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

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8 Obtaining travel documents

8.1 Introduction

This chapter is still part of the examination of the actions to be taken by third-country nationals, and limits thereon, in fulfilling their obligation to return, as set out in the first research question. However, whereas the previous chapters have focused on the matter of seeking readmission to specific destinations, this chapter will focus on the second element that was considered a necessary part of the return process, and thus of the obligation to return: obtaining travel documents. As noted in the introductory chapter, obtaining travel documents will normally be a necessary precondition for the fulfilment of the obligation to return by any third-country national who is not already in possession of such documents, or whose travel documents are no longer valid. Such a valid travel document will generally be required for the departure through regular channels from the EU member state, the boarding of transportation to take third-country nationals to their destination, and the entry into that destination; possibly in combination with further proof that they should be admitted there, like a visa.

Whilst an integral part of the process of returning, the current Directive does not include any clear provisions on this issue in relation to voluntary departure. Obtaining the "necessary documentation" from third countries is, however, addressed in relation to the possible extension of the period of detention beyond the normal maximum period of six months when a third-country national is removed.[1] The European Commission's proposal for a recast Directive makes the obligation to obtain travel documents more explicit, as part of a new article imposing certain cooperation obligations on third-country nationals. These include "the duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document."[2] In my view, this can best be considered as a codification of a duty already implied within the broader obligation to return in the current

1 RD Article 15(6)(b).

2 COM(2018) 634 final, Article 7(1)(d). To this, the Council suggests adding the phrase "and to provide all information and statements necessary to obtain such a document and to cooperate with these authorities," Council partial general approach, doc. 12099/18, 23 May 2019, p. 49, amendment to Article 7(1)(d).

Directive.[3] As regards the third-country national's obligations to obtain travel documents, therefore, some general actions that can be expected of them may already be acknowledged. This includes, first, identifying the competent authorities in a position to issue a valid travel document, and to make an application with them. Second, as part of that application, to provide documentary evidence and other information that may be necessary to assess whether a travel document can be issued, including doing so in person if so required.[4] And third, although not mentioned in the proposals above, to fulfil any other administrative requirements necessary for the issuance of a travel document, such as the payment of fees, since this will normally be part of the process of obtaining travel documents.

The analysis of this particular element of the obligation to return will proceed as follows. First, 8.2 will look at situations in which there may be no need to obtain travel documents, which would be the case if the third-country national already has valid travel documents, but also in certain situations in which return would be possible even in the absence of such documents. Subsequently, section 8.3 will look at the specific obligations of countries of return to issue travel documents, and what implications these have for the third-country national's obligations. In section 8.4, attention will turn to specific issues and limits regarding the third-country national's interactions with the consular authorities responsible for issuing travel documents, including in relation to access to such authorities, the evidence to be provided by the third-country national, the payment of fees, but also the prevention of corruption and of the use of fraudulent travel documents. When it comes to access to such authorities, this may imply specific obligations of facilitation on the EU member state. Section 8.5 will furthermore discuss the possibility that the EU member state can act as the competent authority to issue travel documents, and under which conditions the third-country national can be expected to make use of this possibility. Conclusions to this chapter are presented in section 8.6.

3 Provided this can be done without violating the safeguards set in Directive 2013/32 (the recast Asylum Procedures Directive), Article 30, prohibiting information exchanges with countries of origin that could compromise the safety of the applicant or family members during asylum procedures, which would also apply if the third-country national has been issued a return decision but is still awaiting a decision on appeal of his or her asylum request.

4 This may particularly be related to the prevention of the circulation of 'blank' travel documents. The CTOC Smuggling Protocol, Article 10(1)(a), for example, requires states parties to cooperate, by sharing information, in addressing the potential misuse of such blank documents.

8.2 Situations in which there is no need to obtain travel documents

Below, two specific situations in which no action to obtain travel documents may be necessary, but which may still raise issues, are discussed: if third-country nationals already have valid travel documents, but these have been confiscated (8.2.1), and when travel to the destination country is possible without such documents (8.2.2).

8.2.1 Third-country nationals already in possession of valid travel documents and confiscation by the EU member state

It should go without saying that the obligation to obtain travel documents is not relevant to those who already have such valid documents. The situation of third-country nationals who already have valid travel documents could be completely ignored in this chapter, were it not for the specific situation in which those documents are not directly in their possession. This may happen at different points. For example, Article 13(b) of Directive 2013/32 (the recast Asylum Procedures Directive) allows member states to require asylum seekers "to hand over documents in their possession relevant to the examination of the application, such as their passports." While this is tied to the asylum procedure, it appears that, as a matter of practice, not all member states return such documents to the individual when an asylum application is rejected; rather, asylum authorities may keep them or hand them over to the authorities in charge of return procedures.[5] Furthermore, as discussed, member states may impose measures to prevent absconding during the voluntary departure period, which includes the submission of documents.[6]

As regards the first situation, it may be logical for the member state to retain the travel documents of a rejected asylum seeker if a return decision is issued simultaneously with the rejection, and if the member state will proceed immediately with the enforcement of that decision. That is, if no voluntary departure period is granted. However, questions may arise when the third-country national is entitled to a voluntary departure period, especially in terms of the legal basis for retaining documents. Under the recast Asylum Procedures Directive, submitting documents is clearly connected to the examination of the application, which will have ended at the point of rejection and therefore cannot justify keeping those documents anymore.[7]

5 See EMN 2016 with specific examples from member states.

6 RD Article 7(3) and see discussion in 7.2.2.

7 Unless these are fraudulent and they would be obliged to take them out of circulation, see 8.4.3 below.

And under the Returns Directive, the only basis for keeping third-country nationals' travel documents during the voluntary departure period would be to prevent them from absconding. Notwithstanding the fact that several member states report that they foresee this possibility in national law, when there is no risk of absconding, there appears to be a clear gap in the legal basis at the EU level for this.[8] This could amount to less favourable treatment of the third-country national than the Directive foresees. This is particularly problematic from the perspective of the right to leave which, as discussed below, is closely tied up with the individuals having travel documents at their disposal.[9] Although this right can be limited, it is difficult to see to which legitimate aim the interference of depriving a person of his or her travel documents can be connected. While quite a broad interpretation of migration control reasons can be accepted as a legitimate aim, especially in relation to public order,[10] it is not obvious how this aim is affected by the return of travel documents in this situation. After all, we are speaking about third-country nationals who are under obligation to return and have been accorded an opportunity to do this of their own accord, and for whom the member state has not found there is a risk of absconding that would undermine the objective of effective return.[11] As such, there appears to be no reason to fear that the state's aim of migration control is negatively affected.

It could be argued, however, that member states can arrange at any time to make confiscated travel documents available when these are needed, thus negating any potential negative effects for the third-country national being prevented from taking possession of such documents.[12] Whilst this may solve practical issues, it does not address the lack of a clear legal basis in EU law, and the fact that the right to obtain travel documents, as a corollary of the right to leave, should be respected even in the absence of a clear intention of the individual to travel.[13] The situation may be different, of course, when member states do consider there is a risk of absconding. In such cases, the Directive does provide a clear legal underpinning for keeping documents, although again this would imply that the asylum and return procedures seamlessly connect.[14]

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8 EMN 2016.

9 See 8.3.3.

10 See, for example, ECtHR *Stamose* [2012], in which the Court, in principle appears to take a fairly flexible approach as to which migration control considerations could be connected to the legitimate aim of public order.

11 For more on this, see 10.4.

12 See, for example, the approach of the Netherlands in EMN 2016, with the Repatriation and Departure Service making such documents available to consulates for the return procedure, but otherwise "[t]he documents will not be returned as they are still necessary for the return procedure."

13 See 8.3.3.

14 While efforts are being made to better connect EU asylum and return rules (see, for example, Slominski & Trauner 2020), in many member states this may still not be the case, leaving a potential legal gap.

8.2.2 Return without travel documents?

The obligation to obtain travel documents may also not be relevant when third-country nationals, even when they do not have such documents, can still return. These circumstances are mostly exceptional, and may come with further practical problems, but they cannot be completely excluded. Various international agreements provide for regimes for return without official travel documents. Under the Chicago Convention, air carriers must transport inadmissible persons on the basis of a removal order.[15] It is somewhat unclear whether return of inadmissible persons under Chicago Convention could happen without travel documents. On the one hand, the carrier is obligated to return an inadmissible person to the state of embarkation on the basis of a removal order. And the state of embarkation is required to accept him or her "for examination." However, the Convention also sets out rules for cooperation on the procurement of travel documents if needed to return an inadmissible person. When it comes to inadmissible persons arriving by sea, including stowaways, the FAL Convention appears to provide more flexibility in returning persons without travel documents.[16]

Possibilities to travel without valid travel documents may also be formalised in EU readmission agreements. In the EU's agreement with Ukraine, for example, a situation is foreseen in which third-country nationals travel with expired travel documents. This, however, is only the case when Ukraine has earlier provided a travel document, but the return has been delayed, and Ukraine has not extended the document in time. In lieu of a valid travel document, then, the expired document is accepted.[17] The EU's agreement with Turkey goes a step further. Under the normal procedure, once Turkey notifies that it is ready to accept the third-country national back, it should provide a travel document within three days, although this period is extendable. However, if there is no consular office to issue a travel document, or a travel document is not provided within three days, the reply to the readmission request will be considered as the necessary document for return.[18] Both situations still imply that the relevant carrier (if any is used) agrees to transport the third-country national on the basis of an expired document, although such cooperation is more likely to be forthcoming when this is a clearly established practice under an international agreement and the readmission of the third-country national is guaranteed.

On the whole, however, third-country nationals who do not possess valid travel documents will need these to effect their return, and they can be expected to take the relevant steps to obtain such documents as part of

15 Chicago Convention, Annex 9, fifteenth edition, standard 5.5.
16 FAL Convention, Annex, Section 4, Part E, Recommended Practice 4.1.4.1.
17 EU-Ukraine readmission agreement, Article 2(2).
18 EU-Turkey readmission agreement, Article 3(4).

their obligation to return. The remainder of this chapter will therefore focus on the frameworks for obtaining documents and their implications for the third-country national.

8.3 Third countries' obligations to issue travel documents

As with the question of readmission discussed in the previous chapters, the third-country national's obligation to obtain travel documents is one that exceeds the confines of the legal relationship between the individual and the member state. Since, in the vast majority of cases, it will be a third country issuing such documents,[19] the external dimension of the triangle model presented in Chapter 1 will again come into view and play a decisive role in shaping the individual's obligations. Again, the specific obligations of third countries to issue travel documents will to a large extent determine what conditions third-country nationals must fulfil to obtain these. And thus what EU member states can and cannot expect of third-country nationals in this respect.

This section will therefore focus on the specific obligations that countries of origin, transit countries, and potentially other third countries have to issue travel documents to third-country nationals engaged in voluntary return proceedings. It will first discuss such obligations arising out of customary international law and inter-state agreements, which connect the requirement to issue travel documents to obligations to readmit expelled persons (8.3.1). It will subsequently look at human rights-based obligations to issue travel documents, which may be applicable also in situations in which there is no expulsion. This will include a brief look at the effect of the right to return on the issuance of travel documents (8.3.2). Subsequently, the obligation to issue such documents as a means to safeguard the right to leave, including by issuing a passport rather than single-use documents, is discussed in more detail (8.3.3). Finally, obligations of states of habitual residence to issue travel documents to stateless persons are examined (8.3.4).

8.3.1 The link between readmission obligations and the issuance of travel documents in inter-state instruments

As noted in the introductory chapter, the issues of gaining readmission and obtaining travel documents often overlap, even if they are discussed in this dissertation as two separate analytical issues. Several of the sources and instruments discussed in the previous chapters provide that, if the country of return is obligated to readmit the individual, it should also provide replacement travel documents if this is necessary to complete the readmission process. For example, the obligation to issue replacement travel

19 Although see the possibilities of EU member states to do this themselves in 8.5.

documents if this is necessary for return is considered a corollary of the obligation to readmit expelled nationals under customary international law, although the conditions under which this is done remain a matter for the state in question.[20]

The link between readmission obligations and the obligation to issue travel documents is also made in EU readmission agreements, in which the issuance of travel documents is one of the key steps of the procedure agreed between the parties. In a number of these agreements, the responsibility for issuing such documents does not only relate to returning nationals, but also to non-nationals who have transited through the country on their way to the EU.[21] As discussed in Chapter 6, all this requires the active intervention of the EU member state to trigger the procedure that would result in the issuance of travel documents. Since the request for readmission can be made without the consent of the third-country national, this also implies that states of return should issue travel documents regardless of whether the third-country national wants to return or not.[22]

Various multilateral agreements also link readmission obligations to the duty to issue travel documents. This is the case, for example, in the UN Smuggling and Trafficking Protocols. As discussed, these Protocols require the readmission of smuggled persons and of victims of trafficking by the state of nationality. Furthermore, a right of permanent residence, which, in the case of a victim of trafficking may have expired, also triggers a readmission obligation. In such cases, the state in question should also agree, in order to facilitate return, to issue "valid travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory."[23] The Chicago Convention similarly provides that states should provide travel documents to facilitate the return of their nationals, when so requested.[24]

In all the cases above, the 'competent authority' to which third-country nationals should turn to obtain travel documents is the country where they are seeking readmission. However, if third-country nationals' right to choose their destination is to be effective,[25] they must be able to obtain travel documents to return to their intended destination, including another third country. Such a country will normally not issue the travel documents

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20 Hailbronner 1997, p. 15.

21 However, it should be noted that not all EU readmission agreements put the responsibility of issuing replacement travel documents with the country under duty to readmit. In some cases, readmission may even occur without valid documents being issued.

22 See, for example, EU-Russia readmission agreement, Article 2(2): ."..the competent diplomatic mission or consular office of the Russian Federation shall *irrespective of the will of the person to be readmitted*, as necessary and without delay, issue a travel document for the return of the person to be readmitted...," and similar clauses in other readmission agreements (my emphasis).

23 CTOC Smuggling Protocol, Article 8(4); CTOC Trafficking Protocol, Article 8(4).

24 Chicago Convention, Annex 9, fifteenth edition, Standard 5.26.

25 See 7.2.

necessary for return, and third-country nationals will mainly depend on their country of nationality for this. Furthermore, countries of return can meet any obligations related to readmission by issuing single-use documents, such as emergency travel documents or *laissez-passers*, since this is sufficient to allow the individual to return and be readmitted.

Obligations to provide documents for departure to other countries, which should then be valid more widely than emergency travel documents or *laissez-passers*, to the extent they can be said to exist, mainly seem to relate to ensuring that procedures to obtain travel documents are transparent and accessible. But they do not provide for a substantive obligation to issue such documents in situations other than if the person returns to that state specifically. For example, the Chicago Convention requires contracting states to "establish transparent application procedures for the issuance, renewal or replacement of passports and shall make information describing their requirements available to prospective applicants upon request."[26] The wording used would arguably also apply if these contracting states are not themselves the intended destination of return.

8.3.2 The right to return and the right to travel documents

While the right to return provides a strong claim to readmission,[27] case law suggests that the obligation on states to issue travel documents on the basis of this right may be surprisingly limited. In particular, this seems to arise from the fact that a claim to the right to return can be satisfied by ensuring the de facto ability to return. This does not necessarily translate into a self-standing right to travel documents, nor one that would ensure a travel document given the widest possibilities for international travel. As we have seen in the *Nystrom* case, respect for the right to return under the ICCPR may require a person's own country to "materially facilitate" his or her re-entry.[28] This material facilitation, in my view, can be understood to include the issuing of travel documents if this is necessary. However, the extent of this obligation to issue travel documents on the basis of the right to return may be more context specific. In *Nystrom*, the HRC's finding came in the context of an unlawful expulsion of Mr Nystrom by his own country, with the material facilitation of his return necessary to undo this. It is less clear that the right to return encompasses the right to travel documents if individuals are expelled from another country because of their irregular stay.

The Strasbourg institutions, in the limited cases in which they have dealt with the right to return and travel documents, appear to have taken a fairly restrictive approach. For example, in *Marangos v. Cyprus*, the European Commission for Human Rights dealt with a Cypriot citizen who was

26 Chicago Convention, Annex 9, fifteenth edition, Standard 3.15.

27 Although this is not a right that EU member states can require an individual to invoke, see 5.3.5.

28 See 4.2.4.

living abroad and who had been denied a passport because of his refusal to perform his military service. Nevertheless, he did secure re-entry to Cyprus, which led the Commission to conclude that he had not substantiated that the denial of the passport had deprived him of his right to enter.[29] Similarly, In *Momčilović v. Croatia*, the Court found a complaint of a violation of the right to return inadmissible because the applicant had in fact been able to enter the country.[30] Interestingly, the applicant argued that, whilst this was true, he had had to re-enter in an irregular manner, since the Croatian authorities had never issued him with documents. The Court noted that, despite the claim of irregular entry, the applicant was never prosecuted for this, and he was issued identity documents and a passport without further delay after returning to Croatia.[31] It should be noted that neither case dealt with expulsion of the applicant. However, they both indicate that the main consideration in finding a violation of the right to return by the country of nationality lies not in the refusal to issue a travel document, but in the de facto impossibility of returning. This does not rule out that a refusal to issue travel documents could lead to a violation. However, this would depend on a clear link between this refusal and the actual impossibility of re-entry, rather than the refusal itself. Furthermore, even if this link could be established, the case law above would suggest that any obligations on the part of the state could be met effectively by issuing a single-use document only valid for return. In this way, the right to return distinguishes itself from the right to leave, which encompasses a much clearer claim to travel documents.

8.3.3 The right to leave and the right to travel documents with the broadest possible validity

In contrast to the right to return, the right to leave provides a clear basis for a right to travel documents. Additionally, it provides for a right to documents that are valid for travelling to other countries than the country of origin. The HRC has devoted significant attention to the question of persons seeking to obtain travel documents from their countries of nationality, including when staying elsewhere.[32] The HRC has found that a passport in

29 ECommHR *Marangos* [1997].

30 ECtHR *Momčilović* [2002].

31 *Ibid*. The decision in *Momčilović* could be read as implying that this is even the case if the person has to circumvent the state's migration controls to do so. In my view, this would be very unreasonable, and it is unlikely that, despite appearances, the Court would have considered that illegal entry is a credible way to exercise one's right to return. Rather, its finding on the illegal entry should likely be read in light of the fact that documents were issued immediately after Mr Momčilović's return to Croatia, showing that the state had not been unwilling to allow him to enter.

32 The ECtHR, by contrast, has only dealt with the negative obligations on the state in which a person is present at that moment. However, as noted before, the ECHR is of limited significance to the obligations of countries of origin anyway, with the exception of those within the Council of Europe area.

particular is a means of enabling individuals to exercise their right to leave any country,[33] which should be facilitated by the country of nationality, normally the only party authorised to issue a passport.[34] The HRC has held that the fact that a person is outside the state of nationality does not in any way affect this obligation, because even abroad a person remains subject to the jurisdiction of the state of nationality for the purpose of issuing a passport.[35] What is more, the right to obtain a passport as a result of the right to leave has been found to be applicable regardless of the intended destination of the individual, or even regardless of whether the individual has the intention to travel at all. [36] The obligation to fulfil this right remains incumbent on the state of nationality, even if another state presents the individual with a travel document. In *Lichtensztejn*, a Uruguayan national living in Mexico argued that a travel document provided by Mexico, which had various limitations, was not an adequate substitute for a Uruguayan passport.[37] This was apparently accepted by the HRC, as it proceeded to examine the Uruguayan government's failure to issue a passport.[38]

The obligation to issue a passport is not absolute, but restrictions must meet the conditions set out in the limitation clause applicable to the right to leave.[39] In this regard, the HRC found the withholding of a passport to a citizen abroad because he had failed to meet his military service was justified.[40] However, in the majority of the cases, the HRC found a violation of the right to leave because no adequate justification was presented. Additionally, the length of time it takes for a state to respond to a request for a travel document may be a violation of the right to leave. Although no clear deadline is set by the HRC, not replying in due time, or keeping an application "under consideration" for an indeterminate period of time, clashes with the state's positive obligations.[41] This is important as the unclear length of time of proceedings to obtain a travel document may be one of the main sources of tension between a voluntary returnee and the EU member state.

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33 HRC *Lichtensztejn* [1983], paragraph 8.3.

34 But see Torpey 1999, p. 161, who refers to the exclusive competence of states to issue passports to those with close links, which may be broader than just citizens.

35 HRC *Vidal Martins* [1982], paragraph 7; HRC *Lichtensztejn* [1983], paragraph 8.3.

36 HRC *Lichtensztejn* [1983]; ECtHR *Baumann* [2001]; Hannum p. 6: "The right to leave cannot be made to depend on the ability to exercise the right immediately or even in the foreseeable future."; Strasbourg Declaration, Article 10(c).

37 HRC *Lichtensztejn* [1983], paragraph 5.5.

38 *Ibid*., paragraph 8.2.

39 ICCPR Article 12(3): "The above-mentioned rights shall not be subject to any restriction except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

40 HRC *Peltonen* [1994], paragraph 8.4.

41 HRC *El Ghar* [2004]. Also see Strasbourg Declaration, Article 10(d); Uppsala Declaration, Articles 15(b) and 16.

The above indicates that third-country nationals do not only have an individual right to travel documents, which they hold vis-à-vis their countries of nationality, but a right to a travel document which would allow them to travel to the widest possible range of destinations, meaning in practice a passport. This is relevant to our situation since other obligations to issue travel documents, discussed above, are much more limited and could be fulfilled with a one-off travel document, valid only for a single trip to the country of readmission. From the perspective of third-country nationals, however, obtaining a *laissez-passer* may be undesirable. As noted, it would limit their freedom to choose their destinations, since it would only allow them to return to the issuing state, which would either be the country of origin or the transit country. Furthermore, particularly when returning to a transit country, obtaining a passport may be much more preferable. Third-country nationals returning to a transit country on a one-off travel document may find themselves in a similar position as in the EU member state: with an uncertain or irregular status and in need of documents to travel onwards. Passports also hold important value as proof of the holder's nationality, which may impact on such issues as his or her ability to enjoy diplomatic protection.[42]

As part of the voluntary return process, therefore, third-country nationals may turn to their country of nationality not only with a general request for a travel document, but they have the right to make a specific claim to obtain a passport, or to have their expired passport renewed. However, practical issues may intervene. As a general rule, issuing or renewing a passport will likely take more time than issuing an emergency travel document. For example, passports may have to be sent from the issuing countries' capitals, which will inevitably prolong the processing time. By contrast, consular authorities are likely to have direct disposal over emergency travel documents, and whilst they may have to seek authorisation from their capitals to issue these, the process will often be quicker. Furthermore, an application for a passport may be costlier for the third-country national than applying for an emergency travel document.[43] Apart from impacting on the specific travel document third-country nationals can obtain, and thus the scope of possible destinations to which they can travel, these factors are important because they can have specific implications for the relationship between third-country national and the EU member state.

42 Hagedorn 2008.

43 For example, Armenians aiming to return would have to pay € 116 for a replacement passport, while a Certificate of Return (a *laissez-passer*) would be issued for either € 18 or for free, depending on the circumstances of the case, see Armenian Ministry of Foreign Affairs 2021. Similarly, Ghanaian nationals returning from Ireland would pay between € 120 and € 180 for a renewed passport (32 or 48 pages respectively), or € 140 to € 200 for a lost passport, while the fee for an Emergency Travel Certificate is listed at GBP 65. Furthermore, the processing time of the former is indicated as two to three weeks, while the latter is issued in five working days, see Ghana High Commission in the UK 2021a and 2021b.

While they can be considered to be under obligation not to interfere with third-country nationals' attempts to obtain a passport, member states' positive obligations in this regard are not clear. For example, while return assistance programmes financed by member states usually foresee the coverage of costs for travel documents, member states may want to limit this to the cheapest option.[44] Furthermore, if the process for issuing a passport takes longer than the initial voluntary departure period, the practical possibility of obtaining this document may depend on whether the member state can be expected to extend this period.[45] As such, the actual enjoyment of the right to a passport is contingent on a number of other issues in relation to voluntary return.

8.3.4 The obligation to issue travel documents under the 1954 Statelessness Convention

The frameworks for assigning obligations to issue travel documents, which mainly pertain to the country of nationality, leave an important gap for stateless persons. While the country of habitual residence of stateless persons is considered their country of origin within the meaning of the Directive, the country of habitual residence cannot be seen as simply equivalent to a country of nationality for the purpose of issuing travel documents. In particular, the readmission obligations of countries of nationality and countries of habitual residence differ significantly.[46] The existence of a readmission agreement may fill this gap. After all, these typically do not only cover the return of nationals, but also of third-country nationals, which would include stateless persons. Again, this would only pertain to documents sufficient to enable return. This would also be the case if stateless persons can lay a successful claim to return to their 'own country' within the meaning of the ICCPR, which may also trigger an obligation to materially facilitate this return when necessary, but not necessarily to issue a passport.

Since the right to leave, and the connected right to travel documents allowing for the widest possible range of destinations, is held by everyone, including stateless persons, it must be wondered whether the country of habitual residence can still be expected to ensure the fulfilment of this right. Some support for the position that the state of habitual residence of a stateless person takes over the functions the administrative functions normally exercised by a state of nationality can be found in the 1954 Statelessness Convention. The Convention makes certain provisions for such administrative functions, including with regard to travel documents. In this context, the first sentence of Article 28 of the Convention is of particular interest:

44 For further discussion of the role of assistance in the voluntary return procedure, see 9.3.
45 On the extension of a voluntary departure period, see 11.3.
46 See 4.3.

> *"The Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents."*

This provision raises a number of issues, however. Van Waas, for example, notes that it may facilitate the international movement of stateless persons like it would for nationals, but only to "a greatly limited extent."[47] Firstly, it is clearly limited to stateless persons "lawfully staying in their territory." Whilst 'habitual residence' in the meaning of the Directive could conceivably also encompass long-term stay in a country without the appropriate legal status,[48] the lack of such a legal status would negate that state's obligation to issue travel documents under the Convention. For any other stateless person, not meeting the 'lawfully staying' criterion, the second sentence of Article 28 only provides that states "may issue" a travel document. Furthermore, they shall "in particular give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence."[49] Beyond the question whether a stateless person is lawfully staying, a state of habitual residence could also potentially deflect any obligation to issue travel documents by arguing that a stateless person who is applying for them while in an EU member state is not, at that point, on its territory, and therefore does not fall within the scope of Article 28. This, however, would be a very reductive reading, and would be difficult to reconcile with the obvious intention of the Convention to ensure that stateless persons have some authority to turn to for essential administrative matters, including travel documents. A more flexible reading would thus consider "lawfully staying in the territory" as meaning that the stateless person still has an active right of residence there, even if he is not physically present at the moment. This would be consistent with the fact that the Convention clearly foresees the possibility of stateless persons, like others, being able to travel internationally, which should not immediately affect their residence right or the right to return.[50]

A more flexible reading is also supported by the fact that the Schedule attached to the Convention clearly foresees the possibility of issuing travel documents to stateless persons staying abroad. Paragraph 6(2) specifically notes that "[d]iplomatic or consular authorities may be authorized to extend, for a period not exceeding six months, the validity of travel documents issued by their Governments." It should be noted, however, that this is specifically connected to the renewal or extension of documents already

47 Van Waas 2008, p. 252.
48 See 3.2.3.
49 1954 Statelessness Convention, Article 28, third sentence; also see Van Waas 2008, p. 373.
50 See 4.3.4.1 on the obligation of the state to readmit a stateless person within a certain period of validity set out in the document.

issued by that state.[51] This could arguably exclude stateless persons who are abroad and are only then applying for a travel document for the first time, rather than seeking renewal or extension of a pre-existing travel document.

When the state of habitual residence is required to issue travel documents, the Convention sets out certain requirements. It should indicate that the holder is a stateless person under the Convention.[52] The validity of travel documents should normally be "not less than three months and not more than two years,"[53] with the above-mentioned possibility of extension by a maximum of six months. Importantly, the travel document should "be made valid for the largest possible number of countries," except in special or exceptional circumstances.[54] Furthermore, any fees charged for the issue of the document "shall not exceed the lowest scale of charges for national passports."[55] It should be noted that, whilst the 1954 Convention arguably does fill some gaps with regard to travel documents left by the absence of a country of nationality, the Convention is far from universally ratified. At the time of writing, 91 states are party to the Convention, leaving a majority of potential destination states that have not ratified it.

8.4 Interactions with the competent authorities: requirements and limitations

When an appropriate competent authority is identified to which third-country nationals should apply for travel documents, other questions may arise about their interaction with such an authority. In this section, three specific issues are discussed. First, this is the matter of having effective access to such authorities, which should normally be unproblematic, but in some cases may require specific action by the EU member state (8.4.1). Second, the question of the payment of fees for documents (8.4.2). And third, ensuring that the process does not lead to the issuance of documents that could be considered fraudulent, or are otherwise improperly issued (8.4.3).

8.4.1 Access to consular authorities

As a practical matter, the application for travel documents – whether or not in combination with a readmission request- will often require that third-country national present themselves physically at the consular authorities

51 1954 Statelessness Convention, Schedule, paragraph 6(1): "The *renewal or extension* of the validity of the document is a matter for the authority which issued it, so long as the holder has not established lawful residence in another territory and resides lawfully in the territory of the said authority. The issue of a new document is, under the same conditions, a matter for the authority which issued the former document." (my emphasis).

52 1954 Statelessness Convention, Schedule, paragraph 1(1).

53 1954 Statelessness Convention, Schedule, paragraph 5.

54 1954 Statelessness Convention, Schedule, paragraph 4.

55 1954 Statelessness Convention, Schedule, paragraph 3.

of the state that should provide these.[56] The work of consular authorities is regulated in particular by the 1963 Vienna Convention on Consular Relations, which, to a considerable extent, codifies pre-existing rules of customary international law. Under the Convention, consular functions include "issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State."[57] The 'sending state,' in the parlance of the Convention, is the state which has established a diplomatic mission or consular post in another state. The Convention provides that consular functions are undertaken by consular posts, which are any consulate-general, vice-consulate or consular agency.[58] Consular functions may also be undertaken by diplomatic posts, such as embassies, acting in accordance with the provisions of the Convention.[59] Consular functions are, in principle, exercised only within a designated 'consular district,' which is the particular area assigned to a consular post for the exercise of its functions.[60] This is typically one state, meaning one particular consular post is responsible for carrying out consular functions in one other country. However, the Convention leaves open the possibility that a consular post services several countries at the same time.[61] Consular functions can also be exercised on behalf of another state, if it properly notifies the receiving state and if that state does not object.[62]

A basic principle of the Convention is that nationals should have effective access to their consular authorities in order to make use of consular services.[63] This may also include obligations that are incumbent on the EU member state, as the host of a foreign consular representation. These encompass guaranteeing the inviolability of consular premises, and the protection of the freedom of communication of the consular post for all official purposes. Importantly, consular officers must be free to communicate with their nationals. Those nationals have the same freedom to communicate with and to have access to consular officers of their state of nationality.[64]

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56 In this respect, the Council also suggests adding to the Commission's proposed explicit duty to apply for travel documents in the recast proposal a further obligation "to appear in person, if and where required for this purpose, before the competent national and third country authorities." See Council doc. 12099/18, 23 May 2019.

57 Vienna Convention, Article 5(d).

58 Vienna Convention, Article 3; Article 1(1)(a).

59 Vienna Convention, Article 3; Article 70. In many cases, embassies will also have a consular section to perform consular, rather than diplomatic, functions.

60 Vienna Convention, Article 1(1)(b).

61 Vienna Convention, Article 7.

62 Vienna Convention, Article 8.

63 This can also be considered a function of the right to leave. See, for example, Inglés 1963, draft principle III(d): "No foreigner shall be prevented from seeking the diplomatic assistance of his own country in order to ensure the enjoyment of his right to leave the country of his sojourn." Also see Strasbourg Declaration, Article 10(b) on access to consulates.

64 Vienna Convention, Article 36(1)(a).

Consular posts must also be notified of nationals in prison and be free to access them (and vice versa).[65] Such obligations should be read, first and foremost, as obligations of non-interference. However, I suggest, they also imply positive obligations on the EU member state. This is evident, for example, from the requirement that consular authorities should have access to their nationals in prison, which would not be possible without positive action by the EU member state. Whilst such situations would not arise with regard to voluntary departure situations, there may be situations in which the EU member state should take concrete steps to facilitate access.

Above, I discussed the impact of certain measures to prevent absconding, such as the confiscation of documents.[66] That discussion dealt with valid travel documents. However, the EU member state may have also taken other documents, such as identity documents or expired documents, which could be relevant evidence when the third-country national applies for replacement travel documents. As noted, this may raise questions how to balance the need to allow third-country nationals to take the appropriate steps to arrange their return, whilst continuing to prevent absconding. Temporary return of documents to third-country nationals, at least for the duration of their interaction with the consular authorities, may be one way to solve this. The approach sketched above, in which the authorities directly share confiscated documents with the consular authorities of the relevant country of return, may also be a way to deal with this problem.[67] In either case, the need to ensure the effective achievement of the Directive's objectives would require the EU member state to take positive action to ensure that necessary documents can be presented, with a failure to do so in a timely manner having an obvious impact on third-country nationals' ability to meet their obligation to return within the voluntary departure period. Such circumstances should be taken into consideration when assessing compliance with this obligation. Other measures to prevent absconding may also have a practical impact on third-country nationals' access to consular authorities, for example when they are subject to reporting duties or restrictions of movement. Here, the right to leave and the requirement to ensure the *effet utile* of the Directive both point to the need for EU member states to strike an appropriate balance between such restrictions and enabling access to consular authorities. This may include the temporary lifting of restrictions on movement or allowing the third-country national to report at a later time or with a longer interval. Alternatively, this may be done by ensuring that consular officials have access to third-country nationals wherever they are staying. Similar obligations would arise, in my view, from the Vienna Convention.

65 Vienna Convention, Article 36(1)(a)-(b) and (2).

66 See 8.2.1.

67 Although this would limit the possibility of autonomous action by the third-country national and put more administrative burdens on the member state.

In some cases, positive obligations on the EU member state may go further. For example, when there is no consular representation of the country of return in the EU member state. As noted, it is possible for states to exercise consular functions in different countries through the same post. Indeed, many states operate consular posts that serve multiple countries at the same time. For example, in the Netherlands, the consular functions of no fewer than 54 states are exercised from Brussels, rather than a consular post within the Netherlands itself.[68] This includes many African countries and small states, which often do not have the resources to establish a consular post in all EU member states. In special circumstances, a consular officer may also exercise functions outside his designated consular district, subject to consent of the receiving state.[69] If face-to-face contact with consular officials is necessary to obtain travel documents, the absence of a consular post in the EU member state where third-country nationals are staying raises particular issues when they are faced with a return decision. Such third-country nationals cannot travel independently to another EU member state without prior arrangements. After all, they would be considered illegally staying within the meaning of the Directive there as well. In such situations, the EU member state that issued the return decision may thus have to become actively involved. This could either be by making arrangements with the EU member state where the third-country national's consular authorities are located, to enable him or her to go there for the purpose of applying for travel documents. Alternatively, it may require enabling consular officials to visit the third-country national on its territory, if they are willing and able to do so.

8.4.2 Dealing with fees for travel documents and other demands

When applying for travel documents at consular authorities, third-country nationals will not only have to provide the required evidence that they are entitled to such documents, but they may also face other demands. In particular, they may be required to pay administrative fees. Paying such fees is an integral part of the administrative process of obtaining documents and can thus be considered as an obligation to be met by third-country nationals under the terms of the Directive. The question of levying fees for issuing documents is regulated, to some extent, by various international norms. Hailbronner, for example, suggests that customary international law in relation to readmission requires states to only charge reasonable fees.[70] What is reasonable, of course, is not always clear. Although only formulated as a recommended practice, Annex 9 to the Chicago Convention

68 See DT&V 2021. Another three states exercise their consular functions covering the Netherlands from London or Paris.

69 Vienna Convention, Article 6.

70 Hailbronner 1997, p. 15.

provides some guidance by stating that fees charged for the issuance of a passport should not exceed the cost of the operation required for it.[71] By analogy, I would suggest, the same holds for emergency travel documents. This still leaves wiggle room for states of origin, but at least provides some benchmark for establishing when fees are clearly disproportionate. An important safeguard can also be found in the Vienna Convention on Consular Relations, which provides that states may levy fees for consular acts, including the issuing of travel documents, but that these must be set out in the laws and regulations of the state.[72] This then prohibits the state of nationality not only from demanding fees not directly connected to the administrative process of issuing travel documents, but also from doing so in the absence of clear regulations. Various documents on the right to leave and return have also concluded that the effective exercise of those rights would require replacement travel documents to be provided free of charge or only for nominal fees.[73] The need for states to ensure adequate access to information regarding the administrative requirements for obtaining such documents has also been emphasised.[74]

While the frameworks above address the countries responsible for issuing travel documents, there are further international rules which particularly pertain to the EU member state. As noted, the EU and all its member states are a party to the UN Convention against Transnational Organised Crime (CTOC or the Palermo Convention). I have mentioned CTOC so far in relation to the two Protocols on trafficking and smuggling, which may have a bearing on the issue of voluntary return when the third-country national is a victim of trafficking or has been smuggled. However, the main Convention is also relevant in this respect, regardless of the specific status of the third-country national. Article 8 of CTOC requires states to criminalise corruption, when committed intentionally, of its own public officials and to consider doing the same for corruption by foreign public officials or international civil servants.[75] Similarly, the participation in corruption as an accomplice should be tackled.[76] Furthermore, Article 9 requires action to promote integrity and prevent corruption. The concept of corruption covers, inter alia, "[t]he solicitation or acceptance by a public official, directly or indirectly, of an undue advantage … in order that the official act or refrain from acting in the exercise of his or her official duties."[77] This would clearly also cover situations in which a third-country national is asked to pay money to a consular official over and above the normal fee for replacement

71 Chicago Convention, Annex 9, fifteenth edition, Recommended Practice 3.15.1.
72 Vienna Convention, Article 39(1).
73 Inglés 1963, draft principle IV; Strasbourg Declaration, Article 9; Uppsala Declaration, Article 13. Also see Hofmann 1988, p. 312, noting that fees may not be of such character as to impede the exercise of the individual's rights.
74 Uppsala Declaration, Article 14; Hannum 1987, p. 12.
75 CTOC Article 8(1) and (2).
76 CTOC Article 8(3).
77 CTOC Article 8(1)(b).

travel documents, or is asked for other favours in exchange for the travel document.[78]

Not much has been written about corruption in return procedures, although the last few years some research on this issue has emerged, particularly in relation to the reintegration of returnees.[79] However, the risk of corruption in return procedures should be considered real. Of the countries whose nationals were most ordered to leave the EU in 2018 and 2019 according to Eurostat (Ukraine, Morocco, Albania, Afghanistan and Algeria) or issued the most return decisions according to Frontex (Ukraine, Morocco, Afghanistan, Albania and Pakistan),[80] only Morocco ranks lower than 100th in the Corruption Perceptions Index 2020 of the anti-corruption watchdog Transparency International.[81] Several organisations and researchers have also pointed to concerns about bribery at the moment of arrival in the country of return.[82] It is not easy to connect general corruption practices and even post-return risks to the process of obtaining travel documents in preparation of return.[83] However, there are some such indications. For example, a 2013 Country Guidance report on Guinea, published by the Dutch Ministry of Foreign Affairs, is instructive. Concerning the process of obtaining travel documents in Guinea, it noted that that "[b]ecause of the high level of corruption, fraud with documents occurs frequently." And that: "In general, not only can documents be obtained and procedures circumvented by paying money, but due to corruption more needs to be paid than the lawfully set fees."[84]

It should be noted, first of all, that the difference between high fees, which can be part of official policy, and corruption may not always be clear-cut. Furthermore, there will be considerable barriers for a third-country national to show that a consular official is making demands which would come within the scope of corruption. And even if such evidence exists, it may not be easy for EU member states to take action towards consular representations or individual officials, due to reasons of diplomatic immunity or the preservation of good international relations. However, what member states quite clearly cannot do is ignore credible allegations

78 The fact that the Convention deals with transnational crime should not be a barrier here, as it relates to officials of states operating on the territory of parties to the Convention.

79 See, for example, Paasche 2016; Paasche 2018.

80 Frontex 2021, Annex table 11.

81 Transparency International 2021. Albania and Algeria rank joint 104th, Ukraine 117th, Pakistan 124th and Afghanistan 165th (out of a total of 179 countries included) in the Index.

82 Amnesty International Netherlands 2017, p. 44-47; LOS Foundation 2017; Alpes & Sorensen 2016.

83 A study by LandInfo, and independent country of origin information analysis body within the Norwegian Immigration Authorities, for example, noted that the general corruption in Iraq "does not necessarily mean that there is much room for bribing public servants at the passport offices", although "[t]here may be room for bribery in the last link of the chain." LandInfo, 2015, p. 15.

84 Dutch Ministry of Foreign Affairs 2013, p. 18.

of corruption in the process of obtaining travel documents as part of their relationship with third-country nationals. For an EU member state to do so would clash with its obligations under, and the spirit of, CTOC.[85] An EU member state can neither expect, nor accept, that a third-country national becomes a participant in corruption simply to meet his or her obligation to return. It should be noted that this does not only relate to monetary demands by consular authorities, but could also stretch to other issues, such as sexual favours. It should go without saying that, even aside from the question of corruption, tacitly accepting that such favours should be given to consular authorities in order to ensure return would also be clearly incompatible with the fact that the return procedure should be humane and dignified in all its aspects.[86]

But even in those cases that the levying of disproportionate fees does not amount to a clear case of corruption, it may have implications for the EU member state. While the requirements under the Vienna Convention and other instruments address the country issuing documents, they show that disproportionate fees are outside the scope of what is necessary and legitimate within the process of obtaining such documents. Here, the same logic would apply as has been put forward with regard to conditions for readmission. A consistent interpretation of the obligations of third-country nationals under the Directive, in conformity with international law, cannot support the notion that individuals take any action that is unnecessary to fulfil the obligation to return, and states are prohibited from expecting this on the basis of international rules. Again, it is not up to the third-country national to clean the mess left by countries of return failing to act in line with their own legal obligations. The responsibility for such failures are squarely on the shoulders of those states, and cannot be transferred to the individual. As such, individuals cannot be held responsible for non-return if this is the result of their refusal to meet illegitimate demands in relation to obtaining travel documents. This would also be consistent with the findings of the CJEU that member states' own actions in levying fees should not undermine the effectiveness of rights conferred by EU instruments to individuals.[87]

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85 And no doubt with provisions of national law.

86 On the links between corruption and human rights, see RWI 2018. Additionally, accepting that individuals engage in corruption would arguably run counter to the collective responsibility of all states to uphold the integrity of the international system of consular relations in its entirety, regardless of individual cases.

87 CJEU C-508/10 *Commission v. Netherlands* [2012]. The judgment deals with the compatibility of high fees for family reunification under Directive 2003/109 concerning the states of third-country nationals who are long-term residents. Paragraph 73 of the judgment reads: "It follows that, in so far as the high amount of the charges levied on third-country nationals by the Kingdom of the Netherlands is liable to create an obstacle to the exercise of the rights conferred by Directive 2003/109 [the Long-term Residents Directive], the Netherlands legislation undermines the objective pursued by that directive and deprives it of its effectiveness."

8.4.3 The prevention of the procurement and use of fraudulent travel documents

A different, although connected, issue relates to the validity of the travel documents to be obtained. Several international instruments impose obligations on states to prevent the issuance and use of fraudulent travel documents. The Smuggling Protocol, for example, specifically seeks to combat the use of fraudulent travel documents, and includes obligations on states to ensure that international migrants are in possession of valid documents. Fraudulent documents, for this purpose, do not only include those "falsely made or altered by anyone other than those lawfully authorized to make or issue such a document on behalf of a State," but also documents that have been "improperly issued or obtained through misrepresentation, corruption or duress or any other unlawful manner," or used by any person other than the rightful holder.[88] The use or production of such documents should be criminalised and states should take measures to detect them. Similar obligations to detect and take out of circulation fraudulent travel documents also arise out of the Chicago Convention.[89]

Despite these clear obligations, member states' interests in ensuring effective returns, especially for groups that are difficult to remove, may become important incentives to use all options possible. A particularly extreme example of this occurred in the Netherlands in the late 1990s and early 2000s, in relation to Somalis who had to return.[90] Due to the long-term conflict in the country, there were no government structures in Somalia able to issue travel documents. It subsequently emerged that the Dutch government had used mediators to obtain documents nonetheless, including those stamped by the 'Somali embassy in Paris,' which was in fact not operational at the time. Official documents from the Dutch government on return possibilities further indicated that "Somali passports are for sale in Somalia and neighbouring countries in markets."[91] In a reaction to news reports, officials were quoted as saying that "when [returnees] are able to travel to Somalia with the passport, this is fine with us."[92]

This example predates both the adoption of the Directive and CTOC, but shows how the pressure to ensure effective return, even if this would require the use of travel documents obtained in a highly irregular manner, may lead member states to turn a blind eye to concerns over the validity of documents. It is also instructive of the way in which the notion of the individual responsibility of the third-country national can be used, or perhaps more accurately, abused by member states. In particular, the example above is not only noteworthy for accepting that the responsibility of the individual

88 CTOC Smuggling Protocol, Article 3(c)(i)-(iii).
89 Chicago Convention, Annex 9, fifteenth edition, Standard 3.34.1.
90 Trommelen 1997; De Ochtenden 2007.
91 Dutch Ministry of Foreign Affairs 2002, paragraph 3.3.4.
92 Trommelen 1997.

would also encompass participation in unlawful practices, but also for the way that any responsibility of the member state is excluded. While it is highly questionable that, even at the time of the incident described, this would have been legitimate, this is certainly not the case under the clear obligations currently incumbent on EU member states to prevent the use and spread of fraudulent documents. The concrete obligations and general spirit of CTOC and the Smuggling Protocol, as well as the Chicago Convention, resist EU member states directly or indirectly assisting in the use of documents which are clearly false or at least of questionable prominence. Similarly, as the member state is under an obligation to prevent the use of falsified documents, it must at a minimum refrain from suggesting, or requiring (as in the Somalian case) that the third-country national try and obtain travel documents through unofficial channels or through other procedures which bring the validity and legitimacy of documents in doubt. Even if return with documents of questionable provenance is the only way to ensure the third-country national returns, the EU member state cannot accept this, much less promote it. As such, these actions would clearly fall outside the scope of the obligation incumbent on the third-country national under the Directive.

8.5 The EU member state as an issuing authority?

So far, the discussion has focused on situations in which third-country nationals seek to obtain travel documents from countries of return. However, in relation to their obligation to turn to the competent authorities, the potential, if limited, role of the EU member state as an issuing authority should not be ignored. The issuance of travel documents is primarily a matter of domestic discretion. From this perspective, EU member states could be said to always be able to issue such documents. However, the extent to which they could be relevant to return would depend on the international recognition of such documents by other states as valid in general, and the willingness of destination countries to allow returning third-country nationals entry on the basis of such documents (whether or not in combination with a relevant visa or other authorisation) specifically.[93] Many EU member states have regulations allowing them to issue so-called 'aliens passports,' which can be provided to non-nationals in their territories to allow them to travel.[94] In general, however, EU member states are unlikely to issue such documents to irregularly staying third-country nationals. Under domestic rules, these are often reserved for lawfully staying aliens,

93 As well as, of course, the willingness of carriers providing transport to the destination country to allow individuals carrying such documents to board.

94 Note that in various member states, such aliens' passports cover different categories of aliens, including stateless persons and refugees.

and they may furthermore have to show that they are unable to obtain travel documents from their own authorities.[95] These provisions may also exclude travel to the third-country national's country of origin.

A more solid basis, at least in international law, for EU member states to issue travel documents to third-country nationals may be found in the 1954 Statelessness Convention, which has been discussed in detail above in relation to the role of the country of habitual residence. However, its provisions may also be applicable to EU member states. As noted, whilst the Convention requires states to issue travel documents to stateless persons lawfully staying in their territories, it also provides that states may issue such documents to 'other' stateless persons. Read in conjunction with the first sentence requiring the issuance of travel documents to lawfully resident persons, this clearly implies that states are authorised to issue documents on the basis of the Convention to unlawfully staying stateless persons. Although this is not a hard obligation, this means that Convention travel documents issued by EU member states to stateless persons with an obligation to return should be recognised at least by those destination states that are parties to the Convention. Furthermore, if a third-country national can show he or she is unable to obtain a travel document from his country of lawful residence, the Convention would require the EU member state to "give sympathetic consideration" to issuing a travel document.[96] This would imply, in my view, at least offering the third-country national a possibility to make an application, and to give reasoned arguments if it decides not to issue such a document.

The 1954 Convention provides for much lower barriers when it comes to the issuance of identity, rather than travel, documents. Article 27 provides that states party to the Convention "shall issue identity papers to any stateless person in their territory who does not possess a valid travel document." This wording suggests that the lawfulness of the presence of the stateless person is not an issue. As such, EU member states could be expected to at least issue identity documents to undocumented stateless persons. In some cases, such as under certain readmission agreements, such identity documents may be an important basis for readmission. In other cases, at the very least, it would be an intermediate step towards obtaining travel documents.

Another possibility, which could be applicable to all categories of third-country nationals, would be the issuance of a so-called 'European travel document' or 'standard travel document' for the specific purpose of return. This document has its basis in the Council Recommendation of 30 November 1994 concerning the adoption of a standard travel document for the expulsion of third-country nationals. The Recommendation notes the difficulties faced by member states in the expulsion of third-country

95 For an overview of national legislation, see, for example, ECRE 2016b.

96 1954 Statelessness Convention, Article 28, third sentence. Also repeated in Schedule, Paragraph 6(3).

nationals who possess no travel documents. It provided for a specific document – basically a form with a photo, details about the third-country national and a stamp by the member state – to be "used as appropriate by all Member States in the case of third-country nationals being expelled from the territory of the Union."[97]

The nature and legal basis for the EU travel document has sometimes been questioned. In October 2016, the European Parliament and the Council adopted Regulation 2016/1953 on the establishment of a European travel document, which repealed the Council Recommendation.[98] Although it does not explicitly acknowledge doubts about the legal basis for the travel document in the Recommendation, this is clearly one of the reasons for the adoption of the Regulation. The official reason for the adoption of the Regulation is the fact that the EU travel document was "not widely accepted by authorities of third countries, for reasons including its inadequate security standards."[99] It therefore seeks to establish a "more secure and uniform" document, with the explicit aim of facilitating returns in the context of readmission agreements or other arrangements, "as well as in the context of return-related cooperation with third countries not covered by formal agreements."[100]

The possibility to return on the basis of an EU travel document is set out in a number of agreements with third countries, as well as more informal arrangements. Various EU readmission agreements, for example, foresee this possibility. As noted, the EU readmission agreement with Albania provides for the use of an EU travel document if the Albanian authorities fail to issue, extend or renew a travel document within a specified period. [101] This is also the case for Turkey, which also undertakes to accept returns on the basis of an EU travel document "if there is no consular office of Turkey in a Member State."[102] In other readmission agreements, the use of an EU travel document is not only a fall-back option for nationals, but the main option when it comes to the return of non-nationals. The EU's readmission agreements with the Russian Federation, Serbia, and Ukraine all provide that, once readmission has been accepted, it is the EU member state that issues a travel document for the purpose of the return of a non-national.[103]

97 OJ C 274/18, 19 September 1994.
98 OJ L 311, 17 November 2016, pp. 13-19.
99 Regulation 2016/1953, Recital 4.
100 *Ibid*., Recital 6.
101 EU-Albania readmission agreement, Article 2(2).
102 EU-Turkey readmission agreement, Article 4(3).
103 EU-Russia readmission agreement, Article 3(3): "After the Russian Federation has given a positive reply to the readmission application, the requesting Member State issues to the person concerned a travel document recognised by the Russian Federation (EU standard travel document for expulsion purposes in line with the form set out in EU Council recommendation of 30 November 1994)." Also see EU-Serbia readmission agreement, Article 3(4); EU-Ukraine readmission agreement, Article 3(4).

EU travel documents have also been used within the framework of more informal arrangements, such as in the Joint Way Forward with Afghanistan.[104]

The above means that, rather than turning to a country of return, third-country nationals may sometimes be in a position to request documents from the EU member state itself. The EU member state has a clear obligation to safeguard the effectiveness of the return procedure. If this effectiveness can be safeguarded by the EU member state issuing travel documents under the Statelessness Convention, an EU travel document, or even under domestic competences with regard to aliens' passports, it should arguably do so. However, this should be done on the clear understanding that the issuance of a travel document by the expelling state is fundamentally different than the same action being taken by the country of origin or, in certain circumstances, transit countries. In those situations, the issuance of travel document naturally implies that those countries accept those documents as valid, and normally simultaneously provide evidence of that country's willingness to admit the individual. This is not the case for documents issued by the EU member state itself and specific guarantees, especially through formal agreements or conventions, are necessary to ensure that the issued document will indeed be accepted. If clear recognition of such documents is guaranteed, and return on the basis of such documents would have no other adverse effects,[105] the third-country national could legitimately be expected to make use of this option. Because of the somewhat obscure nature of these possibilities, including the issuance of an EU travel document, member states can, in my view, be expected to provide third-country nationals with adequate information about the existence of these options, and to ensure they have access to procedures for obtaining them.

8.6 Conclusions

This chapter has focused on the relevant international and EU law provisions in relation to travel documents, and their relation to third-country nationals' obligations under the Directive, as the second set of actions

104 Joint Way Forward, Part II, paragraph 1: " To facilitate the return process, the EU side will ensure that every Afghan returning to Afghanistan on a voluntary or non-voluntary basis in line with the EU and international laws is in possession of a recognised valid travel document, such as an Afghan passport, an Afghan travel document *or the EU standard travel document for return*" (my emphasis). The draft Standard Operating Procedures with Mali contain a commitment to discuss the possibility of using an EU standard travel document if time limits for the issuance of documents by Mali are not respected, see Council doc. 15050/16, 6 December 2016, Annex, Part 7.

105 In this respect it should be kept in mind that the EU standard travel document is not an identity document, so there may be questions as to what position third-country nationals might find themselves in especially when returning to a transit country. In that case, there may also be problems regarding onward travel, which may leave them in legal limbo.

necessary to return voluntarily. It found that, for those who do not already possess valid travel documents, when there is no way to return without them, the obligation to return under the Directive also implies an obligation to turn to the relevant competent authorities to request such documents, provided this does not clash with ongoing asylum procedures. Without such action to apply for travel documents, the return procedure cannot be concluded effectively, and failure to do so without a reasonable excuse would thus constitute prima facie non-compliance with this obligation. The responsibility of third-country nationals implies that they turn not just to any authority, but one that is competent under (domestic or international) law to issue travel documents that would be sufficient to fulfil their obligation to return. The logic of voluntary return would dictate that it is, in principle, up to third-country nationals to identify that competent authority. This will normally be the country where they seek to be admitted, unless they aim to return to another third country. Under normal circumstances, the country of nationality of the individual should be competent to issue travel documents, including when it is not the intended destination of return. However, the EU member state may have positive obligations to enable access to consular authorities, both under the Vienna Convention and as a way to ensure the effective achievement of the Directive's objectives. This may particularly be the case if the member state has imposed measures to prevent absconding that interfere with the individual's access to a consular authority, such as limits on freedom of movement or reporting duties. When consular authorities can only be accessed on the territory of another member state, coordination efforts can be expected to ensure the third-country national can lodge an application for travel documents.

When the requests for readmission and travel documents coincide, for example in case of return to the country of nationality or to a transit country under an EU readmission agreement, there can be no other obligation than to provide evidence of eligibility for readmission, beyond meeting basic administrative requirements, such as providing (as necessary) a photo for the document and the payment of fees. This question of eligibility for readmission has been discussed in detail in Chapters 4 and 6. As in the case of readmission, third-country nationals can be expected to provide evidence and information to the best of their abilities, in good faith and truthfully. As regards the administrative requirements, there are clear limits to what may be asked of individuals by consular authorities, and therefore what may be expected of them by EU member states during the voluntary return process. In particular, third-country nationals cannot be expected to pay fees beyond what is reasonably connected to the administrative process undertaken by the consular authorities, or those not set out in national rules or regulations. Member states must further protect third-country nationals from having to pay bribes, issue favours, or meeting other demands by consular authorities that would qualify as corruption or abuse of power. No action that can be qualified as such can be part of the legitimate obligation to return under the Directive, and the fact that it is the individual's responsibility to

return cannot be invoked by member states in this respect. Similarly, EU member states cannot allow third-country nationals to leave their territories with travel documents that may be falsified or fraudulent. At no point can member states require or encourage, explicitly or tacitly, that third-country nationals obtain travel documents through processes or channels that risk producing false or fraudulent documents, even if this would be the only way to ensure voluntary return.

Third-country nationals are, in principle, free to decide what kind of travel document to apply for, provided it is suitable for their return. Normally, the EU member state should not interfere with this choice, in particular when the third-country national opts to apply for a passport instead of an emergency travel document, unless it can be duly justified, for example in relation to the risk of absconding. EU member states should particularly not interfere with attempts by third-country nationals to return to their country of nationality, or their 'own country' under the ICCPR. While the EU member state has clear duties of non-interference, positive obligations in facilitating third-country nationals' actions to obtain the travel document of their choice are less clear. Considerations of costs and timing, including the extent to which a voluntary departure period can and should be extended, will impact on this possibility. If they apply for a passport specifically, some other requirements may come into play. Since – in contrast to the obligation to provide documents specifically for readmission – a country of nationality may under certain circumstances refrain from issuing a passport, third-country nationals can be expected to cooperate with the authorities and provide additional evidence.[106]

For stateless persons, the identification of a competent authority may be more problematic. If a state where they have lawful residence has earlier issued travel documents, and these have only expired recently, there is a clear basis for expecting them to turn to that state to renew such documents. However, a state of habitual residence does not have a clear obligation to issue such documents in all cases. This is different if it is a stateless person's 'own country' under the ICCPR, but this returns the discussion to the matter of the forced exercise of one's right to return in Chapter 6. As a result, when assessing compliance with the obligation to obtain travel documents, member states should take account of the extremely limited obligations of countries of habitual residence to issue travel documents to stateless persons.

For stateless persons, but also for other third-country nationals, the option of obtaining travel documents from the EU member state may be open, especially if no other authority can or will issue documents. When such possibilities exist, EU member states can be expected to inform third-country nationals about this. Return on such documents, such as an EU

106 This may include, as in the example of *Peltonen* above, evidence that he has fulfilled military service, if this is indeed a requirement in the country of nationality, although this should not prevent the individual from returning to the country of nationality.

travel document, can only be expected of third-country nationals if there are sufficient guarantees that this will lead to readmission by the transit country and that no adverse effects, in relation to the fundamental rights situation upon return, will occur.