



Competences and Responsibilities of States

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State sovereignty

Sovereignty as a concept of international law has three major aspects: external, internal and territorial. The external aspect of sovereignty is the right of the State freely to determine its relations with other States or other entities without the restraint or control of another State. This aspect of sovereignty is also known as independence. The internal aspect of sovereignty is the State's exclusive right or competence to determine the character of its own institutions, to enact laws of its own choice and ensure their respect. The territorial aspect of sovereignty is the exclusive authority which a State exercises over all persons and things found on, under or above its territory

IML Glossary on Migration

States' Competences

State has the power to regulate:

- ✓ Nationality
- ✓ Admission of non-nationals
- ✓ Residence
- ✓ Detention
- ✓ Expulsion of non-nationals
- ✓ State Security/Border Control

State's Responsibilities

Fundamental principles:

- Power to manage migration must be exercised in full respect of
 - fundamental human rights
 - international commitments

Nationality

- Nationality is a juridical and political link that unites an individual with the state
- It is for each state to determine under its own laws who are its nationals (1930 Hague Convention)
- Naturalization largely depends on domestic law

Right to admit

- Anyone may leave a country
- No international obligation on a State admit a non national (exception: international protection obligations)
- Categories of persons able to assert right of return limited to citizens/permanent residents
 - No one shall be arbitrarily deprived of the right to enter his own country; Art 12(4) ICCPR

Residence

- Conditions of sojourn largely depend of the domestic law of each State
- Human rights standards protect aliens

“Each State Party to the presents Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (ICCPR, Art 2)

- Amount of rights depends of the legal status of foreigner
- Economic rights of aliens are, however, less firmly established than other human rights

Freedom of Movement within the territory

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. Restrictions:
 - provided by law,
 - are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others,
 - consistent with the other rights recognized in the present Covenant.

Detention

- Criminal Detention
 - Punitive in nature or
 - Aiming at prevention (e.g.: prevent suspect from committing a crime or re-offending, etc.)
- Administrative Detention
 - often under the immigration laws
 - in practice fewer guarantees and safeguards against violations
- Detention: “Hard” and “Soft” Law

Detention (“hard” law)

- **UDHR**
 - prohibition against arbitrary detention (Art 9)
- **Art 9 ICCPR:** No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law
 - “Arbitrary” detention prohibited
 - detention only on grounds and in accordance with procedures established by law

Detention (“hard” law)

- **Art 16 ICRMW** (extensive procedural rights)
 - arbitrary detention prohibited
 - *detention only on grounds and in accordance with procedures established by law*
 - consular authorities of State or origin, if migrant so requests, to be informed without delay
 - right to prompt communication with the authorities
 - right to take proceedings before the court so that lawfulness of detention can be determined
 - enforceable right to compensation if detention unlawful

Conditions of detention

- Humane conditions and treatment

Art 10(1) ICCPR Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court in order that a court may decide without delay on the lawfulness of his detention and order his release if detention is unlawful

- Art 17 ICRMW

Conditions of detention

- Immigration detainees to be held separately from convicted criminals
- Women kept separately from men
- Enjoy same rights as nationals re family visitation
- Derived from hard and soft law

Detention (“soft” law)

- Working Group on Arbitrary Detention Deliberation No. 5 on situation regarding immigrants and asylum-seekers, CHR 56th session, E/CN.4/2000/4 (28 Dec 1999)
- Standard Minimum Rules for the Treatment of Prisoners (adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders)
- Basic Principles for the Treatment of Prisoners (G.A. res. 45/111)
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (G.A. res. 43/173)

Right to remove

An alien **lawfully** in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, **except where compelling reasons of national security otherwise require**, be allowed to **submit the reasons against his expulsion** and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority

(Art. 13 ICCPR)

Right to remove

- State has a right to remove a migrant from the territory
- Limited by:
 - Principle of non-refoulement
 - “best interests of the child”
 - Procedural limitations under international law (Art. 13 ICCPR)
 - Measures against collective expulsion (Art. 22 ICMW)

Prohibition of collective expulsion

- Collective expulsion of non-nationals is prohibited
 - Art 22(1) ICRMW
 - Art 22(9) African Human Rights

Protection in the return process

- **AVR preferable to forced return**
 - Fewer risks to HRs
- **Council of Europe Committee of Ministers 20 Guidelines on Forced Return (4 May 2005)**
 - Guideline 1 - Voluntary return to be preferred
 - Guideline 3 – Prohibition of collective expulsion
 - Chapter III - Detention
 - Chapter IV - Readmission
 - Chapter V – Forced Removals

Proposed Directive on common standards and procedures for returning illegal residents

(COM(2005) 391, 1 Sept 2005)

- **“Effective return policy is a necessary component of a well managed and credible policy on migration”**
- **Main features**
 - Voluntary return possible for 4 weeks
 - Two-step procedure (return decision – removal order)
 - Forced return measures to be proportional
 - Re-entry ban for a maximum of 5 years
 - Minimum procedural safeguards

National Security

- A central feature of sovereignty is the power of a State to defend its own security.
- There has always been tension between allowing new arrivals and safeguarding the interests of the State and its existing population.
- “Security” in this context includes the economic, political, religious, cultural and physical security of the State.
- International human rights law permits:
 - Limitations of certain human rights on the grounds of national security.
 - Derogation from a certain rights in times of national emergency.

After September 11 a number of States have taken actions to tighten immigration systems, e.g.:

- The use of biometrics in migration management,
- Data exchange and border control,
- Tighter entry control such as passenger pre-clearance airline liaison officers, etc.

What Does International Law Say About Migration And Security ?

- Limitations
- Derogations
- Other clauses

Limitations

- **ICCPR**

Article 12

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions **except those which are provided by law, are necessary to protect national security**, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

- **ICCPR**

Art. 13 An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of **national security** otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 18

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Article 19

2. Everyone shall have the right to freedom of expression.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. **It may therefore be subject to certain restrictions**, but these shall only be such as are **provided by law and are necessary**:

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 22

1. Everyone shall have the right to freedom of association with others.
2. No restrictions may be placed on the exercise of this right other than those which are **prescribed by law** and which are **necessary** in a democratic society in the interests of **national security** or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

Derogations

- **ICCPR**

Art. 4 (1). In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Rights that cannot be derogated from

- Right to life
- Prohibition of slavery / slave trade
- Prohibition of torture
- Inability to fulfil contractual obligation
- Prohibition against retroactive penal measures
- Right to equality before the law
- Right to leave any country and return to one's own country
- Right to freedom of thought and religion

Other Clauses

- **CONVENTION ON THE STATUS OF REFUGEES**

Art. 33.

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country

- **CAT**

Art. 3 (1). 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

Other Concepts

- **Incorporation**

The main applicable international standards should be adopted in national legislation to contribute to a framework for effective migration policy.

- **Knowledge**

Before rights can be respected, it is necessary to know what they are. This is where training is an important tool.

- **Legality**

Actions taken by the Government must be authorized by law.

- **Transparency**

Government actions, decisions, laws must be accessible to the public.

- **Proportionality**

Any sanction taken by the Government, punishment or denial of liberty must remain proportional to the offence committed.

- **Involvement of all actors**

Inter-state cooperation: MWC

Obligations upon States to

- consult and cooperate to promote sound, equitable and humane migration conditions - Art 64(1)
- Cooperate regarding orderly return, whether on expiration of authorization, or in an irregular situation Art 67(1)
- collaborate to prevent/eliminate irregular migration/employment - Art 68
 - Measures against dissemination of misleading information
 - Measures to detect and eradicate irregular movements , and impose sanctions on those operating such movements
 - Impose sanctions those who use violence/threats/intimidation exploit migrant workers
 - Effective measures to eliminate employment of irregular migrants

Trafficking and Smuggling Protocols

- **Objective of Protocols is to promote cooperation in prevention of trafficking and protection of victims**
- **Cooperation in relation to**
 - Facilitation of return of VoT
 - Verification of nationality of VoT or permanent residence.
 - Issuance of documents once identified
 - Alleviate factors causing vulnerability to trafficking (poverty, underdevelopment, lack of equal opportunity)
 - Discourage demand fostering all forms of exploitation