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**QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL
FREEDOMS, INCLUDING POLICIES OF RACIAL DISCRIMINATION
AND SEGREGATION, IN ALL COUNTRIES, WITH PARTICULAR
REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES
AND TERRITORIES: REPORT OF THE SUB-COMMISSION UNDER
COMMISSION ON HUMAN RIGHTS RESOLUTION 8 (XXIII).**

Written statement submitted by the European Law Students' Association (ELSA),
a non-governmental organization in special consultative status**

The Secretary-General has received the following written statement which is
circulated in accordance with Economic and Social Council resolution 1996/31.

[4 August 2006]

* Pursuant to General Assembly resolution 60/251 of 15 March 2006 entitled "Human Rights Council", all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, including the Sub-Commission, were assumed, as of 19 June 2006, by the Human Rights Council. Consequently, the symbol series E/CN.4/Sub.2/_ , under which the Sub-Commission reported to the former Commission on Human Rights, has been replaced by the series A/HRC/Sub.1/_ as of 19 June 2006.

** This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Forced Deportation

1.

“Deportation” is an inclusive legal term. In general, it denotes the act of expelling a person from one country to another, usually involving the expulsion of foreigners. Coercion is an integral part of “deportation”.

It is a principle of well-established international law that states have the sovereign right, as a matter of their domain reservé, to control the entry, residence and expulsion of aliens. Generally, deportation orders are issued as a means to maintain public order where aliens have been convicted of criminal offences, or in cases of the latter’s illegal residence.¹ In its broad sense, the term deportation also encompasses the formal process of extradition, by which a criminal suspect is handed over from one jurisdiction to another. The abduction and kidnapping of a person by the agents of another state, in order to circumvent existing extradition treaties, has commonly been referred to as “forced extradition”. Forced extraditions are considered violations of state sovereignty and territorial integrity and are held to violate the Charters of the United Nations and the Organization of American States. Absent governmental consent, which directly violates or circumvents a treaty, forced extraditions also deny the kidnapped person any basis upon which to challenge jurisdiction of the prosecuting forum.

Deportation can also mean the forcible resettlement of an individual or a group of people within a country, usually to a remote part of the country with the prohibition to change place of residence. In this sense one could also speak of forced internal relocation. Forced internal relocation has been a problem in countries with high numbers of internally displaced people (e.g. Sudan, Uganda), whereby the governments seek to exert their control on the mass population of internally displaced people.

Forced population transfers contravene international law unless they have the free consent of both the moved population and the host population. Moreover, Art. 7 of the Rome Statute of the International Criminal Court defines “deportation or forcible transfer of population” as a crime against humanity.

The practice of forced deportation in times of war is widespread. Examples of forced deportation go far back in history. However, in the last decades, such a practice has grown substantially, resulting in the displacement of several thousands people.

2.

It can hardly be denied, that among the misfortunes that may befall a person, deportation is one of the most disastrous. To deport may result in loss of property and life; or of all that makes life worth living. Deportation involves arrest, deprivation of liberty, removal from home, family, business, property. Deportation, as follows, is a harsh measure. It is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.

¹ E.g., the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not as such guarantee an alien the right to reside in a particular member country, nor does it shelter the alien from expulsion; *see* opinion of Judge Pettiti in *Beldjoudi v. France*, judgment of 26.03.1992: “The right of an alien to reside on the territory of a High Contracting Party is not guaranteed as such by the Convention. Similarly, the right of asylum and the right not to be deported do not appear as such in the series of rights and freedoms guaranteed by the Convention.”

To seek asylum or withhold deportation of an alien, the alien must show either a well-founded fear or clear probability of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.

Persons accorded the refugee status enjoy protection from refoulement. Refoulement in the context of Article 33 (1) of the 1951 Geneva Refugee Convention² is usually used in the broad sense, referring to “expulsion” as well as to “return (‘refoulement’).

Article 33’s “expel or return (‘refouler’)” language deserves attention. In the classic case, expulsions apply to refugees who are lawfully within a nation’s territory. This is confirmed by Article 32 of the 1951 Convention, which provides various procedural requirements before a state may expel a refugee³, and supported by the *travaux préparatoires*, UN Doc. E/CN.4/713 p. 16: “There was some discussion also of the meaning of the terms ‘expulsion’ and ‘return’ (‘refoulement’) in this article and the following interpretation was recorded: that the word ‘expulsion’ related to a refugee already admitted into a country whereas the word ‘return’ (‘refoulement’) related to a refugee already within the territory but not yet resident.”

From this follows, that the term “return (‘refoulement’)” would be directed at refugees, who are staying illegally within a country’s territory or whose residence permit have expired. However, the question arises whether Article 33 of the Refugee Convention does indeed protect only refugees in the territory of a state.

ELSA observes that the argument against extraterritorial application of non-refoulement would allow contracting states to deprive refugees of protection solely by virtue of their location. This gap in coverage could permit coastal states to intercept boat refugees outside their jurisdiction on high seas.

3.

Whatever the case might be, the refugee or asylum seeker must not be turned back to a country where his life or freedom could be threatened. Thus, whereas the “expulsion” restriction of Article 33 of the Refugee Convention prohibits the removal of a lawfully residing refugee from a contracting state, the “return” restriction prohibits the return of a refugee illegally staying within the country’s territory or who was found at or outside a country’s territory.

We believe that Art. 33 (2) does leave a small balancing act between the national security interests of a state and the protection needs of the individual. In cases where danger to the national security exists, the obligation of non-refoulement is only applicable if there is a risk of torture or other cruel, inhuman or degrading treatment or punishment. The state considering to remove a refugee or asylum-seeker to his or her country of origin must give specific consideration to the nature of the risk faced by the individual concerned. This is because the prospective risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment precludes refoulement absolutely, meaning without exception.

² United Nations (‘Geneva’) Convention Relating to the Status of Refugees; adopted in December 1951 and entered into effect in April 1954.

³ Article 32 of the Convention provides that „[t]he Contracting States shall not expel a refugee in their territory save on grounds of national security or public order.”

Article 3 ECHR and Article 3 CAT do not allow any balancing act between security interests of state parties and the protection needs of individuals. That includes dangers to the national and public security, even cases of a “public emergency” (Article 15 ECHR).

The prohibition of torture, inhuman or degrading treatment or punishment as variously set out in the international and regional human rights instruments enshrines one of the fundamental values of democratic societies. Where substantial grounds have been shown that, upon deportation following a foreign extradition request, the person in question would face a real risk of being subjected to such treatment in the receiving country, this entails a positive obligation on the transferring country not to deport. Arguably, if the authorities of the state to which the person in question is to be deported make relevant assurances, a real risk of violation of Article 3 ECHR and CAT would not arise. However, where such proscribed treatment is widespread or systematic in the state to which the individual is to be transferred, diplomatic assurances by the state to which the individual is to be transferred cannot displace the presumption of the latter running a real risk of suffering torture or cruel, inhuman or degrading treatment and thus cannot be relied upon.

In evaluating assurances by a foreign government, the relevant authorities of the state of refuge have to take into account the human rights record of the government giving the assurances, the government’s record in complying with its assurances and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government’s ability to control its security forces.

Whereas in the aforementioned cases the obligation of non-refoulement is non-derogable, a balancing act is possible in other cases where there is a risk of other forms of persecution. In those cases, Article 33 (2) Refugee Convention allows deportations.

4.

Where the 1951 Geneva Refugee Convention does not provide relief to those who do not face persecution on account of one of the five criterias mentioned in the Convention, civilians who flee their country in the wake of a non-international armed conflict must look to other statutes or international treaties for relief from deportation.

One such treaty is the Geneva Convention Relative to the treatment of Civilian Persons in Time of War (Geneva Convention IV). While these people may not be “refugees”, they may nonetheless qualify for relief from deportation.

To be eligible for relief under Geneva Convention IV, a civilian from a signatory state requesting relief from deportation must meet the following standards:

- person must be fleeing from a conflict not of an international character;
- person must not be taking part in hostile activities;
- signatory’s government cannot provide the humanitarian safeguards required by article 3: Prohibition of violence to life and person, taking hostages, outrages upon personal dignity, passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court.⁴

⁴ Kravitz Roland, Beyond Asylum and Withholding of Deportation: A Framework for Relief under Geneva Convention IV of 1949, in: Temple International and Comparative Law Journal 1 (1985, 1987), 290 f.