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## Introduction

Cornerstone of the refugee protection, the principle of *non-refoulement* prohibits the expulsion of an individual to any territory where his life or freedom may be threatened on account of race, religion, nationality, membership of a particular social group or political opinion, or where he may be submitted to torture or other cruel, inhuman or degrading treatments or punishments. For its humanitarian character, the principle was rapidly incorporated into other bodies of law, such as human rights law and international humanitarian law. Consequently, it had its scope expanded to embrace other persons rather than just refugees.

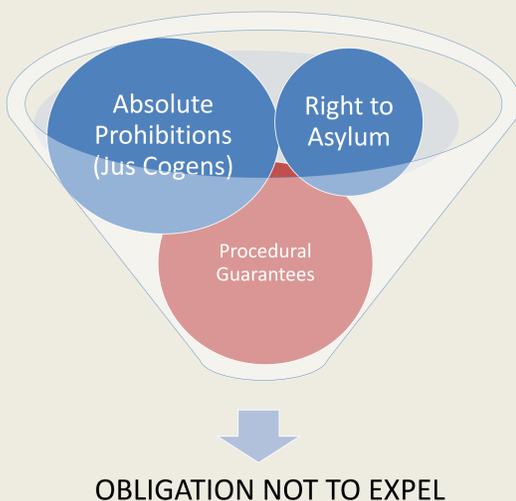
As an open concept, prescribed in general and abstract terms – especially in human rights treaties – the scope of the protection deriving from *non-refoulement* may change depending on the interpretation given by relevant authorities and tribunals to terms as “torture,” “inhuman and degrading treatment,” “persecution,” among others. This “subjectivity” confers to local mechanisms of law enforcement a special role in delineating the scope of the principle within their jurisdictions.

In this sense, the purpose of this work is to analyze the scope and content of the principle of *non-refoulement* in Latin America. The work highlights the role played by the Inter-American Human Rights System in enforcing and overseeing fundamental rights within the region, focusing in its case law on the topic. The author also uses soft-law instruments concerning *non-refoulement* to help to determine the dimension of the principle in Latin America.



## Non-refoulement in the inter-American Corpus Juris

Under Article 22(8) of the American Convention, the principle of non devolution is broader in meaning and scope than the one prescribed in refugee law. *Non-refoulement* can also be inferred as an obligation derived from the prohibitions comprehended by the domain of *jus cogens*, e.g., the prohibition of torture and other cruel, inhuman and degrading treatments. Besides the prohibition of *refoulement* based on substantive law, the principle also encounters support on the procedural guarantees inherent to the due process of law, i.e., no one can be expelled without an adequate and individualized analysis of his request.



## Main Provisions

### Right to Humane Treatment

- Art. 5 of the ACHR
- Art. 6 of the ACHR (Freedom from Slavery)
- Art. 13 of the Inter-American Convention to Prevent and Punish Torture

### Right to Asylum

- Art. 22 (7) and (8) of the ACHR
- Art. 4(5) of the Inter-American Convention on Extradition
- Art. III (3) of the Cartagena Declaration

### Minimum Procedural Guarantees

- Art. 8(1) of the ACHR

## Case-law

### IACtHR

- Case of the *Pacheco Tineo Family v. Bolivia* (2013)
- Advisory Opinion n. 18/1999 (*Juridical Condition and Rights of Undocumented Migrants*)
- Advisory Opinion n. 21/2014 (*Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*)

### IACmHR

- Case of *The Haitian Centre for Human Rights et al. v. United States* (1997)

## INTERNATIONAL AND DOMESTIC INSTRUMENTS PROHIBITING REFOULEMENT

| STATES             | 1951 1967 |      |       |       |      | Domestic Provisions   |
|--------------------|-----------|------|-------|-------|------|---|
|                    | ACHR      | Conv | Prot. | ICCPR | CAT  |   |
| Argentina          | 1984      | 1961 | 1967  | 1986  | 1986 | Const., art. 31 (1994); Dec. n. 1023, art. 171 (1994)                       |
| Barbados           | 1982      |      |       | 1973  |      |   |
| Bolivia            | 1979      | 1982 | 1982  | 1982  | 1999 | Dec. n. 19640, art. 5 (1983)  |
| Brazil             | 1992      | 1960 | 1972  | 1992  | 1989 | Act. n. 9474, art. 36-37 (1997)   |
| Chile              | 1990      | 1972 | 1972  | 1972  | 1988 | Dec. n. 1094, art. 39 (1975)  |
| Colombia           | 1973      | 1961 | 1980  | 1969  | 1987 | Const., art. 93 (1991); Dec. N. 1598, art. 17 (1995)                        |
| Costa Rica         | 1970      | 1978 | 1978  | 1968  | 1993 | General Migration Act., art. 64 (1986); Dec. n. 14845-G, arts. 17-18 (1983) |
| Dominica           | 1993      | 1994 | 1994  | 1993  |      |   |
| Dominican Republic | 1978      | 1978 | 1978  | 1978  | 1985 | Dec. n. 2330, art. 12-13 (1984)   |
| Ecuador            | 1977      | 1955 | 1969  | 1969  | 1988 | Dec. n. 3301, art. 27 and 34 (1992)   |
| El Salvador        | 1978      | 1983 | 1983  | 1979  | 1996 | Const., art. 144 (1983)   |
| Grenada            | 1978      |      |       | 1991  |      |   |
| Guatemala          | 1978      | 1983 | 1983  | 1992  | 1990 | Const., arts. 27 and 46 (1985); Act. n. 22, art. 26 (1986)                  |
| Haiti              | 1977      | 1984 | 1984  | 1991  | 2013 | Const., art. 276 (1987)   |
| Honduras           | 1977      | 1992 | 1992  | 1997  | 1996 | Const., art. 18 (1982)  |
| Jamaica            | 1978      | 1964 | 1980  | 1975  |      |   |
| Mexico             | 1982      | 2000 | 2000  | 1981  | 1986 | General Act of Population, art. 42-VI (1974)                                |
| Nicaragua          | 1979      | 1980 | 1980  | 1980  | 1985 | Const., art. 42 (1995)  |
| Panama             | 1978      | 1978 | 1978  | 1977  | 1987 | Dec. n. 23, arts. 53 and 73 (1998)  |
| Paraguay           | 1989      | 1970 | 1970  | 1992  | 1990 | Act. n. 470, art. 141 (1975)  |
| Peru               | 1978      | 1964 | 1983  | 1978  | 1988 | Const., art. 36 (1993); Dec. n. 1, arts. 1-2 (1985)                         |
| Suriname           | 1987      | 1978 | 1978  | 1976  |      | Aliens Act., arts. 8 and 16-3 (1991)  |
| Uruguay            | 1985      | 1970 | 1970  | 1970  | 1986 | Dec. on political refugees, art. 4 (1956); Act. n. 13.777                   |

## The Dimension of Non-refoulement in Latin America

It is unequivocal that the prohibition on *refoulement* in Latin America encounters strong support in the right to asylum, and vice-versa. The IACtHR has affirmed that the principle of *non-refoulement* is “an effective measure to ensure the right to seek and receive asylum.” In the case of the *Pacheco Tineo Family v. Bolivia*, the IACtHR had the occasion to recognize that the scope of *non-refoulement* under the IAHRS is broader than in other contexts, covering not just refugees but also asylees and asylum seekers. Another pillar of *non-refoulement* in Latin America are the prohibitions of *jus cogens*, e.g., one of the international obligations associated with the prohibition of torture is the obligation not to expel (*non-refoulement*). In this sense, one can infer that a State that expels, extradites or returns an individual to a territory where he may be submitted to torture or other cruel, inhuman or degrading treatments or punishments is violating a peremptory norm of International Law, thus resulting in an aggravated international responsibility. In sum, since it is a component of the absolute prohibition on torture, and other cruel, inhuman and degrading treatments or punishments, *non-refoulement* is, consequently, also absolute and even deemed as a peremptory norm of International Law. The same reasoning applies to cases involving other prohibitions of *jus cogens*, those from which no derogation is permitted. Thus, States are bound not to send a person to a territory where she may be submitted to slavery, apartheid, genocide, or other practice prohibited by imperative law. One may conclude that the dimension of *non-refoulement* in Latin America is intrinsically linked to the current process of expansion of the material content of *jus cogens* operated by the IACtHR.

“States are bound not to return or expel a person – *asylum seeker or refugee* – to a State where her or his life or liberty may be threatened as a result of persecution for *specific reasons* or due to *generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order*, nor to a third State from which she or he may later be returned to the State where she or he suffered this risk – a situation that has been called *indirect refoulement*”

- AO-21, para 212.

## The Future of Non-refoulement in Latin America

As one may perceive, the scope of the principle of *non-refoulement* in Latin America is particularly larger than that of the universal plane and even broader in comparison with other regional systems. One shall notice that this is a result of the combination of two main factors: the long-standing Latin American tradition of asylum and the process of expansion of the material content of *jus cogens*, operated by the IACtHR. In this sense, the basis upon which the principle of *non-refoulement* is erected in Latin America is easily identifiable. The prohibition of *refoulement* gravitates, essentially, around two poles: the individual right to asylum, and the right not to be submitted to torture, or other cruel, inhuman or degrading treatments or punishments, or even other practices prohibited as peremptory norms. Rather than just co-existing, those two poles are, more than compatible, complementary.

One is not, therefore, here assuming that the dimension of the principle of *non-refoulement* is exhausted. On the contrary, it is still expanding its scope and content. Thus, the dimension of *non-refoulement* in Latin America will be enlarged, *pari passu*, as the inter-American or national judge extends the meaning of a key concept or norm as to contribute to the construction of an individual subjective right to asylum or to the expansion of the material content of *jus cogens*.

