

Beyond Non-Refoulement: Status and International Human Rights Law

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1. Introduction

Refugees enjoy a distinct and unique standard of protection under international law within the framework of the international regime for the protection of refugees, which is based on the 1951 UN Convention on the Status of Refugees and its 1967 Protocol. These instruments do not include one of the most fundamental rights of refugees, namely, the right to be granted asylum, an essential premise for the enjoyment of other rights. The drafters of the Refugee Convention were well aware that refugees could find themselves without a country of asylum and therefore the Conference that adopted the Convention recommended that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find *asylum* and the possibility of *resettlement*? (emphasis added, Recommendation D).

International human rights law strengthens the specific refugee legal framework by allowing refugees to invoke the protection of norms whose scope of application may be wider than those in the refugee regime, such as for instance, the *absolute* prohibition of *refoulement* to situations where there is a real risk of torture or inhuman or degrading treatment or punishment. Likewise, the 1948 Universal Declaration on Human Rights (UDHR) included the right to seek asylum in Article 14 and the right to asylum is enshrined in international human rights instruments of regional scope in Latin America, Africa and Europe. Current developments show that residence and citizenship may be, under certain circumstances, also protected.

2. International Human Rights Law and the Principle of *Non-Refoulement*

From the early 1960s, the (no-longer existing) European Commission of Human Rights, established under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to monitor compliance by State Parties with the ECHR, found that despite its silence on asylum and *non-refoulement* matters, the Convention could be applicable to instances of forced removal. The well-established jurisprudence of this body was later confirmed and developed by the European Court of Human Rights (ECtHR), which has consistently found that despite the lack of an express *non-refoulement* provision in the ECHR, such prohibition was already inherent in the general terms of article 3? (*Soering v. United Kingdom*, judgment of 7 July 1989, Application No. 14038/88, para. 88), including when confronted with the complex challenges posed by circumstances affecting national security (*Chahal v. United Kingdom* (1996), Application No. 22414/93, paras. 79-80; confirmed in *Saadi v. Italy* (2008), Application No. 37201/06, para. 138).

The absolute nature of the prohibition to remove someone to a risk of torture has also been affirmed by the UN Human Rights Committee, established under the International Covenant on Civil and Political Rights (ICCPR), including in cases of armed conflict (*Ng v. Canada* (1993), Communication No. 469/1991; see also *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, paras. 10-12; and *Concluding observations of the Human Rights Committee. Canada*, UN Doc. CCPR/C/CAN/CO/5, 20 Apr. 2006, para. 15).

Unlike previous human rights instruments, the Convention Against Torture (CAT) was the first international human rights treaty of universal scope (after the Refugee Convention) to include an express *non-refoulement* provision. Unlike Article 33 of the Refugee Convention, Article 3 CAT does not allow for derogations or exceptions: "No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". The Committee Against Torture has affirmed consistently the absolute nature of the *non-refoulement* prohibition enshrined in Article 3 CAT, even in cases involving national security (*Agiza v. Sweden* (2005), Communication No. 233/2003, para. 13.8) and where the individual falls under the exclusion clauses of Article 1F of the Refugee Convention (*Tapia Paez v. Sweden* (1997), Communication No. 39/1996, para. 14.5).

In sum, the prohibition to remove someone to a risk of prohibited treatment has been unequivocally reaffirmed both at the universal and regional levels. The prohibition is absolute, thus allowing for no derogation or exception under any circumstances, when forced removal exposes an individual to a risk of torture or other inhuman or degrading treatment or punishment. The principle of *non-refoulement* is accepted today by State Parties to the Refugee Convention and its Protocol as customary international law ([Declaration \[1\] of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees](#), 13 Dec. 2001, UN Doc. HCR/MMSP/2001/09, 16 Jan. 2002, Preamble, para. 4), while States in the Latin American region affirm its *jus cogens* nature (1984 [Cartagena Declaration \[2\]](#) on Refugees, Conclusion 5).

The principle of *non-refoulement* in human rights instruments has resulted in the enacting of legislation introducing protection status for individuals who benefit from the principle of *non-refoulement* under international human rights law, but who do not fall under the protection of the UN Refugee Convention. This has taken different forms, notably, the granting of a single status for all protected persons (as it is the case in the US and Canada), or the adoption of a specific and separate status which is called subsidiary protection in the EU (Directive 2011/95/EU).

3. Beyond Non-Refoulement

While the protection of refugees against *refoulement* under international human rights law is now well established, the nature of the obligation to protect is one of result, thus leaving a margin of appreciation to States on the ways in which this may be achieved. Despite this clear standing, however, a trend seems to be emerging to assess whether the type of immigration status afforded to non-removable non-nationals is sufficient to meet relevant international standards.

The Committee Against Torture articulated this position in *Aemei*, noting that "[t]he Committee's finding of a violation of article 3 of the Convention in no way affects the decision(s) of the competent national authorities concerning the granting or refusal of asylum. The finding of a violation of article 3 has a declaratory character. Consequently, the State party is not required to modify its decision(s) concerning the granting of asylum; on the other hand, it does have a responsibility to find solutions that will enable it to take all necessary measures to comply with the provisions of article 3 of the Convention" (*Seid Mortesa Aemei v. Switzerland* (1997), Communication No. 34/1995, para. 11). Two years later, the Committee qualified its position in a case which did not involve a risk of expulsion, as the complainant had a residence permit and his

application for renewal had not yet been decided. Yet, noting that the order for the author's expulsion is still in force, the Committee considers that the possibility that the State party will grant the author an extended *temporary permit for medical treatment* is not sufficient to fulfil the State party's obligations under article 3 of the Convention? (*A.D. v. Netherlands* (1999), Communication No 96/1997, para. 7.3, emphasis added). While the Committee did not identify which particular immigration status would be required in order to comply with Article 3 CAT it made it clear that temporary residence permits based on circumstances whose nature is also temporary were in themselves insufficient to meet the standards of protection against *refoulement* required by the Convention.

Given the more comprehensive nature of other international human rights treaties, notably the ICCPR and the ECHR, the jurisprudence on these instruments has considered issues regarding the specific attachments other than nationality- between individuals and States which may under certain circumstances require the State not merely to refrain from expelling the individual, but rather to take positive measures to ensure their stay and integration in the host country.

The UN Human Rights Committee has considered quite extensively the relationship between individuals with States other than the one of nationality, and in particular the legal relevance of significant attachments other than nationality in the context of the ICCPR. In *Stewart*, the Human Rights Committee was asked to define what constitutes one's own country? within the meaning of Article 12(4) ICCPR: "No one shall be arbitrarily deprived of the right to enter his own country?". The Committee noted that "the scope of the phrase *his own country*? is broader than the concept *country of his nationality*?", which it embraces and which some regional human rights treaties use in guaranteeing the right to enter a country [?] [I]t embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien [?] [T]he language of article 12, paragraph 4, permits a *broader interpretation*, moreover, that might embrace *other categories of long-term residents*, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence? (*Stewart v. Canada* (1996), Communication No. 538/1993, paras. 12.3-12.4; *General Comment No. 27: Article 12 (Freedom of Movement)*, UN Doc. CCPR/C/21/Rev.1/Add.9, 2 Nov. 1999, para. 20). The broad interpretation of the term "one's own country" in the ICCPR has been confirmed in two recent decisions (*Stefan Lars Nystrom v. Australia* (2011), Communication No. 1557/2007, para. 7.6; and *Jama Warsame v. Canada* (2011), Communication No. 1959/2010, para. 8.6). The controversial nature of the notion of a special attachment between non-nationals and States is exemplified in Australia's refusal to comply with the Committee's decision (Australian Government, [Response of the Australian Government](#) [3] *to the Views of the Committee in Communication No 1557/2007, Nystrom et al v Australia* (18 July 2011), para. 14).

At regional level, Article 3(1) of Protocol No. 4 to the ECHR (adopted before the ICCPR) protects *nationals* against expulsion. In *Beldjoudi*, Judge Martens elaborated on the notion of one's own country in a concurring opinion. Recalling that the expulsion of nationals is prohibited, he stated that "in a Europe where a second generation of immigrants is already raising children (and where violent xenophobia is increasing to an alarming extent) it is high time to ask ourselves whether this ban should not apply equally to aliens who were *born and bred in a member State* or who have otherwise, *by virtue of long residence*, become fully integrated there (and, conversely, become completely segregated from their country of origin). In my opinion, *mere nationality does not constitute an objective and reasonable justification* for the existence of a difference as regards the admissibility of expelling someone from what, in both cases, may be called his 'own country'?" (*Beldjoudi v. France* (Judgment), (1992), Application No. 12083/86, Concurring Opinion of Judge Martens, para. 2, emphasis added). Martens' position has been endorsed explicitly or implicitly in different opinions over the years to the Court's case-law. The ECtHR's case-law shows that the case-by-case approach to this matter remains dominant. Yet, the Court has gone as far as

declaring that the denial of residence, of permanent residence and even of citizenship may constitute violation of ECHR-guaranteed rights (*Sisojeva and others v. Latvia* (Judgment), (2005), Application No. 60654/00, para. 105; *Kuri? and Others v. Slovenia* (Judgment), (2010), Application No. 26828/06, paras. 353 & 361).

While the principle of State sovereignty is still prevalent and restrictions to the power of the State to control its population remain exceptional, the above discussion shows that a trend is emerging in the context of international human rights law to affirm entitlements in terms of attachment and belonging for non-nationals in the political community, thus moving beyond the exceptional nature of international human rights law interference with State sovereignty (for a discussion of membership in the political community beyond the legal bond of nationality see, M. Gibney, 'The rights of non-citizens to membership?', in Sawyer and Blitz (eds.), *Statelessness in the European Union: Displaced, Undocumented, Unwanted*, Cambridge, Cambridge University Press, 2011).

María-Teresa Gil-Bazo

PhD in International Law; Senior Lecturer in Law (Newcastle Law School, Newcastle University); Fellow of the European Law Institute (Vienna) and Member of the Spanish Bar Council.

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Residence document

Inhuman or degrading treatment or punishment

Links:

[1] <http://www.unhcr.org/419c74d64.pdf>

[2] <http://www.unhcr.org/45dc19084.html>

[3]

<http://www.ag.gov.au/RightsAndProtections/HumanRights/DisabilityStandards/Documents/NystrometalvAustralianGovernmentResponse.pdf>

[4] <http://rsq.oxfordjournals.org/content/34/1/11>