

ABHANDLUNGEN

Readmission Agreements and the Obligation on States under Public International Law to Readmit their Own and Foreign Nationals

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I. Introductory Remarks

The question of international obligations to readmit a state's own or foreign nationals has to be distinguished from that of whether there exist rights of the individual to return. Despite this, the two topics are connected and do overlap. Due to the unity of the international legal order, it is not possible to create contradictory individual or interstate rights. This does not mean, however, that individual claims have to correspond to those between states. Even the exclusion or forfeiture of an individual's right to return does not inevitably mark a limit to interstate obligations on a state to readmit. In fact, international legal practice clearly indicates that the exclusion of individual rights does not automatically limit interstate obligations on a state to readmit its own nationals. The existence of individual rights to return does on the other hand confer certain corresponding interstate responsibilities on the admitting state. From the fact that individual rights to return have evolved out of interstate obligations to readmit it must follow that interstate obligations to readmit extend at least as far as rights of an individual to return. The overlapping of international readmission obligations with individual rights is not just the result of this evolution but is also the result of a state, due to its sovereignty, being pri-

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marily responsible for its own nationals, and the competence of that state to decide whether or not to readmit foreign nationals and whether or not they may take up residence.

Within Europe's legal province, interstate obligations to readmit a state's own or foreign nationals are mainly based on contractual agreements. The existence of obligations derived from customary law presupposes both a uniform practising of that law across those states involved, as well as a correspondingly uniform *opinio juris*. In this respect, a distinction must be drawn between general principles and the various procedures through which those principles are put into practice.

II. Readmission of a State's own Nationals

1. The international obligation to admit and the individual right to return

According to Art. 13 Section 2 of the United Nations Universal Declaration of Human Rights (December 10, 1948)¹ any human being possesses the right to leave any country, including his own, as well as to return to his own country. Legal restrictions on these individual rights are permitted under Art. 29 of the Declaration, in order to guarantee recognition and respect of the rights and freedoms of others as well as to meet standards of morality, public order and general welfare required by a democratic society.

This provision is developed further in Art. 12 of the International Covenant on Civil and Political Rights. According to Art. 12 Section 2 of the Covenant, any individual is free to leave any country, including his own. Paragraph 4 provides that nobody may be arbitrarily denied the right to enter his own country. The Fourth Additional Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms contains a similar provision. Art. 2 Paragraph 2 of the Additional Protocol grants the right "to leave any country, including his own." Article 3 Paragraph 2 provides: "No one shall be deprived of the right to enter the territory of the state of which he is a national."

Neither the scope nor the limits of the mentioned "right to return to one's own country" are clearly defined. Further, the scope of application

¹ UNGA Res. 217 (III); cf. GAOR 3rd Session, Resolutions, Part I, 71.

is doubtful. Does the concept “to return to one’s own country” relate only to nationals, or also to persons who in accordance with national law held a right to permanent residence even though they had never acquired nationality?²

A UNESCO Commission’s extensive study under the chairmanship of Judge Inglés came to the conclusion that the right guaranteed in Art. 12 Paragraph 4 of the UN Covenant on Civil and Political Rights only refers to a state’s own nationals.³ The prevailing opinion in literature on international law concurs.⁴ Nevertheless, there have been frequent objections in literature as to the right of a respective state to decide whom to accept as a national. A person’s “own country” must be defined according to objective criteria:

“A person’s ‘country’ is that to which he is connected by a reasonable combination of such relevant criteria as race, religion, language, ancestry, birth and prolonged domicile. Governments come and go, and their political fluctuations and vagaries should not affect the fundamental rights of human beings, such as the right to return to one’s own country and to have a homeland.”⁵

Neither in literature on international law⁶ nor in the practice of states has the thesis of a right of admission for “permanent residents” been laid down. Only under strictly limited prerequisites does national law permit the readmission of persons to whom permanent residence or the right to settle has been granted. As a rule, a stay of longer duration in a foreign country will in any case result in the loss of the right to residence or settlement. A general recognition of a “right to return” for aliens who formerly had a right to permanent residence or settlement cannot be found in the legal practice of states.

² Correspondingly e.g. H. Hannum, *The Right to Leave and Return in International Law and Practice*, 1987, 56.

³ J.D. Inglés, *Study of Discrimination in Respect of the Right to Everyone to Leave any Country, Including his own, and to Return to his Country*, UN-Doc. E/CN.4/Sub.2/229/Rev.1 (1963).

⁴ P. Sieghart, *The International Law of Human Rights*, 1983, 197; similarly P. Weis, *Nationality and Statelessness in International Law*, 1979, 318; for a different view see S.A.F. Jagerskiöld, *Historical Aspects of the Right to Leave and Return*, in: K. Vasak/S. Lisakofsky (eds.), *The Right to Leave and Return: Papers and Recommendations of the International Colloquium held in Uppsala, Sweden, 19–21 June 1972*, 1976, 180; id., in: L. Henkin (ed.), *The International Bill of Rights, The Covenant on Civil and Political Rights*, 1981, 180.

⁵ M. Mazzawi, *Comment on the Middle East*, in: *Uppsala Colloquium* (note 4), 343.

⁶ Weis (note 4), 318.

Customary international law does state that the duty of a state to permit entry and residence to its own nationals arises from citizenship. However, a clear conclusion as to the content and limits of international obligations to readmit one's own nationals cannot be drawn from this alone. Traditionally, obligations under international law generally only exist between states. According to conventional international law, rights granted to individuals qualify as international claims which, in case of conflict, may be asserted and enforced by their home state.

Even though the right to return lost its exclusively interstate character after having been included in the catalogue of human rights, its use has always remained an interstate matter, affecting the legal position of both the receiving state and the actual state of residence. The 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 state of origin and state of residence and between personal sovereignty and territorial sovereignty. This is the essential distinction separating the right to return from other human rights. Corresponding to the right of an individual under international law to request admission from the "home state", interstate obligations exist on that state to admit those persons legally denied further residence by another state in the exercise of its territorial sovereignty.

Therefore, assuming that the right of the individual to return tallies with international rights and obligations to receive, the question then follows of whether those rights and obligations under international law regarding readmission of one's own nationals go beyond the component protecting the individual person. As 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. Its expression in terms of international obligation is also tied to the willingness of the individual to return to his state of origin.

Against such an interpretation speaks the existence, beyond the right of return guaranteed in Art. 12 Para. 4 of the UN Covenant on Civil and Political Rights, of separate international obligations to readmit a state's own nationals which are independent of individual protection, amount to more than the mere realisation of human rights guarantees, and have their foundation in the territorial sovereignty of each state. According to literature, the independent character of a state's obligation to readmit its nationals, which is not related to an individual right, derives from the basic right of each state to bar aliens from residence within its national territory irrespective of their will to return.

If therefore an obligation to readmit one's own nationals may be derived from both the decision-making power over entry and residence of aliens as predetermined by international law and from territorial sovereignty, it must follow that its existence must be independent of the assertion of an individual right to return. The authority of a state to terminate residence typically assumes involuntariness.

2. Scope and limitations of individual rights to return – general overview⁷

The comparative studies based on national reports of the UPPSALA colloquium of 1972 show that in respective legal systems as well as in practice, the right of a state's own nationals to return is largely undisputed.⁸ Even if many constitutions do not expressly guarantee a right of return to their own nationals, it is directly or indirectly recognised in national law. An extensive study of Inglés of 1963 also comes to the conclusion that despite some obstacles and difficulties concerning the assertion of these rights, there are only a few cases in the practice of states where nationals have actually been barred from returning to their country.⁹ In fact, as a rule, entry has been granted to those persons who were able to prove their nationality even if they did not have valid travel documents. However, a return visa is also required by some states. Moreover, many states demand the presentation of valid travel documents even for entry of their own nationals, whereas the legal order of other states is such that the presentation of passports or other travel documents in case of entry of their own nationals is, as long as nationality is otherwise proved, expressly waived.

Grounds of public order, security and health do not – as far as is apparent – play a significant role in the restriction of the return of one's own nationals even though they indirectly gain significance, especially through the apparatus of the withdrawal of citizenship.¹⁰ In reference to Art. 12 Para. 4 of the UN Covenant for Civil and Political Rights, Inglés already remarked in 1963 that there exists total consensus on the fact that a state must not refuse entry to its own nationals for reasons of health or morals.¹¹ In addition, it was agreed that restrictions applicable when leav-

⁷ Cf. Partsch, in: Uppsala Colloquium (note 4), 43 et seq.

⁸ Cf. esp., *ibid.*

⁹ Inglés (note 3), 56 f.

¹⁰ Cf. *infra*, III.

¹¹ Inglés (note 3), 39; similarly Jagerskiöld (note 4), 182.

ing the country for reasons of public order should not apply to the return of a state's own nationals.¹²

Of considerably greater practical importance for the return of a state's own nationals are restrictions placed by procedural demands. A comparison of law does not provide a uniform picture here either. Many legal systems do not expressly require the presentation of a valid passport or other travel document for the entry of their own nationals.¹³ In other states, however, the presentation of a valid travel document is requested on crossing the border, no matter whether it is a case of voluntary return or of deportation by the state of residence. In such cases, a restriction on return may be expressed through the non-issue or the reluctant issue of a valid travel document by the state of origin.¹⁴ In particular those persons who left their home state without necessary travel documents in order to seek asylum, or who subsequently destroyed their travel documents, frequently encounter problems with the issue of papers necessary to return to their state of origin. Comparative analysis also shows, however, that no state definitely denies the return of its own nationals solely because they are not in possession of valid travel documents. In this respect, the claim to the issuing of substitute papers replaces the right of entry.

3. Readmission of a state's nationals under international treaties

(a) The principle of readmission

After World War II, numerous bilateral agreements were concluded in Western Europe regulating the admission of persons at borders. These treaties typically include the obligation to take back a state's own nationals who other states intend to deport.

The obligation to readmit one's own nationals laid down in the bilateral agreements of the 1950s and 1960s already existed in 19th century Swiss and German treaties on settlement and reception. For instance the Treaty of Gotha of July 15, 1851, contains the obligation to take back "those individuals who are still their nationals."¹⁵ Treaties on settlement concluded by Switzerland, Germany and Italy contain similar provisions.

¹² Inglés (note 3), 38.

¹³ Cf. e.g. the legal situation in the Netherlands and Sweden, Partsch (note 7), 85, 93.

¹⁴ Cf. Inglés (note 3), 13.

¹⁵ Cf. H. Suffrian, *Die Rechtsstellung der Heimatlosen*, 1925, 36 seq.

At the Codification Conference at The Hague 1930, the "Comité préparatoire" took the unanimous view that states had an unconditional obligation to readmit any of their nationals to be sent back from abroad.¹⁶ At the conference itself, however, representatives of some states voiced reservations about an absolute duty to reaccept. The conference nevertheless adopted a protocol, confirming the obligation of the state of origin to readmit. The Protocol, however, did not come into force.¹⁷

Pre-war agreements endorse the principle of the obligation to readmit a state's own nationals. The Treaty on the Expulsion of Aliens concluded between Belgium and France in 1938 obliges the contracting states to readmit those of their nationals expelled from the territory of the other contracting party. This arrangement is seen as the expression of a general practice. The few exceptional occasions on which states have refused to readmit their nationals who were to be returned from abroad essentially concern special cases of expulsion.¹⁸

Therefore, literature on international law concludes, as is unanimously apparent, that a state is obliged to readmit its nationals expelled from abroad.¹⁹ The basis of this obligation lies in the personal sovereignty of the state. International order presupposes that each state should at least take care of its own nationals. If the latter are abroad, they enjoy the diplomatic protection of their state of origin which in this respect is entitled, where necessary, to complain to the state of residence. The state of residence, through the principle of reciprocity, does on the other hand possess the right to request that the return of those aliens whom, for valid reasons, it does not want to keep on its territory be made possible. The obligation of a state to readmit its nationals where expelled from abroad therefore results from the responsibility of a state for the welfare of its nationals.

Another reason corresponding to the personal sovereignty of the state of origin consists of the territorial sovereignty of the state, according to which, the obligation to reaccept derives from the right of the state of residence to expel aliens. The obligation to readmit a state's own nationals is

¹⁶ See E. Castrén, *Die gegenseitigen Pflichten der Staaten in bezug auf den Aufenthalt und die Aufnahme ihrer Staatsangehörigen und der Staatenlosen*, 11 *ZaöRV* (1942/43), 375, referring to a comment of Sweden according to which the country of origin can be released from its obligation to readmit in case of a long stay abroad.

¹⁷ *Ibid.*

¹⁸ Cf. the Turkish legislation of 1928 that considered the return of an expellee to his country of origin a punishable offence, see *ibid.*, 376.

¹⁹ *Ibid.*, 372, with further references in note 241.

the inevitable correlate of the right of expulsion of aliens. If there were no state with the ultimate obligation to readmit a foreigner subject to expulsion, the right to expel would, in certain cases, lose its practical significance.²⁰

More recent international treaties confirm the obligation to readmit one's own nationals. Readmission agreements concluded recently between Western European "front-line states" such as Germany, Switzerland and Austria on the one hand and a number of Eastern European states on the other put the principle of readmission of one's own nationals into concrete terms. Moreover, the first multilateral readmission agreement concluded, was that between the Schengen states and Poland concerning the readmission of illegal residents. These agreements as well as changes in laws of asylum in some Western European states and the consequent acceleration of return of persons seeking asylum but having entered from "safe third states" have resulted in the conclusion of readmission agreements between a number of Eastern European states which also hold to the principle of readmitting one's own nationals.

The principle of readmission of a state's own nationals is also confirmed by the model bilateral readmission agreement between a member state of the European Union and a third country adopted by the European Council on November 30, 1994.²¹ The principle of readmission of a state's own nationals is also laid down in a reciprocal agreement between the U.S. Immigration and Naturalization Service and the Canada Employment and Immigration Commission for the exchange of deportees between the U.S. and Canada of July 24, 1987. The agreement states that deportees who are citizens or nationals of Canada or the U.S. will be received by their country of citizenship or nationality under the terms of the agreement. Return requires that citizenship or nationality can be satisfactorily established by presentation of a birth or baptismal certificate, a certificate of naturalization or citizenship, a valid or expired passport, or other verifiable evidence of citizenship or nationality.

The most recent readmission agreement has been concluded between the government of Germany and the government of Bosnia and Herzegovina on November 20, 1996. Under the agreement both governments agree to readmit their own nationals who have entered the territory of the other Contracting Party with a valid national's passport or who have been issued during their stay in the territory of the other Contracting Party a

²⁰ H. Lessing, *Das Recht der Staatsangehörigkeit*, 1937, 117.

²¹ Official Journal of the European Communities of 19.9.1996, No. C 274, 20.

national passport; and persons who during their stay in the territory of the other Contracting Party have lost the nationality of the other Contracting Party without having acquired a different nationality or at least an assurance of naturalization by the requesting party. In addition, there is a general readmission obligation independent of a formal application or any other formality regarding all persons who have not yet entered into the territory of the other Contracting Party provided that they possess a valid passport of the other Contracting Party. Both governments agree that they will issue their nationals who are no longer in the possession of a valid passport a passport or any other travel document entitling them to return to their country of origin.

(b) Limits on the obligation to readmit one's own nationals

In principle, the obligation to readmit one's own nationals in the agreements referred to is neither limited by time nor dependent on other material preconditions. Similarly, the assertion of the obligation to readmit is not tied to any formalities. In state practice this clause is generally understood such that the request to readmit does not have to be transmitted through formal diplomatic procedures but is handled directly between border authorities or authorities concerned with aliens, which, as long as nationality has been proved or substantiated, must readmit the person in question. It is generally provided for that the return to the requesting state may be effected where it subsequently emerges that the conditions for readmission, i.e. nationality, are not fulfilled.

Only in occasional cases can restrictions of the obligations to readmit for certain categories of persons be found in readmission agreements. In this respect it is remarkable that exceptions mentioned in earlier literature on international law (e.g. a state's own nationals expelled from the country; criminals) are not listed in any of the more recent readmission agreements. Few cases make exceptions for the situation where a person having to be readmitted possesses multiple nationality or a permanent residence permit in a third state. The agreement between Switzerland and Bulgaria of 18 July 1994²² in these cases excludes the obligation to readmit if the person in question is able to enter a third state. On the other hand, the agreement between Poland and Albania provides for an exception "when such persons have the right to permanently stay on the terri-

²² Article 1 (3).

tory of a third country” without expressly taking into account whether it is actually physically possible to exit into the third state. A clause which has not been repeated elsewhere²³ is contained in the readmission agreement between Austria and Italy of 22 April 1963. According to this clause the obligation to readmit one’s own nationals is also made dependent, in principle, on whether the person in question has been detained within a zone of 20 km from the common frontier, and whether the request to readmit has been lodged with the border control authorities no later than two weeks after the illegal entry into the territory of the other state.

(c) Requirements of proof

More recent bilateral treaties on readmission do not, in general, make the obligation to readmit dependent on providing complete proof of nationality. The agreements concluded in the 1950s and 60s by Western European states equate proof with substantiation. Regularly, the documents or other means through which nationality may be substantiated are contained in an additional paragraph²⁴. In this respect the agreement between Austria and Italy of 22 April 1963 has remained isolated: it provides that persons who are not already detained at the frontier only have to be readmitted if the nationality they claim to possess “can definitely be established through diplomatic or consular authorities accredited to the state of residence.”

Substantiation instead of proof is generally considered a sufficient substitute for proof in all readmission agreements of the more recent type. A Recommendation of the European Council on Guidelines for the Drafting of Protocols Implementing Readmission Agreements of 24 July 1995²⁵ contains an extensive description of means by which nationality or citizenship can be proved or made credible.

Similarly, the readmission agreement between the governments of Germany and Bosnia and Herzegovina of 20 November 1996 provides for a number of documents which may be used for the proof of nationality. In addition to certain documents like ID-cards the agreement admits any

²³ Cf. Article 1 Sub-Paragraph 1 of the agreement.

²⁴ Cf. e.g. Article 1 (1) of the agreement between the Netherlands and the Federal Republic of Germany of 19.9.–10.10.1958; Sect. A (1) of the agreement between Austria and the Federal Republic of Germany of 25.8.1961; Article 1 a of the agreement between Austria and France of 30.11.1962.

²⁵ Official Journal No. C 274 (note 21), 25.

other documents as well as copies like drivers' licences or military passes as well as any other documents which may be useful in the determination of a person's nationality. These documents may also be used as proof if they have become invalid due to passage of time.

An additional protocol contains regulations regarding the formalities, the competent authorities, time limits, as well as the readmission procedure.

4. The readmission of a state's own nationals under customary international law

(a) Principles

The obligation postulated in readmission agreements as a rule of customary international law limiting the territorial sovereignty of states had already found consideration in pre-war literature on international law.²⁶

By far the majority of pre-war authors on international law who commented on questions of the obligation to readmit hold, in respect to state practice and especially agreements made between states, to the view that states have the duty to readmit their own nationals in all cases.²⁷

The foundation of the obligation of a state to readmit its own nationals is found to lie in the personal and territorial sovereignty of states. International order presupposes that each state takes care at least of its own nationals. If they are abroad, they enjoy the diplomatic protection of their state of origin which is entitled, if necessary, to execute diplomatic protection vis-à-vis the state of domicile. The principle of reciprocity assumes, however, that the state of residence has the right to demand that the return to the state of origin of such aliens whom, for valid reasons it does not intend to keep on its territory, remains possible. The obligation of a state to readmit its nationals to be expelled from abroad therefore follows, on the one hand, from a state's responsibility for the welfare of its nationals, and on the other, from the right of the state of residence to expel foreigners: The obligation to readmit one's own nationals is the correlate of the right to expel aliens. If there exists no state ultimately responsible for

²⁶ Castrén (note 16), 372; for further references and a proposal of the International Commission of Jurists see American Journal of International Law 1928, Special Supplement, 242.

²⁷ Lessing (note 20), 117, referring to K. Neumeyer, Internationales Verwaltungsrecht, 1910, 10; P. Heilborn, in: Enzyklopädie der Rechtswissenschaft, Vol. 5, 1914, 525; F. von Martitz, Internationale Rechtshilfe in Strafsachen, 1888, 13 et seq.

the readmission of the alien who has lost his right of residence, the right to expel loses its practical importance.²⁸

Contemporary authors unanimously arrive at the same conclusion. Th. Dupuis points out an obligation recognised under customary international law, such that a state cannot rid itself of its unwanted nationals by expulsion, as it would otherwise injure the respect due to other states.²⁹

In modern literature the principle of the obligation of a state to readmit its own nationals is mostly considered so unproblematic that it is now hardly mentioned and is only discussed, if at all, in connection with the question of withdrawal of nationality.³⁰ Reasons for an obligation to readmit have, to a large extent, remained unchanged. The right to expel, resulting from territorial sovereignty, correlates to the obligation of the state of origin to readmit:

"To make the right of expulsion effective, the practice of states has insisted on the duty to the home state to receive back any national expelled from a foreign state."³¹

The opinion of R. Plender:

"It seems clearly established as a principle of international law that each state is obliged to admit its own national to its territory"³²

finds general recognition in literature.

Special emphasis is thereby placed on the interstate aspect, although, in so far as the obligation to readmit derives from nationality, it certainly cannot be considered a purely international obligation. In this sense, H.F. van Panhuys writes:

"Towards other states a state is bound to admit its nationals to its territory; this duty corresponds to the right of expulsion of the state of residence ... according to international law, the duty of admission only exists towards foreign states and not towards the national."³³

²⁸ Lessing (note 20), 117.

²⁹ "Il est admis, en principe et sans difficulté, qu'un Etat ne peut pas expulser ses nationaux, qu'il contredirait au respect qu'il doit aux autres Etats s'il prétendait se débarrasser, pour les en embarrasser, des sujets, citoyens ou ressortissants qu'il tient pour indésirables," in: *Recueil des Cours*, Vol. 32, 1930 II, *Règles Générales Du Droit de la Paix*, 156.

³⁰ Cf. K.M. Meessen, *Nationality*, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, 8th instalment, 1985, 422.

³¹ G. Schwarzenberger, *International Law*, 3rd ed. 1957, Vol. 1, 361; L.F. Oppenheim, *International Law*, 8th ed. 1955, Vol. 1, 645; A. Verdross/B. Simma, *Universelles Völkerrecht*, 3rd ed. 1984, 794.

³² R. Plender, 19 *American Journal of Comparative Law* (1971), 287, 317.

³³ *The Role of Nationality in International Law*, 1959, 56; similarly Weis, *ibid.*, 50.

In literature limits are discussed mainly with respect to the assertion of an individual's right to return³⁴ and with regard to the question of an obligation to readmit where the receiving state has unlawfully expelled aliens.³⁵ In international legal practice the principle of the readmission of a state's own nationals has in principle – as far as is apparent – never been questioned. In the case of *van Duyn*, the European Court of Justice formulates as follows:

“Furthermore, it is a principle of international law, which the EEC treaty cannot be assumed to disregard in the relations between member states, that a state is precluded from refusing its own nationals the right of entry or residence. It follows that a member state, for reasons of public policy, can, where it deems necessary, refuse a national of another member state the benefit of the principle of freedom of movement for workers in a case where such a national proposes to take up a particular offer of employment even though the member state does not place a similar restriction upon its own nationals.”³⁶

In connection with this, the controversy in international law over British policy on the occasion of the expulsion of holders of British passports of Asiatic origin on arrival from Uganda is important for the assumption of *opinio juris*.³⁷ During a discussion concerning the adoption of the Immigration Act in 1968, withholding the right to enter the United Kingdom and to take up residence from certain categories of “British nationals,” the British Foreign Secretary James Callaghan stated:

“I was asked what we would do about a man who was thrown out of work and ejected from the country. We shall have to take him. We cannot do anything else in those circumstances.”³⁸

During debates, a clear distinction was made between the right of the individual to be readmitted (restricted) and the international obligation to readmit. The Solicitor General argued that the statute of 1968 “cannot be regarded as contravening the principle of international law” according to which every state is held to admit its own nationals. He supported his argument with the fact that Kenya had, up to then, not expelled any UK cit-

³⁴ Cf. Plender (note 32), 287, 317 et seq.

³⁵ G.S. Goodwin-Gill, *International Law and the Movement of Persons between States*, 1978, 136 et seq.

³⁶ Case 41/74 *van Duyn v. Home Office*, [1974] ECR 1337, 1351.

³⁷ Cf. esp. R. Higgins, 49 *International Affairs* (1973), 340, 346 et seq.; Plender (note 32), 287 et seq.; F. Woolridge/V.D. Scharma, 9 *International Lawyer* (1975), 30 et seq.

³⁸ 759 *House of Commons Debates*, 28.2.1968, Col. 1501; see also R. Plender, 49 *International Affairs* (1973), 346 note 12.

izens.³⁹ Regarding expulsion, executed or threatened, of British nationals, the British Lord Chancellor, Lord Hailsham, also stated that the British standpoint was that the holder of a British passport did not have a right under international law to enter the United Kingdom even though the United Kingdom was obliged, vis-à-vis the land where the holder of the passport resided, to readmit.

"In international law a state is under a duty as between other states to accept in its territories those of its nationals who have nowhere else to go."⁴⁰

(b) Procedure

The recognition of a principal obligation to readmit one's own nationals includes at the same time procedural duties of the receiving state. The obligation to readmit one's own nationals must not be thwarted through unjustified formalities and burdens of proof.

Signs that the obligation to readmit has been put into concrete procedural terms can be found in more recent readmission agreements. State practice, however, 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. In international practice the possession of a passport is in principle viewed as a *presumptio juris*, but not, however, as a conclusive proof of citizenship.⁴¹

If the person to be expelled possesses a valid passport, the state of origin may, however, not refuse to take the person back where it cannot show concretely that the person in question does not possess its nationality.⁴²

If the individual to be expelled does not possess a valid passport or another proof of identification, the receiving state has to accept other documents or circumstantial evidence of the individual's nationality. In modern state practice, a substantiation is uniformly held as sufficient. Definite proof of nationality, which frequently cannot be supplied by the request-

³⁹ Cf. Plender (note 39), 318.

⁴⁰ 355 House of Lords Debates, 14.9.1972 Col. 497, see also Higgins, (note 37), 346.

⁴¹ D. Turack, 12 William & Mary Law Review (1971), 804, 815; id., The Passport in International Law, 1972, 250 et seq.

⁴² Cf. Turack, ibid., 821; the Netherlands discontinued their practice of issuing "facility passports" to South-Moluccans because nearly no European state was prepared to admit such persons without visa; those passports were designed to put them on the same footing with Dutch nationals without granting them Dutch citizenship, cf. 10 Netherlands Yearbook of International Law (1979), 337 et seq.

ing state, or only at disproportionately high cost, cannot be demanded, as this would constitute a frustration of the state's obligation to admit. As a result, a state is not permitted to refuse the readmission of persons, whose nationality has been substantiated, for purely formal reasons.

Due to lack of a uniform practice, according to which the state of origin has to take back its own nationals without the presentation of valid travel documents, a rule of customary law, allowing a transfer without travel documents, cannot be identified. The state forced to readmit does, however, not have the right to frustrate its obligation to readmit by refusing to issue substitute documents. In general, it lies within the competence of each state to lay down the conditions under which substitute documents are issued. The obligation to readmit vis-à-vis the state of residence is linked, according to the principle of good faith, to a duty not to frustrate the return of the nationals. In this respect, modern developments in the law of air transport are exemplary. The contracting states of the ICAO Convention must accept as a substitute for original travel documents a document stating circumstances of entry and arrival at the airport of destination, where the person in question was refused entry. Disproportionately long delays and exaggerated preconditions for the issue of travel documents and the recognition of substitute papers, considered to be materially unjustified, are seen as an abusive exercise of the rights held by the state.⁴³

III. The Readmission of Former Nationals

1. Practice in international law

In the 19th and early 20th century, the protection of stateless persons was at the forefront of international efforts to regulate the rights and obligations of states towards aliens. As a consequence of major transfers of population and revolutionary developments in Imperial Russia, the problems of deprivation of citizenship and expulsion steadily grew in importance. Restrictions on the right of states to expel stateless persons can be found in numerous 19th century treaties. The restrictions were partly countered in that the obligation of readmission was only valid vis-à-vis former nationals.⁴⁴ Some bilateral agreements include an explicit obliga-

⁴³ Cf. the English and American cases described by Turač (note 41), 820; see also J.P. Clark, *Deportation of Aliens from the United States to Europe*, 1931, 339 et seq., 414.

⁴⁴ Concerning the treaty of 1818 between Prussia and Bavaria, cf. Lessing (note 20), 132.

tion of the state of origin towards its former nationals to readmit. Literature on international law pays a great deal of attention to the protection of stateless persons. The predominant claim is that persons who, in the wake of the First World War, had been expelled or deprived of their citizenship, must not be without protection against measures affecting their right to residence. Attention is hereby primarily directed at the restriction of the right of the state of domicile to expel, while only secondary attention is given to the obligation of the state of origin to readmit.⁴⁵

Most of the bilateral agreements of the 19th century regulating the welfare of home nationals abroad, however, purely relate to persons who, at the moment of admission, are the state's own nationals.⁴⁶ The Treaty of Gotha of 1851, however, which has been used as a model for numerous bilateral agreements, extends the obligation of readmission so that it also covers former nationals.⁴⁷

It follows that the contracting governments commit themselves not only to readmit, on request of the other state, "those individuals who continue to be their nationals" but also their "former nationals even if they lost their subservience ('Untertanenschaft') to national legislation, providing they have not acquired the other state's nationality according to its legislation" (Paragraph 1). Paragraph 2 even provides for an obligation to readmit persons who never belonged to any of the contracting states as long as certain connecting features, such as five years of residence, are shown.⁴⁸ Preceding the Gotha treaty, numerous similar conventions had been concluded between Prussia and each of the other German states. This was the first time that the problem of the legal status of stateless persons was dealt with through a treaty. In the second half of the 19th century, a number of repatriation treaties and national laws were formulated based on the Treaty of Gotha. The treaty concluded between Germany and Italy on August 8, 1873, e.g., stipulates:⁴⁹

"Moreover, on request of the other party each of the contracting parties engages itself to readmit its nationals even if they have already lost their nationality according to national law, unless they have acquired the nationality of the other state according to its legislation."

⁴⁵ Cf. e.g. A.A. Philonenko, 64 *Journal du Droit International* (1937), 699 et seq.; *id.*, 60 *Journal du Droit International* (1933), 1161 et seq.; M. Trachtenberg, *Revue de Droit International et de Législation Comparée*, *Séries 3*, Vol. 17 (1936), 553 et seq.

⁴⁶ Cf. Suffrian (note 15), 36.

⁴⁷ For a detailed description see *ibid.*, 36 et seq.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, 29.

Similar provisions may be found in treaties of settlement and repatriation concluded by Italy, Denmark, Russia, the Netherlands and Switzerland.⁵⁰ Switzerland and Germany in particular, concluded treaties at an early stage, laying down the obligation to readmit former nationals who have become stateless.⁵¹

Older literature on international law principally concluded that the obligation to readmit former nationals, laid down in treaties on repatriation, was an expression of customary law. Each state was therefore obliged to accept its former nationals, even where no contractual agreement existed.⁵²

In reference to the repatriation treaties of the 19th century, F. Stoerk and E. Loening state:

“As the loss of nationality through *non-usus* has a conditional effect under international law only, civilised nations have recognised, partly in customary legal practice, partly through express international agreements, the obligation to readmit those of their former nationals having lost their nationality either by absence or by formal release or in another way, yet not acquired another nationality, if they are repatriated by the foreign state.”⁵³

Likewise the Institut de Droit International, at their Hamburg session in 1892, formulates:

“Le droit international est contraire à tout acte qui interdit aux nationaux l'accès ou le séjour sur le territoire auquel ils appartiennent. Il en est de même des personnes qui, après avoir perdu leur nationalité, n'en ont pas acquies une autre.”⁵⁴

During The Hague conference of 1930, however, not all states were prepared to accept the principle of readmitting former nationals.⁵⁵ In a “Special Protocol concerning statelessness”, adopted by a majority of the conference, an obligation to readmit was approved only, where the persons concerned are “permanently indigent” or accused criminals (facing a

⁵⁰ Ibid.

⁵¹ Castrén (note 16), 382, referring to F. Leske/E. Loewenfeld/G. Crusen et al., *Rechtsverfolgung im internationalen Verkehr*, Vol. VII, 332; see also S. Büel, *Vollzug von Fernhalte- und Entfernungsmassnahmen gegenüber Fremden nach dem Recht des Bundes und des Kantons Zürich*, Dissertation, Zurich 1984, 36 et seq.

⁵² Suffrian (note 15), 28, 32; likewise Lessing (note 20), 116 et seq.

⁵³ *Fremdenpolizei*, in: *Handwörterbuch der Staatswissenschaft*, Vol. IV, 3rd ed., 1909, 482; likewise J. Kohler, *Grundlagen des Völkerrechts*, 1918, 115.

⁵⁴ Trachtenberg (note 45), 553, 557, note 11; for a critical view concerning the validity of this sentence as customary law see *ibid.*, 560 et seq.

⁵⁵ Castrén (note 16), 383, note 293, referring to the comments of the French, Italian and Turkish representatives; Lessing (note 20), 123 et seq.

prison sentence of at least one month). It was further pointed out that the question of whether these provisions are binding under customary law was not to be prejudiced. As a result, a mere recommendation to readmit former nationals, now stateless, was adopted.⁵⁶

Readmission agreements concluded since World War II contain only occasional provisions on the obligation to readmit former nationals. Such an obligation is principally made dependent on proof of nationality of the requesting party. Since the problem of illegal entry of nationals of third states is now increasingly included in agreements, the problem of readmission of former nationals may be considered to have lost importance. However, the return of nationals of third states, having entered illegally, is considerably different from the absolute obligation to readmit former nationals.

The practice of releasing returned nationals of their present nationality at short notice, in order to frustrate their return to their state of origin, has recently led to contractual provisions which, under certain conditions, include former nationals in the obligation to readmit. Art. 2 Para. 1, 2nd Sentence of the readmission agreement between Germany and Bulgaria, for instance, provides that the obligation also includes persons "having been released from Bulgarian nationality on their own request without at least having received an assurance of naturalisation from German authorities." A corresponding clause is found in Art. 1 Para. 1 of the model draft of a bilateral agreement on readmission between a member state of the E.U. and a third state proposed by the E.U. Council. The E.U. model agreement states that the readmission obligation shall also apply to persons who have been deprived of their nationality of the requested contracting party since entering the territory of the requesting contracting party without at least having been promised naturalization by the requesting contracting party. Almost all readmission agreements state that the requesting contracting party shall readmit returned persons if checks show that they were not in possession of the nationality of the requested contracting party when they departed from the territory of the requesting contracting party.⁵⁷ This obligation, however, does not apply if the readmission obligation is based on the fact that the requested contracting party deprived the person in question of his/her nationality after that person had entered the territory of the requesting contracting party without

⁵⁶ Recommendation C.228.M 115.1930.VS.14; cit. according to Lessing, *ibid.*, 124.

⁵⁷ Cf. Article 1 Para. 3 EU model agreement.

that person at least having been promised naturalization by the requesting contracting party.⁵⁸

2. The obligation to readmit former nationals in the doctrine of international law

In earlier literature on international law a state is considered to be obliged to readmit its former nationals if they have not at least acquired a new nationality. But in view of the different positions voiced on this question at the Codification Conference at The Hague, the existence of a rule under customary law was placed in doubt.⁵⁹ Those who voiced an opinion against an obligation to readmit, generally based this position on the argument that in denaturalising the former country of origin not only releases itself from its obligations towards the respective stateless person but also from those towards other states. This position is often criticised as being both theoretically unsatisfactory and factually incorrect. In principle international law should provide that there exists a state responsible for each individual. It follows, that the closest link of a person to a state is the fact that he or she has formerly been its national.⁶⁰

The grounds for such a readmission obligation are seen in the obligation of states to care for the welfare of their former nationals and the territorial sovereignty of states. A state which refuses to readmit a former national who has become undesirable for any reason imposes a burden on other states.⁶¹ Lessing considers such an attitude an abuse of law.⁶² The refusal of readmission is tantamount to the forcing of undesirable elements on other countries. The rights of the state of residence are, in light of this unilateral shifting of duties, prejudiced. The principle of legal equality of states is consequently infringed. The transfer of the burden of responsibility for a state's own nationals to other states through denaturalisation is not permissible.⁶³

It is in this context that the argument of "requirements of orderly international relations" is used.⁶⁴ The withdrawal of nationality alone does not

⁵⁸ Ibid.

⁵⁹ For a detailed representation see Lessing (note 20), 123 et seq.

⁶⁰ Castrén (note 16), 378 et seq., referring to numerous comments in the literature in note 270.

⁶¹ Ibid., 379.

⁶² Ibid., 116 et seq.

⁶³ Lessing (note 20), 116, 119.

⁶⁴ Castrén (note 16), 380; F. Stoerk, *Staatsunterthanen und Fremde*, in: *Handbuch des Völkerrechts* (ed. v. Holtzendorff), 1887, 603.

release a state from the obligation it has towards other states arising from its recognition of a person as its national, i.e. from the obligation to keep those former nationals on its territory with whom other states do not wish to be burdened. This obligation only passes over to another state where that state naturalises the person in question.⁶⁵

Lessing refers to this as the continuity of nationality.⁶⁶ Under international law nationality represents the continuing responsibility of a state to readmit its nationals whenever a third state legally wishes to deport them. While the withdrawal of nationality implies the unilateral renunciation of the right to protection connected with nationality, the unilateral removal of an obligation to readmit is not possible. In such a case legal succession is necessary. The new holder of the obligation must take over the readmission obligation of the previously committed state with private effect, otherwise an unpermissible negative (in *odium tertiorum*) shifting of rights would take place.⁶⁷

This argumentation concerns the regulatory function of nationality in the order of international legal relations, on the one hand, and the transfer of obligations tied to the withdrawal of citizenship, on the other.⁶⁸ Each state possesses the right to determine the group of admissible aliens, or to rid itself of aliens already in the country.⁶⁹ The following statement made by Lessing is typical of such reasoning:

“It is out of question that it could be legal for a state to pass on an obligation incumbent upon him to the state of residence, that means as an onus to that state. The rule of the ineffectiveness of unilateral dispositions to the detriment of a third party is a fundamental legal rule *per se*, without which all legal order between equal legal subjects would not even be thinkable. Such an infringement would lie in the expulsion of former nationals as well as in the refusal to reaccept them, not, however, in expatriation, which does not directly concern other states.”⁷⁰

Consequently, the obligation to readmit only ends if the state of residence agrees to bear the dispositions to its detriment, be it by recognising its obligation to receive or by granting citizenship. The granting of a right

⁶⁵ Castrén (note 16), 380; with further references in footnote 277.

⁶⁶ Lessing (note 20), 152 et seq.

⁶⁷ Ibid., 136.

⁶⁸ See also J. Langhard, *Das Recht der politischen Fremdenausweisung mit besonderer Berücksichtigung der Schweiz*, 1891, 74.

⁶⁹ Lessing (note 20), 120.

⁷⁰ Ibid., 121.

to domicile as such, however, cannot be seen as the acceptance of the state of origin's obligation to readmit.

This view is supported by prominent authors of international law of the 19th and early 20th century. For instance, Johann Caspar Bluntschli formulates, in his standard work on international law of 1878:⁷¹

"Every state is obliged to readmit its nationals to the country, if they are sent home or repulsed by other states for reasons of public law, and no state has the right to send its criminals to an uninvolved state without the latter's permission. Through completed emigration, the ties by which up to then the emigrant was bound to his former home state are untied. The emigration is completed when the up to now co-citizen leaves his home country with the intention to abandon his association with it and is received by another state's community. Apart from the requirement of a release from the state community requested by some states, the acceptance in the new community is decisive because there exists a general interest under international law not to cause new homelessness. Thus, the existing membership in the state's community continues until it is replaced by a new one."

Influenced by the results of the Codification Conference in The Hague in 1930 and the restrictive practices of states following the abolition of earlier treaties of repatriation (Art. 282 of the Treaty of Versailles⁷²), the general thesis that the obligation to readmit lies with the state of origin, regardless of the duration of residence or the conditions under which that residence was granted, has increasingly been criticised in literature.⁷³

Remarkably, even critics of this thesis have, under certain conditions, accepted an obligation to readmit. The following comment by Weis is representative for a number of statements:

"If a state were to resort to denationalisation of nationals abroad solely for the purpose of denying them readmission or to prevent their return, for instance, in the case of a national threatened with deportation, such action taken in *fraudem juris internationalis* will be contrary to international law not only as an abuse of a right but as a direct infringement on the sovereign rights of the state of residence, e.g. on the right to expel aliens, which follows from its territorial supremacy."⁷⁴

⁷¹ Das moderne Völkerrecht der civilisirten Staaten, 1878, 214 et seq.

⁷² Cf. Suffrian (note 15), 28.

⁷³ Cf. Decisions of the Swiss Federal Court of Justice, Official Collection of Decisions, Vol. XVII (1891), Decision of 7.2.1891, *Bundesrath v. Tessin*, 97; P. Weis, Nationality and Statelessness in International Law, 1979, 54 et seq.; C. Albert, Die Staatenlosen, Dissertation, Göttingen, 1933, 58 et seq.; W. Cahn, Gesetzeskollision, 66 et seq.

⁷⁴ Ibid., 57.

G. Leibholz presents the argument of the prohibition of arbitrary acts under international law in a similar way. According to this prohibition, both the expulsion of a state's own nationals and the withdrawal of citizenship are incompatible with principles of international law in so far as they create potential obligations on other states to receive, thus infringing their jurisdiction, without sufficient material reason. Such behaviour represents an abuse of a state's right of discretion.⁷⁵

The view that a state may not, by withdrawal or renunciation of nationality, withdraw from the international obligations it has resulting from nationality can at least be seen as widely recognised. The Federal Court of Switzerland, for instance, stated in 1891 that the Canton of Tessin was not obliged to accept aliens made stateless through the renunciation of Italian nationality, and that Italy was obliged to take back these former nationals.⁷⁶ This, however, cannot be considered proof of an obligation under customary law, since Italy had previously assumed an express obligation to readmit former nationals in an agreement of 1890.

The thesis that a state may not withdraw from its obligation to readmit through the withdrawal of citizenship from its nationals while they are abroad finds wide agreement in more recent literature.⁷⁷ In this respect, it is irrelevant whether the loss of citizenship takes place with the agreement of the person concerned or if nationality is involuntarily withdrawn. Since the obligation of the state to readmit depends, to a large extent, on considerations towards the other state, it does not matter by which means the release from nationality has taken place. The former state of origin is therefore obliged to readmit if the person has relinquished his or her nationality or has neglected certain formalities which are necessary for the maintenance of nationality.⁷⁸ In the "Encyclopedia of Public International Law," published by the Max Planck Institute of Heidelberg, the actual state of valid international law is described as follows:

"If denationalisation occurs after the individual has abandoned his state and is in the territory of another state, the duty of admission persists, because oth-

⁷⁵ 1 ZaöRV (1929), 77, 101.

⁷⁶ Cf. *Bundesrath v. Tessin* (note 73), 97.

⁷⁷ Cf. Weis (note 73), 54 et seq.; A. Randelzhofer, in: Maunz/Dürig, Kommentar zum Grundgesetz, as at 1983, Art. 16 Abs. 1 Grundgesetz, note 40; K. Doehring, Staatsrecht der Bundesrepublik Deutschland, 3rd ed. 1984, 355; R. Schiedermaier/M. Wollenschläger, Handbuch des Ausländerrechts der Bundesrepublik Deutschland, as at 1985, 2nd ed., note 14.

⁷⁸ Castrén (note 16), 385; Lessing (note 20), 125.

erwise the other state would be deceived in its expectation that the state whose nationality the individual possessed is obliged to receive the individual.”⁷⁹

If denationalization occurs while a national is abroad, a right of residence could be forced since there exists no obligation to readmit. Such a unilateral shifting of responsibilities contravenes the principles of good faith.

“The good faith of a state which has admitted an alien on the assumption that the state of his nationality is under an obligation to receive him back would be deceived if by subsequent denationalisation this duty were to be extinguished.”⁸⁰

The recognition of a continuing obligation to readmit former nationals from the point of view of the denationalisation in abuse of the state’s powers of discretion does not require proof of the intention to harm. It is far more important for a continuing obligation of readmission that a shifting of burdens to the disadvantage of the receiving state, through unilateral deprivation or renunciation of nationality, be allowed to take place. A deprivation of citizenship or a renunciation of nationality is therefore definitely irrelevant where a foreign national enters another state.⁸¹ In this respect Plender and van Panhuys correctly point out that the obligation of the former state of origin to readmit is fundamentally based on the basic principles of equity in legal relations between states. Every state is under the obligation, to any other state, to refrain from acts which defeat the latter’s right of discretion over the admission and further presence of an alien.⁸² Thus, it is not the proof of the former state of origin’s intent to cause damage which is crucial, but rather the objective fact that the sovereign rights of the state of residence have been frustrated. This is also borne out by modern state practice. Article 1 of the model bilateral readmission agreement of the Council of the European Union refers to the question of whether a person is released from the nationality of the requested party after entry into the sovereign territory of the requesting party.

The deciding factor is therefore not whether or not notice of statelessness has been offered. The alien has equally to be accepted, whether having entered illegally or unnoticed by his state of origin, provided that this obligation already existed at the time of entry or taking up of residence.

⁷⁹ R. Bernhardt (ed.), *Encyclopedia of Public International Law*, 8th instalment, 1985, 422.

⁸⁰ Weis (note 73), 55.

⁸¹ Van Panhuys (note 33), 57.

⁸² R. Plender, *International Migration Law*, 2nd ed. 1988, 149.

Each subsequent change of status means, in principle, a unilateral shifting of responsibility to the detriment of the state of residence.

The duration of absence from the state of origin is considered irrelevant for the continued existence of the obligation to readmit. This obligation of the state of origin is not diminished by the length of stay in the state of residence. In principle the state of residence must be able to rely on the fact that the alien will be taken back by the state of origin even if the stay is extended.

The situation may be different if the stateless person is granted permanent residence subsequently to the withdrawal of nationality. From the temporary granting of residence alone an automatic transfer of the obligation to readmit, formerly with the state of origin, cannot be concluded. In deciding whether a transfer of responsibility from the home state to the state of residence has taken place, the duration⁸³ and the nature of the right of residence must be taken into account.⁸⁴

In view of the lack of a common state practice and of *opinio juris*, the existence of a general obligation under customary international law to readmit former nationals, in cases of a change of status before entry into a third state, seems doubtful. It may be possible to assume the existence of a "substitute obligation". The fact that from the point of view of international relations an obligation to readmit constitutes a problem of assignment of responsibility for the fate of a human being speaks in favour of the assumption of such a "substitute obligation". Since human existence is only possible within the territory of a state, there must exist, according to the rules of international law, a state obliged to readmit. The obligation to readmit therefore appears to be a problem of the assignment of responsibility in international relations. In the absence of other links (e.g. promise of citizenship, granting of permanent residence, etc.) reasons could be found, at least in a moral sense, to attribute responsibility to the state of origin for former nationals who have subsequently been made legally stateless by the state of residence and have found no other third state willing to admit. It is in this sense that, without wishing to codify customary law, the final act of the Codification Conference of The Hague in 1930 made the recommendation:

⁸³ A 15-year duration of stay was suggested by the Swedish delegate during the Hague Conference on Codification. This proposition did not gain a majority. Cf. Lessing (note 20), 127.

⁸⁴ Differently Lessing, *ibid.*, 127, who generally considers the stateless persons' period of absence from his state of origin as irrelevant.

“to examine whether it would be desirable that in cases where a person loses his nationality without acquiring another nationality, the state whose nationality he last possessed should be bound to admit him to his territory at the request of the country where he is, under conditions different from those set out in the special protocol relating to statelessness which has been adopted by the Conference.”⁸⁵

IV. Readmission of Foreign Nationals

1. Readmission agreements

While agreements on repatriation and treaties of settlement and friendship concluded in the 19th century are, as a rule, limited to the readmission of one's own or former nationals, readmission agreements concluded after the Second World War contain rules on the acceptance of persons who are not nationals of one of the contracting parties. Typical of the readmission agreements concluded in the 1950s and 60s between almost all Western European states is the obligation to readmit persons who have entered the territory of a state illegally, from another state, if the state entered makes such a request within a certain time limit. Further, the obligation to readmit is typically made dependent on the prerequisite that the illegal migrant has spent a certain amount of time in the state to be obliged to readmit.

It has been pointed out correctly that the readmission agreements of the 1950s and 60s did not live up to expectations.⁸⁶ Despite the interpretation of the term “illegal entry,” problems arise for the state requesting readmission in that proof of the time and place of entry must be demonstrated.

Provisions of the agreements on readmission of persons picked up in border regions frequently pose difficult questions concerning proof. In such cases persons can generally be taken back without formalities, i.e., in direct contact between the border authorities. As a rule, the authorities requesting readmission must, however, at least provide concrete information enabling the authorities of the requested state to establish that these persons crossed the common frontier without permission within the period

⁸⁵ Resolution A II, quoted from Weis (note 73), 57.

⁸⁶ O. Reermann, Readmission Agreements, Prepared for the Research Project “German and American Migration and Refugee Policies”, Ladenburg, 18./19.7.1995; published soon in: K. Hailbronner/D. Martin/H. Motomura (eds.), *Immigration and Refugee Policies and Controls*, 1996.

of time provided for in the treaty (7 or 15 days).⁸⁷ Some treaties, however, actually require authorities to “furnish proof that these persons have crossed the common frontier unlawfully.”⁸⁸ It is self-evident that such proof cannot easily be furnished, especially as far as the time limit is concerned. Readmission agreements concluded in the 1990s take these weaknesses into account by not tying readmission to proof or substantiation of illegal entry. It is instead decisive whether entry from the territory of one contracting party into the sovereign territory of another contracting party is in accordance with conditions of entry and residence of the latter.

These obligations are supplemented by detailed regulations on how such obligations to readmit an alien may be proved or substantiated. For instance, the common declaration on interpretation and application of certain provisions of the readmission agreement between Germany and Switzerland states that the entry via an outer frontier of the Contracting Parties may be “proved” or “substantiated.” Along with proof or substantiation of the entry of an alien of a third state across the common frontier into the sovereign territory of the requesting contracting party, the previous entry of the alien via an outer frontier into the sovereign territory of the requested contracting party is to be proved or substantiated. It is of fundamental importance that entry via outer frontiers or via a common border can be substantiated or proved through a number of different forms of circumstantial evidence.

Art. 2 of the readmission agreement of the Schengen countries with Poland for example provides:

“(1) At the request of a contracting party, the contracting party whose external border was the point of entry of the person who does not fulfil or who no longer fulfils the entry or visit conditions applicable within the territory of the requesting contracting party, shall readmit that person to its territory without formalities.

(2) For the purposes of this article, external border means the first border crossed which is not an internal border of the contracting parties within the meaning of the Schengen Agreement of June 14, 1995, on the gradual abolition of checks at common borders.”

As in the case of the German-Swiss agreement, the obligation to readmit is dependent on non-compliance with conditions of entry or residence and entry via the outer border of the contracting states.

⁸⁷ Cf. e.g. Article 4 of the treaty between Sweden and the Federal Republic of Germany of 31.5.1954.

⁸⁸ Cf. e.g. Article 3 (3a) of the agreement between Switzerland and France of 30.6.1965.

Both agreements contain an exception to the obligation to readmit, where a person entering the territory of the requesting contracting party possesses a valid visa or a valid title of residence of the latter contracting party, or has been issued a visa or a title of residence subsequent to entry. In such cases it would hardly be reasonable to burden the requested contracting party with the obligation of readmission, since the requesting contracting party has given rise to the entry or residence by issuing a visa or title of residence. The requesting party therefore remains responsible, after termination of the right of residence, for the further destiny of the alien who has entered legally or continues to reside legally.

Further, both agreements provide for certain time limits on the implementation of readmission procedures. The requested contracting party has to reply to a readmission request within 8 days, and where the obligation is accepted, must take back the person within one month. Time limits, the lapse of which excludes the obligation to readmit, exist only in the German-Swiss agreement. According to Article 6, a request to readmit can no longer be lodged if an alien, demonstrably and with the knowledge of the contracting party, resides uninterruptedly for longer than one year in its territory. The wording of this article avoids difficulties in the older style of agreement as residence with knowledge of a contracting party is now the decisive point. This puts an end to the frustration of readmission due to falsification of the duration of residence.

A look at recent state practice shows, of course, that the type of regulation outlined in the agreement of Schengen with Poland has not found general acceptance. Although the draft version of a bilateral readmission agreement recommended by the Council of the European Union is orientated towards the Schengen-Poland agreement, more recent bilateral agreements often differ.

A uniform picture cannot be drawn from bi- and multilateral agreements. The readmission agreements of a recent type, outlined here, base the obligation to readmit on the fact that the requested state allowed the entry of nationals of third states onto its territory who then travelled further onto the territory of the requesting state without the necessary entry permission or residence permit. It is therefore the actual residence on the territory that is the cause of the following infringement of territorial sovereignty resulting from the unlawful crossing of the common border.

In contrast to this, in one of the more modern types of readmission agreements the illegality of entry or residence is not the decisive factor. Rather, the decisive factor is the granting of a visa or other title of residence. Thereby, the existence of an entry or residence permit at the time

of entry is of central importance, regardless of whether a continuing right of residence exists. In this context, the exchange of Notes 3 and 5 between Switzerland and Slovenia in August 1992 commits both contracting parties to accept without formalities nationals of third states who do not or no longer fulfil the prerequisites for entry or residence of the other state, provided they hold a valid visa or a valid title of residence of the other state on entry into the territory of the state.⁸⁹

Occasionally, such agreements also contain obligations of readmission which are founded either on the illegal crossing of the common outer border or on the granting of permanent residence.⁹⁰ The idea that the responsibility for a national of a third state passes on to the state which has granted the right of residence regardless of the question of actual residence may, of course, also be found in other types of bi- or multilateral readmission agreements based primarily on the illegal entry or illegal residence in the requesting contracting state. Both the agreement of the Schengen states with Poland and Art. 3 of the E.U. model agreement read:

“If a person who has arrived in the territory of the requesting Contracting Party does not fulfil the conditions in force for entry or residence and if that person is in possession of a valid visa issued by the other Contracting Party or a valid residence permit issued by the requested party, that Contracting Party shall readmit the person without any formality upon application by the requesting Contracting Party.”⁹¹

2. Exemptions from the obligation to readmit

Provisions negating the obligation of readmission where a person to be taken back has acquired, be it in the state of residence or in a third state, a status which suggests the transition of responsibility were already present in readmission agreements of the 1960s. Agreements concluded during the 1950s and 60s constantly contain a clause that Germany shall not exercise readmission if those persons to be expelled are nationals of

⁸⁹ Correspondingly the exchange of diplomatic notes of 8. – 9.2.1993 between Switzerland and Croatia concerning the mutual abolition of visas for the holders of diplomatic, service or other special passports; Article 7 of the agreement between Switzerland and Poland on the mutual abolition of visas of 2.9.1991.

⁹⁰ Cf. Article 3 and Article 6 of the agreement between the Government of the Republic of Poland and the Government of the Republic of Slovakia on the Transfer and Acceptance of Persons across the Common State Border.

⁹¹ An additional regulation in the model agreement provides the competence of the party to the agreement whose visa or other title of residence expires last if both parties have issued those.

one of the Nordic states within which freedom of movement exists (Nordic Passport Union). Persons will also not be readmitted if they have, according to the Geneva Convention on the Status of Refugees, gained the status of refugees whilst in the requesting state. Corresponding provisions can be found in subsequent bilateral and multilateral readmission agreements. This clause, however, is not expressly contained in the treaty of the states of Schengen with Poland or in the model agreement drafted by E.U. interior ministers, where it is eclipsed by the rule that the issue of a visa or a valid title of residence represents an automatic transfer of responsibility. This applies generally to those cases falling under the refugee clause.

It cannot, however, be established that the subsidiarity of the obligation to readmit toward the possible states of expulsion has gained general acceptance in recent readmission agreements. The agreement of the Schengen states with Poland only provides for a transition of responsibility once another contracting party has issued a visa or a title of residence. The mere reference to the possibility of expulsion to a neighbouring state is therefore not sufficient. Also, the possibility existing on grounds of nationality that persons be taken back into their state of origin does not, according to the model agreement of the E.U. interior ministers, constitute an exception to the obligation to readmit. On the contrary, the contracting parties simply try to return nationals of adjoining states, preferably to their state of origin.

It follows from this, that a definite transition of responsibility is tied to the issuing of a valid visa or title of residence by the other contracting partner. It is therefore remarkable that, according to the wording of the treaty of Schengen, the obligation to readmit is no longer dependent upon illegal entry from the territory of the contracting state concerned, but concerns every contracting state which has issued a visa or a right of residence to the person residing illegally in the other contracting state. Corresponding provisions are to be found, partly word for word, partly in a more general sense, in agreements amongst Eastern European states.⁹²

A number of readmission agreements concluded in past years contain *ordre public* clauses. The agreements between Switzerland, Poland and Slovenia on the reciprocal abolishment of visa requirements, for example, contain a reservation according to which each contracting party may suspend the application of the provisions of this agreement, wholly or in

⁹² Cf. e.g. Article 3 (3) of the agreement of readmission between Romania and Poland of 19.11.1993.

part, for reasons of public order, security or health, except where its own nationals are concerned.⁹³

Similar provisions are contained in agreements between Poland and the Slovak Republic,⁹⁴ and Austria and Hungary.⁹⁵ The model draft of the E.U. has also adopted a clause on *ordre public* in Art. 13:

“2. After informing the other Contracting Party each Contracting Party may suspend this Agreement by giving notification on important grounds, in particular on the grounds of the protection of state security, public order or public health. The Contracting Parties shall notify each other of the cancellation of any such measure without delay via diplomatic channels.

3. After informing the other Contracting Party, each Contracting Party may terminate this Agreement on important grounds by giving notification.

4. The suspension or termination of this Agreement shall become effective on the first day of the month following the month in which notification was received by the other Contracting Party.”

Contrary to the provisions of *ordre public* mentioned above, this provision does not allow the evasion of obligations to readmit in specific cases. In so far, it is decisive that a suspension of the agreement must be extended to the agreement as a whole and that it only takes effect one month after notification. If an obligation to readmit exists subsequent to the lodging of a valid application to readmit, this obligation cannot be invalidated through a delayed handling of the application.⁹⁶

3. Admission for the purposes of transit

The admission of nationals of third states for the purposes of transit forms an important part of post-war European agreements. These modern style agreements do not differ greatly from agreements concluded in the 1950s and 60s.

The modern contractual practice between E.U. states is orientated towards conventional clauses.⁹⁷ The model agreement of the E.U. Council

⁹³ Article 13 of the agreement with Slovenia of 3. – 5.8.1992; Article 13 of the agreement with Poland of 2.9.1991; Article 12 of the agreement of 8. – 9.2.1993 with Croatia.

⁹⁴ Article 11.

⁹⁵ Article 6.

⁹⁶ The agreement of readmission between the contracting states of Schengen and Poland contains a similar clause; a suspension or denunciation of the agreement, however, is already possible “on serious grounds”, cf. Article 9.

⁹⁷ Cf. e.g. Article 5 of the agreement of readmission between Germany and Romania of 13.11.1994.

does not substantially differ. By way of an “Unberührtheitsklausel” (provision of “not being affected”) it is guaranteed that the obligation to permit transit does not exist where either the Geneva Convention on the Status of Refugees or international treaties on extradition and transit apply. The contracting parties also try to limit transit to aliens for whom direct return to the state of origin is not possible.⁹⁸

4. Readmission of foreign nationals as an expression of customary international law

The obligation to readmit nationals of third states having entered unlawfully from a neighbouring state, or residing illegally in the state of residence, contained in modern agreements, has its roots in the principle of neighbourliness and the responsibility of a state for those impairments to other states emanating from its territory. Legal or illegal residence of an alien does not constitute a basis for an interstate claim to readmit. In principle, each state is entitled to refuse a foreign national's (re-)entry to and residence in its territory, except where a claim to protection exists arising from considerations of refugee law, human rights or contractual agreements.⁹⁹

How directly obligations under customary law to readmit alien nationals derive from the principle of neighbourliness of states has, until now, hardly been clarified in literature on international law. Reference in these writings is essentially restricted to obligations of readmission deriving from the concept of nationality. It may perhaps be possible to deduce an obligation under European customary law from the considerable number of readmission agreements concluded in Europe. These postulate an obligation, under differing preconditions, to readmit nationals of third states having entered or presently residing illegally. The points of departure here are the principle of neighbourliness, on the one hand, and general principles concerning the transfer of responsibility for those aliens granted a right of permanent residence by the state, on the other.

On signing the readmission agreement between the Federal Republic of Germany and the Czech Republic on 3 November 1994, the German representative, Federal Minister *Kanther* stated:

⁹⁸ Article 7 (4).

⁹⁹ Cf. K. Doehring, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. I, 1992, 107, 109.

"The readmission agreement, together with the agreement of co-operation equally signed today, is the expression of this international solidarity and a step in the direction of a fair distribution of burden in Europe. With this treaty the Federal Republic of Germany and the Czech Republic accept their common European responsibility to alleviate the pressure grown out of migration movements.

Thereby both states recognise the principle arising from the idea of good neighbourhood, that each state bears the responsibility for such aliens who have continued their journey into the neighbouring state although they do not comply with the conditions for entry and residence, and has to take them back."¹⁰⁰

This statement corresponds to declarations of states at several European conferences of belief in the need for joint action to cope with uncontrolled migration. This concept is also expressed in Art. 2 of the EU model readmission agreement. Art. 2 provides that the Contracting Party via whose external frontier a person can be proved, or validly assumed, to have entered who does not meet or who no longer meets the condition in force for entry or residence on the territory of the requesting Contracting Party shall readmit the person at the request of that Contracting Party and without any formality. Art. 2 further provides that the readmission obligation shall not apply in respect of a person who was in possession of a valid residence permit issued by the requesting Contracting Party when the person entered the territory of that Contracting Party, or who was issued a residence permit by that Contracting Party after entering its territory. In addition, Contracting Parties shall make every effort to give priority to deporting nationals of an adjacent State to their country of origin. While Art. 2 is only applicable in the case of third country nationals who entered via the external frontier, Art. 3 provides for readmission of nationals of third countries by the Contracting Party responsible for the entry. If a person who has arrived in the territory of the requesting Contracting Party does not fulfil the conditions in force for entry or residence and if that person is in possession of a valid visa issued by the other Contracting Party, or a valid residence permit issued by the requested party, that Contracting Party under Art. 3 Para. 1 shall readmit the person without any formality upon application by the requesting Contracting Party. If both Contracting Parties issued a visa or a residence permit, responsibility shall reside with the Contracting Party whose visa or residence permit expires last. Art. 3 of the model agreement reflects the same con-

¹⁰⁰ Bulletin of the Federal Government of 10.11.1994, no. 104, 957.

cept of responsibility as laid down in the Schengen Implementation Agreement and the Dublin Agreement concerning a Contracting State's exclusive responsibility to examine an asylum request.

Whether the concept of neighbourliness, as expressed in contractual obligations on readmission, can already be considered as customary international law must be judged with regard to the general principles concerning the emergence of customary international law in agreements.¹⁰¹ In numerous cases states have referred to contractual practice as proof for the emergence of customary law.¹⁰² It is accepted that numerous conclusions of agreements do not *per se* constitute sufficient proof for a uniform *opinio juris*.¹⁰³ The contracting parties may be of the conviction that in entering into contractual arrangements they do not undertake any obligations not laid down in that treaty.¹⁰⁴ On the other hand, there is consensus that the element of uniform state practice does not require a majority. It has already been concluded by the Permanent International Court of Justice that the practice of only a few states is required for the existence of general practice.¹⁰⁵ In such cases, however, it must be possible to conclude from the inaction of other states at least a tacit acceptance of the rule asserted.¹⁰⁶ In the case of readmission agreements, for instance, it is conceivable that neighbouring states consider the conclusion of agreements unnecessary, because the readmission of third state nationals, having entered unlawfully, is common practice between neighbouring states although no contractual basis exists, or because the problem rarely actually arises. Given the restrictive attitude of states toward the readmission of nationals of third states, it seems doubtful whether obligations to readmit nationals of third states would be practised without a contractual basis. Especially the fact that requests for readmission frequently fail due to formal requirements conflicts with the existence of a general state practice. In the same way, the creation of multilateral treaties frequently fails because states do not wish to assume general readmission duties but only

¹⁰¹ Cf. K. Villiger, *Customary International Law and Treaties*, 1985; K. Doehring, 36 *ZaöRV* (1976), 77 et seq.; D. Weisburd, 21 *Vanderbilt Journal of Transnational Law* (1980), 2 et seq.

¹⁰² Cf. A.A. d'Amato, *The Concept of Custom in International Law*, 1971, 113 et seq.; R. Baxter, 41 *British Year Book of International Law* (1968), 275 et seq.

¹⁰³ Doehring (note 99), 92; H. Triepel, *Völkerrecht und Landesrecht*, 1899, 53.

¹⁰⁴ Weisburd (note 101), 45.

¹⁰⁵ Cf. *Wimbledon Case*, Decisions of the Permanent Court of International Justice 1923, Serie A, no. 1.

¹⁰⁶ Cf. International Court of Justice, *North Sea Continental Shelf Case*, ICJ Reports 1969, 1 et seq.

those relating to a particular contracting party under the specific provisions of the agreement in question. Outside contractual arrangements the readmission of third state nationals, who have entered illegally or presently reside illegally in the state of residence is – as far as is apparent – only practised in exceptional cases, if at all.

It is also doubtful whether in cases of the readmission of third state nationals who have illegally entered the receiving state an *opinio juris* exists which would demonstrate that states assume a duty under customary international law. The existence of such an *opinio juris* requires the conviction of the states in question that, with the application of the agreement, an obligation under customary international law is complied with, and the preparedness to take over responsibility for infringements of these obligations, independently of the provisions of the agreement.¹⁰⁷ The fact that states accept an obligation to readmit nationals of a third state only under special circumstances, e.g. in the case of forced return by air of an alien without the right of entry,¹⁰⁸ argues against such an *opinio juris*.

Due to lack of sufficient general state practice and a corresponding *opinio juris*, a responsibility under customary international law for those nationals of third states who have continued their journey into the neighbouring state although they do not fulfil the preconditions for entry into and residence in the neighbouring state, cannot be deduced from the principle of good neighbourliness recognised under international law. The principle of neighbourliness under international law is considered to be universally accepted.¹⁰⁹ This principle defines a limit to the territorial sovereignty of states. Territorial sovereignty of a state may therefore only be employed in such a way that the neighbouring state is not damaged or otherwise impaired in its rights.¹¹⁰

Irrespective of the question of if and how an illegal continuation of the voyage of a third state national constitutes an impairment of the territorial sovereignty of the neighbouring state is the question of to what extent the principle of good neighbourliness has been put into concrete terms concerning the obligations of readmission of nationals of third states who have continued their journey without controls. Up to now state practice

¹⁰⁷ Weisburd (note 101), 23.

¹⁰⁸ See *infra*, p. 35.

¹⁰⁹ Cf. F.A. von der Heydte, Das Prinzip der guten Nachbarschaft im Völkerrecht, in: Festschrift für A. Verdross, Völkerrecht und rechtliches Weltbild, 1960, 133 et seq.

¹¹⁰ Cf. in view of damages to the environment the *Trail Smelter*-Arbitral Award, Reports of International Arbitral Awards, Vol. 3, 1911, 1938 et seq.; G. Dahm/J. Delbrück/R. Wolfrum, Völkerrecht, Vol. I/1, 2nd ed. 1989, 441, 443 et seq.

offers no hint for an elaboration of the principle of good neighbourhood which would go beyond the actual use of territory-related sovereignty.

It must, however, be noted that during the Berlin Conference on Measures to Stem Illegal Entries of 30 – 31 October 1991, and the follow-up Conference in Budapest of 15 – 16 December 1993, the principle that uncontrolled immigration to Western Europe must be resolved by means of European co-operation and international solidarity found general agreement. However, the principle of a common European responsibility for unlawful migration is still too vague to constitute an obligation to readmit. The decisive test for the future formation of customary law will be the question whether the legal interest in the implementation of a system of repatriation of nationals of third states continuing their journey uncontrolled will be so strong that a transgression of the rules on readmission will be considered offensive behaviour and a contravention of binding European standards.¹¹¹ This does not preclude the assumption of an obligation to readmit following the general principles of reparation in cases of international injustice, where the requested state has breached its obligations towards the neighbouring state to control the residence of aliens and the supervision of their common frontier. Illegal crossing of the border is therefore not sufficient to create an obligation under international law. This is not, however, the case if a state intentionally or negligently promotes massive illegal entry of third state nationals into the neighbouring state or tolerates such entry from its territory.

It is recognised under international law that a state which harms another state is obliged to pay reparations.¹¹² As a consequence of common European efforts to resolve the problem of uncontrolled migration which have found their way into numerous declarations of intent and resolutions of conferences, it has been accepted that each state bears the responsibility for migration taking place from its territory into neighbouring countries. In this sense, Convention No. 143 of the International Labour Organisation on the Abuses of Migration and the Promotion of Equal Opportunity and Equal Treatment of Migrant Workers of 24 June 1975 sets out a duty to co-operate in the prevention of uncontrolled migration movements.

The common European responsibility which led to the conclusion of the more recent readmission agreements with Eastern European states can

¹¹¹ Cf. Doebling (note 99), 93.

¹¹² Cf. Verdross/Simma (note 31), 3rd ed. 1984, 845 et seq., 873 et seq.

be considered an indication of the further development of the duty to act responsibly in respect to the prevention of uncontrolled migration movements.

One cannot refer to "readmission" in the sense explained above where nationals of third states are refused entry on the maritime or territorial border for lack of necessary documentation. Under international air traffic law, the authority to return persons arriving at an airport to their place of departure is, in principle, undisputed. An obligation on the state of departure to readmit the national of a third state cannot be concluded from this. The state of departure is, however, obliged to admit a refused person in order that a check-in and where necessary a deportation to third states can be made possible.

At maritime and territorial borders, the obligation of states to readmit persons to whom entry has been refused derives indirectly from the sovereign right of each state to decide which foreign nationals to admit to its territory. An American court has described the legal situation as follows:

"It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."¹¹³

On the one hand, a state has the authority to reject aliens at its border. On the other hand, the neighbouring state from which the person tries to enter is obliged to readmit the rejected person. There is no major difference between entry at territorial borders and entry through airports or seaports within the territory of the respective state. It is common practice under international law to take the alien back to the state from which he tries to enter. An air traveller is usually taken back to the state of departure; in the case of a mere stopover in the state of departure, the alien is brought back to his last state of residence.¹¹⁴ A further obligation to admit persons who have entered illegally by means of forged identification papers or by any other means is questionable due to the lack of contractual agreements. In Europe, the informal return of persons entering illegally is generally conducted on the basis of readmission agreements

¹¹³ *Nishimura Ekin v. United States*, 142 U.S. 651, 659 (1892); cf. about this decision: Goodwin-Gill (note 35), 96; for a critical view see J.A. Nafziger, AJIL Vol. 77, 1983, 804 et seq.

¹¹⁴ Cf. W. Kanein/G. Renner, *Ausländerrecht*, 6th ed. 1993, Para. 60 AuslG, margin no. 15.

within a certain period. In the absence of contractual agreements there are no indications of the existence of binding obligations under international law to readmit third-state nationals who have entered illegally and who are to be expelled shortly after their entry.

V. Special Cases

1. Readmission of recognised refugees, persons seeking asylum, and stateless persons

Numerous agreements on the legal status of refugees concluded before the Geneva Convention Relating to the Status of Refugees came into force provide for the issue of a travel document to the refugee covering the right to leave and to return. The sole right retained by the contracting parties is that to make the right of return dependent on certain temporal preconditions.¹¹⁵ Para. 13 of the Annex to the Geneva Convention Relating to the Status of Refugees of 1951 provides that each contracting party is obliged to issue a travel document, containing a right to return, to the refugee. It can be derived from this that the state which issues a travel document according to the Convention is obliged to receive a refugee for the period of validity of the travel document.¹¹⁶

The Convention on the Legal Status of Stateless Persons of 28 September 1954 contains identical clauses for stateless persons.¹¹⁷ The issuing state, however, is authorised to set a discretionary limit of up to 3 months for the right to return contained in the documents.

According to the European Agreement on the Abolition of Visa for Refugees of 20 April 1959, an obligation of readmission, independent from the validity of travel documents also exists.¹¹⁸

“Article 5: Refugees who have entered the territory of a Contracting Party by virtue of the present Agreement shall be re-admitted at any time to the territory of the Contracting Party by whose authorities the travel document was issued, at the simple request of the first-mentioned Party, except where this Party has authorised the persons concerned to settle in its territory.”

An obligation to readmit for an indefinite period cannot be deduced from this document. The provision only relates to refugees who have en-

¹¹⁵ A. Grahl-Madsen, *The Status of Refugees in International Law*, Vol. 2, 1972, 290 et seq.

¹¹⁶ *Ibid.*, 295.

¹¹⁷ K. Hailbronner/G. Renner, *Staatsangehörigkeitsrecht*, 1991, 579 et seq.

¹¹⁸ For the text see European Treaty Series N° 31.

tered the territory of a contracting party on the grounds of the agreement. This means that a refugee has to possess a valid travel document at the time of entry and that his visit may not last longer than 3 months. What is more, the obligation to readmit does not apply if the refugee holds the right to settlement in another contracting state. Such a settlement is presumed where a residence permit, the validity of which exceeds that of the right to return contained in the travel document, is granted to the refugee.¹¹⁹

Art. 11 of the Convention on Refugee Sailors of 23 November 1957¹²⁰ provides that the contracting party in whose territory the refugee sailor legally resides, or whose territory is held (according to Art. 28 of the Geneva Convention Relating to the Status of Refugees) to be the area of his legal residence, has to grant entry into the territory upon the application of the contracting party in whose territory the refugee sailor presently is. This obligation of readmission is also valid if a contracting party, for compulsory reasons of public order or the security of the state, considers its duties towards the refugee sailor under the Convention to be obsolete.

Readmission obligations also result from the European Convention on the Transition of the Responsibility for Refugees of 16 October 1980.¹²¹ According to this Convention, the responsibility is regarded to have passed on to the state where the refugee currently and permanently resides with the permission of the authorities for a period of 2 years. The transition can take place even earlier if the other state permits the refugee to remain in its territory either permanently or longer than the travel document is valid. The 2-year period starts when the refugee is admitted into the territory of the second state or, if this moment cannot be verified, with the day on which he registers in that state.¹²² As long as the responsibility remains, according to these provisions, the first state must readmit the refugee to its territory even where the relevant travel documents have expired.¹²³

The Dublin Convention of the EC-states on the Determination of the State Competent for the Examination of an Application for Asylum Lodged in a Member State of the E.U. of 15 June 1990¹²⁴ and the Con-

¹¹⁹ Grahl-Madsen (note 115), 304 et seq.

¹²⁰ Cf. K. Hailbronner, *Ausländerrecht* (loose-leaf ed.), B6.

¹²¹ *Ibid.*, E6.

¹²² Cf. Article 2 (1) of the agreement.

¹²³ Article 4 (1) clause 1.

¹²⁴ Cf. A. Achermann/B. Bieber/A. Epiney/R. Wehner, *Schengen und die Folgen*, 1995, 96 et seq. (for the text of the convention see 243 et seq.).

vention of Schengen II of 19 June 1990¹²⁵ also contain provisions on the readmission of persons seeking asylum. According to these conventions, the competent state has the duty to admit or readmit asylum-seekers who have applied for asylum in another contracting state or reside there illegally, if the asylum-seeker resides illegally in the territory of another contracting party, for the duration of the asylum procedure¹²⁶. The same duty applies if an asylum-seeker, having been rejected definitely, has entered the territory of another contracting party without the authorisation to reside therein.¹²⁷ In the afore-mentioned case such an obligation no longer exists where the other contracting party has issued to the asylum-seeker a residence permit with a validity of one year or longer. In this case the competence to examine the application for asylum passes to the other contracting party.¹²⁸

The rules of the Schengen Agreement II and of the Dublin Agreement are based on the principle that an asylum-seeker must apply for asylum in the first safe state which has permitted him entry or into which he has entered in another way. The principle of an exclusive responsibility within a greater European contractual community is the basis for numerous recent Western European laws on asylum. It remains impossible to derive recognition of the "first-country concept" from customary international law. The obligation of readmission of the responsible states resulting from the agreements of Schengen and Dublin, however, take into account the necessity to impede an uncontrolled further migration of asylum-seekers. From the fundamental ideas they contain, these agreements can be viewed as cornerstones of a developing European system of asylum law. The admission obligation of the first safe state, which is responsible for performing the asylum procedures according to these rules, is based on the principle that each state is responsible for the control of movements of migration in its territory.

¹²⁵ Agreement for the Execution of the Agreement Concerning the Gradual Abolition of Controls at the Common Borders Concluded Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic at Schengen on 14 June 1985., cf. *ibid.*, 193 et seq.

¹²⁶ Cf. Article 33 (2) of the Schengen Convention II.

¹²⁷ Article 34 (1) of the Schengen Convention II.

¹²⁸ Article 33 (2) of the Schengen Convention II.

2. Repatriation of refugees to their state of origin

Many resolutions of international bodies contain an express right to return for refugees who have been expelled from their usual state of residence due to persecution or violence. Concerning refugees from Yugoslavia, the Commission on Human Rights states:

"The Commission ... re-emphasises the right of refugees, displaced persons and other victims of ethnic cleansing to return to their homes and the invalidity of forced transfers of property and other acts made under duress."¹²⁹

Annex 7 of the Dayton Agreement of 10 November 1995 providing for repatriation of refugees and displaced persons states in Article I (Rights of Refugees and Displaced Persons):

"(1) All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries.

(2) The Parties shall ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution or discrimination, particularly on account of their ethnic origin, religious belief or political opinion.

(3) The Parties shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons. To demonstrate their commitment to securing full respect for the human rights and fundamental freedoms of all persons within their jurisdiction and creating without delay conditions suitable for return of refugees and displaced persons, the Parties shall take immediately the following confidence building measures."

In addition the agreement provides that choice of destination shall be up to the individual or family, and the principle of the unity of the family shall be preserved. The Parties agree not to interfere with the returnee's choice of destination, nor shall they compel him to remain in or move to situations of serious danger or insecurity, or to areas lacking the basic infrastructure necessary to resume a normal life. It is envisaged that in co-operation with the UNHCR and the asylum countries a repatriation plan is developed that will allow for an early, peaceful, orderly and phased re-

¹²⁹ Commission on Human Rights, Report on the 49th Session, 1993, Res. 1993/7, 55.

turn of refugees and displaced persons which may include priorities for certain areas and certain categories of returnees. The Parties agree to implement such a plan and to conform their international agreements and internal laws to it. They accordingly call upon states that have accepted refugees to promote the early return of refugees consistent with international law.

The readmission agreement between the governments of Germany and Bosnia and Herzegovina of 20 November 1996 refers to the right of return laid down in the Dayton Agreement. The readmission agreement provides for a phased return of war refugees and displaced persons, attaching priority to a voluntary return although forced return is not excluded.

The principle of repatriation of refugees, once the situation which caused their flight has ended, has been postulated by UN bodies in the post-war period, in particular in relation to the return of Palestinian refugees. Resolution 3236 of the UN General Assembly of 22 November 1974 states:

"The General Assembly ... reaffirms the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and calls for their return."¹³⁰

Despite the specific legal questions arising from a "right to return" of the Palestinians to the state of Israel,¹³¹ it may be concluded from the practice of international organisations that a right to return and a corresponding obligation to readmit are considered to be an element of existing international law. Such a duty to repatriate is, however, often only vaguely outlined. Recently, repatriation actions on a larger scale are increasingly made dependent on financial contributions or on other prerequisites such as the willingness to return, or on limiting the number of refugees.

Contractual practice, however, is not completely uniform. Recently, a number of measures to repatriate have been carried out on the basis of bilateral agreements.

The agreement between Germany and Vietnam, signed on 21 July 1995, concerning the readmission of Vietnamese citizens provides, without re-

¹³⁰ 29 UNGA Official Records, Supp. (No. 31), 4; UN Doc. A/96/31 (1974); Committee on the Exercise of the Inalienable Rights of the Palestinian People, 31 UNGA Official Records, Supp. (No. 39), 5; UN Doc. A/31/35 (1976).

¹³¹ For a critical analysis see R. Lapidot, 16 *Israel Yearbook of Human Rights* (1986), 103 et seq.; K.R. Radley, 72 *American Journal of International Law* (1978), 586 et seq.

striction to "voluntary repatriation", for the repatriation of 40,000 Vietnamese citizens who reside in Germany without a valid residence permit. In the agreement, Vietnam recognises its duty under international law to readmit all nationals who reside in Germany without valid residence permits.¹³² The return of persons obliged to leave takes place on the basis of the Common Declaration of 6 January 1995 on the elaboration and deepening of German-Vietnamese relations, which prescribes yearly repatriation contingents of 2,500 to 6,500 persons.

Various recommendations of the UNHCR's Executive Committee contain such statements as: "Voluntary repatriation constitutes generally, and in particular when a country accedes to independence, the most appropriate solution for refugee problems."¹³³

These and other declarations, however, do not allow the conclusion that the practice of international law makes repatriation dependent on the willingness of the individual to return. In modern state practice many examples of repatriation can be found where it was executed with differing degrees of pressure on the refugees. Albanian refugees from Italy, Tamil refugees from numerous Western European countries, e.g. from Great Britain, have, amongst others, been repatriated in such a way.¹³⁴ The latest example of such a repatriation is the Memorandum of Understanding between the Bahamas and Cuba, according to which up to 30 undocumented Cuban nationals have to be taken back to Cuba each week, the only stipulation being evidence of Cuban nationality.¹³⁵

The principles recently accepted by German interior ministers on 26 January 1996 concerning the repatriation of refugees of war to Bosnia-Herzegovina also provides for a staggered return of civil war refugees until 1997, with "voluntary return" being promoted, yet compulsory return being by no means excluded.

There is no reference in literature on international law indicating that the idea of "voluntary repatriation" restricts an otherwise existing international obligation to readmit. The repatriation of refugees is only limited by individual refugee rights according to the Geneva Convention Relating to the Status of Refugees (Art. 33 – principle of *non-refoulement*) and Art. 3 of the European Convention on Human Rights. Thereby, a refugee

¹³² Cf. ZAR-aktuell (supplement to: Zeitschrift für Ausländerrecht und Ausländerpolitik), no. 5/95 of 25.9.1995.

¹³³ UNHCR, ExCom Res. No. 18 (XXXI), – voluntary repatriation.

¹³⁴ Cf. M. Mushkat, 5 International Journal of Refugee Law, (1993), 568, 573 et seq.

¹³⁵ Memorandum of Understanding concerning the Repatriation of Undocumented Cuban Citizens Illegally Residing in the Bahamas of 12.1.1996.

must not be exposed to political persecution or inhuman treatment in his state of origin.¹³⁶ Van Krieken, however, has recently detected a trend "according to which repatriation has to be voluntary in large-scale repatriation operations."¹³⁷ But an analysis of actions of repatriation shows that, in spite of the preference for voluntary repatriation, states have not relinquished their entitlement to compulsory return of those refugees whose need for protection lapsed as a consequence of changes of actual conditions in their state of origin.¹³⁸

It is doubtful whether there also exists an obligation to readmit those refugees who, before being caused to flee, merely resided in the state of origin without being its nationals. The right to return acknowledged in the resolutions of international bodies does not generally differentiate according to the nationality of the refugee. It is, however, not possible to conclude with certainty that an obligation to repatriate also extends to foreign nationals who formerly had permanent residence in the requested state. An inclusion of all displaced persons in the concept of repatriation does suggest itself, however, considering that an obligation to accept persons to be repatriated exists not only due to the assignment function of nationality but also due to general principles of international tort law.

An obligation to readmit as a form of reparation of former injustice under international law presupposes, however, that an expulsion manifests itself as an infringement of commitments under international law to the receiving state and that, in this way, the rights of the state granting shelter to refugees are infringed upon. In principle, states are obliged to respect each other's territorial integrity. A state which, by means of expulsion, forces parts of its population to flee infringes upon the sovereign right of other states to determine entry and residence of foreign nationals.¹³⁹ In this way, receiving states are forced to admit refugees in need of protection. There is presently a vigorous discussion in literature on international law concerning the extent to which the causing of refugee movements creates a duty of financial reparations towards the states of residence.¹⁴⁰

¹³⁶ Cf. G.S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed., 1996, 117 et seq.

¹³⁷ 13 Netherlands Yearbook of International Law (1982), 93, 98.

¹³⁸ Similarly van Krieken, *ibid.*, 122 et seq.

¹³⁹ This is generally accepted according to C. Tomuschat, *State Responsibility and the Country of Origin*, in: V. Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues*, 1995, 59, 72.

¹⁴⁰ Cf. *ibid.*, and H. Coles, *State Responsibility in Relation to the Refugee Problem, with Particular Reference to the State of Origin*, 1993, 4 et seq.

So far it has not been possible to prove a state practice clear enough to demonstrate an international liability for the costs of refugee admittance.

This, however, does not preclude the conclusion that massive expulsions of population create an obligation to readmit the expelled persons after the situation having caused their flight has passed. Nor can the concept of "right to return to their home land", in its international form as confirmed in numerous legal instruments, be limited to a state's own nationals. Clear state practice is certainly lacking in this area.

Indications of this are stated under the law of armed conflict. Art. 49 of the IVth Geneva Convention concerning the Protection of Civilians in Times of War neither allows forced individual nor mass transfers or the removal by force of civilians out of occupied territories into the territory of the occupying power or into any other state. Removal or displacement of civilians are considered "grave breaches" under Art. 147 of the Convention. In literature on international law these rules are mainly seen as the expression of a general principle according to which any expulsion of the civilian population by a warring party is forbidden.¹⁴¹ Whether general principles of the treatment of the resident population under conditions of civil war are deducible cannot be answered unequivocally in view of differing state practice.¹⁴²

Within the European legal system, the prohibition of collective expulsions based on Art. 4 of the IVth Additional Protocol to the European Convention on Human Rights at least proves the existence of a duty to repatriate towards "permanent residents". The E.U. Council's decision to extend the duty to readmit to "those others who have left their territory" confirms this trend. A general obligation to repatriate can therefore be considered as an expression of a general legal principle of international law. This means that measures of expulsion contrary to international law are, as a rule, to be compensated by permitting refugees, having temporarily been granted protection by other states, the return to their state of origin. This principle may be considered to be generally recognised, even though effective instruments for its implementation do not exist.¹⁴³

¹⁴¹ Cf. A.M. de Zayas, 16 *Harvard International Law Journal* (1975), 207, 212 et seq. with numerous further references.

¹⁴² Cf. *ibid.*

¹⁴³ *Ibid.*, 207, 257 et seq.

VI. Conclusions

1. Summary

International obligations to readmit one's own and foreign nationals have to be distinguished from the existence of rights of an individual to return.

The existence of an individual's right to return, however, does automatically indicate the existence of international obligations to readmit. These result from the evolution of the individual right to return to the home state, the law of international relations, and the function of nationality as a means to define responsibilities in international legal relations.

Obligations to readmit are not, therefore, dependent upon the willingness of the individual to return. The right to return does not constitute the right of the individual to choose not to return to his home state if the state of residence withdraws the right of residence.

The principle of readmission of one's own nationals is generally recognised within treaties under international law. Because of a uniform *opinio juris* and consistent state practice it is also considered a principle of customary international law.

It follows from the international obligation not to foil claims for readmission of states of residence and from the principles of good faith that states of origin must not make obligations to readmit their own nationals dependent on formal requirements, for example the presentation of valid documents. Moreover, according to principles of good faith, home states are obliged to co-operate in the execution of their own nationals' readmission and for this purpose to issue any necessary substitute papers within reasonable time.

Due to lack of a sufficiently representative state practice and a sufficiently uniform *opinio juris* there exists no general obligation on a home state to readmit its former nationals under customary law.

According to principles of good faith and ordered relations between states a state must readmit its nationals both where they renounce their nationality and where their home state withdraws it without the persons' having acquired the nationality of the state of residence or a third state.

The obligation to readmit expires if the state of residence grants the stateless person a right to permanent residence or a promise of naturalisation.

More recent readmission agreements reflect a tendency towards an obligation on states to readmit those nationals of third states who have con-

tinued their journey to a neighbouring state although they did not fulfil entry and residence requirements of the state first entered.

Due to lack of a common European practice and *opinio juris* an obligation, derived from customary law, on neighbouring states to readmit nationals of third states who have entered illegally is not yet evident.

Principles of good neighbourly conduct do, however, provide a common point of departure with regard to the development of a joint European responsibility for dealing with uncontrolled migration movements. This can be said despite the fact that obligations to readmit based on these principles may not, at present, be deduced.

According to the general principles of international law a state does have an obligation to a neighbouring state to readmit nationals of third states if the manner in which the first state supported or tolerated illegal migration of third state nationals is considered reproachable.

States are committed to repatriate refugees having fled from violence or persecution once the conditions causing that flight have changed. Those states which granted temporary protection to these refugees are entitled to demand that the home state repatriate them.

The obligation to repatriate does not only cover one's own nationals but also extends to persons who, preceding the circumstances which caused them to flee, had their permanent residence in that state from which repatriation is now requested.

The obligation to repatriate lies with the state of residence and is not dependent upon the willingness of the individual to return.

2. Outlook

The existing system is based on the principle of bilateralism and is shaped by considerable legal uncertainties in the implementation of treaties or of customary law obligations with respect to a state's own nationals or foreign nationals. Thus the creation of European standards is made more difficult. A contractual policy based mainly upon superficial national interests is promoted which does not recognise the necessity of a European solution to the problem of uncontrolled migration movements. An often unjustified combination of the readmission problem with financial and economic advantages can easily have the effect of promoting or tolerating uncontrolled illegal migration and in this way impede more effective preventive measures.

There is a lack of regulation dealing with the readmission of a state's nationals particularly in the field of repatriation procedures and with regard

to the rights and duties of the states requested to repatriate. Furthermore, there is often an insufficient regulation of which rules are applicable in cases of withdrawal or loss of nationality. Readmission agreements should make clear that a loss of nationality which occurs in the state of residence due to renunciation or withdrawal of nationality does not have any influence over the obligation of the former state to readmit.

Further, a fixing of the principle that stateless persons – for lack of other links (i.e. granting of permanent residence, recognition as a refugee) – are to be readmitted by the former home state appears to be justified within treaties, even though corresponding rules in customary law cannot be shown.

In the field of readmission of foreign nationals more recent bilateral agreements show a clear trend towards an obligation on states to readmit nationals of a third state who have illegally migrated to a further neighbouring state. Until now material and procedural demands on the state obliged to readmit are only precisely described in a few of the readmission agreements. This is precisely where the development of uniform European standards is urgently needed as uncontrolled migration movements can only be effectively kept in check where repatriation rules foreseeable for the individual and simple to handle, which make an illegal migration unattractive, exist. Repatriation procedures should be made rapid and unbureaucratic where the alien in question possesses neither a right to reside nor needs protection for either humanitarian or international legal reasons.

Until now preventive aspects have found little consideration within international treaties. Readmission agreements primarily lay down the rights and obligations of the participating states. They do, however, also determine the legal status of individuals and of their decisions. The clearer and simpler the readmission rules in cases of unlawful entry and residence are, the less temptation there is for further illegal migration in order to obtain an otherwise unobtainable right of residence in the desired state. A European system of readmission rules, as unified as possible, should therefore be made generally known. This can, however, only follow the clearing up of weak points within the present system which often reward the falsification of statements and of routes taken.

Readmission rules should be formulated so that it is clear that obligations to readmit a state's own nationals or foreign nationals already exist under customary international law. The formulation of newly negotiated treaties should clearly show that the provisions of the respective agreement put those existing mutual rights and obligations which presently ex-

ist under customary law into concrete terms. Even where a sufficient legal practice for the readmission of foreign nationals does not yet exist, it should be explained that, as a result of principles of good neighbourliness and European solidarity, there do exist obligations to readmit third-state nationals who have entered a state illegally in order that uncontrolled migration may be overcome.

Procedural rules are of great practical importance when formulating obligations under international treaties. The implementation of a right to readmission, whether under customary law or recognised within international treaties, frequently meets practical difficulties resulting from the lack of co-operation of the state requested to readmit. A clear statement of the documents required as evidence of an obligation to readmit and an exact description of the state's procedural duties in cases of readmission applications is therefore necessary. It must be considered whether major efforts should not be undertaken towards a multilateral agreement to replace the existing system of mostly bilateral ones. Arguing in favour of bilateral agreements are their greater flexibility and the factor of time. Procedures can be adapted to the special relationship between two contracting parties and thus can contain more detailed provisions than multilateral agreements. Ponderous and frequently time-consuming negotiations involving several contracting parties to reach a common, often watered-down consensus, are avoided. These advantages could be important, especially where the readmission of foreign nationals is concerned, since regional peculiarities and relations between neighbouring states often point to a solution "made to measure".

On the other hand, in the long run multilateral agreements have the significant advantage that they can prevent a fragmentation of contractual practice. At the same time, contravention of international law and its use as a "bargaining position", especially where a state performs its duty to readmit a citizen, is made more difficult. Multilateral negotiations offer the further advantage that principles to readmit a state's or foreign nationals can be pushed through with much greater political and economic force on the state concerned. In the long run, multilateral treaties founded on uniform principles, whereby peculiarities are incorporated through additional protocols, offer considerable advantages. It is, for example, at the same time possible to prevent special cases from weakening useful readmission principles in order to attain short-term solutions to problems. Further, the legally questionable acquisition of financial gains through the readmission of citizens (*per capita premium*) would be easier to counter.

Independently of this, the readmission problem should be discussed at a European level (Council of Europe, OSCE) and should be included in negotiations towards a European solution to the problem of uncontrolled migration. The recommendation of the EU Council of a model of bilateral readmission agreements represents an important first step. At the same time, however, more common European standards in the form of decisions or recommendations are required.

Financial concessions and aid to ease burdens on a state requested to repatriate persons should not be combined with readmission obligations in a reciprocal sense, but should be independently granted under separate agreements, preferably in combination with questions of economic development in the sense of a European solidarity. For such an agreement to succeed it must be preceded by co-ordination among the countries required to repatriate. This would avoid the misuse of economic aid as a compensation for the performance of obligations already required under international law.

An incorrect linking of financial aid to the performance of readmission obligations could be avoided if, for example, the recognition of readmission obligations or the adherence to corresponding multilateral readmission agreements was made a precondition of entry into negotiations on economic aid for reconstruction. One should furthermore consider whether or not a contractual combination could also be used to demonstrate that economic co-operation is dependent on the adherence to existing readmission obligations.

The E.U. has already effected such a combination in association agreements with third states and in the Lomé IV Agreement. It should, however, at the same time be made clearer than previously was the case that general readmission principles are to be respected by all states concerned, regardless of whether they have been concluded on a bilateral or multilateral basis.

