10 Exceptional Duties to Admit Aliens

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I. Introduction

At the end of the XIX century, in the Preamble to the International Rules on the Admission and Expulsion of Aliens it was asserted that ‘for each State, the right to admit or not admit aliens to its territory or to admit them only conditionally or to expel them is a logical and necessary consequence of its sovereignty and independence’.

However, well before the affirmation of international human rights, this assertion was completed by another statement, whose significance has gained greater importance in more recent times, that ‘humanity and justice oblige States to exercise this right while respecting, to the extent compatible with their own security, the rights and freedom of foreigners who wish to enter their territory or who are already in it’.

Based upon the traditional view, statements can be found that in the absence of treaty obligations, a state should admit aliens on such terms and conditions as it might deem to be consonant with national interest and deport from its territory those whose presence it might regard as undesirable. This view has however been contested more recently. As it has been pointed out ‘the emphasis on States’ freedom

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1 Preamble of the International Rules on the Admission and Expulsion of Aliens, adopted by the Institute of International Law on 9 September 1892.
of action, which is found in the older text books appears misplaced'. It has been argued that although a State has no duty to admit all aliens who might seek to enter its territory, it could however be identified a qualified duty to admit aliens when they pose no danger to the public safety, security, general welfare or essential institutions of a recipient State.

Despite the theoretical conceptualizations developed in the reconstruction of the applicable principles, it can be affirmed that the margin of discretion belonging to states has come to be increasingly narrowed down. Already more than thirty years ago, it was argued that issues arising from the exercise of powers of exclusion and expulsion are commonly affected by matters such as nationality and fundamental rights. This approach has been subsequently confirmed by the Human Rights Committee, that in its General Comment No. 15, after clarifying that the International Covenant on Civil and Political Rights does not recognize the right of aliens to enter or reside in the territory of a state party and it is in principle a matter for the state to decide who it will admit to its territory, asserted that in certain circumstances they may enjoy the protection of the Covenant even in relation to entry or residence. This is the case, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise. The European Court of Human Rights as well, while maintaining a traditional view of state sovereignty in relation to the admission and expulsion of foreigners, however, has limited state’s discretion in connection with the protection of certain fundamental rights.

This debate, far from being an academic disquisition, assumes particular importance today as striking a proper balance between protecting the rights of all those who are inside or at its borders, and maintaining control of the borders has been defined as one of the main challenges for the state. In the light of this evolutionary process, reserving an increasingly significant role to fundamental rights, it

6 UNHRC, ‘General Comment 15: Positions of Aliens under the Covenant’ (1986) UN Doc CCPR/A/41/40, para 5.
7 ibid para 4.