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1 Introduction

The European Union (EU) has proclaimed in its Treaties[1] that it "constitutes an area of freedom, security and justice with respect for fundamental rights". The EU has developed coherent policies on external border control, asylum and immigration which address security concerns, while also aiming to ensure the fair and humane treatment of migrants.

In the context of irregular migration, Directive 2008/115/EC[2] ("**Return Directive**" or "**RD**") reiterates that fundamental rights are applicable to everyone, irrespective of their legal status, and Member States are obliged to guarantee their effective protection. Nevertheless, the migration control measures taken by Member States often fail to meet fundamental rights standards enshrined in the Charter of the Fundamental Rights of the EU ("**CFR**"), the European Convention on Human Rights ("**ECHR**") and other human rights instruments[3].

The present study examines the level of protection of the fundamental rights of irregular migrants (such as the prohibition of torture and inhuman or degrading treatment[4], the principle of non-refoulement[5], respect for private and family life[6], prohibition of collective expulsions[7], fair trial[8] and equal treatment[9]) during the different stages of the return process. This contribution aims to pinpoint which rights are at most risk of infringement. It outlines the shortcomings and gaps in protection in the application of the Return Directive and offers some specific recommendations to strengthen the legal framework.

[1]Art. 67, para. 1 of the Treaty on the Functioning of the European Union ("**TFEU**"). See also Art. 3, para. 2 of the Treaty of the European Union ("**TEU**").
[2] 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.
[3] UN Convention on the rights of the child ("**CRC**"); the International Covenant on Civil and Political Rights ("**ICCPR**"); the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**").
[4] Art. 3 ECHR, Art. 4 CFR.
[5] Art. 3 ECHR, Art. 19, para. 2 CFR.
[6] Art. 8 ECHR, Art. 7 CFR.
[7] Art. 4 Additional Protocol No 4 to the ECHR, Art. 19, para. 1 CFR.
[8] Art. 6 ECHR, Art. 47 CFR.
[9] Art. 14 ECHR, Art. 21 CFR.

2 Pre-immigration stage

The pre-immigration (pre-admission) stage is included in this study because in most of the cases people are physically present on the territory of a Member State before being subjected to pushback practices and denied access to proper procedure under the Return Directive.

2.1. Definition of pushbacks

Even though pushbacks are quite common practices at many borders across the world, including external EU borders, they are not defined in any law instrument. One of the most accurate definitions, well-capturing this phenomenon, was proposed by the Special Rapporteur on the Human Rights of Migrants:

> "pushbacks" as various measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border[10].

The only specific legal provision that exists and relates to practices commonly referred to as pushbacks and which can be used to challenge such practices in a court of law is Article 4 of Protocol 4 to ECHR which prohibits the "collective expulsion of aliens". The jurisprudence of the European Court of Human Rights ("**ECtHR**") links the term 'collective' to the principle of non-refoulement and the obligation of the state to individually assess every case of expulsion in order to ensure that no person will be sent back to the country in which they could face

[10] Special Rapporteur on the Human Rights of Migrants, Report on means to address the human rights impact of pushbacks of migrants on land and at sea, A/HRC/47/30, 12 May 2021, p. 4.

torture or any form of ill-treatment; everyone shall have the opportunity to present arguments against their expulsion that shall be properly examined by the authorities[11].

2.2. Circumstances in which people on the move are pushed back

In the Hirsi Jamaa and Others v. Italy case[12] it was underlined that the states are obliged to apply ECHR in situations when they exercise de jure and de facto control over migrants. Thus, the fundamental rights of the migrants shall be respected not only when they are present on the territory of a particular state but also in certain circumstances when their boats are intercepted on the high seas or when their entry is denied at a border crossing point. When extraterritorial jurisdiction is established, migrants cannot be summarily transferred or pushed back to any country that is known for violation of human rights or ill-treatment. Such an interpretation of ECHR seems the most consonant with the corpus of law, taking into account the growing number of countries expanding border control beyond their territories[13].

To establish that a person was subjected to expulsion, it is irrelevant whether they are returned to another country or simply removed to the designated territory of the state that expelled them[14]. The provisions of the ECHR 'must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory'[15] and different circumventions (technical or legal) applied by some states should not prevent the situation from being classified as pushback when a migrant is removed from the territory and not allowed to re-enter. In addition, a state may not use domestic law or administrative practices to limit its

[11] Hakiki, H. (2022). The ECtHR's Jurisprudence on the Prohibition of Collective Expulsions in Cases of Pushbacks at European Borders: A Critical Perspective, in: *Theory and Practice of the European Convention on Human Rights.* S. Schiedermair, A. Schwarz, & D. Steiger (Eds.), pp. 139–140, Nomos. See also ECtHR, *M.K. and others v. Poland,* Application nos. 40503/17, 42902/17 and 43643/17, 23 July 2020, paras. 172-173.
[12] ECtHR [Grand Chamber], *Hirsi Jamaa and others v. Italy*, Application № 27765/09, 23 February 2012, para. 81.
[13] Hakiki, op. cit, p. 137; Barnes, J. (2022). Torturous journeys: Cruelty, international law, and pushbacks and pullbacks over the Mediterranean Sea. *Review of International Studies*, 48(3), p. 451.
[14] ECtHR, *Shahzad v. Hungary*, Application № 12625/17; 8 July 2021, para. 49.
[15] Ibid, para. 50.

responsibility and cannot declare that physical barriers they built on its borders and especially the territory beyond them are not part of its territory to avoid jurisdiction[16].

According to ECtHR[17], when a person is under the jurisdiction of a state the non-refoulement principle should be observed even if no asylum application is submitted[18]. Thus, even non-admission to the territory of a state may be tantamount to an expulsion. All people on the move should enjoy the right to an individual assessment of their case and benefit from protection against an automatic expulsion, especially to the country which could violate their rights protected by Article 3 of the ECHR[19]. Even if the country of origin is considered safe, it is prohibited to expel a person to a third transit country where they would be exposed to ill-treatment[20].

The ECtHR has also pointed out on numerous occasions[21] that the state is obliged to examine whether, in the expelling country, (1) a person has a real opportunity to have their asylum case properly and carefully examined by the authorities and (2) can exercise effective protection from being further expelled to the country where their life could be put at risk. The practice of chain or indirect refoulement is prohibited[22].

2.3. People excluded from the protection due to their 'own conduct'

In the N.D. and N.T. case, the ECtHR declared that the protections of the Convention may not be granted when

[16] Carrera, S. (2020). The Strasbourg court judgement 'N.D. and N.T. v Spain': A 'carte blanche' to push backs at EU external borders?, EUI Working Paper RSCAS, European University Institute.
[17] ECtHR [Grand Chamber], *N.D. and N.T. v. Spain*, Applications № 8675/15 and 8697/15, 13 February 2020, paras. 179-18.
[18] The ECtHR highlighted in another judgment that those who want to apply for asylum can express their willingness to do it in whatever form. Moreover, the government should 'provide border officers with training to enable them to detect and understand asylum requests, even in cases where asylum seekers are not in a position to clearly communicate their intention to seek asylum' (ECtHR, *M.A. and others v. Lithuania*, Application № 59793/17, 11 December 2018, para 109).
[19] Carrera, op. cit., pp. 3-5; Hakiki, op. cit., p. 138.
[20] ECtHR, *Illias and Ahmed v. Hungary*, Application № 47287/15, 21 November 2019, para. 124; see also Klaus, W. (Ed.) (2021). Humanitarian crisis at the Polish-Belarusian border. Report by Grupa Granica.
[21] ECtHR, *M.K. and others v. Poland*… paras. 172-173; ECtHR, *M.A. and others v. Lithuania*… para. 105-115
[22] Oudejans, N., Rijken, C., & Pijnenburg, A. (2018). Protecting the EU External Borders and the Prohibition of Refoulement. *Melbourne Journal of International Law*, *19*(2), pp. 616-617.

the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety[23].

Undoubtedly, this raises the question of what the term 'large numbers' means and how to calculate it. It should be emphasized, though, that the ECtHR did not refer to the general number of migrants who irregularly cross the border but to the particular event at the particular time and the particular group; in the N.D. and N.T. case, it was the group of 600 persons[24].

Another premise that has to be fulfilled is the 'use of force'. In the N.D. and N.T. case, applicants climbed onto the fence and no form of violence was reported. Thus, one might reasonably question whether the applicants or other members of their group used force to cross the border in a way that would jusitify their exclusion from protection standards. Nevertheless, ECtHR decided that they were excluded.

The N.D. and N.T. decision became a point of reference in other cases, in which ECtHR considered whether 'use of force' took place. In Shazhad case[25] the ECtHR mentioned that the applicant was not violent against any person (neither actively nor as a form of resistance) and that he followed orders of the enforcement agents[26], opposing this situation to the N.D. and N.T. case.

In several other cases, the ECtHR has focused on the manner in which borders were crossed. In the M.K. and others v. Poland decision[27], the ECtHR found a violation of Article 4 of Protocol 4 of the ECHR concerning people on the move sent back to Belarus and not being admitted to Poland; the fact that the applicants tried to legally enter the country and filed their asylum applications at the border crossing points was crucial.

[23] ECtHR [Grand Chamber], *N.D. and N.T. v. Spain*... para. 201.
[24] Baranowska, G. (2021). Pushbacks in Poland: Grounding the Practice in Domestic Law in 2021. *Polish Yearbook of International Law*, 41, p. 209
[25] ECtHR, *Shahzad v. Hungary*… para. 61
[26] Hakiki, op. cit., p. 145
[27] ECtHR, *M.K. and others v. Poland*… paras. 203, 205, 207

The problem of irregularity of the border crossing was further developed by the ECtHR in A.A. and others v. North Macedonia[28] where the way in which the applicants entered the territory of the state became the main reason why the ECtHR denied them protection:

[T]he Court considers that the lack of individual removal decisions can be attributed to the fact that the applicants (…) did not make use of the official entry procedures existing for that purpose, and was thus a consequence of their own conduct.

The relevance of such an interpretation of Article 4 of Protocol 4 of the ECHR remains as long as the state provides the migrants with a reasonable and effective opportunity to file asylum applications at the border crossing point[29]. Those states that can demonstrate an effective system for registration of asylum applications at the border may rely on ECtHR jurisprudence and may push back irregular crossers without any procedure[30]. An effective access to the territory and to asylum means inter alia the establishment of a sufficient number of border crossing points[31] That position was reaffirmed in the Shahzad case when the ECtHR found Hungary in breach of the ECHR because the applicant was deprived of the possibility to effectively apply for asylum in the so-called transit zone[32]; exclusive places where an asylum application could be submitted were created by the Hungarian authorities, but in an extremely limited number[33].

[28] ECtHR, *A.A. and others v. North Macedonia*, Application № 55798/16, 55808/16, 55817/16 et al., 5 April 2022, para. 123

[29] It is worth noticing that double standards are visible in the practice of the ECtHR regarding the assessment of the so-called 'cooperative' and 'non-cooperative' states. The former were given much more credit by the Court regarding the explanations provided by these states in reference to the claims made by applicants. The latter consists of countries where human rights protection is questionable, like Russia or Turkey, but lately also Hungary and Poland which position the authorities of these states and their explanations as less trustworthy – see. Baranowska, G. (2023). Exposing Covert Border Enforcement: Why Failing to Shift the Burden of Proof in Pushback Cases is Wrong. *European Convention on Human Rights Law Review*, 4 (4), pp. 473–494

[30] Schmalz, D. (2022). Enlarging the Hole in the Fence of Migrants' Rights: A.A. and others v. North Macedonia. Verfassungsblog.

[31] Baranowska, G. (2021), Pushbacks in Poland…, p. 209. Even though in the very case of *N.D. and N.T.* the ECtHR ignored facts provided by international organizations which proved the practical ineffectiveness of the Spanish system in regard to the legal avenues to enter the country and file the asylum claim for Sub-Saharan nationals – see Carrera, op. cit, p. 11-17

[32] Schmalz, op cit.

[33] Klaus, W. (2017). Closing Gates to Refugees: The Causes and Effects of the 2015 "Migration Crisis" on Border Management in Hungary and Poland. *Yearbook of the Institute of East-Central Europe*, *15*(3), pp. 11–34

Moreover, ECtHR considers that a person does not deserve protection if they are not really interested in applying for asylum but use this legal framework just to access the territory of the "transit" state with an intention to continue to travel further on[34]. This of course raises many questions of proof and the nature of inquiries that take place between the person and government agents.

2.4. Right to protection of borders vis-à-vis protection of human rights

The EU is obliged to develop a common asylum policy, in line with international human rights standards, with a special focus on guaranteeing access to international protection and compliance with the non-refoulement principle[35]. This obligation, stipulated in art. 78, para. 1 of the TFEU, was also strongly reinforced by the ECtHR in the M.S.S. v Belgium and Greece case[36] when the right of the state to protect borders or prevent irregular border crossings was balanced by the obligation to fully embrace international standards for the protection of people on the move. In particular, the ECtHR stressed the necessity to protect individuals from the risk of torture or ill-treatment (article 3 of the ECHR). Thus, the non-refoulement principle must be observed in every case of expulsion, even if expedited procedures are applied in accordance with a re-admission agreement. The state shall provide an effective remedy (including judicial overview) to scrutinize the actions of the authorities and prevent the unlawful refoulement of migrants, which might cause irreversible damage[37].

That argumentation was later reversed in the N.T. and N.D. decision where the ECtHR (Great Chamber) declared that the non-refoulement principle shall be applied in every single case without exceptions but also referred to the state's sovereignty to protect its territory and

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[34] Mitsilegas, V. (2022). The EU external border as a site of preventive (in)justice. *European Law Journal*, *28* (4–6), pp. 263–280

[35] Goodwin-Gill, G. S. (2011). The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement. *International Journal of Refugee Law*, *23*(3), p. 446

[36] ECtHR [Grand Chamber], *M.S.S. v Belgium and Greece*, Application №. 30696/09, 21 January 2011, para. 216.

[37] Goodwin-Gill, op. cit, p. 454; Dicle Ergin, A. (2022). "Protection" or "Instrumentalization" of Refugees: Will the European Court of Human Rights Fill in the Gaps in Pushback Cases After the Greece/Turkey Border Events?, in: *The Informalisation of the EU's External Action in the Field of Migration and Asylum,* E. Kassoti & N. Idriz (Eds.), pp. 204–205, 208–209, T.M.C. Asser Press and Springer.

to manage migration processes, including irregular border crossing. It was established that the authorities may indicate certain border crossing points where an asylum claim should be submitted. As a consequence, states are allowed to disregard other asylum applications submitted by persons who had crossed the border irregularly. Thus, the ECtHR accepted that people can be returned to the borderline[38].

In the Alhowais v. Hungary[39] case the ECtHR further discussed the obligations of states when planning and conducting border operations and stressed that they should actively protect the lives of people on the move. The obligation to avoid a real and immediate risk to life also refers to the construction of all physical barriers at the border. Such obligation is not revoked during the mass influx of people on the move and also pertains to the cases when people take geographically dangerous routes or are unprepared to survive such a journey. In all situations mentioned above, the positive obligations of the states in fact increase as it has better knowledge of the routes and the ways in which migrants behave; therefore it has to plan better on how to conduct border operations in a safe manner[40]. The ECtHR highlighted that states should protect the lives of migrants notwithstanding their 'culpable conduct' as defined in the N.T. and N.D. decision[41].

To sum up this not particularly clear way of arguments presented in jurisprudence it should be observed that the ECtHR has never repealed the non-refoulement principle but has tried to somehow operationalise it in a way to give authorities of Member States more clear instructions on how to behave when managing irregular border crossing on a bigger scale. The Court highlighted the obligation of opening a sufficient amount of border crossing when an asylum application can be filed legally and effectively. At the same time, declaring the fact that

[38] On the incoherent reasoning of this decision see Carrera, op. cit., pp. 5-6
[39] ECtHR, *Alhowais v. Hungary*, Application №. 59435/17, 2 February 2023, para. 132
[40] Łysienia, M. (2023). Pushbacks, border deaths and the right to life: The recent case law of the European Court of Human Rights. *ERA Forum*, *24*(3), p. 9
[41] Łysienia, op.cit, p. 11

states have the right to protect their borders the ECtHR underlined that their primary obligation is to protect the lives of people on the move and prevent their deaths on the state's border and in the territory under its jurisdiction.

2.5. Attempts to ground pushbacks in national legislation

Pushbacks are a part of the broader phenomenon which can be called 'covert border enforcement.' This can be described as 'a set of practices whereby states effectively prevent people from entering their territory, while denying that such practices take place'[42]. The states use 'legal maneuvers' to adopt regulations which seem to be legal and well-founded but which in fact have at least two functions: (1) to create moral indifference and to diminish the moral significance of the harm they cause or contribute to; and (2) to evade the legal (and also moral) responsibility of the state and its authorities. As Barnes accurately stated that 'cruelty does not just occur through violations of the law. Depending on how the law is used, it can help create the conditions that make cruelty possible'[43].

However, states may not use national law to unilaterally render such practices legal as they are prohibited by international standards[44]. This was confirmed in the Shahzad case, as the ECtHR said that for its assessment it is entirely irrelevant how domestic law will name a practice whose actual function is to expel a person[45].

2.6. Frontex and its responsibility for human rights violations at borders

The role of the European Border and Coast Guard Agency ("**Frontex**") as an EU agency responsible for border management has been constantly growing over the last several years and it got a special boost after the so-called 2015 refugee crisis[46]. This has raised substantial

[42] Baranowska, op. cit., p. 1
[43]Barnes, op.cit., p. 443.
[44] Hakiki, op. cit, p. 138.
[45] Schmalz, D. (2021). Rights that are not Illusory: The ECtHR Rules on Pushbacks from Hungary. Verfassungsblog
[46] Fernández-Rojo, D. (2021). *EU Migration Agencies: The Operation and Cooperation of FRONTEX, EASO and EUROPOL*. Edward Elgar Publishing.

questions about the legal responsibility of the agency for the misconduct of their representatives in protecting EU borders[47]. In theory, the presence of Frontex officers at EU external borders should contribute to increasing the protection of the human rights of people on the move. In practice, however, there have been many reports of negative consequences, as recent examples in Greece and Hungary show that Frontex officers were indifferent to the violence they witnessed and did not interfere to prevent illegal pushbacks. Some have suggested that the presence of Frontex officers actually legitimised violations of human rights; and that sometimes Frontex even took an active part in denying that such violations happened[48]. The indirect responsibility of Frontex for human rights violations may be established when the agency either supported (financially or technically) operations that were conducted with a breach of international standards or when it failed to withdraw its officers from such activities[49].

On the other hand, the potential positive role of Frontex should not be underestimated, provided that it may stand for the protection of individuals and their human rights instead of simply supporting any activities at the border that EU member states conduct. Along with offering proper training to border guard officers and sensitizing them to human rights, the agency could create better complaints mechanisms to investigate alleged cases of human rights abuse[50]. The existing mechanisms have proven to be ineffective. For example, Frontex did not find any infringements in the situation at the Polish-Belarussian border where people seeking asylum were pushed back to Belarus by Polish authorities[51]. In contrast, the ECtHR in several decisions regarded the very same situation as an example of illegal collective expulsion[52].

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[47] Mitsilegas, op. cit., pp. 267-268
[48] Gkliati, M. (2022). The Next Phase of The European Border and Coast Guard: Responsibility for Returns and Push-backs in Hungary and Greece. *European Papers - A Journal on Law and Integration*, *2022 7*(1), pp. 179–180, 188.
[49] Gkliati, op. cit., p. 192
[50] Gkliati, op. cit., p. 187
[51] Fernández-Rojo, op. cit., pp. 196-197
[52] See for example ECtHR, *M.K. and others v. Poland*

2.7. Externalisation of borders and responsibility for human rights violation

Signing agreements with neighboring countries and making them responsible for controlling people on the move is part of the externalization of migration control. Those agreements create a difficult space for human rights protection, watering down the direct responsibility of EU member states and the EU as a whole. On the one hand, EU member states use such agreements to circumvent the application of the ECHR and to undermine the standards for protection of the fundamental rights of migrants set by ECtHR jurisprudence[53]. On the other hand, international bodies apply different strategies to avoid the assessment of the legality of such agreements – as it was in the case of the Court of Justice of the EU and the EU-Turkey agreement[54]. Another striking example is the border security agreement concluded between Italy and Libya in 2017 that was endorsed by the EU even when Libya had a proven track-record of severe violations of migrants' human rights[55].

2.8. Monitoring of violations at EU external borders

Setting up monitoring mechanisms regarding the potential violation of human rights at the external EU borders is the common responsibility of the EU and the Member States. The absence of procedures safeguarding respect for the non-refoulement principle paves the way for further infringements of international standards for protection. On the EU level, Frontex (in theory) could monitor practices conducted at different EU borders in an independent and impartial manner. However, the position of the Fundamental Right Officers that currently operate within the agency is too weak and giving them more executive power to intervene could improve their position only partially[56]. Probably in the future, some other solutions

[53] See for example ECtHR, *Hirsi Jamaa and Others*

[54] Spijkerboer, T. (2018). Bifurcation of people, bifurcation of law: Externalization of migration policy before the EU Court of Justice. *Journal of Refugee Studies*, *31*(2), pp. 216–239

[55] Barnes, op. cit, pp. 242-244

[56] Fernández-Rojo, op. cit., p. 201;

should be discussed to make the role of monitors more independent and more influential and one of the solutions can be to relocate them to a different EU agency.

Part of the monitoring process is to examine the existing regulations (including by-laws, internal manuals and instructions given to border guards). Human rights standards should be properly embedded into such documents that should be available for analysis at least for the experts. The next step is to monitor how the regulations are actually applied and to ensure that the day-to-day behaviors of the border officers are compliant. Therefore, gathering data on border operations is very important for monitoring. The data gathered should be publicly accessible or at least available to dedicated human rights protection offices: national, like the Ombudsmen, and international, like the UNHCR[57].

3 Return stage

According to Art. 1 of the RD fundamental rights are treated as guiding principles in its application. The RD contains provisions that explicitly refer to some fundamental rights while others are envisaged to be included in its proposed Recast[58]. The link between the RD and the fundamental rights is also established by case-law and soft-law sources as will be seen below.

3.1 Relevant provisions of the RD

The RD sets out the minimum standards for the protection of fundamental right in the return process[59] and explicitly mentions those enshrined in the CFR[60]. Other international instruments such as the CRC, the ECHR and the 1951 Refugee Convention are also

[57] Goodwin-Gill, op. cit., p. 456
[58] Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (proposed Recast) A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018 (COM/2018/634 final). The proposal to Proposed Recast the RD was first made in 2018 by the Commission. As of 2019 the report of the LIBE Committee rapporteur Judith Sargentini was not adopted in the 2014-2019 term. Following the elections of the Parliament in 2019, LIBE Committee Tineke Strik was appointed as a rapporteur and her draft report of the proposed Recast was published in 2020.
[59] Recital 11 RD.
[60] Recital 24 RD.

referenced.[61] Some rights in particular are extended by the RD to encompass illegally staying migrants[62] - the rights of the child, the right to family life, the right to health and to asylum protection.[63] The jurisprudence of the Court of Justice of the European Union ("**CJEU**") and the ECtHR contains valuable guidelines on how these fundamental rights should be guaranteed in the return process.

3.1.1 The principle of non-refoulement

It is important to highlight the conclusion of the CJEU that return procedures must include an assessment of the principle of non-refoulement that is individual and separate from the one conducted within the framework of the asylum cases[64]. The sole fact that the stay of the person concerned is categorized as "illegal", as soon as their application for international protection is rejected at first instance, does not allow Member States to ignore the principle of non-refoulement or to deny them the right to an effective remedy[65].

3.1.2 Prioritization of voluntary departure

Voluntary[66] departure is prioritized in the RD since it guarantees the right to liberty and security[67] of the foreigner. Art. 7, para. 4 of the RD provides an exhaustive list of exceptions where Member States are not obliged to grant a period for voluntary departure. In Zh and O, CJEU held that Member states should avoid refusing voluntary departure under Article 7, para.4 of the RD on the basis of automatic findings of the 'risk to public policy' solely related to suspicion or the commission of a criminal offense in the past[68]. When a Member State relies

[61] Recitals 22 and 23 RD.
[62] Queiroz, B. (2018). *Illegally staying in the EU*. Hart Publishing, Portland, USA, pp. 85-86.
[63] Art. 5 RD requires that the best interests of the child, the right to family life, the state of health of the third-country national and the principle of non-refoulement are taken in due account when implementing the Directive.
[64] See CJEU, *LM. v. Centre public d'action sociale de Seraing*, C-402/19, 30 September 2020; CJEU, B v. Centre public d'action sociale de Liège, C-233/19, 30 September 2020
[65]CJEU [Grand chamber], *Sadikou Gnandi v. État,belge*, C-181/16, 19 June 2018, para. 58 Recently, ECtHR adopts a more restrictive interpretation of *non-refoulement* principle: see above discussion on *ND and NT v. Spain* decision
[66] Although the term "voluntary" has been established to denote the non-coercive departure to the country of origin it should not imply that such a scenario is always sincerely desired and willingly chosen by the foreigner.
[67] Recital 10 and Art. 7RD.
[68] CJEU, *Z. Zh. v. Staatssecretaris voor Veiligheid en Justitie,* C-554/13, 11 June 2015, para. 70.

on general practice or any assumption to determine such a risk, it fails to meet the requirements for an individual examination of his/her case and his/her entitlement to protection as well as to the principle of proportionality[69].

3.1.3 Conditions and limitations of migrant detention

The right to liberty and security can be limited by detention, but only as a last resort measure under exceptional circumstances.[70]. When assessing whether pre-removal detention is legal and not arbitrary, the ECtHR looked at whether or not a less intrusive measure could have been imposed instead of resorting to deprivation of liberty.[71] The detention measure should aim to ensure the effectiveness of the return procedure and shall not pursue a punitive purpose. In I. L.,[72] the CJEU notes that detention is permitted by the RD solely "in order to prepare the return and/or carry out the removal process". In Kadzoev, the CJEU clarifies the term "reasonable prospect of removal" in connection to the periods laid down in Articles 15(5) and (6) of the RD and concludes that detention may not be justified where it appears unlikely that the person concerned will be admitted to a third country[73].

Any detention must strictly comply with the principle of proportionality and must observe the fundamental rights of the third country national. Detention measures should comply with the requirement of protection against arbitrariness. Article 15, para. 1 of the RD does not allow Member States to detain a third country national solely on the basis of a general criterion based on the risk that the effective enforcement of the removal would be compromised. When assessing the 'risk of absconding' under the RD, Member States should establish 'the intent of the person concerned to escape from someone or to evade something'[74].

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[69] Ibid. para. 50.
[70] Art. 15, recital 6 and 16 RD.
[71] ECtHR, *Louled Massoud v. Malta*, Application № 24340/08, 27 July 2010, para. 68; ECtHR, *Rahimi v. Greece*, Application № 8687/08, 5 April 2011, para. 109; ECtHR, *Yoh-Ekale Mwanje v. Belgium*, Application №.10486/10, 20 December 2011, paras. 124–125.
[72] CJEU, *I. L. v. Politsei- ja Piirivalveamet*, C-241/21, 6 October 2022
[73] CJEU [Grand Chamber], *Said Shamilovich Kadzoev (Huchbarov),* C-357/09 PPU, 30 November 2009, para. 66
[74] CJEU, *Abubacarr Jawo v. Bundesrepublik Deutschland*, C-163/17, 19 March 2019, para. 56

Conditions of detention have to respect the right to human dignity and allow for the exercise of fundamental rights, including the right to family life and to a fair trial. While in detention, families shall stay together and be given privacy; children shall be provided with conditions to facilitate their best interest (education, leisure activities, etc.).[75]

A detainee should be immediately released where the maximum period of detention laid down by that RD has expired, notwithstanding the fact that they are not in possession of valid documents, their conduct is aggressive, and have no means of supporting themselves outside detention; release should follow even if no accommodation or means are supplied by the Member States for that purpose[76].

3.1.4 Protection during removal

Forced returns are subject to limitations in conformity with the principles of proportionality and effectiveness[77].

The RD stipulates that coercive measures have to be employed with due respect for the human dignity and right to physical integrity of the removed person.[78] Pending removal, the right to family life, right to healthcare, right to education of children and special vulnerabilities have to be taken into account.[79]

In M.D.[80], the CJEU stressed that when withdrawing residence permits and issuing entry bans, as provided for by the RD, Member States have to consider the implications of such decisions for a third country nationals' family members who are EU citizens even if they have never exercised their right of free movement; a measure can be justified for reasons of public order or national security only after all relevant circumstances are taken into account, in

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[75] Art. 16-17, recital 17 RD.

[76] CJEU *Kadzoev*... para. 68. Therefore, detention should not be utilized as a means to evade the Member states' responsibility in providing assistance to irregular migrants who cannot support themselves or lack housing.

[77] Recital 13 and Art. 8(4) RD.

[78] Art. 8 RD.

[79] Art. 14 RD.

[80] CJEU, *M.D. v. Hungary,* C-528/21, 27 April 2023

particular the best interest of the child who is an EU citizen and who is dependent on the third country national.

Removal of a minor has to be accompanied with making sure that the child has a certain person/place to be returned to (family, a nominated guardian or adequate reception facilities).[81] In TQ[82], the CJEU recognized the obligation of Member States to apply the best interest of the child principle at all stages of the return procedure and to all children, regardless of their age and legal status. Member States should undertake a general and in-depth assessment of the situation of an unaccompanied child. Additionally, Member States have to be sure that adequate reception facilities are available in the state where the child will be returned to. If this premise is not fulfilled, a child could be subject to a return decision, but they could not be removed. The CJEU has warned that if a child is nevertheless removed this would harm their best interest since they will be "placed in a situation of great uncertainty" as to their legal status and future.[83]

Member States can decide not to apply the RD against certain categories of persons as set out in Article 2(2)(a)[84], but still have to provide them with some of the guarantees relating to the right to asylum, right to health and right to liberty and security. Options for postponement of the forcible return procedure are available with regard to the principle of non-refoulement and the person's physical and mental integrity.[85]

3.1.5 Right to good administration

The right to good administration is also partially covered by the procedural safeguards of the RD. For example, written documents for removal should be translated to a language that

[81] Art. 10, para. 2 RD.
[82] CJEU, *TQ v. Staatssecretaris van Justitie en Veiligheid,* C-441/19, 14 January 2021, para.
[83] O'Donnell, R. (2021) Spotlight on the Best Interests of the Child in Returns of Unaccompanied Children & Reflections for the New Pact on Migration and Asylum, Odysseus Network.
[84] Art. 4, para. 4 RD.
[85] Art. 9 RD.

is understandable for the third-country national, although a possible exception is envisaged in the provision when the person has entered illegally.[86]

The right to good administration also requires the relevant authorities to examine carefully and impartially all the relevant aspects of each individual's case and give reasons for their decisions.[87] Although the RD does not explicitly mention the right to be heard[88] its relevance has been confirmed by the Courts. Every person has the right to be heard in relation to any action that could adversely impact them. Individuals must also have access to their files and recourse to legal advice prior to the adoption of the decision. In the Mukarubega[89] and Boudjlida[90] judgments, the CJEU held that a third country national should have the opportunity to voice their opinion regarding the legality of their stay, present relevant facts that may deter authorities from adopting a particular decision regarding their return, justify exception(s) to expulsion, and highlight social circumstances, including the best interests of the child, family ties, health conditions and the risks of non-refoulement. Regarding deadlines, the ECtHR considered that the speed of the proceedings should not undermine the effectiveness of the procedural guarantees that aim to protect an applicant against refoulement.[91]

3.1.6 Right to an effective remedy and fair trial

The rights to an effective remedy and to a fair trial are enshrined in Article 13 of the RD. All foreigners who are subject to return decisions must have a remedy at the national level capable of addressing the substance of any "arguable complaint" under the ECHR and, if

[86] Art. 12 RD, and more notably para. 2-3 of the same provision
[87] CJEU, *G. and* R, C-383/13 PPU, 10 September 2013, para. 35 and CJEU, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques* C-249/13,11 December 2014, paras. 37-39.
[88] Ilareva, V. (2020). The Right to be Heard: The Underestimated Condition for Effective Returns and Human Rights Consideration, in: *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union*. M. Moraru, G. Cornelisse and Ph. de Bruycker (Eds.), Modern Studies in European Law, p. 351, Hart Publishing, Oxford, the United Kingdom.
[89] CJEU, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, C-166/13, 5 November 2014
[90] CJEU, *Khaled Boudjlida*
[91] ECtHR, *I.M. v. France*, Application №. 9152/09, 2 February 2012, para. 147.

necessary, granting appropriate relief[92]. In Čonka v. Belgium, the ECtHR underscored in particular that stays of the execution of deportation orders (when applied as discretionary remedy by the court only upon a request by the applicant) may sometimes be wrongly denied and therefore may not be considered as an effective remedy[93]. In similar vein the CJEU concluded that, to ensure compliance with Article 47 of the CFR and the non-refoulement principle, an appeal against a return decision must have an automatically suspensive effect before at least one judicial body, since the enforcement of that decision may, inter alia, expose the concerned person to a real risk of being subjected to treatment contrary to Article 19(2) of the CFR[94]. The CJEU, however, does not require that there must be two levels of judicial decision (appeal) in respect of a return decision and a possible removal decision.[95]

3.2 Fundamental rights, soft law and the RD

Soft law may be defined as a set of non-binding prescriptions contained in an instrument that lacks formal legal force[96]; however, soft law is relevant since it influences the behavior of the legal actors[97].

Traditionally playing a marginal role in EU migration law, soft law was utilized as a response to the migration crisis of 2015/16 and gained additional importance during the COVID-19 pandemic[98]. Flexibility is regarded as one of the main advantages of soft law because it allows certain shifts in migration policy to be introduced unilaterally by the

[92] ECtHR [Grand Chamber], *M.S.S. v Belgium and Greece*… para. 288; ECtHR [Grand Chamber], *Kudła v. Poland*, Application №. 30210/96, 26 October 2000, para. 157
[93] ECtHR, Čonka v. Belgium, Application №. 51564/99, 5 February 2002, para. 82; this was the first case when ECtHR established a collective expulsion of aliens in violation of Article 4 or Protocol № 4. See also ECtHR, A.C. and Others v. Spain, Application №. 6528/11, 24 April 2014, para. 88 for an overview of other case law on the issue of the suspensive effects of the appeal.
[94] CJEU, *Sadikou Gnandi* ... para. 56 - 58
[95] CJEU, *Sadikou Gnandi* … para. 56 - 58; CJEU, *X v. Belastingdienst/Toeslagen*, C-175/17, 26 September 2018; CJEU, *X and Y v. Staatssecretaris van Veiligheid en Justiti*e, C-180/17, 26 September 2018.
[96] Snyder, F. (1994). Soft Law and Institutional Practice in the European Community, in The Construction of Europe: Essays in Honour of Emile Noel. Martin, S. (Ed.), pp.197–226, Kluwer Academic Publishers, Dordrecht, The Netherlands
[97] Terpan, F., 2015. Soft Law in the European Union. The Changing Nature of EU Law. European Law Journal, 21 (1), pp. 68–96.
[98] Thym, D. (2023). *European Migration Law*. Oxford University Press, Oxford, United Kingdom, p. 59.

Commission or by the Council[99] without the involvement of the European Parliament that usually raises considerations for the human rights of returnees[100].

In relation to the return process under the RD, the most important soft law instrument to be discussed is the revised Return Handbook (2017)[101]. It provides guidance to national authorities competent to carry out return related tasks and covers standards and procedures in Member States for returning illegally staying third-country nationals. The Return Handbook is primarily based on the RD and promotes stricter, tightened interpretation of its provisions. As a soft law instrument itself, the Return Handbook refers and even directly quotes many other soft law instruments adopted by the UNHCR, Council of Europe, FRA and others that contain more detailed recommendations on various issues such as the best interest of the child, apprehension of migrants, voluntary return, detention (including detention of children), alternatives to detention, material detention conditions. It can be expected that some new soft law instruments will be adopted to reflect the amendments in the EU migration and asylum law, for example as a follow-up to the new EU strategy on voluntary return and reintegration (COM/2021/120 final).

Other soft law instruments identified as relevant (including those quoted in the Return Handbook) are set out in Table 1:

Topic	Instrument
General	GUIDELINE 9: Human rights-based return or removal - UN Office of the High Commissioner for Human Rights (OHCHR),

[99] Ibidem

[100] Slominski, P. and Trauner, F. (2021) Reforming me softly – how soft law has changed EU return policy since the migration crisis, *West European Politics*, 44 (1), p. 105

[101] Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks, C/2017/6505, OJ L 339, 19.12.2017, p. 83–159

Topic	Instrument
	Recommended Principles and Guidelines on Human Rights at International Borders, 2014[102]
Apprehension	FRA, Apprehension of migrants in an irregular situation – fundamental rights considerations, 2012
Voluntary Return	Council of the EU, Non-binding common standards for Assisted Voluntary Return (and Reintegration) Programmes implemented by Member States, Council document 8829/16, 11th May 2016[103].
Best Interest of The Child	- UNHCR-Unicef, Safe and Sound, 2014 - UN, General comment No 14 (2013) on the right of the child to have his or her best interest taken as a primary consideration (Art. 3, para. 1), 2013 - UNHCR, Guidelines on Determining the Best Interests of the Child, 2008 - FRA, Returning unaccompanied children: fundamental rights considerations, 2019

[102] Interestingly, this soft law instrument is not mentioned in the RD.
[103] It should be noted, however, that the recent *EU strategy on voluntary return and reintegration* (COM/2021/120 final) envisages changes in this field i.e. probably a new soft law instrument will be developed.

Topic	Instrument
Detention	Council of Europe, Administrative Detention of Migrants and Asylum Seekers, 2023
Alternatives to Detention	UNHCR, Options paper 2: Options for governments on open reception and alternatives to detention, 2015 FRA, Alternatives of detention for asylum seekers and people in return procedures, 2015
Material detention conditions	- Guideline on forced return No 10 – Council of Europe: Committee of Ministers, Twenty Guidelines on Forced Return, 2005 - CoE Committee on the Prevention of Torture, CPT standards, document CPT/Inf/E (2002) 1 — Rev. 2013; - CoE Committee on the Prevention of Torture , CPT Factsheet on immigration detention, document CPT/Inf(2017)3 - Committee of Ministers, European Prison Rules, Recommendation to Member States Rec(2006)2-rev - UNGA, Standard Minimum Rules for the Treatment of Prisoners, Resolution A/RES/70/175

Topic	Instrument
Detention of children	- UNHCR, Options paper 1: Options for governments on care arrangements and alternatives to detention for children and families, 2015 - FRA, European legal and policy framework on immigration detention of children, 2017

Finally, the informal (non-binding) readmission agreements concluded by the EU with third countries are also classified as soft law and may be analyzed as part of the greater trend to "informalization" of EU migration law[104]. Criticized for their lack of transparency and the potential impact on returnees' human rights, the conclusion of these agreement raises many questions concerning the rule of law in the EU[105]. Generally, informal readmission agreements do not include references to international protection of refugees and human rights[106]. However, some writers submit that this cannot negatively affect the returnees who can always invoke the RD in case of a need of protection to their fundamental rights.[107]

3.3 Fundamental rights in the Proposed Recast of the RD

The aim of the proposed Recast RD is to increase the effective return of irregularly staying third-country nationals. The Proposed Recast specifies that the EU return policy should

[104] Thym, D, Op. cit., p. 59 and pp. 579-581. A full inventory of these agreements is published by Cassarino, J-P, *Inventory of The Bilateral Agreements Linked to Readmission,* available at https://www.jeanpierrecassarino.com/datasets/ra/

[105] Fernando-Gonzalo, E. (2023). The EU's Informal Readmission Agreements with Third Countries on Migration: Effectiveness over Principles?. *European Journal of Migration and Law*, 25(1), 83-108.

[106] ECA (2021). Special Report №. 17/2021 EU readmission cooperation with third countries: relevant actions yielded limited results, p. 25

[107] Thym, D, op. cit., p. 581.

be based on common standards, as well as international law, including refugee protection and human rights obligations[108]. Again, voluntary departure is regarded as the preferred option over removal and an appropriate period for voluntary departure of up to 30 days is proposed[109], although in practice its application will be subject to limitations[110]. The new Art. 5 of the Proposed Recast obliges the Member States to take due account of the best interests of the child, family life and state of health and to respect the principle of non-refoulement.

However, the proposed Recast expands the use of detention through the introduction of 'objective criteria' for risk of absconding[111]. The list consists of 16 factors with some left to the discretion of national authorities. This change could potentially make it easier for Member States to justify detention.

The Proposed Recast intends to limit the opportunities for appeal against return decisions[112] which could prevent certain Member States from applying higher levels of protection and may be regarded as incompatible with their procedural autonomy.

The envisaged expansion of the use of 'entry bans'[113] to individuals with rejected asylum applications is of particular concern, as the proposal does not allow the consideration of future changes of circumstances in the country of return. Proposing closer links between return procedures and asylum[114] is considered as 'disproportionate and counterproductive' by the Sargentini Report, Amendment 62, as the legal regimes for asylum and persons subject to removal measures are in need of a precise distinction. The obligation for cooperation, proposed by the Commission does not state the potential consequences of the refusal of such by the third-country nationals, which may be interpreted broadly.

[108] Recital 4 of the proposed Recast
[109] Recital 13 of the proposed Recast
[110] Art. 7, para 1 of the proposed Recast
[111] Art. 6 of the proposed Recast
[112] Art. 16, para 1 of the proposed Recast
[113] Art. 13 of the proposed Recast
[114] Art. 8 of the proposed Recast

4. Monitoring Forced Return Procedures

The preparation for the adoption of the RD began in 2005 when the Commission conducted an impact assessment on the common return criteria. The Council of Europe's 2005 guidelines on forced returns had already provided a comprehensive monitoring structure for forced returns, emphasizing Member States' responsibility to implement effective systems and document operations, including significant incidents and restraint measures[115]. The Commission itself recommended developing uniform regulations on return procedures that protect "the human rights and fundamental freedoms" of returnees and training return enforcement officials on human rights and anti-discrimination. In the first EU Return Directive proposal, released on 15 September 2005, the Commission noted that "minimum safeguards for the conduct of forced return should be established" and should take into consideration Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States.

In 2008, almost verbatim from the 2005 CoE Guidelines, the Article 8, paragraph 6 of the RD stipulates that "Member States shall provide for an effective forced-return monitoring system". Although the RD requires that Member States put in place such monitoring systems, it does not provide any clarification with regard to their elements. The Return Handbook (2017) mentions that monitoring should cover "all activities undertaken by Member States in the respect of removal — from the preparation of departure, until reception in the country of return". Moreover, it is clarified that monitoring "does not cover post-return monitoring, i.e. the period following reception of the returnee in a third country". In addition, the Return Handbook notes that the monitoring systems should be independent from the enforcing institutions and provides examples of types of institutions which can act as monitoring bodies.

[115] Council of Europe (2005). Twenty Guidelines on Forced Return.

The Return Handbook further specifies the following:

"Article 8(6) of the Return Directive does not imply an obligation to monitor each single removal operation. A monitoring system based on spot checks and monitoring of random samples may be considered sufficient as long as the monitoring intensity is sufficiently close to guarantee overall efficiency of monitoring".

Meanwhile, in 2017, a pool of forced return monitors was established within Frontex. Currently, Article 51 EBCG Regulation[116] stipulates that Frontex "shall constitute a pool of forced-return monitors from competent bodies of the Member States (MSs) who carry out forced-return monitoring activities in accordance with Article 8(6) of Directive 2008/115/EC […]". Article 10 of the EBCG Regulation tasks Frontex, among others, with monitoring "compliance with fundamental rights in all of its activities at the external borders and in return operations". Unlike national return operations, collecting return operations ("return operations for which the means of transport and return escorts are provided by a third country of return") have to be monitored throughout, until the arrival in the country of return (Article 50 EBCG Regulation).

4.1 Fundamental rights within the scope of the monitoring

Numerous rights are at a great risk of being breached during forced return: the right to life (ECHR Article 2), right to liberty and security (ECHR Article 5), prohibition of torture and inhumane and degrading treatment (ECHR Article 3), human dignity, non-discrimination (ECHR Article 14), freedom of thought, conscience and religion, access to information, right to health and access to medical assistance, access to food and water, rights of vulnerable groups (e.g. victims of trafficking, persons with disabilities etc.), right to family unity, child rights, personal data protection, property rights, and good administration/complaint rights[117]. In

[116] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624
[117] ICMPD (2021). Forced-Return Monitoring. Background Reader. Vienna: ICMPD.

accordance with the indivisibility principle, fundamental rights apply cumulatively and equally to all returnees.

Thus, monitoring (both at EU and national level) encompasses various activities that aim to verify that forced return procedures comply with the fundamental rights of returnees. Consequently, these monitoring activities are solely concerned with the return procedure and not with the return decision, detention prior to removal (although the EU legislation does not exclude this specifically) or post-arrival phases. The return procedure/operation pertains to the accompanied transportation of a third country national to their country of origin or a country of return, in accordance with a removal order issued by a national court or administrative body of a Member State. Throughout the monitoring procedure, representatives of the institution responsible with carrying out the return decision are tasked with "enforcing the return in line with the respective national legislation, applicable fundamental rights and/or codes of conduct in place"[118].

4.2 Limitations of monitoring systems

The main issues with the ways in which monitoring is currently in place, both at EU and national levels, are independence and effectiveness (particularly with regard to resources and the structure of a follow-up mechanism). The 2014 evaluation of the implementation of the RD found that, with regard to the enforcement of return decisions, "monitoring of forced returns is carried out by an Ombudsperson/National Preventive Mechanism (NPM), civil society organisations, or bodies affiliated with enforcement staff, whose institutional independence may be questionable."[119] The lack of adequate funding for monitoring bodies was also stressed as a problem.

[118] ICMPD (2015). Training Manual. Forced Return Monitoring. Comprehensive Training for Forced Return Monitors. Vienna: ICMPD.

[119] EPRS (2020). The Return Directive 2008/115/EC. European Implementation Assessment. Brussels: European Union, p. 18

In its most recent annual overview of the forced return monitoring, the Fundamental Rights Agency stressed the importance of independence and included the following indicators on the effectiveness of a monitoring system: the monitoring organization, the number of operations monitored, the phases of monitored return operations, the number of (trained) monitors, as well as the public reporting on the side of the monitoring institution[120]. In the same document FRA describes as operational 23 out of 27 national monitoring systems analysed; three countries have put in place partly operational systems and one country, not bound by the Return Directive, has no system in place[121].

In its 2020 Resolution on the implementation of the RD, the European Parliament calls the Commission to ensure that proper monitoring bodies are put in place both at EU and national levels, including transparent procedures, capacity and competence. It stresses the need for return monitoring to cover all phases of return operations and calls for cooperation with independent bodies. The Parliament also has urged the Commission to establish a post-return monitoring mechanism, ensure proper handover of child protection services, and follow up on reintegration plans[122].

A 2020 report on the gaps of national monitoring systems in 22 European countries found limitations in several areas, among which: limited monitoring mandate and institutional capacities to carry out monitoring (lack of funding or limited inter-institutional communication); limitations during the monitoring process (e.g. lack of specialists, lack of/late receipt of information); limitations with regard to the monitoring report and lack of a follow-up mechanism of monitoring reports[123]. In the same document experts suggested a broader legal mandate for monitors (as currently monitors cannot intervene in the course of a return

[120] FRA (2023). Forced Return Monitoring Systems - 2023 Update. Vienna: FRA
[121] Ibid
[122] EP (2020). European Parliament resolution of 17 December 2020 on the implementation of the Return Directive. Brussels
[123] ICMPD (2020). Gaps and Needs Analysis of the National Monitoring Systems in Twenty-Two European Union Member States and Schengen Associated Countries. Vienna: ICMPD

operation or do not have access to all stages of a return operation). Furthermore, increased capacities of monitoring bodies (which need more financial and human resources) and better inter-institutional cooperation were also mentioned.

FRA also recommends that an independent actor should be entrusted with the management of the pool of forced-return monitors; the implementation of that recommendation would require the revision of Article 52 of the EBCG Regulation. "In this regard, consideration could be given to involving an international body with relevant human rights monitoring expertise"[124].

Several major limitations have been underlined in relation to the current monitoring system in place within Frontex and more specifically to the complaint mechanism. Firstly, under the current procedure, only complaints submitted by individuals are allowed. Moreover, complaints cannot be made anonymously. Although complaints are being dealt with by the Fundamental Rights Office (FRO), the independence of the FRO has been questioned, also in line with the FRA opinion and the EP recommendation[125].

Finally, follow-up mechanisms (according to monitoring outcomes) are necessary in order for monitoring outcomes to be taken up by return enforcing institutions and for them to have an impact on future return practices[126].

5. Post-return stage

The principle of non-refoulement is closely tied to the post-return situation of the returnee, as it requires states to assess the circumstances that the returnee would face upon return. This principle necessitates an assessment of both the current state of the country of

[124] FRA (2018). The revised European Border and Coast Guard Regulation and its fundamental rights implications. Opinion of the European Union Agency for Fundamental Rights. Vienna: FRA, p. 7
[125] Carrera, S. & Stefan, M. (2018). *Complaint Mechanisms in Border Management and Expulsion Operations in Europe. Effective Remedies for Victims of Human Rights Violations?* Brussels: CEPS
[126] ICMPD (2020). Gaps and Needs Analysis of the National Monitoring Systems in Twenty-Two European Union Member States and Schengen Associated Countries. Vienna: ICMPD

return and how it would affect the post-return of the returnee. Ideally this assessment can be done through a monitoring mechanism that tracks the foreigner for a specific period following his return.

The principle of non-refoulement states that no-one can be expelled to a country where their fundamental rights will be seriously at risk. This principle is to be found in various treaties, most prominently in Article 33 of the Refugee Convention and Article 19 of the CFR. The ECtHR has found this principle to exist as an implied obligation to various Covenant rights, as will be seen below.

Non-refoulement does not guarantee an individual a right to receive a residence permit; it only ensures the right not to be expelled when this will lead to violation of fundamental rights. In the context of the RD (art. 9(1)(a)), the observance of the non-refoulement principle does not prevent the issuance of a return order but requires its execution to be suspended. This means that an individual who cannot be returned could fall in a sort of limbo, tolerated by the State without being granted any formal entitlement[127]. Depending on the circumstances, this situation could impose under the ECHR a positive obligation to regularize the status of irregular migrants who have developed strong ties with the host country[128].

5.1 Scope of the non-refoulement principle

Although the principle of non-refoulement is widely recognized, it has a broader scope in human rights law than under migration and refugee law.

The 1951 Refugee Convention (Article 33) aims to protect refugees from being returned to a place where they might face persecution due to race, religion, nationality, social group, or political opinion. Literally, this provision has a narrow scope and does not prevent expulsion to countries where there are generalized risks not specifically targeting the asylum seeker.

[127] FRA (2011), Fundamental Rights of Migrants in an Irregular Situation in the European Union, Vienna: FRA
[128] Majcher, I. (2019). The European Union Returns Directive and its Compatibility with International Human Rights Law. Brill Nijhoff. Gil-Bazo, M. T. (2015). Refugee protection under International Human Rights Law: From non-refoulement to residence and citizenship. Refugee Survey Quarterly, 34(1), 11-42.

However, efforts are made to align Article 33 of the 1951 Refugee Convention with human rights standards and it is now interpreted to encompass protection against any threat to life or freedom, extending beyond persecution[129]. It is also accepted that this safeguard[130] should be expanded to include asylum seekers with a pending procedure since the decision in an asylum procedure merely recognizes rather than creates the status of a refugee[131].

In human rights law, non-refoulement applies regardless of individual targeting[132] and legal status[133]. Additionally, the protection provided by the non-refoulement principle extends beyond life and liberty violations to encompass physical integrity breaches like torture, inhuman treatment, or enforced disappearance (Article 3, paragraph 1 of the Convention Against Torture; Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance). Sometimes a violation may imply a complex mechanism of indirect causation; thus the ECtHR and the HRC noted that the individual should be protected against refoulement in cases where breaches to other types of human rights may impact their life, liberty or physical integrity. For instance, the return of seriously ill individuals can amount to inhuman or degrading treatment if the return exposes the returnee to an imminent risk of dying or to a serious, rapid and irreversible deterioration of their health or life expectancy on account of lack of appropriate treatment in the country of return[134]

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[129] UNHCR (2019), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 4., para. 51

[130] Edwards A. (2022), "International Refugee Law" in: *International human rights law*, Moeckli, D., Shah, S., Sivakumaran, S., & Harris, D. (Eds.). Oxford University Press, pp. 575-576; Executive Committee of the High Commissioner's Programme (UNHCR ExCom), General Conclusion on International Protection №. 99 (LV) - *2004*, 8 October 2004, №. 99 (LV)

[131] UNHCR (2019), op. cit., para. 29; Lauterpacht, Sir E. and Bethlehem, D. (2003). The scope and content of the principle of non-refoulement: Opinion, in Refugee protection in international law, in: *UNHCR's Global Consultations on International Protection.* E. Feller, V. Tilrk, and F. Nicholson (Eds.), pp. 87-177, at p. 152, Cambridge University Press, Cambridge, UK; see also Recital 9 of the RD.

[132] HRC (1992), General Comment № 20: Prohibition of torture or other cruel, inhuman or degrading treatment or punishment (article 7), paras. 2 and 9; see also Art. 3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[133] ECtHR, *Levakovic v. Denmark,* Application № 7841/14, 23 October 2018, para. 45.

[134] ECtHR, *Paposhvili v. Belgium,* Application №. 41738/10, 13 December 2016, para. 183; ECtHR, *Savran v. Denmark,* Application № 57467/15, 7 December 2021, para. 129; HRC, *C. v. Australia*, Communication №. 900/1999, 13 November 2002, para. 8.5. See also CJEU, *Centre Public d'action Sociale d'Ottignies- Louvain-La- Neuve v. Moussa Abdida*, C-562/ 13, 18 December 2014, para. 46-49, 53

Extreme poverty can also constitute inhuman or degrading treatment. In the M.S.S. v. Belgium and Greece case the ECtHR ruled that there is a violation of the non-refoulement principle regarding an asylum seeker who faced extreme poverty after being transferred under the Dublin Regulation[135] to Greece; the Greek asylum system failed to provide adequate housing and support, forcing the asylum seeker onto the streets, which amounted to inhuman or degrading treatment[136]. The HRC and the CJEU made similar decisions in analogous cases[137].

Furthermore, risks of facing flagrant denials of justice upon return can also activate the prohibition of refoulement[138].

5.2 Returnees as beneficiaries of the principle of non-refoulement

The principle of non-refoulement literally applies to anyone who has entered or is already inside a territory of a state and is then threatened with removal. However, the ECtHR in the case ND and NT v. Spain made it clear that the principle of non-refoulement can apply to individuals who have not even entered the territory of the state[139].

Non-refoulement is relevant even when a person is outside the borders of a state if they fall under its jurisdiction. For instance, the Hirsi Jamaa and others v. Italy case, discussed in section 2.2. above, found the collective expulsion to Libya of intercepted migrants in the high seas as a violation[140]. Likewise, under General Comment 4 of the Committee Against Torture

[135] Regulation (EU) № 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 (proposed Recast)

[136] ECtHR, *M.S.S. v. Belgium and Greece…*

[137] HRC, *O.Y.K.A. v. Denmark*, Communication № 2770/2016, 7 November 2017, paras. 8(10)- (12) and 9; CJEU, *N.S. v. Secretary of State for the Home Department and M. E. an Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C- 411/10 and C- 493/10, 21 December 2011, paras. 86 and 94

[138] ECtHR, *Harkins v. The United Kingdom*, Application № 71537/14, 15 June 2017, para. 62-63; ECtHR, *Othman (Abu Qatada) v. The United Kingdom* ... para. 272-287

[139] ECtHR, *ND and NT v. Spain*, Application №. 8675/15 and 8697/15, par. 178. See also art. 4(4)(b) of the EU Return Directive; Executive Committee of the High Commissioner's Programme (UNHCR ExCom), Protection of Asylum-Seekers in Situations of Large-Scale Influx №. 22 (XXXII) - 1981, 21 October 1981, №. 22 (XXXII). Executive Committee of the High Commissioner's Programme (UNHCR ExCom), General Conclusion on International Protection №. 99 (LV) - 2004, 8 October 2004, №. 99 (LV)

[140] ECtHR, *Hirsi Jamaa …*, para. 169 ff.

(CAT), states must adhere to non-refoulement in any area under their control, including ships or aircraft registered in the state[141].

5.3 Criteria for monitoring of the post-return situation

The UNHCR has recommended that states put in place ongoing monitoring mechanisms to assess post-returns[142]. It should be noted that the country of return may be the country of origin of the foreigner or a "safe third country" within the meaning of the Asylum Procedures Directive[143]. The legality of returning migrants to a safe third country has been recognized in international law as it is necessary to acknowledge the need for alleviating the burden of states dealing with significant refugee inflows[144]. Monitoring post-returns in so-called safe third countries is particularly relevant, especially when considering that the individual initially sought protection in the EU. If it were not for the safe third country principle, the migrant's claim would be processed in the EU. If Member States are permitted to alleviate their burden when dealing with significant refugee inflows, they should be also capable of ensuring and committing to the safety of the transferred individuals.

The UK's Rwanda deportation policy highlights the complexities and controversies surrounding the concept of "safe third countries". Under this policy, the UK could transfer asylum seekers to Rwanda, which is considered a safe third country by the UK government. However, the deal has faced significant criticism and legal challenges, with concerns raised about Rwanda's human rights record and its capacity to ensure the safety and fair treatment of transferred individuals. This situation underscores the importance of properly assessing "the

[141] CAT (2018), General Comment №. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22
[142] UNHCR (2016), Report on the Annual Consultations with Non-governmental Organizations 15-17 June 2016, p. 18.
[143] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection
[144] UNHCR (2003). *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum- Seekers (Lisbon Expert Roundtable, 9– 10 December 2002)*

safe third country" category to prevent asylum seekers from being exposed to harm or inadequate protection.

While the UNHCR established similar criteria with the Asylum Procedures Directive for designating a country as safe, it goes beyond it by emphasizing additional aspects, which point towards the need for an adequate post-return assessment of the situation[145]:

a/ Meaningful link: the UNHCR has urged returning States to consider the migrant's meaningful links, such as family and social networks, with the country of return[146]. Various NGOs have emphasized the importance of cultural ties, language, and previous visas[147]. The returnee's cultural and social ties in the country of return can influence their ability to adapt, function, and thrive upon return; even when return is possible in principle, social and professional difficulties need to be taken into account[148]. These factors highlight the importance of evaluating post-return impacts on the individual and the family. By examining these factors collectively, authorities can better comprehend the potential challenges, vulnerabilities, and disruptions that individuals and families might face upon return.

b/ Effective protection against refoulement: While Art. 38, para. 1 (c) of the Asylum Procedure Directive requires Member States to ensure that in the country of return the returnee will be treated in line with the non-refoulement principle of the 1951 Refugee Convention, it fails to specify what this commitment entails[149]. The UNHCR has called on the returning State to ensure that the returnee is not exposed to the risk of indirect refoulement[150]. According to

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[145] Majcher, op. cit.
[146] UNHCR (2003), op. cit.
[147] ECRE (2005). The Way Forward: The Return of Asylum Seekers Whose Applications Have Been Rejected in Europe; Amnesty International EU Office (2006). *Returning "irregular" migrants: The Human Rights Perspective: Amnesty International's Comments on the Draft Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third Country Nationals COM (2005) 391 Final*; Caritas Europa et al. (2018), Recommendations for Humane Return Policies in Europe. In contrast, Art. 38, para. 2 (a) and (c) of the Asylum Procedures Directive grants Member States the discretion to decide whether any connection with the returnee's country is required; only after such a requirement is introduced, Member States should allow individuals to challenge those connections.
[148] ECtHR, *Butt v. Norway,* Application № 47017/09, 4 December 2012, para. 88
[149] Majcher, op. cit.
[150] UNHCR (2003), op. cit.

the jurisprudence of the ECtHR and the recommendations of the CAT, this entails the returning state's obligation to ensure, firstly, that the country of origin (where the migrant may potentially be sent) is safe for the migrant and secondly, that the transit or third state, where the migrant will be returned to, will afford effective protection against refoulement[151]. The protection against indirect refoulement is crucial for ensuring the safety of the returnee and fostering a more secure and stable post-return environment.

c/ Individualized assessments: Article 38, para. 2 (b) of the Asylum Procedures Directive gives Member States the flexibility to assess the safety of a third country through either general or individualized assessments. However, the UNHCR has emphasized the importance of individualized assessments and cautioned against relying solely on general assessments[152]. The recommendations of CAT also support the conclusion that the applicant's situation should warrant individualized assessments of their post-return reality[153].

d /Access to an effective procedure: Article 38, para. 1 (e) of the Asylum Procedures Directive requires returning states to ensure that there is a possibility to request refugee status in the country of return, and in case it is granted, to receive protection; actually it is sufficient to demonstrate that an asylum procedure exists without explicitly requiring the individual's admission into it[154]. Therefore, the Asylum Procedures Directive does not guarantee that the individual will escape a cycle of deportations with associated risks of persecution and mistreatment. In contrast, the UNHCR highlighted that the individual should be granted entry into a fair and effective asylum procedure for determining their refugee status in the country of return[155]. This emphasis on fairness and effectiveness ensures that the individual will not be

[151] ECtHR, *Hirsi Jamaa ...* paras. 146-158; CAT, *Korban v. Sweden*. Communication № 88/1997, 16 November 1998, paras. 6(4)-(5) and 7

[152] UNHCR (2001). Background Note on the Safe Country Concept and Refugee Status. EC/ SCP/ 68, July 26, 1991; UNHCR, Global Consultations on International Protection/ Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), EC/ GC/ 01/ 12

[153] CAT, *Korban v. Sweden* … paras. 6(4)-(5) and 7

[154] Majcher, op. cit.

[155] UNHCR (2003). *Summary Conclusions ...*

transferred to a country inadequately equipped to examine refugee claims promptly and thoroughly[156]. A proper assessment of the asylum seeker protection level in the country of return is crucial for ensuring a safe post-return situation and reduces the risks of subsequent deportations of the returnee.

5.4 Monitoring mechanisms

Currently there is no formal system in place for post-return monitoring, despite such a system once having been envisaged while the drafting of the RD.[157] This absence stems from both legal and political concerns.

a/ Legally, returning states are not responsible for what happens in the countries of return; their responsibility under human rights law is limited to their own territory or jurisdiction. According to repeated international jurisprudence, being under the jurisdiction of the state implies being under its "effective control". Such control can manifest itself in several ways, such as de facto control over part of a territory abroad, de jure control because of delegation or authorization of a foreign government, acts of consular or diplomatic representatives or acts occurring on board of crafts or vessels flying the flag of the state[158]. However, none of these situations would occur in a normal return scenario.

The legal framework for determining the deporting state's responsibility regarding post-return outcomes is currently under discussion in the case S.S. and others v. Italy that is pending before the ECtHR[159]. In this case, the applicants have argued that the state holds jurisdiction over acts carried out by others under its control and direction (refoulement by proxy), or as an accomplice when it provides support for such acts. If these arguments were accepted by the

[156] ECtHR, *M.S.S. v. Belgium and Greece …*

[157] The European Parliament (2007) proposed the inclusion of the following clause on monitoring post-return in the Draft EU Return Directive, however, this clause was deleted thereafter: "For the purposes of evaluating the impact of the return policy on the persons concerned as well as on the country or society to which they are returned, all returns shall be registered and monitored with a view to drawing up statistics" (Amendment 72).

[158] ECtHR, *Bankovic and others v. Belgium and 16 Other States,* Application №. 52207/99, 12 December 2001, para. 70-73.

[159] ECtHR, *S. S. and Others v. Italy*, Application №. 21660/18. For comments on this application, see Barnes, J. op. cit., p. 458.

Court, it would establish a foundation for holding the deporting state accountable for post-return occurrences, potentially leading to broader monitoring obligations in the future.

This set of issues is particularly important in EU border countries, but also elsewhere where the dynamics of return and post-return situations raise significant human rights concerns. In such cases, the lack of post-return monitoring mechanisms exacerbates the vulnerability of returnees, highlighting the need for more robust legal and procedural frameworks to ensure their safety and well-being.

b/ Politically, concerns about sovereignty compromise, border control implications and fabrication of stories by migrants hinder formal monitoring[160]. In addition, monitoring may reveal issues that returning states may want to purposely not to be disclosed; if such issues are discovered, they should be taken into account when issuing return decision under the RD i.e. the return rate will drop[161]. Furthermore, political factors may hinder the European Union and its Member States from holding states accountable for post-return outcomes. One example is the agreement between Italy and Libya, which has led to a decrease in irregular crossings of the Mediterranean but has come at the cost of severe human rights violations by Libyan authorities. To maintain this effective cooperation, which benefits the EU as a whole, the EU and its Member States have chosen to overlook these violations, turning a blind eye on the situation[162].

Despite these arguments, there are compelling political and legal reasons to introduce some form of post-return mechanisms that would benefit not only the returnees but also the countries involved:

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[160] Pirjola, J. (2019). Out of Sight, Out of Mind: Post-return Monitoring–A Missing Link in the International Protection of Refugees?. *Refugee Survey Quarterly*, *38*(4), pp. 367-368.
[161] Collyer, M. (2012). Deportation and the micropolitics of exclusion: The rise of removals from the UK to Sri Lanka. *Geopolitics*, *17*(2), pp. 276-292.
[162] Barnes, op. cit., p. 457.

On the legal side, the non-refoulement principle obligates the correct assessment of factual risks. As noted above, the principle of non-refoulement is not satisfied with a de jure assessment of risks. It requires states to correctly assess the real conditions that are faced by those subject to deportation. For this dimension of responsibility to be meaningful, it is necessary to have information about post-deportation outcomes insofar as they relate to those rights protected by the principle of non-refoulement. Although states are not broadly responsible for what occurs post-deportation, they have a duty under human rights to use their best offices to ensure the good behavior of countries receiving returnees[163].

Politically, post-return mechanisms could serve to update the information on countries of origin and transit for assessing asylum applications[164]. In particular, post return monitoring could be useful to assess the correctness of the asylum decisions[165] and encourage migrants to return. It is submitted that voluntary return relies primarily on the dissemination of accurate information that allows the returnee to anticipate risks, if any[166]. Furthermore, post-return monitoring could assist in assessing the sustainability of returns and identifying common group vulnerabilities. For instance, post-return monitoring could highlight that migrants with no contacts in the country of return will have greater difficulties in integrating and reaching sustainable returns[167]. In addition, post-return monitoring mechanisms could enhance the transparency and accountability of the return procedure, which can increase the likelihood of returnees to trust the system and foster compliance[168].

[163] In parallel, the duty to protect stems from p. 13 (b) of the UN Guiding Principles on Business and Human Rights, adopted by the UN Human Rights Council by Resolution 17/4 on 16 June 2011; the document is not binding but represents a standard that has received worldwide endorsement.

[164] Pirjola, op. cit., p. 374; Alpes, J. and Majcher, I. (2020), Who Can Be Sustainably Reintegrated After Return? Using Post-Return Monitoring for Rights-Based Return Policies. *United Nations University Institute on Comparative Regional Integration Studies, Policy Brief 3*; Countries' information is used by several European countries to assess asylum applications, see for instance, in the UK.

[165] Podeszfa, L., and Vetter, F. (2013). Post-deportation monitoring: why, how and by whom?. *Forced Migration Review*, (44)

[166] Noll, G. (1999). Rejected asylum seekers: The problem of return. *International Migration*, *37*(1), 270.

[167] Alpes and Majcher, op. cit.

[168] Noll, op. cit., p. 284, Pirjola, op. cit., p. 372.

While the adoption of a comprehensive post-return mechanism is still pending, there are efforts to fill in the regulatory gap that should be mentioned:

Some states involve their consular representatives in visiting returnees, especially if they face imprisonment upon return. This practice can be valuable in identifying and responding promptly to the materialization of feared risks. A notable case illustrating this scenario is X v. Switzerland brought before the ECtHR[169]. X, a Tamil individual who had engaged in armed resistance against the Sri Lankan government in the 1990s, irregularly entered Switzerland seeking asylum. He and his family were denied protection based on the Swiss' authorities assessment of Sri Lanka's post-war safety. Upon return, they were detained and interrogated, with X ultimately being imprisoned. However, during a consular visit from the Swiss office to the prison, it was discovered that X exhibited signs of ill-treatment and fear. X's family was immediately relocated to Switzerland and after 2 years, X was granted asylum upon his release from prison. The involvement of the Swiss consular office played a pivotal role in this case, collecting first-hand information on the returnees' wellbeing, enabling immediate action to ensure his safety, and also contributing to enhanced decision making about the safety in specific countries.

In addition, some small-scale unofficial monitoring efforts have been implemented by NGOs and researchers in different countries[170]. However, irregular migrants and rejected asylum seekers are an exceptionally vulnerable group as they are often perceived as political opponents upon their return to their home countries, making them susceptible to interrogations, detentions, torture, and other forms of inhuman and degrading treatment[171]. The limited scope of those small-scale initiatives hinders comprehensive monitoring of their well-being.

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[169] ECtHR, *X v. Switzerland*, Application № 16744/14, 26 January 2017
[170] Podeszfa and Vetter, op. cit.; Pirjola, op. cit., p. 369 ff.
[171] Majcher, op.cit.

6. Non-return situations

The return process framework leaves some loopholes creating a group called "non-removable returnees": people who have "fallen out" of the regulated system and have entered a state of limbo between regularity and irregularity[172]. Practically speaking, non-removable returnees are the greater part of irregularly staying migrants in the EU - in 2022 only around 22% of all persons issued a return decision have actually been returned.[173]

6.1 RD provisions on non-return

The problem with the non-removable returnees was caused by Member States themselves who did not agree to add in the RD a provision obliging them to grant some status to persons in a state of non-return[174]; thus, a regulatory gap was created.

In fact, some scenarios of non-returnability are described in Art. 9 of the RD: first, when humanitarian or compassionate reasons are present a person is not removed (for example, to prevent a possible violation of non-refoulement principle or to consider the health status of the returnee); second, when the return decision is suspended; third, when the return is postponed due to technical reasons.

In other cases, non-returnability may be caused by some actions undertaken by the Member States in compliance with the RD. For example, return decisions have to be issued to all illegally staying migrants as per Art. 6, para. 1 of the RD disregarding the reasons why foreigners were not unable to renew their residence permits although these same reasons may hinder the return.[175]

An interesting contribution to the analysis is provided in the Return Handbook (2017) which distinguished two groups of reasons for non-return - justified and unjustified:

[172] Farcy, J (2020) 'Unremovability under the Return Directive: An Empty Protection?', in: *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union*, M. Moraru, G. Cornelisse and Ph. de Bruycker (Eds.), Modern Studies in European Law, pp. 441-442 Hart Publishing, Oxford, the United Kingdom
[173] Eurostat (2023). Enforcement of immigration legislation statistics
[174] Queiroz, B, op. cit., pp. 83-88.
[175] *Ibid,* pp. 92-93.

a/ Justified reasons are considered to be reasons outside the scope of influence of the returnee (for example, delays in obtaining necessary documentation from third countries caused by bad cooperation of third-country authorities, crisis situation in country of return making safe return impossible, granting of formal postponement of return to certain categories of returnees)[176]. According to the Return Handbook, the mere subjective wish of an illegally staying third-country national to stay in the EU can never be considered as a "justified reason".[177]

b/ Unjustified reasons are those within the scope of influence of the returnee which are not recognised as legitimate or justified by EU or national law, such as: lack of cooperation in obtaining travel documents; lack of cooperation in disclosing one's identity; destroying documents; absconding; hampering removal efforts). It should be underlined that

The Return Handbook (2017) warns about a potential conflict between the desire to dissuade the non-returnees from remaining illegally and the obligation of the Member States to protect their fundamental rights, particularly those guaranteed by the ECHR and the CFR. Penal sanctions may be imposed only on foreigners who have no justified reasons for non-return and must comply with fundamental rights as well the proportionality principle[178].

Even when issued, the return decision may be suspended because of the right to family life and the best interest of the child as per Art. 5 of the RD which has to be considered.[179] Sometimes safe return is considered as impossible because sending the non-returnees back would be too dangerous and would result in a violation of the prohibition on torture or inhuman or degrading treatment or punishment and the principle of non-refoulment.[180]

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[176] Return Handbook, 4. Criminal law measures for infringements of migration rules, p.20
[177] Return Handbook, 4. Criminal law measures for infringements of migration rules, p.21
[178] Return Handbook, 4. Criminal law measures for infringements of migration rules, p.21
[179] Farcy, J. op. cit., p. 441-442
[180] Ilareva, V. (2015). From “asylum seekers” to “people”: the legal status of foreigners who cannot be returned on humanitarian grounds. *European Law Review XII (In Bulgarian:* Иларева, В (2015). От „търсещи убежище“ към „хора“: правното положение на чужденците, които не могат да бъдат отведени по хуманитарни причини. *Европейски правен преглед, том XII).*

Additionally, the Return Handbook (2017) emphasizes that Member States should take into account the state of vulnerable persons. It is also noted that "the need to pay specific attention to the situation of vulnerable persons and their specific needs in the return context is, however, not limited to the expressly enumerated categories of vulnerable persons". Member States are encouraged to identify other situations of special vulnerability which could result in a non-return state such as a serious illness and mental disorder[181].

It is within the discretion of the Member States to grant non-returnees an autonomous residence permit or other authorization offering a right to stay for compassionate, humanitarian or other reasons (Art. 6, para. 4 of the RD). Providing Member States with such powers should help to reduce gray areas but it may also increase the absolute number of return decisions that are issued but not enforced. Acknowledging the problem, the Commission had proposed to provide for a minimum level of conditions of stay for non-returnees by referring to the substance of a set of conditions already covering four basic rights: 1. family unity; 2. health care, 3. schooling and education for minors and 4. respect for special needs of vulnerable persons[182]. However, other important rights such as access to employment or material reception conditions (as guarantee to the asylum seekers under the Reception Conditions Directive[183]), are not provided to non-returnees.

6.2 Jurisprudence on non-return

The provisions of the RD provide minimal guarantees for the fundamental rights of the non-returnees. Member states are required to define their basic conditions of subsistence and to provide them with some form of written confirmation of their situation[184]; the non-returnees also enjoy the safeguards pending return under Article 14 of the RD.

[181] Return Handbook, 1.8 Vulnerable persons, p. 13
[182] Return Handbook, 13. Safeguards pending return, p. 74
[183] Directive 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 (proposed Recast)
[184] Recital 12 RD.

Case-law strives to fill-in the gaps and to include more fundamental rights of non-removable returnees not only within the scope of the RD, but in the EU asylum acquis as a whole[185]. This is done, on the one hand, by limiting the preconditions which allow a person to enter a state of legal limbo, and, on the other, by elaborating on the consequences that follow for the persons who are already in that state.

Examples of the former include the Arslan case[186] where the CJEU has prevented one of the possible scenarios for creating a state of limbo by finding that a person who has applied for international protection cannot be regarded as an illegally staying third-country national in the sense of Art. 2, para. 1 of the RD. In the light of Art. 5 of the RD which provides protection of fundamental rights, it has been determined by the CJEU that the state of limbo puts a minor in a state of uncertainty, therefore it could not be in their best interest.[187] Protection of family life has been invoked by the CJEU in the Zambrano case[188] where it argued that a residence permit should be given to those third-country citizens solely on the fact that their minor children are EU citizens, thus keeping the family together and allowing for the parents to sustain their children.[189]

The right to liberty and security has been strengthened by the CJEU in the Kadzoev case[190] which interpreted Art. 15, para. 4 of the RD and established that the non-returnees should be immediately released if there is no reasonable prospect of removal within the timeframes established by the RD. However, it is not clear what happens with non-returnees after they are released from detention.

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[185] As the RD does not aim at regulating conditions on residence, reference should be made to the Qualification Directive and its interpretation; See CJEU, *Bashir Mohamed Ali Mahdi,* C-146/14, 5 June 2014, para 87.
[186] CJEU, *Arslan,* C-534/11, 30 May 2013
[187] CJEU, *TQ,* paras. 53–54.
[188] CJEU [Grand Chamber], *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm),* C-34/09, 8 March 2011
[189] The right to family life was also upheld in the CJEU, *K.A. and others v. Belgische Staat*,, C-82/16, 8 May 2018.
[190] CJEU, *Kadzoev*.

Forms of national protection to persons in a severe health state have been addressed in the case law before the CJEU. In the M'Bodj case the CJEU deemed that "medical cases" are completely disconnected from the concept of international protection but underlined that they fall within the scope of the Member States' obligations towards human rights (and more precisely under Art. 4 and 19 CFR); thus, some sort of protection has to be provided at a national level.[191] In the Abdida case[192] the CJEU found that Art. 14, para. 1 (b) of the RD precludes national legislation which does not make provision, in so far as possible, for the basic needs of non-returnees to be met, in order to ensure that the person may in fact avail himself of emergency health care and essential treatment of illness during the period in which that Member State is required to postpone removal.[193]

In 2023 a new case was filed before the CJEU[194] posing even more concrete questions on the character of the national protection which has to be provided by Member States to non-removable returnees: whether the scope of the national protection can exceed that of international protection under the EU Qualification Directive 2011/95; whether the written confirmation under Art. 14, para. 2 of the RD is mandatory; whether the national legislation has to be interpreted in the light of Art. 1 and 4 CFREU regardless of the scope of the Qualification Directive; whether not providing national protection would constitute a violation under Art. 1, 4 and 7 CFR. The expected judgment on this case may have significant consequences for the future of all persons in a state of legal limbo within the EU.

6.3 Non-return in the proposed Recast of the Return Directive

Even when Member States take all necessary measures to enforce a return decision it may remain unimplemented if the authorities of the country of return refuse to cooperate. The

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[191] CJEU [Grand chamber], *Mohamed M'Bodj v État belge*, C-542/13, 18 December 2014, para. 47.
[192] CJEU, *Abdida*
[193] For a more detailed analysis of the two decisions, see Ilareva, V.op. cit.
[194] CJEU, *Changu,* C-352/23, (Request for a preliminary ruling).

RD does not contain provisions that describe such a situation although Art. 9 and Art. 14 mention a possible postponement of the procedure.

Regarding the Recast of the RD, the Commission highlights that the 'main reasons for non-return relate to practical problems in the identification of returnees and in obtaining the necessary documentation from non-EU authorities'. However, the Proposed Recast does not contain any specific provisions that address the issue. Obviously, an improved cooperation between the EU and the countries of origin is needed to accelerate the readmission of their citizens and this problem will not be solved by the mere adoption of the Proposed Recast.

The Proposed Recast (Art. 7) aims to impose an obligation to cooperate on third-country nationals subject to return procedures; no other sanctions are provided by the Proposed Recast for breaching these obligations except detention. Thus, Member States are given discretion to establish their own sanctioning regime.[195]

Finally, the Proposed Recast brings major change on the detention of returnees, increasing the possible grounds for detention unrelated to the return procedure and linked to security concerns, namely when the returnee poses a risk to public policy, public security or national security.[196]

7. Conclusions and recommendations

There are a number of warning signs that fundamental rights in the return process are not sufficiently safeguarded. The recent case-law of the ECtHR seems to shift the 'person-centric mandate to primarily safeguard individuals' human rights in their interactions with states'[197] and puts the sovereignty (at least in migration control) of the state first. This position of the ECtHR ignores the vulnerability of people on the move and undermines the protection that

[195] EPRS Briefing (2019), EU Legislation in Progress - Reacting the Return Directive, p. 7
[196] *Ibid.*, p. 6
[197] Carrera, op. cit., p. 8

Article 3 ECHR provides. The consequences of several judgments of the ECtHR (especially, the N.D. and N.T. case) have also been challenged by other international organisations, especially the UN treaty bodies who advocate for individual assessment of each case prior to return[198].

Some states persistently resort to practices that clearly violate international standards for protection of migrants. For example, although pushbacks are regarded as illegal (especially when authorities actively participate and assist in such operations while being aware of the actual situation in the country of return regarding the application of torture or other forms of ill-treatment)[199], several Member States (Poland, Lithuania, Italy, Spain, Greece and Hungary among them) still attempted to ground these practices in their national legislation[200].

Guy Goodwin-Gill argued that 'the problem common to many governmental institutions [is] of failing to think human rights before thinking policy'[201]. Another explanation for that situation is also plausible – governments are fully aware that they often act in non-compliance with international law but they deliberately choose to do so in order to reshape and diminish the scope of protection offered to migrants[202]. Human rights are de facto the only rights that migrants can refer to for any legal protection regardless of how illusive and distant it may appear[203]; thus, depriving migrants of fundamental rights leaves this group completely unprotected from any policies and regulations the authorities use or would like to use in the future.

Finally, it should be remembered that the legitimacy of the return procedures depends strongly on the existence of a fair and consistent asylum system charged with the task to

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198 Ibid, pp. 19-20
199 Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Doc. №. A/HRC/37/50 (2018), pp. 15-16, 20.
200 Baranowska, op. cit.; Barnes, op. cit; Carrera, op. cit; Gkliati, op. cit.; Klaus (2021). *Humanitarian crisis* ....; Perkowska, M., & Gutauskas, A. (2023). Were the Lithuanian and Polish Responses to the Refugee Influx Legal or Illegal? *Białostockie Studia Prawnicze*, 28(1), 117–136.
201 Goodwin-Gill, op. cit., p. 455.
202 Barnes, op.cit., pp. 442 and 446.
203 Crosby, A. (2014). The Political Potential of the Return Directive. *Laws*, *3*, p. 120

examine "whether a person will face a well-founded fear of persecution or serious harm if returned. Unfortunately, currently it cannot be assumed that a person whose asylum claim has been rejected does not have a case for protection in Europe"[204]. A reform to the return procedure cannot be completed without corresponding changes in the Common EU Asylum System.

Additionally, improvements in the return procedure cannot be measured solely by the number of return decisions and/or removals. Increasing the number of people removed in violation of their fundamental rights or forced in a state of legal limbo could not be regarded as a success.

[204] ECRE (2019), Policy note # 9: No Safety in Numbers, p. 2

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