Type: Research Article

Non-Incorporation of the Principle of Non-Refoulement in the Chilean Immigration and Aliens Law

Valentina Rioseco Vallejos *

School of Law, the University of Edinburgh, Scotland, the United Kingdom
valentina.rioseco@ed.ac.uk

* corresponding author

ABSTRACT

This paper critically analyses the non-incorporation of the principle of non-refoulement in the Chilean Immigration and Aliens Law 21.325 of 20 April 2021. It was published in the context of migratory pressures within the Latin American region, deriving mainly from the Venezuelan socio-political crisis. It was also published after the recommendations given by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) in the last two periodic reviews of 2011 and 2021 to update the previous version dictated during the Pinochet dictatorship. As a state party to the core international human rights treaties and the American Convention on Human Rights, an urgent claim existed in Chile to adapt its migration law. Following a heated debate in 2019, the parliament eliminated the recognition of the principle of non-refoulement contained in the draft law arguing it was already recognised in refugee legislation. Instead, they identified a ‘complementary protection’. This paper examines whether this decision breaches human rights standards, particularly the obligation to adopt legislative measures to give effect to the principle of non-refoulement. It begins by analysing the principle of non-refoulement in international refugee law. Then, it turns into identifying the human rights obligations emanating from the principle of non-refoulement. Finally, the paper applies this standard to law 21.325. The paper concludes that not incorporating the principle of non-refoulement into law 21.325 constitutes a breach of Chile’s human rights obligations, facing the risk of incurring international responsibility.

This is an open-access article under the CC-BY-SA license.
human rights law, the principle of non-refoulement is explicitly recognised in international and regional human rights treaties. Additionally, the UN and regional human rights systems identify a positive obligation on states to prevent refoulement (Chetail, 2019). Current state practice is enough to affirm that - at least in its core protection against torture - the principle of non-refoulement is crystallised as a customary norm of international law (Chetail, 2019; Costello, 2013; Costello & Foster, 2016; Mathew, 2021). Therefore, states must apply the principle of non-refoulement to any person, without discrimination and regardless of their nationality or migratory status.¹

The principle of non-refoulement challenges states’ right to control their borders and impacts their territorial sovereignty. States may control their borders by admitting and excluding migrants.² However, state sovereignty is not an absolute principle, it is limited by human rights law. The principle of non-refoulement constitutes one of its limitations. As early as 1986, the UN Human Rights Committee (CCPR) interpreted that the prohibition of inhuman treatment was a circumstance under which ‘an alien may enjoy the protection of the Covenant even concerning entry or residence’. (CCPR, 1986) Similar interpretations are repeated both at the international and the Inter-American human rights systems (CCPR, 1999; IACHR, 2015) and are also supported by scholars (di Pascale, 2015). Notably, Byrne and Gammeltoft-Hansen recognise the relevance of law scholarship in expanding the scope of protection of the principle of non-refoulement. (Byrne & Gammeltoft-Hansen, 2020) Interpretations in this regard extend as far as affirming that the principle of non-refoulement has evolved into a right to entry (UNGA, 2022).

The effectiveness of the principle of non-refoulement can only be measured at the domestic level. It is here where the tensions between the principle of territorial sovereignty and human rights are solved (Besson, 2011; IACHR, 2015). Unfortunately, domestic incorporation of the principle of non-refoulement is not as clear as articulated at the international and Inter-American levels, and Chile is a clear example.³ Despite being bound to non-refoulement obligations, the recently passed Chilean Immigration and Aliens Law 21.325 of 20 April 2021 (Law 21.325, 2021) does not recognise this principle. This was not an omission but a deliberate decision from the Chilean parliament. Following a heated debate in 2019, the parliament eliminated ‘Artículo 10: Principio de No Devolución’, which contained recognition of the principle of non-refoulement.⁴ They argued that the principle was already recognised in refugee legislation, and instead, they included ‘Artículo 10: Protección Complementaria’, which extends the prohibition of return to asylum seekers whose claims were denied.

The decision not to incorporate the principle of non-refoulement into law 21.325 raises questions related to Chile’s international and Inter-American human rights responsibilities.

¹ A more complex application of the principle of non-refoulement is found in recent case law of the European Court of Human Rights. See, i.e., (Ciliberto, 2021).
² The right of States to control their borders is broadly recognised, even by the UNHCR. James Hathaway discusses this affirmation in the context of the Global Compact for Refugees, proposing to move towards a ‘global and managed system for refugee protection’. (Hathaway, 2018). For further analysis on the lack of a human right to immigrate, see (Acosta, 2018, p. 149; CAT, 2018, para. 10; Chetail, 2019, p. 400).
³ For a more extensive study on international and regional human rights implementation, see (Jelić & Mührel, 2022).
⁴ Article 10 prescribed: ‘Ningún extranjero podrá ser expulsado o devuelto del país donde su derecho a la vida, integridad física o la libertad personal corran peligro de ser vulneradas en razón de su raza, nacionalidad, religión, condición social u opinión política, en conformidad a los tratados internacionales ratificados por Chile’. In English: No foreigner may be expelled or returned from the country where their right to life, physical integrity or personal liberty is in danger of being violated due to their race, nationality, religion, social status or political opinion, in accordance with ratified international treaties by Chile.
The literature has not addressed or responded to these issues. A recent study analysed the treatment of the principle of non-refoulement at the Chilean Supreme Court (Feddersen M. et al., 2023). Earlier research examined the extent to which Chile respected the principle of non-refoulement with refugees and asylum seekers (Olea, 2012). This paper asks whether the decision not to incorporate the principle of non-refoulement in law 21.325 breaches the standards set in refugee and human rights law.

2. Research Methods

The methodology used in this article is a legal and doctrinal analysis. It is specifically based in refugee law, and international and Inter-American human rights law, as well as Chilean domestic legislation regulating the principle of non-refoulement. Relevant jurisprudence from both, the human rights systems and the domestic level is also examined to identify the scope and application of the analysed provisions.

The article begins by analysing the principle of non-refoulement in refugee law. Then, it turns into identifying the human rights obligations emanating from the principle of non-refoulement, including interpretations from the Inter-American human rights system, to which Chile is a party. Finally, the paper applies this standard against Chilean legislation, particularly law 20.430 of 2010, which establishes provisions for the protection of refugees (Law 20.430, 2010) and law 21.325. The paper concludes that not incorporating the principle of non-refoulement into law 21.325 constitutes a breach of Chile’s human rights obligations, facing the risk of incurring international responsibility.

Analysing Chile as a case study is relevant to human rights law. Chile demonstrates the tensions between territorial sovereignty and the human rights of migrants in Latin America (Ceriani Cernadas, 2011). Chile incorporates its human rights obligations via Article 5, paragraph 2 of its Constitution, which establishes that the international human rights treaties ratified by Chile constitute a limit to national sovereignty (CPR, 2010). Additionally, Chile was the last country in South America to adopt a migration law following the dictatorship period from 1973 – 1990, despite being a signatory to the core international and regional human rights treaties (ACNUDH, 2023). Changes in the legislation occurred after the recommendations given by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) in the last two periodic reviews of 2011 and 2021 (CMW, 2011, 2018). Eight draft laws in 10 years and four governments were discussed until the current one was approved in 2021. Chile’s economic and political stability over the last decade attracted migrants. Despite the recent social crisis, migration numbers continue to increase. In 2022, the Chilean National Institute of Statistics estimated that 1,482,390 migrants resided in the country, corresponding to 7.5% of the Chilean population, an increase of 14% from 2018. (INE, 2022) This is mainly due to the intense migration pressures caused by the Venezuelan socio-political crisis. Venezuela is the country with the most significant diaspora in the world (Díaz-Sánchez et al., 2021; Pirovino & Papyrakis, 2023). Most of the population is migrating within the Latin-American region, Chile is one of the four countries receiving the most Venezuelan migrants.

---

5 More broadly, Lohaus and Stapel addressed the motivations of American States to engage with regional human rights standards (Lohaus & Stapel, 2022).
3. Discussion

3.1. The Principle of Non-Refoulement in Refugee Law

3.1.1. Law and Scope of Protection

The principle of non-refoulement is cemented in article 33 of the 1951 Convention Relating to the Status of Refugees (Refugee Convention), to which Chile is a party. According to article 33, ‘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’ (Refugee Convention, 1951). Exceptions to the protection against refoulement are included in paragraph 2 of article 33, when there are reasonable grounds for considering asylum seekers as a danger to the security of the country or who, having been convicted by a final judgment of a severe crime, constitutes a danger to the community.

Therefore, in international refugee law, the principle of non-refoulement applies to those who qualify as refugees. The conditions for qualifying as a refugee are enumerated in Article 1 of the Refugee Convention, amended by the 1967 Protocol relating to the status of refugees. The term ‘refugee’ applies to any person who:

- Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In Latin America, the conditions for being recognised as refugee are broadened. In the third conclusion of the 1984 Cartagena Declaration on Refugees (Cartagena Declaration), states agreed to include the concept of refugees ‘persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order’ (Cartagena Declaration, 1984). The Cartagena Declaration is a non-binding instrument (UNHCR, 2015; UNHCR, 2014, 2016). However, the Inter-American Court of Human Rights (IACtHR) recognised its legal relevance in Advisory Opinion Rights and guarantees of children in the context of migration and/or in need of international protection. Based on the ‘progressive development of international law’, the court ruled that the obligations under the right to seek and receive asylum are operative for those who met the requirements of the Cartagena Declaration (Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection, Advisory Opinion OC-21/14, 2014, para. 79). The court also identified a tendency in Latin American states of adopting an expanded concept of refugee, that includes the criteria of both, the Refugee Convention and its 1967 Protocol, and the Cartagena Declaration. In fact, the IACtHR based this affirmation on the domestic legislation of 19 Latin American countries, Chile being one of them (Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection, Advisory Opinion OC-21/14, 2014, para. 77).7

---

6 To further explore how does the Refugee Convention relates to non-signatory parties, see (Janmyr, 2021).
7 The ongoing Venezuelan crisis challenges the application of the extended definition of Refugee contained in the Cartagena Declaration. See (Acosta et al., n.d.; Blouin et al., 2020; Feline Freier & Parent, 2019; Hammoud-Gallego, 2022; Hammoud-Gallego & Freier, 2023; Ochoa, 2020). For a critical view on the Cartagena Declaration, see (Fischel de Andrade, 2019).
Chile regulates refugee protection in law 20.430 and its regulation, Decree 837 of 17 February 2011. The concept of a refugee is contained in Article 2 of law 20.430. While paragraph 1 of this article contains the concept of a refugee recognised in the Refugee Convention, paragraph 2 includes the broader protection contained in the Cartagena Declaration. The principle of non-refoulement is also regulated in article 4 of law 20.430, but with a wider scope of protection than the Refugee Convention, incorporating human rights protections, such as the prohibition of torture. This regulation will be further analysed in the last section of this article.

Despite being in line with the standards set up by international refugee law, these standards are not clearly reflected in Chilean practice. A recent report shows that only one-third of the 22863 refugee applications presented in Chile during the past five years have been decided, and refugee protection was granted to only 6 per cent of the applicants (Feddersen M. et al., 2023). Additionally, it is well documented that migration authorities are deciding in situ whether a person can claim asylum (Feddersen M. et al., 2023; Olea, 2012). Authorities that receive asylum claims decide at their discretion whether to give the application form to asylum seekers. This means they are de facto applying a pre-admission stage not contemplated in the law (Feddersen M. et al., 2023). This also means that no individual non-refoulement assessment is being carried out. Noting this information, the CMW urged Chile to respect the right of migrants and act in accordance with the principle of non-refoulement (CMW, 2021).

The illegality of this practice is also reflected in an increase of habeas corpus at Chilean courts (Instituto Nacional de Derechos Humanos con Bellolio, 2023 considering décimo sexto). On a recent habeas corpus application by the Chilean National Institute of Human Rights, the Supreme Court decided on the illegality of this practice and ordered the Chilean National Migration Service to create a public protocol that civil servants must follow when receiving an asylum seeker. Forty days were given for the Chilean National Migration Service to comply with this obligation (Instituto Nacional de Derechos Humanos con Bellolio, 2023). The deadline passed recently, and there is no public knowledge of the existence of this protocol. From an Inter-American human rights perspective, domestic remedies are exhausted at the Supreme Court. Not complying with the Court’s decision puts Chile in risk of having the case raised in the Inter-American human rights system.

3.1.2. Declaratory Nature of The Refugee Status

The act by which a state recognises a refugee is declaratory. There are no provisions in the Refugee Convention related to the procedures that states must follow to determine if a person qualifies as a refugee formally. According to Article 12 of the Refugee Convention, the personal status of a refugee is governed by the law of the country of his domicile or, if he has no domicile, by the law of their country of residence. Nonetheless, states do not make someone a refugee but declare them to be one. As affirmed by UNHCR, ‘A person is a refugee within the meaning of the Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur before the time at which his refugee status is formally determined’ (UNHCR, 2019). The declaratory nature of refugee status is recognised by the

---

8 Article 2 prescribes:

- **Concept of refugee.** People who are in any of the following situations will have the right to have their refugee status recognised:
  1. Those who, due to a well-founded fear of being persecuted for reasons of race, religion, nationality, belonging to a certain social group or political opinion, are outside the country of their nationality and cannot or do not want to avail themselves of its protection due to said fears.
  2. Those who have fled their country of nationality or habitual residence and whose life, security or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances that have disturbed public order in that country seriously.

9 For further research on how discretion affects asylum policy, see (Darling, 2022).
Inter-American Commission on Human Rights (IACHR) and by the authoritative literature (IACHR, 2015; Hathaway, 2005; Costello & Foster, 2022).

The declaratory nature of the refugee status produces effects regarding the obligations that states should comply with when respecting the principle of non-refoulment in two ways. Firstly, when states decide to expel or return a person to their country of origin, they must take all the necessary steps to ensure that said person is not a refugee and will not be sent to a place where there is a well-founded fear that they may be persecuted for the reasons indicated in Article 33 of the Refugee Convention (ACNUR, n.d.). In addition, states must also ensure that their life, liberty or security are not threatened for the reasons indicated in the expanded definition of a refugee in the Cartagena Declaration’s third recommendation. Thus, if the person being expelled claims to be a refugee, an adequate and individualised analysis of their requests must be carried out, respecting the rules of due process, including the prohibition of rejection at borders (IACHR, n.d.). Secondly, states must respect the principle of non-refoulment, even when the person enters the country through an irregular pathway. This right emanates from article 31 of the Refugee Convention, according to which states cannot impose penalties on those who, coming directly from a country in which their life or freedom are threatened, enter or are present in the country without authorisation, provided they present themselves to the authorities and show good cause for their irregular entry or presence.

The declaratory nature of the recognition of refugee status is incorporated in article 35 of law 20.430, which prescribes: ‘The recognition of the condition of refugee is a declaratory act’. Furthermore, denying access to the country without evaluating the risk of non-refoulment is prohibited in Article 4. Finally, article 6 reproduces the regulation on no penalties for irregular entry of Article 31 of the Refugee Convention.

3.1.3. Summary

According to the ordinary meaning of the Refugee Convention, the non-refoulment principle only applies to those who qualify as refugees under Article 1 of the said Convention. The scope of protection of the principle of non-refoulment was broadened at both the international and Inter-American levels in two ways: Firstly, the principle of non-refoulment also applies to those who qualify as refugees in accordance with the Cartagena Declaration, which is reflected in Article 2(2) of law 20.430. Secondly, due to the declaratory nature of the refugee status, the principle of non-refoulment applies not only to those whom Chile formally recognises as refugees but also to asylum seekers, at least until the country formally solves their claim. For this reason, even from the perspective of refugee law, the non-refoulment principle limits states’ power to control their borders. Because the evaluation of the refugee application must be individual and respect the norms of due process, refugees or asylum seekers cannot be immediately rejected at the border. This broadened scope of protection is reflected in Chilean legislation but not entirely in the practice of Chilean migration authorities. Obstacles to access to asylum claims were solved as illegal by Chilean courts.

Despite broadening the scope of protection of the non-refoulment principle, applying this principle to those who do not qualify as refugees is not solved in refugee law. The arguments given by Chilean parliamentarians for excluding the principle of non-refoulment in law 21.325 were that the principle is not applicable to those who do not claim refugee status, must be duly founded.

---

60 The article reads: Article 35.- Declaratory Effect of the act of Recognition and Foundation of the Resolutions. The recognition of refugee status is a declaratory act. All Resolutions issued, referring to the determination of refugee status, must be duly founded.
protection. The next section of this article shows the opposite: the principle of non-refoulement also applies to those who do not qualify as refugees or asylum seekers.

3.2. Principle of Non-Refoulement in Human Rights Law

3.2.1. Regulation, Definition, and Scope of Protection

The principle of non-refoulement is explicitly regulated in international and Inter-American human rights law to which Chile is bound. Additionally, the principle of non-refoulement is developed through the evolutionary interpretation of human rights courts and treaty bodies. In both treaty law and their interpretations, the scope of protection of the principle of non-refoulement is broadened.11 In the international human rights system, the principle of non-refoulement is regulated in Article 3 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UN CAT) and Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance. The former prescribes:

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.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The Inter-American human rights system contains a similar protection against refoulement, under article 13 of the Inter-American Convention to Prevent and Punish Torture.12 Additionally, Article 22(8) of the American Convention on Human Rights (ACHR, 1978), prescribes:

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

The scope of protection of article 22(8) of the ACHR is broader than refugee law regarding whom it protects. The IACHR interpreted article 22(8) as a 'complementary protection' to any person who is not a refugee or an asylum seeker and is threatened by any of the five conditions enumerated therein (Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection, Advisory Opinion OC-21/14, 2014, para. 217). Nonetheless, regarding the danger the person faces, the scope of protection of article 22(8) is narrower than the international and Inter-American conventions against torture. Article 22(8) limits the danger that the person risks facing to the same five conditions enumerated in the Refugee Convention. When presented with both options abovementioned, the IACHR and the IACtHR prefer the broader protection.13

11 Previous research applied the broader non refoulement protection to US, EU and Canada models. (Guild, Elspeth, 2014).
12 Which reads ‘Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.’
13 In this regard, see (IACHR, 2015, para. 438, 2019 Principle 6: Non-Refoulement; Case of the Pacheco Tineo Family v. Bolivia, Preliminary Objections, Merits, Reparation and Costs, Judgment, 2013, para. 135; Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection, Advisory Opinion OC-21/14, 2014, para. 238; Case of Wong Ho Wing V. Peru, Judgement (Preliminary objection, merits, reparation and
Article 10 of the Chilean migration draft law was identical to Article 22(8) of the ACHR. A comparison of both regulations in their original Spanish language demonstrates that Article 10 of the migration draft law transcribed the entire paragraph of Article 22(8) of the ACHR. Then, it included the phrase ‘in conformity with international treaties ratified by Chile’. In addition, the migration draft law and law 21.325 have a norm of ‘interpretation following the Constitution and international norms of human rights’. Despite opting for narrower protection, the scope of Article 10 of the migration draft law could have been broadened in the case law by Chilean courts interpreting its application. The Chilean Supreme Court already demonstrates a progressive application of human rights law when deciding habeas corpus against expulsion orders (Henriquez-Viñas, 2022). Furthermore, and as mentioned below, case law at the Supreme Court shows a widened scope of protection when applying the principle of non-refoulement.

In addition to the explicit recognition in human rights treaties, the human rights systems have further interpreted the scope of protection of the principle of non-refoulement by identifying positive obligations emanating from the prohibition against torture and other serious human rights violations (CAT, 2018b; CCPR, 1992; IACHR, 2010 Principle 6; UN CMW, 2013). It is not a matter of this article to deeply analyse the broad literature and jurisprudence on the topic (Akal, 2023; Cali et al., 2020; Costello & Mann, 2020; Garrett & Barrett, 2021; Mann, 2020; Mathew, 2021; McAdam, 2020; McCall-Smith, 2020; Shaindl & Lazickas, 2022). Three elements are, however, relevant to mention for this article’s case study.

Firstly, a new definition of the principle of non-refoulement is applicable. Synthesising the interpretations of the international human rights system, the Special Rapporteur on the Rights of Migrants (SR Rights of Migrants) referred to the principle of non-refoulement as a principle which ‘prohibits States from deporting any person to another State’s jurisdiction or any other territory where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or ill-treatment or other serious human rights violations, or where there would be a real risk of such violations’ (UN HRC, 2018b). Consequently, the scope of protection given in international refugee law to the principle of non-refoulement is expanded. It applies not only to refugees and asylum seekers but to any person under the jurisdiction of the state, regardless of whether they are nationals or foreigners or their immigration status, that is, whether they are refugees, refugee applicants, or migrants in regular or irregular status. As ruled by the IACtHR in the Case of the Pacheco Tineo Family v Plurinational State of Bolivia (hereinafter Case of Pacheco Tineo):

Hence, if the preceding norms are complemented by the international corpus juris applicable to migrants, it may be considered that, under the inter-American system, the right of any alien, and not only refugees or asylees, to non-refoulement is recognised, when his life, integrity and/or freedom are in danger of being violated, whatsoever his legal status or migratory situation in the country where he is. (Case of the Pacheco Tineo Family v. Bolivia, Preliminary Objections, Merits, Reparation and Costs. Judgment, 2013, para. 135).

The definition also shows that the non-refoulement principle protects not only against torture or ill-treatment but against “other serious human rights violations”. Among the protected rights, there is the right to life, the right to a fair trial and the prohibition of arbitrary detention, enforced disappearance, threats to the liberty and security of a person, risks to life such as the absence of necessary medical care and living conditions (UNCCCT, 2021). The SR Rights of Migrants goes further into affirming that the principle of non-refoulement is applicable to migrants, whether they are nationals or aliens, under the jurisdiction of the state, regardless of whether they are refugees or asylum seekers. As ruled by the IACtHR in the Case of the Pacheco Tineo Family v Plurinational State of Bolivia (hereinafter Case of Pacheco Tineo):

Three elements are, however, relevant to mention for this article’s case study.

Firstly, a new definition of the principle of non-refoulement is applicable. Synthesising the interpretations of the international human rights system, the Special Rapporteur on the Rights of Migrants (SR Rights of Migrants) referred to the principle of non-refoulement as a principle which ‘prohibits States from deporting any person to another State’s jurisdiction or any other territory where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or ill-treatment or other serious human rights violations, or where there would be a real risk of such violations’ (UN HRC, 2018b). Consequently, the scope of protection given in international refugee law to the principle of non-refoulement is expanded. It applies not only to refugees and asylum seekers but to any person under the jurisdiction of the state, regardless of whether they are nationals or foreigners or their immigration status, that is, whether they are refugees, refugee applicants, or migrants in regular or irregular status. As ruled by the IACtHR in the Case of the Pacheco Tineo Family v Plurinational State of Bolivia (hereinafter Case of Pacheco Tineo):

Hence, if the preceding norms are complemented by the international corpus juris applicable to migrants, it may be considered that, under the inter-American system, the right of any alien, and not only refugees or asylees, to non-refoulement is recognised, when his life, integrity and/or freedom are in danger of being violated, whatsoever his legal status or migratory situation in the country where he is. (Case of the Pacheco Tineo Family v. Bolivia, Preliminary Objections, Merits, Reparation and Costs. Judgment, 2013, para. 135).

The definition also shows that the non-refoulement principle protects not only against torture or ill-treatment but against “other serious human rights violations”. Among the protected rights, there is the right to life, the right to a fair trial and the prohibition of arbitrary detention, enforced disappearance, threats to the liberty and security of a person, risks to life such as the absence of necessary medical care and living conditions (UNCCCT, 2021). The SR Rights of Migrants goes further into affirming that the principle of non-refoulement is applicable to migrants, whether they are nationals or aliens, under the jurisdiction of the state, regardless of whether they are refugees or asylum seekers. As ruled by the IACtHR in the Case of the Pacheco Tineo Family v Plurinational State of Bolivia (hereinafter Case of Pacheco Tineo):

Hence, if the preceding norms are complemented by the international corpus juris applicable to migrants, it may be considered that, under the inter-American system, the right of any alien, and not only refugees or asylees, to non-refoulement is recognised, when his life, integrity and/or freedom are in danger of being violated, whatsoever his legal status or migratory situation in the country where he is. (Case of the Pacheco Tineo Family v. Bolivia, Preliminary Objections, Merits, Reparation and Costs. Judgment, 2013, para. 135).

The definition also shows that the non-refoulement principle protects not only against torture or ill-treatment but against “other serious human rights violations”. Among the protected rights, there is the right to life, the right to a fair trial and the prohibition of arbitrary detention, enforced disappearance, threats to the liberty and security of a person, risks to life such as the absence of necessary medical care and living conditions (UNCCCT, 2021). The SR Rights of Migrants goes further into affirming that the principle of non-refoulement is applicable to migrants, whether they are nationals or aliens, under the jurisdiction of the state, regardless of whether they are refugees or asylum seekers. As ruled by the IACtHR in the Case of the Pacheco Tineo Family v Plurinational State of Bolivia (hereinafter Case of Pacheco Tineo):

Hence, if the preceding norms are complemented by the international corpus juris applicable to migrants, it may be considered that, under the inter-American system, the right of any alien, and not only refugees or asylees, to non-refoulement is recognised, when his life, integrity and/or freedom are in danger of being violated, whatsoever his legal status or migratory situation in the country where he is. (Case of the Pacheco Tineo Family v. Bolivia, Preliminary Objections, Merits, Reparation and Costs. Judgment, 2013, para. 135).

The definition also shows that the non-refoulement principle protects not only against torture or ill-treatment but against “other serious human rights violations”. Among the protected rights, there is the right to life, the right to a fair trial and the prohibition of arbitrary detention, enforced disappearance, threats to the liberty and security of a person, risks to life such as the absence of necessary medical care and living conditions (UNCCCT, 2021). The SR Rights of Migrants goes further into affirming that the principle of non-refoulement is applicable to migrants, whether they are nationals or aliens, under the jurisdiction of the state, regardless of whether they are refugees or asylum seekers. As ruled by the IACtHR in the Case of the Pacheco Tineo Family v Plurinational State of Bolivia (hereinafter Case of Pacheco Tineo):

Hence, if the preceding norms are complemented by the international corpus juris applicable to migrants, it may be considered that, under the inter-American system, the right of any alien, and not only refugees or asylees, to non-refoulement is recognised, when his life, integrity and/or freedom are in danger of being violated, whatsoever his legal status or migratory situation in the country where he is. (Case of the Pacheco Tineo Family v. Bolivia, Preliminary Objections, Merits, Reparation and Costs. Judgment, 2013, para. 135).

The definition also shows that the non-refoulement principle protects not only against torture or ill-treatment but against “other serious human rights violations”. Among the protected rights, there is the right to life, the right to a fair trial and the prohibition of arbitrary detention, enforced disappearance, threats to the liberty and security of a person, risks to life such as the absence of necessary medical care and living conditions (UNCCCT, 2021). The SR Rights of Migrants goes further into affirming that the principle of non-refoulement is applicable to migrants, whether they are nationals or aliens, under the jurisdiction of the state, regardless of whether they are refugees or asylum seekers. As ruled by the IACtHR in the Case of the Pacheco Tineo Family v Plurinational State of Bolivia (hereinafter Case of Pacheco Tineo):

Hence, if the preceding norms are complemented by the international corpus juris applicable to migrants, it may be considered that, under the inter-American system, the right of any alien, and not only refugees or asylees, to non-refoulement is recognised, when his life, integrity and/or freedom are in danger of being violated, whatsoever his legal status or migratory situation in the country where he is. (Case of the Pacheco Tineo Family v. Bolivia, Preliminary Objections, Merits, Reparation and Costs. Judgment, 2013, para. 135).
refoulement is also applicable in cases of return to situations of socioeconomic deprivation (UN HRC, 2018b). However, the extent to which human rights violations trigger non-refoulement protection is contested (Costello, 2016; Mathew, 2021). It appears that the minimum requirement is that the violation amounts to an ill-treatment (Chetail, 2019).

The Chilean Supreme Court applies a broader scope of protection of the principle of non-refoulement in its case law. Common facts of these cases are Venezuelan citizens who entered the country irregularly due to not having travel documents. Migration authorities dictated an expulsion order against them based on their irregular entry. Claiming the illegality of this expulsion order, they presented habeas corpus at Chilean Appeals Courts. Often, these cases were brought to the Supreme Court, which decided to leave the expulsion order without effect. The recent considerations given by the Court to adopt this decision are health risks. First, the court considered the impact of the COVID-19 pandemic increased the risks of affecting the claimants' physical and psychical integrity and their personal security if being returned. Second, the court considered the claimants under the broad definition of refugee protection of the Cartagena Declaration. Third, the court recognised their non-refoulement guarantee despite not having applied for refugee status and their irregular entry to the country (Supreme Court, ROL: 5546-2023; 5986-2022; 48889-2022; 39936-2022). The Courts' arguments are in line with scholars analysing non-refoulement and COVID-19 around the world (Catro Padrón & Feline Freier, 2021; Feline Freier, 2022; Foster et al., 2021; Ogg & Taoi, 2021; Reches, 2022).

Secondly, when the protection of non-refoulement is against the risk of torture and ill-treatment, the principle of non-refoulement is an ‘absolute and non-derogable principle’, it does not admit limitations and must be applied with no exceptions (CCPR, 1992; UN HRC, 2018b, 2018a). Consequently, state parties must apply this principle in all their jurisdiction and to everyone, including those who need international protection, without discrimination and no matter their nationality, their statelessness condition, their juridical, administrative or judicial situation, and in normal circumstances or an emergency state (CAT, 2018b). This rule differs from international refugee law, where states can invoke the exceptions of article 33.2 of the Refugee Convention (Costello & Foster, 2016; Mathew, 2021). This is reflected in the interpretations of the human rights monitoring bodies. For example, in the case of José Henry Mongue Contreras v Canadá (José Henry), the CCPR decided that if Mr Henry was expelled to El Salvador, Canada would violate his rights protected under article 7 of the ICCPR, even considering that Canada did not recognise the complainant’s refugee status for security reasons and that it rejected an application for permanent residence based on humanitarian reasons (Communication No. 2613/2015, 2017).

The broadened scope of protection of the principle of non-refoulement is also reflected in Principle 6 of the Inter-American Principles (IACHR, 2019). When the risk of refoulement is other than torture, the IACHR interprets that the exceptions of article 33.2 of the Refugee Convention can be applied, but under restrictive interpretation and following the principle of proportionality. Despite the broader scope of protection that the human rights systems give under the principle of non-refoulement, specific requirements need to be met for a person to claim their protection. When discussing the incorporation of the principle into Law 21.325, right-wing parliamentarians argued against it because they feared opening the borders without control. A member of the parliament argued that for protection against refoulement, ‘it is enough that the person claims that his life is at risk or that he is afraid to live in his country’ (Cámara de Diputados, 2019). However, this is not the case. As interpreted by the CCPR, in individual communications, such as José Henry, the obligation to refrain from returning a person is applicable when the consequence of said return is a real and personal risk, accompanied by severe reasons to determine that it would cause irreparable damage,
such as that contemplated in the article 7 of the ICCPR (Communication No. 2613/2015, 2017, para. 8.2, 8.7; Communication No. 2007/2010, 2014). Applying this standard also means that in some situations, human right treaty bodies find expulsions to be compliant with human rights law, as, the case of X v Denmark at the CCPR (Communication No. 2007/2010, 2014). Furthermore, there should be ‘substantial grounds for believing a person is facing a risk of torture’. According to CAT interpretations, ‘substantial grounds’ exists when ‘the risk of torture is foreseeable, personal, present and real’, which needs to be proved (CAT, 2018b).

In summary, the principle of non-refoulement forms part of the human right to be free from torture: It is regulated in human rights treaties and emanates as a positive obligation from the prohibition against torture and other serious human rights violations. Therefore, it applies to any person, not only to refugees and asylum seekers; and when deriving from the prohibition against torture, it is an absolute and non-derogable principle. Section 4 will show that, for the case of Chile, more than recognising this principle in law 21.325 is required since it is limited to refugees and asylum seekers, and exceptions are allowed.

3.2.2. Obligations to Adopt Positive Measures Against The Violation of Non-Refoulement

Concrete human rights obligations emanate from the principle of non-refoulement which are interpreted by human rights monitoring bodies and courts (Mathew, 2021). This section will analyse the obligations related to the legal treatment Chile should give to the principle of non-refoulement. In addition to refraining from returning a person when non-refoulement requirements are met, a positive obligation emanates from the principle of non-refoulement: States must adopt legislative, administrative and other measures they take to prevent and punish its violation (CAT, 2018b; CCPR, 1992). To comply with these obligations, the measures adopted must be immediate (Stabrock, 2011). This is the nature of the obligations emanating from civil and political rights, such as the prohibition of torture and ill-treatment from which the principle of non-refoulement emanates. Compliance with these obligations can be analysed in two groups: the adoption of administrative and judicial measures and the adoption of legislative measures.

Regarding administrative and judicial measures, a state will only be able to return a person without it being a human rights violation when their return is accompanied by a strict and individualised situation of their case (Case of the Pacheco Tineo Family v. Bolivia, Preliminary Objections, Merits, Reparation and Costs, Judgment, 2013, para. 153). Thus, each expulsion must be examined by the Chilean administrative and judicial authorities ‘individually, impartially and independently [...] in conformity with essential procedural safeguards, notably the guarantee of a prompt and transparent process, a review of the deportation decision and a suspensive effect of the appeal’ (CAT, 2018c). In addition, the CAT interpreted specific preventive measures to avoid non-refoulement violations, such as providing the person concerned with a lawyer and respecting the person’s language during the administrative or judicial procedure (CAT, 2018b; UN HRC, 2018b). Consequently, the principle of non-refoulement is incompatible with rapid rejections at the border (UN HRC, 2018b).

Regarding legislative measures, this obligation must be read in conjunction with article 2 of the ACHR ’”Domestic Legal Effects’, which prescribes:

Where the exercise of any of the rights or freedoms referred to in article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.
The IACHR interpreted the application of this article in the document ‘Human Mobility Inter-American Standards of 2015’, which can be read in the light of Chile’s obligations to adopt legislative measures for the case of the principle of non-refoulement: Firstly, Chile must eliminate laws and practices of any kind that somehow violate the guarantees of non-refoulement; and secondly, Chile must issue laws and develop methods conducive to the practical observance of the guarantee against refoulement (IACHR, 2015). Detailed recommendations on non-refoulement compliance by UN monitoring bodies to Chile confirm this argument. In fact, guaranteeing the principle of non-refoulement ‘in law and practice’ is precisely what the CMW recommended to Chile in its Concluding Observations on the second periodic review. Moreover, within this recommendation, the CMW explicitly applied the broader scope of protection of the principle, affirming that, in its view, the principle of non-refoulement prohibits the removal of any person to a territory where they would be at real risk of persecution or serious human rights violations (CMW, 2023). Similarly, the CAT called on Chile to adopt legislative measures necessary to ensure an effective guarantee of the principle of non-refoulement (CAT, 2018a). Consequently, the principle of non-refoulement should have been incorporated in law 21.325 in at least paragraph II of Title II, entitled ‘Rights and obligations of aliens’. Furthermore, because the principle of non-refoulement constitutes a limitation to the power of states to expel migrants, the principle of non-refoulement should also be mentioned in Title VIII “Expulsion”.

In summary, in light of Chile’s positive obligation to adopt administrative, judicial and legal measures, the principle of non-refoulement should be incorporated in law 21.325. Such incorporation does not mean creating new obligations for the country. On the contrary, it constitutes a tool to facilitate compliance with existing Chilean human rights obligations. The following section analyses the extent to which the principle of non-refoulement is recognised in Chilean migration legislation.

3.3. The Principle of Non-Refoulement in Chilean Legislation

3.3.1. The Principle of Non-Refoulement in Law 20.430

The principle of non-refoulement is incorporated and defined in articles 3 and 4 of Law 20.430. Article 4 allows an analysis of the scope of protection under the principle of non-refoulement in Chilean refugee law. The first thing to consider is that Article 4 of law 20.430 limits the expulsion of refugees from Chile. This is clear from the first paragraph, which prohibits the expulsion, devolution or refusal at the border of refugees or asylum seekers to a country where their life or personal freedom is in danger. It is also clear from the location of article 4 in law 20.325. The following article -article 5 of law 20.325- regulates the expulsion of refugees and prescribes that this is an exceptional measure that can only be applied for national security and public order reasons. It also recognises the right of refugees to appeal against expulsion through administrative and judicial pathways. Therefore, if a refugee or asylum seeker is expelled, they should be allowed to claim their non-refoulement protection at the legal procedures regulated in article 5. Consequently, forced returns should always be a measure of last resort and should be applied following the rules of due process (UN HRC, 2018b). Additionally, appeals against forced returns should suspend deportation (UN HRC, 2018b). Thus, the principle of non-refoulement contained in article 4 of law 20.430 limits the already limited power of the state to expel refugees.

Secondly, paragraph 2 of article 4 of law 20.430 includes broader protection against refoulement than the ‘well-founded fear of persecution’ contained in the Refugee Convention. It refers to the obligation to refrain from returning refugees or asylum seekers

---

15 Translated from original spanish: Derechos y obligaciones de los extranjeros.
16 Translated from original spanish: De la expulsión.
whose safety is in danger or for whom there are well-founded reasons to believe they could be subject to torture or cruel, inhuman or degrading treatment or punishment. This is in line with current human rights standards, as commented above in the case of José Henry. Furthermore, according to paragraph 3, a persistent situation of manifest, patent or massive violation of human rights will be considered to assess the risk the refugee or asylum seeker faces if being returned. Again, this aligns with the broadened concept of refugees in the Cartagena Declaration.

However, article 4 is not entirely in line with the human rights standards analysed in the previous sections of this article. The principle of non-refoulement is still applied exclusively to refugees and asylum seekers, as defined in article 2 of law 20.325. Thus, the person will have to prove that he or she faces a well-founded fear of being persecuted for reasons of race, religion, nationality, belonging to a specific social group or political opinions; or having fled the country for reasons of generalised violence. Moreover, narrowing non-refoulement protection only to refugees or asylum seekers means establishing limitations and requirements to be protected from torture, which contravenes its absolute and non-derogable character.

A possibility of applying the principle of non-refoulement to those not qualifying as refugees is identified in paragraph 4 of article 4. Here, it is established that asylum seekers who have not been granted refugee status can request a residence permit in the country. However, the paragraph does not indicate that the migration authorities will grant this permit when non-refoulement protection is needed. It does not recognise a right to stay on these grounds. It only grants the option to request a residence permit.

Despite the abovementioned, and as indicated in section 3.1., the Chilean Supreme Court has interpreted a broader scope of protection for the principle of non-refoulement. Furthermore, the court also ruled that non-refoulement protection should be applied to a person whose asylum application was denied. (Sáez con Bellolio, 2021 Décimo tercer - décimo cuarto) (Feddersen M. et al., 2023).

3.3.2. The Decision of Not Incorporating The Principle of Non-Refoulement in Law 21.325

Law 21.325 does not contain the explicit recognition of the principle of non-refoulement included initially in article 10. The article was replaced with a ‘Complementary Protection’. An identical provision is included in Decreto 296 of 2022, which approved the regulation for law 21.325. This section discusses this provision in light of the international and Inter-American refugee and human rights standards analysed in the previous sections of this article. A first point to consider is that incorporating a ‘complementary protection’ is a positive institutional change. The previous migration law Decreto 1.094 of 1975, did not include such guarantee. The title ‘complementary protection’ is identical to the wording used by the IACtHR when interpreting article 22(8) of the ACHR, as analysed in section 3.1. above. Article 10 of law 21.325 protects asylum seekers who were not given refugee status, which means the scope of protection of the principle of non-refoulement, previously recognised only to refugees, is broadened. Nonetheless, the provision falls short in its complementary protection. Following the interpretation of the IACtHR, the ‘complementary protection

---

17 Despite not being a comparative article, the case of Hong Kong Courts is relevant to mention for their relevance in expanding non-refoulement protection whose legal protection was short (Choy & Shi, 2021).

18 This was explicitly mentioned by the CMW on paragraph 10 of the Concluding Observations on its second Periodic Review to Chile. It is worth mentioning that the English version reads ‘additional protection’, however, the original Spanish version reads ‘protección complementaria’, which is the same wording used in Article 10 of Law 21.235. (CMW, 2021, para. 10).
constitute a normative development that is consistent with the principle of non-refoulement’ (Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection. Advisory Opinion OC-21/14, 2014, para. 240). Article 10 is inconsistent with the principle of non-refoulement. Four reasons allow making this affirmation.

Firstly, the authority granting the complementary protection is the same as the one prescribed in law 20.430. According to Title III of law 20.430 and Title III of Decreto 837, this authority is a commission composed of the ‘Subsecretario del Interior’, two representatives of the ‘Ministerio del Interior’, and two representatives of the ‘Ministerio de Relaciones Exteriores’. The representatives are elected by their respective ministers. A member of UNHCR is allowed to attend. Apart from the latter, these are all political designations which risk having complementary protection dependent on the political views of the commission. Those who guarantee the principle of non-refoulement have no expertise in due process norms and refugee and human rights law. Therefore, respect for the application of administrative and judicial measures analysed in section 3.2. above cannot be ensured. In addition, there was no subsequent modification to law 20.430 after law 21.325 entered into force. Therefore, granting complementary protection is not within the faculties recognised by these authorities in law 20.430. It is hardly possible that this commission would grant complementary protection. The small number of asylum claims granted by this commission in the past years contributes to this argument. Hence, giving the power of granting complementary protection to these authorities can turn into not guaranteeing the principle of non-refoulement when needed.

Secondly, the first paragraph of article 10 prescribes that the authorities specified in law 20.325 will grant complementary protection under the requirements and visas established by the National Migration Policy, which will set the grounds for cessation of said complementary protection. The National Migration Policy is not yet publicly available, and there is no precise date for when this will happen. In the meantime, it is unclear how the residence permits of those with complementary protection would operate in practice. Under article 32 of law 20.430, asylum seekers are granted an 8-month residence permit, which can be renewed until a decision is adopted. No similar right is recognised for those with complementary protection. Following the interpretations of the IACtHR, the very essence of complementary protection is to be a way in which the state acknowledges a person’s situation, identifies his risks and ascertains his needs’ (Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection. Advisory Opinion OC-21/14, 2014, para. 238).

Furthermore, when commenting on law 21.325, the CMW recommended Chile to clarify the residence permits of those with complementary protection (CMW, 2020, p. 11). Not regulating their residence permit can cause individuals to fall into irregular migration status, increasing their vulnerability. In fact, a recent study showed that processes of bureaucratic waiting affects asylum seekers’ health conditions in Santiago, Chile (Carreño et al., 2019). Falling into irregular migration status often leaves individuals with no other alternative than leaving the country, exposing them to a risk of non-refoulement.

---

19 The most recent information to the date this article was submitted on this Public Policy is related to the launching of the formulation process, in June 2022. https://www.interior.gob.cl/sin-categoria/2022/06/14/conocesobre-el-proceso-de-formulacion-de-la-política-de-migracion/

20 Read in conjunction with Article 42 of ‘Decreto 837 Que aprueba el reglamento de la ley 20.430, que establece disposiciones sobre protección de refugiados’.

21 The lack of regulation can be regarded as a case of ambiguity, as studied by social sciences outside the scope of law (Tekin, 2022).

22 This can be seen as a worsening of asylum seekers’ already affected mental health. As recently demonstrated, at least one third of adult refugees and asylum seekers, and half of children in this situation, are prone to experiencing Post Traumatic Stress Disorder (PTSD) (Magwood et al., 2023; Nagy et al., 2023; Watters et al., 2022).
Thirdly, the article needs to include the broader scope of protection recognised under the Cartagena Declaration and in the human rights systems. In article 10, paragraph 2, the risk of being persecuted is conditioned to six circumstances: race, nationality, religion, social condition, political opinion and sexual orientation or gender identity. Therefore, the complementary protection is not guaranteed to any person having substantial grounds for believing that he or she would be in danger of being subjected to torture, ill-treatment, or other serious violations or where there would be a real risk of such breaches. This narrows the scope of protection of the principle of non-refoulement, placing Chile in danger of incurring in international responsibility. Furthermore, it does not mention specific protection against torture. In addition, it puts a higher burden of proof on the claimant. They not only have to prove that they face danger but also that they belong to one of these specific groups. Fourth, exceptions to complementary protection are allowed in article 10 paragraph three. Allowing for exceptions is an obstacle to guaranteeing the absolute character of the prohibition of torture. An adequate analysis of each claim must be made in any case. Additionally, one exception is having a criminal past, which does not align with previous judicial decisions at the domestic level. Applying a proportionality test, the Chilean Supreme Court has already recognised a right to stay for claimants with a criminal past (Ostos Buitrago Juan contra Subsecretaria del Interior, 2017).

Another exception in paragraph 3 of article 10 is to be considered ‘for founded reasons as a danger to the national security of the country’. This places Chile a risk of violating the principle of non-refoulement under human rights standards. As mentioned in section 3 above, for the CCPR in the case of José Henry, national security was not reason enough to deny protection against refoulement. Additionally, the phrase allows for broad interpretation and discretion on the side of the authorities deciding on the complementary protection. This is relevant in the current Chilean context, where there exists an intense stigmatisation of migrants and their connection to criminality. Three situations confirm this: First, a recent Chilean survey showed that 60% of Chileans think that criminality is more violent due to immigration (CADEM, 2023). Second, in April 2023, a new criterion for prosecuting migrants was installed at the Chilean prosecution. They agreed on requesting pre-trial detention against all migrants that are detained not carrying an identity document (Vallejos & Silva, 2023). Third, the parliament has an ongoing discussion about criminalising irregular entry to the country (Centro de Prensa, 2023).

In summary, despite constituting a positive step towards recognising complementary protection, article 10 of Law 21.325 needs to improve in its defence against non-refoulement. The legislative power needed to fully incorporate the interpretations of the IACtHR on complementary protection despite receiving specific recommendations from the CMW. The scope of protection of Article 10 is narrower than the current human rights standards established by human rights law and its interpretations. It lacks explicit protection against torture, limits the protection of refoulement to six specific conditions, and admits exceptions. Furthermore, the absence of a clear procedure for both granting the complementary protection and making it effective might make this provision in practice inapplicable. The consequence of eliminating an explicit recognition of the principle of non-refoulement is not providing Chile with the necessary tools to avoid incurring in refoulement as a consequence of returning migrants.

4. Conclusion

The principle of non-refoulement exists in refugee law, international human rights law and Inter-American human rights law. No matter the area of law, it limits the right of states to decide who enters and stays within their territory. To a minimum extent, Chilean
legislation reflects the overlapping regulation: It incorporates protection against refoulement in refugee law and a complementary protection in migration law. In refugee law, Chile mirrors international and Inter-American standards. It not only recognises entitlement to this right to refugees but also to asylum seekers. Additionally, it includes the broader definition of the Cartagena Declaration. Nonetheless, the practice of Chilean migration authorities does not reflect the legal requirements set out in the law.

The principle of non-refoulement is also regulated in international and Inter-American human rights treaties to which Chile is bound. Consistent interpretations of the human rights systems demonstrate that the principle of non-refoulement constitutes a positive obligation emanating from the prohibition against torture. And as such, it is an absolute, non-derogable right that does not allow for exceptions. Furthermore, it constitutes a norm of customary international law. A specific obligation of adopting positive measures to prevent its violation emanates from the principle of non-refoulement, which includes incorporating it into law 21.325. Complying with this positive obligation would provide Chile with the necessary tools to manage its migration flows without violating this principle. By eliminating an explicit recognition of the principle of non-refoulement and replacing it with the complementary protection of article 10 of law 21.325, Chile falls short of providing the broadest scope of application that human rights law gives to migrants, refugees and asylum seekers. Furthermore, Chile is not complying with its human rights obligations to adapt domestic legislation to prevent non-refoulement violations. A better alternative would have been to include ‘Article 10. The principle of non-refoulement’, accompanied by a definition such as the one provided by the SR Rights of Migrants and an article on complementary protection, with detailed specifications on the residence permits and rights granted to those holding this protection.

The Chilean Supreme Court applies a broader interpretation of the principle of non-refoulement, in accordance with human rights standards. Of course, this does not mean that every person needing non-refoulement protection will receive it, but it does mean that domestic remedies are available. Unfortunately, however, judicial decisions have not yet encouraged Chile to change its legislation or to modify its practice, and if this continues, the risk of incurring in international responsibility for violating the principle of non-refoulement will remain.

Acknowledgement

Research Funding ‘Becas de Doctorado en el Extranjero, Becas Chile, Convocatoria 2018. Resolución Exento No° 1083/2023’. With thanks to Kasey McCall-Smith for her thoughtful comments. All errors remain my own.

References


General Comment No. 4. Implementation of article 3 of the Convention in the context of article 22. CAT/C/GC/4


CCPR. (1986). General Comment 15: The Position of Aliens Under the Covenant. UN Doc. HRI/GEN/1/Rev.9 (Vol. I)

CCPR. (1992). General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)

CCPR. (1999). General Comment No 27 (67*) Freedom of Movement (article 12). CCPR/C/21/Rev.1/Add.9


Communication No. 2613/2015, CCPR/C/119/D/2613/2015 (CCPR 12 May 2017)


CMW. (2011). Consideration of reports submitted by State parties under article 74 of the Convention. CMW/C/CHL/CO/1

CMW. (2018). List of issues prior to submission of the second periodic report of Chile. CMW/C/CHL/QPR/2


CMW. (2021). Concluding observations on the second periodic report of Chile. CMW/C/CHL/CO/2

Constitución Política de la República de Chile, (2010)

Convention Against Torture (adopted 10 December 1984, entered into force 26 June 1987) UNTS 85 (UN CAT)

Ostos Buitrago Juan contra Subsecretaria del Interior, ROL 37229-2017 (Corte Suprema 22 August 2017)

Sáez con Bellolio, ROL 131056-2020 (Corte Suprema 15 March 2021)

Instituto Nacional de Derechos Humanos con Bellolio, Rol no 115.005-2022 (Corte Suprema 20 March 2023)


IACHR. (n.d.). Informe sobre la situación de los derechos humanos solicitantes de asilo en el marco del sistema canadiense de determinación de la condición de refugiado. Retrieved 28 February 2019, from http://www.cidh.org/countryrep/Canada2000sp/canada.htm%A.%C2%A0%C2%A0%C2%A0Visi%C3%B3n%General%del%Proceso%de%Petic%C3%B3n%y%Determinaci%C3%B3n


International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)


Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection. Advisory Opinion OC-21/14, (IACtHR, 19 August 2014)

Case of Wong Ho Wing V. Peru. Judgement (Preliminary objection, merits, reparation and costs), (IACtHR 30 June 2015)


Ley 20.430 que establece disposiciones sobre protección de refugiados, (2010)
Ley 21.325 de Migración y Extranjería, (2021)


UN CMW. (2013). General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families. CMW/C/CG/2.

UN HRC. (2018a). Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment. A/HRC/37/50


