

# EXTERNALISATION OF BORDERS

detention practices and denial of the right to asylum

February 25th and 26th, 2020  
LAGOS (Nigeria)

## The “voluntary” in assisted voluntary return

di Jean-Pierre Gauci\*

This note explores the concept of ‘voluntary’ in ‘assisted voluntary return’. Building on court decisions and other areas of international and domestic law, it raises questions as to the circumstances in which return can truly be considered to be voluntary or where concerns as to that voluntariness ought to be raised. This in turn, raises other questions as to the legality of return, including in light of the principle of non-refoulement and the question of the responsibility of States and international organisations for internationally wrongful acts, such as when they implement or fund programmes that mask involuntary deportation as voluntary returns.

This note is organized as follows. Part 1 focuses on the definition of Assisted Voluntary return and discusses the ways in which this definition has evolved across the 3 editions of the International Organization for Migration (IOM) Glossary of International Migration. Parts 2 and 3 focus on the requirement of ‘free’ consent (Part 2) and informed consent (Part 3). Part 4 provides some additional remarks. Part 5 concludes by proposing a view of consent to AVR as process.

### Part 1. The (d)evolving definition of Assisted Voluntary Return

Whilst different organisations will use different definitions of assisted voluntary return, this note focuses on the definition(s) used by the international organisation for migration in its ‘International Migration Law Glossary on Migration’. This, for a number of reasons not least that IOM is a foremost provider of AVR programmes globally. It must be stated at this juncture however that, like other IOM publications, the glossary includes a disclaimer that ‘the opinions expressed in this Glossary do not necessarily reflect the views of the International Organization for Migration’. The evolution of the definition across the 3 editions of the glossary raises a number of concerns.

---

\* Arthur Watts enior research fellow di Diritto Internazionale Pubblico e Direttore di Insegnamento e Formazione, all’Istituto Britannico di Diritto Internazionale e Comparato e Fondatore e Direttore di The People for Change Foundation. L’autore vorrebbe ringraziare I partecipanti alla conferenza di Lagos e in particolare Jane Kilpatrick (Statewatch) e Idel Hanley (BIICL) per i commenti alle versioni precedenti a questa presentazione.

The first edition (2004) of the IOM Glossary defined 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>1</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>2</sup>

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>3</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, a language definition of ‘volunteer’ is ‘a person who freely offers to do something’.<sup>4</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>5</sup> Decide, on the other hand, is a more intransitive term defined as ‘making a choice or judgment’.<sup>6</sup> The subtle difference, in my view is from an action whereby someone presents himself for return through a programme to one where he/she is selecting between different options. My reading of the change (which, I argue, would not have been made had it not been meaningful) is therefore one that moves towards a more restrictive understanding.

The second change is in the listing of those categories of persons who AVR is targeted towards. The evolution moves from an inclusive list (rejected asylum seekers, victims of human trafficking, stranded students, qualified nationals and other migrants) to the reference to ‘migrants’.<sup>7</sup> The focus on migrants generally appears to deflect from the focus, clear in the definition in the first two editions, of AVR being targeted towards rejected asylum seekers. Interestingly, the definition of migrants in the latest edition, contrary to earlier editions, does not make reference to people in need of protection or to people who are undocumented. The glossary, however, does not provide a definition but rather explains it as a non-legal term reflecting a ‘common lay understanding’. The examples provided are:

---

<sup>1</sup> *Glossary of Migration* (1st edn, International Organization for Migration 2004).

<sup>2</sup> *Glossary of Migration* (2nd edn, International Organization for Migration 2011).

<sup>3</sup> *Glossary of Migration* (3rd edn, International Organization for Migration 2019).

<sup>4</sup> See: <https://www.lexico.com/en/definition/volunteer>

<sup>5</sup> See: <https://www.merriam-webster.com/dictionary/voluntary#legalDictionary>

<sup>6</sup> See: <https://www.merriam-webster.com/dictionary/decide>

<sup>7</sup> It is worth noting that the definition of migrant provided in the Glossary has also changed between the first and the 3<sup>rd</sup> edition of the Glossary.

migrant workers, smuggled migrants and international students. That said, the various categories of migrants listed in previous editions would still be captured by the new terminology of ‘migrants’. I note this difference not least in light of the European Court of Human Rights’ (ECtHR) decision in *NV v Finland* whereby the reference to ‘rejected asylum seekers’ would fall foul of the voluntariness requirement.

## **Part 2. Consent Freely Given**

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

Voluntariness is assumed to exist if two conditions apply; a freedom of choice, which is defined by the absence of physical or psychological pressure to enrol in an assisted voluntary return and reintegration program and be an informed decision which requires the availability of timely, unbiased and reliable information upon which to base the decision.

It is notable that the key requirements of ‘voluntariness’ are captured within an accompanying note rather than within the definition itself. That said, the note relies on ‘freedom of choice’ and on an ‘informed decision’. Also notable is the use of ‘assumption’ that voluntariness is present. Freedom of choice is defined by an absence of pressure rather than a presence of will. The pressure that must be absent is circumscribed as being ‘to enrol in the program’ rather than ‘to return home’ more generally. Finally, the pressure is also limited to ‘physical or psychological’ pressure and excludes other form of pressures such as abuse of a vulnerable position, pressures relating to status and economic pressures (to mention just a few). We return to this issue in discussing abuse of a position of vulnerability later in this article.

## **NA v Finland**

In *NA v Finland*,<sup>8</sup> a decision rendered in November 2019, the European Court of Human Rights pronounced itself, for the first time, on the question of voluntariness in Assisted voluntary return. The case was brought by Ms N.A, whose father had returned to Iraq from Finland through an assisted voluntary return programme, having been denied asylum. The applicant, the deceased’s daughter, alleged that ‘her late father’s expulsion to Iraq violated Article 2<sup>9</sup> and 3,<sup>10</sup> and that her father’s expulsion and his violent death cause her considerable suffering under Article 3 of the Convention’.

The applicant’s father had applied for asylum in Finland. The Finnish Immigration Service did not accept that he would be in danger of persecution upon return. The Administrative Court dismissed his appeal. Whilst he applied further to the Supreme Administrative Court requesting leave to appeal, the latter did not order a stay on removal and eventually refused his leave to appeal on the merits.<sup>11</sup> This final decision was made on 30 November 2017. The applicant’s father applied for assisted voluntary return on 12 October 2017 – that is after the decision by the Administrative Court but before

---

<sup>8</sup> *NA v Finland* [2020] European Court of Human Rights 25244/18.

<sup>9</sup> Right to Life

<sup>10</sup> Prohibition of torture, cruel and inhuman treatment

<sup>11</sup> The decision on the merits was rendered the day after his return to Iraq.

his application to the Supreme administrative court. Voluntary return was granted on 13 October 2017. He left Finland on 29 November 2017.

Whilst the discussion of the merits of the decision is beyond the scope of this article I will focus primarily on the admissibility stage of the application during which the Finnish government argued that the application for AVR meant that it could not be held liable for what happens to the applicant's father upon his return to Iraq. Indeed agent for Finland argued that:

following the applicant's fathers 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.

Furthermore, before his departure he 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. Indeed, 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 argues that participation in the AVR programme was simply a means to avoid detention, attract less attention from the Iraqi authorities and to avoid a 2-year entry ban to the Schengen area all of which would flow from a forced return. The arguments are 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 he 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>12</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 issues against him. Consequently, his departure was not "voluntary" in terms of his free choice.<sup>13</sup>

There is no information provided as to any preparation implemented between the application on the 12th October and the return on 29 November. However, there is nothing to indicate that much was done during this time. Indeed, it is of concern that the decision to grant assisted voluntary return was made within one day of application and that it was on the same day that the individual in question

---

<sup>12</sup> Para 53

<sup>13</sup> Para 57

was expected to sign a waiver of liability for both the IOM and the Finnish government. The promptness of this decision reflects a lack of time to ponder the implications of the decision.

### **Lessons from other areas of law**

The next question I wanted to focus on is whether there are other areas of law that can help us determine the question of voluntariness in the context of assisted voluntary return. I focus primarily on two areas. One is the international law relating to human trafficking and in particular the inclusion of ‘abuse of a position of vulnerability’ (APOV) 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 in that law. What follows is not an elaboration of the principles of law in those areas but is intended only to offer context from other areas of law that have developed theory relating to this question.

Article 3 of the Trafficking Protocol<sup>14</sup> considers abuse of a position of vulnerability to be a means of trafficking. The same provision is included in the definition of trafficking under the CoE Trafficking Convention,<sup>15</sup> the EU Directive<sup>16</sup> and the ASEAN Convention.<sup>17</sup> If any of the means are present, any consent given by the victim to the intended exploitation is rendered irrelevant.

Despite the apparent consensus on the 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 of abuse of vulnerability as a means of trafficking.<sup>18</sup> To clarify – the idea of abuse of a position of vulnerability requires 2 elements – the existence of a ‘vulnerability’ and the ‘abuse’ of that vulnerability for the purpose of exploitation. According to the *travaux préparatoires* of the Protocol, the reference to the abuse of 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’. This same 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>19</sup> The commentary to the Council of Europe Convention notes that by abuse of a position of vulnerability is meant:

---

<sup>14</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000. 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>15</sup> Council of Europe Convention on Action against Trafficking in Human Beings; Warsaw, 16 May 2005; Council of Europe Treaty Series - No. 197.

<sup>16</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA. OJ L 101, 15.4.2011, p. 1–11.

<sup>17</sup> ASEAN Convention Against Trafficking in Persons, especially Women and Children; Kuala Lumpur, 21 November 2015

<sup>18</sup> For more on the importance of the distinction see: Anna 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>19</sup> *ibid.* Page 18.

abuse 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>20</sup>

Another thing to bear in mind is that when we talk about abuse of position of vulnerability, we must also look both at the objective situation to assess whether there is a position of vulnerability which is being abused as well as understanding the situation as perceived by the victim. 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, we can still see a situation where we have abuse of position of vulnerability which may be enough 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. For instance, one can think of the situation of a migrant in an undocumented situation or who is held within a detention centre where the people/ organisations who are running the centre (or who are otherwise involved in the management) are proposing return as the most viable solution. In that context I would argue that there is a situation of a position of power, perceived or actual, that can hinder effective consent. I will return to this briefly when I discuss the question of undue influence under contract law.

The other issue to keep in mind is the question of vulnerability and how we understand vulnerability. Whilst a discussion of the definition of vulnerability is beyond the scope of this note but suffice to say that vulnerability is contextualised 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 he or she finds him or herself. This will include situational vulnerability including being a detained migrant or indeed being in an undocumented situation in the country.<sup>21</sup>

The other area of law I also wanted to explore briefly is contract law. As readers will know, contract law is broadly based on consent. A contract is 'an agreement giving rise to obligations which are enforced or recognised by law'. Contract law is different from other areas of law in the sense that it is 'based on an agreement of the contacting parties'. Under contract law here are various factors that vitiate the consent that lies at the bottom of that agreement. 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 assisted voluntary return, the issue of duress and undue influence are possibly the most relevant. The idea of duress is broadly understood as any threat which has the effect of bringing about a coercion of the will which vitiates consent.<sup>22</sup> Of particular interest for the purposes of this note is the

---

<sup>20</sup> Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (Council of Europe 2005) vol CETS No. 197. Para 83.

<sup>21</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>22</sup> See: *Pau On v Lau Yiu Long* [1980] A.C. 614 at 636; cf. *The Atlantic Baron* [1919] Q.B. 705; *The Proodos* C[1980] 2 Lloyd's Rep. 390 at 393; *Coote* [1980] C.L.J. 40; *Re r* [1993] Fam. 95 at 115-116. See also: Treitel, *On the Law of Contracts*.

case from 1847 in *Cummings vs Ince*<sup>23</sup> where an elderly lady 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 in situations where recruitment for 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, of an officer working in a detention centre who is able to ‘convince’ a detained migrant to sign up to an AVR programme.

A further issue that merits attention when drawing parallels with contract law is the idea of inequality of bargaining position.

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 (for example, the principle of non-refoulement) one can not use the agreement to return voluntarily as an excuse for the violation of the international legal principle.

### **Part 3. Information**

Beyond the question of whether consent was freely given the other key requirement for ‘real’ consent is that it is ‘informed consent’. Information must be available; it must be accessible and there must be some form of comprehension by the person receiving the information. There are two types of obligations regarding information: the first is an obligation of conduct: the organisation or individual must show that it has informed the individual of what assisted voluntary return is and what the implications are. The second is an obligation of result where the organisation must show that the individual concerned has understood the various repercussions of their decision.

I would argue that given the implications of the decision to return, one must surely lean towards the second ‘level’ of obligation 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 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.

---

<sup>23</sup> *Cumming v Ince* (1847) 11 Q.B. 112

Parallels in terms of information provision can also be drawn from other areas of asylum law especially Article 29 of the Eurodac regulations,<sup>24</sup> Article 5 of the Reception Directive,<sup>25</sup> Article 22 of the Qualification Directive,<sup>26</sup> Article 8 of the Procedures Directive<sup>27</sup> and Article 12 of the Returns Directive.<sup>28</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 they understand or are reasonably supposed to understand.

#### **Part 4. Miscellaneous remarks**

Before concluding, there are a number of issues that are worth highlighting when discussing the question of assisted voluntary return. The first is that some people will genuinely wish to return. The reasons for this are varied and beyond what I am able to explore in depth, but they may include attempts to retry their migration project or simply to return home due to family or other obligations. It is therefore imperative that we strike the right balance between ensuring that the willingness to return is real and valuing the expressed wishes of the migrants involved. Put differently, we must avoid paternalistic attitudes (or infantilizing the decisions of migrants) whereby we make decisions for others that they would not wish made for themselves.

Second, there is a significant impact of financial incentive on consent and this is something that merits further analysis. Many of us will decide that certain risks are worthwhile for a particular price and this is not irrelevant in determining the reality of one's consent to return home through an AVR programme. Related to this is the question of how the financial incentive is determined and indeed whether there are concerns raised by the idea of financial incentives being increased to secure further buy in into the relevant schemes. A comparative analysis

Third, training and support is 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.

Fourth, in order to ensure that return is really voluntary, we must re-think how we assess success/ evaluate AVR projects. So far assessment of assisted voluntary return programmes tends to focus only on the number of persons returned whilst little effort is made to follow up on returnees and to

---

24 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice. OJ L 180, 29.6.2013, p. 1–30.

25 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. OJ L 180, 29.6.2013, p. 96–116.

26 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. OJ L 337, 20.12.2011, p. 9–26.

27 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. OJ L 180, 29.6.2013, p. 60–95.

28 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. OJ L 348, 24.12.2008, p. 98–107.



ensure that their plans have worked out and indeed that their return remained their voluntary choice. If we want assisted voluntary return programmes to be more respectful of individuals' actual voluntariness, we must ensure that organisations working in these programmes 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 assisted voluntary return programmes remains the number of people returned then the incentive for organisations to hasten the process and push people into AVR schemes remains problematic.

Finally, whilst there is indeed important scope for looking at the organisations that are implementing problematic Assisted Voluntary Return programmes we must also look behind the curtains and the front liners and address the States and organisations that are funding and promoting such measures and exerting pressures for the implementation of programmes in a particular way. This is not to say that we should not look for responsibility directly in the implementing agencies, but also that we should look further.

## **Part 5. Concluding remarks: consent to return as process**

In conclusion, I argue therefore that consent in the context of AVR must be seen as a process and not as a decision. It is a factor that must be present throughout the process of return and not simply a one-off element. It is not something that should be assumed including in case of doubt. Given the sensitive nature of the decision, 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 will include training for the people managing that situation, time for the person to think over the information provided (the idea of a reflection period can also be gleaned from the context of human trafficking), a requirement of ensuring that the information given is clear, up to date and understood and 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.

Neither is it something that can be enforced. If a person changes their minds, then they should be allowed to do so if the return is really to be voluntary. Indeed, a reversal of consent to participate in the AVR programme should be assumed, where the person involved takes measures as to indicate that they no longer wish to return – such as for instance seeking an additional level of appeal through judicial means. 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 ones asylum application is considered to have been withdrawn when he or she does something that indicates that he is no longer interested in the protection of the State. I argue here that in the context of assistant voluntary return one ought to use the same approach. This means that even if an individual has applied to be returned home if he or she then undertakes measures such as applying for a further level of appeal or a similar measure then one should assume that that he or she is 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; for instance how can an organisation implement any VR program if participants are allowed to change their minds up to the last minute? Is there a point where a cut off can be legitimately imposed by the organisations that are spending the money to assist in their return?