

## IOM and ‘Assisted Voluntary Return’

### Responsibility for Disguised Deportations?

JEAN-PIERRE GAUCI\*

#### 14.1 Introduction

Recent years have seen the proliferation and implementation of assisted voluntary return (AVR) schemes across Europe and around the world.<sup>1</sup> These programmes, many of which are administered by the International Organization for Migration (IOM) in cooperation with the governments of host States, aim to facilitate the return and reintegration of migrants who are unwilling or unable to stay in host or transit countries to their countries of origin. Typically offering financial assistance, transportation, logistical support or reintegration and development assistance (or some combination thereof) to returning migrants, AVR schemes are often presented as providing a more humane alternative to ‘forced deportations’.<sup>2</sup> In practice, however, the voluntary nature of such return is questionable, and these programmes can easily morph into so-called ‘soft’ or ‘disguised’ deportations.<sup>3</sup>

\* The author would like to thank Georgia Greville, Researcher in Labour Exploitation and Human Rights at BIICL for her research support in the drafting of this chapter, and to the editors of this volume for their invaluable insights and feedback on earlier drafts. The chapter further develops and adapts a chapter originally published as: Jean-Pierre Gauci, ‘The “Voluntary” in Assisted Voluntary Return’ (Externationalisation of Borders: Detention Practices and Denial of the Right to Asylum, Lagos, 25 February 2020).

<sup>1</sup> See, e.g. Ine Lietaert, Eric Broekaert and Ilse Derluyn, ‘From Social Instrument to Migration Management Tool: Assisted Voluntary Return Programmes – The Case of Belgium’ (2017) 51 *Social Policy and Administration* 961, 962.

<sup>2</sup> See, e.g. the objectives set out in IOM, *A Framework for Assisted Voluntary Return and Reintegration* (2018); see also, Commission, ‘The EU Strategy on Voluntary Return and Reintegration’ (Communication) COM (2021) 120 final.

<sup>3</sup> See generally: Barak Kalir, ‘Between “Voluntary” Return Programs and Soft Deportation: Sending Vulnerable Migrants in Spain Back “Home”’ in Zana Vathi and Russell King (eds), *Return Migration and Psychosocial Wellbeing* (Routledge 2017); Arjen Leerkes, Rianne van Os and Eline Boersema, ‘What Drives “Soft Deportation”? Understanding the Rise in Assisted Voluntary Return among Rejected Asylum Seekers in the Netherlands’ (2017) 23 *Population, Space and Place* e2059; Shoshana Fine and William Walters, ‘No Place like

Given the legal implications of the ‘dichotomy’ between voluntary and other forms of return (as highlighted by the European Court of Human Rights in *Khan v UK*), the critical role that IOM plays in the field of AVR, and IOM’s stated limitations on what forms of returns it will engage with, the question of whether a return situation is indeed voluntary or otherwise becomes critically important.<sup>4</sup> This chapter seeks to unpack the conditions under which returns can be considered voluntary from a legal perspective. In doing so, it contributes to the debate on the voluntariness of AVR emerging from ethics, political science and other social sciences, especially migration studies.<sup>5</sup> It adds a legal dimension to the debate, by providing a close look at the legal issues related to IOM’s role in AVR.

The chapter is organized as follows. Section 14.2 provides an overview of the work IOM does in the field of AVR and how its internal policy documents articulate IOM’s role in this field. Section 14.3 analyses the evolution of IOM’s definition of AVR across the three editions of the IOM Glossary on Migration (from 2004, 2011 and 2019), comparing these to the definitions used by other organizations, in particular the Office of the United Nations High Commissioner for Refugees (UNHCR). Sections 14.4 and 14.5 focus on the requirement of ‘free’ consent (Section 14.4) and informed consent (Section 14.5). Section 14.6 reconceptualises consent and voluntariness as a process, arguing for consent to be present throughout the process, and the implications on the enforceability of ‘voluntary’ return. Section 14.7 touches upon a number of related issues including financial incentives, the need for staff training and the requirement to respect the genuine demands of migrants seeking to return. Section 14.8 considers the implications of these principles for IOM and makes a number of recommendations for reform.

As a matter of its own policies, IOM states that ‘As an intergovernmental organization, IOM cannot carry out forced returns of migrants for, or on behalf of, governments’.<sup>6</sup> International law does not clearly prohibit

Home? The International Organization for Migration and the New Political Imaginary of Deportation’ (2021) 48 *Journal of Ethnic and Migration Studies* 3060.

<sup>4</sup> *Khan v UK* App no 35394/97 (ECtHR, 12 May 2000); For IOM policies indicating that the agency only supports voluntary returns, see e.g. IOM, *Policy on the Full Spectrum of Return, Readmission and Reintegration* (2021) 3.

<sup>5</sup> See, e.g. Marta Bivand Erdal and Ceri Oeppen, ‘Theorising Voluntariness in Return’, in Katie Kuschminder and Russell King (eds), *Handbook of Return Migration* (Edward Elgar 2022) 70; Mollie Gerver, *The Ethics and Practice of Refugee Repatriation* (Edinburgh University Press 2018); Frances Webber, ‘How Voluntary Are Voluntary Returns?’ (2011) 52 (4) *Race & Class* 98.

<sup>6</sup> IOM, *Policy on the Full Spectrum of Return* (n 4) 3. The legal reasoning behind this statement is not provided in the policy.

international organizations such as IOM from being involved in deportations, as long as these are consistent with, for example, international human rights law. This chapter does not engage in debates on whether IOM should be involved in non-voluntary returns – although IOM's own policies would need to be revised if this were to be the case. Rather, it argues that some situations IOM describes as 'voluntary' are not actually voluntary and given the legal implications should be more accurately defined as forms of soft deportations. Particularly when human rights violations ensue, this would have implications for the accountability of IOM in relation to its own policy frameworks, as well as under international human rights law and the International Law Commission Draft Articles on the Responsibility of International Organizations; and for the States involved.<sup>7</sup>

## 14.2 IOM and AVR

IOM has been involved in the promotion and implementation of AVR programmes since 1979 and positions itself as the leading organization for voluntary return globally. Indeed, AVR programmes are one of IOM's core areas of business and a 'means by which it has grown in funding and authority'.<sup>8</sup> According to its website, during the past four decades, IOM has assisted more than 1.7 million migrants to return voluntarily to their countries of origin.<sup>9</sup> In 2020, despite limitations on AVR programmes as a result of COVID-19, IOM facilitated the return of 37,043 migrants to their countries of origin through AVR channels.<sup>10</sup>

<sup>7</sup> This, however, does not mean that non-voluntary return is not permitted under international law. The assumption in international law is that States may indeed return people to their country of origin, with limitations on that right being the exception rather than the rule. The limitations include the principle of *non-refoulement* as established in Article 33 of the Refugee Convention and other related instruments; the protection of the right to life, the prohibition of torture, cruel and inhuman treatment as set out in, inter alia, Article 3 of the Convention Against Torture, the European Convention on Human Rights; and the protection of the right to family life. Critically, it is worth noting that these rights and related obligations, most notably the prohibition of torture, cruel and inhumane treatment, are principles of customary international law and as such are arguably binding upon international organizations including IOM. This, in turn, has implications for both the activation of the responsibility of international organizations themselves as well as that of the States which instruct IOM's actions.

<sup>8</sup> Fine and Walters (n 3) 7.

<sup>9</sup> See IOM, 'Migration Management' <<https://eea.iom.int/migration-management>> accessed 26 April 2022.

<sup>10</sup> IOM, *Return and Reintegration Key Highlights 2020* (2021) 4.

Pre-pandemic, this figure was 64,958 in 2019.<sup>11</sup> AVR programmes implemented in cooperation with IOM play an increasingly important role in the migration policies of many countries, particularly European nations,<sup>12</sup> and such schemes have steadily grown in number, size, and scale over recent years.<sup>13</sup>

IOM's commitment to assisting with voluntary returns can be traced back to its Constitution which, in Article 1, lists the provision of voluntary return migration services to States, including in cooperation with other international organizations, as a key purpose and function of IOM.<sup>14</sup> By 'offering migrants the possibility to return in a safe and dignified manner',<sup>15</sup> IOM considers AVR programmes to be 'essential to the Organization's mission'.<sup>16</sup> Such schemes are a key component of IOM's broader engagement with returns. In addition to its AVR activities, IOM is also engaged in promoting and facilitating the return of internally displaced persons (IDPs) in post-conflict and post-disaster settings,<sup>17</sup> as well as supporting some aspects of repatriation processes for refugees, sometimes in cooperation with UNHCR.<sup>18</sup> IOM's work on return migration is guided by its 2021 Policy on the Full Spectrum of Return, Readmission and Reintegration, which promotes a 'holistic, rights-based

<sup>11</sup> IOM, *Return and Reintegration Key Highlights 2019* (2020) 2.

<sup>12</sup> Webber (n 5) 99.

<sup>13</sup> Katie Kuschminder, 'Taking Stock of Assisted Voluntary Return from Europe: Decision Making, Reintegration and Sustainable Return – Time for a Paradigm Shift' (2017) Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2017/31, 2 <<https://ssrn.com/abstract=3004513>> accessed 21 June 2022; Leerkes, Os and Boersema (n 3) 2; Lietaert, Broekaert and Derluyn (n 1) 962.

<sup>14</sup> *Constitution of the International Organization for Migration* (Intergovernmental Committee for European Migration, 1953) art 1, para 1(d), amended 1989. Notably, the Constitution does not explicitly indicate that IOM may provide services in support of returns *only* when they are voluntary; under the 'permissive provisions' of the IOM Constitution, the agency engages in a wide range of activities that are not expressly provided for in its constitutive document. See Vincent Chetail, 'The International Organization for Migration and the Duty to Protect Migrants: Revisiting the Law of International Organizations' in Jan Klabbers (ed), *Cambridge Companion to International Organizations Law* (Cambridge University Press 2022) 245

<sup>15</sup> IOM, *A Framework for Assisted Voluntary Return and Reintegration* (n 2) 5.

<sup>16</sup> IOM, *Return and Reintegration Key Highlights 2018* (2019).

<sup>17</sup> See, e.g. IOM, 'IOM Framework for Addressing Internal Displacement' (6 June 2017) IOM Doc S/20/4.

<sup>18</sup> See, e.g. United Nations High Commissioner for Refugees, *Handbook on Voluntary Repatriation: International Protection* (1996) 69; Anne Koch, 'The Politics and Discourse of Migrant Return: The Role of UNHCR and IOM in the Governance of Return' (2014) 40 *Journal of Ethnic and Migration Studies* 905.

and sustainable development-oriented approach that facilitates safe and dignified return, readmission and sustainable reintegration'.<sup>19</sup>

Indeed, in contrast to forced deportation, AVR programmes are typically conceived of and presented as offering migrants a more humane and dignified form of return. IOM states that it does not carry out forced returns for governments, as this is a sovereign power and 'enforcement measure exercised solely by governments'.<sup>20</sup> Accordingly, its role is self-limited to assist only with returns that are voluntary – although, strikingly, IOM contends that this does not prohibit it from 'providing non-movement services prior to or after a forced return movement, such as pre-departure counselling or post-arrival assistance, as long as they are provided with the informed consent of the migrant and contribute to protecting their rights and well-being, nor from providing policy and technical support to governments to enhance their capacities in this space, in compliance with applicable international law'.<sup>21</sup> This focus on voluntariness, at least when it comes to physically moving individuals, is confirmed by IOM's 'Framework for Assisted Voluntary Return and Reintegration' policy document, which lists voluntariness as the first guiding principle for the implementation of effective AVR programmes.<sup>22</sup> The Framework further lists as a key objective for AVR processes that migrants be capable of making 'an informed decision and tak[ing] ownership of the voluntary return process'.<sup>23</sup>

However, scholars and commentators have often queried the true voluntariness of AVR schemes. Indeed, in situations where the main other legal option available to rejected asylum seekers or irregular migrants is deportation, it is difficult to conceive of AVR as offering such migrants a genuine, informed choice in the matter of return.<sup>24</sup> In this way, the tactics

<sup>19</sup> IOM, *Policy on the Full Spectrum of Return* (n 4) 3. As a policy framework on a broader issue, this document appears to provide a broader frame for the AVRR framework adopted in 2018. Whilst the latter appears more operationally focused, this document sets out policy guidance.

<sup>20</sup> IOM, *Policy on the Full Spectrum of Return* (n 4) 3; Koch (n 18) 912; Human Rights Watch, 'The International Organization for Migration (IOM) and Human Rights Protection in the Field: Current Concerns' (November 2003) 7 <[www.hrw.org/legacy/backgrounder/migrants/iom-submission-1103.pdf](http://www.hrw.org/legacy/backgrounder/migrants/iom-submission-1103.pdf)> accessed 21 June 2022. On the exercise of sovereign powers of states by international organizations see: Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press 2007).

<sup>21</sup> IOM, *Policy on the Full Spectrum of Return* (n 4) 3.

<sup>22</sup> IOM, *A Framework for Assisted Voluntary Return and Reintegration* (n 2) 3.

<sup>23</sup> *Ibid.*

<sup>24</sup> Webber (n 5) 103; Koch (n 18) 911; Erlend Paasche, May-Len Skilbrei and Sine Plambech, 'Vulnerable Here or There? Examining the Vulnerability of Victims of Human Trafficking Before and After Return' (2018) 10 *Anti-Trafficking Review* 34.

of persuasion often involved in such schemes have led some to describe AVR as a form of ‘soft deportation’, or a ‘transformation within the regime of deportation itself’,<sup>25</sup> or to conceptualise forced and voluntary returns not as dichotomous but rather as falling somewhere along a continuum with forced deportation on one extreme and spontaneous voluntary return on the other.<sup>26</sup>

### 14.3 The (D)evolving Definition of Assisted Voluntary Return

This section explores the way in which the definition of AVR has changed across subsequent editions of the IOM Glossary on Migration. Like other IOM publications, the glossary includes a standard disclaimer that ‘the opinions expressed in this Glossary do not necessarily reflect the views of the International Organization for Migration’.<sup>27</sup> However, the definition of AVR in the third edition is replicated in IOM’s policy documents about return, suggesting that it does in fact represent IOM’s conceptualisation of the term and thereby ‘the views of the organisation’.<sup>28</sup>

The first edition (2004) of the IOM Glossary defines AVR as:

Logistical and financial support to rejected asylum seekers, trafficked migrants, stranded students, qualified nationals and other migrants unable or unwilling to remain in the host country who volunteer to return to their countries of origin.<sup>29</sup>

The second edition (2011) makes a number of changes, and defines it as:

Administrative, logistical, financial and reintegration support to rejected asylum-seekers, victims of trafficking in human beings, stranded migrants, qualified nationals and other migrants unable or unwilling to remain in the host country who volunteer to return to their countries of origin.<sup>30</sup>

<sup>25</sup> Fine and Walters (n 3) 2. On the point of soft deportation, Fine and Walters refer to: Kalir (n 3).

<sup>26</sup> Barak Kalir and Lieke Wissink, ‘The Deportation Continuum: Convergences between State Agents and NGO Workers in the Dutch Deportation Field’ (2016) 20 *Citizenship Studies* 34, 35.

<sup>27</sup> See the introductory note to Alice Sironi, Céline Bauhoz and Milen Emmanuel (eds), *Glossary on Migration* (3rd edn, IOM 2019).

<sup>28</sup> See, e.g. IOM, *A Framework for Assisted Voluntary Return and Reintegration* (n 2) 1.

<sup>29</sup> Richard Perruchoud (ed), *Glossary on Migration* (1st edn, IOM 2004).

<sup>30</sup> Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Glossary on Migration* (2nd edn, IOM 2011).

The third and most recent edition (2019) further changes the definition and AVR is now defined as:

Administrative, logistical or financial support, including reintegration assistance, to migrants unable or unwilling to remain in the host country or country of transit and who decide to return to their country of origin.<sup>31</sup>

There are two notable differences between the original definition and the definition in the latest edition. First, the wording changes from 'volunteers' to return to 'decides' to return. This may seem like semantic parsing of words. However, the use of the verb 'volunteers' denotes a more active willingness to return. Indeed, an ordinary definition of 'volunteer' is 'one who of his own free will takes part in any enterprise'.<sup>32</sup> The Merriam-Webster legal definition of 'voluntary' is that it is 'proceeding from one's own free choice or consent rather than as the result of duress, coercion or deception', 'not compelled by law: done as a matter of choice or agreement' and that it is 'made freely and with an understanding of the consequences'.<sup>33</sup> An ordinary meaning of the term defines volunteering as 'to offer to do something that you do not have to do, often without having been asked to do it and/or without expecting payment'.<sup>34</sup>

Decide, on the other hand, is a more intransitive term defined as 'to make a choice or judgment'.<sup>35</sup> This subtle but significant difference dilutes the requirement of voluntariness. A decision may be the only option available, but to be voluntary, there must be a selection between different options. This reading of the change (which, I argue, would not have been made had it not been meaningful) is less protective and dilutes the concept of voluntariness.

The second change concerns the categories of persons for whom AVR programmes are offered. The evolution moves from an inclusive list (rejected asylum seekers, victims of human trafficking, stranded students,

<sup>31</sup> Sironi, Bauloz and Emmanuel (n 27).

<sup>32</sup> See: Oxford English Dictionary, 'Volunteer, n. and adj.' (Oxford University Press 2020).

<sup>33</sup> Kalir (n 3).

<sup>34</sup> See: Cambridge Dictionary, 'Volunteer' (Cambridge University Press 2022). The idea of the ordinary meaning is relevant here given that under (Article 31 of the Vienna Convention on the Law of Treaties: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose').

<sup>35</sup> See: Merriam-Webster Dictionary, 'Decide' (Merriam-Webster 2022).

qualified nationals, and other migrants) to a broad reference to 'migrants'.<sup>36</sup> The focus on migrants generally appears to detract attention from the notion that AVR is targeted towards rejected asylum seekers, as shown in the definition in the first two editions. The 2019 glossary does not provide a definition of the term 'migrant' but rather explains it as a non-legal term reflecting a 'common lay understanding'.<sup>37</sup> The examples provided are migrant workers, smuggled migrants, and international students. That said, the various categories of migrants listed in previous editions (of the AVR definition) would still be captured by the new definition of 'migrant'.

The definition of AVR in the third edition of the glossary is accompanied by a note which reads:

[v]oluntariness is assumed to exist if two conditions apply: (a) freedom of choice, which is defined by the absence of physical or psychological pressure to enrol in an assisted voluntary return and reintegration program; and (b) an informed decision which requires the availability of timely, unbiased and reliable information upon which to base the decision.<sup>38</sup>

It is notable that the key requirements of 'voluntariness' are set out in an accompanying note rather than within the AVR definition itself. The two key requirements set out are 'freedom of choice' and an 'informed decision'. These generate an 'assumption' that voluntariness is present. Freedom of choice is defined by an absence of pressure rather than a presence of a will. Moreover, only certain forms of pressure are acknowledged as undermining voluntariness, namely 'physical or psychological' pressure, thus apparently excluding other forms of pressure such as abuse of a vulnerable position, economic and legal pressure. Furthermore, voluntariness is tested with regard to the decision 'to enrol in the program' rather than the return decision itself, further undermining the voluntariness standard. We return to this issue in discussing abuse of a position of vulnerability later in this article.

Beyond the dilution of the articulation of voluntariness by IOM over time, it is also revealing to compare IOM's AVR definition with those of other international organizations. For example, UNHCR's Master Glossary defines voluntary repatriation as:

The free and informed return of refugees to their country of origin in safety and dignity. Voluntary repatriation may be organized (i.e.

<sup>36</sup> It is worth noting that the definition of migrant provided in the glossary has also changed between the first and the third edition of the glossary.

<sup>37</sup> Sironi, Bauloz and Emmanuel (n 27) 132.

<sup>38</sup> Ibid 13.

when it takes place under the auspices of the concerned States and/or UNHCR) or spontaneous (i.e. when refugees repatriate by their own means with little or no direct involvement from government authorities or UNHCR).<sup>39</sup>

Critically, the reference to 'refugees' in the definition speaks to the ability of that person to remain in the State in question, thereby making the repatriation 'voluntary'. However, the UNHCR Master Glossary further defines AVR as:

Administrative, logistical, financial and reintegration support to non-nationals unable or unwilling to remain in the host country and who make a free and informed decision to return to their country of origin or habitual residence.<sup>40</sup>

A few critical similarities are worth highlighting. Both definitions refer to a decision to return rather than volunteering to return, raising the questions discussed above. More importantly, the reference in both definitions (including different editions of the IOM definition) to 'unable or unwilling' to remain in the host country raises the question as to whether the reference to inability to remain includes, for instance, decisions by the host State rendering stay 'unauthorised' and therefore requiring the person to leave the host State.

#### 14.4 Freedom of Choice

The definition discussed above refers to voluntariness as being the result of a combination of freedom of choice and informedness. This section explores the notion of freedom of choice further, in particular in light of the fact that AVR programmes are often designed for those who would otherwise face deportation. How does the existence of such a legal obligation to leave the country impact on freedom of choice? This issue has been considered by the European Court of Human Rights (ECtHR) in its 2019 ruling in *NA v Finland*.<sup>41</sup> Although the decision has since been annulled for factual reasons, the reasoning is nonetheless still persuasive and may inform debates on IOM's activities, in light of its stated commitment not to engage in forced returns.

<sup>39</sup> UNHCR, 'Master Glossary of Terms' (2022) <[www.unhcr.org/glossary/](http://www.unhcr.org/glossary/)> accessed 21 June 2022.

<sup>40</sup> Ibid.

<sup>41</sup> *NA v Finland* App no 25244/18 (ECtHR, 14 November 2019).

#### 14.4.1 NA v Finland *before the European Court of Human Rights*

Judicial determination of the question of whether a return is voluntary or otherwise is rare. In *NA v Finland*, the ECtHR examined this issue for the first time. The case was brought by Ms NA, arguing that Finland had violated her father's rights under the ECHR. Having been denied asylum, he had returned to Iraq from Finland through an AVR programme. Upon return to Iraq, he had allegedly been murdered. The applicant alleged that 'her late father's expulsion to Iraq violated Articles 2<sup>42</sup> and 3 of the Convention,<sup>43</sup> and that her father's expulsion and his violent death caused her considerable suffering under Article 3 of the Convention'. The applicant's father had unsuccessfully applied for asylum in Finland. He applied for an AVR programme coordinated by the Finnish Government and IOM after the decision by the Administrative Court (rejecting his appeal) but before his application to the Supreme Administrative Court (which was eventually also rejected). A voluntary return was granted on 13 October 2017. He left Finland on 29 November 2017.

The judgment of the ECtHR was annulled on 13 July 2021 under Rule 80 of the Rules of Court, on the basis of abuse of the right of application based on the subsequent discovery that documents and information central to the Court finding a rights violation had been forged by the applicant, warranting annulment of the judgment. In brief, evidence emerged (and was confirmed by the Finnish Courts) that the applicant's father was in fact alive and that the documents presented to the Court (including his death certificate) had been forged. The Court noted that:

It has thus been established that the applicant has relied on false information and forged documents to support the key allegations on which her complaint before the Court was based. The Court notes in this respect that the alleged death of the applicant's father was decisive for the applicant's victim status.<sup>44</sup>

Despite the annulment of the judgment, the deliberation of the Court in the admissibility stage provides relevant considerations as to the argument on the voluntariness of return and on the spectrum of deportation. Those arguments are not based on the facts of the case, but on the legal scope of the concept of 'voluntariness'. At that stage of the proceedings, the Finnish government argued that the application for AVR meant that it

<sup>42</sup> Right to life.

<sup>43</sup> Prohibition of torture, cruel, and inhuman treatment.

<sup>44</sup> *NA v Finland (revision)* App no 25244/18 (ECtHR, 13 July 2021) para 12.

could not be held liable for what happened to the applicant's father upon his return to Iraq. Indeed, the agent for Finland argued that:

[F]ollowing the applicant's father's voluntary departure to Iraq, it could be considered that his *voluntary departure* put an end to his victim status and that after his departure he could no longer be regarded as a potential victim of any violation of the Convention.<sup>45</sup>

The crux of the submission of the Finnish government was that the applicant's father had decided to return home and that therefore the applicant's claim was inadmissible. The applicant in turn argued that participation in the AVR programme was simply a means to avoid detention, attract less attention from the Iraqi authorities and to avoid a two year entry ban to the Schengen area, all of which would flow from a forced return. The arguments were summarised by the Court as follows:

The Court notes that according to the Government's argument, the circumstances of the case did not engage the jurisdiction of Finland, because the applicant's father had left Finland voluntarily for Iraq, where he had subsequently been killed. The applicant in turn argues that her father's return had not been genuinely voluntary but based on the decisions already taken by the Finnish authorities with a view to his expulsion, and that her father's death had thus been a consequence of the risk to which he had been exposed by the actions of the Finnish authorities.<sup>46</sup>

The Court decided in favour of the applicant on this matter:

For the Court the fact that the applicant's father had first lodged an application under the voluntary returns programme before submitting his application for leave to appeal before the Supreme Administrative Court cannot be regarded as decisive, either. In the light of the circumstances of the case, in particular the factual background of the applicant's father's flight from Iraq as acknowledged by the domestic authorities, the Court sees no reason to doubt that he would not have returned there under the scheme of 'assisted voluntary return' had it not been for the enforceable removal order issued against him. Consequently, his departure was not 'voluntary' in terms of his free choice.<sup>47</sup>

The argument of the Court on this point of admissibility reinforces the argument that provided that there is a removal requirement from the host State, then the return cannot be considered to be voluntary. This shifts the return away from being a 'voluntary return' to some other form of

<sup>45</sup> *NA v Finland* (2019) (n 41) para 46 (emphasis added).

<sup>46</sup> *Ibid* para 53.

<sup>47</sup> *Ibid* para 57.

deportation (soft deportation/disguised deportation) – that is, a form of return that IOM insists it does not undertake. This, in turn, is a relevant consideration, especially when seen in the broader jurisprudence of the Court including when in *Abdul Wahab Khan v The UK* the Court determined that:

There is no principled reason to distinguish between, on the one hand, someone who was in the jurisdiction of a Contracting State but voluntarily left that jurisdiction and, on the other, someone who was never in the jurisdiction of that State.<sup>48</sup>

In that decision, the Court determined that the voluntary departure meant that the UK's jurisdiction was not engaged. This in turn highlights the relevance of accurately differentiating between 'genuinely voluntary return' and forms of deportation that fall into categories other than 'voluntary'.

The Finnish Government's argument was complemented by a statement that before his departure, the applicant's father had signed a declaration in which he had agreed that, in return for receiving financial aid, any agency or government participating in the voluntary return could not in any way be held liable or responsible. The signature of such declarations appears to be part of IOM practice.<sup>49</sup> For example, the IOM-facilitated 2011 UK Voluntary Assisted Return and Reintegration programme – Declaration of Voluntary Return includes a provision stating that

I agree for myself as well as for my dependants, heirs and estate that, in the event of personal injury or death during and/or after my participation in the IOM programme, neither IOM nor any other participating agency or government can in any way be held liable or responsible.<sup>50</sup>

Similarly, the sample forms available in the Standard Operating Procedures for Reintegration of Returnees in Ghana produced by IOM provide the following wording:

I acknowledge, for (name of migrant) and for any person for whom I have the right to do so as well as for his/her relevant heirs and estate, that IOM will not be held liable for any damage caused, directly or indirectly, to me

<sup>48</sup> *Abdul Wahab Khan v UK* App no 11987/11 (ECtHR, 28 January 2014) para 26.

<sup>49</sup> See, e.g., IOM, 'Standard Operating Procedures for Reintegration of Returnees in Ghana' (September 2020) 83 <[www.iom.int/sites/g/files/tmzbdl486/files/country/docs/ghana/sops\\_for\\_reintegration\\_of\\_returnees\\_in\\_ghana\\_sept\\_2020.pdf](http://www.iom.int/sites/g/files/tmzbdl486/files/country/docs/ghana/sops_for_reintegration_of_returnees_in_ghana_sept_2020.pdf)> accessed 21 June 2022.

<sup>50</sup> See annex to Katy Brickley, *Communicating Assisted Voluntary Return (AVR) Programmes in the UK: Examining Tensions in Discursive Practice* (PhD dissertation, Cardiff University 2015) 300.

or any such person in connection with IOM assistance that derives from circumstances outside the control of IOM.<sup>51</sup>

On this point, in *NA v Finland* the Court found that:

In the present case, the applicant's father had to face the choice between either staying in Finland without any hope of obtaining a legal residence permit, being detained to facilitate his return by force, and handed a two year– entry ban to the Schengen area, as well as attracting the attention of the Iraqi authorities upon return; or agreeing to leave Finland voluntarily and take the risk of continued ill-treatment upon return. In these circumstances the Court considers that the applicant's father did not have a genuinely free choice between these options, which renders his supposed waiver invalid. Since no waiver took place, his removal to Iraq must be considered as a forced return engaging the responsibility of the Finnish State.<sup>52</sup>

The Court was therefore clear that given the options available to him, the agreement to participate in a programme of AVR, and indeed to sign a waiver of responsibility, does not render the return, in fact, voluntary. This, in turn, has implications for the responsibility of the States involved (as parties to the relevant Convention) but also for the organizations involved in such returns, including IOM. If the Court's analysis also holds for international organizations, IOM can no longer claim to be involved only in voluntary returns.

#### 14.4.2 *Lessons from Other Areas of Law*

It is also instructive to consider other areas of law where the concept of voluntariness plays a role. Two areas are considered particularly interesting. One is the international law relating to human trafficking and in particular the inclusion of 'abuse of a position of vulnerability' as one of the means listed in the definition of trafficking. The other is the ordinary law of contract, and in particular the issues around vitiated consent, a basic legal acknowledgement that coercion undermines consent. The reasons for this selection include that the legal space in which these debates occur is often similar. For example, the discussion of voluntariness in movement is often a key point in the case of trafficking, as is the question of abuse of one's migration status as a 'means' through which trafficking occurs (and thereby rendering consent irrelevant). Moreover, one can identify parallels between situations of duress as a vitiating factor in the context of contract law (for example related to threats of detention) having a clear parallel in the return space.

<sup>51</sup> IOM, 'Standard Operating Procedures for Reintegration of Returnees in Ghana' (n 49) 83.

<sup>52</sup> *NA v Finland* (2019) (n 41) para 60.

This section aims to offer two different examples of how voluntariness is understood in law, in order to clarify whether situations that have been described as being of ‘voluntary return’ are indeed so.

Article 3 of the Trafficking Protocol<sup>53</sup> considers abuse of a position of vulnerability to be a means of trafficking alongside coercion, fraud, deception and abuse of a position of power. The same provision is included in the definition of trafficking under the Council of Europe Trafficking Convention,<sup>54</sup> the EU Directive,<sup>55</sup> and the Association of Southeast Asian Nations (ASEAN) Trafficking Convention.<sup>56</sup> If any of the means are present, any consent given by the victim to the intended exploitation is rendered irrelevant from a legal perspective.

Despite the apparent consensus on the trafficking definition, elements thereof remain unclear and continue to be interpreted and applied differently in different jurisdictions. This includes the idea of abuse of a position of vulnerability. It should be clarified that the focus here is not on the idea of vulnerability as susceptibility to trafficking but rather on the abuse of vulnerability as a means of trafficking.<sup>57</sup> The notion of abuse of a position of vulnerability requires two elements – the existence of a ‘vulnerability’ and the ‘abuse’ of that vulnerability for the purpose of exploitation. According to the *travaux préparatoires* of the Trafficking Protocol, the reference to the abuse of a position of vulnerability is understood as referring ‘to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved’.<sup>58</sup> This same

<sup>53</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted and opened for signature, ratification and accession by UNGA Res 55/25, 15 November 2000) 2237 UNTS 319. For more on the Protocol, see David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and Its Protocols* (Oxford University Press 2007); Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010).

<sup>54</sup> Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005) CETS 197.

<sup>55</sup> Council and Parliament Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1.

<sup>56</sup> ASEAN Convention Against Trafficking in Persons, especially Women and Children (adopted 21 November 2015, entered into force 8 March 2017).

<sup>57</sup> For more on the importance of the distinction, see: Anne T Gallagher, *Issue Paper: Abuse of a Position of Vulnerability and Other ‘Means’ within the Definition of Trafficking in Persons* (United Nations Office on Drugs and Crime 2013).

<sup>58</sup> *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations Office of Drugs and Crime, 2006) 347.

interpretation of vulnerability is carried through the EU Directive, which uses the same definition in Article 2.2.

No further explanation is given of what a 'real and acceptable alternative' is. The inclusion of the term seems to have been an attempt to cover the myriad of more subtle means of coercion by which people are exploited.<sup>59</sup> The commentary to the Council of Europe Convention notes that abuse of a position of vulnerability means:

[A]buse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse. The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited.<sup>60</sup>

When examining abuse of position of vulnerability, one must consider both the objective situation to assess whether there is a position of vulnerability which is being abused as well as understanding the situation as experienced and perceived by the victim.<sup>61</sup> If the victim perceives themselves as being in a vulnerable situation where they have no real or acceptable alternative, then irrespective of whether this is the objective reality or not, the situation can still be one of abuse of a position of vulnerability sufficient to vitiate consent.

Beyond the idea of abuse of a position of vulnerability there is also the idea of abuse of a position of power within the context of the trafficking definition that might have some resonance in the current context.<sup>62</sup> For instance, one can think of the situation of a migrant who is undocumented or who is held within a detention centre where the people/organizations who are running the centre (or who are otherwise involved in the management) propose return as the most viable solution. In that context, it could be that there is a situation of a position of power, perceived or actual, that can hinder effective consent.

<sup>59</sup> Gallagher (n 57) 18.

<sup>60</sup> Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings* (2005) CETS 197 para 83.

<sup>61</sup> See also on this: Maria Grazia Giammarinaro and Letizia Palumbo, 'Situational Vulnerability in Supranational and Italian Legislation and Case Law on Labour Exploitation' (*Vulner Blog*, 7 April 2022) <[www.vulner.eu/99788/Situational-Vulnerability](http://www.vulner.eu/99788/Situational-Vulnerability)> accessed 21 June 2022.

<sup>62</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (n 53).

The other issue to keep in mind is the question of vulnerability and how the concept is framed from a legal perspective.<sup>63</sup> Whilst a detailed discussion of the definition of vulnerability is beyond the scope of this chapter, vulnerability is a contextualised notion and therefore an individual migrant who might not otherwise be considered to be vulnerable can be rendered vulnerable partly because of the context in which they find themselves. This includes situational vulnerability, such as being a detained or undocumented migrant.<sup>64</sup> Therefore, if abuse of a position of vulnerability is sufficient to render any consent in the context of trafficking irrelevant (including to the extent of it being a criminal offence), then where a migrant is in a vulnerable position, which is used for the purposes of recruiting that person into an AVR programme, then that situation cannot be considered to be one where the individual is genuinely exercising free choice, meaning that the return is not genuinely voluntary.

Contract law also turns on individual agency and consent to enter into contractual relations. Without consent, contracts are not freely entered into and so are not contracts. A contract is 'an agreement giving rise to obligations which are enforced or recognised by law'.<sup>65</sup> Contract law is different from other areas of law in the sense that it is 'based on an agreement of the contracting parties'.<sup>66</sup> Under contract law, there are various factors that vitiate the requisite consent. When these factors are present, consent is deemed to not be freely given or to be invalid. These include misrepresentation, mistake, duress and undue influence. Whilst most of these will be relevant to the discussion of consent in the context of AVR, the issues of duress and undue influence are the most obviously relevant. The idea of duress is broadly understood as any threat which has the effect of bringing about coercion of the will which vitiates consent.<sup>67</sup> Canonical

<sup>63</sup> See generally: Martha Albertson Fineman, 'Vulnerability in Law and Bioethics' (2019) 30 (4 Supplement) *Journal of Health Care for the Poor and Underserved* 52; Fiona David, Katharine Bryant and Jacqueline Joudo Larsen, *Migrants and Their Vulnerability to Human Trafficking, Modern Slavery and Forced Labour* (IOM 2019); Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 *Oslo Law Review* 133; Martha Albertson Fineman, 'Vulnerability and Social Justice' (2018) 53 *Valparaiso University Law Review* 341; Noemi Magugliani, '(In)Vulnerable Masculinities and Human Trafficking: Men, Victimhood, and Access to Protection in the United Kingdom' (2022) 14 *Journal of Human Rights Practice* 726.

<sup>64</sup> Moritz Baumgärtel, 'Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights' (2020) 38 *Netherlands Quarterly of Human Rights* 12.

<sup>65</sup> G H Treitel, *The Law of Contract* (10th edn, Sweet & Maxwell 1999).

<sup>66</sup> *Ibid.*

<sup>67</sup> See *Pao On v Lau Yiu Long* [1980] AC 614, 636; cf. *North Ocean Shipping Co v Hyundai Construction Co (The Atlantic Baron)* [1979] QB 705; *Syros Shipping Co SA v Elaghill*

cases in contract law demonstrate that duress may include threats of detention. Of particular interest for the purposes of this chapter is the 1847 case of *Cummings v Ince*<sup>68</sup> where an elderly woman was told to sign over all her property or face not ever having a committal order to a 'mental asylum' lifted. That contract was found to be void.

Parallels can be drawn here to situations where recruitment for IOM's AVR programmes is done within the context of detention centres, and where continued detention is a looming threat, whether explicit or implicit. Also relevant is the issue of undue influence. This refers to a situation where an individual is able to influence the consent of another due to the relationship between the two parties. This could be the case, for instance, for an officer working in a detention centre who is able to 'convince' a detained migrant to sign up to an AVR programme. The multiple services offered by IOM, which is involved in both service provision in detention centres and promoting voluntary return, can therefore raise significant concerns.<sup>69</sup>

On a related note, it is worth recalling that contract law is based on questions of legality. One may not contract into something that is otherwise illegal. For instance, an employer who is failing to pay minimum wage is not exempted from his obligations merely because the employee has signed a contract of employment where the agreed salary is below that statutorily established for the country. In the same way, if the return in question would violate law (e.g. the principle of non-refoulement), one cannot use the agreement to return voluntarily as an excuse for the violation of the international legal principle.

## 14.5 Information

Beyond the question of whether consent was freely given, the other key requirement for 'real' consent is that it is an 'informed decision'. Information must be available; it must be accessible and there must be some form of comprehension by the person receiving the information.

*Trading Co* (The Proodos C) [1980] 2 Lloyd's Rep 390, 393 Brian Coote, 'Duress by Threatened Breach of Contract' (1980) 39 Cambridge Law Journal 40; *Re T* [1993] Fam 95, 115–116. See also: Treitel (n 65).

<sup>68</sup> *Cumming v Ince* (1847) 11 QB 112.

<sup>69</sup> On IOM's work in detention contexts, see Angela Sherwood, Isabelle Lemay and Cathryn Costello, 'IOM's Immigration Detention Practices and Policies: Human Rights, Positive Obligations and Humanitarian Duties' in Megan Bradley, Cathryn Costello and Angela Sherwood (eds), *IOM Unbound? Obligations and Accountability of the International Organization for Migration in an Era of Expansion* (Cambridge University Press 2023).

There are two thresholds of requirements regarding information. The first is of conduct: the organization must show that it has informed the individual of what AVR is, what the implications are, and what the potential risks and benefits are. The second is one of result, where the organization must show that the individual concerned has understood the various repercussions of their decision.

Given the implications of the decision to return, one must surely lean towards the second 'level' of requirement (obligation of result) even if the reality would seem to fall somewhere in between these two standards. Special attention must be given to particularly vulnerable individuals. What works for an educated adult might not work for a less educated young or older person, for instance. Beyond issues of return, the applicants should also receive information on the meaning and implications of the waiver of liability forms that they are expected to sign (see above).

This is further complicated by the question of uncertainty of information provided. With situations constantly evolving, some of the information provided may soon become out of date as the realities change, whilst information about specific risk or protection factors may be difficult to access. Organizations involved have a duty to diligently ensure that information is constantly updated and that they provide the best information they can, but equally to clarify uncertainties about the information as part of the information delivery process. Lessons from the medical space, on the way uncertainty should be shared with the recipient of information, could be relevant here.

Parallels in terms of information provision can also be drawn from other areas of European asylum law, especially Article 29 of the Eurodac Regulation,<sup>70</sup> Article 5 of the Reception Directive,<sup>71</sup> Article 22 of the

<sup>70</sup> Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L 180/1.

<sup>71</sup> 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 [2013] OJ L 180/96.

Qualification Directive,<sup>72</sup> Article 8 of the Procedures Directive<sup>73</sup> and Article 12 of the Returns Directive.<sup>74</sup> Requirements include ensuring that the information is provided in writing, and where required orally, in an age-sensitive way and in a language that the individual understands or is reasonably supposed to understand.<sup>75</sup>

Beyond freedom of choice, access to adequate information is critical to ensure that the return is indeed voluntary, keeping in line with IOM's own limitation of only engaging with voluntary returns. Arguably, the obligation of information also comes with an obligation to inform about alternative options.

#### 14.6 Consent and Voluntariness as Process

Given the above consideration, this chapter posits that voluntariness, expressed as consent to return, in the context of AVR must be seen as a process and not as an isolated decision. It must be present throughout the process of return and not simply a one-off element. It is not something that should be assumed. Given the sensitive nature of decision-making around the return, the vulnerable situations in which most people will find themselves and the potential risks upon return, additional safeguards must be put into place.

Such safeguards include training for IOM staff involved in AVR programmes, time for the migrant to think over the information provided (the idea of a reflection period can also be gleaned from the context of human trafficking), a requirement that the information given is comprehensive, clear, up to date and understood, and that the individual in question is given every opportunity to seek advice and assistance. An understanding of the risks of return, including the implications for future migration opportunities, should not be assumed.

<sup>72</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9.

<sup>73</sup> 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 [2013] OJ L 180/60.

<sup>74</sup> 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 [2008] OJ L 348/98.

<sup>75</sup> Other areas of law which may also provide relevant parallel analysis include data protection regulations.

Neither is voluntariness something that can be enforced. If a person changes her mind, then she must be allowed to revoke her consent if the return is really to be voluntary. Indeed, a reversal of consent to participate in an AVR programme should be assumed where the person involved takes measures as to indicate that she no longer wishes to return – such as for instance seeking an additional level of appeal through judicial means in the country of current residence. A parallel can be drawn here to the idea of implied withdrawal of asylum applications. In asylum procedures, there are any number of situations where an asylum application is considered to have been withdrawn when an applicant does something that indicates that he or she is no longer interested in the protection of the State. In the context of AVR, IOM, States and other actors involved in the process ought to use the same approach. This means that even if an individual has applied to be returned, if they then undertake measures such as applying for a further level of appeal or a similar measure then it should be assumed that they are no longer voluntarily returning. If implied withdrawal in the context of asylum applications is an accepted approach, there is no reason why it should not also be allowed in the context of voluntary return.

This, however, comes with many practical challenges to the implementation of AVR programmes, raising the question as to whether there is a reasonable cut-off point that can be legitimately imposed by organizations such as IOM that are spending money to assist returns. These issues can be mitigated if issues of informed consent and free choice are maintained throughout the process. Whilst frustrating, and potentially costly, theoretically, if AVR is to be truly voluntary, the possibility of retracting one's decision must be a possibility until the last possible opportunity.

### 14.7 Further Considerations

Before concluding, there are a number of issues that are worth highlighting when discussing the question of AVR, and IOM's role in it. The first is that some people will genuinely wish to return despite the possibility of remaining in the current host country or indeed despite the difficult or dangerous circumstances in the country of origin. The reasons for this are varied and beyond the scope of analysis in this chapter. They may include attempts to retry their migration project or simply to return home due to family or other obligations. Those reasons may be related to improvements in the home countries or deterioration of conditions in the host country. It is therefore imperative that the right balance is struck between ensuring that the willingness to return is 'real' and valuing the expressed wishes of

the migrants involved. Put differently, one must avoid paternalistic or discriminatory attitudes (or infantilizing the decisions of migrants) whereby assumptions on the desirability of return replace the informed wishes of the migrant themselves.

This then links to the question of whether an international organization like IOM should be involved in returns, which are genuinely voluntary, but to places where the safety and security of the returnee cannot be guaranteed. The balance to be struck in such situations is an incredibly difficult one. If truly and genuinely voluntary, meaning there is no pressure to return and there is a genuine understanding of the risks, then one could argue that IOM should at the very least facilitate the return in such scenarios.

Second, there is a significant impact of financial incentives on consent and this is something that merits further analysis. Many people may decide that certain risks are worthwhile for a particular price, and this is not irrelevant in determining the reality of consent to return through an AVR programme. Related to this is the question of how the financial incentive is determined and whether there are concerns raised by the idea of financial incentives being increased to secure further buy in into the relevant schemes.<sup>76</sup>

Third, training and support are needed for those involved in promoting and securing AVR participation. This includes training and information but also psychological support for people implementing a role which is psychologically and otherwise taxing. Those working for organizations like IOM must have access to the country of origin information in the same way that those supporting asylum applicants must. They must also be provided with ongoing on-the-job support.

Fourth, in order to ensure that return is really voluntary, the manner in which the success of AVR programmes is assessed requires an overhaul. If AVR programmes are to be more respectful of individuals' actual voluntariness, one must ensure that organizations working in these programmes (such as IOM) are funded to provide services such as support information and counselling over and above the individual successful case of an individual being returned. For so long as the measure of success for AVR programmes remains the number of people returned then the incentive for organizations to hasten the process and push people into AVR schemes remains problematic. The addition of 'reintegration' services as part of AVR programmes is a welcome development, not

<sup>76</sup> See on this: Mollie Gerver, 'Paying Refugees to Leave' (2017) 65 *Political Studies* 631.

least because it purports to provide support to individuals upon return. Its monitoring, however, must not override the need to also monitor the voluntariness of return itself.

Finally, whilst there is indeed important scope for looking at the organizations that are implementing problematic AVR programmes, we must also look to the entities that fund and promote AVR. Responsibility and accountability for problematic programmes must be sought both from the direct implementors of such programmes (including IOM) and also from the States and other international organizations (such as the EU) that are funding and otherwise requiring and supporting these programmes.

### 14.8 Conclusions and Proposals for Reform

This chapter has argued that in various circumstances, AVR may not be 'voluntary' and may cross the line into a form of disguised deportation. It has highlighted the role that IOM plays in AVR programmes and the implications that the actual voluntariness of that return might have on the suitability of its engagement and accountability under human rights law. As an international organization, IOM is bound by its own constitutive documents, its internal policies, as well as other sources of international law, including human rights law.<sup>77</sup> Its engagement must therefore be reformed so as to ensure that it continues to provide AVR programmes that are genuinely voluntary and that engagement in soft deportations is not wrongly disguised as 'voluntary return'.

IOM should resist pressures from governments and others, often channelled through funding schemes, to offer AVR programmes to individuals who may not genuinely be signing up to return out of their own free choice. It might consider developing alternative channels to provide assistance and support, including re-integration support to those being deported by States, outside the realm of the AVR programmes subject to relevant assessments on whether it is appropriate for IOM to engage in such processes, most notably based on whether appropriate safeguards (including under the principle of *non-refoulement*) have been considered.

<sup>77</sup> See: S Fine and Walters (n 3); Kalir (n 3); Leerkes, Os and Boersema (n 3). See also: Dapo Akande, 'International Organisations' in Malcolm Evans, *International Law* (5th edn, Oxford University Press 2018); Sarooshi (n 20); Nigel D White, *The Law of International Organisations* (3rd edn, Manchester University Press 2016).

IOM must exercise due diligence to avoid tacitly endorsing policies and practices that violate international standards. It should seek to break the link between migrant detention and AVR and ensure that counselling about AVR includes, where relevant and appropriate, information and support in exploring other viable options in the country.

IOM should also ensure that all information given is indeed accurate and up to date. In order to ensure that the information provided meets the criteria discussed above, IOM should continue to critically and regularly evaluate the information that it provides to migrants seeking information and advice about returning home, ensuring that the information provided is comprehensive, clear and up to date. Such evaluations should be publicly available (open to scrutiny by civil society for example); incorporate the views of a broad range of governmental and non-governmental stakeholders (including NGOs); and consider relevant credible assessments of the country's situations (including but not limited to UNHCR).

IOM and its donors should revise and replace the indicators of success for AVR programmes so as to ensure that a holistic approach to return counselling is provided and that the successful application of that approach is monitored and considered for IOM's monitoring and evaluation of programmes. The number of persons returned should not be the measure of success of AVR programmes. This should be coupled with strengthened internal processes to monitor the implementation of AVR programmes, including a constant evaluation of AVR programmes against IOM's relevant policies and standards, and against international law more broadly. Such processes should incorporate the views of and proactively (genuinely) engage NGOs and other bodies,<sup>78</sup> and the results of the same should be publicly available for scrutiny by researchers, civil society, migrant groups and others.

<sup>78</sup> On potential contributions of human rights advocacy NGOs to this process, see: Angela Sherwood and Megan Bradley, 'Holding IOM to Account: The Role of International Human Rights Advocacy NGOs' in Megan Bradley, Cathryn Costello and Angela Sherwood (eds), *IOM Unbound? Obligations and Accountability of the International Organization for Migration in an Era of Expansion* (Cambridge University Press 2023).