

Expulsions of aliens in international human rights law

OHCHR Discussion paper

Geneva, September 2006.

Citizens of a country have the right to enter and leave that country.¹ While no State may expel its nationals, it is the sovereign prerogative of states to regulate the presence of foreigners on their territory. This power is not unlimited and international human rights law places some restrictions on when and how to exercise this power. The purpose of this discussion paper is to identify those restrictions. With regard to expulsions, three types of protection are available, namely substantive protection against return to face grave violations of human rights, procedural safeguards during deportation procedures, and protection with regard to the methods of expulsions. In addition to the general protection afforded to all foreigners, certain categories of foreigners, such as refugees and migrant workers may be afforded additional protection against expulsions and/or benefit from additional procedural guarantees. As a preliminary remark, one should note that many terms are used by States to refer to “expulsions”: in some cases, these are called “deportations”, “removals”, and so on.

This paper will first review what substantive protection is available to individuals facing expulsion to a country where they may be exposed to grave human rights violations, including torture.² The paper will then identify what procedural guarantees are available to persons who are subject to an expulsion decision. In the light of these procedural safeguards, it will be demonstrated that mass or collective expulsions are clearly prohibited under international law. International human rights law also places restrictions on the methods of expulsion.

1. Protection against expulsion to a country where the person would face grave human rights violations.

1.1 The Refugee Convention.

¹ Article 13 of the Universal Declaration of Human Rights provides that “everyone has the right to leave any country, including his own, and to return to his country”. Article 12(2) of the International Covenant on Civil and Political Rights contains a similar provision, while article 12(4) guarantees that “no one shall be arbitrarily deprived of the right to enter his own country”. In addition, article 3 of the 4th Protocol to the European Convention on Human Rights, article 22(5) of the American Convention on Human Rights, article 12(2) of the African Charter on Human and People’s Rights and article 27 of the 2004 Arab Charter on Human Rights prohibit the expulsion of nationals.

² Some protection is also provided against expulsions which would result in the separation of family members. Since this topic has already been covered in a previous discussion paper, there will only be brief references to the relevant caselaw. See Discussion paper on family reunification.

The Refugee Convention was adopted in 1951 and is the first international instrument to place legal restrictions on State parties' power to expel foreigners. Article 33 lays down the prohibition of "refoulement" according to which no State party "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."³

Since all asylum seekers are presumed to be refugees until proven otherwise, they benefit from the protection afforded by article 33 unless their claim to refugee status is rejected. Such protection against "refoulement" can however not be invoked by refugees who pose a security threat to the country or who have committed a particularly serious crime. This principle of "non-refoulement" has become a cornerstone of international refugee law and it has been argued that it is now part of customary international law.⁴ Of course, the principle as set out in article 33 applies only to refugees and persons who are not recognised to be refugees can be expelled.⁵

A refugee who is lawfully in the territory of a State party benefits from the additional protection available under article 32 which prohibits expulsions save on grounds of national security or public order. Article 32 also contains some procedural safeguards since it provides, for instance, that such an expulsion can take place only in pursuance of a decision reached in accordance with due process of law, and that the refugee has the right to submit evidence to clear himself, to appeal to and be represented before a competent authority. Such procedural safeguards are not available where there are compelling reasons of national security.

1.2 International human rights instruments.

1.2.1 The Convention against Torture.

While article 33 of the 1951 Refugee Convention applies only to refugees, article 3 of the Convention against Torture has expanded the scope of the protection against expulsion since it explicitly prohibits States parties to "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". It must be noted that, in contrast with article 33 of the 1951 Convention, article 3 of the Convention against Torture does not include any public security exception: every person is protected against expulsion to face torture, regardless of what he or she is or may have done in the past. In addition, according to article 3 of the Convention against Torture, the ill-treatment need not be connected to one of the five grounds enumerated in the 1951 refugee definition (i.e. race, religion, nationality, membership of a particular social group or political opinion). On the other hand, since article 1 of the Convention defines torture as committed by or with

³ See also article II(3) of the 1969 OAU Convention governing the specific aspects of refugee problems in Africa.

⁴ See G. Goodwin-Gill, "Non-refoulement and the new asylum seekers" (1986) 26 *Virginia Journal of International Law* 897.

⁵ See Executive Committee of UNHCR, *Conclusion on the return of persons found not to be in need of international protection*, No.96 (LIV) – 2003.

the consent of public authorities, a person must fear ill-treatment by public authorities in order to invoke the protection of article 3.⁶

The Committee made its first finding of a violation of article 3 in 1994.⁷ The overwhelming majority of communications submitted to the Committee concern article 3. As a result, the Committee adopted its one and only General Comment on the implementation of article 3 of the Convention in the context of article 22. Article 3(2) of the Convention provides that “for the purposes 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 General Comment on article 3 elaborates on what considerations are relevant in the examination of the case. The burden of proof is on the author to demonstrate that he or she has substantial grounds for believing that there is a risk of torture upon return. This danger must be personal and present. Aside from the human rights record of the country to which the author is returned, the Committee will also examine whether the author has been tortured or maltreated in the recent past, whether there is medical or other evidence to corroborate this claim, whether the human rights situation has changed since these events, whether the author has continued his or her political or other activities, whether the author is credible and whether there are factual inconsistencies in his or her claims.⁸ The Committee has emphasised that an effective remedy for arguable claims under article 3 must be available prior to expulsion.⁹ Since 1994, it has made many findings of violations of article 3 of the Convention, which has led some State parties to modify their expulsion procedures.

1.2.2 The International Covenant on Civil and Political Rights.

The International Covenant on Civil and Political Rights does not contain any specific provisions prohibiting certain types of expulsions. Before developing its jurisprudence on expulsions, the Human Rights Committee had only cautiously hinted to the fact that “in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry and residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise”.¹⁰

A few years later, article 7 of the ICCPR was for the first time interpreted as including a prohibition of expulsion if there is a risk of torture. Indeed, when commenting on article 7 of the Covenant, the Human Rights Committee stated that “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”¹¹

⁶ See *G.R.B. v. Sweden*, CAT/C/20/D/83/1997, 15 May 1998.

⁷ See *Mutombo v. Switzerland*, CAT/C/12/D/13/1993, 27 April 1994.

⁸ See General Comment no.1 of 21 November 1997, para.8.

⁹ See *Agiza v. Sweden*, CAT/C/34/D/233/2003, 20 May 2005, paras.13.6 to 13.8.

¹⁰ See General Comment 15/27 of 22 July 1986, para.5.

¹¹ See General Comment 20/44 of 3 April 1992, para.9.

Over the years, the Committee has developed its jurisprudence on article 7 and has found violations of that provision in cases where the author would be sent to a country where he or she would face torture, or cruel, inhuman or degrading treatment. Earlier cases involved extradition proceedings to countries where the author of the communication would face the death penalty. In the groundbreaking decision of *Kindler v. Canada*, the Committee famously stated that if a State party removes a person within its jurisdiction, and the necessary and foreseeable consequence is a violation of that persons' rights under the Covenant in another jurisdiction, the State party itself may be in violation of the Covenant.¹² In a more recent case, the Committee decided that a State party which had abolished capital punishment violated article 6 (right to life) when expelling or extraditing a person to another State where he or she would face the death penalty.¹³ The Committee has also decided that a person should not be returned to a country where his illness - which was in whole or in part caused by the State party's violation of his rights - cannot be treated.¹⁴

The jurisprudence of the Committee has been reinforced by General Comment 31/80 of 29 March 2004 on the nature of general legal obligations imposed on State parties to the Covenant. Indeed, the Committee stated that "the article 2 obligation requiring that State parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable damage, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may be subsequently removed". In the same General Comment, the Committee added that "the relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters".¹⁵ One should also note that the Committee has suggested that women should not be sent back to States where they are likely to be subjected to forced female genital mutilation and that such deportations would amount to violations of article 7.¹⁶

The Committee has received many communications concerning children who have received, or whose parents have received, a deportation order, and will be separated from one or both parents if the order is executed. The Committee's general position is that the mere fact that one member of a family is *entitled* to remain in the territory of a State does not necessarily mean that requiring other members of the family to leave involves an interference with family life. However, it also considers that there may be cases in which the refusal to allow one member of the family to remain in the country may involve interference with that person's family life.¹⁷ It has noted that where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one

¹² See CCPR/C/48/D/470/1991, 5 November 1993, para.13.2.

¹³ See *Judge v. Canada*, CCPR/C/78/D/1086/2002, 4 August 2003.

¹⁴ See *C. v. Australia*, CCPR/C/76/D/990/1999, 28 October 2002.

¹⁵ See para.12.

¹⁶ See Concluding Observations on the Netherlands, CCPR/CO/72/NET, 27 August 2001, para.11.

¹⁷ See *Winata v. Australia*, CCPR/C/72/D/930/2000, 21 July 2001, para.7.1.

hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other hand, the degree of hardship the family and its members would encounter as a consequence of such removal.¹⁸

1.2.3 The Convention on the Elimination of Racial Discrimination.

The Convention on the Elimination of Racial Discrimination does not contain any specific provisions on expulsions. Nevertheless, the Committee on the Elimination of Racial Discrimination has adopted a General Recommendation on discrimination against non-citizens in which it has made several pronouncements on expulsions. The Committee recommended that national laws on expulsion should not discriminate in purpose or effect among foreigners on the basis on race, colour or ethnic or national origin, and that foreigners should have equal access to the right to challenge expulsion orders.¹⁹ It reiterated that foreigners should not be returned to a country where they are at risk of serious human rights abuses.²⁰ Finally, it recommended that States parties avoid expulsions of foreigners, especially long-term residents, that would result in disproportionate interference with the right to family life.²¹

1.2.4 The Convention on the Rights of the Child.

While the Convention on the Rights of the Child does not contain any specific provisions on expulsions, the Committee on the Rights of the Child has recently adopted a detailed General Comment on the treatment of unaccompanied and separated children outside their country of origin which addresses the subject. In that General Comment, the Committee stated that States parties should not return a child to a country "where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention".²² It specified that it was irrelevant whether the harm was inflicted by non-State actors. It added that "the assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services."²³

With reference to article 38 of the Convention, in conjunction with articles 3 and 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, the Committee also suggested that "States shall refrain from returning a child in any manner whatsoever to the borders of a State where there is a real risk of underage recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real

¹⁸ See *Madafferi v. Australia*, CCPR/C/81/D/1011/2001, 26 July 2004, para.9.8.

¹⁹ See General Recommendation no.30 of 1 October 2004, para.25.

²⁰ *Ibid*, para.27.

²¹ *Ibid*, para.28.

²² See General Comment no.6, 1 September 2005, para.27. Article 6 protects the right to life and article 37 deals mainly with the prohibition of torture and other cruel, inhuman or degrading treatment and the right to liberty and security of the person.

²³ *Ibid*.

risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties.”²⁴

1.2.5 The draft International Convention for the Protection of All Persons from Enforced Disappearance.

Article 16 of the draft Convention expressly prohibits any State party to “expel, return (“refouler”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance”.²⁵ The provision adds that “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 or of serious violations of international humanitarian law”.²⁶ This follows the practice of the Committee against Torture.

1.3 Other international legal instruments.

The 2000 Protocol to prevent, suppress and punish trafficking of persons, especially women and children, supplementing the Convention against transnational organized crime, contains very few provisions dealing with the protection of victims of trafficking. Article 7 of the Protocol merely provides that State parties “shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in [their] territory, temporarily or permanently, in appropriate cases”. In doing so, State parties shall “give appropriate consideration to humanitarian and compassionate factors”. Article 8 of the Protocol deals mainly with inter-State cooperation to facilitate the repatriation of victims of trafficking. Again, it merely provides that “such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary”.

Mention should be made here of the OHCHR Recommended Principles and Guidelines on human rights and human trafficking. Guideline 6 provides that State should “ensur[e] the safe and, where possible, voluntary return of trafficked persons and explor[e] the option of residency in the country of destination or third-country resettlement in specific circumstances (e.g. to prevent reprisals or in cases where re-trafficking is considered likely).”²⁷

1.4 Regional human rights instruments.

²⁴ See General Comment no.6, 1 September 2005, para.28.

²⁵ See E/CN.4/2005/WG.22/WP.1/REV.4, 23 September 2005.

²⁶ See also article 8 of the 1992 Declaration on the Protection of All Persons from Enforced Disappearance and principle 5 of the 1989 Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.

²⁷ See E/2002/68/Add.1, 20 May 2002. See also Guideline 8 on special measures for the protection and support of child victims of trafficking.

1.4.1 The European Convention on Human Rights and Fundamental Freedoms.

The European Convention on Human Rights does not contain any specific provisions prohibiting certain types of expulsions. However, the European Court of Human Rights has developed an interesting jurisprudence on expulsions. In its landmark decision in *Soering v. United Kingdom*, the Court found that the extradition of the author to the United States breached article 3 of the Convention because his detention on death row would constitute cruel, inhuman or degrading treatment.²⁸ Since that decision, the Court has extended this jurisprudence to cases of deportation.²⁹ Since article 3 does not contain any exception, no individual, “however undesirable or dangerous”, can be returned to a country where he would face torture.³⁰ In contrast with article 3 of the Convention against Torture, article 3 of the European Convention applies also to deportation cases in which the risk of ill-treatment emanates from non-state agents *and* if state authorities are unwilling or unable to provide protection.³¹

Whereas the UN Convention against Torture contains a clear definition of torture, there remains uncertainty as to what constitutes inhuman and degrading treatment for the purposes of article 3 of the European Convention on Human Rights. The Court has given some guidance as to the type of treatment which may fall within the definition of ill-treatment prohibited by the Convention: it has stated that “ill-treatment” must attain “a minimum level of severity and involve actual bodily injury or intense physical or mental suffering” and that “the suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible”.³² In one case, it decided that a person who was terminally ill should not be returned to a country where he have no access to medical treatment and would die in cruel, inhuman or degrading conditions.³³

Other articles of the Convention should be considered when examining the legality of expulsions. The Court has found some expulsion orders to be in breach of article 8 which protects the right to private and family life. In earlier cases, article 8 was successfully invoked only where the removal decision would impact on the enjoyment of family life of those already established within the territory of a State party to the Convention. Indeed, the Court focuses on whether the refusal to permit entry or the expulsion of the spouse/child/parent of a settled person amounts to an ‘interference’ with that person’s right to respect for family life.³⁴ For such an interference to exist, the applicant has to demonstrate that he cannot follow his spouse and establish his family life elsewhere.³⁵

²⁸ See (1989) 11 E.H.R.R. 439.

²⁹ See *Vilvarajah v. United Kingdom* (1991) 14 E.H.R.R. 248.

³⁰ See *Chahal v. United Kingdom* (1996) 23 E.H.R.R. 413, para.80.

³¹ See *H.L.R. v. France* (1998) 27 E.H.R.R. 29.

³² See *Pretty v. United Kingdom* (2002) 35 E.H.R.R. 1, para.52.

³³ See *D v. United Kingdom* (1997) 24 E.H.R.R. 425.

³⁴ See *Abdulaziz, Cabales and Balkandi v. United Kingdom* (1985) 7 E.H.R.R. 471.

³⁵ For more detail, see N. Rogers, “Immigration and the European Convention on Human Rights: are new principles emerging?” (2003) *European Human Rights Law Review* 1:53.

More recently, the Court has shifted its attention to the right to private life of the person to be expelled. In *Bensaid v. United Kingdom*, it declared that a decision to remove a person to a situation in which he would face treatment which does not reach the severity of article 3 “may nonetheless breach article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity.”³⁶ It is worth noting that article 8 was broadly interpreted to include elements such as gender identification, name, sexual orientation, sexual life, mental health and so on.³⁷ While the Court is now clearly open to the suggestion that some expulsion orders may breach article 8 in this manner, it has so far not found any actual violation of article 8 on the sole ground that the person will face a severe interference with his or her private life.

Finally, the Court has made several statements of principle on the applicability of article 2 (right to life),³⁸ and article 6 (right to fair trial) to cases of deportation/extradition,³⁹ without making an actual finding of a violation of these provisions.

1.4.2 The American Convention on Human Rights.

Article 22(8) of the American Convention on Human Rights provides that no alien shall “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.”⁴⁰ This provision is modelled on article 33 of the Refugee Convention since any person invoking it must demonstrate a nexus between the possible ill-treatment and at least one of the five enumerated grounds. The scope of the protection afforded by article 22(8) is therefore more restricted than that afforded by the UN Convention against Torture or the European Convention on Human Rights. It must also be noted that, under article 27, State parties can derogate from article 22 “in times of war or other public emergencies that threaten the independence and security of the State party”.

Under article 63(2) of the Convention, the Inter-American Court of Human Rights has the power to adopt provisional measures “in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons”. It has adopted such measures in the case of threatened collective expulsions of Haitians and Dominicans of Haitian origin (based on racial or national origin) by the Dominican Republic.⁴¹

³⁶ See (2001) 33 E.H.R.R. 10, para.46.

³⁷ *Ibid*, para.47.

³⁸ See for instance *D. v. United Kingdom* (1997) 24 E.H.R.R. 423, para.59.

³⁹ See *Soering v. United Kingdom*, para.113. See also the admissibility decision in *M.A.R. v. United Kingdom* (1997) 23 E.H.R.R. CD120 Eur Comm HR. This case was subsequently settled. See also *Mamatkulov and Abdurasulovic v. Turkey* (2003) 14 B.H.R.C. 149

⁴⁰ Article 13 of the 1985 Inter-American Convention to prevent and punish torture prohibits the extradition of any person to a country where his life is in danger, where he will be subjected to torture or to cruel, inhuman or degrading treatment, or where he will be tried by special or ad hoc courts. However, this provision does not appear to apply to expulsions.

⁴¹ See Orders of the Court of 18 August 2000, 12 November 2000, and 26 May 2001, Inter-Am. Ct. H.R. (Ser. E) (2000 and 2001).

1.4.3 The African Charter of Human and Peoples' Rights.

The African Charter of Human and Peoples' Rights does not contain any express prohibition of expulsion in cases of risk of torture. Nevertheless, article 5 of the Charter prohibits torture, cruel, inhuman or degrading treatment and the African Commission on Human and Peoples' Rights has interpreted this provision as including a prohibition of returning a person to a country where he or she would face torture, cruel, inhuman or degrading treatment.⁴²

1.5 Other regional legal instruments.

Article 19 of the European Social Charter provides that migrant workers lawfully residing within the territories of the State parties shall not be expelled unless they endanger national security or offend against public interest or morality.

The European Union has adopted a Directive defining who should qualify for refugee status and other forms of protection.⁴³ The text provides that any person who would face "a real risk of suffering serious harm" upon return should not be expelled and should benefit from "subsidiary protection". The notion of "serious harm", as defined in article 15 of the Directive, encompasses

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict

Reference should also be made to article 21(1) of the Directive which reiterates the principle of *non-refoulement*.

The European Union has also adopted several instruments which limits the discretion of Member States to expel nationals of other Member States and members of their families. These instruments have now been consolidated into one directive on the rights of EU citizens and members of their families to move and reside freely in the European Union.⁴⁴

2. Procedural guarantees.

⁴² See *Modise v. Botswana*, communication no.97/93 (1997 and 2000).

⁴³ See *Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and for the content of the protection to be granted*, OJ 2004 L 304/12.

⁴⁴ See *Directive 2004/38/EC of 29 April 2004 on the right of citizens and their family members to move and reside freely within the territory of the Member States*, OJ 2004 L 158/77.

Procedural guarantees do not protect from expulsion as such, but they help to ensure that substantive protection against expulsion is provided and that no arbitrary expulsion decisions are taken. It must first be noted that the provisions on the right to fair trial do not seem to be applicable to expulsions procedures.⁴⁵ As for the Human Rights Committee, it has not applied article 14 of the International Covenant on Civil and Political Rights to expulsion proceedings,⁴⁶ although it does not seem to have excluded this possibility entirely.⁴⁷ The apparent refusal to apply general provisions on fair trial to expulsion proceedings may be explained by the fact that there are some specific provisions in international and regional human rights instruments dealing with the procedural standards to be applied in the case of expulsions.

In many cases, concerns have been expressed by the Special Rapporteur on the Human Rights of Migrants regarding the procedures leading to expulsions and the methods of expulsion.⁴⁸ The Special Rapporteur has also examined expulsions procedures during several of the country visits. In the case of Morocco, the former Special Rapporteur recommends the establishment of measures to protect minors and pregnant women, whose status prevents them from being expelled even though they are technically liable for expulsion. She also recommended that training courses be offered to those responsible for expulsions, to enable them to carry out their duties while respecting the rights and dignity of migrants.⁴⁹

2.1 International human rights instruments.

2.1.1. The International Covenant on Civil and Political Rights.

Article 13 of the Covenant provides that

An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against this expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.⁵⁰

⁴⁵ It has been the consistent jurisprudence of the European Court of Human Rights that “decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him, within the meaning of article 6(1) of the Convention”. See *Maaouia v. France*, application no.39652/98, 5 October 2000, para.40.

⁴⁶ See for instance *Ahani v. Canada*, CCPR/C/80/D/1051/2002, 15 June 2004, para.10.9.

⁴⁷ See *V.R.M.B. v. Canada*, CCPR/C/33/D/236/1987, 18 July 1988, para.6.3.

⁴⁸ See Report of the Special Rapporteur on the human rights of migrants, Mr. Jorge Bustamante, E/CN.4/2006/73, 30 December 2005, para.44.

⁴⁹ See the report on the country visit to Morocco (E/CN.4/2004/76/Add.3, 15 January 2004). See also the reports on the country visits to Italy (E/CN.4/2005/85/Add.3, 15 November 2004) and Spain (E/CN.4/2004/76/Add.2, 14 January 2004).

⁵⁰ The General Assembly has adopted a Declaration on the human rights of individuals who are not nationals of the country in which they live. This Declaration contains a provision which is very similar to article 13 of the Covenant. See GA Res. 40/144 of 13 December 1985. Article 7 provides that “An alien lawfully in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be

Although the Human Rights Committee has recalled that “article 13 directly regulates only the procedure and not the substantive grounds for expulsion”, the distinction between the two types of protection is not always clear and the purpose of article 13 is obviously to prevent arbitrary expulsions.⁵¹ It is also worth noting that article 13 applies only to aliens who are “lawfully in the territory”. As a result, the Committee has emphasised that “illegal entrants and aliens who have stayed longer than the law or their permits allow” cannot invoke the protection of article 13.⁵² The provision also contains an exception: the protection afforded by article 13 is not available where there are “compelling reasons of national security”.⁵³ The Committee has interpreted the phrase “in accordance with law” as being in accordance with the domestic law of the State party concerned.⁵⁴ In its jurisprudence under the Optional Protocol, it has not found violations of article 13, unless there were clear procedural defects.⁵⁵

In order to benefit from the procedural safeguards set out in article 13, the person subjected to an expulsion order should have access to legal representation in order to submit the reasons against his or her expulsion.⁵⁶ While he or she has the right to have these reasons examined when the expulsion decision is made, it is not clear whether article 13 implies a right of review of this initial decision.⁵⁷ However, when commenting on State reports, it has recommended that emergency remedies filed by asylum-seekers against expulsion orders be given suspensive effect.⁵⁸

It is also worth noting that the Committee has stated that women should be given on an equal basis with men the right to submit reasons against their expulsion, and to have their case reviewed as provided in article 13. In particular, they should be able to

allowed to submit the reasons why he or she should not be expelled and to have the case reviewed by, and be represented for the purpose before, the competent authority or a person or persons specially designated by the competent authority. Individual or collective expulsion of such aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited.”

⁵¹ See General Comment 15/27 of 22 July 1986, para.10.

⁵² *Ibid.*, para.9.

⁵³ See *V.R.M.B. v. Canada*, CCPR/C/33/D/236/1987, 18 July 1988, para.6.3 ; and *Karker v. France*, CCPR/C/70/D/833/1998, 26 October 2000, para.9.3.

⁵⁴ See *Maroufidou v Sweden*, CCPR/C/12/D/58/1979, 9 April 1981, para.9.3.

⁵⁵ See *Hammel v. Madagascar*, CCPR/C/29/D/155/1983, 3 April 1987; *Giry v. Dominican Republic*, CCPR/C/39/D/193/1985, 20 July 1990; and *Cañon Garcia v. Ecuador*, CCPR/C/43/D/319/1988, 12 November 1991. In *Ahani v. Canada*, it noted that the author of the communication was not allowed “to submit reasons against his removal in the light of the administrative authorities’ case against him and to have such complete submissions reviewed by a competent authority, entailing a possibility to comment on the material presented to that authority”. Since the author claimed that he could face torture upon return, the Committee found a violation of article 13, in conjunction of article 7. See CCPR/C/80/D/1051/2002, 15 June 2004, para.10.8.

⁵⁶ The Committee has recommended that “the State party should provide information as to the stages of the application procedures at which legal assistance may be had, and whether the assistance is free of charge at all stages for those who cannot afford it”. See Concluding Observations on Denmark, CCPR/CO/70/DNK, 31 October 2001, para.17.

⁵⁷ In *Maroufidou v. Sweden*, the author appealed against the initial expulsion decision, but only after she was deported. In that case, the Committee found no violation of article 13. See CCPR/C/12/D/58/1979, 9 April 1981, para.11.

⁵⁸ See for instance Concluding Observations on Belgium, CCPR/CO/81/BEL, 12 August 2004, para.23.

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submit reasons based on gender specific human rights violations such as dowry killings, rape, forced abortion or forced sterilisation.⁵⁹

At this point, mention should also be made of article 12(4) which provides that “no one shall be arbitrarily deprived of the right to enter his own country”. The Committee has pointed out that the provision is not restricted to nationals and that it could also apply to long-term residents who can consider the country of residence as their “own country”.⁶⁰ It would follow that such persons shall not be expelled arbitrarily from that country. However, the Committee has been cautious in interpreting article 12(4) as covering long-term residents. For instance, in *Stewart v. Canada*, the author had been convicted of numerous felonies, had lived in the country for over thirty years, was brought up there from the age of 7, had married and divorced there, but he still had British citizenship and family in Scotland. The Committee decided that Canada could not be regarded as his “own country” for the purposes of article 12(4).⁶¹

2.1.2. The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Whereas article 13 of the International Covenant on Civil and Political Rights applies only to aliens who are lawfully in the territory of a State party to the Covenant, article 22 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families applies to *all* migrant workers and members of their families, regardless of their immigration status. The procedural guarantees contained in article 22 are much more extensive than those contained in article 13 of the Covenant, and it is worth reproducing the entire provision here

1. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.
2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.
3. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.
4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent

⁵⁹ See General Comment 28/68 of 27 March 2000, para.17.

⁶⁰ See General Comment 27/67 of 12 November 1999, para.20.

⁶¹ See CCPR/C/58/D/538/1993, 1 November 1996, para.12.9. See also *Canepa v. Canada*, CCPR/C/59/D/558/1993, 3 April 1997.

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authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.

5. If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.

6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.

7. Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.

8. In case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs.

9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.

Mention should also be made of article 23 which deals with consular or diplomatic protection. It provides that, in the case of expulsion, the person concerned shall be informed without delay of his or her right to have recourse to the protection and assistance of the consular or diplomatic authorities of the State of origin, and that the authorities of the expelling State shall facilitate the exercise of such right. Like article 22, article 23 applies to all migrant workers and members of their families regardless of their legal status.

In contrast, article 56 applies only to migrant workers and members of their families who are documented or in a regular situation. It provides that they may not be expelled from a State of employment, except for reasons defined in the national legislation of that State and subject to the safeguards listed above. It also prohibits expulsions which are resorted to for the purpose of depriving a migrant worker or a member of his or her family of the rights arising out of the authorisation of residence and the work permit. Finally, article 56 provides that in reaching an expulsion decision, consideration should be given to the humanitarian considerations and the length of time that the person concerned has already resided in the State of employment.

2.2 Regional human rights instruments.

2.2.1 The European Convention on Human Rights.

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Article 1 of Protocol no.7 to the European Convention on Human Rights lays down some procedural safeguards relating to the expulsion of aliens: an alien lawfully resident can be expelled from the territory of a State party only in pursuance of a decision reached in accordance with law and has the right to submit reasons against his expulsion, to have his case reviewed and to be legally represented. Such procedural safeguards can be restricted when the expulsion is necessary in the interests of public order or is grounded on reasons of national security. The provision is modelled on article 13 of the International Covenant on Civil and Political Rights.

When Article 1 of Protocol no.7 is not applicable to the case under consideration, the European Court of Human Rights has applied article 13 (right to an effective remedy) in conjunction with another article of the Convention. For instance, it has stated that “where there is an arguable claim that such an expulsion may infringe the foreigner’s right to respect for family life, article 13 in conjunction with article 8 of the Convention requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality”.⁶²

2.2.2 The American Convention on Human Rights.

Article 22(6) of the Convention contains a guarantee that an alien lawfully in the territory of a State party may be expelled only pursuant to a decision reached in accordance with law.

2.2.3 The African Charter on Human and Peoples’ Rights.

Article 12(4) of the Charter provides that “a non-national legally admitted in a territory of a State party to the [...] Charter, may only be expelled from it by virtue of a decision taken in accordance with the law”. The African Commission on Human and Peoples’ Rights has found violations of this provision in cases where people were expelled from a State party without being able to challenge the expulsion decision before a competent court.⁶³ It is worth noting that the Commission considers article 12(4) to be applicable to some irregular migrants, since some of them may have been legally admitted in the first place. In order to justify this decision, it has stated that

The Commission does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide. It is however, of the view that it is unacceptable to deport individuals without giving them the possibility to plead their case before the

⁶² See *Al-Nashif v. Bulgaria*, application no.50963/99, 20 June 1992, para.133.

⁶³ See *Organisation Mondiale Contre la Torture v. Rwanda*, communications no.27/89, 46/90, 49/91, 99/93 (1996) ; and *Union Inter-Africaine des Droits de l’Homme and others v. Angola*, communication no.159/96 (1997).

competent national courts as this is contrary to the spirit and letter of the Charter and international law.⁶⁴

2.2.4 The 2004 Arab Charter on Human Rights.⁶⁵

Article 26(2) of the Charter also provides that an alien lawfully in the territory of a State party may be expelled only pursuant to a decision reached in accordance with law. In addition, the alien must be allowed to submit a petition to the competent authority, unless compelling reasons of national security preclude it.

3. Protection against collective expulsions.

A general prohibition on collective expulsions follows from the procedural safeguards against arbitrary expulsions: if each alien is entitled to an individual decision on his or her expulsion, mass or collective expulsions should be prohibited. Moreover, mass expulsions would prevent the proper identification of people entitled to special protection such as asylum seekers, people who might be subject to torture if expelled, victims of trafficking, and so on.

Several cases of collective expulsions have been brought to the attention of the Special Rapporteur on the Human Rights of Migrants over the years. On 7 December 2004, the Special Rapporteur sent an urgent appeal regarding information received alleging a risk of imminent deportation from Malaysia of hundreds of thousands of migrants in an irregular situation such as migrant workers, asylum seekers and victims of trafficking.⁶⁶ In June 2005, the Special Rapporteur received information on the forcible return by Italy of some 180 persons to Libya and the possible return of over 1,000 other persons.⁶⁷ In October 2005, he issued an urgent appeal regarding the collective deportation by Morocco of migrants and asylum seekers, many left in the desert without food or water.⁶⁸

3.1 International human rights instruments.

The Covenant does not explicitly prohibit collective expulsions of aliens. However, the Human Rights Committee has stated that the right of each foreigner to a decision in his or her own case and to submit reasons against expulsions would make mass or collective expulsions incompatible with article 13.⁶⁹ It has made several comments condemning mass expulsions as being incompatible with the provisions of the Covenant. For instance, it has held “mass expulsions of non-nationals to be in breach of the

⁶⁴ See *Union Inter-Africaine des Droits de l'Homme and others v. Angola*, communication no.159/96 (1997), para.20.

⁶⁵ This instrument will enter into force after seven ratifications.

⁶⁶ See the Special Rapporteur's report to the Commission on Human Rights on Communications, E/CN.4/2005/85/Add.1, 4 February 2005, paras.128-131.

⁶⁷ See the Special Rapporteur's report to the Commission on Human Rights on Communications, E/CN.4/2006/73/Add.1, 27 March 2006, paras.118-129.

⁶⁸ *Ibid.*, paras.208-220.

⁶⁹ See General Comment 15/27 of 22 July 1986, para.10.

Covenant since no account is taken of the situation of individuals for whom the Dominican Republic is their own country in the light of article 12, paragraph 4, nor of cases where expulsion may be contrary to article 7, given the risk of subsequent cruel, inhuman or degrading treatment, nor yet of cases where the legality of an individual's presence in the country is in dispute and must be settled in proceedings that satisfy the requirements of article 13.”⁷⁰ This would suggest that protection against mass expulsions is not limited to those lawfully residing in the country.

As mentioned above, article 22(1) of the Convention on the rights of migrant workers expressly prohibits collective expulsions of migrant workers and members of their families.

In the General Recommendation mentioned above, the Committee on the Elimination of Racial Discrimination has recommended that foreigners not be subject to collective expulsions, in particular where there insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account.⁷¹

3.2 Regional human rights instruments.

Collective or mass expulsions of aliens are unequivocally prohibited under article 4 of Protocol no.4 to the European Convention on Human Rights, article 22(9) of the American Convention on Human Rights, article 12(5) of the African Charter on Human and Peoples' Rights and article 26(1) of the 2004 Arab Charter on Human Rights. Article 12(5) of the African Charter on Human and Peoples' Rights defines mass expulsions as being aimed at national, racial, ethnic or religious groups.

The European Court of Human Rights has defined collective expulsions as “any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group”.⁷²

The African Commission on Human and Peoples' Rights has also found violations of article 12(5) of the Charter in cases where large groups of migrants were expelled from the territory of a State party and were not given the opportunity to challenge the decision on their deportation. The Commission has insisted that although the migrants concerned may be in the country illegally, the State party's right to expel foreigners does not justify the manner employed to expel them.⁷³

⁷⁰ See Concluding Observations on the Dominican Republic, CCPR/CO/71/DOM, 26 April 2001, para.16.

⁷¹ General Recommendation no.30 of 1 October 2004, para.26.

⁷² See *Andric v. Sweden*, application no.45917/99, 23 February 1999, para.1. In *Conka v. Belgium*, the Court found a violation of article 4 of Protocol no.4 because the expulsion procedure did not provide “sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account”. See application no.51564/99, 5 February 2002, para.63.

⁷³ See *Rencontre Africaine pour la Défense des Droits de l'Homme c. Zambia*, communication no. 71/92 (1996); and *Union Inter-Africaine des Droits de l'Homme and others v. Angola*, communication no.159/96 (1997).

4. Conditions of expulsion.

There are no provisions in international and regional human rights instruments which explicitly deal with methods of expulsion. However, general provisions apply. When executing an expulsion order, States are still bound by their obligations to respect the right to life physical integrity, and should not subject any person, including any foreigner being expelled from the country, to cruel, inhuman or degrading treatment. For instance, when examining the State report of Belgium, the Human Rights Committee noted that

Procedures used in the repatriation of some asylum seekers, in particular the placing of a cushion on the face of an individual in order to overcome resistance, entails a risk to life. The recent case of a Nigerian national who died in such a manner illustrates the need to re-examine the whole procedure of forcible deportations.⁷⁴

More recently, with references to articles 6 and 7, the Committee has expressed again its concern over allegations of excessive force being used when aliens are deported.⁷⁵

There has been very little case law concerning methods of expulsion which may breach the prohibition of torture, cruel, inhuman and degrading treatment.⁷⁶ In most cases, individuals being subject to an expulsion decision have sought to challenge that decision on the ground that their state of health may be aggravated by the deportation itself: the Committee against Torture has stated on several occasions that such aggravation does not amount to the type of cruel, inhuman or degrading treatment envisaged by article 16 of the Convention.⁷⁷

Expulsion procedures may entail arrest and administrative detention prior to expulsion. Administrative detention is not covered in the present paper since a previous discussion paper has already analysed the relevant legal framework.⁷⁸ It is worth mentioning here that the European Court of Human Rights has found a violation of article 5(1) of the Convention (right to liberty and security of the person) in a case in which the authorities lured the asylum seekers to a police station with a view to arresting and subsequently deporting them. It noted that “a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with article 5”.⁷⁹

⁷⁴ See Concluding Observations on Belgium, CCPR/C/79/Add.99, 19 November 1998, para.15.

⁷⁵ See Concluding Observations on Belgium, CCPR/CO/81/BEL, 12 August 2004, para.14.

⁷⁶ On the applicability of article 3 of the European Convention on Human Rights to methods of expulsion, see Medical Foundation for the Care of Victims of Torture, *Harm on removal: excessive force against failed asylum seekers* (2004), pp.18-32, available at <http://www.torturecare.org.uk/UserFiles/File/publications/Harm%20on%20Removal%20-%20final2.pdf>.

⁷⁷ See *G.R.B. v Sweden*, CAT/C/20/D/83/1997, 15 May 1998, para.6.7; *B.S.S. v Canada*, CAT/C/32/D/183/2001, 12 May 2004, para.10.2; and *S.S.S. v Canada*, CAT/C/35/D/245/2004, 16 November 2005, para.7.3.

⁷⁸ See Discussion paper on administrative detention.

⁷⁹ See *Conka v. Belgium*, application no.51564/99, 5 February 2002, para.42.

Regarding methods of expulsions, the former Special Rapporteur on the human rights of migrants stated that “the expulsion, deportation or repatriation of undocumented migrants should be carried out with respect and dignity”.⁸⁰ She received several cases involving the use of excessive force during forced deportations. In August 2003, she and the Special Rapporteur against Torture examined a case involving a forced deportation and ill-treatment at Zurich airport.⁸¹ In June 2003, both Special Rapporteurs were alerted to a case of ill-treatment during an attempted forced deportation in France.⁸² The Special Rapporteur on the human rights of migrants also received reports of two deaths during forced deportations from France.⁸³

5. Recently adopted principles on expulsions.

Some intergovernmental organizations have adopted non-legally binding declarations on expulsions.⁸⁴ These reflect largely the provisions analysed above. In addition, these declarations also try to recommend examples of good State practice with regard to expulsions.

In May 2005, the Committee of Ministers of the Council of Europe adopted “Twenty guidelines on forced return”.⁸⁵ These guidelines aim at providing guidance to national governments on this issue and are applicable to all persons subject to expulsion measures, regardless of their administrative status.⁸⁶ The guidelines are quite detailed and deal with voluntary return, the removal order, detention pending removal, readmission and forced removals. In terms of substantive protection against expulsions, the guidelines recommend that no removal order should be issued in the following situations:

- a. a real risk of being executed, or exposed to torture or inhuman or degrading treatment or punishment;
- b. a real risk of being killed or subjected to inhuman or degrading treatment

⁸⁰ See Report of the Special Rapporteur on the human rights of migrants, Ms. Gabriela Rodríguez Pizarro, E/CN.4/2005/85, 27 December 2004, para.75.

⁸¹ See the Special Rapporteur’s report to the Commission on Human Rights on Communications, E/CN.4/2004/76/Add.1, 16 February 2004, paras.221-228.

⁸² *Ibid.*, paras.70-71.

⁸³ *Ibid.*, paras.64-65 and 72-77.

⁸⁴ One should also note that a coalition of non-governmental organisations adopted “Common principles on removal of irregular migrants and rejected asylum seekers” in August 2005. There are nine principles which worth recalling in full: voluntary return should always be the priority, vulnerable persons should be protected against removal, persons subject to a removal order should have access to effective remedies, detention pending removal should be the last resort, family unity should be respected, independent monitoring and control bodies should be created, use of force should comply with Council of Europe recommendations, re-entry ban should be prohibited and a legal status should be granted to persons who cannot be removed. See <http://hrw.org/english/docs/2005/09/01/eu11676.htm>.

⁸⁵ See also the Council of Europe Recommendation 1547 (2002) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity.

⁸⁶ See Council of Europe, Twenty Guidelines on Forced Return, September 2005, available at : http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Foreigners_and_citizens/Asylum%2C_refugees_and_stateless_persons/Texts_and_documents/Comments%20on%20twenty%20guidelines%20forced%20return%202005.pdf.

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by non-state actors, if the authorities of the state of return, parties or organisations controlling the state or a substantial part of the territory of the state, including international organisations, are unable or unwilling to provide appropriate and effective protection; or

c. other situations which would, under international law or national legislation, justify the granting of international protection.⁸⁷

In December 2004, the Berne Initiative has made, *inter alia*, recommendations on “mandatory return”. It was suggested that mandatory return policies should be transparent, humane and fair, that mandatory return is conducted in safety and dignity, that forced return to conditions of danger should be avoided, that mandatory return should be in conformity with international law standards, and that mandatory return should be implemented with the full knowledge and agreement of the country of origin.⁸⁸

6. Conclusion.

A legal framework regulating States’ powers to expel foreigners from their territories has gradually emerged. Indeed, several general provisions have been interpreted in such a way as to provide some protection to persons who are subject to expulsion orders. These jurisprudential developments are relatively recent since they date back to the early 1990s.

It is now well-established that no one should be returned to a country where there is a real risk of torture, or cruel, inhuman or degrading treatment, and this prohibition has been held to be absolute. In addition, some expulsions should not be enforced where they would result in a violation of the right to private and family life of the person concerned. The scope of the procedural safeguards suggests that collective expulsions are unlawful under international and regional human rights law. In contrast, methods of expulsion are not specifically mentioned in any of these instruments, but there is no doubt that the general provisions on cruel, inhuman or degrading treatment apply in this respect and that no one should be expelled in a manner that would put his life or physical integrity at risk.

⁸⁷ See Guideline 2.

⁸⁸ See The Berne Initiative, *International Agenda for Migration Management: common understandings and effective practices for a planned, balanced, and comprehensive approach to the management of migration*, Berne, 16-17 December 2004, pp.55-56.