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MASS EXPULSION:  
THE LEGAL ASPECTS

by

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## 1. Introduction

Recent examples of the phenomenon of mass expulsion have exposed again the liability of individuals, groups and communities to removal from their country of residence or nationality. The potential for further excesses appears practically unlimited; national minorities, ethnic groups, the politically undesirable, migrant workers, refugees and displaced persons, may all one day face the consequences of the arbitrary and capricious exercise of sovereign powers. Given the inherently political and politicised discourse surrounding incidents of mass expulsion, a major problem remains to accommodate, and achieve some sort of consensus among, the various perceptions. Mass expulsion involves not only individual human beings and expelling and receiving states; it also involves international and regional community interests. Mass expulsion is thus a destabilising factor, and in itself a major threat to the development and maintenance of desirable standards of interstate conduct. At the same time, it invites serious consideration not only of fundamental principles of human rights (in their individual aspect), but also of related concerns of states, including issues of self-determination, development, economic rights and sovereignty over natural resources. The ultimate aim is to reach a series of guidelines or standards of conduct commensurate with that degree of protection of human dignity which is required by the international community.

It is trite knowledge that mass expulsions are commonly linked to massive movements of refugees and displaced persons, and to large-scale migration for employment purposes. The modalities of the latter have so far been insufficiently analysed, but it is clear that even so-called irregular migration is often tolerated by receiving states for political and economic purposes; such knowledge and omission to effect control have a direct bearing upon the issue of state responsibility. Likewise, the fact of presence upon state territory of particular ethnic or other minorities, whether indigenous

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or deriving from earlier, historical patterns of migration, raises unavoidable obligations for the authority claiming to exercise sovereign control and jurisdiction.

Knowledge of the root causes for mass movements of people (for example, drought, famine, underdevelopment) may in some cases open up opportunities for avoidance or effective management through judicious use of international aid resources. In other cases (for example, aggression and foreign occupation, or civil strife), similar opportunities for removal of those causes may be available to the diplomatically astute. But recent experience has revealed the absence and inadequacy of such preventive measures, and the non-existence generally of appropriate international or regional mechanisms, even among contemporary institutions. Moreover, one lesson to be learnt from mass expulsions over the last decade is that a knowledge of causes offers little comfort in the task of determining how such incidents may be avoided in the future. Relevant reasons have included territorial claims as a prelude to conflict and war (Iraq/Iran in 1969 and 1979); alleged threats to the economy, and/or from alien criminal elements (Ghana/Togo and Nigeria in 1969, Zanzibar in 1971, Kenya/Tanzania in 1974, Nigeria/Ghana and others in 1983). Nationals also have been subject to mass expulsion, for example, in reaction to localised movements for greater autonomy or independence (Iraq/Turkey and Iran in 1974), or on racial and economic grounds (Uganda in 1972; Vietnam in 1978 and afterwards). Such refugee movements have scarcely spared any region of the world, while they have revealed nevertheless a clear breakdown in the norms which ought to govern the day-to-day relationship between citizen and state. The personal suffering which has followed, at the individual and family level, has been documented only too frequently.

## 2. The power of expulsion

It is an undisputed rule of international law that states have the right or power or privilege to expel foreign nationals. What is more often neglected is that the power in question is limited, firstly, by rules

emanating from the legal relationships existing between states; and secondly, from particular considerations relating to human rights and pertaining to individuals and groups. The net result is that international law imposes significant limitations upon the discretion of states to exercise their power of expulsion; it confines the class of those liable to be affected; it prescribes the justification for such measures and it regulates their implementation.

At a fairly high level of generality, therefore, states are bound by general principles of international law, including the principle of good faith; the duty not to intervene in matters within the domestic jurisdiction of any state; and the duty of states to co-operate with one another in accordance with the United Nations Charter. More specifically, while international law makes available the power of expulsion as a measure of defence or protection, the local competence nevertheless remains subject to satisfaction of the requirements of opposability. At an individual level this means that the state of nationality may take up the claim of its citizens expelled for other reasons, for example, in order to effect expropriation. At a broader level it is also clear, for example, that the hardships caused by the collective expulsion of members of an ethnic group raises humanitarian issues germane to the purposes of the U.N. Charter. Any presumption which may be claimed or enjoyed by an expelling state (and due perhaps in right of sovereignty) stands to be up-ended by evidence of irrelevant motives, unlawful discrimination or resulting harm.

General international law also requires that the expulsion of foreign nationals be justified. In so doing it concedes to the expelling state a margin of appreciation in the determination of the existence and seriousness of the necessary reasons of ordre public, public safety or morality, or national security. But it also elucidates a clear distinction between the right of the state to expel, and the rightful exercise of that power; so much so, indeed, that the power is better described as a conditional privilege,

than as something inherent and absolute. In the context of their legal relationships with protecting states (and protecting organisations where particular treaty regimes prevail) expelling states are formally obliged to balance their own interests against those of the individuals liable to be affected, taking account of their acquired rights and legitimate expectations and aiming to achieve a reasonable relationship of proportionality between the end (protection of recognised interests) and the means (potential severance of the individual from home and livelihood). While the facts in particular cases will vary, the absence of reasonable cause or the refusal of the expelling state to give reasons for its action may reveal its capricious and unlawful nature.

Similarly, general international law and the provisions of treaties now widely ratified, impose limitations on the manner and form in which measures of expulsion may be carried out. The first requirement and defence against arbitrary action is that the decision to expel be in accordance with local law. Increasing recognition of both substantive and procedural due process argues also that some provision be made for a hearing or appeal, or for judicial review. The local law and practice, including the personal treatment in fact accorded to the foreign national, will be judged in the light of the standards of international law.

### 3. Those liable to be expelled

There is no self-evident limit to the categories of foreign nationals liable to be expelled from their country of residence (the situation of nationals is examined in section 4 below). The process of categorization may nevertheless bear upon the precise legal consequences, including the possibilities for protection, claims and remedies.

First, there are the workers. Many recent examples of mass expulsion have been expressly directed against foreigners who have entered state territory for the purposes of employment. More frequently than not, most are in an irregular situation, their presence and economic activity tolerated for a

variety of reasons, particularly in times of growth. When stagnation, recession or crisis arrive, the foreign worker must often suffer the further disadvantage of expulsion. The conventions which protect migrants in such circumstances have secured relatively few ratifications, while their benefits often are limited to those lawfully in the country. Foreign nationals expelled from Nigeria in 1983, for example, were outside the scope of the free travel agreement of the Economic Community of West African States, which was limited to visa-free travel for periods up to three months. Moreover, it is worth noting that at a seminar organised by the Intergovernmental Committee for Migration in April of that year, no agreement was reached on even the fundamental human rights which undocumented or irregular migrants should enjoy. Many participants stressed, too, that acceptance of basic rights should not imply a de facto recognition of the legality of status.

Notwithstanding these divergences of opinion, fundamental human rights as formulated in general international law are due to all, regardless of national or other status. Over and above that, a state's obligations may be rendered more specific, for example, where workers have been admitted in accordance with treaty; or in the light of particular circumstances pertaining to the individual, such as long residence, acquisition and strengthening of links with the host state, family connections and the incidence of effective nationality.

Special rules also govern the situation of refugees and displaced persons, victims of war and natural disaster, and stateless persons. Whether by virtue of the express provisions of Article 33 of the 1951 Convention relating to the Status of Refugees or of the equivalent rule in general international law, states are bound by the principle of non-refoulement. Save in certain limited and exceptional cases, states may not return refugees in any manner whatsoever (including rejection at the frontier or expulsion after entry), to territories in which their lives or freedom may be endangered for reasons of race, religion, nationality or political opinion. Non-refoulement through time, the rule in its dynamic sense, forms the basis moreover of temporary refuge, the minimum content of asylum which is required by general international law.

States are still under no formal obligation to grant asylum (in the sense of a durable solution) to refugees, and are technically free to expel refugees elsewhere than to their country of origin. Unless such third state agrees to their reception (which has indeed occurred in certain politically sensitive cases), any such expulsion would be unlawful, the obligation to admit binding only the country of nationality. In large-scale situations the prospect of obtaining third state agreement, otherwise than for resettlement programmes extending over time, will be remote. Pending any solution, the state of refuge remains under a duty to treat refugees according to the minimum standards deriving, in particular, from the rules and principles which enjoin respect and protection of fundamental human rights. That state has further obligations to the international community, deriving from general international law, from elementary considerations of humanity and founded on the international community's interest in and concern for refugees.

Fundamental humanitarian principles dictate a broadly similar approach to other groups in distress, including those in flight from armed conflict, famine or equivalent man-made or natural disaster. Expulsion in such circumstances could hardly be compatible with the dictates of humanity, particularly given the existence of intergovernmental and other mechanisms for the provision of relief and assistance to people in distress. The fact that those affected may have arrived or be present in breach of local law would not itself justify the measure of expulsion; international obligations focus on the treatment in fact accorded and, from that perspective, render unlawful actions resulting in harm. The rules governing the conduct of armed conflict likewise restrict the forcible removal of protected persons from an occupied country, unless to protect the security of the population or for overriding military reasons.

#### 4. The expulsion of nationals

The expulsion of nationals is unlawful. Municipal law provisions governing denationalization work no effect upon the situation in international

law, where state responsibilities are governed by considerations other than political dissidence, religious difference, ethnic distinction, or fraud in the process of naturalization.

The legal position is confirmed by the provisions of both general and conventional law. In the Nottebohm case, for example, the International Court of Justice expressly recognized that underlying the legal concept of nationality is the social fact of attachment. In its Advisory Opinion in the Western Sahara case, the court has also implicitly recognized not only that this relationship is at the heart of the concept of ownership of territory, and hence of sovereignty, but also that there are limited circumstances in which that link may be ruptured. Sovereignty in this context describes both the relationship of control and jurisdiction over people and territory, and the legal responsibility which springs from the fact of control.

In addition to the basic legal principles, a variety of treaty provisions support the proposition that states are bound not to expel their nationals, directly or indirectly, by act or omission. Article 12(4) of the 1966 Covenant on Civil and Political Rights, for example, declares that "No one shall be arbitrarily deprived of the right to enter his own country." Equivalent provision is made in the American Convention on Human Rights and in the Fourth Protocol to the European Convention. Such instruments also commonly provide that no derogation is permitted from provisions such as those guaranteeing the right to life, freedom from torture or inhuman treatment, recognition as a person by the law, equality before and equal protection of the law.

By definition, the expulsion of nationals amounts to the creation of refugees. An apparent exception might be the exchange of populations, carried out under treaty. The legality of such operations must remain open to doubt, however, at least in the absence of any right of option available to those affected. In all other cases, for the state of origin to "write off" those who have fled or been expelled is to involve it in a breach of obligation to

receiving states and perhaps also to the international community. Such is the case even though, given conditions prevailing in the country of origin, the actual return of refugees may be barred by that complex of duties erga omnes which derives from the principle of non-refoulement.

A principle of responsibility for "creating" refugees is easy to state, but more difficult is the precise formulation of underlying rights and duties. One element in the scheme of liability is undoubtedly the damage which a refugee flow (or indeed the mass expulsion of foreign nationals) causes to the national interests of receiving states. Also part of the picture will be the breach of original obligations regarding human rights and fundamental freedoms which have given rise to the exodus. The legal consequences of liability remain somewhat uncertain, however, although there is doubtless a duty on all states concerned to co-operate to resolve such problems as emerge.

A state remains duty-bound to admit those of its nationals denied admission to or expelled from other states. International law permits denationalization in certain circumstances but that competence may not be misused so as to avoid international obligations. The concept of nationality does not just represent the relationship between individual and state; it is also a legally relevant fact having consequences in international law. A state of refuge is bound by obligations with regard to refugees, but the obligations of the state of origin, deriving from the juridically relevant fact of attachment, are not extinguished by either expulsion or denationalization. No state can oblige any other state to admit or keep its "nationals" by virtue of any such formal or informal measure. A refugee movement necessarily has an international dimension, but neither general international law nor treaty obliges any state to accord durable solutions. Indeed, it is debatable whether such a development is desirable; rather, it may subvert the ideal, which is the right to remain, and institutionalize exile at the expense of the fundamental right to return.

5. Mass expulsion in international law

General international law limits the power of expulsion by reference to its function and purpose, which are to protect the essential interests of the state, by requiring justification or reasonable cause, and by obliging states to give due weight to the interests of the individual and due regard to human dignity and basic human rights. Any formal definition of mass expulsion is probably superfluous; the phenomenon is self-identifying and recognizable immediately by its trespass upon those outer limitations to the competence of states.

The power under examination can no longer be argued to reflect an absolute discretion. Article 13 of the 1966 Covenant on Civil and Political Rights, for example, provides that aliens lawfully within state territory may be expelled "only in pursuance of a decision reached in accordance with law," and that they shall be entitled to obtain review, save "where compelling reasons of national security otherwise require." Equivalent provisions appear in the United Nations conventions on refugees and stateless persons; special rules regulate expulsion in situations of armed conflict, while in certain extreme circumstances expulsion may constitute a crime against humanity, a war crime and a breach of the 1948 Genocide Convention. Article 4 of the Fourth Protocol to the European Convention declares that the "Collective expulsion of aliens is prohibited," as does Article 12(5) of the 1981 African Charter of Human and Peoples' Rights, where mass expulsion is defined by reference to measures directed against national, racial, ethnic or religious groups.

Even though the measure on occasion may be formally directed against illegal or undocumented aliens, at other times mass expulsion has been explicitly founded on political considerations, such as reprisal, or on grounds of racial discrimination, or on the desire to dispose of a particular national minority. Whatever its form or basis, mass expulsion is always inherently suspect. Any presumption in favour of the acting state due from the simple existence of the power to expel foreign nationals is displaced by the circumstances; the burden shifts to the actor to exculpate itself.

In all or most cases, xenophobia will be an element if not the very foundation of measures which, in the suddenness of their application, must disregard the individualized aspect of basic human rights; experience shows that mass expulsions always take place in conditions of great hardship. The illegality arises not solely by reason of that loss or of the loss suffered by receiving states. Depending upon the particular circumstances of each case, it stems initially from breach of the principle of non-discrimination, considered either with reference to the recognised prohibited grounds such as race or religion; or with reference to the concept of arbitrariness. Mass expulsion not facially objectionable on racial grounds, for example, will nevertheless arbitrarily deny to those affected the right to recognition as persons before the law, to equality before and equal protection of the law, and to the benefit of the minimum requirements of due process.

Some may argue that the collective interests of the expelling state, its community, economy and security, override any claim of the individual to have his or her case considered on its merits. However, Article 29 of the Universal Declaration of Human Rights, reiterated in other instruments, not only stresses the duties of everyone to the community; it also explicitly confines the limitations which may be placed on the exercise of rights to those which "are determined by law solely for the purpose of securing due recognition and respect of the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Great caution is needed in face of arguments that non-nationals generally are entitled to a lesser standard of procedural fairness than nationals or other members of the body politic. The import of human rights and of international standards generally, including the principles of effectiveness of obligations and non-discrimination, is that claims to offer a lesser degree of justice to particular groups or individuals are called into question. The generality of human rights is due not because the individual is or is not a member of a particular group; claims to such rights are determinable not

according to membership, but to the character of the right in question. To many rights, legitimate exceptions attach, but the lawfulness of the latter depends upon their bearing a reasonable relationship to some greater community interest. The causing of harm, breach of the principle of non-discrimination and violation of the standard of equality of treatment will be difficult to defend, particularly when the action impugned is based upon reasons such as alienage, or political reprisal, which are irrelevant to enjoyment of the subjective right in question.

The collective interest is also conceptualised at law in such notions as ordre public, (although not without some controversy as to the threat posed by their very existence). Other collective concerns can also be found in the so-called third generation human rights of peace, development, and solidarity. Whatever the standing of these and of economic, social and cultural rights, their simple invocation is alone insufficient to justify measures impinging on individuals to the extent of expulsion en masse. This lesson has been learnt from the practice of states and regional organizations with regard to emergency powers, even if continuing disquiet and concern are still justified. The concept of the margin of appreciation (which allows states some discretion in assessing what is required by the exigencies of a particular situation) contains inherent dangers for individual liberties. Evidently, the existence of facts, which may be alleged to justify expulsion, can be determined objectively, while action on those facts is controlled, at the lowest level, by the requirements of reasonableness and good faith. Thus, the measures taken must not be employed for purposes other than the intended and permissible purposes. Where procedures of supervision, investigation or adjudication exist (for example, in the context of regional human rights organizations), states can be called upon to show objective justification and a reasonable proportionality between the means employed and the aims sought to be realised. International law provides the governing standard; inherent powers must yield to the requirement that restrictions on liberty be "prescribed by law and necessary in a democratic society."

Alienage itself is a suspect basis of classification, and an insufficient basis in itself for harmful discriminatory treatment; it is not a reasonable or relevant distinction in the matter of enjoyment of those human rights which are denied by measures of mass expulsion. The development of pragmatic standards to govern expulsion generally certainly requires recognition of the "legitimate interests" of states, not as a mask for absolute power, but as reflecting a controlled area of discretion. Exercise of the power to expel thus requires justification on the facts, and must satisfy the further requirements of due process (as understood in general international law). Individuals' acquired rights and their own "legitimate expectations" themselves impose significant limitations on state power. A principled approach to the situation of foreign nationals must take account of such right-generating considerations, and also of the precise circumstances surrounding entry and presence; these include, among others, whether original entry was lawful and, if illegal, whether it was in fact tolerated or encouraged; whether the foreign nationals in question entered for recognised employment purposes; how long they have been resident; the extent of family and other ties which have been established; and whether the foreign nationals have any claim to refugee or other protected status.

At the same time, full attention must be given to the motivating causes for mass expulsion: what is the nature of the emergency, if any, which is claimed to justify the measure; can the threat be averted or met in other ways; which international or regional agencies have been requested to assist (although respective institutional responsibilities in this field are uncertain and require analysis and rationalization); is an ad hoc relief operation called for; are political initiatives needed, for example, in regard to the self-determination of particular peoples. Only a fully comprehensive approach is likely to offer the prospect of humane solutions; it in turn must accommodate states' interests, as well as the potential harm to individuals and communities.

Mass expulsion remains *prima facie* unlawful, in that it presumptively violates the principle of non-discrimination and basic human rights, and is the cause of loss to individuals and states.

6. The future

The problem of mass expulsion is likely to recur and the question arises, how best to formulate a set of rules or guidelines which will prevent that eventuality. Some have argued that an appropriate declaration or code of conduct be promoted, for example, within the United Nations General Assembly. There are several objections to this proposal: first, the phenomenon of mass expulsion is not such a frequent occurrence as to be ever present in the international consciousness, and therefore strong support for curative or preventive measures cannot be taken for granted; secondly, the competence of states to expel foreign nationals remains a sensitive issue, so that any proposed limitations on its exercise may be negatively interpreted as tending to maintain colonialist domination, foreign control of natural resources or other inequities in international economic relations; thirdly, the problems relating to mass expulsion cannot be separated from precedent and subsequent factors governing transfrontier movements of people.

The treatment and management of such displacements are ripe for attention by international and intergovernmental organizations, such as the ILO and ICM, and by regional economic, social and human rights institutions, while UNHCR remains competent to deal with certain aspects at least of the problem of expelled nationals. Nevertheless, there is certainly room for promotion in an appropriate context of a strong framework of humanitarian principles bringing together various strands and common values. The danger of such an exercise is that it may be manipulated to the point of raising soft law over hard law, so that principles are diluted, standards fudged and the sharp edge of rules blunted. The following principles have been framed with that danger in mind, but they have also been declared at such a minimum level of generality as is justified by the current state of international law; in many cases, the principles are already amplified and made more finite by specific rules deriving from both customary international law and treaty.

DECLARATION OF PRINCIPLES FOR THE AVOIDANCE  
AND RESOLUTION OF PROBLEMS ARISING  
FROM THE TRANSFRONTIER AND  
INTERNAL DISPLACEMENT OF PEOPLE

1. All states, in accordance with the provisions of the International Covenant on Economic, Social and Cultural Rights, other relevant instruments and principles of general international law, shall take such steps as shall assure to their peoples the enjoyment, among others, of the rights to work and to just and favourable conditions of employment, to an adequate standard of living, to health, to education and to participation in cultural life.
2. All states, in accordance with the provisions of the International Covenant on Civil and Political Rights, other relevant instruments and principles of general international law, shall take such steps as shall assure to their peoples the enjoyment, among others, of the rights of life, liberty and security of person, to freedom from torture, cruel, inhuman or degrading treatment or punishment, to freedom from slavery and servitude, to freedom of movement and freedom to leave and return to their own country, to freedom from arbitrary arrest and detention, to equality before and equal protection of the law, to freedom of thought, conscience and religion, and the rights to participate in public affairs and to vote.
3. Recognising that nationality, whether formally acknowledged by municipal law or not, corresponds with a genuine connection between individual and state, based upon the social fact of attachment, all states shall refrain from any act which has the object or purpose of severing that relationship, unless permitted by a rule of general international law. In all other cases, including the forcible exchange of populations, the expulsion of nationals is forbidden.
4. All states shall respect and ensure to all persons within their territory

and jurisdiction human rights and fundamental freedoms without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status. Collective expulsion of aliens, in particular, is prohibited.

5. All states, individually and in co-operation with others, shall strive to create the conditions necessary that their people may enjoy the right to belong and not to be compelled to take flight in search of decent living conditions or freedom from strife. In particular, states shall co-operate in the establishment of a just and equitable international economic order.

6. All states shall co-operate with one another to settle their disputes peacefully, shall refrain from the threat or use of force, and shall not intervene in matters within the domestic jurisdiction of other states.

7. In accordance with the principles of international solidarity and burden-sharing, states shall take all necessary measures to assist, at their request, other states in which people may be found or admitted in distress. People in distress include those displaced by natural disasters, wars of aggression, occupation, foreign domination, or events seriously disturbing public order, as well as those in flight from persecution for reasons of race, religion, national or ethnic origin, social group or political opinion.

8. Where people in distress present themselves at a national frontier they shall be admitted and rendered such assistance as is necessary. It shall be for the admitting state, in co-operation with the United Nations, to determine the causes of flight and to take appropriate interim steps to promote a durable solution.

9. No person in distress shall be returned to any country or rejected at any frontier if the effect of such measure would be to expose him or her to a threat to life or liberty for reasons of race, religion, national or ethnic origin, social group or political opinion, or would be otherwise inhumane.

10. People in distress shall be accommodated in receiving states until such time as they are able to return to their homes in their homelands. They shall be treated with humanity and in accordance with the human rights and fundamental freedoms recognised by general international law.

11. All states shall co-operate to relieve the burden borne by states receiving people in distress.

12. All states shall co-operate, in accordance with the principles of international solidarity and burden-sharing, in promoting solutions through local integration or resettlement for people in distress who, owing to a well-founded fear of being persecuted for reasons of race, religion, national or ethnic origin, social group or political opinion, are unable or unwilling to return to their own country.