-party nationals in executing pushbacks in Greece and direct military involvement in Bulgaria.

For the prospects regarding the EUTRA and EUTS, the third part of the research showed that Turkey has been developing its border management and taking the necessary measures to prevent the opening of any new sea or land routes for irregular migration from Turkey to the EU, such as re-introduction of visa requirements for those Syrians travelling to Turkey by air and sea from a third country in 2016 (Ovacik et al. 2024). However, despite the increased measures at the borders, there has been a steady decrease in irregular border crossings because

of domestic and foreign policy developments, such as the Taliban's takeover in 2021 and the completed border walls at the Syrian and Iran borders as of September 2023.

In addition, Turkey's national return mechanisms have advanced significantly, incorporating sophisticated technologies and coordinated efforts to manage migration. Such as the introduction of new migration control tools, the Mobile Migration Points (MMPs) equipped with advanced fingerprinting technologies for identification and Migrant Pre-Admission and Referral Centres that work 24/7, accelerated deportations, and cause invisibility. Most importantly, parallel to the new generation of readmission tools, they create "informality" along with the increased pushbacks. In addition, along with the voluntary return and reintegration programme (AVRR) with the IOM, which started in 2009, with the collaboration of the ICMPD, the national AVRR (N-AVRR) mechanism was established in 2022 (Mencütek Şahin 2023). However, the multi-sited fieldwork displayed severe legal and implementation problems regarding detention and deportation practices. Ovacık et al. (2024, 169) argue that concerning those practices in Turkey, including many cases, ECtHR ruled on the case Akkad v. Turkey (BVMN 2022) as that also fits the typical profile of the EUTS, Turkey should not be considered a safe third country for returns from EU Member States. However, rather than changing Turkey's "safe third country" status, the main expectation appears to be capacity building and financial support from the renewed EUTS.

7. Conclusion

This article has analysed the EU's return and external policy instruments using Turkey as a case study and focusing on two critical readmission instruments—the EUTRA of 2013 and the EUTS from 2016. The longitudinal research displayed the complexity of readmissions to the fore showcased, how readmission tools are interpreted and instrumentalised by the EU and Turkey, and how differentiated integration has become the norm of the EU return policy. It has shed much-needed light on TCS' strategies to resist EU externalisation efforts, particularly their cost-benefit calculations in engagement with the EU on returns and readmissions.

The article displays that Turkey has leveraged conditionality in its favour rather than being a passive policy receiver. Since the Syrian mass migration, it has deployed migration as a foreign policy tool to accomplish various objectives. This was apparent in negotiations over the EUTRA in 2013, but Turkey had expanded its demands by the EUTS in 2016. The EUTS presented that this temporary and extraordinary measure or purportedly 'exceptional' readmission strategy has become the new norm, particularly after the EU Pact. Despite its failures, the EUTS has served as a blueprint for other countries, and the EU Pact confirms expectations regarding similar bilateral cooperation with non-European countries going forward.

The EUTRA and the subsequent EUTS represent pivotal moments in the externalisation of EU migration policy. Despite their significant aims, the practical outcomes and operational challenges highlight the complexities and limitations inherent in these agreements. The suspension of the readmission components of these agreements by Turkey since 2020 has led to a critical shift in migration dynamics in the region. Greece, facing substantial migrant accumulation at its borders, has resorted to informal pushback practices, which, although not legally sanctioned, illustrate the tensions and practical difficulties in managing migration flows. Turkey's response to these pushbacks has been characterised by actions that could be termed "push-through," where individuals are expelled and facilitated back towards Greece. This term captures the reciprocal and escalatory nature of border enforcement tactics between these two nations.

Moreover, the fieldwork conducted in Edirne and İzmir underscores the dual nature of Turkey's national return mechanisms. On the one hand, significant efforts are being made to facilitate voluntary returns to safe zones in Northern Syria, reflecting Turkey's strategic

interest in stabilising these regions and reducing its domestic burden. In this context, during the renewal process of the EUTS, there have been notable expectations for the support of Turkey's national return mechanism, particularly for capacity building and the strengthening and further expansion of the safe zone established by Turkey in Northern Syria were highlighted by the meso-level respondents.

The findings underscore the complexities and political sensitivities surrounding the EUTS and EUTRA. The evolving nature of EU-Turkey migration cooperation highlights the need for more balanced and comprehensive approaches that address immediate migration management needs and the underlying causes of displacement. Future agreements must reconcile the practicalities of border control with the imperatives of human rights and sustainable development, ensuring that policies are effective, ethical, and just. The EU's shift towards informalisation and differentiated externalisation must be carefully managed to avoid undermining the broader goals of stability, security, and respect for international law.

This case study enhances our understanding of readmission arrangements and externalisation policies by showcasing Turkey's strategic use of conditionality and leveraging its geopolitical position in EU negotiations. Future research should examine the evolving EU-Turkey migration dynamics, the long-term effects of informal readmission agreements, and the roles of other non-EU countries in similar externalisation agreements to gain broader insights into global migration governance.

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Decentring the Study of Migrant
Returns and Return Policies

Externalisation of EU Migration Policies: The Case of Cooperation in the Georgian Citizens' Returns from Poland

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List of Abbreviations

AVR	Assisted voluntary return
COVID-19	Coronavirus Disease
EaP	Eastern Partnership
EC	European Commission
ENIGMMA	Enhancing Georgia's Migration Management
ENIGMMA-2	Sustaining Migration Management in Georgia
ENP	European Neighbourhood Policy
EU	European Union
Frontex	European Border and Coast Guard Agency
ICMPD	International Centre for Migration Policy Development
IDIs	Individual In-depth Interviews
IDPs	Internally displaced persons
IOM	International Organisation for Migration
n.d.	No date
NGOs	Non-governmental organisations
OFII	French Office for Immigration and Integration
RCMES	Readmission Case Management Electronic System
SCMI	State Commission on Migration Issues
UK	United Kingdom

Abstract

Migration remains an essential factor in the dynamics of EU politics. This working paper aims to broaden our understanding of the cooperation mechanism between the EU and Georgia in the context of the EU's externalisation of migration policies. We focus on the EU Member State – Poland, the sending country, and Georgia, the country receiving returnees, one of six Eastern Partnership members. We pay particular attention to the returns of Georgian citizens from Poland (with various levels of coercion), as they represent one of the largest groups of returned foreigners under Poland's return practices. At the same time, Georgia remains a country strongly committed to integration with the EU structures. The paper draws on the qualitative material and data collected during fieldwork on Georgia from February to May 2024. The main part of the research was carried out on-site in Tbilisi. Follow-up interviews were conducted in Poland, mainly online. We conducted 25 individual in-depth interviews with representatives of international organisations, public institutions, non-governmental organisations, and other experts who had knowledge about returns to Georgia and the reintegration of Georgian citizens. This work was supplemented with desk research regarding the legal framework and return infrastructure in Poland and Georgia and the reintegration framework in the latter. The results reveal the untapped potential of the cooperation between Polish and Georgian institutions, which could make the returns more satisfying for migrants and – consequently – more efficient for the EU policies. The paper suggests, among other things, strengthening 1) information dissemination to prospective returnees before departure and 2) the role of local organisations in Georgia in assessing business plans within the reintegration programmes.

Keywords: return migration, EU migration policies, Georgia, Poland, externalisation of migration policies

1. Introduction¹

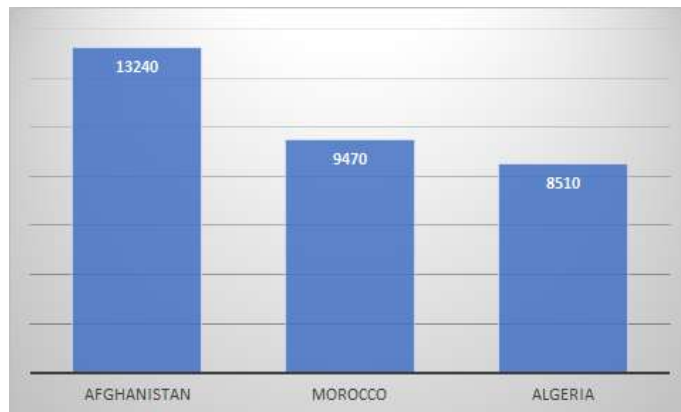
Since the so-called migration crisis with the outbreak in 2015, migration remains one of the most important factors shaping the dynamics of European Union (EU) politics. The European Commission (EC), as early as 2011, declared that ‘migration is now firmly at the top of the EU’s political agenda’ (EC 2011). The EU policies in the field of migration and home affairs are based on the security principle, assuming the need for effective border control (Huysmans 2006; Delcour 2013; Trojanowska-Strzęboszewska 2018). Ensuring such a control pertains not only to regulating the entry of migrants into the EU territory but also their returns to the countries of origin. Importantly, this paper avoids using a dichotomy between forced and voluntary returns, assuming that various levels of coercion are present in the case of each return (Şahin-Mencütek et al. 2023).

To ensure the highest possible level of effectiveness of its migration policy, the EU externalises the application of migration control in the form of readmission agreements, visa facilitation agreements, and mobility partnerships being signed with different countries (van Munster, Sterkx 2006; Delcour 2013; Papagianni 2013; Tittel-Mosser 2019). Externalisation is, thus, understood in this working paper as seeking cooperation with non-EU countries on migration issues (Reslow 2018).

Regarding irregularly staying third-country nationals, the EU’s migration policy focuses on efforts to effectively return this group of migrants and this approach, which remains a priority for the Member States practices regarding migratory issues (EMN 2017). However, the number of migrants returned remains much lower than the figures of those ordered to leave. In the years 2021-2022, in the EU, the former did not exceed a quarter of the latter (Eurostat 2023). Interestingly, the figures of migrants ordered to leave and those returned vary in terms of nationalities (and returning countries). While the citizens of Georgia are not within the top three of those ordered to leave in the last quarter of 2022 (see Figure 1.), they occupy the second place among the returnees (see Figure 2.). Moreover, while among the top three nationalities of those ordered to leave are only non-European countries, among the top three of those returned are two EU candidates: besides Georgia, there is also Albania (Eurostat 2023; see Figure 2.). This leads to the questions of how the potential accession to the EU impacts the cooperation in the return of migrants and what it means for the externalisation of the EU migration policies.

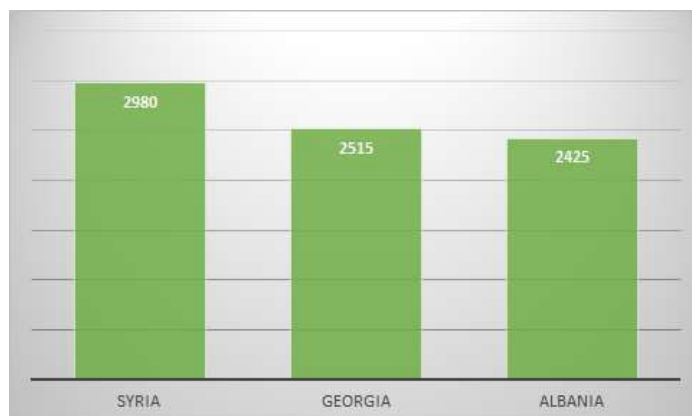
¹ The Authors would like to thank the GAPs WP2 co-leader – Ela Gökalp Aras (Swedish Research Institute in Istanbul) and the GAPs co-coordinators – Zeynep Şahin Mencütek (Bonn International Centre for Conflict Studies) and Soner Barthoma (Uppsala University) for their guidance and helpful comments in the preparation of this paper. Special thanks go to two experts who, at our kind request, prepared external reviews of the paper, allowing us to refine it and substantially improve it. These are: Irina Tkeshelashvili (Team Europe Direct Poland) and Monika Szulecka (Polish Academy of Sciences and Centre of Migration Research, University of Warsaw). We also highly appreciate the feedback and suggestions received from two internal reviewers from the GAPs consortium – Gerasimos Tsourapas (University of Glasgow) and Samet Apaydın (University of Glasgow). We would also like to thank Agostina Trentacoste (University of Milan, University of Warsaw) for her support in revising and finalising this paper.

FIGURE 1: TOP 3 NATIONALITIES ORDERED TO LEAVE THE EU IN Q4 2022



Source: Eurostat (2023).

FIGURE 2: TOP 3 NATIONALITIES RETURNED FROM THE EU IN Q4 2022



Source: Eurostat (2023).

The returns of Georgian citizens are an especially salient element of migratory policies in some Member States. In Poland, since 2022, this group of migrants has become important for the country's return practices. At the same time, Georgia (despite recent political unrest²) remains a country strongly committed to integration with the EU structures. Since 14 December 2023, the candidate status of Georgia has been officially confirmed by the EC, following an application by Georgia in March 2022 (European Commission n.d.). Hence, Georgia has been chosen for the case study due to its ongoing integration process with the EU and the relevance of this country for the EU return policy.

This working paper aims to broaden our understanding of the cooperation mechanism between the EU and Georgia in the context of the EU's externalisation of migration policies. We focus on the EU Member State – Poland, the sending country, and Georgia, the country receiving returnees, one of six Eastern Partnership (EaP) members. We pay particular

² The proposed bill on tightening control over the NGOs led to mass demonstrations in May 2024. For more on the illiberal reforms in Georgia see Brender (2024).

attention to the returns of Georgian citizens from Poland (with various levels of coercion), as they represent one of the largest groups of returned foreigners under Poland's return practices. At the same time, Georgia remains a country strongly committed to integration with the EU structures. The paper draws on the qualitative material and data collected during fieldwork regarding Georgia from February to May 2024. The main part of the research was carried out on-site in Tbilisi. Follow-up interviews were conducted in Poland, mainly online. We conducted 25 individual in-depth interviews (IDIs) with representatives of international organisations, public institutions, non-governmental organisations and other experts having knowledge about returns to Georgia and the reintegration of Georgian citizens upon return. The interviews were conducted using the interview guidelines and were preceded by obtaining clearance from the Ethics Committee of the Centre of Migration Research at the University of Warsaw. The principles of informed consent and anonymous participation were crucial for the research team when conducting the interviews. This work was supplemented with desk research regarding the legal framework and return infrastructure in Poland and Georgia and the reintegration framework in the latter.

The results reveal the untapped potential of cooperation between EU Member States and Georgian institutions, which could make returns providing more opportunities for migrants, especially in terms of reintegration and—as a consequence—more effective from the point of view of EU policies. The analysis suggests, *among other things*, strengthening both the information dissemination before departure and the role of local organisations in Georgia in assessing business plans within the reintegration programmes.

The paper proceeds as follows. The context of the externalisation of EU migration policies is discussed at the beginning. Next, the practical dimension of migration in Georgia and the EU-Georgia cooperation is presented regarding both returns per se and reintegration, which constitutes a crucial factor in an effective return policy. Based on this analysis, the working paper points out the gaps in the current application of the return policy in the scope under study and offers recommendations to address them. In the conclusion, the broader dimension of the externalisation of the EU migration policies is briefly analysed, drawing on the research results.

2. Background

2.1. Externalisation of the EU Migration Policies

As already mentioned, the EU's externalisation of the migration policy is understood in this working paper as seeking cooperation by the EU institutions or the Member States with non-EU countries on migration issues (Reslow 2018). In the case of the EU, the main forms of externalisation are readmission agreements, visa facilitation agreements, and mobility partnerships (van Munster, Sterkx 2006; Delcour 2013; Papagianni 2013; Tittel-Mosser 2019) including very practical dimensions in the form of covering costs of bureaucratic procedures and detention facilities (Himmrich 2018: 4). Important examples of externalisation were the EU-Turkey deal of March 2016 (Pastore, Roman 2020), the cooperation arrangements launched in the summer of 2017 between Italian and Libyan authorities (Cassarino 2018), and a recent Italian agreement with Albania (Human Rights Watch 2024).

There is no strictly defined role for non-EU countries cooperating in the internalisation process. Ali Bilgic (2011) claims that the EU envisaged such roles for the external partners as filters of migration flow and asylum claims as well as a 'dumping ground' for unauthorised

migrants. The exact role assigned to a given country depends on its geographical location and negotiating capacities, which are, in turn, a result of different political settings.

Mobility Partnerships based on the EU's Global Approach to Migration and Mobility are a complex solution applied within the externalisation. These partnerships are focused on combining the prevention of unauthorised migration with looking for ways of legal migration and boosting the nexus between migration and development. As such, this measure should lead to a 'Win-Win-Win' situation for all the parties involved: migrants as well as sending and receiving countries (Brocza, Paulhart 2015). Therefore, the external dimension of the EU migration policy is not based solely on deterrence and combating unauthorised flows; it also envisages creating legal alternatives; however, returns of unauthorised migrants have priority over other goals (Pastore, Roman 2020). As the EC stated in 2016, efficient returns would be essential in the case of partnership with non-EU countries (European Council 2016a; 2016b). It aligns with the general principle of the EU migratory policies based on security and effective border control (Huysmans 2006; Delcour 2013; Trojanowska-Strzęboszewska 2018).

Migration issues remain salient also under the European Neighbourhood Policy (ENP) (Delcour 2013). Within the EaP (defined as an institutionalised forum for EU cooperation with Armenia, Azerbaijan, Belarus³, Georgia, Moldova, and Ukraine), the Panel on Migration and Asylum has functioned since 2011 with the objective to 'strengthen the asylum and migration systems of Eastern partners and advance the dialogue on migration and asylum issues between the Eastern partners and the EU, as well as amongst the Eastern partners' (European Commission n.d. b). This kind of political mechanism can be understood as an example of trans-regional governance, which, as argued by Laure Decour (2013), links different regions, contributing to replacing formal multilateral bonds with a global institutional framework of migration governance. It is claimed that the EU is attempting to use the ENP to keep the identified threats out of the EU's door, which is being achieved, e.g. by exporting policy norms and templates to the cooperating countries (Balzacq 2009). Eastern European countries (including the Caucasus region) are an important part of the ENP, with six countries cooperating with the EU in the EaP scheme since 2009. Although the priority for the EU, in terms of preventing unauthorised migration, is Sub-Saharan Africa, not the post-Soviet area (Pastore, Roman 2020), the readmission agreements were initially signed mostly with Eastern European neighbours, which proves their importance for this kind of cooperation (Delcour 2013).⁴

Seeking solutions based on the externalisation measures was reinforced by the failure of internal EU solutions to migration challenges, such as the relocation scheme after 2015 (Pastore, Roman 2020). Externalisation can also be seen as a chance for the EU Member States to overcome obstacles to implementing more restrictive policies on migration (Lavenex 2006). On the other hand, for non-EU countries, it is an opportunity 'to capitalise on securitised perceptions of migration by positioning themselves as proxy implementers of restrictive migration policies of the EU' (Pastore, Roman 2020: 135). However, this pertains mostly to the transit role of some countries (e.g. Libya or Morocco in relation to migrants from Sub-Saharan

³ After 2020 presidential elections, the EU-Belarus relations were reviewed and revised by the EU. The EU's support post-2020 has been reoriented towards non-state actors. Minsk regime's involvement in the full-scale Russian aggression against Ukraine led to the imposition of a series of individual sanctions and sectoral measures on Belarus. In 2021, the country's participation in the EaP was suspended by the Belarusian authorities. All this resulted in the factual suspension of readmission cooperation with Belarus. For more details, see EU website, e.g. European Commission (n.d. c).

⁴ It should be also noted that the obligation to readmit not only own nationals, but also third country nationals and stateless persons who transited through the given state was problematic for South Mediterranean countries in the case of readmission agreements (Delcour 2013).

Africa), not the role of the countries of origin, as in the case of Georgia. Regarding the countries of origin, the interest in enhancing cooperation on returns lies mainly in the incentives made by the EU to develop possibilities of legal migration. In these terms, externalisation should be seen as a 'bargaining process' between the EU Member States and third parties (Pastore, Roman 2020: 139). However, as Laure Delcour (2013) points out, the governments of the state willing to join the Union possess less capacity to negotiate the conditions of cooperation than the others. As recent developments on the Polish (Lithuanian and Latvian)-Belarusian border show, this 'bargaining process' may mean threatening destabilisation by instrumental use of migrants smuggled through the borders (Górczyńska 2021).

The externalisation of migration policies impacts both the situation of migrants and the cooperating non-EU countries; its consequences are more far-reaching than expected and include side effects (Delcour 2013) or are considered to be a 'road to nowhere' since they have failed to prevent a new surge in irregular migration or even contributed to this new crisis (Martini, Megerisi 2023). Ferruccio Pastore and Emanuela Roman (2020) argue that externalisation shaped the number of migrants crossing the Mediterranean routes and political dynamics in African states. It did not stop the migration but changed the routes, and it also had a detrimental effect on the livelihoods of migrant families by curbing remittances (Delcour 2013). Externalisation was likewise criticised from the human rights perspective regarding deterring migrants from the EU borders (Gammeltoft-Hansen, Hathaway 2015; Spijkerboer 2013). In this regard, externalisation was accused of leaving migrants in the hands of authoritarian governments and at risk of chain refoulement (Delcour 2013). The object of criticism was also subcontracting other than state actors for implementing migration policies, seen as a 'business' or 'industry' (Andersson 2014) serving to 'maximise the effectiveness and minimise the costs and visibility of measures and operations' (Pastore, Roman 2020: 138).

2.3. A Brief Overview of the Emigration from and Returns to Georgia

Georgia is known as an emigration country. After regaining independence in 1991, high unemployment, poverty, and low salaries led many Georgian citizens to seek better opportunities abroad (Khishtovani et al. 2022). Despite the economic development in recent years, the outflow of people from Georgia increased by 7% from 2010 to 2020, exceeding 860,000 emigrants, which is 23% of the country's population (Khishtovani et al. 2022). The main destination for Georgian migrants, as of 2017, was Russia (approx. 450,000), followed by Greece (approx. 81,000) and Ukraine (approx. 65,000) (SCMI 2019). Around three-fourths of Georgian emigrants reside in post-Soviet countries, and this figure remains relatively stable. From 2010 to 2020, the share of the post-Soviet area as a destination for Georgian emigration slightly declined from 75% to 72%, while the shares of EU countries and the UK increased from 20% to 21% (Khishtovani et al. 2022). The main EU destinations for Georgians in 2017 were – besides already mentioned Greece – Germany (approx. 23,000), Cyprus (approx. 16,000), and Italy (approx. 12,000) (SCMI 2019).

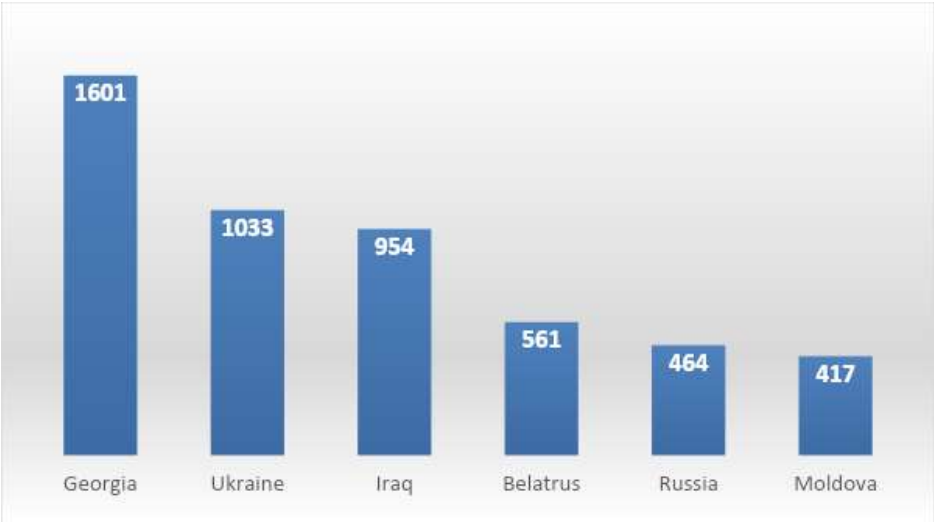
The 2017 EU-Georgia visa liberalisation agreement was followed by an increase in concerns about the activities of Georgian organised crime groups in the EU (IOM 2019). The number of asylum applications from Georgians in the EU/Schengen countries increased since the introduction of visa-free travel to this area for Georgian citizens. However, around 95% of these applications have been considered unfounded and rejected (as of 2018), and some EU Member States placed Georgia on the list of safe countries (SCMI 2019). Data from the Polish

migration agency (Office for Foreigners) show that in 2019-2023, there were 375 Georgian citizens applying for international protection, but none was recognised as a refugee, and only one person received subsidiary protection (Office for Foreigners n.d.)

Considering Georgia’s emigration character, it is not surprising that the Georgian diaspora remains an important asset of the country, especially in economic terms but also in the case of advocacy for the country (SCMI 2020). Remittances from migrants working abroad play a salient role in Georgia’s economy. For instance, in 2018, as many as 57% of Georgians abroad were sending money to their family in Georgia, and the total monetary value of remittances was higher than that of foreign direct investment in this country (SCMI 2019). The diaspora’s saliency for economic growth is evident as remittances more than doubled from 2015 to 2021 (Khishtovani et al. 2022). In 2008, the Office of the State Minister for Diaspora Affairs was created, and in 2016, it was incorporated into the Ministry of Foreign Affairs of Georgia. The Georgian policy on diaspora seems to be balanced and encouraging to return.

At the same time, there was also an increase in the number of Georgians being refused entry to the EU/Schengen states, notably for reasons such as failing to justify their purpose and conditions of stay. Between 2015 and 2016, Poland was the first and, in the years 2017-2018, the second (after Greece) EU country to have the highest number of refusals of entry issued to Georgian citizens (SCMI 2019). Also, in 2018, Poland occupied fourth place among the EU Member States, with the highest number of Georgian citizens found illegally staying in the country (SCMI 2019). Since recently, Georgian citizens have dominated Poland’s forced return policy (see Figure 3.), and this country was the fourth in the EU regarding the number of issued readmission requests to Georgia (see Figure 3.).

Figure 3: Foreigners leaving Poland based on administrative decisions in 2022



Source: Border Guard statistics. <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html> (last accessed 26 April 2024).

Figure 4: Readmission Requests received by Georgia from EU Member States in 2023

Country	Received	Approved	Rejected
Germany	2771	2760	11
France	635	633	2
Greece	175	173	2
Poland	106	106	0
Italy	97	97	0
The other countries	399	394	5
Total	4183	4163	20

Source: Information received upon request from the Ministry of Interior of Georgia (2024).

Return migration constitutes an important element of the Georgian migratory landscape. The number of Georgians ordered to leave the EU increased from 6,345 in 2015 to 9,754 in 2018, and in the same period, the growth of figures regarding forced and voluntary returns was even higher – in sum, from 3,140 up to 6,625 (SCMI 2019). The large number of returns was especially visible as a corollary of the COVID-19 pandemic. As a result, in 2020, Georgia observed a positive net migration balance, which was quite an exceptional situation (Khishtovani et al. 2022). According to accessible data, as many as 23,000 Georgian citizens formerly residing abroad moved back into the country only in the first six months of 2021 (IOM 2021a). Yet, this phenomenon did not change the country of emigration character of Georgia.

2.3. Reintegration Infrastructure in Georgia

The increase in returns also contributed to the increase in the number of beneficiaries of reintegration programmes. However, not all returnees are entitled to reintegration programmes and not all of those entitled participate in them. The most important eligibility criteria for being a beneficiary of the reintegration programmes are linked to time spent abroad.

For instance, in 2015, there were 560 beneficiaries of reintegration programmes in Georgia, while in 2018, this number increased to 815. These numbers are not high compared to the figures on returns (3,140 and 6,625, respectively). Almost half (45%) of all beneficiaries of reintegration in this period came from Greece, and other significant countries in this regard were Germany (24%) and Belgium (15%). Poland occupied the seventh position (SCMI 2019). Most reintegration beneficiaries are returnees from EU states (SCMI 2020).

The reintegration of returnees was made the key priority for the Georgian government, along with preventing irregular migration to Georgia and applying for asylum by Georgian citizens in the EU. As Georgia's Migration Strategy declares, 'it is the country's priority to encourage the return of Georgian citizens from abroad and facilitate their reintegration upon return' (SCMI 2020: 36). However, at the same time, the Strategy envisages an important role for the Georgian diaspora, stating that the Georgian constitutes 'a valuable contribution to

Georgia's socio-economic development' (SCMI 2020: 39). As a public administration worker told us, 'it will be not clever to call all Georgians to return to their homeland because, uh, it's we have a not good enough resources to offer for everyone somehow houses, accommodation, job, etc.' (IDI_GE_11). This proves that reintegration is not only a matter of the individual situation of a given migrant but it heavily depends on the structural factors in the country of origin. For instance, even the best business project would not be successful if there is no supply on the local market for the offered products or services. Because of that, the return policy is strongly overlapping with economic and development policies.

Head of the Policy Department in the Ministry of Health, Labour and Social Affairs of Georgia, Giorgi Chavchavadze, stressed the importance of reintegration and pointed out development, social protection, education, and health programmes as crucial to establishing effective reintegration policy (IOM 2021a). The most common form of reintegration assistance is a grant to set an income generating project (usually a small business), while an identified shortage exists in psychological help (IOM 2021b). According to the International Organisation for Migration (IOM), the outcomes of Georgian returnees are poorer than global averages (IOM 2021b).

3. Externalisation of the EU Migration Policies – The Case of Returns to Georgia

3.1. Cooperation Between the EU and Georgia in Combating Irregular Migration and Performing Returns

The integration of Georgia with the EU is an essential factor in developing migration policies in this country. As Georgia's Migration Strategy declares, 'development of migration management system in Georgia was given a strong impetus by an accelerated process of Georgia's approximation with the European Union' (SCMI 2020: 6). The cooperation between Georgia and the EU is shaped by different arrangements: on the EU-Georgia level as well as within both bilateral and multilateral agreements between the Georgian government and various EU Member States. Since November 2009, Georgia has cooperated with sixteen EU Member States within a *Joint Declaration on cooperation in the framework of EU's Partnership for Mobility*. This initiative focuses on fighting against illegal migration and the promotion of legal migration paths. Readmission and reintegration are important elements of this cooperation. Moreover, it provides arrangements for circular migration, inevitably linked to returns and re-returns (SCMI n.d. a).

In the case of Georgia, an effective policy on returns is a condition for such incentives as visa regime liberalisation. The EU-Georgia visa liberalisation agreement recognises that 'visa facilitation should not lead to illegal migration' and pays 'special attention to security and readmission' (Agreement 2011a: preamble). This agreement was signed together with the one on readmission (Agreement 2011b). It was decided that it shall only enter into force on the date of the entry into force of the agreement on readmission (Agreements 2011a: art. 14). Although there is an emphasis on reciprocity in the agreement (Agreement 2011b: preamble), the obvious aim of the deals were the effective returns of Georgian citizens from the EU rather than *vice versa*. The readmission agreement stipulates means of evidence regarding nationality of a migrant (art. 8), time limits of the readmission procedure (art. 10), transfer modalities and

modes of transportation (art. 11), as well as transit procedures (art. 14). It also sets up Joint Readmission Committee with the competences of monitoring the application of the agreement, deciding on implementing arrangements ‘necessary for the uniform application’ thereof, proposing amendments and exchanging information (art. 18). The full implementation of the readmission agreement was also included in the EU-Georgia Association Agreement (2014: art. 16). Therefore, the effective returns remain an expectation from Georgia in case of the general integration process with the EU.

Two crucial EU-funded projects related to migration were implemented in Georgia across the Mobility Partnership and visa facilitation scheme: ENIGMMA and ENIGMMA-2. The first one stands for *Enhancing Georgia’s Migration Management* and was implemented in 2013-2017 by the International Centre for Migration Policy Development (ICMPD). The project focused on developing a labour migration strategy, circular migration, and diaspora involvement. It also envisaged expanding the analytical capacities of Georgian migration institutions (SCMI n.d. b). The same agency implemented the second project, *Sustaining Migration Management in Georgia*, in 2016-2023. Despite the lack of explicit focus on returns, the project aimed at minimising the risks of irregular migration, developing ‘legal channels for regularisation of Georgian migrants in irregular situation’, and generally strengthening cooperation of migration agencies (Eu4Georgia.eu n.d.). According to our interviewed stakeholders, both projects considerably improved data protection in the area of migration in Georgia, so they not only led to more effective returns from the sending country’s point of view but also had some positive impact on the rights of migrants.

The EU praised Georgia for the implementation of readmission procedures. During a conference organised by the IOM on the occasion of the third anniversary of the EU-Georgia visa liberalisation agreement, EU Ambassador Carl Hartzell claimed that ‘visa-free travel available to citizens of Georgia has demonstrated its worth by bringing the EU and Georgia closer together’. The general feeling, he noted, is that Georgia has demonstrated a laudable commitment to cooperating with the authorities of EU Member States in decreasing the pressure of irregular migration (IOM 2019).

Apart from cooperation at the EU level, bilateral agreements are also an essential part of the externalisation of migration policies by EU Member States. Germany plays an important role in this regard, having an agreement with Georgia regarding seasonal workers (Agenda.ge 2021) and an agreement to facilitate the returns of rejected asylum applicants (AA 2023). Importantly, the agreement facilitating returns offers academic exchange programmes for Georgians (AA 2023). This aligns with the policy of offering incentives in exchange for readmission enhancements.

Some projects in the field of returns are co-funded by the EU and a sending member state. This was the case of the project Strengthening the Development Potential of the EU Mobility Partnership in Georgia through Targeted Circular Migration and Diaspora Mobilization funded by the EU and the German Federal Ministry for Economic Cooperation and Development and implemented in 2013-2016 (SCMI n.d. c). The co-funded (by the EU and Member States) cooperation also included returns of Georgian citizens. According to our respondents, assisted voluntary returns (AVR) are funded by the EU funds and the governments of the sending countries. Within this form of cooperation, combined flights are also organised. As one expert involved in the assistance for returnees in Georgia said, ‘in most cases, all the migrants from the European Union [were] combined in Germany and they were deported from this state [to Georgia]’ (IDI_GE_14-15). Furthermore, as one of the public administration employees told us: ‘Minister of Internal Affairs is in charge of this. They’re

sending a plane with staff, for example, in Poland, in Germany, and they accompany these returnees on the [basis of the] readmission agreement' (IDI_GE_11). As noted by our interviewees, representatives of the Ministry of Internal Affairs of Georgia participate in the Collecting Return Operations organised by Frontex and ensure escort for Georgian returnees (IDI_GE_21). Representatives of the Georgian Ombudsman randomly monitor the flights.

Also, with the EU funding and support of IOM, the Readmission Case Management Electronic System (RCMES) has been developed. This system is a web-based, secure platform which facilitates the exchange of necessary information with partner countries and competent Georgian authorities and significantly simplifies the procedure of receiving and processing requests on readmission (IDI_GE_21). Thus, the externalisation of the EU policy on return also involved the development of technologies and capacities of Georgian migration agencies.

3.2. Cooperation Between the EU and Georgia in Organising the Reintegration of Returnees

Overview

Reintegration assistance after return to Georgia is an important element of Georgian migration policy. The *State Programme for Supporting Reintegration of Returned Georgian Migrants*⁵ offers assistance such as medical services, social projects, vocational education, and temporary livelihood to Georgians irregularly residing abroad for more than one year and rejected or accepted asylum applicants. As observed by a public administration employee interviewed, the state reintegration programme was elaborated in cooperation with the IOM. The project also covers starting a business and provides up to six-day accommodation after arrival to Georgia.

Since 2003, IOM has implemented a separate EU-funded programme for those who have unlawfully stayed abroad or rejected asylum applicants (SCMI n.d. d). The IOM programme offers consulting, temporary accommodation provision, necessary medication purchase, training and job placement, and assistance in income-generating activities (together with funding) (IOM n.d.; SCMI n.d. d).

There are also other programmes for returnees. Frontex supports EU Member States and Schengen Associated Countries in providing reintegration assistance both during the first days following the arrival in the country of origin (post-arrival assistance), as well as longer-term assistance up to 12 months (post-return assistance). Frontex is not implementing these activities but subcontracting implementing partners (Frontex n.d. a). In the case of Georgia, Frontex works in formal partnership with Caritas International Belgium, which cooperates with Caritas Georgia. The assistance provided by Caritas Georgia within this scheme includes airport pick-up or reception at the place of arrival, temporary accommodation, in-country travel assistance, special assistance for vulnerable people, referral for urgent medical care and cash assistance as post-arrival assistance. Furthermore, post-return assistance is available through business start-up assistance, long-term housing support, social, legal and medical support, job placement, schooling and language training, vocational training, and cash assistance (Frontex n.d. b).

⁵ The programme has annual editions, see e.g. the 2018 edition, see more: (SCMI n.d. e).

There are also programmes developed by countries returning Georgians (sending countries). The returnees can benefit from both the state programme and those implemented by the sending country. For example, the German and French governments developed important programmes. One of the components of the project *Strengthening the Development Potential of the EU Mobility Partnership in Georgia through Targeted Circular Migration and Diaspora Mobilization* (2013-2016) was assistance in the reintegration offered for 40 professionals of the nursing and hospitality sector as well as encouraging 45 Georgians trained in Germany to return home and set up enterprises (SCMI n.d. c). Since 2017, Germany has developed the *Starthilfe* project (implemented by IOM); however, Georgians are eligible only for one-off financial support because reintegration support should be covered within the EU Reintegration Programme (BAMF 2024). There is a special repatriation programme for highly qualified returnees from Germany. Also, the French Office for Immigration and Integration (OFII) supports the programme for Georgian returnees, which aims to assist them in starting businesses. The programme includes social and medical assistance as well as support for professional and economic projects (OFII 2022). Poland has neither introduced any particular reintegration programme nor cooperated with any Polish NGOs on the issue of return and reintegration with the Georgian side.

The statistics on the beneficiaries of all the programmes are as follows. According to the IOM, between 2015 and 2019, there were 4,929 beneficiaries within four programmes: the programme implemented by the IOM (2,607), the Government of Georgia's State Reintegration Programme (987), the project implemented by Caritas (732), and the OFII's reintegration programme (603) (IOM 2021b: 11).

Implementation of the Programmes in Practice

As we were informed within the field study, 'effective implementation of return and readmission policies represents one of the top priorities of the Ministry of Internal Affairs of Georgia' (IDI_GE_21). However, as one of our interviewees admitted, 'the State Migrations Reintegration Programme is simply too small. Basically, it has no impact.' (IDI_GE_8-9-10). Another interviewee explained: 'last year, over 900 persons applied for the state reintegration programme, of which only 278 were eligible and provided with support' (IDI_GE_8-9-10). As the study conducted by IOM revealed, the State Programme was used mainly by proactive and independent migrants due to the way of applying for participation (IOM 2021b: 11). Therefore, the programmes developed by various EU Member States seem to fill the gap in the assistance provision of returnees in Georgia. Generally – despite various funding sources – the reintegration support is not offered to all returnees, and the difference between the level of support and services offered to returnees might be confusing.

It is important to remember that externalisation in the case of reintegration of returnees is not limited to the territory of Georgia but also pertains to the pre-departure activities in the EU Member States. As one Georgian NGO worker said, 'the reintegration starts before they [migrants] even are deported. That the first, you know, information about the opportunities in Georgia is given back' (IDI_GE_2-3-4). Thus, the information provision seems to be the crucial factor of reintegration effectiveness.

Strong social links in Georgian society support the effectiveness of the programmes. The employee mentioned above ensured that in the case of accommodation, Georgians can rely on their relatives because, as he said: 'we are believing that if someone find[s] our relatives in the

street, it's our shame' (IDI_GE_11). Other interviewees expressed similar opinions.⁶ Thus, the culture of strong family ties, in particular, is an important element supporting the reintegration of returnees in Georgia, and the reintegration is, to a considerable extent, dependent on social networks. As the recent IOM study revealed, 68% of Georgian returnees from Germany expressed strong community belonging in Georgia (IOM 2024: 48).

The assistance often also encompasses travel arrangements and administrative aid for travel preparations. The businesses set up by returnees are usually small-scale undertakings such as hairdresser salons, washing car services, or tailor workshops (People in Need 2024). There are situations when there is a special need to reintegrate children who spent most (of all) of their life abroad, and they need to 'get private tutoring to enhance their Georgian language skills so that they can join their peers and not the lower grades that correspond to their age because of their language problems' (IDI_GE_8-9-10). Therefore, the programmes developed by the EU Member States also attempt to cover specific needs which are not included in the other programmes.

The NGOs engaged in the reintegration process work closely with beneficiaries to write or correct the business plans. Often, the role of advisors (also known as return/reintegration counsellors) in this process is crucial – one of our interviewees admitted: 'in most cases, we change their business plan with the very close cooperation and negotiation of the beneficiary, because (...) their view about what they can do in Georgia, in Tbilisi, in Kutaisi is much different, different from what they really can do' (IDI_GE_2-3-4). As our interviewees stressed, the organisations implementing the reintegration programmes are also responsible for procuring goods, as the beneficiaries do not receive money for setting up their businesses. Instead, the NGOs purchase necessary items and hand them out to the returnees. The NGO worker quoted above declared: 'We have a very good procurement division that works actively over that because we are eager to find everything with best specifications and lowest prices'. Another person engaged in the preparation of the business plans process said that it 'might spend months working with one beneficiary in terms of making a business plan' because the advisors are 'narrowing down the plan to as tight and suitable for the beneficiary as possible' (IDI_GE_2-3-4). Another person responsible for reintegration programmes listed the most common forms of businesses: 'dairy farms, goat farms, fishery, like land cultivation, like greenhouses, production of dairy products, small production sites, like furniture production or sewing workshops, depending on the experience of a person' (IDI_GE_8-9-10).

The implementing agencies are obliged to monitor the further development of the businesses, which is usually done after one or two years. As our interviewees admitted, the success rate is quite high⁷, and one of our interviewees pointed out that 'there have been some cases [of people] who have been very good and who have expanded their businesses, who have employed some other people' (IDI_GE_8-9-10). However, almost all businesses are rather small and have no employees. The same interviewee summarised the assistance provided within reintegration schemes as crucial for returnees because 'otherwise they would be just returning with their empty hands and then thinking again of going someplace'. However, regarding the monitoring of the businesses of returnees, it is not always possible to reach the beneficiaries. One NGO worker admitted: 'sometimes you're planning your monitoring visit to Kutaisi, for example. They say, are you? [...] Okay, come, I come and they don't answer the phone' (IDI_GE_16-17).

⁶ However, some interviewees pointed out that the pool of accommodation within the state programme is sometimes not sufficient to cover all needs, so the social networks play the crucial role in this case.

⁷ One interviewee estimated it at 85% (IDI_GE_8-9-10).

The funding provided within the partnership with the external actors, the EU included, is crucial for the work done to reintegrate the returnees. Some of our interviewees emphasised the role of external partners and were sceptical about cooperation with the Georgian government. As one of the NGO workers stated: ‘We do not work with the government (...) because [the] government do[es] not really have any kind of programmes to support people who are returning for us to cooperate with them. Okay. Basically, whatever we do about the returnees, about the... this project, what we implement, we work with our partner in [name of the country]. That’s it’ (IDI_GE_2-3-4). Importantly—as our interviewees explained—the money the beneficiaries receive often depends on the country from which they return.

4. Identified Gaps and Shortcomings

According to the opinions of our interviewees, the cooperation between the EU and Georgia on the returns of Georgian citizens will gain importance in the coming years. This will pose a difficulty for the reintegration systems and increase the need to develop the existing programmes or new ones in cooperation with the sending countries or the EU as a whole. Moreover, an NGO worker interviewed by us doubted the successful development of programmes for returnees because – according to this person – ‘the government’s main policy... policies and political like vision about returnees is internal returning and support IDPs, mainly [those] who lost their homes’ (IDI_GE_2-3-4). Therefore, the still unsolved situation of the IDPs (internally displaced persons) from the occupied territories of Abkhazia and South Ossetia can be a burden for the effective development of assistance for returnees from abroad. Our interviewees also doubt the possibility of externalisation in the form of an agreement similar to the UK-Rwanda one (aimed at sending some migrants ordered to leave the UK to Rwanda) or the Italy-Albania one (aimed at keeping the asylum-seekers, who applied for the Italian asylum system, on the territory of Albania). According to the experts we talked to, there is no political discussion about such solutions right now. One of our interviewees ensured that it is ‘unthinkable to create [on Georgian territory] some programme like British people want to do in Rwanda’ (IDI_GE_18-19).

The most significant gaps identified within the study pertain to problems with the effectiveness of the reintegration programs, which make returnees emigrate again to the EU. Also, some structural problems were identified, which could be the factors pushing Georgians to emigrate. One expert involved in the implementation of reintegration policies we interviewed stressed that returnees sometimes do not have trust in the state reintegration programme due to prolonged procedures, and another problem is the short time of the programme (IDI_GE_12). Some interviewees assessed the state integration programme as not satisfying the needs. One public entity representative pointed out that not enough funding was allocated to the reintegration: ‘it [the reintegration programmes] needs to increase their budget because one of the biggest problems is related to the budget’ (GE_14-15). In sum, as one of the international organisations’ representatives told us: ‘Georgians keep on applying for asylum, even though they know that they will not get eligible. But they keep on going there. And the State Migration Reintegration Programme is simply too small. It has no impact.’ (IDI_GE_8-9-10). Based on the research material collected, this migrants’ strategy is difficult to explain. Even the organisations interviewed that draw attention to it do not know what is behind it.

Another problem is the access to information, which makes some returnees unaware of the assistance they can receive. As the official data of Georgian migration institutions show, some

returnees do not know about the reintegration programmes available in Georgia (SCMI 2020). As one of our interviewees claimed, ‘one of the most important component[s] [of the reintegration process] is the information access’ (IDI_GE_8-9-10). A former worker of one international organisation said: ‘using the example of Poland, I can say that Georgian citizens located in Poland, in any voivodeship, do not receive information regarding the possibility of return’ (IDI_GE_25). Some other interviewed experts mentioned misinformation⁸ in Polish detention centres before the departure, which resulted in anger after arrival.

Moreover, those who stayed illegally abroad especially encountered difficulties with reintegration. One of the most problematic issues is the recognition of education certificates and the need for retraining to meet the market demands (SCMI 2020). As one of the public administration employees noted, ‘the professions which Georgian citizens have, it’s not in line with the market demand’ (IDI_GE_11). Unfortunately, the language skills gained during emigration are not always an asset in Georgia because, as one interviewee said, there is no ‘a huge spectrum of international companies’ which can hire people based on a specific foreign language they speak (IDI_GE_13).

Our interviewees also emphasised that in public opinion, returnees may not need much help because they should possess resources achieved during migration: ‘in Georgia, if you stop somebody on the street and ask about migrant, in his or her eyes, [a] migrant is a person with money, with opportunities, and with everything he or she needs’ (IDI_GE_2-3-4). Another interviewee depicted this attitude with the words: ‘When you come back from abroad, everyone thinks of you as rich, no one knows what you earned there, you don’t have anything there, and now you have to help everyone. Well, I think it’s also very burdensome for these people’ (IDI_GE_24). In the opinion of the NGO workers who talked to us, this social attitude towards returnees impacts the psychological state of non-quite-successful returnees and, as a consequence, encourages them to re-emigration. Also, strong pressure on migrants to send as much money home as possible can push them into a precarious position abroad and lead to the need for return.

Another problem is that the national health service does not cover 100% of the costs of medical treatment. According to our interviewees, this can be a push factor for people with serious illnesses if they cannot afford the medical costs. Also, our interviewees noted that it is a problem that some of the business plans are assessed abroad without full knowledge of the market and cultural reality in Georgia.

5. Conclusions and Recommendations

Following Russia’s full-scale aggression against Ukraine and the relative ban on the return of Ukrainian citizens to their country of origin from 2022 onwards, it is Georgians who have become one of the dominant groups of foreigners against whom return decisions are issued both in the EU and Poland. Georgia’s cooperation with the EU allows for the smooth implementation of return decisions and the participation of Georgian services (relieving Frontex in this role). Reintegration programmes offered to Georgian citizens on return decisions are not always sufficient to convince Georgian citizens to return. They are also not complete enough, in particular financially, to convince returnees to persist in their resolve to return to their country of origin. It is worth considering extending the reintegration package

⁸ Misinformation about the money available after return is an example. The returnees have not received cash which they were promised and which returnees on the same flight but from other countries were receiving.

and coordinating the amount of support of the various reintegration programmes, which vary widely.

The cooperation established by the EU with Georgia in organising return appears to be working quite well. The involvement of Georgian actors in organising flights and reintegration assistance after return significantly relieves the burden on the EU side (Frontex or individual Member States). However, the question remains whether the ‘pushing’ of the tasks of carrying out air return operations does not entail a reduction in the guarantees to which returned foreigners are entitled. This relates, for example, to issues such as security on board the aircraft and compliance with health protection requirements for persons belonging to vulnerable groups (sick persons, persons with disabilities and pregnant women). Furthermore, whether the Georgian side sufficiently monitors these operations should be considered.

Based on the identified gaps and shortcomings, we recommend what follows. Strengthening access to relevant information prior to departure seems crucial for the effective reintegration process. Information dissemination is essential at all stages of the return process and should be accessible both prior to departure and upon arrival in Georgia, namely in strategic places of first contact like airports, railway stations, and bus stations. Hence, it should be an important part of the cooperation between migration agencies in the EU Member States and in Georgia. We also recommend that, if possible, the training should be accessible before departure so the returnee can find a job immediately after arrival. Furthermore, the results of our study suggest the need to strengthen the role of local NGOs in the implementation of reintegration programmes, which means that as much contextualised knowledge as possible is needed to increase the efficiency of such programmes. This is particularly important in remote mountainous regions of Georgia and those inhabited by ethnic minorities. It would also be beneficial for the effectiveness of reintegration programmes to enhance cooperation between the NGOs supporting migrants in the sending countries and Georgia. Last but not least, we recommend organising information campaigns that can alter the social attitude towards returnees and the requirements that are imposed on them based on the assumption that they are able to support relatives in Georgia instead of requiring support themselves.

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Decentring the Study of Migrant
Returns and Return Policies

Procedures of irregularisation in Greece: spatial, carceral and temporal aspects

Working Paper (WP2)

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List of abbreviations

ADET	Uniform-Format Residence Permit
AMKA	National Insurance Number
AVRR	Assisted Voluntary Return and Reintegration
CCAC	Closed Controlled Access Centres
CJEU	Court of Justice of the European Union
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIL	Enforcement of immigration legislation
EU	European Union
GAS	Greek Asylum Service
GCR	Greek Council for Refugees
IO	International Organisation
IOM	International Organization for Migration
JMD	Joint Ministerial Decision
MMA	Ministry of Migration and Asylum
MS	Member State
NGO	Non-Governmental Organisation
PAAYPA	Temporary Insurance and Health Care Number
PRDC	Pre-Removal Detention Center
RIC	Reception and Identification Center
RMI	Return Migration Infrastructure
SOP	Standard Operating Procedures
TCN	Third-country national

Abstract

This working paper explores how the irregularisation of migration is produced and reproduced through the workings of the legal and institutional framework of migration and asylum in the case of Greece. Irregularity is not considered here only as a legal status (or the absence of it), but as the outcome of policies, institutional arrangements, and the formal and informal practices of various actors within the wider political and socio-economic context. We thus discuss irregularisation as a process rather than a state of things, one in which many (also ‘regular’) people may be involved, in sequences of (ir)regular statuses. Irregularisation entails a sum of diverse informal or ‘irregular’ or ‘illegal’ practices that also people with ‘regular’ statuses develop in order to navigate in the otherwise hostile migration and asylum regime.

The paper examines in short how irregularisation has emerged through the immigration system over the last three decades including the complicated pathways to regularisation procedures, and the police practices. It then focuses on the labyrinth of irregularisation that has been reproduced through the newly established asylum system after 2015-16, in all the stages of an asylum application: the initial registration of the asylum claim; the asylum procedure and the multiple categories of deservingness/undeservingness it creates; the so called inadmissible claims related to the safe third country rule and the recent suspension of readmissions to Turkey; the irregularisation and criminalisation of asylum seekers’ practices by reducing or withdrawing reception provisions; the appeal procedure; and the return policy framework characterised by coercion reinforcing irregularisation, even in cases of self-proclaimed ‘voluntary’ returns.

The paper also analyses the spatial and temporal dimensions of the process of irregularisation, starting from even before border-crossing and extending during the diverse routes along which legislation and institutional practices create borders and categorise people. Moreover, the crucial role that is reserved for migrants’ deprivation of liberty (even for those applying –or having already applied– for asylum) calls for a separate examination of the carceral dimension that affects dramatically migrants’ pathways in space and time in the contemporary migration regimes.

The spatial and temporal boundaries among the figures of the (il)legal, the (ir)regular, the registered, the detained, the returnee, the deportee, and the asylum-seeker are blurred, as are the experiences and the statuses of those emplaced in these spaces and temporalities. Overall, as the paper argues, irregularisation is both produced by laws and their implementation but is also productive in itself in spatial, temporal and carceral terms. As some recent developments in the EU system of migration governance show, Greece can be considered as a showcase and a field of experimentation for irregularisation in Europe.

Keywords:

Process of irregularisation, migration and asylum policies, asylum procedures, space-time, detention, Greece

1. Introduction¹

The aim of the Working Paper is to explore and critically analyse the notion of irregularisation, and particularly to examine how it emerges through legislation and institutional procedures in the case of Greece. Its objective is twofold. First, to discuss irregularisation not in terms of the status of irregularity, but as a dynamic and evolving process in which many (also ‘regular’) people may be entangled. The process of irregularisation consists of sequences of regular and irregular statuses, but also of informal, or ‘irregular’, or, ‘illicit’, or ‘illegal’ practices that also people with ‘regular’ status may develop in their efforts to navigate the complex and restrictive legal frameworks of asylum and immigration. Second, the paper aims to unpack and explore the different dimensions in which irregularisation as a process unfolds, namely the procedural, the spatial, the temporal, and the carceral. We seek to explore how irregularisation is (re)produced at the intersections of these overlapping layers.

More precisely, our research questions are the following:

- i. What are the institutional procedures that irregularise individuals and groups? What is the place of these procedures in the legal framework on migration and asylum and in its implementation in practice?
- ii. What is the temporality of irregularisation? How does it change in the long run of changing migration and asylum policies? What are the tempos, the paces and the duration of irregularisation procedures in the sort run of individual trajectories?
- iii. What is the spatiality of irregularisation? Which are the geographical routes that are affected and the places where it occurs?
- iv. How is irregularisation entangled with the detention of migrants and asylum seekers?

2. Methodology

Methodologically, the Working Paper is based on both desk and primary research conducted as part of the GAPs ‘De-centring the Study of Migrant Returns and Readmission Policies in Europe and Beyond’ project. Desk research, included the study of the institutional framework, national laws and legal provisions, policy documents, official reports, statistical data, EU-related documents, as well as reports from a number of actors involved in the field of migration and asylum such as International Organisations (IOs) and Non-Governmental Organisations (NGOs). Primary research included mainly qualitative methods exploring the concept of ‘Return Migration Infrastructures’ (RMIs). Research on RMIs aims to bring to the fore how return migration governance is put into practice, by focusing on: the actors involved in the operation of returns, their relationships and networks, their everyday practices, the different steps of the return process, and the materials and technologies that shape the ways in which returns take place on the ground. In Greece, research on RMIs involved sixteen (16) semi-structured interviews with stakeholders and actors engaged in the implementation of returns, a focus on the Assisted Voluntary Return and Reintegration (AVRR) program, run by the

¹ The authors would like to thank the GAPs coordinators Zeynep Şahin Mencütek (Bonn International Centre for Conflict Studies) and Soner Barthoma (Uppsala University), as well as Anna Triandafyllidou (Canada Excellence Research Chair in Migration and Integration, Toronto Metropolitan University) for their constructive comments and suggestions that improved the paper. The authors are also grateful to the members of the Stakeholder Experts Panel formed in Greece and their invaluable insights provided during the first SEP & EKKE team meeting that was held on the 4th of October 2023, as well as to actors’ representatives that accepted to be interviewed for the needs of the GAPs project.

International Organization for Migration (IOM), as an ‘entry point’ for the research, as well as ethnographic methods in constituting parts of the particular RMI.

More particularly, interviews were conducted with representatives of national authorities, IOs, and NGOs, as well as of migrant and refugee communities and organisations. The selection of stakeholders started by focusing on the actors implementing the AVRR program, particularly IOM and its different teams/departments responsible for the implementation of the different parts of the return procedure. Gradually, a number of other actors were approached related to the management and planning of AVRR in other scales, including state authorities, such as the Ministry of Migration and Asylum (MMA). Participants also included actors engaged with other types of RMIs in Greece, notably forced returns and pushbacks: NGOs, institutional bodies, and commissions related to the monitoring of returns, human rights and legal advocacy. In an infrastructural perspective, these interviews constituted a tool to explore the relations and interactions between actors, materials, and technologies that together mediate the ways in which returns take place. The majority of interviews were conducted in the actors’ premises, while few were conducted online or at National Centre for Social Research’s (EKKE’s) offices. Most lasted about one hour, while some lasted much more, approaching the two hours. In all cases, participants offered their informed written consent.

Field research also included ethnographic visits and observations in different localities, places, premises, and offices, all being constituent parts of the RMIs in Greece. These included the IOM headquarters where a number of services are provided and where most procedures take place, the Athens airport as part of the material dimensions of the AVRR infrastructure, and the Open Centre for migrants registered for AVRR (OCAVRR), where beneficiaries are provided temporary accommodation in Athens. The research team conducted ethnographic research through field visits and guided tours by IOM representatives in these three places, strictly adhering to the ‘do no harm’ principle towards research participants and other people present in these places at the time of the visits.

3. Conceptualising irregularisation

In this Working Paper **irregularity is understood as a process rather than a fixed condition, a state of things, a characteristic or ‘quality’ that certain people possess** (also in Näre et al., 2024); a process which is ‘above all a product of the law’ (Jacobsen & Karlsen, 2020: 10) deriving from the ever restrictive and highly complex migration and asylum policies (Näre et al., 2024; Triantafyllidou & Spencer 2020; Ambrosini, 2016; De Genova, 2002). Irregularity entails a number of informal, or ‘irregular’, or ‘illegal’ practices that both ‘irregular’ and ‘regular’ people develop in order to navigate within the otherwise hostile migration and asylum system along their shifting migratory projects and trajectories.

Irregularity has increasingly been a major reference point in dominant public discourses concerning migration. Irregularity becomes defined through normative antithesis: regularity or actually legality. Thus irregularity is interpreted through a simplified lens of a binary good (legal, regular) and problematic (irregular which gets equated with illegal) that may easily be employed in scapegoating ‘irregulars’ as threats to the social and political (national and EU) body.

The ‘illegal’ migrant together with the ‘bogus’ asylum seeker have been pivotal figures around whom political discourses on migration (control) and migration and asylum policies have been shaped and reshaped over the past decades (see also Balibar, 2010; Mezzadra, 2015). Yet the ‘shades’ of il/legality, ir/regularity and un/deservingness are never so clear-cut as they

are often presented to be. Rather they entail multi-faceted and complex categorisations that reflect the changing political conjunctures and employment/labour needs in a particular context that deem a migrant as deserving.

Irregularity involves multiple categories, conditions and experiences, ‘including those who remain on state territory after having overstayed their visa, having had their residency revoked or asylum application rejected or never having applied for residency or asylum’ (Jacobsen & Karlsen, 2020: 1; similarly in Triandafyllidou & Spencer, 2020: 2). Notions of ‘semi-legality’ or ‘befallen irregularity’ (see Triandafyllidou & Bartolini, 2020; Triandafyllidou, 2023) have been coined to describe not only the multiple categorisations but also the transience of ir/regularity. In order to represent the diverse ways that people might end up in irregular statuses, Näre et al (2024: 10) in their comparative report for I-CLAIM project, identify three main routes into administrative irregularity and precarity in the six I-CLAIM countries: the administrative, the demographic and the geographic one. As Savatic et al. (2024: 3) argue, ‘the distribution across categories depends upon visa and asylum policies’ and ‘states are trapped in a circular logic: migration and asylum policies determine how many border-crossers are counted and whether they are labelled as “refugees” or “(ir)regular migrants” making states the origin of the distinction that then subsequently requires distinct policies’.

This complex categorisation and hierarchical positioning of migrants along the spectrum of ir/regularity is, according to De Genova (2015: 3-4), ‘the work of immigration regimes and citizenship law’ as well as product of ‘the bordered definition of state territoriality that constitutes particular forms and expressions of human mobility as ‘migration’ and classifies specific kinds of people who move as “migrants”’. Criminalisation along with illegalisation frame the ways irregularity and irregularisation is understood in many EU policies (Näre et al., 2024: 9), while its conceptualisation is territorially bounded to the irregular crossing of the external Schengen borders (ibid) and on irregularly staying in an EU country.

Since states often consider deportations difficult to conduct, apprehending mobility is prompted by an array of measures for securitising and militarising the multiple borders, by criminalising border-crossings (Macias-Rojas, 2021) as well as by de-territorialising asylum claims (as for example in the case of ‘the fiction of non-entry’ in the New Pact). Moreover, as Klaus and Szulecka (2023) discuss ‘another technique often used is the creation of a hostile environment on legal, practical, economical or discursive levels to try to encourage people to depart, to leave the country “voluntarily”’.

Deportability, bearing the ‘ability’ to be deported at any time, relies exactly on demarcations of (migrant but not only) illegality and their border practices. Despite claims for being ineffective, deportation regimes and deportability per se, impact on the exploitation, the vulnerability but also on the broader economies of migration and security regimes (see also Karadag & Sert, 2023). Hence, De Genova (2010) contends that deportability of migrants has ‘to be seen in a continuum with “detainability”’ as well as with other modalities of ‘captivity and confinement’.

Actually, and increasingly, someone can be labelled as ‘illegal’ even before any legal decisions or irrespective of them (as has been the case in 2020 with the tensions in Evros at the Greek-Turkish borders and elsewhere). Thus illegality becomes a de facto attribute inscribed into the bodies and identities of migrants crossing borders (albeit not to all migrants’ groups since it tends to be nationality driven). As Jansen writes, ‘and today, while Frontex is operating on the European borders—which have been extended far beyond the EU—and people regularly drown, suffocate or suffer and die by other means, it is their “illegal” movement which still tends to be perceived first and colours perception of their death, detention or deportation’ (Jansen, 2015: 16).

As (illegalised) migrants continue to incarnate a major ‘threat’ in European discourses, migration is increasingly perceived as something ‘irregular’ and thus managing this irregularity and securitising the core body of the EU becomes a key priority, resulting in the proliferation of border practices and bio- and necro-political governance of migrants (see De Genova, 2015). As Jansen et al argue (2019: ix), ‘the irregularisation of migration and the increase of border policing are processes standing in close connection to the free flow of labour, commodities and money in a globalised economy. The smoothing of mercantile space goes hand in hand with —and indeed seems to facilitate— an ever more complex stratification of geographical space and a dismantling of rights and political agency. In that context, borders could be said to differentiate among populations —to create different spaces for different populations even— and increasingly so, down to the level of the individual’. Similarly, Mezzadra and Neilson (2013: 7) observed that border practices instigate a form of ‘differential inclusion’ that ‘select and filter people and different forms of circulation in ways no less violent than those deployed in exclusionary measures’. Yet this practice of differentiation, also results in differentiated rights for different categories of people depending on the place and time of border practices and on people’s nationality. It may also result in differentiated ‘deportability’ and ‘inhabitation’ of the grey spaces of irregularisation that we will see further on.

Finally, illegality is not only produced but is productive in itself. As several scholars have discussed (De Genova, 2002; Triantafyllidou & Spencer, 2020; Ambrosini, 2016) irregularisation produces an exploitable and vulnerable workforce living under constant threat. Ruben Anderson (2014: 7, 15) studied the ‘illegality industry’ flourishing in European borderlands, to highlight ‘not the repressive but the productive nature’ of migration and border controls, in particular ‘how the “management” of irregular migration is a particularly expensive -and lucrative- field’. The concept, he argued, ‘allows for the consideration of a dispersed “value chain”, or the distinct domains in which migrant illegality is processed, “packaged”, presented, and ultimately rendered profitable’ for a wide and diverse array of actors including rentier states and employers, smuggling networks and security companies, border guards and aid workers, the media and academia (Anderson, 2014) This industry, ‘feeding on the illegality it is meant to control, only produces more and increasingly distressing forms of it’ (Anderson, 2014: 24).

There are several insights from the literature on the so-called migration industries (e.g. Gammeltoft-Hansen & Sorensen, 2013) and political economic critiques to migration controls which are relevant here. From lobbying strategies of private contractors managing detention facilities who push for expanding detention (Conlon & Hiemstra, 2014), to Frontex’s incentives to count more irregular/illegal border crossings in order to depict unauthorised migration as a problem ‘which requires a securitised response - a response that it can provide if given more resources’ (Savatic et al., 2024: 25). In the carceral landscape of the wider borderlands, according to Achtnich (2022: 112, 98-9), ‘the precarious migrant body becomes part of a transnational system of economic production..., subjected to multiple rounds of value extraction’. Along similar lines of thought, Martin (2021: 747) argued that ‘legal categorisation is foundational’ in producing what she calls ‘carceral economies of migration control’, analysing, among others, how ‘status value’ is created by the ‘illegalisation of mobile people’ allowing for the commodification of migrant life not ‘as property but as assemblages of services, bed space, data and mobility’.

Although a great part of this discussion oscillates between legalities and illegalities, analysing the complexities of the multiplicities of laws (akin to the multiplication of borders) and taking into consideration the ad-hoc legal suspension (Sundberg, 2015: 210; also Agamben, 2006) that is increasingly ‘normalised’ (as for example the recent and now

institutionalised border closures depriving asylum seekers from their rights) can provide an additional vantage point for analysing irregularisation. Hence, in this multitude of laws and regulations, one could argue that irregularisation, besides being a product of political will and interests, is also engendered by an over-regulation and an obscured/invisibilised implementation (that exploits the legal ‘gaps’ and ‘invisibilised’ practices such as pushbacks etc.).

Considering the spectrum that constitutes irregularisation and the fact that irregularisation unfolds in multiple spatialities, temporalities and legalities, the socio-spatial notions of informality and of ‘grey spaces’ (Yiftachel, 2009a; 2009b) might further enrich its theorisation. Sahin-Mencutek and Triandafyllidou (forthcoming) contend that although informality has been explored as a way ‘in which migrants navigate mobility or immobility’, its role ‘in migration governance has not been sufficiently theorized’. Therefore, they suggest that ‘formality and informality intersect in governing returns leading to a sort of “messy governance” which is intentional.

The intentional aspect of informality has been extensively discussed in the respective scholarship. By bringing in dialogue research on migrant illegalisation and critical poverty scholarship, De Genova and Roy (2020) argue that ‘the study of practices of illegalisation allows critical poverty scholarship to better discern how sociopolitical categories and classifications that are central to wider processes of marginalisation and domination may arise or be reinforced as effects of the state’s legal productions of illegality’. Correspondingly, seeing migrant irregularisation through the lens of informalisation supports our understanding of informality as a process that takes place both at the edges of the legal and illegal and at the whole spectrum in-between, ‘in the shadows of formal and informal’ and handled ‘by employing a range of delegitimising and criminalising discourses, regulations and violence’ (Yiftachel, 2009b: 243).

Writing on informality and on the ‘coming apartheid’ in Israel, Yiftachel (2009a; 2009b), with a more spatial outlook, describes grey space as referring to ‘developments, enclaves, populations and transactions positioned between the “lightness” of legality/approval/safety and the “darkness” of eviction/destruction/death. Grey spaces are neither integrated nor eliminated, forming pseudo-permanent margins of today’s urban regions, which exist partially outside the gaze of state authorities and city plans’. Discussing about practices of illegalisation of migrant and non-migrant populations, De Genova and Roy (2020) refer to cut-off dates (for legalisation or amnesties) as a powerful spatio-temporal technology, reinscribing legality and illegality and renewing relationships of political loyalty and dependency. Scholarship on urban informality has paid close attention to cut-off dates as a way of understanding the ‘temporal rhythms’ of statecraft, especially in relation to those ‘who live on the margins of the state’ (De Genova and Roy, 2020: 7). Temporariness, and specifically permanent temporariness is also a key feature of grey spaces (Yiftachel, 2009a; 2009b) but also of irregularisation whereby immobilisation, lack of foreseeable future, ‘temporary accommodation’ or ‘temporary protection visas’ complement the aforementioned ‘temporal rhythms’ of the state.

Wanting to underline the deeply racialised and exclusive /expelling aspects of deportability, Kalir (2019) employs the notion of ‘departheid’. ‘Departheids formal goal to maintain a national territory vacated of illegalised migrants is to be achieved by the deployment of legal, psychological, and physical violence at three key sites: first, at the point of entry, states fortify and protect borders to pre-emptively deny entrance to those who, it is suspected, will become illegalised migrants; second, inside their sovereign territory, states segregate and confine illegalised migrants to specially designated waiting zones’—neighborhoods, camps, hotspots, prisons, and detention facilities—from where surveillance and controlled removals can be

more easily managed; third, at the point of exit, states oblige illegalised migrants to “voluntarily leave” or be forcefully deported’ (Kalir 2019: 20).

Triantafyllidou and Bartolini (2020: 13) suggest conceptualising irregular migration ‘as a continuum of different statuses between regularity and irregularity’. In this sense, we can conceptualise irregularisation (the process of becoming irregular) as a process navigating multiple grey spaces, temporalities and legalities that produce transient and transitional irregularities.

4. The immigration policy framework in Greece: a regime of irregularisation

The notion of ‘multifaceted labyrinth’, through which Tsitselikis (2019) characterised the complex asylum system established in Greece after 2015, is probably appropriate to describe the entire immigration regime as it has been established since the 1990s. It is when Greece is known to have transformed from a country of emigration to a destination and transit country due to the increase of immigrant arrivals mainly from Balkan and Eastern European countries, predominantly from Albania.

Back then, the state’s unpreparedness and the lack of a coherent immigration policy were marked in practice by a contradictory combination. Migrant irregularity was, on the one hand, criminalised through excessive policing (Kourtovic, 2001), involving border patrols, internal controls and mass deportations (Baldwin-Edwards & Fakiolas, 1998; Maroukis, 2008). On the other, it was tolerated for serving a quasi-laissez-faire approach feeding the labour market with needed cheap and flexible work (Lazaridis & Poyago-Theotoki, 1999; Hatziprokopiou 2006). Early institutional arrangements have contributed to the creation of an ethnic hierarchy as migrants considered as of Greek origin were the only ones to receive some kind of integration assistance (Triandafyllidou & Veikou 2002; Kandylis 2006). The majority encountered strict requirements for legal residence and complicated and discouraging regularisation procedures that forced them into a perpetual state of limbo between legality and illegality (Triandafyllidou & Veikou 2002; Marvakis 2004; Kandylis 2006; Hatziprokopiou 2006).

Since the late 1990s, successive Greek governments focused on regulating the stay and work of people already living in the country. In light of the forthcoming 2004 Olympic Games, and in parallel with the deepening xenophobic and racist perceptions towards migrants (Ventoura, 2004), large-scale regularisation processes took place in order to ensure the worker status of previous undocumented migrants (Lazaridis & Poyago-Theotoky, 1999). Cheap and precarious migrant labour, especially in construction, agriculture and domestic services, contributed to the high rates of economic growth of that period. Despite seemingly decreasing, deportations of irregular migrants never ceased to take place, with a number of them constituting land pushbacks.

The post-2008 debt crisis significantly impacted the sociopolitical circumstances, as well as experiences of irregularisation. Situations of ‘befallen irregularity’ (Triandafyllidou, 2023) with the sharp rise in unemployment affecting disproportionately migrants, as the longstanding requirement of submitting proof of formal employment in order to renew a stay permit led

many settled immigrants back to irregularity (Pratsinakis et al., 2017)². Deepening inequalities affecting the migrant population have been very much due to ‘periodic transitions from legal to illegal residence status and long-lasting periods in an ambiguous legal status’ which ‘remained the norm for many of the established immigrants and most newcomers’ (Kandylis & Maloutas, 2017: 136). Worsening life conditions were exploited to augment xenophobia, racist discourses, and discrimination against migrants. Meanwhile, naturalisation, the sole route to full participation rights, has been notably difficult to access for the majority (Mavromatis, 2018; Gogonas & Tramountanis, 2023).

The early 2010s were characterised by a dominant discourse insisting on the ‘war against illegal migration’ (Papatzani & Petraco, 2022). Specific policies were implemented in this regard, with a shift of emphasis to sealing the border. The Law 3907/2011 was adopted to transpose the Directive 2008/115/EC on common standards and procedures for returning illegally staying TCNs. Securitisation of borders was enhanced, especially through the adoption of the ‘Integrated Border Management Program for Combating Illegal Immigration’ in 2011, whose main targets were ‘the protection of both the EU and national borders’, and the ‘reduction of the illegal migration’ (Ministry of Citizen Protection, 2011). This program included -among others- the construction of the Evros fence in the southeast borders of Greece, described as a ‘technical barrier’ that will combat ‘illegal’ migration (Ministry of Citizen Protection, 2011). Despite its cost in a period of economic crisis, ‘national-level discourse by political actors reveals that the construction of the fence was linked to the wider EU-level migration and border control practices, as well as to the national-level perception of migration as a security issue’ (Grigoriadis & Dilek, 2019: 171). At the same time, a system of pre-removal detention centres was established with a Ministerial Decision in 2015, regulating already existing detention facilities.

Even though border controls had been tightening, applying for asylum (even if one is aware of the limited possibilities for a positive decision and that the application could involve detention in case of arrest), had been a main pathway to some kind of regularity. Asylum, after all, has long been a main ‘corridor’ for many migrants entering Greece in search of safety and/or better life prospects in the country or some other EU member state, even well before 2015 (Papatzani et al., 2022a). In the absence of legal routes and in the context of limited opportunities for regularisation, a significant number of undocumented migrants were granted residence permit for humanitarian reasons (‘Humanitarian status’). The Humanitarian Status was granted to undocumented migrants based on the Law 4251/ 2014 (art.19A, par.1) and Law 4375/2016 (art. 22) mainly until 2015 as a first instance decision. Until 2020 it was granted at second instance and referred to a significant number of positive decisions. Recently, these provisions were abolished by the Law 4825/2021 (art.72).

During the last few years, two legal arrangements were adopted that promoted migrants regularisation. The first is the Memorandum of Understanding ‘for immigration and mobility’ signed by Greece and Bangladesh ratified by Law 4959/2022. The Memorandum sets out the conditions of entry and temporary residence of Bangladeshi nationals who have been staying in Greece before 9 February 2022 for the purpose of temporary employment. The permit is valid for 5 years, the permit holders are required to return to Bangladesh for at least 3 months per year, and once the permit expires, they have no right to renew or apply for another residence permit and are required to leave the country. This legislation put about 11,000 irregular workers, mainly in the agricultural economy, in the process of regularisation, aiming

² Additional legislation came to address what has been, e.g. by reducing the number of social insurance stamps required as proof of legal employment, by speeding up procedures for permit renewals, or by opening up access to longer duration of residence permits (Triandafyllidou, 2014).

to end the phenomena of exploitation revealed by the landmark judgment of the ECtHR 'Chowdhury and others VS Greece' (2017), the well-known case of Manolada (Kerasiotis, 2024). The same year Greece and Egypt signed an Agreement ratified by Law 5009/2023 for the employment of seasonal workers in the agricultural sector. The second legal arrangement is the Law 5078/2023 (art. 193) granting a new type of residence permit for work, acting as a broad regularisation for undocumented migrants. The main characteristics of this three-year permit, among others, include the requirement of three years of previous residence in the country and a certificate from the employer that the person is going to work for him/her; and the possibility of subsequent renewal to any other type of residence permit.

Pragmatic labour market considerations seem to be at the heart of these recent legal initiatives, following about a decade of policies aimed primarily at regulating asylum and building a reception system at the expense of established migrants and their offspring (Christopoulos, 2020). Our interviews revealed, on the one hand, that a number of asylum seekers whose applications have been rejected, especially from nationalities with 'low recognition rates' (e.g. Pakistan), apply for residence permit, giving an – at least temporal until the decision on their application – end to their irregular status that followed the asylum decision on their cases. On the other, it has been argued that the initial attempts to implement the aforementioned measures have been problematic, as immigration services across the country interpret the law in different ways. A striking example is the requirement for undocumented migrants to present a rent contract in their name when applying, despite the Immigration Code clearly stating that contracts cannot be issued to TCNs without legal documents (Kerasiotis, 2024). Additionally, various issues arise concerning the proof of uninterrupted three-year residence in the country. Decentralised administrations often reject documents of certain date despite the not restrictive mention in the law's circular, and despite the fact that it is widely known that undocumented individuals often lack any form of documentation. These examples of administrative abuse put a significant portion of the population at risk and the regularisation will likely benefit far fewer people than anticipated (Kerasiotis, 2024).

Irregularisation does not derive solely by regulations on paper, but also from institutional practices that have been implemented throughout the years. As already mentioned, the large-scale deportations of irregular Albanian migrants- widely known as 'sweep operations' - were performed by the police on the streets, as a means to combat irregular migration enjoying wide coverage in the national media, yet on the fringes of official legal rules (Baldwin-Edwards & Fakiolas, 1998; Maroukis, 2008). Such police practices were enhanced within the context of the economic crisis, when xenophobia and racism re-increased substantially (Baldwin-Edwards, 2014). During the early 2010s, as part of the aforementioned 'Integrated Border Management Program for Combating Illegal Immigration' the 'Xenios Zeus' police 'sweep' operation was launched in urban centers since 2012. The operation - ironically called Xenios Zeus akin to the ancient God of hospitality - had the explicit purpose of combating 'illegal migration and criminality' (Xenakis & Cheliotis, 2013). It has been implemented through patrols and raids targeting immigrants on the streets, followed by massive arrests aiming at identifying and subsequently deporting irregular migrants. What this campaign brought about was not so much an increase of deportation, but a significant increase of the number of people imprisoned in harsh conditions in pre-removal detention centres around Greece, even for periods longer than two years (HRW, 2012; 2013). The daily interactions between the police authorities and migrants marked by regularly reported incidents of violation of rights and abuse and associated with massive detention (Pavlou, 2009; Karamanidou, 2016), while controls and search of documented migrants on the streets put also them in situations of

uncertainty in everyday life (Papatzani, 2021) blurring the boundaries between regularity and irregularity.

Overall, we could argue that the legal, policy, and institutional framework of immigration has diachronically reproduced a regime of irregularisation, since the transformation of Greece into a destination country in the 1990s. Both the regulations on paper, including their transformations over the years, and the institutional practices implemented by different actors, especially on the part of the police authorities, have determined the protracted nature of irregularity as a condition and the different sequences of regular and irregular statuses that define immigrants' irregularisation as a process. The above have also determined migrants' experiences, which have mostly been characterised by legal limbo and a series of restrictions, followed by periods when residence permits offered more opportunities to improve living conditions, before being restricted again, e.g. after the expiry of the permits, due to their short-term nature.

5. The Greek asylum system: an emerging labyrinth of irregularisation

Prior to 2011, the asylum system in Greece suffered from chronic structural deficiencies. It was characterised by extremely low recognition rates of only few asylum applications with the majority rejected at the first instance. Indicatively, from 2009 to 2013, there were approximately 10,000 to 15,000 asylum applications per year, with fewer than 4% ultimately approved (Tramountanis, 2023). The system was also characterised by the non-proper transposition and implementation of EU Directives, the enhanced role of the police in decision-making, poor utilisation of available EU funds, limited administrative capacities, minimal and sporadic protective measures, excessive use of detention, and substandard living conditions in reception and detention facilities, among others (Black, 1994; Sitaropoulos, 2000; Papadopoulou, 2004; Papageorgiou, 2013). It is characteristic that in 2011, the European Court of Human Rights and the Court of Justice of the EU ruled that systemic deficiencies in the Greek asylum procedure violated the European Convention on Human Rights and EU law (Tramountanis, 2023). Before the so called 'refugee crisis', Greece had not yet established an asylum system able to respond to the existing needs. It is indicative that it was only in 2011 that the Greek Asylum Service (GAS) was established, while it started operating in 2013. In the following, we analyse how the newly established asylum system, the asylum laws, policies and institutional framework after 2015 have had an impact on the reproduction of irregularisation.

In 2015 Greece became one of the main entry point to Europe for nearly one million refugees and migrants. This –initially transit– movement was soon disrupted by the EU-Turkey Statement in March 2016, which –among others– was a return agreement under which migrants and asylum seekers with unfounded or inadmissible claims would be 'returned' from Greece to Turkey. While its implementation resulted in the decrease of departures from Turkey, it did not really increased the numbers of actual returns that remained very low in comparison with the number of arrivals. At the same time, other EU agreements with third countries were paving the way for deportations of specific nationals. Moreover, following the EU 'Hotspot Approach', five hotspots were established in the islands of Lesbos, Chios, Samos, Leros and Kos, while the Balkan Route was closed by March 2016. A Ministry of Migration Policy was established for the first time in Greece in 2016 (later MMA). Since then, extensive and substantial amendments of the Greek asylum law took place. As part of conforming to and implementing its obligations as a guardian of EU borders at the Union's south-eastern corner,

the asylum system was highly complex, constantly shifting, and adapting with mushrooming legislation (Tsitselikis, 2019)³.

5.1 Who deserves protection? Registration, complex asylum procedures and profiling

For a refugee⁴ in Greece, this labyrinth of irregularisation starts at the very beginning of the asylum process, especially during the registration of an asylum claim, or better, as part of **the procedure towards the registration**. On the one hand, those on the eastern border islands, are confronted with particular procedures deriving from the Hotspot Approach during their stay in the formerly Reception and Identification Centres (RICs), recently re-established as Closed Controlled Access Centres (CCACs). These may include their ad-hoc detention in the RICs or CCACs before registering their asylum claim, and their ‘geographical restriction of freedom of movement’ on the islands during the examination of their asylum application: both form spatial and carceral aspects of a process distinguishing those ‘deserving’ from those ‘undeserving’ protection and asylum. On the other hand, **those at the mainland who wish to register for asylum may end up irregularised** even if they should be considered as asylum seekers. Since September 2022, access to the asylum procedure on the mainland includes, first, the booking of an appointment through an online platform for the electronic pre-registration of asylum seekers and then the completion of the registration and the application in one of the two registration facilities in Diavata (Thessaloniki) or Malakasa (Attica). However, access to this has not always been possible, and in some cases, appointments for registration are assigned many months later. For example, some asylum seekers have waited over twelve months after initially applying for pre-registration before receiving an appointment (GCR-ECRE, 2023: 54). Moreover, in numerous cases, appointments were unavailable, underscoring the insufficient capacity of the facilities and resources. During this waiting period, applicants remain undocumented without access to reception provisions, medical care, or essential services, while they are not protected from detention (GCR-ECRE, 2023: 19-20).

‘There is also a part, before you go to the asylum procedure, if you have passed without ending up in a RIC or CCAC, hence you did not have access to asylum, then you have to make an appointment on a platform, appear in Malakasa (RIC), be subjected to de facto detention [...], and until you do all this you are in fact again in a limbo, even the document you get for your appointment does not give

³ To name but just a few, the main laws adopted since 2015 related to asylum, protection and reception of refugees are the Law 4375/2016 ‘Organisation and functioning of the Asylum Service, Appeals Authority, Reception and Identification Service, etc.’ and its amendments; Law 4540/2018 ‘Adaptation of Greek legislation to the provisions of Directive 2013/33/EU etc.’; Law 4636/2019 ‘on international protection and other provisions’ and its amendments; and Law 4939/2022 ‘Ratification of the Code on reception, international protection of TCNs and stateless persons, and on temporary protection in cases of mass influx of displaced migrants’ and its amendments.

⁴ In this paper, we avoid differentiating between the terms ‘migrant’, ‘refugee’, ‘asylum seeker’, etc., due to our understanding of the movement of refugees as a component of the broader migration phenomenon. The use of the term ‘asylum seekers’ is because it is the official designation used by the asylum system that we examine, and although conformist, the term highlights the tenuous distinction between migrants and refugees.

you any rights. You may be arrested while holding this document'
(GAPs_GRstakeholder13_2024).

As the above indicate, such long, complex and lengthy procedures lacking basic safeguards create frustration among refugees, disincentivise asylum applications functioning as a form of deterrence, and eventually push asylum seekers into different forms of irregularisation. As mentioned by a lawyer, representative of a Greek NGO, this development also indicates a policy of expelling refugees and the refugee issue from the public sphere and from visibility. It should be mentioned that before the adoption of this procedure (since 2014), access to the asylum procedure on the mainland took place through an appointment system via Skype, also characterised by structural difficulties. Its shortcomings were primarily due to its limited capacity and availability of interpretation services, as well as barriers hindering applicants' access to the internet. As a result, individuals seeking asylum often had to make numerous attempts over several months before successfully connecting to the Skype line to secure an appointment for the full registration of their application. This process exposed them to the risk of potential arrest and detention by the police, while they were denied the support typically offered to asylum seekers, notably access to reception provisions (GCR-ECRE, 2023: 53).

The labyrinth of irregularisation is reproduced through asylum procedures themselves, which have become too complex. Different procedures are defined in Law but amended several times during the last few years, making the system extremely complicated. These include: 1) the Regular procedure (which may be either a i) Prioritised examination for applications likely to be well-founded or made by vulnerable applicants, or a ii) fast-track processing which aims at accelerating the processing of specific caseloads as part of the regular procedure, without reducing procedural guarantees), 2) the Admissibility procedure, 3) the Border procedure (which includes two types, i) the 'normal border procedure' and ii) the 'fast-track border procedure', 4) the Accelerated procedure (which entails lower procedural safeguards, whether labelled as 'accelerated procedure' in national law or not.) among others (GCR-ECRE, 2023: 25).

Moreover, a number of other ad hoc procedures also exist, that in cases contradict the rule of Law, but affect refugees' experiences and may reproduce aspects of irregularisation. An indicative example emerged during the first years of the 'refugee crisis' and its management on the Aegean border islands. More particularly, since 2017 a 'pilot project' known as the 'Low-Profile Scheme' has been implemented in Lesbos, Kos and partly Leros (Leivaditi et al., 2020). The 'Low Profile Scheme' refers to a highly systematised and arbitrary practice of detention which is not legally defined in the legislation. Newcomers belonging to particular nationalities, whose country of origin has low recognition rates in the EU due to the safe country of origin concept (such as people from Algeria, Morocco, Egypt, sub-Saharan countries, the Sahel, Pakistan and Bangladesh), were immediately placed in administrative detention upon completion of reception and identification procedures and remained there for the entire asylum procedure (GCR, 2018). Another more recent example, as explained by a lawyer, representative of an NGO, is that a process that provides refugee status to particular groups without an asylum interview has been implemented on the CCACs on the islands since September 2023. The procedure is called 'prima facie' and concerns people from Sudan, Yemen, and Palestine who after registration receive refugee status only through their files, without the need to conduct an interview (GAPs_GRstakeholder13_2024). Such practices constitute ad hoc decisions of actors in the field, permitted through the asylum system, giving room for arbitrary decisions to be made, by thus reproducing and redefining different categories of people; those 'deserving' and the 'undeserving' asylum and protection, as

categories that are highly fluid and unstable and may irregularise particular groups or individuals in not always visible ways.

As the above indicate, the asylum laws, policies, regulations and the institutional framework as they have been established and transformed since 2015-2016, reproduce a labyrinth of irregularisation for refugees in Greece. What is crucial is that irregularisation is reproduced in all stages of an asylum application, as also discussed in the following sections. It forms part of the procedure towards the registration of the asylum claim, when asylum seekers encounter the discouraging temporalities of the asylum system and its carceral dimensions through their detention. It is also reproduced through the multiplicity of asylum procedures that refer to - and at the same time construct- different categories of people, mainly around the axes of deservingness/undeservingness. Categorisations such as refugees VS asylum seekers, have already given their place to a range of categories based on different criteria or concepts, i.e. the 'safe country of origin' division. Such procedures derive –not from the 'gaps' of the asylum system– but from its very core, and systematically irregularise people and discourage asylum applicants of their right to asylum.

5.2 Criminalising asylum seekers' practices by depriving them from reception provisions

After the EU-Turkey Statement, the Hotspot approach, and the closure of the Balkan route, people on the move have been obliged to stay in Greece and undergo asylum procedures, by that time as the only possible pathway of regular migration towards Europe (Papatzani et al., 2022a). This pathway constitutes –till today– an option giving access to the status of asylum seeker, regular in its legal basis, but with a range of obstacles related to people's movement, settlement, and integration trajectories in the country.

The most prominent example is the increasing number of regulations that concern asylum seekers' reception stage during the examination of their asylum claim. Asylum seekers are obliged to follow a number of rules during their asylum examination, otherwise the reception conditions they are entitled to, or other reception provisions they receive during their stay in camps may be reduced or even terminated. More particularly, according to Article 61 (1), (2), (3) and (4) of the Asylum Code, reception provisions may be reduced or -in exceptional and specifically justified cases- withdrawn, following a decision of the competent reception authority, where applicants: a) If provided with accommodation in the context of reception, abandon said accommodation without informing the competent administration or without permission, or abandon the geographical location of residence which has been determined for them in the case of the geographical restriction on the Aegean islands; b) Do not comply with the obligation to report personal information, such as address and employment contracts, or do not attend in person or do not respond to requests for information or do not attend, in the process of the examination of their application for international protection, a personal interview within the deadline set by the receiving and examining authorities; c) Have lodged a subsequent application (GCR-ECRE, 2023: 150). Secondly, the reception authority reduces material reception conditions if it determines that the applicant has not submitted an application for international protection promptly upon arrival in Greece without a valid reason. Thirdly, the reception authority may withdraw material reception conditions if it is found that the applicant has concealed financial resources, thereby unjustly benefiting from these conditions.

Moreover, in 2021, a new regulation was introduced for the newly established CCAC on the islands. This includes the possibility of terminating accommodation and withdrawing material reception if applicants are unjustifiably not identified during two consecutive regular census-verifications of the resident population, although no separate procedure is outlined for this. Such census-verifications are also implemented in mainland camps regularly, and asylum seekers that are absent may lose their accommodation places in the camp (Papatzani et al., 2022a).

Based on the above regulations, asylum seekers, even if usually are not in risk of return or detention as they are considered as a ‘regular’ category, they are not permitted to implement a number of practices related to mobility and settlement in the country, as the asylum system renders these practices ‘irregular’. As the Greek Council for Refugees has reported, between June and December 2020, material reception provisions were withdrawn for 4,957 individuals—2,964 of whom were residing in camps and 2,033 in the ESTIA accommodation scheme—following either status recognition or a second-instance negative decision (GCR-ECRE, 2023: 152).

Yet such ‘irregular’ practices may include asylum seekers’ trans-regional or trans-local movements between different reception facilities in the country, their absences for reasons of employment before the period of six months after which they are entitled to work ‘legally’, their movements between different places e.g. from the camps to the nearest cities in order to cover daily needs, or needs of health and education, or maintain networks and relationships, among others (Papatzani 2022a; 2022b). Nevertheless, the labyrinth of complex regulations and highly restrictive rules, mainly related to asylum seekers’ reception and accommodation, essentially **irregularises such everyday practices of asylum seekers**, as people with regular status, through a range of punitive measures (e.g. by withdrawing or reducing material reception services and provisions). It thus may reproduce processes of irregularisation even during the examination of an asylum claim, thus during people’s entitlement to asylum provisions and to ‘regularity’.

5.3 Safe third country inadmissibility & suspension of read-missions to Turkey

Among other aspects of the increasingly complex asylum system, the admissibility procedure mentioned above has acquired a crucial role in the last few years relating to processes of irregularisation emerging especially since 2015. Under Article 89 of the Asylum Code, an application can be considered inadmissible, among others, when the ‘safe third country’ concept is applied.

The examination of the safe third country concept in practice used to take place under the scope of the fast-track border procedure since 2016. More specifically, from 2014 until June 2021, it was applied to **Syrians who fell under the EU-Turkey Statement**, namely those who had entered Greece via the Greek Aegean islands and who were subject to a ‘geographical restriction of freedom of movement’. They were **eligible to a fast-track procedure examining their cases** and often resulting in the granting of refugee status⁵. This situation

⁵ This procedure also applied to those who formerly resided in Syria who could provide original documents such as passports, or who had been identified as Syrians/persons with a former residence in Syria within the scope of the Reception and Identification Procedure; provided that the EU-Turkey Statement and the fast-track border procedure did not apply in their case.

changed significantly after the Joint Ministerial Decision (JMD) 42799/2021⁶, designating Turkey as a safe third country for asylum applicants coming from Syria, Afghanistan, Somalia, Pakistan, and Bangladesh without providing any legal reasoning (GCR-ECRE, 2023: 83). As a result, applications for international protection lodged by persons of the aforementioned nationalities, this time **throughout the Greek territory (borders and mainland)** (and not only at the borders) are examined under the safe third country concept; they are now channelled into the admissibility procedure upon arrival, to assess whether Turkey is a safe third country and whether their cases are admissible and should be examined on the merits. Three out of the five nationalities mentioned in the JMD are those who are most often recognised as refugees in Greece. The following table presents the numbers of inadmissibility decisions issued in 2022 and 2023, including decisions based on the border procedure and the safe third country concept.

Table 1. Inadmissible Decisions in 1st & 2nd Instance, including those based on the border procedure and the safe third country concept

Inadmissible Decisions in 1st & 2nd Instance, including those based on the border procedure and the safe third country concept				
	first instance inadmissibility decisions	first instance based on the border procedure and the safe third country concept	second instance inadmissibility decisions	second instance based on the border procedure and the safe third country concept
2022	8,962	3,601	6,043	2,708
2023	8,901	3,454	5,030	1,237

Source: Ministry of Migration and Asylum, 2023, 2024, & authors' elaboration

Contrary to Art. 38 (4) of the Asylum Procedure Directive, applicants are not provided with an in merits examination. The overwhelming majority of those decisions concerned the procedure on the mainland. Subsequent applications lodged following a final rejection of an application for international protection as inadmissible are channelled again into admissibility procedures and dismissed based on the safe third country concept or due to a lack of new elements.

“The adoption of a national list on the designation of Turkey as a “safe third country” for citizens of Afghanistan, Syria, Pakistan, Somalia and Bangladesh has led to the arbitrary rejection of numerous asylum applications as inadmissible. As a result of the EASO, the Asylum Service rejects the international protection applications of applicants from these five countries without examining their merits, i.e. the reasons why they left their countries’ (GAPs_GRstakeholder6_2023).

At the same time, readmissions to Turkey have been suspended since March 2020 as a result of geopolitical antagonisms between Greece and Turkey, manifested through the events in

⁶ Amended by JMD 485868/2021 and 734214/2022

Evros region, after which Greece suspended the registration of asylum applications for one month and foresaw immediate deportation for those entering the Greek territory, while Turkey declared the suspension of readmissions presumably due to the COVID-19 outbreak (RSA, 2020). The suspension of readmissions to Turkey has created a wide 'grey zone' and exposed thousands of applicants for international protection, including vulnerable persons, to a number of significant risks (Hatziprokopiou et al., 2024). Particularly, refugees whose applications have been/are rejected as inadmissible based on the 'safe third country' concept end up **in a state of legal limbo, exposed to a direct risk of destitution and detention**, without access to an in-merit examination of their application and without the possibility to lodge a subsequent asylum application (GCR-ECRE, 2023: 83). This also leads to the **exclusion of people from reception conditions**, resulting in no access to dignified living standards or to cater for their basic subsistence needs, including health care and food (GCR-ECRE, 2023: 130). Despite this, the Asylum Service continues not to apply Article 38(4) of the Procedural Directive to applicants whose application is examined on the admissibility under the safe country concept vis-a-vis Turkey. As stated repeatedly by the EU Commission, 'to the extent the applicant is not permitted to enter the territory of the safe third country, in particular if the underlying situation preventing entry persists since 2018 or 2020, the MS shall ensure, in accordance with the Asylum Procedures Directive, that access to a procedure is given to the applicant' (GCR-ECRE, 2023: 20-21).

'People whose asylum claim is rejected under the safe third country [...] And at the same time, since March '20, before the Common Ministerial Decision, Turkey does not accept anyone back, okay? The Directive says that these people should normally, if they can't be returned, should have access to a merits examination. [...] We are talking about refugees. Syria, Afghanistan, Somalia. [...] in Greece there is no [...] automatic procedure as required by the Directive, that (since) you cannot be returned, I will examine you on merits and you will be granted refugee status. [...] Yeah, so there were a lot of people who are Syrian citizens, who are refugees and they make an asylum claim in Greece, it is rejected, as unacceptable, and they are left in a legal limbo. And then they have to reapply, reapply for asylum to have their claim examined' (GAPs_GRstakeholder13_2024).

In October 2021 this situation changed drastically. An internal Standard Operating Procedures (SOP) of the Asylum Service, still in force, declared that asylum seekers of these nationalities that had crossed from Turkey **a year ago or more must be considered as not having a special link with Turkey or that, in any case, this link had been breached**. Subsequently, this was applied to the majority of cases examined on the Aegean islands, leading, eventually, to admissibility decisions and the examination of the asylum applications on their merits. Thus, several first instance decisions with the same reasoning have been issued since October 2021, since the aforementioned SOP started to be implemented. **This has been of great importance for all Syrian cases, and even Afghanis and Somalis stuck in 'limbo' in Greece for more than a year**, many of whom were waiting for the examination of their subsequent applications.

'At some point in 2022, the Asylum Service said, [...] "if you've been in Greece for a year, then I don't consider you to have a connection with Turkey, so I consider your application admissible" [...] so in that one year, waiting for the one year to pass you are in limbo, so you are in limbo. Also, if you've made an asylum claim in this year e.g. you don't have proper legal advice, how would you know that

trick, that's a trick we're talking about. [...] but we end up saying to a person, "don't make an asylum claim yet, wait...". Yes, but if you make an asylum application and it is rejected because the year has not passed, for example, and you go to make a second subsequent one as soon as the year has passed, you have to pay a fee of one hundred euros. And if you're a family of six, it's 600 euros' (GAPs_GRstakeholder13_2024).

The above-mentioned 'trick', as one legal representative described it, managed to provide a temporary solution for people who were stuck in a legal limbo because their applications were deemed inadmissible due to the fact that Turkey was considered a safe third country, but at the same time they couldn't be returned to Turkey due to the suspension of readmissions. By waiting for a year, they could prove that they had no ties with Turkey, but during this 'waiting' they remained irregularised in Greece, without any rights. If they were lucky enough to have well-informed legal advice, they would be able to have their applications considered admissible after this one year - if not, they would have to make another application, paying a fee. The complex situation described above is only one of many that place refugees in a position of obligatory protracted irregularity, to be finally followed (after the late issuance of the authorities' decision) by the admissible examination of their asylum claim, which will hopefully lead to international protection at a later stage. In other words, when international protection is acquired, it follows a sequence of irregularity.

5.4 Irregularisation during processes of notification of decision and appeals

Aspects of irregularisation are also reproduced during processes of notification of the asylum decisions as well as processes of appeal. As regards the notifications of first instance decisions, it should be mentioned that the International Protection Act further introduced the possibility for decisions not to be communicated in person to the applicant ('fictitious service'/ *πλασματική επίδοση*) or to be communicated to the applicant by administrative authorities other than the Asylum Service. Both practices were maintained in the Asylum Code throughout 2022 and may significantly underestimate the possibility for the applicant to be informed about the issuance of the first instance decision and/or the content of this decision and/or the possibility to lodge an appeal. Consequently, deadlines for submitting an appeal against a negative first-instance decision may expire without the applicant being actually informed about the decision. As the Greek Ombudsman has noted with regard to the provisions of fictitious service, they effectively limit the access of asylum seekers to legal remedies (GCR-ECRE, 2023: 60). Concerning the notification of second instance decision, similar to the 'fictitious service' at first instance, both the International Protection Act and the Asylum Code also provide the possibility of a 'fictitious service' of second instance decisions as described above. Once again, as a result of this provision - which triggers the deadline for lodging an appeal - these deadlines for legal remedies against a negative second instance decision may expire without the applicant being actually informed about the decision (GCR-ECRE, 2023: 67-68). In other words, the applicants may remain irregularised without knowing it, and may lose their chance to appeal.

As far as appeals are concerned, first instance decisions of the Asylum Service are appealed before the Independent Appeals Committees under the Appeals Authority. Appeals before the Appeals Authority had automatic suspensive effect in all procedures under the previous law. The International Protection Act abolished the automatic suspensive effect for certain appeals,

in particular, those concerning applications rejected in the accelerated procedure or dismissed as inadmissible under certain grounds (GCR-ECRE, 2023: 65). The Asylum Code that came into force in the second half of 2022 has maintained these provisions. Thus, appeals submitted against decisions rejecting applications in the accelerated procedure or dismissed as inadmissible on certain grounds do not have an automatic suspensive effect despite the fact that these decisions also incorporate a return decision with immediate effect (GCR-ECRE, 2023: 20). In such cases, the appellant may submit an application before the Appeals Committees, requesting their stay in the country until the second-instance appeal decision is issued. However, considering the significant lack of an adequate system for the provision of free legal aid, it is questionable if such appellants will in fact be able to submit the relevant request. Suspensive effect covers the period during the time limit provided for an appeal and until the notification of the decision on the appeal (GCR-ECRE, 2023: 65).

According to the IPA, and regarding the process of judicial review, applicants for international protection may lodge an application for annulment of a second instance decision of the Appeals Authority Committees solely before the Administrative Court of First Instance of Athens or Thessaloniki within 30 days from the notification of the decision. According to the International Protection Act, following the lodging of the application for annulment, an application for suspension/interim order can be filed. The decision on this single application for temporary protection from removal should be issued within 15 days from the lodging of the application. The effectiveness of these legal remedies is severely undermined by a number of practical and legal obstacles, including – among others – that the application for annulment and application for suspension/interim order do not have automatic suspensive effect. Therefore between the application of suspension/interim order and the decision of the court, there is no guarantee that the applicant will not be removed from the territory (GCR-ECRE, 2023: 68-69).

Overall, the above legal provisions, as well as their particular implementation and the obstacles encountered tend to reproduce certain pathways to irregularisation, and at the same time do not protect from the risk of return or detention. The above remind what was earlier mentioned that irregularisation in Greece is reproduced in all stages of an asylum claim examination.

5.5 An ambiguous return framework of coercion that reinforces irregularisation

As Hatziprokopiou et al. (2024) recently noted, returns in Greece are governed by an ambiguous legal framework mainly due to preceding legal arrangements on ‘administrative expulsion’ that remain in force. More particularly, the co-existence of Law 3907/2011 which transposed the Return Directive 2008/115/EC into the Greek legislation and determines the operation of returns, and Law 3386/2005 regarding administrative expulsions of third country nationals in the Greek legal order seems to produce ambiguity regarding the respective scopes of the two laws. A number of inconsistencies emerge in this regard, including the fact that the state administration often bypasses the procedures of the Directive and apply the deportation procedures of Law 3386/2005 (Hatziprokopiou et al., 2024).

This is the case, for example, with expulsion decisions issued against TCNs illegally entering Greece at the borders even if the TCNs subsequently apply for international protection and obtain a permit to stay in the country; something that raises issues of compatibility with the Return Directive and the Return Handbook (European Commission, 2017). In Greece, TCNs irregularly entering Greece at the borders are arrested, detained and an expulsion decision is

issued against them in dereliction of the reception and identification process set out in Law 4939/2022 (art. 38). Additionally, CJEU has ruled that the term ‘in connection with the irregular crossing’ in Article 2(2)(a) of the Directive requires a ‘direct temporal and spatial link with that crossing of the border’. It thereby applies to persons ‘apprehended or intercepted by the competent authorities at the very time of the irregular crossing of the border or near that border after it has been so crossed’⁷. Subsequently, in the event that a TCN applies for international protection, s(he) obtains an authorisation to stay in the country and his/her expulsion is suspended until the completion of the examination of his/her application. If the application is rejected, the expulsion decision is executed in accordance with the procedures of Law 3386/2005. This procedure raises issues of compatibility with Article 2 para. (2) (a) of the Return Directive which clarifies that an exception from the scope of the Directive can only occur if TCNs who were caught irregularly crossing the border were not subsequently granted the right to remain in the country (National Commission for Human Rights, 2021).

‘The (Return) Directive sets a framework and explains when it is allowed an exception, derogation from the framework of the Directive [...] What has been observed over the last 7 years in the islands of the Eastern Aegean is that this derogation is being systematically used, but without the relevant conditions for the use of this derogation, i.e. there is no closely linked arrest of a person in the border. [...] The police systematically issues a deportation order to exist, which is often not delivered. [...] so that an administrative individual file can be opened and an administrative readmission procedure can be initiated. [...] This practice is doubly problematic because, on the one hand, a decision ordering an illegal removal (expulsion) is issued, since the asylum seeker is not expelled, while the asylum procedure is ongoing, on the basis of the principle of non-refoulement, and, on the other hand, it is issued with the wrong procedure because it does not legally derogate from the Return Directive’ (GAPs_GRstakeholder6_2023).

Another type of irregularisation may emerge even during the assisted ‘voluntary’ returns from Greece, and particularly the Assisted Voluntary Return and Re-integration Programme (AVRR), implemented by the International Organization for Migration (IOM). While participation in AVRR is voluntary in the sense that any participant has the right to withdraw at any time, the wider context in which the program operates is one of coercion (Hatziprokopiou et al., 2024). Other scholars also argue about the character of AVRR program as a project of ‘self-deportation’ (Spathopoulou et al., 2022). This is because AVRR is also addressed to migrants issued with a return decision and even detainees and thus, it risks being a ‘facade’ of ‘voluntariness’ for migrants who face ‘the tough dilemma of absconding or departing “voluntarily”’ (Triandafyllidou & Ricard-Guay, 2019). Besides, the interplay of formal policies and informal practices in returns may reveal the nuances in the forced and voluntary return dichotomy, and more importantly the coerced nature even of the ‘voluntary’ procedures (Sahin-Mencutek & Triandafyllidou, forthcoming). Furthermore, there exist relations between AVRR and detention, as IOM’s practices include close interventions and communication in detention centers, as people registered in AVRR may also be kept in detention. On the one hand, this applies to those who register for AVRR while in detention and remain detained despite their declared willingness and consent to return. On the other hand, it may also apply to those who register in AVRR while at liberty but get arrested by the police

⁷ CJEU, Case C-47/15 *Affum b Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai*, 7 June 2016, para 72; Case C-444/17 *Aribi*, 19 March 2019, para 46.

afterwards and are held in detention, again despite that AVRR procedures have already started (Hatziprokopiou et al., 2024).

Even more crucially, registration in the AVRR involves an implicit coercion leading to the acceptance of an irregular status, as enrolment in the program and its provisions presupposes that the migrants should abandon or withdraw their efforts on asylum applications, to refrain from any rights coming with a regular status – either of an asylum seeker or of an international protection beneficiary or a migrant on a valid stay permit – and remain in an irregular status for a few days before applying for return.

‘The whole part of the returns is based on the free will of the person [...] Even a recognised person, a migrant who has received international protection, can give up his status if he wants to, and go through the process normally. [...] Then there is the case of a person coming to us, being an asylum seeker here, that is, with an active asylum claim, but wishing to leave. In that case, the resignation procedure should be promoted, i.e. the person should give up the asylum, so that the resignation can act as a decision to return. Again, it is done with a referral from us in cooperation with the asylum service, an appointment is made and the person can go to the asylum service and withdraw from the asylum claim’ (GAPs_GRstakeholder1_2023).

What the above reveal is that irregularisation is directly reproduced by the legal and institutional framework of governing returns in Greece. This framework allows the authorities to employ detention and deportation procedures even for people who claim asylum immediately. In parallel, in the case of ‘voluntary’ assisted returns, questions of coercion arise (Sahin-Mencutek et al., 2023; Sahin-Mencutek & Triandafyllidou, forthcoming), in an otherwise self-proclaimed ‘voluntary’ program based on the free will of people and their informed decision.

5.6 Irregularisation as process: The stories data (don’t) tell

In the previous sections we showed how irregularisation is (re)produced in Greece through the immigration policy framework and asylum system, focusing on specific procedures and practices within the latter as evolved since 2015 and especially considering recent developments. The complexity of pathways to and from (ir)regularity as well the ambiguity, fluidity and hence precarity of status unveiled a rather messy situation in sharp contrast with the clear-cut on/off or either/or categories of documented vs illegal that politicians like to portray and that official statistics often imply. For example, the structure of Eurostat data under the topic ‘Enforcement of immigration legislation’ (EIL) consists of four sub-topics: refusal of entry at the external (Schengen) border; individuals found to be illegally present in the territory of a Member State (MS); individuals ordered to leave a MS (not including those transferred to another MS under the Dublin mechanism); and those who ‘returned’, i.e. left a MS following an order to leave (Eurostat 2022)⁸.

This is a structure apparently suitable for two connected purposes. The first is to evaluate and assess law enforcement, especially by comparing the number of those returning to the larger pool of those ordered to leave and the even larger of those illegally present. The second is to

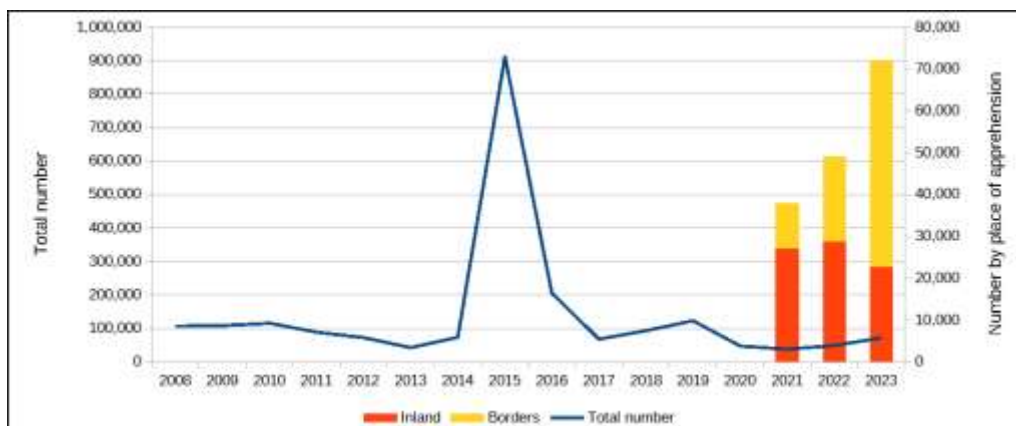
⁸ Also see Reference Metadata at:

[https://ec.europa.eu/eurostat/cache/metadata/en/migr_eil_esms.htm]. Accessed: July 14, 2024.

create the impression that irregularity, albeit being by definition a difficult to measure phenomenon, is supposedly captured and monitored by official statistics. In other words, official statistics tend to shrink the complex process of irregularity/irregularisation into a simplistic linear succession of apprehension – order to leave – return. Paradoxically, detention statistics are not included, despite that detention is a key element of legislation enforcement, at least in the Return Directive (2008/115/EC). Similarly, there is no data about how many migrants were stopped by law enforcement agencies for the purpose of checking their documents and *not* found to be illegally present.

According to Eurostat data, the number of ‘TCNs found to be illegally present’ in Greece ranged from approximately 40,000 to slightly over 100,000 for most of the period from 2008 to 2023, with one notable exception in 2015-2016, years of the so-called ‘refugee crisis’ (Figure 1, blue line). Available data for past three years 2021-2023 reveal that the distribution between those who were apprehended in border regions and those apprehended in the inland is roughly equal, albeit showing some yearly fluctuation (Figure 1, yellow/red bars). As for the reason for apprehension, the vast majority of the cases are officially recorded by Eurostat as ‘illegal entry’ and only a few hundred each year as ‘overstay’. Obviously, this means that numerous migrants are apprehended for illegal entry in places of the inland practically unconnected with official or unofficial entry points at the borders.

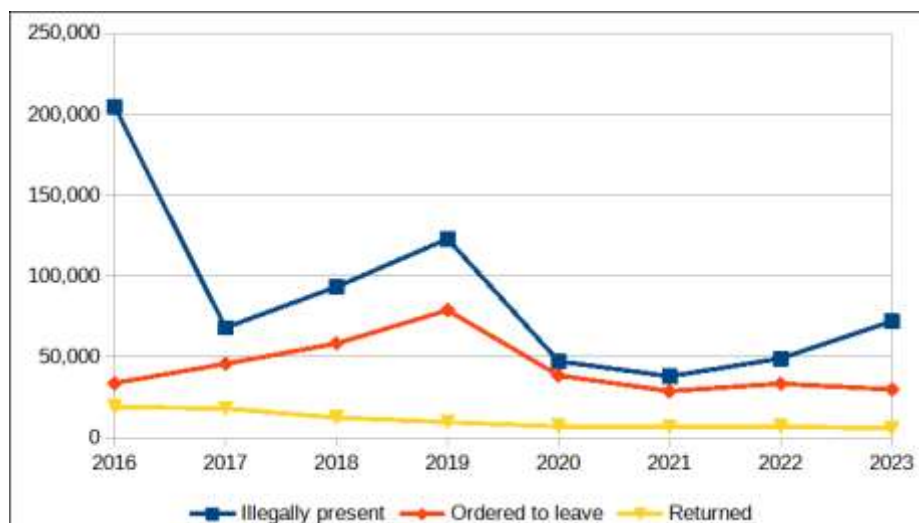
Figure 1: Number of TCNs found to be illegally present in Greece, 2008-2023



Source: Eurostat database [migr_eipre]

The number of TCNs ordered to leave showed a sharp increase after 2015 and then decline over 2020-23, with an exception in 2022, following a relatively parallel trend with the data described above (Figure 2). At the same time, the number of those who returned following an order represents a steady minority only of those receiving such an order. Moreover, an overview of the main nationalities of the individuals who were identified as illegally present between 2016 and 2023 shows that seven out of ten were citizens of five countries: Syria comes first (with 25%) and is followed by Afghanistan (17%), Albania (11%), Iraq (10%) and Pakistan (10%). The same countries figure in the top of the list of those receiving a return decision, but in a different order: Albania (17%), Pakistan (17%), Syria (12%), Afghanistan (10%) and Iraq (8%). Concerning migrants who did ‘return’ to another country during the same period, either by a forced return operation, an assisted ‘voluntary’ return operation or as non-assisted, the main countries of citizenship include Albania which comes first with 51%, Pakistan (11%), Georgia (10%), Iraq (7%), and Afghanistan (3%), but returns to the country have effectively ceased since 2022).

Figure 2: Number of TCNs found illegally present, ordered to leave and returned, Greece 2016-2023 (rounded)



Source: Eurostat database [migr_eipre], [migr_eiord], [migr_eirtn].

There are two main conclusions that derive from these statistics. First, Albanians, by far the biggest migrant group in the country and a long-established one, also constitute the biggest group of those returned from Greece to their country of origin. Despite that most 'irregular' Albanians are apprehended for illegal entry in Greece, they mainly get arrested in inland areas. We may reasonably assume that at least a number of them and subsequently of those returning are not newcomers, but people who have lived for longer or shorter periods in Greece, possibly moving 'back' and 'forth' between Greece and Albania, albeit not being able to get and/or renew a legal migrant status⁹. Second, several other third country nationals continue to be identified as 'illegally present' and subsequently ordered to leave, despite being citizens of countries where return is practically impossible, for whom high levels of recognition as beneficiaries of international protection are recorded. Apart from Syrians and Afghans, this also applies to migrants from smaller communities in Greece, such as Palestinians and Iranians. Thus, irregularity can be seen as a condition that affects various migrant groups, either those with members that have longer presence in the country and have experienced previous and current periods of legal stay, or those with members who face life conditions directly linked to what international rules determine as refugee status.

The national system for collecting and processing EIL-statistics starts with the Regional Services of the Hellenic Police which register data in an application called 'Mapping of Migrants'. Two centralised police agencies, namely the Border Protection Division and the Migration Management Division are responsible to 'receive' and 'extract' data from this application and then to 'fill into Eurostat's template' and 'validate the results'. Despite that there is no external validation and data quality assessment mechanism, the related National Reference Metadata published by Eurostat¹⁰ reports no accuracy issues. However, beyond the quality of data as such, the procedures followed by the Hellenic Police and other collaborating

⁹ Eurostat data remain silent about the period of stay or the date of arrival of the apprehended and the 'returned' in a MS. Failing to collect such information, individual trajectories prior to apprehension or return are effectively effaced.

¹⁰ See [https://ec.europa.eu/eurostat/cache/metadata/EN/migr_eil_esqrs_el.htm]. Accessed: 14 July 2024.

agencies while enforcing the immigration legislation are out of the question for the National Reference Metadata – similarly as in the case of other aspects of institutional practices producing irregularisation shown in this chapter.

Furthermore, migrants' trajectories often follow paths that fall beyond the scope of the clear-cut categories and sequential stages unfolding in the linear way as the data imply. As mentioned earlier, applying for asylum in Greece is one of the few possible regular migration pathways towards Europe. Nevertheless, as we have shown, the asylum processes entails multiple aspects of irregularisation, even in cases of regular status, e.g. that of the asylum seeker. At the same time, the hardships that asylum seekers encounter in Greece affect future mobilities and decisions. It is not rare, for example, asylum seekers, or beneficiaries of international protection to decide to irregularly leave Greece towards other European countries where circumstances are better. Most usually complete the asylum process and attempt to reach their desired destinations once they receive international protection status in Greece, yet there are some who leave Greece before completing the process (Papatzani et al., 2022a). This practice results in irregularity in their new destinations, as asylum seekers in Greece will have to confront the Dublin Regulation on the 'first country of asylum' and the implications it may bring, while recognised refugees are allowed to travel to other EU countries for three-month visits only. Despite this, there exist institutional pathways permitting refugees recognised in Greece to settle in other EU countries, on the grounds of harsh living conditions and limited integration prospects; these include a number of courts' decisions in line with the 2011 judgment *M.S.S. v. Belgium and Greece* that did not permit refugees recognised in Greece to be returned¹¹.

At the same time, the labyrinthine asylum system and the strict and complex policies and procedures that are meant to deterrence may lead people on the move to **decide not to apply for asylum in Greece and skip entirely the system from the very beginning**, by trying to avoid being arrested and fingerprinted at the borders or in mainland Greece (Papatzani et al., 2022a). In other words, some migrants may choose to remain **self-irregularised** during their short stay in Greece, while making arrangements for their next mobility steps, and remain undocumented in different areas in the country, usually the large urban centers, while their everyday life mainly involves a continuous search for ways to leave Greece. As undocumented, they are constantly under the fear and threat of arrest by the regular police controls on the streets, which could lead to their detention and deportation from Greece. This is why, as research has shown in the case of Athens, they usually avoid spending time in public, they use to hide from the police, change their routes during their everyday mobilities, thus living in the shadows of the city even if at the same time residing at its very center (Papatzani, 2021).

¹¹ e.g. <https://www.courthousenews.com/refugees-cannot-be-returned-to-greece-german-court-rules>

6. Intersecting Layers of Irregularisation

6.1 Temporal

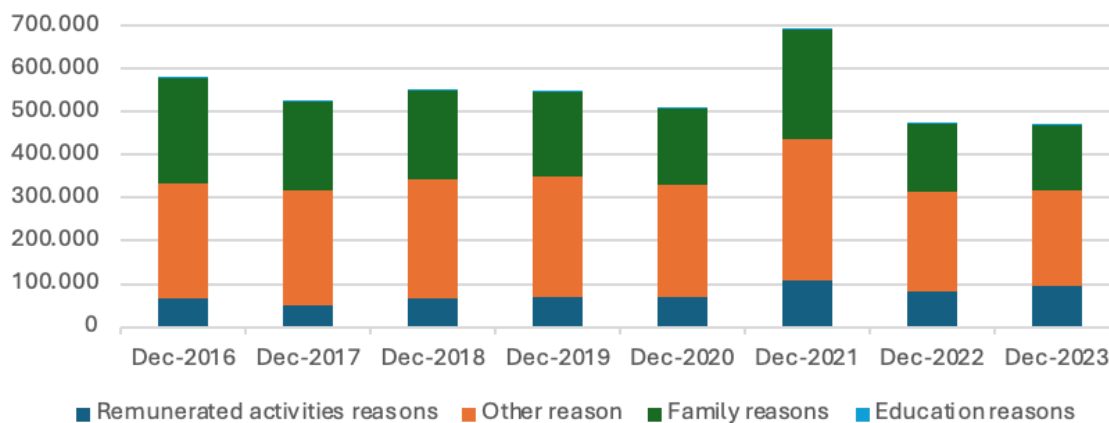
Conceptualising irregularisation as a process implies a temporal layer. As evidenced throughout chapter 5, for various normatively defined categories of migrants, the Greek migration regime is characterised by different stages and sequences, diverging paces and tempos, timeframes and deadlines, durations and temporalities as well as temporal inconsistencies. This section brings to the fore some of the temporal dimensions in processes of irregularisation stemming from the legal framework, administrative procedures and their implementation in practice that have already been discussed in the previous chapter. Moreover, it situates these in a historical overview of how Greek migration and asylum policies have evolved over time.

Irregularity may be a product of the law, but it begins at the borders even before they are crossed. The observation by van Liempt et al. (2023: 4) that ‘in the 21st century, irregularity is inherently related to the lack of legal migration channels’ holds true in our case. Indeed, the vast majority of newly arriving migrants enter the country without authorisation, mainly due to the unavailability of alternative (legal) routes. This may paradoxically bare similarities with the early 1990s, i.e. when Greece first emerged as a destination and most migrants arrived by irregularly crossing the border due to the virtually absent provisions for regular entry (and stay). Even when legal pathways to regularisation came by, in the late 1990s, these proved to be complicated in practice, due to the spirit of these measures but also their administrative handling (Hatziprokopiou, 2006), and were marked by several temporalities: stages, overlaps and setbacks, waiting, time inconsistencies.

A first ‘amnesty’ programme, for example, initiated in 1998, involved two stages: people would receive a temporary permit at a first place before being able to apply for a stay permit of longer duration; but tight criteria including proof of regular employment had deterred many from passing on to the second stage. This is why the applicants in subsequent large-scale regularisation programmes (2001, 2005) partly overlapped, either because a previous application was rejected, or because criteria for renewal were impossible to meet (Triandafyllidou, 2014). Long queues of people waiting to submit applications or receive documents from various authorities were common, sometimes resulting in casualties that have never been investigated (Kandylis, Papatzani, Polyzos, forthcoming). The short duration of most stay permits, coupled with administrative deficiencies such as severe delays in the issuing or renewal of a permit would often result in the absurd situation of receiving the documents after they had expired (Hatziprokopiou, 2006). In the meanwhile, short-sighted planning had resulted in legal gaps that left certain categories of people with migrant background in a limbo, again involving temporal layers entailing setbacks to irregularity. Coming of age is an example: when the children of immigrants would reach adulthood, they lost their status as dependents covered by their parents’ stay permit. In the lack of provisions specific to them, applying for a stay permit often led to bureaucratic absurdities such as being asked to submit a birth certificate from their parents’ country of origin even if the applicants were born in Greece¹².

¹² An amendment to the Citizenship Law 3838/2010 came to provide a relatively easy path to citizenship for children born or schooled in Greece, yet this was later annulled by the Council of State, before being partly reinstalled through provisions for a special ‘second generation’ permit (Law 4251/2014) and subsequent measures facilitating access to citizenship (Law 4332/2015). The recent Immigration Code (Law 5038/2023) has been criticised for reintroducing difficulties for some categories of children born

Figure 3: Valid resident permits in Greece, 2016-2023



Source: Ministry of Migration and Asylum, Authors' elaboration

Even though many long-settled migrants are now holders of long term or indefinite duration stay permits, precarity remains order of the day. A look at stay permit statistics over time reveals high fluctuations in the numbers of legally residing migrants (see Figure 3): a significant growth of about 185,000 valid permits between 2020 and 2021 was followed by substantial decrease of more than 221,000 permits by the end of 2022. This may be partly explained by increased numbers of stay permit applications that the bureaucracy falls short to process: between 2021 and 2022 the number of applications for new permits grew by 47%, while those for renewals grew by 40%; within 2023, alone more than 121,000 applications for new permits were launched, more than double the number of 2022. As a result, there has been a rise of applications pending to be examined for both new stay permits and renewals: respectively 87,358 and 83,747 at the end of 2023. The point implied here has to do with the repercussions in the lives of the people concerned, revealing recurring patterns of lasting legal ambiguity for significant numbers of migrants. What is more, different types of stay permit expectedly are of different durations. Stay permits for dependent employment last for relatively short periods of time, while permits for seasonal work e.g. in agriculture give access to the Greek labour market for up to 9 months annually for a total period of up to 5 years. The aforementioned 'Memorandum of Understanding' signed in 2022 with Bangladesh (see chapter 4) had similar provisions. Similar timeframes are set in the ongoing larger scale regularisation giving access to a 3-year residence permit for employment to migrants who can prove three years continuous stay in Greece.

As mentioned earlier, even before 2015 asylum has long been a main 'corridor' for many migrants heading to Europe: asylum claimants in the 2000s would receive an application certificate (the so-called 'pink card') which would grant them temporary status, albeit precarious, though giving time to regularise their status or attempt onward movement (Papadopoulou, 2004; Christopoulos, 2020). To some extent this went on after establishing competent bodies, and continued, in the absence of any provisions for alternative pathways to regular entry, or safe passages for refugees, albeit in different ways amidst tightening border

or schooled in Greece who reach adulthood, as they can only be granted a stay permit provided they were holders of a different type of stay permit as minors.

controls, increasing restrictions and mushrooming legislation following the ‘long summer of migration’, as already documented in detail.

Registering for asylum involves multiple stages, temporalities and waiting periods. Registration at the border involves a period of confinement on the islands, often starting with ad hoc detention (see below) followed by stay in a RIC (or more recently a CCAC). Lately this is set to last for no more than 25 days, at least on paper. In cases of people who have crossed a land border or have otherwise managed to somehow bypass the island-based “hotspots” may involve much longer waits (over 12 months) between the moment of (online) pre-registration and the actual timing of a registration appointment, while in the meanwhile applicants remain in practice undocumented, without having access to reception provisions or services, neither protection from detention (GCR-ECRE, 2023: 19-20).

At the implementation level, however, there are diversions from the Law. For example, since 2016, for every new arrival ‘the Greek police systematically issues a deportation decision involving the newcomer’s detention, with the aim of readmission to Turkey’. This was noted by one of our expert interviews (GAPs_GRstakeholder6_2023), who explained that the police does so by invoking the provisions of Law 3386/2005 on deportation as well as Law 3907/2011 yet on derogation from the Directive; even if this is rarely implemented, it serves ‘to open an administrative individual file and to be able to initiate an administrative readmission process’. All too often, no time difference is stated on the document ‘between the arrival and the issuing of the decision’. Yet, in many cases, the decision is not handed to the persons concerned, hence they are not aware that there’s a deportation decision which comes before all other procedures that follow.

The asylum procedure itself, as earlier detailed, is characterised by different tempos and varying paces: prioritised or fast-track *regular* procedure, fast-track *border* procedure, *accelerated* procedure. Moreover, expectedly as it may be in any bureaucratic system, different phases and steps in the asylum procedure involve specific timeframes, as well as tight deadlines. For instance, the MMA website informs asylum claimants: that their application may take between 2- days to six months to be processed; that, in case of a negative decision, an appeal must be lodged within a deadline specified in the decision; that, if granted Geneva refugee status, their Uniform-Format Residence Permit (ADET) is valid for three years and can be renewed by applying via e-mail no later than 30 calendar days expiry; and many more. Failure to meet deadlines in these cases does not deprive refugees from their rights, but involves expensive penalty fees.

However, such prescribed timeframes do not always work in practice, thus subjecting migrants and asylum seekers to further precarity and irregularisation. As mentioned, until recently, long periods of waiting and uncertainty (for an asylum decision, of staying in a camp, etc.) were followed by periods marked accelerated speed to meet several tight deadlines to complete several formalities. As we have seen in section 5.6, there have been cases of asylum seekers bypassing the reception system in order to move on with their lives and join family or other social networks elsewhere in the country (Papatzani et al., 2022a). This was of course before recent legal amendments which have increased punitive restrictions involving penalties, such as losing benefits or even revoking the asylum application (section 5.2). Moreover, when the ‘safe third country’ concept was initially introduced in legislation for specific nationalities (section 5.3), it was retrospectively applied for people who had been already waiting in a camp for an outcome on their asylum applications, which risked being revoked.

Further, deadlines for submitting an appeal against a negative first-instance decision may expire without the applicant being actually informed about the decision (section 5.4). Whether following a negative first instance decision or the outcome of an appeal, migrants receive an

order to willingly leave the country within a set period of time (subject to extension). However, not all migrants comply with this order, for a number of reasons. In a recent paper, Tsavdaroglou et al. (2024: 2) narrate the story of one of their interlocutors in Thessaloniki, a migrant from Algeria who crossed through Turkey in 2017: after spending two years in a camp, he received a negative decision, stayed homeless and undocumented before seeking ‘refuge, like many other migrants without papers or unregistered newcomers, to the abandoned train wagon areas in the western part of the city’. Going invisible and ‘under the radar’, however, as discussed in 5.6, may appear as a reasonable option for desperate asylum seekers who are separated from close family members and are tired of waiting for an asylum decision. Papatzani et al (2022a: 4396) recall the experience of a young Afghan woman who, at the time of her interview in 2020, resided in a subsidised (ESTIA) apartment in Athens after having lived in a Lesvos hotspot and a camp in Attica since her arrival in 2016, still waiting for her asylum interview. She was determined to follow her parents and siblings to join a sister in Germany, even if that meant traveling irregularly: ‘No, I don't want to wait for that... I have a plan to go, informally... There is no other choice’. The authors observe that ‘the boundaries between different mobility types are blurred and porous, as are the sequences of “legal” or ‘irregular’ statuses to which they lead and with which they closely interrelate’, concluding that ‘if ‘legality’ – that is, going through the Greek asylum system – entails multiple layers of immobilisation, then moving at the margins, bypassing restrictions, or opting out of the system may facilitate mobility in multiple scales, local or transnational, albeit unauthorized’ (Papatzani et al., 2022a: 4396).

6.2 Spatial

As evidenced in the previous chapter, the labyrinth of irregularisation procedures has its own equally labyrinthine spatiality. We could argue that irregularisation is an inherently geographical process that starts before border-crossing and entails diverse routes along which legislation and institutional practices categorise people and places (and emplaced people for that matter). Geography can be detrimental throughout the asylum process, impacting at the assessment of asylum applications as well as on the treatment of all the categories of migrants. Expectedly, the spatiality of irregularisation involves national borders but not only as lines that separate states. As has been discussed in an already vast but still burgeoning literature in border studies inspired especially by migration ethnographies borders may and do extend beyond border zones, both externalising outside and internalising within the nation-state (e.g. Parker et al., 2009; Mekdjian, 2015; Chattopadhyay, 2019; Fauser, 2024).

To begin with, migrants’ nationality determines in multiple ways their access to asylum and the outcome of their claims. In 2015 SIA (Syrian, Iraqi, Afghan) was a shortcode implying the faster and relatively easier access to the asylum process by nationals of these countries. Gradually, this relative ease was attributed solely to Syrians and more recently, not even to them as discussions about ‘returning’ Syrian refugees to safe areas there thrived recently. This is further reflected in the newer procedures (especially the border one) where migrants coming from countries with lower than 20% recognition rate will be directed to.

The route that migrants follow in order to reach Greece / the EU is also impacted by EU border control policies, including Frontex operations. This means migrants being directed to more dangerous crossings in order to avoid being apprehended, being more dependent on the traffickers and the information they provide and often finding themselves in highly vulnerable and risky situations before and during crossings; situations that clearly result in their multiple irregularisation. But even when they have reached or are about to reach the borders, migrants

might find themselves in the midst of state's (and implicitly EU's) illegal and informal practices of pushbacks. Numerous reports have traced and described the processes and often deadly outcomes of pushbacks. Even when not deadly, pushbacks pull migrants into yet another cycle of irregularisation and obstruction of filing an asylum application. If people escape being pushed back, when they are arrested at the borders, they immediately have a deportation order filed for them – even if it's not executed due to the filing of an asylum claim. As this is not something communicated with those arrested, people might find themselves into an irregular status while in Greece without even knowing it.

As several of our experts / interviewees pointed out, at present, there are minimal chances that a migrant can file an asylum application without being detained either during the identification process or as a result of the apprehension and arrest. Detention, along with the transformation of camps into 'Closed control access centres' create (carceral) zones of waiting and uncertainty at or close Greece's eastern (mostly) borders. In line to observations of several researchers, the border and the irregularisation it imposes is encountered not only at a country's territorial edges but also within.

Moreover, the assemblage of spatial entities involved in 'reception and identification', accommodation and return processes at times blurs the boundaries of (il)legal, (ir)regular, registered, detained, to-be-returned, deportee, asylum-seeker further. This assemblage consists of RICs, CCACs) which contain RICs and detention and/or pre-deportation facilities, Controlled Access Facilities of Temporary Accommodation (previously called *Open* Facilities), and Pre-Removal Detention Centers (PRDCs). The geography of these facilities extends to the Eastern border of Greece (Lesvos, Chios, Samos, Leros, Kos, Evros) plus Attica (Malakasa), Thessaloniki (Diavata) and the outskirts of smaller cities. Within these, people may acquire changing statuses and spectrums of (il)legalisation as they are transferred from one space to another. The aforementioned registration identification and return infrastructures / assemblage are also coupled with PRDCs, managed by the Greek police, at Korinth, Athens, Drama, Fylakio and Xanthi, as well as with police cells who operate as pre-departure 'facilities' (see Greek Ombudsman, 2023: 23).

The 'typical' process states that after identification TCs are transferred to inland facilities in order to either file and be assessed as recipients of international and subsidiary protection or to be re-admitted (to Turkey), returned or deported. Yet 'typical' often becomes rather untypical in the way the whole processes unfold. As one of our experts explains:

'There is an explicit obligation for the police/coast guard, as soon as they come into contact with a person who does not have the legal documentation, to take him/her to a RIC/CCAC to start the identification process. In practice this does not happen: on the islands they can be transferred to the RIC/CCAC, but if someone is arrested without papers in the centre of Athens the same thing will not happen, they will be transferred for detention to a police station and then to a PROKEKA (detention center) (e.g. Amygdaleza), while there is a RIC in the mainland, e.g. in Malakasa. In other cases, although new arrivals on the islands have been subject to a reception/identification procedure and have applied for asylum, a deportation order is issued against them, which is not served, but exists even though the asylum seeker is not deportable' (GAPs_GRstakeholder6_2023).

For a significant period of time, the enforcement of geographic restrictions from 2016 onwards trapped people in the islands leaving scant options for being transferred to inland facilities. Furthermore, as of 2020 re-admissions to Turkey (in line with the EU-Turkey

statement) have been suspended, leading to an increase of people ‘incarcerated’, detained for long periods of time as their future was ‘pending’.

Last but not least, as already mentioned in the previous section, the designation of safe third countries (Albania, North Macedonia and Turkey for Syrian, Afghan, Pakistan, Bangladesh and Somali nationals) as well as of safe countries of origin (Egypt, Nepal, Benin, Ghana, Senegal, Togo, Gambia, Morocco, Algeria, Tunisia, Albania, Georgia, India, Armenia, Pakistan, Bangladesh and Ukraine (?)) have strongly and adversely impacted the whole asylum (and return) process by ‘fast-tracking’ re-admissions and returns and by rejecting asylum-claims. As a result, migrants spend increasing periods of time in legal limbo (waiting for appeals, etc.) as well as in spatial and temporal limbo as re-admissions and/or return operations might not be feasible (interview13) and, in practice, are transformed into indefinite detention.

‘We officially know that the Afghans from 2021 onwards, because we sent a question to the headquarters of the Greek Police, that they are not being returned. And this has to do with the Taliban taking power. However, the single male Afghans, up to the end of 2022, continued to be detained in Greece for extended periods of time. This was a completely illegal detention. To our opinion, it was purely a means of discouragement and deterrence and of new entry. The idea was that we would give the message that we, here, are detaining the Afghans, which is completely stupid. I mean, we overestimate the deterrent power of detention. As if, they won't leave Afghanistan or Turkey to come here because we're going to detain them’ (GAPs_GRstakeholder13_2024).

Interestingly, the variability of border procedures seems to be further institutionalised in the EU’s new Pact on Migration and Asylum (2024). Especially the Screening Regulation with its border procedure and accelerated procedures form a very restrictive (legally, temporally, spatially and subjectively) framework for assessing the ‘right’ to asylum and for distinguishing the ‘real’ from the ‘bogus’ (namely economically/poverty driven) refugees. Specifically, ‘people who “pose a security risk, who mislead the authorities by providing false information or withhold information, or who are coming from countries with a low recognition rate’ will be subjected to a ‘border procedure’ with the result that they will not remain at liberty in the country while their claim is being examined, but be obliged to remain at specific facilities at or near the border, for a maximum period of 12 weeks until it is decided whether they will move on to the ‘in-territory’ asylum procedure –the normal asylum procedure– or to expulsion (González Enríquez, 2024). The accelerated screening process is supposed to take place within seven days, deciding upon whether the person should be transferred to the traditional asylum procedure, be returned or go through the border procedure.

Detention, especially at the borders and nearby areas, becomes the de facto material and institutional way of ‘managing asylum’, since ‘the border procedure will often take place in detention, as will the new “pre-entry” screening process’ (Woollard, 2024). Both the screening process and the accelerated border procedure as well as the expansion of the use of detention, are founded on the legal method of ‘fiction of non-entry’. The ‘fiction of non-entry’ maintains that although a person is physically on the territory of a MS, legally his/her arrival at EU territory is not recognised as such thus placing her/him in a gray/limbo/transit zone (Woollard, 2024; Schug, 2024; González Enríquez, 2024). Woollard (2024) argues that both for border and accelerated procedures (which can be cumulative) ‘the pretence of non-entry applies, even when they take place away from the border, elsewhere on the territory, which is allowed’. Statewatch (2024) contends that the fiction of non-entry leads to lower safeguards and heightens the risk of human rights violations and pushbacks at borders.

6.3 Carceral

The link between return and detention is quite straightforward in the EU Return Directive (2008/15/EC), which set up ‘common standards and procedures for returning illegally staying third-country nationals’. In it, detention is prescribed as a means ‘to prepare the return and/or carry out the removal process’ of those who are ‘subject to return’, namely those who do not fulfil the Schengen conditions or other conditions for entry and stay in a MS. Thus, the Directive seems to imagine a linear procedure starting from illegal entry or stay and leading in turn to identification to a return decision to detention to removal. It is commonplace to remark that things are much more complicated during law implementation than on paper. What we further argue here is that implementation procedures work in a somewhat inverse trajectory, one in which the intention to remove migrants is the starting point and illegality is the ongoing outcome.

The Directive stipulates more precisely that detention is implemented when there is a risk of absconding or a TCN avoids or hampers the return process. To these already general reasons for detention the Greek law that transposed the Directive (Law 3907/2011) adds one more, that of national security concerns. In practice, detention is the rule rather than the exception whenever a return or expulsion decision is issued in Greece and, as the Greek Ombudsman has repeatedly observed, detention decisions are very often based on public security and public order reasons, pertaining to sentences for the possession of forged documents or non-possession of documents (Greek Ombudsman, 2019). As a result, third country nationals end up being detained for the sole reason of entering the country.

Migrants’ detention in Greece comes indeed very early after border crossing. First of all, the rule is that all newcomers have to be transferred by the police to one of the RICs or CCACs, where they are immediately deprived of their liberty for a period of up to 25 days for reasons of identification or screening. Since this is a general measure of detention practically applied to all newcomers, it seems to violate the EU Directive on reception standards for applicants of international protection (2013/33/EU) that stipulates that no one should be detained for the sole reason of being an applicant for international protection. Despite that it is generally known (and admitted by the authorities, see RSA, 2024) that most people in these facilities do apply for international protection, in practice this period of initial detention is imposed on everyone, no matter their individual circumstances and intention to submit an application.

‘The European Commission has initiated an infringement procedure for this [...]. What we have in our legislation allows us to detain anyone without pointing to the reasons, without justifying. The infringement procedure means that you have transposed the EU legislation in the wrong way, that you have a legislation that permits something not permitted by the EU law’ (GAPs_GRstakeholder6_2023).

Even individuals who have expressed their intention to apply for international protection via the devoted digital platform of MMA are detained for the same period of 25 days as soon as they arrive at the RICs in the mainland (GAPs interviews, Stakeholder 13). Both in RICs and in CCACs, migrants have reportedly been detained for a ‘waiting period’ even before their registration (and the 25 days) started.

‘Technically speaking (...) people who wish to apply for asylum in Greece have to put themselves in a status of deprivation of liberty. You cannot apply for asylum while at liberty in Greece’ GAPs_GRstakeholder6_2023.

Another layer of even earlier resort to detention has been introduced since 2016 and the infamous EU-Turkey Statement. During the period of its partial implementation, but also after its freezing by Turkey in 2020, the Hellenic Police continuously invoke the Statement in order to issue decisions of deportation accompanied by detention as soon as they encounter newcomers, for the purpose of readmission to Turkey. Interestingly, this procedure is officially applied in derogation from the Return Directive and based on the older Law 3386/2005.

In some cases, these decisions concern individuals who have declared their intention to apply for international protection (GAPs interview, Stakeholder 6). But even when an application for international protection is not finally submitted, this practice is legally contested since it affects people who are not arrested at the borders but in other areas, even several days after border crossing. Moreover, it is quite common for these readmission decisions not to be handed to those affected. On the other hand, undocumented migrants who are not arrested in the (sea or land) border regions but are caught for the first time in the mainland are not transferred to RICs but immediately held in detention in police stations and in the PRDCs.

Additionally, individuals who have already applied for international protection may be detained even after their application. This practice is grounded in the Reception Conditions Directive (2013/33/EU) which includes a list of reasons for detention, based on individual assessment. As Falsone (2021) remarks, in 2018 one in four applicants had been detained. Asylum seekers in Greece are not necessarily detained in separate facilities. They may be detained in PRDCs together with non-applicants, also in violation of the related provision of the Directive. In all these cases, it becomes quite evident that *de jure* or *de facto* detention is a generalised measure by which the Greek authorities communicate to newcomers that their arrival is irregular and that they should preferably comply to leave the country from the very first moment.

However, not only newcomers are exposed to the risk of detention. Established migrants also face various challenges in getting access to legal documents or renewing expired ones. In the past, police operations of massive arrests, as the aforementioned ‘Xenios Zeus’ operation, especially in the city of Athens, based on racialised characteristics ended up in detention in the PRDCs. Since most of those arrested have reportedly been found not to violate the conditions of legal stay, the spectacle of these operations that has been repeatedly circulated in public media and propagated by authorities as a means to re-establish public order have cultivated a common sense of massive irregularity. Detention has again a key role in this, since it has been used both as an excessive means for identification and as a ‘remedy’.

Official statistics reveal the key role of detention in the overall infrastructure of forced removal in Greece. According to data published by Refugee Support Aegean (RSA, 2024), 29,869 removal orders were issued by the Hellenic Police in 2023:¹³ about two out of three return orders were based on Law 3907/2011 transposing the Return Directive, and one out of three based on Law 3386/2005, in derogation from the Return Directive¹⁴. During the same year, the Hellenic Police issued more than 24,000 detention orders. Among them more than 10,000 were under Law 3907/2011 and roughly the same number were under Law 3386/2005.

¹³ In comparison with roughly 30,600 in 2022 and 21,000 in 2021.

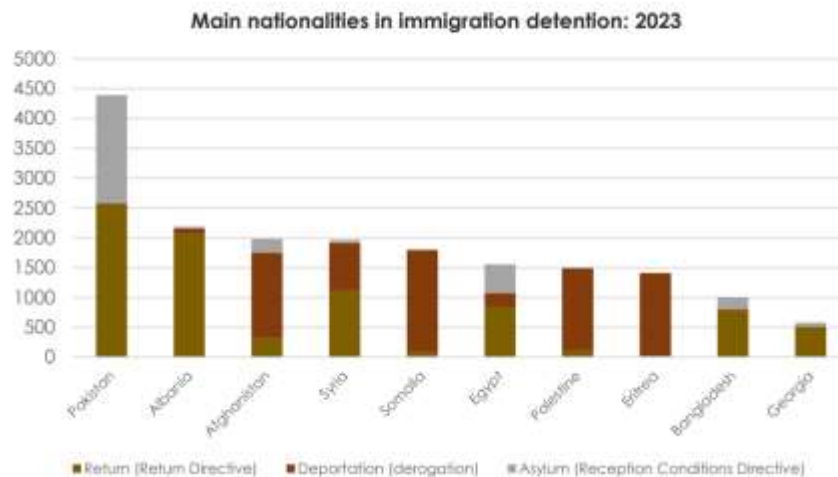
¹⁴ Return and deportation procedures are based in two different legal acts, one transposing the return Directive (Law 3907/2011) and one earlier concerning deportation (Law 3386/2005). Their different scope is not well defined but in practice the older law is implemented in combination with a derogation from the newer one and the former leads to a much higher proportion of detention than the latter (RSA & PRO ASYL, 2022).

This means that more than 53% of return decisions according to the Return Directive and more than 96% of deportation decisions outside the scope of the Directive ended up in detention orders. Another more than 3,600 detention orders were issued for applicants of international protection, namely under the Reception Conditions Directive. At the end of the year there were 2,303 migrants in detention, 2,042 in the six PRDCs and 261 in police stations.

The detention orders are rather seldom contested. The first existing mechanism to challenge a detention order is an administrative appeal before the police, i.e. the same authority that issues detention orders in the first place, in a deadline of five days. Only 1.2% of those issued in 2023 were appealed and among these only 6% were accepted, that is merely 22 cases among almost 30,000 detention orders. According to RSA (2024), the reason behind this is the absence of any free legal assistance that persists in the country, despite the Council of the EU recommendation to Greece to revise this practice. Secondly, detainees may challenge administrative detention by lodging an objection before administrative courts. In 2023 approximately 5,000 such objections were lodged and almost half of them were granted. In various cases the ECtHR has found the objectives procedure to be ineffective, failing to examine the lawfulness of detention, including detention conditions (GCR-ECRE, 2024). The absence of free legal assistance applies here as well. Thirdly, an automatic procedure of *ex officio* review of detention orders (or of the extension of the detention period) by the administrative courts also exists. Despite that this procedure uses the same criteria and is performed by the same courts which judge objections, it turns out to no more than 0.5% of orders found unlawful (RSA, 2024).

The nationalities of detainees reveal some important patterns. In 2023 almost 4,500 detention orders concerned Pakistani citizens. They were followed by citizens of Albania, Afghanistan, Syria and Somalia, while other countries of origin of those detained include Egypt, Palestine, Eritrea, Bangladesh and Georgia. Interestingly, different countries of origin exhibit different distributions among the various pathways to detention. Thus, the population of Pakistani detainees is almost equally divided between those detained under the Return Directive and asylum seekers detained under the Reception Conditions Directive. Other third country nationals, especially the Albanians and to some extent Bangladeshis and Georgians are mainly detained under the Return Directive. Interestingly, people from countries with high percentages of recognition as beneficiaries of international protection and where return is practically impossible (Afghanistan, Somalia, Palestine, Eritrea and to some extent Syria) are mainly detained under the deportation procedure, in derogation from the Return Directive. It seems that the Hellenic Police use the derogation from the Return Directive in order to detain people who have greater possibility to be recognised as refugees and thus to irregularise them in advance.

Figure 4: Main nationalities in immigration detention: 2023



Source: RSA, 2024.

The period of detention is often prolonged. The maximum period of six plus twelve months stipulated by European law is often exhausted and sometimes violated, no matter whether a removal is practically feasible or not. Nonetheless, even after a release, one can be arrested and detained again.

As for detention conditions, they have repeatedly been found to violate basic human rights and dignity by various agents, such as the Greek Refugee Council, the Greek Ombudsman and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). According to the last update of the AIDA country report (GCR-ECRE, 2024) several issues persisted up to 2023 in PRDCs, including ‘a carceral, prison-like design, the lack of sufficient hygiene and non-food items, including clothes and shoes, clean mattresses and clean blankets, the lack of recreational activities, and overcrowding’. The conditions for those detained in police stations are even harsher, for example with no outdoor access, lack of natural light and insufficient food¹⁵.

Medical staff shortage has also been repeatedly confirmed, but only marginal improvement occurred, if at all. For example, in 2023 there were two doctors in the PRDC of Amygdaleza (near Athens) for an official capacity of 1,000 detainees, only one doctor in the PRDC in Corinth for an official capacity of 1,344 and no doctors in the PRDCs of Paranesti and Kos.

¹⁵ See GCR-OXFAM (2021) for a collection of telling testimonies from detention centres and police stations.

7. Concluding remarks

This working paper explored how irregularisation as a process is reproduced through the legal and institutional framework of migration and asylum in the case of Greece. Irregularisation was examined and discussed as an outcome of migration and asylum policies, institutional frameworks, the political and socio-economic contexts, as well as their interplay with the formal and informal practices of various actors. The above was examined by focusing on the functioning of the European asylum system since 2015 and its particular implementation in Greece, highlighting how these reproduce aspects of irregularisation.

As noted in section 2, the irregularisation of migration is by no means a Greek phenomenon. Other member states and the EU as a whole continue to perceive migration as a major threat and in tandem with securitisation of the European borders, irregularisation has been a key priority for the European migration regime(s). However, developments in Greece may have been the model for wider policy reorientation and have offered institutional tools to implement it. For example, the events at the Greek-Turkish borders in March 2020 for which the European Commission President, Ursula von der Leyen praised Greece for being the shield of Europe, seem to have been one of the founding acts of the European discourse on 'hybrid threats' and the instrumentalisation of migration by third countries. Similarly, commenting on the whole array of regulations and procedures introduced by the 2024 Pact, Statewatch (2024) argues that 'the newly introduced screening and border procedures will lead to more people, including children and families, being held in prison-like detention facilities modelled on the Closed Controlled Access Centres already operating in Greece'.

Irregularisation in Greece, is reproduced in various ways by the migration regime and the recently transformed asylum system. The present Working Paper analysed a number of relevant procedural and institutional aspects interrelated with the three different layers of irregularisation, the spatial, the temporal, and the carceral. More particularly, the Working Paper examined how irregularisation is reproduced through the immigration system and its transformations over the last three decades including both the extremely difficult and complicated regularisation procedures and regulations on paper, and the institutional practices of the actors involved, such as the police operations that impact irregularisation processes and experiences. Increasing restrictions and legal complexity, together with supranational arrangements and geopolitical currents, have made 'regularity' more difficult to reach, as it is subject to preconditions that are often too demanding or impossible, while certain types of regular status are now for many more uncertain, precarious and fragile.

Irregularisation was also redefined after the changes in asylum laws that followed the so-called 'refugee crisis' of 2015-'16, which created a 'labyrinth' of asylum procedures that were difficult to navigate. In this labyrinth, spatialities and temporalities of irregularisation may vary, as procedures are usually characterised by temporal discontinuity and are differentiated according to distinct geographies. As also noted in the Working Paper, law implementation is much more complex than procedures on paper, while an inverse trajectory is observed, one in which the intention to remove migrants is the starting point and illegality is the outcome. In this regard, detention is also a determinant of this labyrinth. Detention is a common practice during the asylum application and registration process both in the border islands (at the RICs or the CCACs), and in the mainland (through the process of the online platform and the appointment in a camp). It may also concern people who have already applied for international protection and are detained even after their application. Even though border controls had been gradually tightening, applying for asylum, even if knowing that this had limited possibilities for a successful outcome and being aware that it could involve detention in case of arrest, had been a main pathway to some kind of regularity.

The asylum procedure involves different and extremely complex types of procedures, which are spatially different (between the borders and the Greek mainland), and which are not only defined in regulations on paper but also evolve over the years in an ad hoc manner, in cases that are contrary to the rule of law. Moreover, aspects of irregularisation refer to a range of 'irregular' practices that people with 'regular' status, such as asylum seekers, may use to navigate the restrictive asylum and reception system. These may include practices of mobility and settlement that are not permitted by the system –or are even criminalised by it– as asylum seekers who engage in them may lose certain asylum and reception provisions. This fact illustrates how irregularisation may be reproduced even during the examination of an asylum claim, i.e. while people are entitled to asylum provisions.

Irregularisation in the case of Greece also emerges due to the process of safe third-country inadmissibility and its particular implementation in the country, combined with the fact that readmissions to Turkey have been suspended since March 2020. A wide 'grey zone' has been created and thousands of applicants for international protection were exposed to legal limbo, the risk of detention, and exclusion from protection and reception conditions. Furthermore, irregularisation emerges during the processes of asylum decision notification which may expire without the applicant being informed about asylum rejections; the same concerns processes of appeals and judicial reviews since in particular cases, they do not have an automatic suspensive effect of the return decision they incorporate. As regards the return framework this is characterised by ambiguity, by reproducing aspects of irregularisation due to the co-existence of different Laws. This fact permits the maintenance of the police practice of issuing expulsion decisions against TCNs irregularly entering Greece at the borders even if they subsequently apply for international protection and obtain a permit to stay in the country. Also, self-irregularisation emerges during the AVRR program. This is because enrolment in the program and its provisions presupposes that the migrants should abandon or withdraw their asylum applications or any rights deriving from a regular status and remain in an irregular status for a short (but indeterminate) period before their return.

The Working Paper also attempted a conceptual and theoretical contribution concerning the notion: irregularisation is not perceived as a stable or static characteristic of an individual or a group of people, or as a fixed category of legal status that some migrants do not possess while others do. Rather, irregularisation emerges as a process in which many people (also of 'regular' status) may be involved, in sequences of (ir)regular statuses, a process unfolding at the intersections of the spatial, the temporal, and the carceral layer, as an inherently spatio-temporal process.

Spatiality and temporality in the process of irregularisation is constitutive even before border-crossing, but also during the diverse routes along which legislation and institutional practices categorise people, places, and periods of time. The spatialities of irregularisation are interconnected with the spatiality of borders, not merely the lines that separate states, but those multiplied and transferred beyond border zones, both externally and internally within the nation-state. At the same time, irregularisation is not only reproduced at the borders, but through procedures and institutional frameworks that create borders, categories, restrictions, carceralities. Indicatively, as argued in the paper, spaces of irregularisation are defined through the asylum system itself, during the entire process of applying for asylum, including different facilities that range from those of detention to those of refugee identification, reception and accommodation. The boundaries of spaces of (il)legal, (ir)regular, registered, detained, to-be-returned, deportee, asylum-seeker are blurred, as are the experiences, statuses, and spectrums of irregularisation of those emplaced in these spaces. Time is also essential. The migration and asylum system is characterised by different stages and sequences,

diverging paces and tempos, timeframes and deadlines, durations and temporalities. These are not given or stable but rather fluid as they may change over time along shifts and changes in laws and policies, and reflect variably on migrants' subjective experiences, coping practices and adapting trajectories in periods of waiting or acceleration, in moments 'before', 'during' and 'after', in forward moves but also reversals or even loops. In its temporal dimension, irregularisation begins at the borders, sometimes before their crossings, and accompany migrants' trajectories throughout the migration and asylum system, the asylum procedure, the spaces of waiting for –or acceleration of– the procedures.

Space and time, inherently interconnected in the constitution of irregularisation as a process define migrants' experiences. Irregularisation involves multiple categories and conditions of irregularity, characterised as fluid and not clear-cut, not only at the edges of the legal and illegal but also at the whole spectrum in between. Moreover, irregularisation as a process is broader than the sequences and the interplay of the multiple and different (ir)regular statuses as it may also include a number of informal or irregular practices that 'regular' people develop in order to navigate in the otherwise hostile migration and asylum system. The interrelations of irregularisation to the changing political conjunctures, the socioeconomic contexts, and the employment/labour needs that deem a migrant as 'deserving' protection, asylum, regularisation, etc. may thus reveal how irregularisation is not only produced by laws and their implementation but is productive in itself.

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Deliverable D8.2 **Policy Brief**

Policy recommendations for the dignified treatment of irregularised, non-removable third-country nationals in the EU



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Executive summary

This Policy Brief builds on the key findings of a comprehensive comparative study¹ examining seven EU Member States: Belgium, Germany, Greece, Italy, Slovenia, Spain and Sweden.² Based on desk research and the national reports, the study analysed the legal and policy responses to the treatment of irregularised third-country nationals (TCNs). Specifically, it focused on persons classified as ‘non-removable’ or ‘non-deportable’, and others who, despite lacking any such official classification, remain in an irregularised situation.

After assessing the status quo in these seven countries, the Policy Brief showcases the most crucial findings when it comes to the implementation of the EU Return Directive, with particular attention being given to the provisions dealing with the situation, treatment and fundamental rights of TCNs who cannot be expelled based on legal, technical or practical grounds.

Based on the findings of a MORE comparative study assessing promising practices across these countries, this Policy Brief also includes references to national practices that should also be considered at the EU level.

Regarding the anticipated replacement of the return framework by the European Commission with new legislation, these findings serve as the basis for actionable, forward-facing policy recommendations for the EU’s approach to non-removability and future EU expulsion policies.

1. Relevant provisions of the EU Return Directive and their assessment

There are several provisions in the Return Directive (Directive 2008/115) that centre on the treatment of non-returnable individuals with expulsion orders that were – at least temporarily – postponed or suspended. Particularly, there are four key elements in this

¹ <https://zenodo.org/records/14747937>

² While the United Kingdom is part of the overall comparative assessment under the MORE Project and was examined in the Comparative Reports and Synthesis Reports (Deliverable D2.1 under the project), this Policy Brief specifically addresses EU policymakers and therefore omits the UK from consideration.

context: Recital 12 and Articles 9, 13 and 14, which lay down limited safeguards and some rules for providing socio-economic rights, access to justice and documentation of non-returnability.

While the EU Return Directive fails to provide a harmonised approach covering and addressing the situation of legal limbo resulting from the protracted non-deportability of irregularised TCNs, some of the above-mentioned Articles lay down clear legal obligations to EU Member States, which when read in combination with the EU Charter of Fundamental Rights ('Charter') and Court of Justice of the EU (CJEU) case-law, lay down a ceiling of administrative guarantees and rights which national policies cannot go below.

1.1 'Basic conditions'

Recital 12 suggests that national law 'should' define the 'basic conditions of subsistence' for irregular, non-removable TCNs. The recital also makes it clear that Member States 'should' issue a written confirmation of non-returnability to the individuals in such situations. However, the broad discretion explicitly granted to Member States, as well as the use of the term '*should*', stands at odds with regulatory fragmentation and the implementation gaps found in the comparative assessment.

On 'basic conditions', Article 14 lays down procedural safeguards regarding TCNs who may still depart voluntarily or whose removal was suspended. Member States are *obliged* to ensure that four core principles are considered in how they treat these individuals. These principles are (1) the maintenance of family unity with family members residing on the territory, (2) access to emergency healthcare and essential treatment, (3) access to basic education for minors and (4) considerations for the special needs of vulnerable people.

While Article 14 includes a 'shall' clause – making the provision of the above principles obligatory – some of these terms are fairly broadly defined and therefore allow for discrepancies between national interpretations. It is also presented as an exhaustive list, even though the comparative findings indicate that the inaccessibility of adequate housing, regular employment, non-emergency healthcare or social assistance can have a detrimental impact on TCNs' dignity and may cause them to fall into destitution.

Concerning the 'basic conditions of subsistence', the comparative report has found that in all the assessed countries, irregularised individuals are either largely excluded from accessing socio-economic rights and justice or only have limited and ineffective or

inadequate access to these rights. This includes especially important rights for upholding human dignity such as non-emergency healthcare, adequate accommodation and social assistance.

Usually, TCNs encounter severe legal and practical barriers to securing essential socio-economic rights. But even if they can practically access certain rights, the ‘basic label’ under which these conditions are currently presented by the Return Directive fails to uphold the higher set of standards required by European and international human rights law and the Charter, which call for these rights to be adequate, effective and decent. Illustrative examples include the obligation to ensure both an adequate standard of living and adequate housing, *decent* work and a decent existence through social and housing assistance. The resulting picture is one perpetuating a cycle of *hyper-precarity*.

1.2 Written confirmation of non-returnability

In Recital 12, Member States are called to provide written confirmation to individuals proving that they cannot be returned, which is subsequently underlined by Article 14(2). The comparative analysis revealed the tendency to offer some form of documentation about the postponed or suspended return decision/removal order. According to the Return Directive and the CJEU case law, issuing such a document is a Member State obligation.³ However, the Directive opted not to include any clear guidelines for national authorities to follow, explicitly giving them wide discretion to define the form and format of such ‘confirmations’.

Consequently, there is quite an array of discrepancy across national approaches. For instance, if the return decision is temporarily postponed, then it is communicated through a separate document in Belgium; meanwhile, in Sweden, permission to stay or a temporary residence permit may be issued alongside a return decision⁴

³ CJEU (2024), *LF v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite* [Changu], Case C-352/23, 12 September 2024, paragraphs 60 and 61.

⁴ This is supported by the MORE national reports. For instance, the Belgian Immigration Office tends to issue a written decision to the TCNs but the report showed that those residing in administrative detention centres may not receive such a document and are instead first orally informed about their expulsion being suspended or postponed, with a written certificate possibly following upon their release. By contrast, the Swedish national report indicated that there is no written suspension confirmation but that the Swedish Migration Agency may issue a 12-month residence permit. A different approach was observed in Italy, where national research found that written documentation is issued to those who appeal a return order at the Magistrate Court, which serves

1.3 Grounds for suspending or postponing removals

Article 9 of the Return Directive establishes different grounds for postponing removals, with one being presented as mandatory and others as ‘optional’ for national authorities. Its first paragraph includes two obligatory grounds, which, by the nature of the *shall* clause, allows no discretion for EU Member States. These two grounds are *non-refoulement* (as envisaged in international refugee and human rights standards) and if the appeal lodged by an individual is granted a suspensive effect by the competent national authority. In paragraph (2), grounds presented as ‘optional’ are listed that are connected to assessing the specific circumstances of individual cases, so that the TCN’s physical or mental state, as well as any possible technical reason, could lead to expulsions being postponed. The wording of the second paragraph suggests that this list is non-exhaustive, which has likely contributed to discrepancies among the Member States as to what authorities may consider as additional grounds for the non-enforcement of a return decision.

Additionally, Article 5 requires Member States to take due account of ‘the best interests of the child’, family life, health conditions and the non-derogable principle of *non-refoulement*⁵ when implementing the Directive. As confirmed by a recent CJEU judgment, these assessments must be undertaken by the authorities *ex officio*, and authorities also must review previous return decisions considering *non-refoulement* every time a new procedure is launched, including applications for residence permits.⁶

In reality, the countries each established their own varying grounds for suspending return orders, with most of them framed as *de jure* grounds and laid out in national legislation. Yet the formal existence of such reasons in the letter of the law may not be automatic guarantees for postponement/suspension, should the requirements be met. Some cases seemingly include a wide range of different grounds anchored by applicable legislation that

as evidence of temporary postponement until the date of the hearing, but this postponement does not come with any short-term permit or other documentation.

⁵ The principle of non-refoulement protects several fundamental rights and requires national authorities to carry out individual assessments in all cases to ensure that the prohibition of ill-treatment and torture (Article 3 of the European Convention on Human Rights [ECHR]) remains untouched, which also includes examining whether the medical condition, mental health state and overall physical and psychological health situation of a returnee would be negatively impacted upon their removal. See: Gionco, M. and Levoy, M. (2022), *Barriers to return: Protection in international, EU and national frameworks*, PICUM, pp. 10-12.

⁶ CJEU (2024), *K, L, M, N v Staatssecretaris van Justitie en Veiligheid* [Ararat], Case C-156/23, 17 October 2024, paragraphs 35 et seq.

are then not consistently applied and respected in practice by all the national authorities.⁷ Furthermore, Article 9(2) of the Return Directive fails to acknowledge that some of the foreseen situations, such as those related to mental/physical health, may in fact lead to EU Member States being obliged to not issue a return decision/removal order.

The CJEU confirmed in *X v. Staatssecretaris van Justitie en Veiligheid*,⁸ that national authorities may adopt a return decision, or enforce a removal order, 'only if it has taken into account that person's state of health'.⁹ A return decision or enforcing a removal order should be precluded where it would expose a TCN to a 'real risk of a significant reduction in his or her life expectancy or a rapid, significant and permanent deterioration in his or her state of health, resulting in intense pain'. The Court also confirmed in this same case that the medical treatment of irregularised TCNs forms a part of their private life under Article 7 of the Charter and held that EU Member States may have legally binding obligations to halt expulsions when considering both the family and private life of irregularised TCNs.

1.4 Effective remedies

Article 13 of the Return Directive stipulates that TCNs must be afforded an effective remedy – either by way of appeal or judicial review – which may lead to the suspension of their return. In paragraphs (3) and (4), the provision also makes it mandatory for Member States to provide individuals with the possibility to obtain legal advice, representation and linguistic assistance, to be granted free of charge upon request. Under 'effective remedy', a distinction

⁷ For example, 'statelessness' is envisaged as a formal ground for suspending removals in Slovenia. However, although the country is party to the Statelessness Convention, there is no 'statelessness determination procedure' (SDP) available. Consequently, the definition of 'statelessness' under Slovenian law remains narrower than the Convention's definition, which may lead to individuals not being granted a suspension of removal although they meet the Convention's requirement for determining statelessness. As the national report found, even if the authorities have determined that the individual is stateless under Slovenian law, they are not obliged to consider a statelessness claim and may refuse to grant protection.

See: The Peace Institute, Institute on Statelessness and Inclusion & European Network on Statelessness (2017), Joint Submission to the Human Rights Council at the 34th Session of the Universal Periodic Review [OHCHR], Slovenia, point 14., p. 4 and K. Vucko (The Peace Institute, 2023) for the Statelessness Index, <https://index.statelessness.eu/country/slovenia>.

⁸ CJEU (2022), *X v. Staatssecretaris van Justitie en Veiligheid*, Case C-69/21, Judgment of 22 November 2022 [Grand Chamber].

⁹ Ibid., paragraph 95.

is made between redress against (1) a return and a removal order and (2) a subsequent decision rejecting a request for the suspension of removal.

Despite the mandatory nature of the article, which must be read in light of Article 47 of the Charter, MORE research suggests that there is a considerable lack of accessible information and awareness among affected individuals about available legal recourse and access to justice avenues. Without comprehensive information and support as to their rights and options, TCNs are enduringly hampered in their ability to seek recourse and residence security. Likewise, while there may be viable pathways towards regularisation or the transitioning of administrative status, this 'knowledge gap' acts as a significant obstacle and reinforces exclusion and injustice. Other than a lack of sufficient clarity about the available legal tools, the understandable fear of forced removal also prevents them from enquiring about their rights and exercising them, thus reinforcing their precarious situation without a real way out of this limbo.

A promising practice: Case management initiatives

The countries analysed have developed initiatives offering different forms of support to undocumented migrants to find durable solutions, including through individualised case management support to regularise their status. In Belgium, since 2022, the administrations of major Belgian cities such as **Ghent, Antwerp, Bruges and Brussels**, together with local civil society organisations, have been running **several projects to provide accommodation for an indefinite period to homeless migrants, while providing counselling services to find durable solutions**. They are part of the *Shelter and Orientation projects* which receive financial and operational support from Fedasil. As a condition, migrants must cooperate with social workers in finding a durable solution, with priority given to a residence permit. The aim is to provide stability and intensive coaching and guidance for homeless undocumented migrants who are committed to finding a durable solution for their future. However, a major downside is that these initiatives do not protect migrants from the risk of expulsion if there is no regularisation option for the person concerned.

2. Key comparative findings

2.1 Hyper-precarity created by systemic barriers and failed implementation

The comparative analysis yielded results that reflect severe disparities in the policy approaches to the non-returnability of certain TCNs in irregularised situations. This diverse range of disparities include inconsistent practices in recognising and enforcing grounds that justify postponing or suspending deportation, as well as in documentation, making residency rights accessible, providing socio-economic support and access to effective remedies.

While the Return Directive offers a 'basic', applicable framework for all these areas, such a framework does not stand up to the level of protection required by international, regional and EU fundamental rights standards, and is implemented in highly heterogeneous and disparate ways across all the examined countries.

However, there is one commonality: the comparative report found evidence of significant, systemic barriers that impede non-returnable, irregularised TCNs from leading a dignified, secure life, which leads to 'hyper-precarity', i.e. a highly precarious living situation where access to social protection, rights and the transition to a secure residence status is severely compromised, and where individuals may routinely be subject to exploitative working conditions and inadequate standards of living and destitution.¹⁰

These systemic barriers, in turn, find their roots in the lack of compliance with legal obligations – including ones stemming from international law as well as primary and secondary European law – and a lax approach towards effectively enforcing the protective standards envisaged in the EU Return Directive, and their alignment with the Charter, as interpreted by the CJEU.

¹⁰ For the term 'hyper-precarity', see, for instance: Zou, M. (2015), 'The Legal Construction of Hyper-Dependence and Hyper-Precarity in Migrant Work Relations', *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 31, No. 2, pp. 141–162., and Lewis, H., Dwyer, P., Hodkison, S. and Waite, L. (2015), 'Hyper-precarious lives: Migrants, work and forced labour in the Global North', *Progress in Human Geography*, Vol. 39, No. 5, pp. 580-600.

2.1.1 The road to non-returnability

This regulatory fragmentation and the resulting precarity is showcased by the varying policy approaches towards recognising, implementing and respecting the grounds that justify postponing or suspending return decisions/removal orders.

As introduced above, the Return Directive recognises several grounds that *could* lead to the (temporary) suspension or postponement of a return decision. That notwithstanding, both the Directive and the applicable CJEU case law¹¹ and the European Court of Human Rights (ECtHR)¹² establish obligations that are binding upon the EU and its Member States. These reasons are anchored by human rights grounds stemming from – but also going beyond – the *non-refoulement* principle, as well as considerations including:

- physical and mental health, including being unable to access adequate medical treatment in the country of return;
- familial ties in the country, respect for private life, the best interests of the child;
- technical circumstances, such as a lack of identification, appropriate means of transport or cooperation from the country of return and
- statelessness or being the victim of violence or trafficking.

In the countries examined, *non-refoulement* and related considerations were found to be anchored by law and recognised in practice In the area of medical reasons preventing return. Though the report highlighted the recognition of health-related grounds for postponement, the CJEU¹³ held that Member States are precluded from even *adopting* a return decision if there is a real risk that a TCN's serious illness would be significantly exacerbated due to the lack of appropriate care in the country of removal. Yet MORE research found that such medical grounds do not necessarily preclude authorities from issuing a return decision anyway, even if its enforcement is postponed later.¹⁴

¹¹ See, for instance: *Aranyosi and Căldăraru* (2016), *K.A. and Others* (2018), *X v. Staatssecretaris van Justitie en Veiligheid* (2022), *Bundesamt für Fremdenwesen und Asyl v AA* (2023).

¹² Such as, *M.S.S. v. Belgium and Greece* (2011) and *Paposhvili* (2016),

¹³ See *Staatssecretaris van Justitie en Veiligheid*, *supra* footnote 5.

¹⁴ For example, German law assumes that deportation is not precluded on health grounds, unless the TCN provides a qualified medical certificate proving that their illness may 'interfere with deportation', which would then lead to a temporary suspension. In Slovenia, the Aliens Act recognises health reasons as grounds for

Although there are several legitimate grounds preventing authorities from issuing and enforcing return decisions – which are unequivocally legally binding – these are often described ‘obstacles’ to ‘effective’ migration management and return, rather than being recognised as legal obligations.

Such framing is fallacious and misleading, as recognising and applying these grounds is a matter of complying with international law and human rights obligations or being held responsible and consequently liable for dehumanising socio-economic exclusion, arbitrary detention and illegal expulsions.

2.1.2 Dissonance between ‘policy’ and ‘reality’

Despite the existence of legal obligations compelling authorities not to issue return decisions or enforce removal orders, or to postpone or suspend them if any of the grounds mentioned above apply, the trajectory of the EU-wide policy agenda giving priority to returns at all costs inadvertently encourages non-compliance and blame-shifting games by competent national authorities. With immigration enforcement and accelerating returns being increasingly prioritised, these serve as the overarching aims for the EU’s current expulsion policy, and meeting these goals may often require that an individualised assessment of existing circumstances and grounds for non-expulsion is not duly carried out.

Non-compliance with these obligations therefore appears to be justified by the overriding policy priorities, even though expulsions stemming from the pursuit of this aim could very well be unlawful and violate absolute human rights. Consequently, while an increased return rate may be branded a ‘policy success’ or as an indicator of ‘effectiveness’, the EU’s

extending the period for voluntary departure, presupposing that a return decision is still to be adopted by the authorities. Likewise, legislation from Greece and Belgium all frame medical reasons as grounds for postponing or suspending an existing return decision rather than being impediments to adopting expulsion orders.

For Germany, see: Aliens Act, Sections 60(7) and 60a(2c), as well as Schütze, T. (2023), The (Non-)Status of ‘Duldung’: Non-Deportability in Germany and the Politics of Limitless Temporariness, *Journal of Refugee Studies* 36(3), pp. 409–429. For Slovenia, see: Aliens Act, Article 73(2). Greece: EMN, Fouskas, T. et. al. (2020), ‘National Report : Greece’, p. 10., https://home-affairs.ec.europa.eu/document/download/e4404716-36e2-42cc-9201-e748b1e7386d_en?filename=greece_itism_study_2020_en.pdf. Belgium: Residence Act, Article 74/17 § 2.

acceleration-focused policy approach to enforced removals¹⁵ could end up constituting an ‘obstacle’ to effectively meeting EU Treaty founding principles under Article 2 TEU and the Charter. Both emphasise the human dignity of every person irrespective of their immigration status.

Despite all this, enforcing return decisions, just like access to justice and human rights, remains low in practice.¹⁶ Yet what does this actually tell us about policy implementation dynamics and do these numbers also hide the existence of legitimate grounds for non-removal and the practical reality of applying alternative policy approaches to expulsions?

MORE research shows that competent national actors implementing the return policy often end up considering other alternatives as more ‘effective’ responses to the situation of non-returnable TCNs. Such alternatives include the transitioning of statuses based on individual assessments or group-based regularisations.

This example underlines that – often unjust – efforts that are technically in line with the ‘effective’ policy responses envisioned may constitute the successful implementation of political priorities. Existing alternatives to return, though against the grain of policy objectives, may end up being not only more humane, but also more ‘effective’ and realistic.

A promising practice: Access to permits

Another promising practice was the Italian special protection status, which was introduced by a 2020 legal reform to replace a previous humanitarian permit, and then subsequently abolished in 2023. The special protection status provided the possibility to grant a permit to people with barriers to return, based on the right to family and private life that was evaluated by balancing factors such as work, housing situation, family ties, and duration of stay in Italy as criteria. This practice was considered promising because it provided an additional pathway to access a residence permit, as well as protection from deportation and access to work (without being dependent on the employer) and social services.

¹⁵ See, European Commission, *A humane and effective return and readmission policy*, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en.

¹⁶ See Eurostat’s quarterly statistics – *Returns of irregular migrants*, last updated on 6 December 2024, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Returns_of_irregular_migrants_-_quarterly_statistics.

2.2 Extreme limitations on access to rights and justice

The lives of irregularised TCNs are marked by an administrative ‘limbo’ – they do not have regular, secure statuses but can neither be deported, thus existing in a legal vacuum and a non-policy domain that heavily impacts their ability to lead a dignified life. While in limbo, access to socio-economic rights is extremely limited and usually conditional, exacerbated by a lack of sufficient legal and social support and ineffective access to justice in cases of human rights violations. Even when certain ‘basic’ rights are formally ensured and, in principle, also accessible, they often fall short of human rights law standards or are contingent upon further administrative requirements and exclusions, preventing effective access and perpetuating precarity, as well as their ‘cooperation’ with authorities in their return procedures.

The comparative analysis has revealed critical commonalities when it comes to systemic obstacles and structural discrimination that essentially prevent irregularised TCNs from seeking basic services, including healthcare, housing, employment and justice. For example, non-emergency or long-term medical care for irregularised TCNs is often contingent on strict eligibility requirements, such as proof of regular residency or financial contributions. Notably, individuals may also be unable to navigate often complex administrative procedures due to language barriers and a lack of support.¹⁷

Furthermore, while (temporary) shelters, social or other state-subsidised low-cost housing options may be *technically* available – though often overcrowded and insecure – undocumented people are often excluded from accessing these, which leads to their overwhelming concentration in the private housing market. Due to high levels of discrimination in the housing market, irregularised TCNs may be forced to accept inadequate housing conditions, often offered way above market prices or further exclusion on the grounds of their undocumented status.¹⁸ Meanwhile, the inaccessibility of the formal labour market for irregularised TCNs means that they have no choice but to engage in irregular employment to keep themselves afloat. However, this accelerates the risk of

¹⁷ This was highlighted in all MORE national reports. See also: Carrera, S. and Shabbir, A. (2024), *Humanising EU Migration Policy: The transitioning of statuses in the EU regular and labour migration law*, CEPS Report, Brussels.

¹⁸ See: PICUM (2020), *Written Submission to the Consultation for the Action Plan for the implementation of the European Pillar of Social Rights*, Brussels and Clair, A., Reeves, A., McKee, M. and Stuckler, D. (2019), ‘Constructing a housing precariousness measure for Europe’, *Journal of European Social Policy*, No. 29, pp. 13–28.

exploitation, suboptimal working conditions without the chance to earn a living wage or receive otherwise available benefits from the employer. In a similar vein, while social benefits and decent working conditions are severely limited, MORE research showed education to be the one area where somewhat broader access is provided for irregularised children. While the right to compulsory education tends to be recognised for children – which is framed as an *obligation*, rather than a right – it is rarely extended to adults. This logic shows that accessibility may also be dependent on whether the person seeking to access socio-economic rights is being perceived as someone trying to fulfil an obligation set out by the state or asking for a benefit offered by the same entity without *quid pro quo*. At the same time, several barriers to the effective access to education remain, including limited possibilities to continue studying beyond compulsory education¹⁹ or accessing support for education-related costs.²⁰

A promising practice: El Padrón and arraigo

The Padrón is Spain's municipal administrative residents register, which can include even those without a regular residence status. Being registered in the Padrón allows irregularised TCNs to access certain socio-economic rights and benefits, including free access to the public health system and education for children. Additionally, Spain offers the 'arraigo' scheme, which grants temporary residence authorisation to TCNs on the grounds of 'rootedness' in the country (i.e. social ties), humanitarian or other exceptional considerations.

Yet there are other barriers. On the one hand, 'cooperation' with the authorities may be another problematic structural barrier. Newer legal instruments concerning migration and returns often frame rights as 'conditional', only to be granted *if* the TCNs cooperate with the competent authorities, even to their own detriment (such as cooperating to enable their own removal from the country's territory at the expense of their own human rights).²¹ The notion of 'non-cooperation with authorities' pursues a penalisation or punitive approach for people to enjoy their human dignity, even in cases where grounds for postponing, suspending or

¹⁹ This is only the case in Greece – the other countries examined require a residence permit for continued studies.

²⁰ For example, in Belgium, *de facto* restrictions were found by the national report, which pointed out that undocumented children rarely receive support or access to adequate school equipment, extracurricular activities and other educational activities not strictly covered by basic education.

²¹ See, for example, the *Asylum and Migration Management Regulation* (Regulation (EU) 2024/1351 of 14 May 2024), Recital (58) and Article 18(1).

halting expulsions are in fact mandated by the law. It tends to be blurrily constructed and applied subject to disproportionately large margins of manoeuvre by relevant national authorities, which is incompatible with the need to ensure equality before the law by every person. Once again, this logic is based on the understanding that to be *deserving* of access to 'basic necessities', the individual must meet certain requirements to be deemed eligible and cannot receive them by the mere virtue of being a person in need.

Additionally, the absence of support and information prevents individuals from making use of available legal recourse and aid against unjust removal orders or the refusal to formally suspend deportation despite the existence of legitimate grounds that should prevent expulsion. These barriers to effective remedies, while serving the purpose of indeed accelerating procedures, essentially re-frame the rights of TCNs as 'secondary' and opens the way to systemic violations with little opportunity for redress. Crucially, many hesitate or choose not to assert their entitlements and rights due to the fear of being 'found out', sanctioned or forcefully expelled.

This challenge is further exacerbated by the lack of a 'firewall' to secure access to adequate services. In this context, a 'firewall' would mean that public and private service providers, including healthcare workers, teachers, social service employees and civil society actors, would be relieved from any 'reporting duties'²². If a firewall is put in place, these providers will not have to report irregularised TCNs to the competent immigration authorities²³, thereby shielding them from the dangers of looming criminalisation and forced expulsions. In this way, irregularised TCNs can have effective access to essential services without fear of forced deportation, criminalisation or other forms of retaliation.

Civil society organisations play a key role in helping non-returnable individuals. However, their activities are underfunded or are not well-equipped to handle all incoming requests.

Additionally, irrespective of migration policy priorities, the treatment of non-removable TCNs must align with international and regional human rights standards, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European

²² European Commission against Racism and Intolerance (2016), *ECRI General Policy Recommendation No. 16 on 'Safeguarding irregularly present migrants from discrimination'*, CRI(2016)16, Point 11 (page 8). <https://rm.coe.int/ecri-general-policy-recommendation-no-16-on-safeguarding-irregularly-p/16808b5b0b>.

²³ PICUM, *FAQ – Reporting obligations and firewalls*, Point 9 (page 6). <https://picum.org/wp-content/uploads/2024/12/FAQ-Reporting-Obligations-Firewalls.pdf>. Refer to Objective 15 of the UN Global Compact on Migration (GCM) covering 'Provide access to basic services for migrants'.

Social Charter and the EU Charter. These standards prioritise unequivocal respect of human dignity, negating any attempt to ‘balance’ human rights against migration policy priorities. Effective access to fundamental rights is neither negotiable nor a possible trade-off in favour of seemingly ‘efficient’ procedures.

The national policies examined in this report fail to comply with these standards and legal obligations.

A promising practice: Initiatives promoting access to rights

In **Belgium**, the *[‘Up together’ project](#)*, developed by Jesuit Refugee Services (JRS) Belgium, provided **accommodation and support to non-returnable migrants** between 2015 and 2018. The project explicitly targeted people who could not return to their country for administrative, legal or medical reasons and who were released from detention with no place to stay and no right of residence. The project brought together families and individuals to create social networks of solidarity and provide housing and support to these non-returnable TCNs. Although the project ended due to a lack of funding, it was able to provide support and accommodation to 19 people (including seven children) upon their release from an administrative detention centre.

3. Priorities for the EU

The main objective of the Return Directive is to establish ‘an effective removal and repatriation policy that fully respects the fundamental rights and dignity of the persons concerned’. Therefore, fundamental rights compliance is by design a core part of the equation and must go together with any assessment of its ‘effectiveness’.²⁴ Respect for human dignity and access to fundamental rights must be provided to all persons on EU territory – irrespective of their administrative status.

This Policy Brief therefore calls on the EU and its Member States to radically re-evaluate their policy approaches that prioritise expulsion-driven effectiveness, possibly at the expense of dignity and rights. The biggest challenge towards more humane practices

²⁴ CJEU (2018), *Gnandi*, Case C-181/16, Judgment 19 June 2018, paragraph 48; and CJEU (2022), *X v. Staatssecretaris van Justitie en Veiligheid*, supra footnote 5, paragraph 88. In paragraph 89 of this same judgment the CJEU held that ‘It follows that, when they implement Directive 2008/115, including when they envisage adopting a return decision or making a removal order in respect of an illegally staying third-country national, Member States are required to respect the fundamental rights which the Charter grants to that national’ (Emphasis added).

remains the lack of common interpretation and rigorous EU-led enforcement of protective elements across the EU Member States.

However, in line with the Commission's 2024-2029 priorities²⁵, new legislation is expected to be adopted to 'reform' the 2018 Return Directive. At the time of writing, this instrument is still being drafted and little is known about its precise content.²⁶ However, based on the Political Guidelines, it is likely that a new legislative proposal will centre on the Commission's so-called 'fair and firm' approach²⁷ to returns, which is understood as a system aimed to accelerate expulsions and increase the rate of enforced return decisions.²⁸ However, this approach prioritises the 'speed' of administrative proceedings, even to the detriment of human rights safeguards. Paradoxically, this may mean that an expulsion policy, which is supposed to be 'fair', will likely fall short of the EU's own fundamental rights standards and commitment to uphold human dignity²⁹ across all policy areas, in direct contradiction to the Treaties' core principles.

At the same time, adopting a new legislative instrument will not solve the main challenge pointed out in the comparative research and without a change in the overall policy approach, namely that the same issues of lacklustre enforcement, fragmented interpretations and prevailing coercive and punitive practices will remain when it comes to EU safeguards and rights. Therefore, the best course of action for the Commission and the EU legislators would not be an overhaul of the Return Directive but rather to put all their efforts into better enforcing it in line with the Charter, as interpreted through CJEU standards and international/regional human rights obligations and commitments.

²⁵ European Commission (2024), *Europe's Choice – Political Guidelines for the next European Commission*, Strasbourg, 18 July 2024, p. 16, https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf.

²⁶ The new instrument will likely to be a Regulation, though this remains unconfirmed. The proposal is expected to be published by the Commission in March 2025. See: Ionta, N., Euractiv, 24 February 2025, <https://www.euractiv.com/section/politics/news/exclusive-commission-pushes-to-fast-track-asylum-rules-review/> and InfoMigrants, 20 February 2025, <https://www.infomigrants.net/en/post/62957/melonibrunner-promise-to-expedite-eu-migration-pact-and-list-of-safe-countries>.

²⁷ See, for instance, Commission President Ursula von der Leyen's Mission letter to Henna Virkkunen, Commission Executive Vice President for tech Sovereignty, Security and democracy, page 5, https://commission.europa.eu/document/3b537594-9264-4249-a912-5b102b7b49a3_en and to Magnus Brunner, Commissioner for Internal Affairs and Migration, page 7, https://commission.europa.eu/document/ea79c47b-22f8-4390-a119-5115dc40fc3e_en.

²⁸ European Commission, *supra* footnote 8.

²⁹ As laid down in Article 2 TEU.

Against this background, the Policy Brief puts forward four recommendations aimed at better implementing the current legal framework for a more humanising strategy that is reflective of the realities on the ground, and which frames the situations of non-removability, the transitioning of status and regularisations of TCNs as policy priorities.

3.1.1 Effectively enforce the protective elements of the Return Directive

The European Commission should ensure the proper implementation of the aforementioned protective elements of the EU Return Directive in a more effective and timely manner, including the provisions covering the situation of non-removable TCNs and their socio-economic rights as laid down in Recital 12 and Article 14.

This means that national authorities must also be directed to recognise the Directive's safeguards and some of the grounds for postponing or suspending a return decision and the enforcement of the removal order as mandatory, not 'facultative' options. In short, our research does not provide evidence of the need for revising or recasting the current Return Directive. Instead of proposing a new instrument, the Commission should be dedicated to effectively enforcing and issuing new guidance for better implementing the Directive and for a more unified interpretation of it by the Member States, with particular attention to its protective provisions in line with the Charter. This would address the existing regulatory fragmentation and deficits in the area of non-returnability by promoting clear and uniform approaches to the treatment and documentation of irregularised TCNs. This way, inconsistencies can be reduced and a more uniform policy landscape across the Union established.

3.1.2 Ensure broad access to socio-economic rights and effective remedies

In the same vein, the EU must promote and ensure Member States' compliance with the socio-economic rights discussed above, including those enshrined in Article 14 of the Return Directive and those envisaged in the Charter. Such rights, stemming from obligations under international and regional human rights law and in alignment with the UN Global Compact on Migration, must be granted to *all* individuals irrespective of administrative immigration status. Instead of focusing on policing and punitive measures, strategies focused on social inclusion, the eradication of poverty, adequate standards of living/housing, healthcare/medical assistance and decent employment should be given priority.

Particularly, national authorities must be obliged to adopt, uphold and promote social policies allowing effective access to healthcare, employment, housing and assistance to uphold human dignity and avoid destitution and hyper-precarity.

3.1.3 Establish a ‘firewall’ for confidentiality in essential social services and the work of civil society actors, and funding Case Management

EU policy should introduce a firewall approach whereby medical staff, employers, teachers, social workers, civil society and other essential service providers both in the public and private sectors do not have reporting obligations towards law enforcement authorities when encountering individuals in an irregular situation.³⁰ This ‘firewall’ is necessary to allow undocumented TCNs to seek help, access to basic social services and get support whenever they need it without fear of arbitrary deportation and undue criminalisation.

Additionally, promising practices such as case management initiatives offering holistic individualised support to undocumented TCNs with the aim to work towards case resolution should be amplified, shared across the Member States and supported by targeted funding. Such stable, long-term case management or free legal aid programmes should be broadly accessible to all individuals requiring support in finding and pursuing avenues to case resolution, which may include voluntary return and longer-term regularisation.

³⁰ This also follows the recommendations by the Fundamental Rights Agency’s (FRA) and the European Commission against Racism and Intolerance (ECRI). In this context, the FRA acknowledged that ‘detections at or next to public institutions such as schools, hospitals or courts, as well as reporting or exchange of personal data between these institutions and immigration law enforcement bodies may create a general atmosphere of fear among migrants in an irregular situation, deterring them from accessing such institutions and thus disproportionately interfering with their fundamental rights’, recommending that ‘medical establishments’, ‘schools’ and ‘civil registries should not be required to share migrants’ personal data with immigration law enforcement authorities for eventual return purposes’. See: FRA (2013), *Apprehension of migrants in an irregular situation – fundamental rights considerations*, Point e) as well as Recommendations 3, 5 and 7, https://fra.europa.eu/sites/default/files/fra-2013-apprehension-migrants-irregular-situation_en.pdf.

Meanwhile, ECRI recommends that ‘[t]here must be clear firewalls which separate the activities of state authorities which provide social services and, where applicable, the private sector, from immigration control and enforcement obligation’, as firewalls are ‘ineluctable consequence of states’ duties to protect everyone within their jurisdiction from discrimination’. See: ECRI (2016) *General Policy Recommendation No. 16 on safeguarding irregularly present migrants from discrimination*, Adopted on 16 March 2016, Recommendations 3 and 11, <https://rm.coe.int/ecri-general-policy-recommendation-no-16-on-safeguarding-irregularly-p/16808b5b0b>.

3.1.4 Transitioning of Status and Regularisations as *Effective* Policies

Finally, new EU Guidance on returns – as suggested above – should include actionable steps towards abolishing administrative ‘limbo’. This would entail ensuring that those who cannot be returned are granted access to accessible and expedient procedures to be granted autonomous residence permits or other authorisations conferring a right to stay and ensuring security of residence to the beneficiaries. Existing practices – as observed in both Spain³¹ and Greece³² in spite of their diverging political approaches – to provide the possibility of registration and thus, to a certain extent, socio-economic rights, as well as access to more stable residence permits on humanitarian or other grounds (as underlined in Article 6(4) of the Return Directive), should be supported, promoted and expanded as an ‘effective policy’, with the possibility of transitioning to long-term permits.

³¹ As discussed above in Section 2.2. On Spain’s *Padrón* and *arraigo*, see also: González-Enríquez, C. (2009), ‘Country Report Spain’, *Undocumented Migration – Counting the Uncountable. Data and Trends*, CLANDESTINO Project, pp. 20-2; García-Juan, L. (2021) ‘The disruptive regularisation mechanism in the Spanish law that challenges the reform of the Common European Asylum System’, *Migraciones*, Vol. 51, May 2021, pp. 31-60. and Fiontelli, C., Cassain, L. and Echeverria, G. (2024), *Spain – Country Brief on Irregular Migration. Policy Context*. MIRREM Project – Measuring Irregular Migration, 05/2024, pp. 8, 12 <https://irregularmigration.eu/wp-content/uploads/2024/11/MIRREM-Fiontelli-et-al-2024-Spain-Country-Brief-on-Irregular-Migration-v1.pdf>.

across Europe

³² In 2023, Greece passed new legislation (Law No. 5078/2023, Government Gazette A 211/20.12.2023, ‘Reform of professional insurance, Rationalization of Insurance legislation, Pension Arrangements, Appointing and hiring system for public service educators and other provisions’), which introduced a new residence permit for employment purposes to third-country nationals. The permit is to be granted for three years, also to the spouses, parents and children of the TCN, with the possibility of transitioning to a different category of residence permit after its expiry in line with the migration code. The Greek national report estimated that up to 30,000 irregularised TCNs will benefit from the scheme, which will help address the significant labour shortages in the country.

See also: <https://etias.com/articles/greece-residency-permit-labor-shortage> and https://migrant-integration.ec.europa.eu/news/greece-new-online-platform-tcn-residence-permit-applications_en.



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Motivations, experiences and consequences of returns and readmissions policy: revealing and developing effective alternatives

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Motivations, experiences and consequences of returns and readmissions policy: revealing and developing effective alternatives



Development of the Return and Readmission policy across Europe: multilevel analysis –

Key findings



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Disclaimer

This document provides a concise summary of the key findings from the policy brief on Return and Readmissions policy across Europe that was conducted in the framework of MORE project. For detailed analysis, evidence, and comprehensive insights, please refer to the full report. The information in this summary should not be considered complete or fully representative of the entire study.

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Introduction

The Amsterdam Treaty and Tampere Agenda of 1999 played pivotal roles in establishing the Common European Migration policy and the Common European Asylum System (CEAS). Before these agreements, migration and asylum matters were handled solely at the national level, with intergovernmental cooperation. The Amsterdam Treaty elevated migration and asylum cooperation to a supranational level, granting the European Commission a significant role.

However the foundations of the European Migration Regime were laid out in the Schengen Agreement of 1985, which facilitated the free movement of people within the Schengen zone while strengthening border controls for third-country citizens. This led to the emergence of internal and external dimensions of European Migration and Asylum Policy, including border control harmonization and asylum system coordination.

The EU's external migration regime focuses on preventing unauthorized entry and managing returns of third-country nationals lacking legal residency. The EU Return Directive (2008/115/EC), in force since 2010, sets standards to ensure "effective and humane return policy as a necessary element of a well-managed migration policy" (EU DIRECTIVE 2008/115/EC). Voluntary return was seen as more effective than forced return because it ensured the protection of the fundamental rights of returnees and reduced the risk of remigration. Finally, as the third important principle of a well-managed, i.e., effective migration policy, return was expected to be implemented "in accordance with fundamental rights as general principles of Community law as well as international law" (Ibid.:101).

Initial evaluations of the Return Directive indicated effective return procedures and sustainability. However, during the 2015 refugee crisis, policy focus shifted towards return rates, often neglecting sustainability and migrant rights. This shift is evident in subsequent policy documents, reflecting member states' pressure.

This policy brief is, part of a larger EU-funded project examining motivations, experiences, and consequences of EU returns and readmission policies, based on in-depth analysis of policy documents and expert interviews with stakeholders etc. It aims to summarize key policy trends and their implications, focusing on five critical areas at both EU and national levels.

Historically, all the member states included in the project had some kind of policy towards "unwanted" citizens of third countries, some of them as early as the 1980s, and most of them since the beginning of the 1990s. These policies differed depending on the political and economic priorities, traditions, and path dependencies related to the previous policy paths. Some of them (Greece, Italy, Spain) have traditionally been countries of emigration, and they started to deal with immigration issues only in the 1980s. The countries included in our study became EU members on different dates. In addition to the founding countries (Belgium, Italy and Germany), Greece joined in 1981, Spain in 1986, Sweden in 1995, and Slovenia in 2004. The UK joined in 1973 and left in 2020. All this certainly influenced the creation, development and orientation of their migration policies in the period before the Amsterdam Treaty, and on the strategies of harmonizing their policies after that.

Evidence and analysis

Relationship between Protective and Enforcement Policy Intentions

Pre-2010 period: Our national reports indicate that at the time of the adoption of the Directive in 2008 and its entry into force in 2010, R&R policies in many EU member states were stricter than the Directive itself, with a dominance of enforcement measures and quite limited protective safeguards.

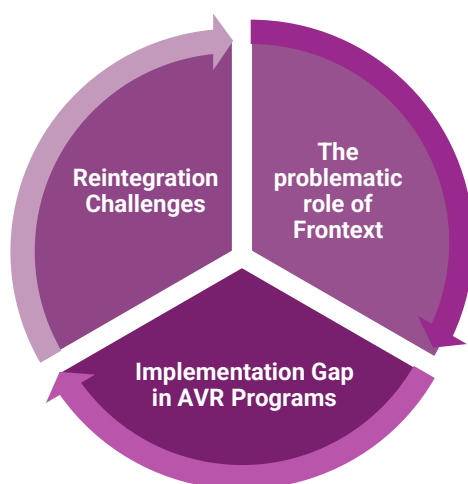
Shift Post-2015: A crisis-driven phase post-2015 saw a shift towards prioritizing effectiveness in deportations, reducing protective measures and increasing deportation rates.

Post-2019 Consolidation: Since 2019, there has been a systematic erosion of human rights for returnees, with strategies to formally meet protection criteria while violating them in practice, supported by legitimizing discursive strategies.

Deterrence Policy: Since the 1980s, many countries have implemented policies reducing immigrants' rights to encourage voluntary departure and deter potential immigrants ("Unfriendly Environment" policies). The European Commission's European Agenda on Migration from 2015 also adopted this policy within its strategy to reduce incentives for irregular migration.

Employment-Based Stay Initiatives: Alongside increased restrictiveness, several countries allow individuals facing deportation to remain if they secure employment, though this often leads to economic exploitation and disenfranchisement, creating a vulnerable state of deportability for migrants.

(Assisted) Voluntary return (AVR)



Implementation Gap in AVR Programs:

National AVR programs emphasize sustainability, legal certainty, and human rights, but in practice, they focus more on return rates, often undermining the voluntariness of returns through limited legal access, prolonged detention, coercion, and linking social assistance to return cooperation.

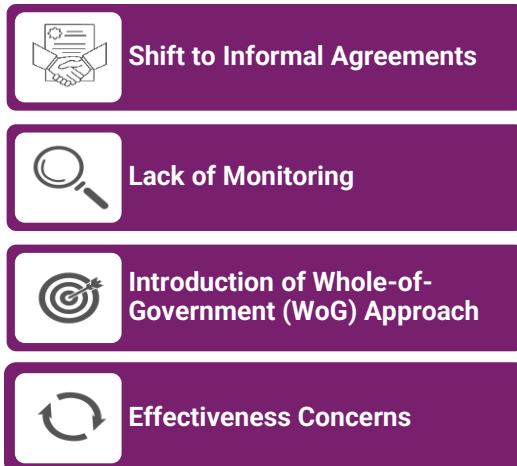
AVR policy. However, empirical research suggests that Frontex has contributed to further criminalization of migration and migrants, besides facing accusations of engaging in illegal and inhumane treatment of migrants.

1. **The problematic role of Frontex:** The European Border and Coast Guard Agency (Frontex) has gained an increasingly significant role within the
2. **Reintegration Challenges:** The reintegration phase is notoriously characterized by a lack of program monitoring and evaluation. Insufficient reintegration support results

in re-migration and the tendency for migrants to choose new and higher risk migration routes.

Formal and Informal Readmission Agreements/Arrangements

Since 2015, EU member states have increasingly relied on over 300 **mostly informal bilateral readmission arrangements** with third countries, which are non-reciprocal and lack binding legal obligations or commitments to uphold international law.



These informal agreements have faced criticism for violating fundamental rights, eroding EU values, and **lacking transparency and monitoring**, suggesting a deliberate strategy rather than administrative oversight.

Whole-of-Government (WoG) Approach has become increasingly important in many national R&R policies. It emphasizes the inclusion, coordination, and cooperation among various institutional

actors and policy areas to enhance the effectiveness of R&R policy. In 2023 has WoG been promoted as a strategy for border externalization and cooperation with third countries, focusing on improved information exchange between EU institutions and member states to present a unified stance towards third countries.

Despite readmission agreements, characterized by the informalization, secrecy, and lack of transparency, affords greater flexibility in implementing of return policy, evidence indicates that informal **agreements have not improved return rates** compared to formal agreements.

Detention



Expansion and Privatization of Detention:

There has been an increase in detention facilities and legislative changes for more frequent use of detention in studied countries, poor living conditions in detention centers, and the detention of vulnerable populations, including children and pregnant women, raising significant concerns.

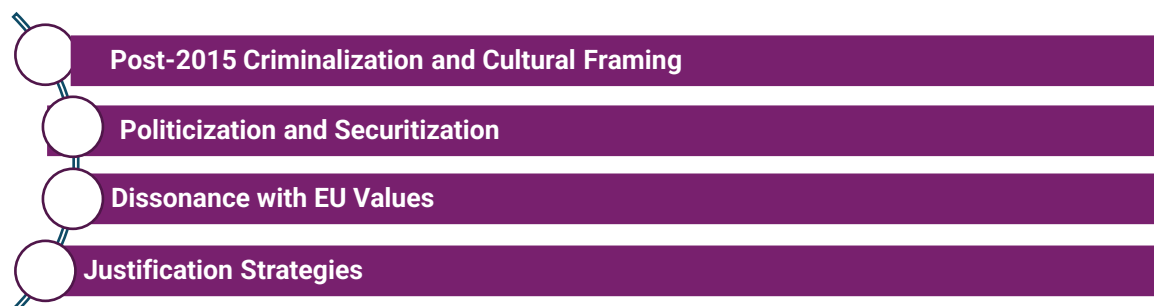
- 1. Quality and Rights Issues:** The privatization of detention centers has led to allegations of inhumane treatment and limited access to legal and healthcare services, aligning with broader “unfriendly environment” policies.
- 2. Marginalization of alternatives to detention:** Concurrently, alternatives to detention, despite they exist within national R&R policies, remain marginalized.

3. **Ineffectiveness:** The expansion of detention in EU member states contradicts research showing that detention does not prevent or reduce migrant arrivals and can lead to migrants taking greater risks. Additionally, detention does not increase return rates or result in a more efficient return policy, with no correlation between the number of detainees and the number of returns.

Conceptualization of 'Effectiveness' within the EU System

1. **Shift in "Effectiveness" Post-2015:** After 2015, "effectiveness" in the Return Directive shifted from a balanced approach, emphasizing human rights and sustainability, to focusing narrowly on return rates, often using forced measures and sidelining procedural safeguards. This period saw a policy realignment toward a "soft law" approach, where interpretations and applications of existing laws evolved, creating a gap between official objectives and practical execution.
2. **Stricter Hard Law Approaches by 2017:** By 2017, a stricter "hard law" approach emerged with initiatives like the Renewed Action Plan on Returns and recommendations for making returns more effective, proposing reduced safeguards, extended detention periods, and redefined voluntary return criteria.
3. **Focus on Return Rates Over Sustainability:** Overall, trends indicate a prioritizing enforcement over protection, favoring forced returns, using informal readmission agreements, expanding detention, and neglecting human rights and alternative detention methods—focus on maximizing return rates at any cost, rather than achieving sustainable returns.

Discursive Aspects in R&R Policy Formulation, Promotion, and Application



Since the 1980s, migration policy has become highly **politicized and securitized**, influenced by populist rhetoric framing migrants as threats to security and welfare. This led to increased militarization, securitization, and externalization of borders, often supported by manipulated migration statistics.

After the 2015 migration crisis, discourses shifted to **criminalizing migrants** and emphasizing **cultural and security** threats. Euphemistic language is used to justify harsh detention practices, obscuring their true nature and complicating statistical analyses.

There is a growing gap between the **EU's foundational values** (human dignity, freedom, democracy, equality, rule of law, and human rights) and the trajectory of R&R policies. These policies, justified with rhetoric claiming adherence to legal frameworks, increasingly diverge from these values, as seen in the controversial 2018 recast of the EU Return Directive.

R&R policies are often **justified** as necessary for maintaining social stability, public safety, and the rule of law, with humanitarian concerns being downplayed. This approach uses discursive **strategies** to align restrictive measures with legal and ethical norms.

Key policy trends

This policy brief intended to provide a comprehensive overview of the evolution of Return and Readmission (R&R) policy, covering its inception to the present and potential future trajectories, across three distinct historical periods.

The analysis spans three historical periods: 1990-2010, characterized by the formulation of fundamental principles emphasizing human rights and constructive engagement; 2015-2019, marked by a paradigm shift towards enforcement measures prioritizing effectiveness over sustainability and migrant rights; and 2019-present, where restrictive trends solidify with increased legislative support and heightened severity and scope.

Key Trends:

Trends in R&R policy include the prioritization of enforcement over protective measures, the shift towards forced returns, informalization of readmission agreements, expansion of detention measures, and the growing threat to human rights. Despite these trends, research suggests they do not lead to a more effective R&R policy.

Contradictory Policy Trends:

The study identifies contradictory trends in R&R policy, including tightening return policies while simultaneously offering opportunities for individuals to remain if they secure employment. These trends reflect politicians' attempts to navigate conflicting political pressures from right-wing populist movements and corporate interests.

Complexities in Policy Justifications:

Political discourse often justifies R&R policies as necessary for maintaining social stability and public safety, despite the dissonance with EU values and humanitarian concerns. Additionally, media narratives on migration often overlook the labor market needs of Global North countries as a primary driver of South-North migration.

Political Hypocrisy and Dual Objectives:

The study suggests that politicians adopt a duplicitous stance on R&R policies, ostensibly tightening anti-immigration measures while also facilitating increased immigration to meet labor market objectives, reflecting the challenges of balancing conflicting political demands.

Policy implications

The EU Return and Readmission (R&R) policy is characterized by several deep structural contradictions that cannot be resolved with simple policy recommendations.

These contradictions include:

- The disparity between the fundamental values, moral, and legal norms on which the EU is based, and the practice of implementing R&R policies, which increasingly diverges from these norms and principles. In addition, new policy practices promise the re-establishment of social stability and strengthening of public security, without offering any evidence that this will necessarily be the case.
- The growing gap between the actual practice of implementing R&R policies and the discursive strategies aimed at mitigating the negative effects of those policies.
- An ever-deepening contradiction between increasingly restrictive policies that fail to deliver practical results and the undiminished enthusiasm with which these policies continue to be implemented.
- The contradictions arising from politicians' efforts to reconcile the anti-immigration demands of increasingly strong right-wing populist forces in all EU societies with the equally strong political demands of corporate capital seeking to secure cheap labor.

Simultaneously, the notorious lack of monitoring and evaluation of current policies, the secrecy of contracts and arrangements with third parties, and the lack of relevant statistics or the use of different methods in collecting and presenting data on current policy results indicate that these are not random mistakes or administrative oversights, but deliberate shift in policy strategies.

Policy recommendation

In the political climate which engenders criminalization of migrants, restrictive migration and integration policies across EU member states and undermines fundamental rights, simple policy recommendations are not applicable. The current policy direction does not need minor adjustments to achieve its goals; it is increasingly at odds with the fundamental principles and values of the EU. What is needed is a broad and inclusive political debate on whether European citizens wish to maintain this course or uphold the EU's Charter of Fundamental Rights which guarantees human rights and dignity to all regardless of legal status, contains the rights to asylum and forbids forced expulsion and removal of persons against the harm and threat to their life.

The main recommendation is to develop an alternative policy that strengthens the role and tools of the EU Fundamental Rights Agency (FRA) to effectively monitor intergovernmental and national human rights systems. When the FRA was established in 2007, its primary goal was to support the implementation of fundamental rights in areas such as migration, personal data protection, equality, and justice. However, from the outset, the FRA was given a limited advisory mandate without formal power to enforce its recommendations. As a result, member states have frequently disregarded FRA's guidance, particularly in the areas of general migration management and, more specifically, return and readmission (R&R) policy.

To address these challenges, it is essential to expand the FRA's mandate and strengthen its authority, allowing the EU and its member states to benefit from more effective support in handling the complexities of R&R policy outlined in this report.

In response to the growing national policy trend toward a restrictive 'whole of government' (WoG) approach—which emphasizes detention and forced returns—it is critical to mobilize civil society through a 'whole of society' (WoS) approach. This would

prioritize migrants' rights, addressing the vulnerabilities and lack of legal protections that rejected migrants face in detention centers and during return and readmission processes. In short, the WoS approach is more legally sound, as it aligns with the EU Charter of Fundamental Rights; more just, reflecting the core moral values upon which the EU is founded; and ultimately more sustainable—both politically and economically—than the WoG approach.

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nota

Geannoteerde agenda van de formele JBZ-Raad, 13-14
oktober 2025 te Luxemburg

Datum

24 september 2025

Onze referentie

6762012

1. Aanleiding

De JBZ-Raad zal van 13-14 oktober 2025 plaatsvinden in Luxemburg onder Deens voorzitterschap. Met de geannoteerde agenda worden de Kamers over de agenda en Nederlandse inzet tijdens deze Raad geïnformeerd.

U wordt geadviseerd de geannoteerde agenda uiterlijk maandag 29 september a.s. te verzenden naar de Kamers in verband met het Commissiedebat dat gepland staat op donderdag 2 oktober a.s.

2. Geadviseerd besluit

Instemmen met verzending van de aanbiedingsbrieven en de geannoteerde agenda aan de Eerste en Tweede Kamer.

3. Kernpunten

De onderwerpen in de aanbiedingsbrieven en de geannoteerde agenda zijn als volgt verdeeld:

MJenV:

- Kabinetsappreciatie Aanbeveling onderhandelingsmandaat voor de Europese Commissie inzake de *Enhanced Border Security Partnership* (aanbiedingsbrief, p. 1-2)
- De Russische agressieoorlog tegen Oekraïne: strijd tegen straffeloosheid (p. 1)
- De toekomst van Eurojust (p. 1-2)
- Toegang tot gegevens voor effectieve strafrechtelijke onderzoeken (p. 2)
- Jaarlijks voortgangsverslag over handhaving en implementatie (justitie-dag) (p. 3)
- Implementatie van interoperabiliteit (p. 4-5)
- Europese Verordening ter voorkoming en bestrijding van seksueel misbruik van kinderen (p. 5)
- Verordening betreffende de versterking van de politieke samenwerking bij de bestrijding van migrantensmokkel en mensenhandel (p. 5-6)
- Uniemechanisme voor Civiele Bescherming en Gezondheidsnoodhulp (p. 6)
- Toegang tot gegevens voor effectieve wetshandhaving (p. 7)
- De impact van de huidige geopolitieke situatie op de interne veiligheid van de EU (p. 7-8)

SJenV

- Ontwikkelingen op het gebied van de rechtsstaat in de justitiële sector (p. 1)

4. Toelichting

N.v.t.

5. Informatie die niet openbaar gemaakt kan worden

Persoonsgegevens van de betrokken beleidsmedewerker.

5.1. Toelichting

De persoonsgegevens van de ambtenaren zijn niet openbaar ter bescherming van de persoonlijke levenssfeer.

6. Bijlagen

1. TK Aanbiedingsbrief bij de JBZ-Raad van 13-14 oktober 2025
2. EK Aanbiedingsbrief bij de JBZ-Raad van 13-14 oktober 2025
3. Geannoteerde agenda bij de JBZ-Raad van 13-14 oktober 2025

Cluster secretaris-generaal

Directie Europese en
Internationale
Aangelegenheden
Europese Unie

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