CHAPTER 3

The Scope of Protection against Arbitrary Expulsion from a State of Legal Residence under International Human Rights Law

Introduction

The expulsion of aliens – though, in principle, a domestic issue – has, to a significant extent, been governed by international human rights law. As a result, States Parties to the international human rights conventions no longer enjoy absolute and uncontrolled discretion in immigration policy and have to exercise it consistently with the obligations expressed in these treaties. In this connection, it is worth drawing attention to the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, which provides that:

Nothing in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. However, such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights.¹

R. Bernhardt stresses that “treaty obligations are in case of doubt and in principle not to be interpreted restrictively and in favour of State sovereignty. It is obvious that this conclusion can have considerable consequences for human rights conventions: every effective protection of individual freedoms restricts State sovereignty, and it is by no means State sovereignty which in case of doubts has priority.”² It must be remembered that international human rights treaties guarantee the protection of an individual against governmental excesses. Thus, expulsion of an alien lawfully residing in the territory of a State

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¹ See: Art. 2(1) of the Declaration the Human Rights of Individuals Who are not Nationals of the Country in which They Live.
Party to the International Covenant on Civil and Political Rights, European Convention on Human Rights, American Convention on Human Rights, African Charter on Human and Peoples’ Rights is subject to the human rights standards established in them as well as the scrutiny of the treaty monitoring bodies.

The expelling State is required to strike a balance between its own interests and those of the individual concerned. It is, therefore, obliged to consider the alien’s acquired rights and reach a decision which bears a fair relationship to the facts. In other words, due consideration must be given to the interests of the individual, including his basic human rights, family and private life, property, and other connections with the host State. Expulsion supposedly based on nationality is, in fact, selective referring to race and ethnicity and as such infringes the principle of non-discrimination. Alienage cannot be used to deprive individuals of their human rights.

The purpose of this chapter is, therefore, to examine the extent of the protection against arbitrary expulsion an alien lawfully residing is entitled to under international human rights law. I will investigate which substantive rights guarantee aliens the protection against arbitrary expulsion, how they are applied in practice and interpreted by the international jurisprudence and what obligations States have in this regard.

It should be stressed that joining international agreements on promotion and protection of human rights as well as basic freedoms, States are obliged not only to respect the rights and freedoms included, but also to ensure their enjoyment. The International Court of Justice in its judgment on Barcelona Traction stated that “in particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.” By pointing to examples of these obligations, the Court invoked basic rights of a human being including protection against slavery and racial discrimination.

The standpoint of the Institute of International Law is also worth mentioning here. In its resolution of 13 September 1989 on The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States it specified that every State has a common, international obligation to respect human rights in relation to the international community as a whole and that

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3 Barcelona Traction (Belgium v. Spain), International Court of Justice, Judgment of 5 February 1970, paras. 33, 34.