**CONFERENCE**
**"Human Rights and Migration:**
**Realising Human Rights Based Approach to the Protection of Migrants, Refugees and Asylum-seekers"**
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# Report on Workshop E. – Expulsion and forced return

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**1.** Expulsion and forced return are multifaceted issues; the title of the Workshop E. (Expulsion and forced return) served as an umbrella covering a lot of interrelated topics. In a human rights-based perspective, expulsion and forced return raise two general questions: a) what are the human rights-based obstacles preventing return of illegally staying third country nationals?; b) if forced returns are carried out, what are the safeguards and human rights standards to be met?

**2.** Two panellists made interventions in the Workshop, chaired by Ms. Cristina J. GORTAZAR (professor, Universidad Pontifica Comillas of Madrid): first, Mr. Olivier BEER (representative, UNHCR Strasbourg) spoke about the application of the principle of *non-refoulement* and analysed this legal notion in different aspects, not only in asylum/refugee law. Then Ms. Nuala MOLE (Director of Advice on Individual Rights in Europe – AIRE) gave on overview on the human rights implications of returning migrants. The panellists' contributions were followed by a questions-answers session, with many questions and vivid discussion on topical issues.

**3.** Regarding expulsion and forced return, the starting point is the very dilemma of State sovereignty (States can expel persons if their presence is not desirous any more) and human rights protection; as well as how these two conflicting approaches could be reconciled in this regard. It was underlined that the term "forced return" applies to all individual illegally staying on the territory of the State, irrespective the reason behind their irregular stay (be them rejected asylum-seekers, migrants illegally crossed the border, over-stayers, regular migrants committing a crime, stateless persons etc.).

Under general international law, expulsion is, as a main rule, allowed for States, it is an exercise of their sovereign rights; but with certain limitations. The first restriction to consider is the well established, customary law principle of *non-refoulement*. It was noted by the panellists that this very principle does not only apply in refugee law (cf. article 33 of the 1951 Geneva Convention relating to the Status of Refugees), but it is also an established human rights principle, as enshrined directly in the 1984 Convention against Torture (CAT) (article 3) and it stems indirectly, on the universal level, from the 1966 International Covenant on Civil and Political Rights (ICCPR) (article 7 on the prohibition of torture), reaffirmed by their respective treaty bodies (Human Rights

Committee, Committee on Torture); or on the regional level from the 1950 European Convention on Human Rights (ECHR) (article 3 on the prohibition of torture), the content of the latter further elaborated by the massive jurisprudence of the European Court on Human Rights (ECrtHR) in Strasbourg. Under contemporary international law, it is submitted that *non-refoulement* is a corollary principle of prohibiting torture which is of *ius cogens* rank. Furthermore, although the 1954 Convention relating to the Status of Stateless Persons has no provision on *non-refoulement* as such, it also sets forth in article 31 that the Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order, and such an expulsion shall be only in pursuance of a decision reached in accordance with due process of law.

Mr. BEER highlighted that there are several challenges in practice regarding the proper application of this very principle. First, he mentioned the mixed migration flows where economic migrants and those really in need on international protection travel together, and in many cases it is difficult the make distinction between them, especially for border guards or sea patrolling authorities. It may result in returning back the person concerned before he/she could apply for asylum. Secondly, some migrants use abusively the asylum systems, therefore States are sometimes opt for more restrictive measures to combat, to the detriment of in-depth examination of the *non-refoulement* principle. Thirdly, better cooperation between the States, especially between countries of origins and countries of destinations would be needed.

**4.** Beside the principle of *non-refoulement*, there are other constraints on States limiting their sovereign power to expel foreigners as stressed by Ms. GORTAZAR and Ms. MOLE. Such a rule is the prohibition of collective expulsion, reflected by the ICCPR and Protocol No. 4 to the ECHR; similarly the human dignity of the returnee is also to be respected. Moreover, we can find other limits in international human rights law, especially in the ECHR in form of article 2 (right to life), article 8 (right to private and family life), article 10 (freedom of expression) or article 12 (right to marry and establish a family) as well as in different Protocols annexed to the ECHR. With regard to article 8, the Court emphasized that the person concerned can enjoy protection under this provision when the principle of *non-refoulement* does not come into play, but the moral and physical integrity of the person would be damaged otherwise. In practice, States do not always respect these obligations; therefore there are a quite number of applications before the ECrtHR on alleged violations of these articles.

**5.** To sum up, Ms. MOLE recalled the multi-layer international legal framework where the principle of *non-refoulement* is embedded; identifying four regimes: the 1951 Geneva Convention relating to the Status of Refugees, the 1966 ICCPR, the 1984 CAT and the 1950 ECHR, all being applicable to all 47 Council of Europe Member States. Besides that, the relevant EU legal framework, with a "*géométire variable*", has also been highlighted, mentioning the quite developed EU asylum *acquis* (the Dublin II. Regulation and the other directives) as well as the Return Directive (2008/115/EC), operating in the policy context marked by the 2008 European Pact on Immigration and Asylum and the Stockholm Programme (2010-2014) in the field of justice, freedom and security, and also the Commission report on the evaluation on the EU-level readmission agreements which is still to come.

**6.** Furthermore, a number of specific issues have been raised and shortly discussed during the panel. These are the following:

**a)** In case of regular migrants committing crimes and then being expelled, proportionality is essential, which is shown by some absurd cases in the United Kingdom, as pointed out by Ms. MOLE.

**b)** The issues of safe third countries, or even EU Member States with no effective asylum determination procedure and poor reception conditions (e.g. Greece) have also been touched upon, since sending back rejected asylum seekers to allegedly "safe" third countries which are in reality unsafe can also lead to human rights violations.

**c)** Voluntary return is in many cases not really a voluntary one, or at last triggered by the fact that if this option is chosen, it does not mean automatically a ban on entry and stay as well, so it is better for the future if the person wishes to travel again.

**d)** Force return and related problems, such as its implementing mechanisms, the so-called readmission agreements, have also been discussed, since in some extreme cases the returnees committed suicide after having returned to their home countries, due to the fear of persecution, or to the total lack of perspectives, after having lived in a Western State for long years enjoying quite fairly good standard of living.

**e)** The monitoring mechanisms of forced returns are of great importance, too. On the universal level, this concept has already appeared in the practice of the Human Rights Committee, and we can also witness the presence of this concept on the regional level, as the EU Return Directive makes it compulsory for the Member States to provide for an effective forced-return monitoring system (article 8(6)).

**f)** Moreover, human rights concerns of using joint flights for return (e.g. within the EU, under Council Decision No. 2004/573/EC) are to be red-flagged, because some serious human rights violations occurred in the last decade (partly to the lack of transparency), some of them amounted to the death of the returnee. States are willing to use this option in order to make return operations less expensive, which is a legitimate aim; nevertheless, it can result in no thorough examination of the case (no assessment of the applicability of the principle of *non-refoulement*), while just focusing on "catching the flight" and putting the person concerned on board, which may be abusive.

**g)** Finally, it was also highlighted that specific attention is to be paid for vulnerable persons (minors, women, and elderly people), in line with the relevant international legal standards (see e.g. the 1989 Convention on the Rights of the Child and the "best interest of the child" as an overarching principle).

**7.** By conclusion, putting expulsion ad forced return in the human rights context clearly showed that this is a field where traditional State sovereignty and prerogatives stemming from it are challenged by the emerging *corpus* of international human rights law and refugee law, where the hardest exercise is to find equilibrium between the two competing interests and approaches. In practice, the instruments are often good and pursue a legitimate aim, fully complying with human rights obligations, but it is the practical implementation that goes against international standards and violates human rights law (sometimes due to the lack of political will to carry out rightly these obligations). Filling this gap is a great challenge to tackle, and the first thing to do is raising awareness.

**8.** As a recommendation to make, States are invited to concentrate more on the practice of the law enforcement bodies and other relevant State agencies, and the implementation of human rights norms throughout all phases of the expulsion and return procedure.