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

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4 Readmission obligations of the country of origin and implications for individual responsibility

4.1 Introduction

The previous chapter saw the beginning of the substantive examination of the actions that third-country nationals can and cannot be expected to take (*research questions 1a and 1b combined*), as well as the specific issue of seeking readmission (*return element (i)*). This chapter, however, shifts the focus from the overarching question of where third-country nationals can be expected to seek readmission, and starts zooming in on the question what can and cannot be expected of third-country nationals when seeking readmission to one particular destination: the country of origin. As discussed in the previous chapter, the concept 'country of origin' pertains to the country of nationality or, for stateless persons, their country of habitual residence. Since it is that country that will have to grant readmission, the full scope of the obligation incumbent on third-country nationals cannot be derived solely from the Directive. Rather, it requires engaging with the external dimension of return, which brings into focus the relationship between the country of origin and the individual, and between the country of origin and EU member state, respectively. This chapter particularly looks at the extent to which countries of origin are required, as a matter of international law, to readmit nationals or habitually resident stateless persons under an obligation to leave an EU member state. And, when such obligations exist, what their specific scope is. This will set the conditions third-country nationals must fulfil to gain readmission, and thus also determines to an important extent what they must do to meet the obligation to return under the Directive.

Because readmission obligations vis-à-vis expelled nationals differ from those applicable to habitually resident stateless persons, these will be discussed separately. Section 4.2 will focus on nationals, while section 4.3 will deal with the situation of stateless persons. The discussion in both sections will draw on different sets of international rules, in particular those arising out of inter-state frameworks (customary international law, readmission agreements and multilateral treaties) and human rights instruments. Following a mapping of the specific readmission duties of countries of origin on the basis of these rules, each section will discuss how these translate into concrete obligations for third-country nationals under the Directive. In the process, I will also identify certain conceptual, and potentially practical, implications that arise out of the differences in scope and function of inter-state and human rights-based readmission obligations. The two sections are followed by some (intermediary) conclusions in section 4.4.

4.2 The country of origin's obligation to readmit nationals and implications for individual responsibility

This section discusses the various sources of obligations on states to readmit their own nationals, being customary international law, readmission agreements, multilateral treaties, and human rights instruments. It will subsequently examine what these readmission obligations mean for the responsibility of individuals under the Directive.

4.2.1 Customary international law

The notion that states are under an obligation to readmit their nationals when they are expelled by other states is one of the foundational pillars of EU return policy. Although the Directive does not mention this explicitly, numerous EU policy documents, published both before and after the adoption of the Directive, have mentioned the explicit starting point that countries of nationality must readmit their nationals if EU member states decide to return them, as a matter of general international law.[1] It is also included in legislative instruments. Regulation 2016/1953, which deals with EU travel documents,[2] for example, states that "[t]he readmission of own nationals is an obligation under international customary law, with which all States are required to comply."[3]

In general, there is wide acceptance of the existence of an international obligation on states to readmit their nationals.[4] However, the pronouncement of the existence of a customary norm that states should readmit their nationals when these are expelled by another state is often based on several elements, which often tend to form overlapping considerations.[5] In particular, they may not always clearly separate situations in which persons want to return to their countries of origin, and situations in which they are expelled and thus compelled to do so, which may be of relevance. First, it is frequently argued that an obligation to readmit arises from the right of individuals to return to their own country. In this respect, reference is usually made to human rights instruments, but also to a more general principle encompassing such a right.[6] This ensures that persons staying in another

1 See Coleman 2009, p. 27, footnote 1, for various examples.
2 Such EU travel documents will be discussed in more detail in 8.5.
3 OJ L 311/13, 17 November 2016, Regulation (EU) 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return, Recital 7.
4 Sohn & Buergenthal 1992, p. 39: "The proposition that every State must admit its own nationals into its territory is widely accepted and may now be regarded as an established principle of international law." Similarly, see Goodwin-Gill 1978, p. 137; Weis 1979, p. 47-48.
5 Coleman 2009, pp. 28-29; Giuffré 2015, p. 263.
6 As I will argue later, the conflation of human rights-based obligations and those arising from inter-state frameworks may be problematic (see Chapter 5), but for the moment this distinction is not particularly relevant.

state are expelled, they have a place to return to. This place is determined by the connection of nationality, which forms a special bond between the state and the individual,[7] with the former carrying a certain responsibility for the welfare of the latter.[8] However, this bond of nationality also comes with responsibility for individuals when another state expels them. This responsibility can furthermore be considered as tied up with personal sovereignty of the state over its citizens.[9]

A further element in the establishment of a customary obligation to readmit nationals is derived from the right to expel aliens as arising out of state sovereignty. Brownlie notes that sovereignty, together with the related issue of the equality of states, "represents the basic constitutional doctrine of the law of nations."[10] Sovereignty is commonly understood as the legal status of a state which is not subject to any higher authority, at least to the extent that it deals with its internal affairs.[11] Sovereignty is connected, first of all, to the territory of the state in question, where the state itself sets the rules and should not be the subject of interference by other states. The external dimension of sovereignty is that, to the extent that the state is bound by rules of international law, it has become bound to these based on its consent. One of the ways in which a state can exercise its sovereignty is by controlling which non-citizens are granted access to, and are allowed to stay on, its territory.[12] This implies that if non-citizens (or 'aliens') present themselves at the border of the state, gain entry without authorisation, or are initially authorised to enter but subsequently are no longer wanted by the state, it has the power to get rid of them. In other words, it has the power (or right) to expel aliens.[13] Being tied up with the "constitutional doctrine" of sovereignty, as an essential building block of international

7 ICJ *Nottebohm* [1955], p. 23; ECtHR *Petropavlovskis* [2015], paragraph 80; dissenting opinion of Judges Bianku and Lemmens in ECtHR *Levakovic* [2018]; also see Sohn & Buergenthal 1992, p. 39.

8 Hailbronner 1997, pp. 1-2.

9 This allows a state, for example, to exercise diplomatic protection over its citizens, even when they are abroad. Similarly, it may allow that state exert certain forms of control over those citizens, for example in relation to criminal law or civic duties, even when they are not present on its territory.

10 Brownlie 2008, p. 289.

11 Steinberger 1987, p. 414.

12 See ECtHR *Abdulaziz* [1985] and since than standing jurisprudence of the ECHR: "Moreover, the Court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory" (citations omitted). Also see, for example, ECtHR *Moustaquim* [1991], paragraph 43; ECtHR *Vilvarajah* [1991]; and ECtHR *Chahal* [1996], paragraph 73, as well as many other instances in which the ECtHR confirmed this. Although for a critical view of how 'well-established' this is, in particular in relation to pronouncement of this by the ECtHR, see Dembour 2018, especially p. 10.

13 See, for example, Jennings & Watts 1997, p. 940; Plender 1988, p. 459. For an extensive overview of international and domestic case law on the right to expel, see ILC 2006, p. 131-139.

law, the right to expel can be considered as one of the foundations of the international system for states' interactions with non-citizens. Despite some theoretical discussions about the existence of the right to expel, it has been confirmed on multiple occasions as a key element of the international regime for migration.[14] This right to expel, it is argued, can only be made effective if another state takes the expelled alien. In light of the special role of nationality, the duty to make this right to expel effective falls to the state of nationality of the alien.[15] As such, the obligation to readmit nationals also derives from sovereign control over state territory, in this case of the expelling state, which triggers reciprocal obligations on the part of the country of nationality.[16]

In comparison to doctrinal approaches establishing a customary duty to readmit nationals, efforts to establish the specific evidence of the two components of any such rule, state practice and *opinio juris*, are much rarer. Perhaps the most frequently cited study in this regard, which has already been mentioned several times above, is that by Hailbronner. On the basis of a range of sources, he finds sufficient evidence of the existence of this customary rule. Of particular importance for Hailbronner's findings is the role of a number of international treaties, usually concluded bilaterally, that set out readmission obligations. He identifies some thirty of those treaties. Hailbronner also addresses national case law, as well as European case law, in particular, the *Van Duyn* case in the European Court of Justice (ECJ, now the CJEU) as an important piece of evidence for the broad acceptance of an obligation on states to readmit their nationals when they are expelled.[17] Although this is not addressed very explicitly in these and most other studies, the implication of such findings generally suggests that the obligation to readmit expelled nationals is absolute: if an expelled person is found to be a national, he or she must be readmitted. A refusal to do so would constitute a clear violation of customary international law.[18]

The process of readmission may be subject to certain procedural requirements, particularly to establish that a person to be expelled is indeed a national. This is not necessarily a limit on or departure from this obliga-

14 Mixed Claims Commission Netherlands-Venezuela *Maal* [1903]; Mixed Claims Commission Italy-Venezuela *Boffolo* [1903]; Mixed Claims Commission Belgium-Venezuela *Paquet* [1903]; ECtHR *Abdulaziz* [1985] and subsequent case law (see footnote 13 above.) Although see, for example, Hannum 1987, p. 5, and Plender 1988, pp. 3-4, who note that sovereign control of migration is no longer absolute.

15 Hailbronner 1997, pp. 11-12 and references contained therein; Weis 1979, pp. 45-47; Goodwin-Gill 1978, pp. 136-137. For a counterpoint to this assumption of a reciprocal duty to readmit expelled nationals, see Noll 2003, and the discussion of his critique in 5.2.3.

16 See, for example, EP 2010, p. 13, noting that the practice of readmission of nationals is perhaps as old as the exercise of state sovereignty itself.

17 CJEU C-41/74 *Van Duyn* [1974], paragraph 22, cited in full in 2.5.3.

18 As discussed in 5.2.3, this absolute nature might be disputed by some countries of return. However, it appears to underpin the approach by the EU and its member states.

tion, but rather a necessary complement to make the obligation effective. However, "[s]tate practice … is not sufficiently uniform to enable the establishment of detailed rules about which documents constitute acceptable proof or about which form readmission procedures should take."[19] Normally, a valid passport would constitute prima facie evidence of nationality,[20] although not necessarily absolute proof. [21] However, even if the individual cannot provide clear proof of nationality, "the receiving state has to accept other documents or circumstantial evidence of the individual's nationality."[22] If it is sufficiently substantiated that the person is a national, and a travel document is necessary to make the expulsion possible, issuing such a document must be presumed to be part of the readmission obligation. While Hailbronner says that "it lies within the competence of each state to lay down the conditions under which substitute documents are issued," this competence must be exercised in good faith.[23] Disproportionately long delays and exaggerated preconditions for the issuing of travel documents would constitute an abusive exercise of this competence.[24]

It has been suggested that "in international decision making and literature, there is absolute agreement about the existence of such a rule" that states must admit their nationals when expelled by other countries.[25] Despite this assertion, the way this rule has been framed has not entirely been without criticism. While some elements of this criticism will be discussed later on, for now the discussion can proceed on the basis that the obligation to readmit, both regarding its existence and its scope as outlined above, is widely supported and, furthermore, clearly forms the basis for the EU's approach to issues of return and readmission.

4.2.2 Readmission agreements

Where EU or bilateral readmission agreements exists with countries of origin, these provide for a clear obligation to readmit nationals faced with return from an EU member state. Some attention in the literature has been devoted to the interplay between customary international law and readmission agreements, including whether the latter merely provide codification of the customary obligation of readmission of nationals, whether they act as a source for that customary obligation (by providing evidence of state practice),

19 Hailbronner 1997, p. 14.
20 Torpey 1999, p. 158 and 160, noting that states retain discretion in issuing passports, and there may be situations in which such passports are issued to certain categories of non-nationals.
21 Turack 1972, p. 250.
22 Hailbronner 1997, p. 14.
23 *Ibid*., p. 15.
24 Also see Chapter 9 on further issues related to travel documents.
25 ACVZ 2004, p. 14 (my translation).

or whether they may even undermine the customary nature of the obligation.[26] Whatever the case may be, readmission agreements provide for a similar basic obligation of readmission as discussed above in relation to customary international law, but add to this more specific rules on the evidence to be provided and the procedures to be followed in this respect.

In terms of establishing nationality, and thereby the existence of an obligation to readmit, EU readmission agreements provide for several categories of evidence to be presented, and related procedures to be followed.[27] Broadly speaking, there are four situations regarding evidence that are recognised in EU readmission agreements, although not all four are included in each agreement. Rather, each agreement normally makes provisions for two or three such situations and subsequent actions. A first situation arises when proof of nationality can be presented. When this is the case, readmission by the country of return is required unconditionally. What constitutes proof is set out in annexes to the agreements. They include passports of any kind.[28] Often, military service books and military identity cards, as well as seamen's registration books and skippers' service cards count as sufficient proof of nationality.[29] The same is true for national identity cards[30] and citizenship certificates (or other documents that mention citizenship).[31] Other documents or proofs may be specified in particular agreements. Almost all of the agreements (except the one with Turkey) explicitly note that the expiration of the document in question does not affect its status as proof of nationality.[32] Finally, all readmission agreements

26 Coleman 2009, pp. 37-41. Giuffré 2015, pp. 267-269.

27 Unless the national is already in possession of a valid passport, travel document, or identity card, in which case the state of return must also accept his readmission without a formal request. EU-Russia readmission agreement, Article 6(2); EU-Ukraine readmission agreement, Article 5(2); EU-Serbia readmission agreement, Article 6(2); EU-Pakistan readmission agreement, Article 4(2); EU-Turkey readmission agreement, Article 7(3).

28 Normally elaborated with mention of different types of passports, such as national passports, diplomatic passports, service passports, and surrogate passports. See EU-Albania readmission agreement, Annex 1; EU-Russia readmission agreement, Annex 2, EU-Ukraine readmission agreement, Annex 1; EU-Pakistan readmission agreement, Annex I; EU-Turkey readmission agreement, Annex 1 (which does not mention specific types of passports). In the case of Serbia, only passports issued after 1996 are included, see Annex 1.

29 *Ibid*. Although this is not the case for Serbia and Pakistan.

30 *Ibid*. In the case of Serbia, this is restricted to identity cards issued after 1 January 2000. In the case of Pakistan, the agreement speaks of "computerised national identity cards." As a general point, Torpey 1999, p. 165 calls identity cards a 'grey zone' as to their ability to provide evidence of nationality.

31 But not, for example, in the EU-Serbia readmission agreement.

32 EU-Albania readmission agreement, Article 8(1); EU-Russia readmission agreement, Article 9(1); EU-Ukraine readmission agreement, Article 6(1)(a); EU-Serbia readmission agreement, Article 8(1); EU-Pakistan readmission agreement, Article 6(1). Only in the case of Turkey does expiration of any of these documents 'relegate' them to prima facie evidence (see below), see EU-Turkey readmission agreement, Annex 2.

clearly stipulate that no obligation to readmit can be derived from any of the above documents if they are false.[33]

A second situation covered in all agreements except the one with Pakistan is when there is prima facie evidence of nationality.[34] Lists of documents that constitute prima facie evidence are also annexed to the agreements. The documents included in these lists are diverse and differ, for example, with regard to the acceptance of photocopies of documents. The agreements also provide for a catch-all category covering "any other document which may help to establish the nationality of the person concerned."[35] But prima facie evidence does not only have to come from documents. For example, most agreements that include the prima facie evidence procedure also accept statements by witnesses, or statements made by the person concerned and languages spoken by him or her, including by means of an official test result.[36] Other idiosyncrasies exist.[37] Faced with such prima facie evidence, the state in question in principle has to accept the readmission. However, in contrast to proof of nationality, prima facie evidence is rebuttable.[38] If the requested state can show that, in

33 EU-Albania readmission agreement, Article 8(1); EU-Russia readmission agreement, Article 9(3); EU-Ukraine readmission agreement, Article 6(1)(a) (referring to "forged or falsified documents"); EU-Serbia readmission agreement, Article 8(1); EU-Pakistan readmission agreement, Article 6(1) (Annex I also re-emphasises that all documents have to be genuine); EU-Turkey readmission agreement, Article 9(1).

34 Although in the case of Russia, it is called 'indirect evidence' rather than prima facie evidence.

35 See footnote 33. In the case of Turkey, this is accompanied by the phrase "including documents with pictures issued by the authorities in replacement of the passport."

36 *Ibid*. The Turkey agreement stipulates that statements must be captured in 'written accounts.' The Ukraine agreement clarifies that 'official tests' is "a test commissioned or conducted by the authorities of the requesting State and validated by the requested State." Russia, on the other hand, only accepts "official statements made for the purpose of accelerated procedures, in particular by border authority staff and witnesses who can testify to the person crossing the border." (Russia agreement, Annex 3A).

37 For example, the agreement with Serbia regards service books and military identity cards, seamen's registration books and skippers' service cards, and citizenship certificates or other certificates indicating nationality as prima facie evidence, whereas these are considered proof of nationality by the other states. The same goes for passports issued during certain periods. See EU-Serbia readmission agreement, Annex 2: "passports of any kind (national passports, diplomatic passports, service passports, collective passports including children's passports) issued between 27 April 1992 and 27 July 1996 and photocopies thereof" are regarded as prima facie evidence. The Turkey agreement is the only one to accept the broad category of "accurate information provided by official authorities and confirmed by the other Party" as prima facie evidence, see Turkey agreement, Annex 2.

38 Coleman 2009, p. 97; EU-Albania readmission agreement, Article 8(2); EU-Ukraine readmission agreement, Article 6(2); EU-Serbia readmission agreement, Article 8(1). There may be some slight variations: the EU-Russia readmission agreement, for example, does not use the term 'prima facie evidence', but includes a system that is de facto the same. See EU-Russia readmission agreement, Article 9(2).

spite of the evidence, the person in question is not a national, it does not have to accept readmission.[39] Failure to rebut, however, means that the state must readmit.

A third method, only included in the Pakistan and Russia agreements, is also based on prima facie evidence. However, in these cases prima facie evidence does not establish a rebuttable presumption of nationality, but rather an obligation to "initiate the process for establishing the nationality of the person concerned" (Pakistan)[40] or "as a ground to start an appropriate verification" (Russia).[41] Such evidence, then, is the input for an investigation, rather than immediate grounds for accepting readmission.[42] The fourth and final method, which is contained in all the agreements discussed here, is to establish the identity of the third-country national through an interview. This can take place in case none of the documents necessary under the previous three methods are available. The requested state must make arrangements for such an interview by the competent diplomatic and consular representation upon request of the member state.[43]

Readmission agreements also set clear deadlines for different steps of the procedure, including the time the presumed country of nationality has to respond to any request, and to issue travel documents or otherwise authorise re-entry if it is sufficiently established that the person involved is indeed one of its nationals. It is not necessary to deal with these in detail, as the question here is mainly one of eligibility for readmission and the subsequent obligations of the state of nationality. These deadlines will be

39 The agreements do not set out what such counter-evidence might be. It can be imagined, however, that possession of a driving license issued by a certain country, for example, would normally point to an irregular migrant's nationality. But driving licenses may also be issued to non-nationals, so the country of return can challenge this evidence.

40 EU-Pakistan readmission agreement, Article 6(3). Annex 2 lists digital fingerprints or other biometric data, temporary or provisional national identity cards, military cards and birth certificates are all triggers for an investigation. The same goes for photocopies of documents normally considered proof of nationality, (photocopies of) driving licences, (photocopies of) seamen's registration cards or skippers' service cards, other official documents that mention or indicate citizenship, or statements made by the person concerned.

41 EU-Russia readmission agreement, Article 9(2). According to Annex 3B, grounds for investigation are: (photocopies) of driving licences, (photocopies of) company identity cards, or any other official document issued by Russia, as well as statements by witnesses and written statements made by the person concerned and language spoken by him or her, including by means of an official test.

42 In the case of Pakistan, this procedure comes in place of the second method, whilst in the case of Russia, both the second and the third method are applicable, depending on the evidence presented.

43 EU-Albania readmission agreement, Article 8(3); EU-Russia readmission agreement, Article 9(4); EU-Ukraine readmission agreement, Article 6(2); EU-Serbia readmission agreement, Article 8(3); EU-Pakistan readmission agreement, Article 6(4); EU-Turkey readmission agreement, Article 9(3).

discussed in other chapters. As noted in Chapter 1, readmission agreements, as a general point, further require member states to make a request to the presumed country of nationality to set the readmission procedure in motion. Since this is more relevant to the return of third-country nationals to transit countries, where readmission agreements may be the only basis for readmission, the implications of this will be discussed in Chapter 6. In the specific context of this chapter, the key point is that readmission agreements set out in detail the types of evidence to be provided during the readmission procedure. However, all these types of evidence serve the same purpose: to establish whether the person faced with return from an EU member state is a national of the presumptive country of origin. When this is sufficiently established, the country of origin is under a duty to readmit the returnee.

4.2.3 Multilateral treaties

Obligations to readmit nationals can also be found, to various extents, in the multilateral treaties that were identified as potentially relevant in section 2.7. According to the UN Smuggling Protocol, for example, each state party must agree to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of smuggling and who is its national.[44] The Protocol does not provide guidance on the means of proof of eligibility for readmission. However, the Protocol does require the state of return, at the request of the expelling state, to verify whether a smuggled migrant is its national or has the right of permanent residence in its territory, again, without undue or unreasonable delay.[45] It does not clarify what constitutes an "undue or unreasonable delay." When a person is without proper documentation, the state of return should agree to issue such travel documents or other authorisation as may be necessary to enable the person to travel to and re-enter its territory.[46] The Interpretative Notes emphasise that a return shall not be undertaken before the nationality or right of permanent residence of the person whose return is sought has been duly verified.[47] The Trafficking Protocol contains provisions that are almost identical with regard to the readmission of nationals, although it specifies that returns of victims of trafficking should preferably be voluntary.[48]

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44 CTOC Smuggling Protocol, Article 18(1). The obligation also extends to smuggled persons with a valid residence permit, see 6.3.

45 CTOC Smuggling Protocol, Article 18(3).

46 CTOC Smuggling Protocol, Article 18(4).

47 Interpretative Notes, paragraph 113.

48 CTOC Trafficking Protocol, Article 8(2). A suggestion to include a similar reference to voluntary return of smuggled persons was discussed during the drafting process but not incorporated. See UNODC 2006, p. 548.

Multilateral treaties on air and maritime traffic also mainly reconfirm a general obligation on states to readmit their nationals who are not, or no longer, allowed to stay in another state. This is evident, for example, from the requirement of states to readmit their nationals who return by air as 'deportees' under the Chicago Convention, or those who are return after being found as stowaways on ships under the FAL Convention.[49] However, none of these provide any substantive expansion of the obligation to readmit under customary international law as described in 4.2.1 above, nor do they generally provide for more specific procedures, such as readmission agreements.

4.2.4 International human rights law

As noted in Chapter 2, the right to return is incorporated in various human rights instruments, most prominently Article 3(2) of Protocol No. 4 of the ECHR, and Article 12(4) of the ICCPR. Although the former may be considered to have a stronger normative impact on the practice of EU member states, due to the clear link with the Charter of Fundamental Rights and general principles of EU law more broadly, it is the latter that is of most importance when looking at the matter of return from the perspective of countries of origin. Although such countries of origin may include states that are parties to the ECHR, its reach is geographically limited. By contrast, the ICCPR is open to all countries worldwide, and it has been widely ratified, providing for almost universal coverage.[50] This also includes those states party to the ECHR, which are therefore also bound by the wider definition of the right to return under Article 12(4) ICCPR.[51] For this reason, it is the latter instrument that will be the focus of the discussion of readmission obligations, both here in relation to nationals, and later regarding stateless persons.

4.2.4.1 The content of the obligation to readmit as a function of the right to return

Under Article 12(4) ICCPR, any individual has the right not to be "arbitrarily deprived of the right to enter his own country." While the notion has broader implications, having the nationality of a country is a sufficient condition for that country to be a person's 'own country.'[52] This is also true

49 Chicago Convention, Annex 9, fifteenth edition, Chapter 5, Section C, Standard 5.22; FAL Convention, Annex, Section 4, Part E, Standard 4.11.1.

50 With some exceptions, see 2.5.

51 See 2.5 on the different formulations of these rights in these respective instruments. Although the provisions of the ICCPR are possibly considered by some states as less important, due to issues of direct effect in domestic law and the fact that, in contrast to the ECtHR, the HRC cannot deliver binding judgments, it should be emphasised that, as a matter of international law, the ICCPR is no less binding on those states as is the ECHR.

52 HRC General Comment No. 27, paragraphs 19-21.

for persons who have the nationality of a country, but are seeking entry for the first time, for example because they were born abroad.[53] The state of nationality's obligation to readmit appears to be qualified, since only arbitrary deprivations of the right to enter one's own country are prohibited.[54] The HRC has stated that the inclusion of this qualification "is intended to emphasize that it applies to all State action, legislative, administrative and judicial."[55] It requires that "even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant" and that it should be "reasonable in the particular circumstances."[56] At first glance, this does not seem to be an enormous barrier to deprivation of the right to enter. However, the HRC clarifies that "there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable."[57] This is also confirmed by the HRC's case law. For example, in *Nystrom*, the HRC found that Australia had not provided sufficient justification to expel the applicant, which would deprive him of his right to re-enter the country, even though he had amassed a very substantial criminal record, including aggravated rape, arson, and armed robbery.[58] In *Warsame*, the applicant's convictions for robbery (nine months imprisonment) and substance trafficking (two years imprisonment), were also not considered sufficient reason to deprive the applicant of his right to enter. [59] This still does not exclude completely that a graver threat may be sufficient to consider a denial of the right to enter as non-arbitrary. Perhaps states' recent actions to rescind the nationality of those who travelled abroad to join terrorist groups, which would also deprive them of the opportunity to return, will provide further occasion for the HRC to consider this. However, even in such cases other means of preventing threats to national security, including prosecution of the returning person, may be available, so it is by no means clear that this would satisfy the threshold in Article 12(4) ICCPR.[60] Overall, as some HRC members noted, the right to enter is "nearly

53 HRC General Comment No. 27, paragraph 19.

54 Contrast also with Article 3(2) Protocol No. 4 ECHR, which does not make such qualification, although it only protects the right to enter for nationals.

55 HRC General Comment No. 27, paragraph 21. Also see Hannum 1987, p. 44-45, who suggests that the drafters included the notion of 'arbitrary' deprivation to ensure it would cover a broader scope of actions than just situations in which the deprivation was not provided for by law.

56 HRC General Comment No. 27, paragraph 21.

57 HRC General Comment No. 27, paragraph 21.

58 HRC *Nystrom* [2001], paragraph 2.3; although its consideration of delays in the removal of the applicant in paragraph 7.6 may suggest implying that more expeditious proceedings might have diminished the risk of arbitrariness.

59 HRC *Warsame* [2001], paragraphs 2.3 and 8.6.

60 This may particularly be the case if the function of the rescinding of nationality was specifically to deny them an opportunity to return.

absolute," and arguably should be absolute.[61] Notwithstanding such issues, Goodwin-Gill has noted that:

> *"[t]he existence of the right to return and the duty to readmit are beyond dispute. Instances in which return has been denied or heavily qualified are generally part of broader contexts involving persecution, other violations of human rights, or situations in which political issues dominate legal entitlements."*[62]

As such, confronted with an attempt to return by a national, a state must, normally speaking, not prevent this. As such, it encompasses, at a minimum, a negative obligation for the state. Although this is less clear as for the right to leave,[63] the right to return may also trigger a positive obligation to make return possible. In *Jiménez Vaca*, the HRC found that Colombia had failed to provide a citizen abroad, who faced threats from a third party in Colombia, with effective domestic remedies that would allow him to return from involuntary exile in safety.[64] Colombia was therefore required to provide him with an "effective remedy, including compensation, and to take appropriate measures to protect his security of person and his life so as to allow him to return to the country."[65] In *Nystrom*, Australia, which was found to be the applicant's own country, and which had already expelled him, was required to provide a remedy, "including allowing the author to return and materially facilitating his return to Australia."[66] Both indicate at least some positive action to enable return when the person's stay abroad is due to the country of nationality's specific actions or omissions. However, it would be reasonable to presume that even for persons who find themselves outside their countries of nationality because of their own decision to travel abroad, some facilitation, at least by providing any necessary authorisation to enable his or her return, would be necessary. This would be in line with

61 HRC *Ilyasov* [2014], joint opinion of Neuman, Iwasawa and Kälin, paragraph 8 and footnote d. However, since the drafters could not agree on an absolute prohibition, there is (mostly theoretical) space for denial in some circumstances. Also see Zieck 1992, p. 145, noting that, during the drafting process of Article 12(4) ICCPR, some delegations wanted to see the complete removal of any qualifications, since any opening provided might be open to abuse. Nevertheless, in *Budlakoti* [2018], paragraph 9.4, for example, while upholding the notion that few, if any, circumstances would make deprivation of the right to enter one's own country reasonable, the HRC also found that, in the specific circumstances of the case, "interference with the author's rights under article 12(4) would be disproportionate to the stated legitimate aim of preventing the commission of further crimes." This could be read as implying that, at least theoretically, situations could be imagined when interference with the right to enter one's own country in relation to serious crimes would be proportionate. However, here again, even the fairly serious nature of the individual's crimes was not considered sufficient in this respect.

62 Goodwin-Gill 1996, p. 100.

63 See 8.3.3 on the obligation to issue travel documents to facilitate the right to leave.

64 HRC *Jiminez Vaca* [2002], paragraph 7.4.

65 *Ibid*., paragraph 9.

66 HRC *Nystrom* [2001], paragraph 9.

the country of nationality's obligations regarding the right to leave which is meant to complement the right to return.[67]

4.2.4.2 Should human rights-based obligations to readmit be distinguished from inter-state obligations?

Although it leaves questions about the exact way to implement it, the ICCPR, just like several other human rights instruments, provides for a very strong obligation to readmit nationals who wish to exercise their right to return. In this way, it might be argued, human rights law further strengthens the readmission obligations set out in the various inter-state instruments, and especially in customary international law, as discussed above. However, the counterpoint to this would be that, while such inter-state norms are specifically aimed at facilitating the effectiveness of a host state's right to expel, the function of the human right to return is different. It seeks to secure to individuals the enjoyment of that right, if they wish to exercise it. And in cases of expulsion it is not at all evident that individuals returning are aiming to exercise their right to return. After all, being expelled is not a choice, and return is the result of a legal obligation, backed up by the possibility of enforcement. As already discussed, this is also true for voluntary return under the Directive, regardless of the connotations that the word 'voluntary' normally has.[68] Nevertheless, there appears to be confusion over the way that readmission obligations on the basis of inter-state norms interact with those based on the human right to return.

One source of confusion seems to be the idea, discussed above in relation to customary international law, that 'the right to return' as a general concept is a key building block of the obligation to readmit. In this respect, Giuffré has observed that "the theory whereby the obligation to readmit depends on the individual right to return erroneously conflates the relationship between individuals and the State with the obligation owed by a State to another State."[69] A particular question that arises in this regard is whether those who refer to a right to return are precise enough about which right they mean. There is little doubt that customary international law on expulsion, long before the birth of international human rights law, had protective functions. This is evident, for example, from the fact that international tribunals, almost 120 years ago, already found that states had certain obligations as to the treatment of expelled aliens.[70] It is also very well possible that such international norms, especially in the light of the responsibility

67 See Chapter 8. This would also be in line with the obligations of states under customary international law to provide travel documents to make readmission possible.

68 See 2.10.1.4.

69 Giuffré 2015, p. 265.

70 See, for example, Mixed Claims Commission Netherlands-Venezuela *Maal* [1903]; Mixed Claims Commission Italy-Venezuela *Boffolo* [1903]; Mixed Claims Commission Belgium-Venezuela *Paquet* [1903].

of states for their nationals, provided for a 'right' to re-enter their countries of nationality. Although such a general rule existed, and provided protection to individuals, it must have necessarily been one functioning at the inter-state level, given the absence of clear international legal personality of individuals at that time. To the extent that individuals could assert their 'rights' this was done through inter-state claims. And while Hailbronner has noted that "individual rights have evolved out of interstate obligations," the specific incorporation of these rights into international human rights instruments has given them their own basis, which is no longer dependent on customary norms and provide broader protection.

Another reason why inter-state and human rights-based readmission obligations are frequently lumped together may be that they pertain to the same substance. In this regard, Hailbronner has observed that:

> *"[t]he obligation to readmit in fulfilment of a right to return derived from nationality is at the same time the fulfilment of an international obligation derived from the international regulation of responsibilities between the state of origin and state of residence…"*[71]

It is certainly true that, when a state readmits one of its nationals, it is virtually impossible for an outside observer to ascertain whether this was done on the basis of an inter-state obligation, or to secure the individual right to return. The effect of either, after all, would be the same: the person is readmitted. Even the readmitting state itself might not specifically distinguish between these situations. It will merely know, based on the various frameworks discussed above, that, if presented with a national seeking to enter for whatever reason, it is under an obligation to readmit. The specific framework applied might not be considered very relevant for this purpose.[72]

Nevertheless, this does not mean that the inter-state readmission obligation and the human rights-based readmission obligation are one and the same. At least as a theoretical point, this is also acknowledged by Hailbronner when he states that "[a]s an exclusive human rights guarantee the right to return to the state of origin would characteristically depend on the willingness of the individual to return."[73] However, he follows this by

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71 Hailbronner 1997, p. 4; also see Goodwin-Gill 1996, p. 100: "As an incidence of nationality, the duty to admit thus encompasses both the rights of other States [to expel aliens]… and the right of the individual to access his or her own country."

72 Indeed, the main point of reference for states is likely to be their domestic laws, which will likely provide for the right of entry of nationals, and in some cases may even be incorporated in their constitutions.

73 Hailbronner 1997, p. 4; also see Legomsky 2003, pp. 617, who discusses the issue of rights and obligations in relation to the return of asylum seekers to a country of first asylum, which he argues can be equated to their 'own country': "the person *does not want* to be readmitted to the first country of asylum; indeed he or she wants to avoid return… Under those circumstances, to speak of the asylum seeker's 'right' to be readmitted to the first country of asylum is irrelevant. To put the point slightly differently, surely the obligation that the first country of asylum owes under Article 12(4) is an obligation that it owes to the individual, not to another state" (emphasis in the original).

referring to the above-mentioned confluence of the two obligations as to their substance, which would make the distinction meaningless. I disagree with this. Conceptually, the two types of obligations pertain to different legal relationships.[74] This is evident from the triangle model described in Chapter 1, and elaborated in Chapter 2.[75] As I have suggested in the introductory chapter, being precise about the different legal relationships between the three key actors, and the different rights and obligations that make up these relationships, is an important way to establish which actor is responsible for what. And by extension, to establish when an actor, in this case the third-country national, can and cannot be held responsible. While an abstract point, it can also become a practical matter that comes to the fore if the inter-state obligation is somehow not effective, and the only obligation on the country of return to readmit an individual will be one based on international human rights instruments. In the next chapter, some possible instances of the ineffectiveness of inter-state norms in relation to the readmission of nationals are provided. The relevance of this issue is arguably further enhanced when readmission obligations become weaker, such as in the case of stateless persons below, leaving an even greater role for the right to return under human rights law.

For the moment, such considerations can be set aside when inter-state readmission obligations vis-à-vis nationals are effective, and the difference between those obligations and the human rights-based obligation is not of immediate practical significance.[76] On that assumption, some provisional conclusions on the implications of the readmission obligations discussed above for third-country nationals required to seek return to their country of nationality under the Directive can be drawn.

4.2.5 Implications for third-country nationals seeking return to their country of nationality

The inter-state legal framework provides for rather clear rules on the readmission of nationals. Based on these rules, both actions that must be considered within the scope of the third-country national's obligation to return, as well as some actions that must be considered outside that obligation, can be identified.

74 Hailbronner 1997, p. 1.

75 In this respect, also see Noll's insistence on clear separation of inter-state and human rights-based readmission obligations in Noll 1999, p. 276; Noll 2003, pp. 62-63, and as discussed in 1.4.2.2.

76 Situations in which this difference becomes relevant will be discussed in Chapter 5.

4.2.5.1 *Obligations on the third-country national to provide evidence of eligibility for readmission*

To meet their obligation to return, considering the conditions for readmission to their country of nationality, third-country nationals can, at a minimum, be expected to provide that country with relevant proof of their eligibility of readmission. Although this eligibility is based on nationality, it may be presumed that this also requires evidence of identity, if this cannot be established on the basis of the documentary evidence for nationality. The two are inextricably linked. While a passport or other document may serve simultaneously as evidence of nationality and identity, in some cases, authorities of the country of return may need further proof. For example, when third-country nationals present evidence of nationality that does not contain pictures or biometric data, such as may be the case for birth certificates, they may need to show that the document in question actually relates to their person. Furthermore, identity documents, or at the very least information pertaining to identity, may provide possibilities for further investigation by the presumed country of origin whether third-country nationals seeking readmission are indeed nationals, also if no specific evidence of nationality can be provided. For example, this may facilitate a search in civil registries or other administrative systems.[77]

Providing this evidence of nationality, in good faith, either directly to the country of nationality or via the EU member state,[78] is the responsibility of third-country nationals as part of their obligation to seek readmission during the voluntary departure period. The exact requirements to be fulfilled, in terms of evidence, are set by each member state, unless these are specifically regulated by readmission agreements. It is up to third-country nationals to ensure they meet these requirements. In relation to readmission agreements, Coleman distinguishes broadly between official documents directly capable of providing evidence of eligibility for readmission, other papers, and oral evidence.[79] Not all these trigger equally strong obligations on the part of presumed countries of nationality. Certain forms of evidence – for example those categorised as 'proof' in EU readmission agreements – will trigger an immediate and undisputed obligation to readmit. Others may only create a rebuttable presumption of an obligation to readmit, or an obligation on the presumed country of nationality to further investigate the readmission claim. As a result, it must be presumed that third-country nationals' obligations with regard to readmission do not only encompass

77 On the links between nationality and identity, see, inter alia, Engbersen & Broeders 2009, p. 872, who note that lack of establishment of an individual's "'true' legal identity" may cause expulsion to be resisted both from within the expelling state (by lawyers and judges) and from abroad (by the countries to which a person should return). Also see Van der Leun 2003, p. 108, who notes that "unidentifiable aliens are constitutionally rather invulnerable to expulsion."

78 In case of readmission agreements. See the more extensive discussion of this in Chapter 6.

79 Coleman 2009, p. 99.

the provision of evidence of nationality, but to provide the evidence at their disposal that will trigger the strongest possible obligation on the state of nationality.[80] Of course, this should be considered within the context of each third-country national's practical possibilities. Persons cannot supply evidence that they do not possess, although third-country nationals can be expected to make reasonable efforts to obtain evidence (school certificates, military service documents, etc.) through family members or others.[81] The possibility of obtaining evidence through others should also not negate or pause third-country nationals' other efforts to ensure the presumed country of nationality is able to assess their readmission claim.

As noted, in case documentary evidence is not sufficient in and of itself to establish eligibility for readmission, an additional method is further examination. This typically includes an interview with the consular authorities. If the readmission process cannot effectively continue without such an interview, the obligation of third-country nationals would also encompass agreeing to participate in such an interview and providing the necessary information during that interview. Refusal to participate in such an interview, or not showing up for such interviews without valid justification would prima facie constitute a failure to fully comply with the obligation to return.

4.2.5.2 Limits on the obligation to provide evidence for readmission

While the scope of the actions that individuals must take to secure readmission may be relatively obvious from the discussion in the preceding paragraphs, another matter, arguably at least as important, is whether there are any specific limits to those actions. While these may be less obvious, the international norms discussed above nevertheless provide a framework to identify such limits. In this respect, it is especially relevant that, in all the cases above, the trigger for the state's readmission obligations is that the individual is found to be a national. The norms discussed above do not

80 Although the non-provision of different types of evidence may have different effects on the ability to return, and therefore may not in all cases result in non-compliance with the obligation to return under the Directive, see 6.2.5.

81 This may be presumed to be dependent on such information being requested of others without endangering the safety of the third-country national or any family members. In this regard, situations when a return decision is issued with the denial of an asylum application, but an appeal is still pending, may require postponement of such an obligation under the Directive, to ensure compatibility with EU asylum law. See, in this regard Article 30 of Directive 2013/32 (the recast Asylum Procedures Directive), which prohibits member states from disclosing or obtaining information that would endanger the applicant or family members in the country of origin. In line with the approach that third-country nationals cannot be expected to put themselves in unsafe situations that would be prohibited if done by member states (see 7.3), this would imply that third-country nationals cannot be required to take such steps at least until their asylum applications are finally rejected. On potential conflicts between the Returns Directive and this provision of the recast Asylum Procedures Directive, see ECRE 2018, p. 9.

leave discretion to states in this regard. When third-country nationals can provide sufficient evidence of their nationality (provided there is also no doubt about identity), they must normally be readmitted. As such, proof of nationality is not only *necessary* to trigger the destination country's readmission obligation, it is also *sufficient*. Translated to third-country nationals' obligations under the Directive, therefore, the same must apply. This means that there is no need on the part of third-country nationals to acquiesce to any demands that are not specifically connected to the establishment of their nationality or identity, since this is not a necessary trigger for the country of nationality's readmission obligations. By extension, I suggest, there is no ground for EU member states to expect third-country nationals to take any action that is not directly connected to the verification of their nationality and identity, as part of their obligation to seek readmission under the Directive.

A well-known example of further requirements imposed on returnees can be found in relation to Eritrea. Given the severely restrictive (and deeply problematic) exit rules applied in Eritrea, persons leaving the country, in particular those who flee, are often found to have left 'unlawfully.' Similarly, people frequently leave the country to escape military service. Such actions can have severe consequences if individuals subsequently return to Eritrea. However, it may also impact on their readmission claims. In this respect, it has been reported that Eritreans seeking readmission, including after a failed asylum claim, have been required to 'regularise' or 'settle' their relationship with the state after leaving, in the eyes of the regime, unlawfully. This includes signing a so-called 'apology letter' or 'regret form,' as well as paying a highly controversial 'diaspora tax.'[82] Again, notwithstanding other concerns of compliance with international law of such practices, these additional demands cannot fall within the scope of the legitimate obligation to return imposed on individuals who are nationals of Eritrea.[83] The scope of unnecessary additional demands may also extend to the practice of asking potential returnees for a statement that they are willing to return, since willingness, at least as a matter of inter-state readmission obligations, is not a requirement for readmission.[84] That such statements are regularly demanded by certain states will be discussed later.[85] Further requirements, such as information about the reason for leaving the country of origin, activities in the EU member state (including political activities), or

82 See, for example, UK Home Office 2015; Immigration and Refugee Board of Canada 2015; Danish Immigration Service 2014; and a more general discussion by Plaut 2015.

83 In general, draft evasion may result in the legitimate denial of a passport, as part of the right to leave, see HRC *Peltonen* [1994]. However, virtually unlimited military service in Eritrea is widely considered to be a serious human rights violation and therefore cannot form the basis for such actions. At any rate, even legitimate considerations of avoiding military service, while possible to affect the right to leave, do not impact on the right to return.

84 Hailbronner 1997, p. 4.

85 See 5.3.1.

any information that might be demanded about third persons, such as the whereabouts or activities of family members, also clearly fall outside the scope of necessary elements for readmission. These thus also fall outside the legitimate expectations towards third-country nationals as part of their obligation to return.

In sum, the specific readmission obligations of countries of nationality set the boundaries of the obligation of third-country nationals to seek return there in two ways. First, they provide the framework for what evidence they can be expected to present and how to ensure that the process of establishing their eligibility for readmission can proceed, including by participating in interviews where necessary. And second, such obligations are limited to what is necessary to establish nationality and identity. And additional requirements, such as signing statements regarding their willingness to return, making apologies for 'dishonouring' the state by leaving or applying for asylum, paying sums of money unrelated to the readmission process, and other demands not directly related to nationality and identity, are all outside the scope of the third-country national's obligation in this respect.[86]

4.3 The readmission of habitually resident stateless persons and implications for their obligations

This section will focus attention on readmission obligations of countries of habitual residence towards stateless persons. Again, it will first map out such obligations arising out of different sources and instruments of international law, and subsequently discuss the implications for the obligations of stateless persons under the Directive. Before doing so, two comments need to be made. First, the term 'country of habitual residence' may be relevant from the perspective of the Directive, in determining where a stateless person may have to return. However, from the perspective of those countries, readmission obligations may not be explicitly defined in relation to habitual residence. Rather, they may focus, for example, on the individual's former citizenship, or on specific residence rights. This may overlap with the way that habitual residence might be framed, which – as discussed in Chapter 3 – is in itself not entirely settled and requires a case-by-case examination, but this overlap is not always complete. The discussion below proceeds on the basis that, in the individual case, a country of habitual residence has been determined to exist as part of the return procedure under the Directive. From that point on, any divergence in terminology used on the side of the prospective country of return is no longer relevant. Rather, the relevance lies in the extent that readmission obligations towards that individual can be identified, regardless of the particular basis and regard-

86 In relation to financial demands by the authorities of countries of return, also see the discussion about fees levied for the issuance of travel documents in 8.4.2.

less of whether the country of origin identifies the person as someone habitually resident or in another way.

The second comment relates to the fact that the definition of 'country of origin' in the Directive relates to one single category of stateless persons in a general sense. Again, the picture from the side of third countries' readmission obligations may be different. In dealing with international obligations, different authors have identified specific categories of returnees. This generally includes stateless persons, but also former nationals and third-country nationals.[87] While only the first of these categories specifically refers to stateless persons, the other two may also be relevant to their readmission. For former nationals, this may be the case if they have not required a new nationality since having lost their nationality of the country of origin. As regards third-country nationals (also 'foreign nationals'), it would first appear that this term is dependent on the individual having the nationality of another state than the prospective country of return. After all, if not, they would not be a 'national' of anything. Nonetheless, in relation to readmission, third-country nationals are often simply defined as those who do not have the nationality of the country of return, nor of the expelling state.[88] This may, therefore, also include stateless persons. Where relevant, therefore, provisions in relation to each of these sub-categories are discussed. However, it should be noted that specific provisions related to the readmission of third-country nationals as a broad category (including stateless persons) are only discussed summarily here, since they will be the subject of more detailed discussion in Chapter 6, which deals with returns and readmission to transit countries.

4.3.1 Customary international law

As discussed in 4.2.1, the logic of readmission obligations in expulsion situations under customary international law is tied up, first and foremost, with the overwhelming importance that is attached to the bond of nationality between the individual and the state. This raises important questions about the situation in which this bond of nationality does not formally exist. Following the doctrine discussed above, no readmission obligations can generally be assumed to exist for persons who are not nationals of the country of origin. In this respect, few if any authors appear to suggest that that there can be any customary readmission obligations arising just out of

87 Giuffré 2015, p. 264; Hailbronner 1997; Coleman 2009, p. 28. The latter refers, additionally, to protection seekers and recognised refugees (pp. 45-47). For reasons discussed in 1.4.3.2, I will leave any overlap with the category of protection or asylum seeker aside in this analysis.

88 Also see the fact that the Returns Directive itself defines third-country nationals in relation to the absence of their citizenship of an EU member state and/or their right to free movement, rather than in relation to having the nationality of another country, as well as the fact that stateless persons, within the Schengen acquis, are considered the same as third-country nationals (see 1.2.1.3).

the fact that the person seeking readmission is stateless. Specific circumstances as to their link to the country in question must therefore additionally be in place.

The above-mentioned category of persons who formerly had the nationality of the country of return but are now stateless, may be able to put forward such circumstances. It has been described how, in literature from the 18th and 19th centuries, a customary obligation to readmit former nationals was sometimes assumed to exist, but that in later years, especially in the first part of the 20th century, this was increasingly put in doubt.[89] However, an argument can be made that, just as for nationals, at least one state should assume responsibility for individuals to be expelled by other states, both to safeguard the welfare of those individuals and to guarantee the territorial rights of those states. It has been argued that there may be a principle of 'continuity of nationality,' that would put that burden on the former state of nationality, as former nationality provides the closest link between an individual and a state available.[90] However, Hailbronner outlines that this has both supporters and critics in contemporary scholarship.[91] Hofmann suggests that "[a]n examination of the practice of States, including their treaty practice, shows, however, that customary international law does not impose on the State of former nationality a duty of readmission."[92]

However, even in the absence of a clear rule to readmit former nationalities, a significant grey area may remain. For example, it has been suggested that an obligation to readmit may continue to exist if a state strips a person of nationality purely to prevent them from being returned.[93] In my view, this would be a logical consequence of the doctrine of readmission obligations as a corollary of other states' right to expel unwanted aliens. This, it has been argued, would both deliberately infringe on the host state's sovereign right to expel, and on the individual's right to return, and constitute violations of the principle of good faith, as well as an abuse of rights.[94] While denationalising a person is, in principle, a matter of sovereignty of the state doing so, it could be argued that this should not infringe on another state's sovereign right to expel.[95] As such, at least theoretically, a basis for a continuing obligation to readmit could exist in such cases.

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89 Hailbronner 1997, pp. 17-19.

90 Lessing 1937, p. 152 and onward.

91 Hailbronner 1997, p. 21.

92 Hofmann 1992, p. 1005.

93 See, for example, Weis 1979, p. 54; Hailbronner 1997, pp. 21-24.

94 Coleman 2009, p. 49. Although on the point of infringement of the right to return it must be noted that the right to return expands beyond nationality, as discussed in 4.3.4.2 below. Furthermore, this again raises issues to what extent individual rights can be used as a doctrinal underpinning for a customary (inter-state) readmission obligation.

95 It should be noted that such issues may in particular arise if denationalisation leaves the person stateless, which in and of itself may make the decision to strip citizenship unlawful.

However, if denationalisation indeed occurs with the implicit or explicit intent to prevent the return of the person, it is difficult to see how a state seeking to expel an individual could successfully invoke such an obligation in practice, which is not particularly clearly recognised generally, and will likely be rejected by the state of return at any rate.

In other situations, in which a person has lost the nationality of a state after leaving, it may be even more difficult to establish a basis for an obligation to readmit. This would particularly be the case if the loss of nationality is due to the specific links between the individual and the country of nationality disappearing over time, such as prolonged absence from the state. This is even more the case if persons have willingly renounced their nationality of the country of origin.[96] Readmission obligations towards former nationals who remain stateless thus appear to be limited to specific situations where the country of origin has deprived them of nationality after leaving for an EU member state. Even in that case, it is a matter open to discussion. But even if this principle is accepted by both the country of origin and the EU member state, it may be difficult to establish, in the individual case, that the readmission obligation is applicable, since this would require some form of evidence that the loss of nationality was due to a deliberate action by the country of origin. Nevertheless, evidence of former nationality may at least provide the starting point for an attempt to gain readmission.

Interestingly, the arguments made above as regards former nationals do not appear to be extended to those who were always stateless, but were nonetheless habitually resident in the presumptive country of origin. It might be presumed that the habitual residence of stateless persons, particularly if they were born in that country, may be the closest approximation of such a special relationship, which would trigger responsibility for such persons.[97] This might particularly be the case if the country in question had failed to end the situation of statelessness, although it could have reasonably done so.[98] However, there is little in the available literature to suggest that such circumstances are seen, from a doctrinal point of view, as sufficient to trigger readmission obligations under customary international law. Nor has much, if any, evidence of either consistent state practice or *opinio juris* in that regard been put forward. This is even the case if stateless persons held a right of residence in the country of origin prior to moving to the EU member state. While this situation is covered by other instruments, customary international law appears to leave a gap here. In this regard

96 See, for example, Coleman 2009, p. 48: "In case of voluntary renunciation of nationality one cannot rely on the above arguments concerning sovereignty, good faith, or an abuse of rights, which pertain exclusively to State interaction."

97 See, for example, Hathaway & Foster 2014, p. 67: "the fact of habitual residence is understood to give rise to a bond between the stateless individual and a state that approximates in critical respects the relationship between a citizen and her state." (emphasis in original omitted).

98 By analogy, see 4.3.4.2 below as regards the treatment of persons who are 'not mere aliens' under the ICCPR.

stateless persons appear to be treated the same as other foreign nationals. And, as will be discussed in section 6.1, no customary obligations exist for the readmission of that category. Rather, where such obligations exist, these are based on specific agreements.[99]

4.3.2 Readmission agreements

The situation of stateless persons aiming to return to their country of origin can be connected to the provisions of EU readmission agreements in several ways. First of all, most agreements provide for an obligation to readmit certain categories of former nationals, subject to conditions.[100] This normally covers persons who have renounced the nationality of the country of origin after entering the EU member state. In this way, a gap left by the customary framework, discussed above, seems to be filled by these provisions. Such readmission is dependent on the person either not having acquired the nationality of the EU member state, or not at least having been promised such nationality.[101] These clauses do not address the situation of persons who were already stateless at the time that they left their country of origin.

Readmission agreements may also provide for obligations to admit spouses or children of persons who should be readmitted, regardless of their nationality. This could thus include spouses or children that are stateless, if the primary person to be readmitted is at least a national or former national meeting the conditions above. In some cases, readmission agreements may make even more specific arrangements for the return of former nationals. In the case of Serbia, former nationals of the Socialist Federal Republic of Yugoslavia who have acquired no other nationality, and whose place of birth and place of permanent residence on 27 April 1992 was in the territory of Serbia, are also readmitted.[102] Beyond this, stateless persons are explicitly covered by the same provisions as those applicable to third-country nationals. In relation to habitual residence, the provisions referring to a right of residence as a basis for a readmission obligation on the part of the country of origin, may be most relevant. The different agree-

99 Hailbronner 1997, p. 37; Giuffré 2015, p. 271.

100 This possibility is only missing from the EU-Pakistan readmission agreement.

101 EU-Albania readmission agreement, Article 2(1); EU-Russia readmission agreement, Article 2(1) EU-Ukraine readmission agreement, Article 2(1); EU-Serbia readmission agreement, Article 2(3); EU-Turkey readmission agreement, Article 3(3). In the case of Russia, the agreement stipulates that no readmission is required if the person has acquired the nationality of the requesting Member State, *or any other State*.

102 EU-Serbia readmission agreement, Article 3(3). The date of 27 April 2002 is when Serbia and Montenegro proclaimed the Federal Republic of Yugoslavia, after Slovenia, Croatia, Macedonia and Bosnia and Herzegovina had each already declared independence. The date thus formally marks the end of the existence of the 'old' Yugoslavia (the Socialist Federal Republic). In 2006, Serbia and Montenegro subsequently became the independent states of today.

ments may vary slightly in this respect. While some require the person to still have a valid residence permit at the time of the readmission request,[103] others may provide that this was the case "at the time of entry" to the EU, which also provides for the obligation to readmit the person if that permit has since lapsed.[104] As such, if stateless persons who are irregularly staying in an EU member state can show evidence of still holding (or having held at the moment of arriving in the member state) a residence permit in the country of habitual residence, this would be sufficient to trigger a readmission obligation, unless specific exemption clauses apply. Such exemption clauses generally specify that no readmission obligation arises if the EU member state had itself issued a residence permit or a visa, although that may again be subject to an exception, for example if the country of origin issued a residence permit of longer duration than the one issued by the EU member state.[105] Similar clauses exist if the stateless person is in possession of a valid visa (at the moment of entry or at the moment of the readmission request, as the case may be), but this may be less relevant to the situation of persons who had their habitual residence in that state.

Furthermore, the readmission clauses related to direct irregular entry into the EU member state, which will be discussed in more detail in Chapter 6, in principle apply to stateless persons. While generally used in relation to transit countries, the fact that a stateless person was found to have irregularly entered an EU member state directly from the state with which a readmission agreement is in force, could also apply if that latter state is the individual's country of habitual residence. The evidence base for readmission in such situations is entirely different, relying not on evidence of residence, but on evidence of irregular entry into the EU member state, which has different implications for the responsibility of the individual.[106]

4.3.3 Multilateral treaties

Under the various multilateral treaties covered in this analysis, a distinction is generally only made between nationals and non-nationals, with the latter also encompassing stateless persons. As with readmission agreements, residence rights of stateless persons in their country of habitual residence may be relevant. While the Smuggling Protocol does not specifically mention stateless persons, it makes provision for the readmission of persons with a residence right. Like for nationals, states where smuggled persons have

103 EU-Pakistan readmission agreement, Article 3(1)(a); EU-Russia readmission agreement, Article 3(1)(b). The agreement with Turkey simply states that the person must "hold a valid resident permit" without specifying at what time (Article 4(1)(b)).

104 EU-Albania readmission agreement, Article 3(1)(a); EU-Serbia readmission agreement, Article 3(1)(a); EU-Ukraine readmission agreement, Article 3(1)(b).

105 In some cases, if the country of origin issued such a permit earlier, it will also be held to readmit, as well as in the situation that the EU member state issued a visa or residence permit on the basis of fraudulent documents.

106 See 6.1.

a permanent right of residence at the time of return must "facilitate and accept" their return, and do so "without undue or unreasonable delay."[107] According to the Interpretative Notes to the Protocol, 'permanent residence' should be read as "long-term, but not necessarily indefinite residence."[108] When the person had a right of permanent residence at least up until the point he or she entered the EU member state, and this right has now lapsed, the Protocol furthermore requires state parties to "consider the possibility" of accepting their return.[109] However, as Gallagher and David note, the wording of this paragraph makes the readmission of a person who previously had the right of permanent residence "almost entirely optional."[110] Similar obligations of readmission, connected to a permanent right of residence are also applicable to victims of trafficking under the Trafficking Protocol.[111] However, the obligation to readmit victims of trafficking also pertain to those who had a right of permanent residence at the moment of entering the EU member state, even if it has subsequently lapsed. Therefore, in contrast to the Smuggling Protocol, the readmission of victims of trafficking with an expired right of permanent residence is also obligatory.

Provisions on the readmission of non-nationals with residence rights can also be found in the FAL Convention on maritime traffic. This is the case if stateless persons arrived in the EU member state as stowaways on a ship.[112] The right of residence is not further qualified, but would appear to be any residence authorisation regardless of length, and would particularly not have to be permanent. It would, however, still need to be valid. The Convention leaves unclear whether this validity should be effective at the time of return, or whether it would be sufficient if it would still be active at the moment the individual arrives in an EU member state as a stowaway. Regarding air traffic, the Chicago Convention only provides for a very weak obligation with regard to holders of authorisation to remain under domestic law. This relates to the specific category of 'deportee.'[113] Under the Convention, state parties must give "special consideration" to the admission of a deportee "who holds evidence of valid and authorized residence within its

107 CTOC Smuggling Protocol, Article 18(1),

108 Interpretative Notes to CTOC Smuggling Protocol, paragraph 112. Also see Gallagher & David 2014, p. 697.

109 CTOC Smuggling Protocol, Article 18(2).

110 Gallagher & David 2014, p. 38.

111 CTOC Trafficking Protocol, Article 8(1).

112 The FAL Convention, Annex, Section 1, part A, defines a stowaway as: "[a] person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person and who is detected on board the ship after it has departed from a port, or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the master to the appropriate authorities."

113 Chicago Convention, Annex 9, fifteenth edition, Chapter 1, Section A (definitions): "[a] person who had legally been admitted to a State by its authorities or who had entered a State illegally, and who at some later time is formally ordered by the competent authorities to leave that State."

territory."[114] This hardly gives a clear guarantee of readmission, although it arguably presents a due diligence obligation on the prospective state of return to consider allowing readmission, and to provide reasons for refusal of this.

The FAL and Chicago Conventions also deal with returns to the point of embarkation, which – just like the third-country national clauses of readmission agreements – may also cover stateless persons. However, for inadmissible persons and stowaways under the FAL Convention this merely entails an obligation on the country of embarkation to accept them for examination. The same is true for inadmissible persons under the Chicago Convention. However, as will be discussed in Chapter 6, the extent to which each instrument provides for sufficiently clear procedures and allows stateless persons or other third-country nationals to independently make a readmission claim remains somewhat unclear. At any rate, this would be subject to evidence of the specific status of the person, as an inadmissible person or a stowaway, which will require an intervention from the EU member state at the very least. Again, the embarkation criterion implies that such obligations can only be triggered to enable the return of stateless persons to their country of habitual residence if they directly travelled to the EU member state from there.

4.3.4 Human rights instruments

It is evident that, while containing some provisions as regards stateless persons seeking readmission to their country of habitual residence, the inter-state frameworks above leave considerable gaps, and do not provide the same guarantees for the readmission of expelled stateless persons as for expelled nationals. In addition to inter-state considerations, such as preserving the right to expel of the host state, the individual right to return has already been flagged as a potentially important source of readmission obligations regarding stateless persons. Below, the obligations that arise out of human rights instruments, specifically the 1954 Statelessness Convention and the right to return to one's own country under the ICCPR, are discussed.

4.3.4.1 The 1954 Statelessness Convention

As the key instrument to deal with the plight of stateless persons worldwide, it might be assumed that the 1954 Convention on the Status of Stateless Persons, and its companion instrument the 1961 Convention on the Reduction of Statelessness, would play a key role also in matters of readmission. However, the 1961 Convention does not address this at all.

114 Chicago Convention, Annex 9, fifteenth edition, Standard 5.23.

And the readmission obligations arising out of the 1954 Convention are surprisingly limited.

In contrast to other instruments discussed, the 1954 Convention makes explicit reference to the country of habitual residence of a stateless person. However, this is in relation to ensuring equal treatment of stateless persons residing in such a country to that country's nationals in a limited number of areas.[115] When it comes to provisions on the international movement of stateless persons, including return and readmission, this is instead connected to their lawful residence in a country, and then only indirectly, since the lawful residence in and of itself is not the basis for readmission obligations. Rather, states where stateless persons are lawfully resident have an obligation to issue them with travel documents.[116] Such travel documents must be valid for at least three months and at most two years.[117] As long as the travel document is still valid, the stateless person has a right to re-enter the issuing state.[118] Considering the explicit connection between the validity of the travel document and the readmission obligation, it must be assumed that this is also applicable if the lawful residence of the stateless person has lapsed in the meantime, but the travel document is still valid. However, the reverse situation may also occur. In a strict reading of the provisions of the Convention, as soon as the travel document has expired, the right to re-entry on the basis of the Convention also lapses, if the document is not renewed.[119] This would be the case even if the person still has lawful residence there. However, in such a situation certain other international provisions, discussed above, may come into play. Stateless persons who are not in possession of a Convention travel document that is still valid, and also do no longer hold lawful residence in their country of origin, however, would be unable to benefit from any clear obligation of readmission under the 1954 Convention.

4.3.4.2 The right to return under the ICCPR

As already discussed above, the right to return to one's own country provides for an almost absolute guarantee of readmission. While this right clearly pertains to nationals of a country, the group of persons who might benefit from it is wider. This wide scope is potentially of great importance to stateless persons seeking readmission to their country of habitual residence. This particularly hinges on the definition of such a country of habitual residence as stateless persons' 'own country' under Article 12(4) ICCPR, which would trigger the obligation on that country to readmit them.

115 Specifically, the protection of artistic rights and industrial property under Article 14, and access to courts under Article 16.
116 1954 Statelessness Convention, Article 28.
117 1954 Statelessness Convention, Schedule, paragraph 5.
118 1954 Statelessness Convention, Schedule, paragraph 13.
119 On renewal of travel documents for stateless persons, see 8.3.4.

The HRC has provided fairly extensive guidance on this, by making findings in individual complaints and through General Comment No. 27, in which its sets out its position on issues related to freedom of movement, including the right to return.[120] The general approach of the HRC in defining one's 'own country' is based on its views in the case of *Stewart v. Canada*,[121] which was later confirmed in other cases,[122] and became the basis for General Comment No. 27. The right to return to a country follows from a special relationship between a person and a country. This, as discussed, is satisfied through the bond of nationality, but special ties or claims may also exist for a person who "cannot be considered a mere alien."[123] The HRC gives two examples of persons who would be considered as more than 'mere aliens': (1) nationals of a country who have been stripped of their nationality in violation of international law; and (2) individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied to them.[124] Both cases clearly encompass persons who have been made stateless or remain so due to specific actions of a state. However, the HRC notes that the language of Article 12(4) ICCPR also "permits a broader interpretation that *might* embrace other categories of long-term residents."[125] Here, the HRC particularly points to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of residence. It also clarifies, however, that this broader category is not limited to such stateless persons and that "other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country."[126]

According to this position of the HRC, stateless persons who are long-term residents should thus be able to benefit from readmission to a country that is, on this basis, their own. However, this leaves unclear whether such residence is subject to specific conditions, such as lawful residence, or whether just long-term presence in a country might suffice. This is particularly important for stateless persons whose resident rights in their country of habitual residence have expired, for example by virtue of their departure to an EU member state, or who never had lawful residence in the first place. In this regard, the extent to which 'other factors' may determine that a

120 Typically, the individual cases did not deal with the destination of an expellee and the obligation to readmit. Rather, the topic was the expulsion of long-term residents, who challenged the legitimacy of the expulsion because they argued that the expelling state was their "own country." Therefore, they should always be allowed to re-enter it, and subsequently, they could not be expelled. Whilst the context is different, the HRC's approach to define the concept of "own country" is similarly applicable to readmission situations.

121 HRC *Stewart* [1996].

122 See, in particular, HRC *Canepa* [1997].

123 HRC General Comment 27, paragraph 20.

124 *Ibid*.

125 *Ibid*. (my emphasis).

126 *Ibid*.

country is one's 'own country' may be of special relevance. Much of the discussion over the last years as regards such other factors has focused on questions of nationality. A particular point of contention has been whether persons who can consider country A, of which they are not a national, their 'own country' within the meaning of the ICCPR, if they have the nationality of country B, even if that nationality is only formal. That is a matter that is clearly not directly relevant to stateless persons. However, in the process of tackling this question, the HRC has provided further clarification of the other factors, which are indeed relevant to stateless persons without lawful residence, and who would seek readmission nonetheless.

This clarification particularly follows from two cases, *Nystrom v. Australia* and *Warsame v. Canada*, decided three days apart in 2001. In each of the cases, the HRC found violations of the right to enter one's own country involving non-nationals, both of whom held the nationality of another state. Mr Nystrom sought to establish Australia as his own country, where he was a long-term resident, but had Swedish nationality. Mr Warsame sought the same for Canada, although being from Somalia. In these cases, the HRC looked at both sides of the equation. First, with regard to the country for which a right to enter was claimed, it looked beyond the question of potentially arbitrary denial or unreasonable deprivation of the opportunity to (re)acquire nationality, as provided for in General Comment No. 27. Rather, it focused more on the social links that the applicant had there. In both cases, the HRC noted that the concept of own country "invite[s] consideration of such matters as long standing residence, close personal and family ties and intentions to remain."[127] The HRC considered the young age when the applicants arrived in their countries of residence (27 days for Mr Nystrom, 4 years for Mr Warsame), the presence of their nuclear families in Australia and Canada respectively, and the main language of the applicants. For Mr Nystrom, the HRC also noted an Australian court had pronounced that he was an "absorbed member of the Australian community," that he bore many of the duties of a citizen and was treated as one, and that the applicant had never acquired Australian citizenship because he thought he already was a citizen.[128] For Mr Warsame, the HRC noted he had lived in Canada "almost all his conscious life" and he received his entire education in that country.[129]

On the other side of the equation, the HRC noted that 'own country' required consideration of the absence of links elsewhere.[130] For Mr Warsame, this included the fact that he had never lived in Somalia,[131] he had no ties there and had difficulties speaking the language. Furthermore, it noted Mr Warsame's claim that he did not have any proof of Somali citizen-

127 HRC *Nystrom* [2001], paragraph 7.4; HRC *Warsame* [2001], paragraph 8.4.
128 HRC *Nystrom* [2001], paragraph 7.5.
129 *Ibid*,, paragraph 8.5.
130 HRC *Nystrom* [2001], paragraph 7.4; HRC *Warsame* [2001], paragraph 8.4.
131 His family moved to Canada from Saudi-Arabia, where he had been born.

ship, and at any rate, that he had "at best formal nationality" in Somalia.[132] Weighed against the ties with Canada, the HRC found that the latter could be considered his own country. In *Nystrom*, despite it being clear that the applicant had Swedish nationality, the HRC considered he had no ties in Sweden and also did not speak Swedish. Balancing his strong ties in Australia with "the lack of any other ties than nationality with Sweden," it found that Australia was Mr Nystrom's own country.[133]

The approach in *Nystrom* and *Warsame*, in which more weight is given to social links in the presumed 'own country' and the lack of links to other countries, even if the person has nationality there, was not uncontroversial, even within the HRC itself.[134] It has been argued that the provisions of Article 12(4) are primarily meant "to protect strongly the right of a state's own citizens not to be exiled or blocked from return," including by stripping them of their nationality first, and thus not to allocate a country where a person has never held nationality as his or her 'own.'[135] However, the approach taken in *Warsame* and *Nystrom* has since been confirmed, and this more expansive notion of 'own country' thus prevails over one that is purely based on (lost or rescinded) nationality.[136]

To meet the requirements above, stateless persons who have not been made stateless or arbitrarily deprived of citizenship would have to show close links with the country of habitual residence, including on the basis of "long standing residence, close personal and family ties and intentions to remain."[137] The *Nystrom* and *Warsame* cases would suggest that the first element could be satisfied also after lawful residence has ended. Whether long periods of irregular residence would also be considered as a relevant element is another matter, and not clear from those cases since both had had lawful residence in their countries up until the moment that the states in question had decided to rescind these. However, particularly long presence

132 HRC *Warsame* [2001], paragraph 8.5.

133 HRC *Nystrom* [2001], paragraph 7.5.

134 In *Nystrom*, two dissenting opinions, encompassing the views of six HRC members, were put forward. The views in the *Warsame* case were only adopted with the smallest possible margin, with seven of the sixteen participating members dissenting.

135 HRC *Nystrom* [2001], individual opinion of Committee members Neuman and Iwasawa (dissenting), Appendix, paragraph 3.1.

136 See HRC *Budlakoti* [2018], in which the Canadian government argued that "the Committee's Views in those cases [*Warsame* and *Nystrom*] represented a departure from the Committee's consistent Views with respect to the deportation of a long-term resident for serious criminality and that the outcomes in those cases were out of step with an appropriate interpretation of State obligations under the Covenant" (paragraph 4.16). However, the HRC clearly rejected this argument, as it proceeded to examine the merits of the case very much along the lines of its approach in *Warsame* and *Nystrom* (paragraphs 9.2-9.3). Furthermore, its findings of a violation of the right to enter one's own country on this basis did not elicit, in contrast to *Warsame* and *Nystrom*, any dissent from any of the fourteen members examining the case, further suggesting that this approach is now well-established and accepted within the HRC.

137 HRC *Nystrom* [2001], paragraph 7.4; HRC *Warsame* [2001], paragraph 8.4.

in a country, especially if the person was born in the country or had moved there at a young age, and leading to their integration there in terms of social links and language, would appear to weigh heavily for the HRC. The question of intentions to stay may throw up some issues in view of the stateless person's departure to the EU member state. But even this should not be fatal. After all, the right to return particularly guarantees the possibility of persons to leave a country (as the other part of international movement rights) and have the possibility to always come back. The fact that a stateless person has decided to move to an EU member state temporarily, even for a number of years, should not affect this, as it would not for a national. If the stateless person would have stayed in the EU member state for extremely long periods, this may change, as it might shift the balance of ties between the two countries.[138]

But barring such a scenario, in general there can be little question that the individual would have important ties in another state. This possibility was considered, and rejected, in the above-mentioned cases on the basis of the applicants having the nationality of another state. In the case of stateless persons, this would obviously not be the case. Overall, then, there would likely be little reason to believe that a stateless person would have strong ties to another country. As such, provided that they could show substantial ties, through long standing residence but also through social links, language and other factors, the balance of determining their 'own country' would almost certainly have to tilt towards the country of habitual residence. Which would subsequently have an obligation to readmit them if they were exercising their right to return.

As an aside, the discussion above also shows that the concept of 'own country' in the ICCPR is broader than 'country of origin' under the Directive. The findings of the HRC suggest that the former concept applies not only to nationals and to stateless persons with sufficient links, but also to persons with such links, but who still hold the nationality of another state, provided their links with that state of nationality are weak. Both applicants in *Nystrom* and *Warsame* had the nationality of another country, but this did not prevent the HRC from finding that the country where they had lived for most their lives was their 'own country.' On this basis, a person formally holding the nationality of Somalia, but who has no strong links there and who instead has strong links with Kenya, for example, may be justified in considering the latter country as his or her 'own.' And would thus have a right to return there. However, as discussed in Chapter 3, the country of habitual residence (or where an individual otherwise has strong links) for persons who possess the nationality of another state is not part of the definition of 'country of origin' in the Directive. As such, in the example above, an obligatory return to Kenya, as a country of habitual residence, would only arise if it could be identified as a transit country within the meaning

138 However, in that case the EU member state would be more likely to have become the stateless person's 'own country' which would exclude his or her expulsion.

of the Directive. If this is not the case, this would still not preclude return to such a country, but this would then be on the basis of it being 'another third country,' which remains an option for the individual as a return destination, but not an enforceable obligation.

4.3.5 Implications for stateless persons' obligations to seek readmission to their country of habitual residence

While the notion of 'country of origin' in the Directive groups together the situation of stateless persons for whom a country of habitual residence can be identified and that of persons with a country of nationality, these are clearly not equivalent cases. This is evident from the respective readmission obligations that pertain to such countries. Whereas countries of nationality have a clear, widely recognised obligation to readmit expelled citizens, with few if any exceptions, such obligations are much more diffuse for countries of habitual residence of stateless persons. Customary obligations may pertain to former nationals, although this may well be limited to those who were purposefully deprived of their nationality by the country of habitual residence, and even this continues to be a matter of contention. Rules contained in readmission agreements in relation to former nationals are slightly wider in that regard. In either case, at a minimum, evidence of former nationality would be necessary to trigger the readmission obligation. Third-country nationals may thus be expected to provide relevant documentary evidence of this, to the extent possible, or to provide the country of origin with such information necessary to help it establish whether they are indeed former nationals. The requirement under readmission agreements that the former nationals have not obtained, or have been promised, the citizenship of the EU member state may require that member state to assist those individuals, for example by providing them with a declaration attesting to this. Proving the circumstances under which a person was deprived of nationality, such as may be required for readmission under customary international law, may be more difficult. Rather, this is a question that the country of origin may have to answer itself, for example by examining whether there is any information available that would show that the individuals in question had relinquished their nationality willingly. However, countries of origin may not be very inclined to admit they had unlawfully deprived individuals of their nationality, particularly if this was done with the view to preventing their re-entry. In this respect, the customary obligation may be difficult to trigger in practice.

Stateless persons may also be expected, as part of their obligation to return, to provide evidence of a right to residence, either still effective or one that was valid at least until the moment of arrival in the EU member state, according to the instrument applicable. Again, any documentary evidence of this (former) right to residence would have to be made available to meet the obligation to return. The same goes for information that would enable the country of origin to check whether such a residence right exists

or existed if no sufficient documentary evidence can be supplied by the individual. If based on readmission agreements, additional evidence to be provided may include the absence of a visa or residence right provided by the EU member state, or at least only one that was shorter than the validity of the residence right in the country of origin. Again, the absence of this will be difficult to prove by individuals themselves and may require the EU member state to provide a declaration or other document attesting to this. As noted, in contrast to readmission agreements, multilateral treaties, while making provisions for readmission on the basis of residence rights in certain cases, do not set out clear procedures. This may be particularly problematic since not only evidence of residence is required, but, strictly speaking, it should also be clear that the individual falls within one of the categories covered by these treaties, such as a smuggled person, victim of trafficking, or as an inadmissible person or stowaway. Being an inadmissible person could be attested by providing a copy of the return decision, but for other categories, member states do not necessarily foresee in separate documentation from which their 'status' can be proven. This is particularly the case for smuggled persons. The fact that a person was smuggled may follow from their own statements, but this does not necessarily result, on the side of a member state, in the recognition of the individual as a smuggled person under the Protocol. This may be different for victims of trafficking, for which separate frameworks exist, but whether this leads to the individual having specific documentary evidence of this status may vary.[139] Also in this case, the obligation of the individual to seek readmission may have to coincide with specific action by the EU member state to make it effective.

For those who cannot meet the conditions regarding former nationality or residence, the irregular entry criterion may be applicable, but this will generally only be of relevance in relation to the country of habitual residence in case of direct entry, and would be nullified if the stateless person had transited through other countries on the way to the EU. The implications of this will be discussed in more detail in Chapter 6. For now, it must be noted that such readmissions require not only action by the individual, but by the member state as well.

Inter-state readmission obligations leave numerous gaps, both in terms of the categories of stateless persons who are habitually resident in a country, as well as the geographical coverage, especially if the main basis for

139 For example, a person cooperating with the authorities in the identification and prosecution of perpetrators of trafficking may be able to show as evidence a temporary residence permit issued to her or him for this purpose. After this permit ends, and the obligation to return kicks in, it may serve to prove that the individual was indeed a victim of trafficking. This status may also be clear when individuals are supported through specific return programmes for victims of trafficking, such as those administered by IOM. However, victims of trafficking who do not press charges or otherwise are granted a temporary residence permit in relation to the investigation or prosecution of trafficking in human beings, or who are not assisted through specialised programmes, may be lacking evidence of them being a victim of trafficking.

return is formed by EU or bilateral readmission agreements. Human rights-based readmission obligations could potentially fill this gap. However, the extent to which the main instrument dealing with stateless persons can actually do so is extremely limited. While the 1954 Statelessness Convention provides perhaps for the clearest evidentiary requirements, they are also very restrictive.[140] The limited provisions on readmission are tied up with the possession by the stateless person of a Convention travel document, previously issued by the country of habitual residence, which still needs to be valid. This is likely to create practical problems even for those who were issued such documents before leaving the country of habitual residence, since their validity is quite limited. While there are some provisions covering the extension of the validity of such a document while being in the EU member state, the stateless person must ensure that, at the time of seeking readmission, it is still valid. The Convention does not provide for an obligation to readmit on the basis of an expired travel document, much less on the basis of any other evidence of previous habitual residence. In addition, it should be reiterated that ratification of the Convention is far from universal, covering less than half of all states worldwide, and obviously no readmission obligations arise out of the Convention for states that are not a party to it.

By contrast, readmission obligations of states of habitual residence based on the right to return in the ICCPR, which is almost universally ratified, are wide-ranging. Potentially, therefore, those obligations would be able to fill significant gaps left not only by the Statelessness Convention, but also by inter-state frameworks. The main issue as regards third-country nationals' efforts to show eligibility for readmission on this basis lies in the fact that the conditions to be fulfilled are both highly dependent on the individual case, and require an assessment of the overall circumstances of that case, rather than a single document or evidence of a single fact, such as prior residence. As such, it is not a priori clear what evidence third-country nationals who may be able to find readmission based on the country of habitual residence being their 'own country' would have to provide. In all likelihood, even establishing what can be accepted as sufficient proof that a specific third country is a stateless person's 'own country' may require a process of exchange and negotiation between the individual and the authorities of that country. That, in turn, would depend on those authorities being willing to cooperate, and at least, as an initial starting point, accept that the individual may have a valid claim to readmission on this

140 This is true both for the scope of persons covered and the readmission obligations incumbent on states of habitual residence. The definition in the 1954 Convention only covers those who are not considered a national by any state under the operation of their laws, but not, for example, those who hold formal nationality which is to all extents and purposes ineffective. Under Article 1(2), it also excludes a number of categories of individuals who may well come within the scope of the Directive, and thus faced with an obligation to return, but unable to benefit of the already limited readmission obligations set out in the Convention.

basis, which is to be examined further. As such, practically there may be significant obstacles to stateless persons using their right to return to their own country to ensure readmission, and thus their departure from the EU member state. Nevertheless, at least normatively, the individual right to return is the widest in scope for stateless persons, and could thus be seen as a key way to fill the gaps left by inter-state instruments, especially in view of the virtually absolute nature of the right to return.

In terms of the limits of the obligations on the individual, the same as for nationals generally applies. Although the scope of conditions to be met for readmission is wider, the various instruments set several conditions that, if fulfilled, must lead to readmission. As such, readmission cannot be made dependent on additional conditions which are not strictly necessary. If countries of origin nevertheless make such additional demands, EU member states cannot expect third-country nationals to meet these, as these fall outside of their individual responsibility. It should further be acknowledged that, although some relatively clear requirements for readmission can be identified, providing documentary evidence of any kind, including of identity, may be particularly difficult for stateless persons. Their possibility for obtaining relevant documents may often be connected to citizenship or immigration status.[141] For example, even when stateless persons have lived in a country all their lives, the mere fact of their statelessness may have prevented them from being issued identity documents, birth certificates, military service booklets or other kinds of papers that may later on help them prove their eligibility for readmission. As a general point, therefore, EU member states, in determining whether stateless persons have done what is necessary to seek return to their country of habitual residence, should take the particular difficulties that they might have in providing documentary evidence into account.[142]

4.4 Conclusions

While Article 3(3) of the Directive does not provide for a hierarchy of destinations, the country of origin is clearly the first among equals. It is not further qualified, while the other destinations are. Furthermore, there would appear to be an underlying assumption that every third-country national

141 See Van Waas 2008, p. 371: "for many stateless populations around the world, in particular those with an uncertain immigration status, the acquisition of any documents – for travel or proof of identity or status – is reportedly very difficult and costly, if not impossible. And earlier in this work we have already seen what a problem access to birth and marriage certificates can pose for the stateless." (citations omitted).

142 Somewhat unsatisfactorily perhaps, I will leave this point as just a general conclusion. Clearly, this raises further practical issues about how exactly member states can do this in a way that both fully ensures that individuals are not failing to meet their obligations under the Directive, but also making clear provisions for the specific difficulties faced by stateless persons. The myriad issues that arise out of this would warrant a separate study.

has a country of origin to which he or she can return, thus guaranteeing, at least in theory, that there is always a pathway to effective compliance with the obligation to return. When it comes to persons who are nationals of the country of origin this largely holds true, since there appear to be well-established customary readmission obligations, further bolstered by a range of specific agreements. Although some challenges to the presumption of a customary obligation to readmit expelled nationals may be put forward,[143] the assumption that such a general and unconditional readmission obligations exist is one of the key conceptual pillars for EU return policy. These readmission obligations also translate quite neatly into actions to be taken by third-country nationals under the Directive, in terms of the evidence of nationality and identity to be provided. Furthermore, they set clear boundaries for what cannot be expected of third-country nationals, covering any demands not directly connected to establishing nationality and identity.

The situation of the second group faced with an obligation to return to their country of origin, stateless persons with habitual residence in such a country, is much more opaque. Readmission obligations, at least at the inter-state level, clearly fall short of ensuring that all stateless persons can be readmitted to their country of habitual residence. While such obligations may arguably exist for some categories of former nationals, both under customary international law and readmission agreements, some further conditions may be attached, as discussed above. Residence rights play an important role in readmission agreements and a number of multilateral treaties, although the extent to which such residence rights must still be active varies. These provisions are furthermore dependent on either their specific applicability between an EU member state and the country of origin, or on the third-country national falling within a specific category defined by such treaties. As such, considerable gaps in the inter-state readmission framework for habitually resident stateless persons remain, and the assumption that they would always be able to return to their country of origin under the Directive is therefore not true in all, and perhaps even the majority of, cases.

It is for this reason that the role of human rights-based obligations, especially under the ICCPR, may be of crucial importance, since they provide for very strong readmission obligations for nationals, but also potentially cover a wide range of stateless persons who have their habitual residence in a third country. However, this conclusion brings us back to the earlier point about the crucial differences between inter-state and human rights-based readmission obligations. As noted, these are owed by the country of return to different actors, namely the EU member state in the case of inter-state sources and instruments, and the third-country national in the case of the right to return. And, as noted, the exercise of the individual right to return may be regarded as something over which the third-country national

143 See 5.2.3.

should, at least theoretically, have discretion. At the same time, this brings a dilemma clearly into focus: how must we assess the situation in which returning is both an individual right and an obligation under the Directive? This relationship between rights and obligations is one that goes to the heart of the issue of individual responsibility, and the tension between choice and coercion that lies at the centre of the concept of voluntary return. It therefore requires closer examination. This will be done in the next chapter, in which I will discuss the extent to which third-country nationals can be expected to put their human right to return at the service of the EU member state's interest in an effective return procedure.