Chapter 2 International law obligations to readmit persons

The objective of this chapter is to identify which obligations to readmit persons exist under general international law, and how these relate to the conclusion of readmission agreements. In case of a lack of a pre-existing obligation under general international law, readmission agreements may be considered to be constitutive of that obligation. To the extent that an obligation to readmit under general international law would exist already, it is necessary to examine in which manner readmission agreements, which reiterate that obligation, relate to that international norm.

The European Community regularly claims that general international law requires States to readmit own nationals. The EC has not supported this claim with legal arguments, or specified the source from which this readmission obligation would arguably derive. Claims to further international readmission obligations are not commonly made by the EC or by States in general.

The question of readmission obligations under international law, and their relation to readmission agreements, has received little specific attention in academic literature. By far the most elaborate study to date is by Hailbronner, which identifies *inter alia* customary international law as a source of readmission obligations. This chapter analyses the obligations under international law to readmit persons, based on this study, several earlier scholarly reflections, careful consideration of readmission practice, and the role and influence of readmission agreements.

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When considering readmission obligations under international law, it is useful to distinguish between the following categories of persons: own nationals, third country nationals, former nationals, and persons formally recognised as refugees or stateless persons. The readmission agreements which the Community is asking third countries to conclude cover all these categories of persons, implicitly or explicitly. In the following, we will discuss these categories separately, although focusing mainly on the obligations to readmit own nationals and third country nationals.

2.1 Own nationals

Subsection 2.1.1 analyses the right to return to one’s country and the right of States to expel aliens, which arguably provide a basis in international law for the obligation to readmit own nationals. This obligation is presumed to be part of international customary law. Subsection 2.1.2 continues by discussing possible challenges to the customary nature of this obligation.

2.1.1 The right to return and the right to expel

A legal basis in general international law for the readmission of a State’s own nationals is generally found in the fundamental right to return to one’s country, and the sovereign right to expel aliens.

The right to return as the legal basis of a State obligation to readmit nationals is uncontested. Fundamental rights catalogues relevant to the EC Member States including a right to return are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the elimination of all forms of racial discrimination, and Protocol No. 4 of the European Convention on Human Rights.

4 For the purpose of the present chapter, use of term “third country national” refers to its meaning within a readmission context, i.e. a person who does not hold the nationality of any of the contracting parties to a readmission agreement. This may also be, but is not necessarily, a person who is not a national of an EU Member State.

5 Hailbronner also discusses the readmission of “ex”-refugees; persons whose cause of flight no longer exists (Hailbronner 1997, p. 40-44). The repatriation of such persons is politically important, and States have concluded specific international agreements for this purpose. While implying the readmission of nationals, however, we will not consider this category separately.

6 Notably, the right to return (and to leave) one’s country has not been explicitly included in the Charter of Fundamental Rights of the European Union. It is arguably subsumed, however, within Article 45, which grants freedom of movement and residence within the territory of EU Member States to EU citizens and long-term resident third country nationals.

7 Article 13(2): “Everyone has the right to leave any country, including his own, and to return to his country”.

8 Article 12(4): “No one shall be arbitrarily deprived of the right to enter his own country”.

9 Article 5(d)(ii): “The right of everyone […] to equality before the law […] in the enjoyment of [t]he right to leave any country, including one’s own, and to return to one’s country”.