Rejected Asylum Claims and Children in International Human Rights Law

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ANNE-CECILE LEYVRAZ, MAY 30 2021

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Adopted in 1989, the International Convention on the Rights of the Child (CRC) is the most widely ratified international human rights instrument. The CRC applies to both citizen and non-citizen children. Yet, some Articles more specifically address situations experienced by non-citizens, such as deportation or being a refugee. Article 3 – the principle that the best interest of the child should be the prime consideration in all actions that affect the child – and Article 2 – which forbids discrimination based on the status of the child's parents or legal guardians – are considered key in the protection of immigrant children, including those who had their asylum-claim rejected. This being said, violations of the human rights of children and impairment of their dignity is widespread. Children in an irregular situation, namely whose 'presence on the territory of a State… does not fulfil, or no longer fulfils the conditions of entry, stay or residence in the State' (IOM 2019) suffer additional violations because of their lack of regular migration status. International reports and the United Nations have been documenting such cases for decades.

Policies that encourage rejected asylum-seekers to leave the territory of the receiving state include the suppression or limitations of rights and access to social services, such as housing or health care (European Migration Network 2016). Even when rights are not legally curtailed, their effective implementation and enjoyment can be infringed by threats or fears of deportation, such as in countries where the education system and immigration authorities share

information. The irregularity of the status, the right of states to control access to their territory, and the credibility of the asylum procedure are just but a few examples of justifications used by states to adopt such policies. They portray asylum-seekers whose claims have been rejected (RAS, CRAS for children) not only as irregular or illegal immigrants, but also as departing. Yet, available data is at odds with such a proposition: in Europe, only a few RAS are being deported. Most end up undocumented and destitute (Harlan 2019). This includes both children and adults.

Most international or regional human rights instruments have instituted a control mechanism – namely a tribunal or expert committee – that is accessible to individuals. International and regional procedures are available to RAS (Leyvraz 2018), not to review the asylum decision as such, but to evaluate an alleged violation of an international obligation. Should they feel a right enshrined in an international human rights convention has been violated, RAS can submit a complaint and have the situation reviewed by an international or regional (quasi-)judicial body. RAS are more active than other irregular migrants before judicial or quasi-judicial human rights bodies and have spurred an important jurisprudential development in international and regional arenas (Chetail 2013). The focus on this specific category adopted in this contribution is thus functional: they are a visible part of irregularity (De Bruycker and Apap 2000). Yet, as the situation experienced by CRAS often overlaps with that of other children unlawfully present on the territory of a state, this chapter will dwell on decisions and comments affecting both.

This chapter will discuss how international and regional (quasi-)judicial bodies handle cases that involve accompanied and unaccompanied CRAS in order to assess the relevance of national socio-legal categories in the

international legal order. Drawing from quasi-judicial cases and observations adopted by expert bodies operating within the United Nations human rights system, I claim that such bodies oscillate between a status-centred approach, where the immigration status is decisive, and an experience-based approach, curbing the relevance of state-based categories. To this end, they appeal to different rationales. In the process of decision-making within the international legal order, international bodies construct a counter-narrative about migration that differs from state-centred discourses on irregularity. In the subsequent sections, I will begin by addressing the context of the emergence of the discourse framing asylum as a 'problem' at domestic level and present the different approach adopted within the international legal order. Then, discussing case law and observations of international expert bodies on situations pertaining to children, I will consider situations where such bodies adopted a status-centred approach or an experience-based approach. I claim that international institutions and movements should build upon experience-based approaches to influence discourse at domestic levels. Indeed, because

of the performative capacities of discourse (Cherfas 2006; Crépeau, Nakache, and Atak 2007), experience-based approaches could alleviate the difficulty migrants face in trying to enjoy their fundamental rights. Access to human rights should not be addressed as a purely legal consideration, but also as context-dependant. The social environment, stigmatization, and criminalization of irregular migration play a non-negligible role in the difficulties of access and enjoyment of fundamental human rights (Cholewinski 2005).

Framing 'Irregularity' from a Domestic and International Perspective

For the last centuries, migration control has been regarded as an expression of sovereignty. Yet, its significance has changed over time, along with the social, historical, economic, and political environment (Plender 1988). Some authors claim that it was not until the 20th century that migration control became an essential attribute of state power (Chetail 2014; Dauvergne 2014). Nowadays, 'governing through migration control' is considered key by most states (Bosworth and Guild 2008).

State sovereignty is not just about power. It also entails responsibility, notably to respect and implement international obligations, such as human rights obligations. It has been described as both 'power' and 'duty' (Saroléa 2006). CRAS are thus situated at the intersection of two areas of law: on the one hand, they are subjected to the sovereign right of the state to control access to its territory and, on the other, they enjoy the protection of the international human rights corpus. In addition, they are subjected to both international and domestic legal orders. However, domestic and legal orders do not apprehend CRAS from the same perspective. The dominant logic governing each legal order expresses a different rationale, as will be discussed in the coming subsections.

Undeserving and Outgoing: Attributes of Irregularity at Domestic Level

Nowadays, the categorization and stratification of persons along such dividing lines as migrants/nationals, regular/irregular, refugee/rejected asylum-seeker is a common feature of national migration policies. This categorizing process occurs within the domestic legal order and then leads to a differentiated application of rights depending on the category the person belongs to.

Contemporary migration management typically operates through various mechanisms (classification and selection, admission procedures, conditions and restrictions). As a result, contemporary migration management involves a proliferation, fragmentation and polarisation of different statuses and related bundles of rights with regard to admission, residence, work, and social rights (Kraler 2009).

From a state's perspective, suppression or limitation of rights is meant to encourage the departure of migrants unlawfully present or deter potential immigration. Such a practice has become part of domestic immigration control. Within domestic orders, human rights are being turned into instruments of power and control (Morris 2010) over an unwanted population, a population expected to leave, and thus whose stay is contemplated as merely temporary.

In most countries, the rejection of an asylum claim is subjected to the obligation to leave the country. Yet individuals' departure proves difficult for states to enforce (Paoletti 2010). One of the direct consequences at the domestic level

has been the adoption of coercive measures, such as harsh reception conditions, restrictive access to economic, social, and civil rights, and exclusion from society in order to 'encourage' the RAS to depart. Restricting rights has not proved necessarily efficient to ensure the departure of the RAS (Valenta and Thorshaug 2011). Yet, it affects those enduring restrictions, sometimes for years. The perception that RAS are 'on the go' or departing is misleading, as in some cases departure proves impossible (Legomsky 2014).

The irregularity of the presence starts when the asylum procedure ends with a negative decision. It is thus the result of national policies embedded in domestic legislation. However, the process is not merely a neutral administrative act of classification: it also triggers a socially constructed representation of the person as 'bogus claimants', 'abusers', and 'undeserving poor' (Da Lomba 2010). This discourse emerged during the 1980s, as states started to frame asylum as a problem. In other words, negative representations of RAS are not contemporary with the adoption of the 1951 Geneva Convention Relating to the Status of Refugees, but only developed decades later, when the economies contracted, the origin of asylum-seekers changed, and the return of RAS proved difficult to enforce (Stünzi and Miaz 2020).

Additionally, operating as a self-reinforcing prophecy, the discourse on the need to 'fight abuses' in the asylum system and 'deter bogus claims' has had a performative impact that led to further impairment of rights (Frei et al. 2014). Such discourses – and the resulting restrictions – are not only directed to adults. They also affect children, whether accompanied, separated, or unaccompanied (PICUM 2015). However, this is not a merely domestic matter: these measures affect the enjoyment of fundamental rights that are protected in international and regional human rights law instruments.

Emphasis on Jurisdiction and Humanity: The Key Elements at International Level

Among the nine core human rights conventions adopted within the international legal order, none specifically addresses the rights of persons whose asylum claims have been rejected. Yet, this does not mean that international instruments are irrelevant. Nevertheless, their applicability is contingent, depending on the material and personal scope of the treaty. For example, the Convention on the Elimination of All Forms of Discriminations against Women will be relevant only in situations involving women RAS; the CRC will be applicable to CRAS. In other words, the entire international and regional human rights corpus is applicable, as long as personal or material criteria of the treaty are met.

The applicability of international norms also depends on the existence of a jurisdictional link. For the CRAS to fall under the jurisdiction of the state usually depends on the territorial presence. As Bosniak (2007, 390) points out, the 'rights and recognition enjoyed by immigrants are usually understood to derive from either their formal status under law or their territorial presence'. While at the domestic level, formal status is key, international human rights law is strongly rooted in jurisdiction and territoriality (Saroléa 2006).

However, this does not mean that the migration status becomes irrelevant to the applicability of human rights: 'international human rights law does not make immigration status irrelevant to one's treatment in the social sphere. What international human rights law does, however, is to carve out a zone of protected personhood' (Da Lomba 2010). The logic of international law is somehow pragmatic or binary: as long as the removal has not been implemented, one's presence in the territory of the rejecting state is sufficient to enable the relevant human rights standards to be applied. Labelling one's stay as irregular or describing a CRAS's presence as merely temporary thus has a lesser impact within the international legal order than at domestic level.

A Status-Centred Approach

Because of domestic laws, rejection of an asylum claim and irregularity often go hand in hand. Such legal status – or absence thereof – permeates the international legal order and influences the interpretation and adjudication of rights-based claims. The case discussed in this section adopts what I call a 'status-centred approach', namely meaning that status is considered a central element in the decision-making process. Yet, status is never the sole consideration: experts or judges have to balance personal characteristics with the rights of states to control access to

the territory. Adjudicated by an expert committee monitoring the implementation of the European Social Charter, the following case is insightful as the instrument explicitly excludes migrants unlawfully present from its personal scope. Nonetheless, the European Committee of Social Rights (ECSR) extended the personal scope of the treaty to protect the dignity of all human beings and in particular the dignity of children.

Protecting Dignity, but Not Interfering with Departure: A Difficult Task

Defence for Children International (DCI) v. the Netherlands (ECSR 2009) is a case submitted to the ECSR by an organisation willing to prevent the deprivation of accommodation suffered by children in an irregular situation, particularly children of families whose asylum claims had been rejected. The claimant argued it was, amongst others, a violation of Article 31(1) and 31(2) of the European Social Charter protecting the right to housing. Although the European Social Charter explicitly excluded from its personal scope persons without a lawful right of presence, the ECSR did not rule out the case for lack of competence. Instead, it proceeded as follows: it first declared that the Netherlands was not required to guarantee access to housing for CRAS as per Article 31(1) because the ECSR had interpreted it as entailing a guarantee of continued residence (ECSR 2009, 43). It also recognised that the obligations arising from the European Social Charter should not undermine the objectives of domestic migration policy and stated that 'to require that a Party provide such lasting housing would run counter the State's aliens policy objective of encouraging persons unlawfully on its territory to return to their country of origin' (ECSR 2009, 44). For these reasons, it concluded that 'children unlawfully present on the territory of a State Party do not come within the personal scope of Article 31(1)' (ECSR 2009, 45), thus upholding the relevance of domestic laws and categories in the international legal order and acknowledging the legality of a differentiated treatment based on irregularity, including for children.

The ECSR went on to examine Article 31(2) on the prevention and reduction of homelessness. It interpreted it as relevant to protect the dignity of children, even those unlawfully present. To meet this obligation, the ECSR found that states should not proceed with the removal of children from their shelter: 'the Committee holds that, since in the case of unlawfully present persons no alternative accommodation may be required by States, eviction from shelter should be banned as it would place the persons concerned, particularly children, in a situation of extreme helplessness which is contrary to the respect for their human dignity' (ECSR 2009, 63).

Thus, the protection against hardship and the prevention of homelessness were not found to harm the objectives of domestic migration policies. Yet, the reasoning of the ECSR is complex and puzzling: it first excluded CRAS from the personal scope of Article 31(1) due to the guarantee of tenure, but then required states to provide shelter as long as the CRAS falls under its jurisdiction, mostly to prevent homelessness.

Building Acceptance to a Differentiated Treatment

The decision of the ECSR in *DCI* provides for a solution that seeks to balance the different interests at stake. Legal status is deemed relevant, yet considerations of dignity, humanity, and the obligation to tackle homelessness call for the establishment of a bottom line in the treatment of children. The ECSR agrees that children unlawfully present do not deserve to the same housing standards as other children, whether nationals or migrants lawfully present. In particular, accommodation does not have to meet the characteristics of security and permanence that would make it a home. Because of the status and the right of states to curb irregular immigration, some children can be treated differently in the eyes of the law.

This reasoning builds on the idea that a CRAS's presence in the territory of the state is temporary and on a long-term discourse of fight against abuses. As pointed out by Fox O'Mahony and Sweeney (2010), such discourses have overshadowed the personal experiences of children housed in shelters that do not meet such requirements as stability, permanency, and privacy. The effort to reconcile states' immigration policies with their protection of fundamental rights is common in the international legal order. By doing so, the result, as is the *DCI* case, invisibilize the experience of those directly affected and is questionable from a human rights perspective. Indeed, 'the provision of a house does not necessarily lead to a realisation of the right to housing if a house is provided absent attention to the rights, freedoms, and dignity we associate with claims to a house in the first place' (Hohmann 2014, 225).

How can the argument of the adequacy of temporary shelter, short of any requirement of privacy be upheld when empirical data show that removal is a long process, assuming it is possible at all? The Special Rapporteur on the Human Rights of Migrants addresses the issue and states that the right to housing, including for failed asylum seekers, must provide security of tenure (UNGA 2010, 41). The Special Rapporteur emphasizes the interdependence of rights and points out that children, as well as adults, can have their well- being affected by the lack of a place to call home (UNGA 2011, 39). In doing so, the Special Rapporteur not only underlines the necessity of considering the interdependence of rights, but also how curtailing one right necessarily has consequences for the enjoyment of other rights. It also makes way for adopting an experience-based approach.

An Experience-Based Approach

The experience of hardship is not restricted to persons with precarious immigration status. Citizens and migrants with a right to remain are also concerned. Yet, some categories – designated as 'vulnerable' or 'marginalized' – are more affected. Adopting what I call an 'experience-based approach', namely focusing primarily on the risk or experience of (future) hardship, international bodies have in some cases placed lesser emphasis on the relevance of the legal status of the individual within the international legal order. Considering some aspects of the right to health and education, in this section I discuss the approach followed by international bodies and point to the rationale they adopt.

Caring and Protecting Vulnerable Ones: Access to All Level of Health Care

The right to health is complex and embedded within several layers of medical care and other obligations (ECOSOC 2000). Access to preventive, primary, secondary, and emergency health care for CRAS, but also for other categories of migrants unlawfully present, is difficult to enjoy in practice. Yet, when emergency health care is at stake, treaty bodies have unequivocally found that access should be granted to all persons (ECOSOC 2008, 37), including children and adults unlawfully present. In other words, all persons within the jurisdiction of states must have access to emergency health care. Medical condition, not immigration status, must prevail. Such an obligation is not merely embedded in the right to health. It also affects the right to life, as emergency health care in most cases address life-threatening conditions.

For other levels of care, such as secondary health care, there is a distinction between adults and children: the latter are to be granted full access, while the former trigger a more complex answer. For example, addressing the situation of unaccompanied or separated children, the Committee on the Rights of the Child called on states-party to ensure that all have the same access to health care as national children, regardless of their migration status (Committee on the Rights of the Child 2005, 5–6). The Special Rapporteur on the Human Rights of Migrants stated:

Regrettably, there were vast discrepancies between international human rights norms and their actual implementation in the field of health care for migrant children whether these children are in regular or irregular situations, accompanied or unaccompanied. Inadequate care had long-lasting consequences on a child's development; for this reason, and in the light of the State duty to protect the most vulnerable, access to health care for migrant children should be an urgent priority (UNGA 2011, 40).

Contrary to the obligation to grant emergency health care, an obligation animated notably by the protection of life and addressing an immediate threat, other levels of health care lean on a different rationale. The development of the child, and thus her future, as well as the mitigation of her vulnerability are contemplated. The temporary presence in the territory of the state is not sufficient to deprive the CRAS from her right.

In the case *International Federation of Human Rights Leagues v. France*, the ECSR had to decide, among other things, whether France's policy to restrain a CRAS from accessing medical care was in compliance with Article 17 of the European Social Charter. Children would be admitted to a medical scheme only after three months, except for emergency health care. Referring to the CRC, the ECSR found it to be contrary to the European Social Charter (ECSR 2004, 36–37). Nevertheless, it did not come to the same conclusion for adults, who did not have to benefit from the same duty of 'care and assistance' (ECSR 2004, 36).

Protecting Present and Future Experiences

When international bodies apply an experience-based approach, they favor a protective stance over domestic policies. They consider children's immediate and future life experiences and seek to preserve the dignity of vulnerable children. To this end, they can draw on the interdependence of all rights. For example, health can only be achieved if housing is adequate. Using its own rationale, the international legal order is thus able to produce a counter- narrative to discourses produced within the domestic order. The right to education is but another example.

Schools play an important role in the process of integration within the host society. School creates an environment where relationships and attachments can be established (FRA 2010). As a consequence, education somehow obstructs state immigration policy: integration and relationships make removal more difficult and uncertain. Additionally, as stated by the UN Committee on Economic, Social and Cultural Rights, it is a way to raise the future prospect of the child. It is 'the foundation for lifelong learning and human development on which countries can systematically build other levels and types of education and training. It is also about providing children with tools for the future that will make them less vulnerable and exploitable' (ECOSOC 1999a). Immediate consideration of integration and that of the future of the child compete. Yet, the international order favors the latter.

Just as for the right to health, the right to education is stratified into different levels, primary education being one of them (ECOSOC 1999b). Treaty bodies have consistently interpreted relevant human rights norms as stating an obligation to provide free primary education for all children who fall under the jurisdiction of the state. This obligation was deemed valid not only for Western states, but also for countries in the 'global south', such as Ecuador (Committee on the Rights of the Child 2010), Egypt (Committee on the Rights of the Child 2011), and Ethiopia (Committee on the Rights of the Child 2015). Addressing the situation in Hong Kong, the UN Committee on Economic, Social and Cultural Rights explicitly urged the state 'to amend its legislation to provide for the right to education of all school-age children in its jurisdiction, including children of migrants without the legal right to remain in [Hong Kong]' (ECOSOC 2005, 101). However, as children move from primary school to higher education, how does it affect the obligations of states? Decisions or comments of international bodies fail to provide an unequivocal answer. However, the European Court of Human Rights did not rule out the possibility of limiting access through higher fees based on nationality or status for secondary education (European Court of Human Rights 2011).

This being said, considerations regarding the legal status of children or domestic immigration policies are always in the background. Moreover, as the rights get more complex, or specific, usually arguments on the rights of states to control immigration start to leak more compellingly into the decisions or observations of international bodies. The rights of states and human rights both belong to the international legal order and influence their decision- making processes. In practice, the status-based approach and the experience- based approach are almost like ideal types (Bosniak 2007). The approach they follow lies on a spectrum between these two extremes. Yet, conceptually, the experience-based approach is powerful: it offers an alternative way to portray children, emphasizing primarily the child, and less on domestically produced socio-legal categories.

Conclusion

The international legal order proceeds according to its own system and rationale and, by doing so, contributes to creating a discourse that differs from the discourse emanating from the domestic legal order. Yet, sometimes both discourses overlap. As discussed in this chapter, socio-legal categories

created at state level can be relevant, and decisions taken within the international legal order may seek to protect domestic policies meant to encourage the departure of CRAS, even when such policies affect their human rights. Indeed, from the vantage point of the state, the irregular nature of the stay of CRAS predominates and entails that she should leave the territory. Her stay is viewed as temporary. When the international legal order espouses this view, it follows what I call a 'status-centered approach'.

However, in other cases, immigration status is not deemed relevant. Considerations of humanity, dignity, and/or interdependence of rights prevail. Indeed, encroaching or limiting a right will affect the enjoyment of other rights

enshrined in international instruments. Protecting the dignity, life, and future of CRAS can demand a different approach that emphasizes one's experience. It thus departs from legal categories and construes the situation in terms of vulnerability and needs. When the international legal order espouses this view, it follows what I call an 'experience-based approach'.

In the process of decision-making, an international perspective thus creates as a counter-narrative on migration that stands out from state-centered discourses on irregularity and fights against abuses. While the international order is not fully impermeable to socio-legal categories created at the state level, the opposite is also true: the international legal order influences domestic legal orders and dominant state-centered narratives. And the narrative it has developed allows for a different stance towards CRAS and migrants unlawfully present on the territory of the state. The global pandemic bluntly reveals social inequalities and vulnerabilities of marginalized populations. Yet, at the same time, it also triggers an upsurge of solidarity that could allow alternative discourses to flourish. The time may thus be ripe for the international rationale to be seized as a performative counter-narrative.

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About the author:

Anne-Cecile Leyvraz is a Research Fellow at the University of Applied Sciences and Arts Western Switzerland (Switzerland). Her research addresses Refugee and Migration Law from an international law perspective. She holds a PhD from the Graduate Institute of International and Development Studies Geneva (Switzerland). Her latest publication is a co-edited collective book addressing the performative role of 'the fight against abuses' in the Swiss asylum system. For several years, she has worked as an immigration lawyer in Geneva.