

EXPULSION OF ALIENS

[Agenda item 6]

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Sixth report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur

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Multilateral instruments cited in the present report

Source

Convention respecting the Laws and Customs of War on Land (The Hague, 18 October 1907)	J. B. Scott, ed., <i>The Hague Conventions and Declarations of 1899 and 1907</i> , 3rd ed. (New York, Oxford University Press, 1918), p. 100.
Regulations concerning the Laws and Customs of War on Land (annexes to the Hague Conventions II and IV of 1899 and 1907)	<i>Ibid.</i> , p. 107.
Treaty of Peace between the British Empire, France, Italy, Japan, Greece, Romania and the Serb-Croat-Slovene State and Turkey (Treaty of Lausanne) (Lausanne, 24 July 1923)	League of Nations, <i>Treaty Series</i> , vol. XXVIII, No. 701, p. 11.
Convention respecting Conditions of Residence and Business and Jurisdiction (Lausanne, 24 July 1923)	<i>Ibid.</i> , No. 704 p. 151.
Convention regarding the Status of Aliens in the respective Territories of the Contracting Parties (Havana, 20 February 1928)	<i>Ibid.</i> , vol. CXXXII, No. 3045, p. 301.
Special Protocol concerning Statelessness (The Hague, 12 April 1930)	ILM, vol. 13, 1974, p. 1.
Convention on International Civil Aviation (Chicago, 7 December 1944)	United Nations, <i>Treaty Series</i> , vol. 15, No. 102, p. 295.
Potsdam Agreement (Berlin, 2 August 1945)	<i>British and Foreign State Papers</i> , 1943–1945, vol. 145, p. 852.
General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, <i>Treaty Series</i> , vol. 55, No. 814, p. 187.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	<i>Ibid.</i> , vol. 75, Nos. 970–973, pp. 31 <i>et seq.</i>
Geneva Convention relative to the Treatment of Prisoners of War	<i>Ibid.</i> , No. 972, p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War	<i>Ibid.</i> , No. 973, p. 287.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977)	<i>Ibid.</i> , vol. 1125, No. 17512, p. 3.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.
Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 March 1952)	<i>Ibid.</i>
Protocol No. 4 to the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (Strasbourg, 16 September 1963)	<i>Ibid.</i> , vol. 1496, No. 2889, p. 263.
Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 22 November 1984)	<i>Ibid.</i> , vol. 1525, No. 2889, p. 195.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, No. 2545, p. 137.
Convention on the Settlement of Matters Arising out of the War and the Occupation (Bonn, 26 May 1952)	<i>Ibid.</i> , vol. 332, No. 4762, p. 219.
Convention on territorial asylum (Caracas, 28 March 1954)	<i>Ibid.</i> , vol. 1438, No. 24378, p. 127.
Protocol between the Governments of Denmark, Finland, Norway and Sweden concerning the exemption of nationals of these countries from the obligation to have a passport or residence permit while resident in a Scandinavian country other than their own (Copenhagen, 22 May 1954)	<i>Ibid.</i> , vol. 199, No. 2675, p. 29.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	<i>Ibid.</i> , vol. 360, No. 5158, p. 117.
European Convention on Establishment (with Protocol) (Paris, 13 December 1955)	<i>Ibid.</i> , vol. 529, No. 7660, p. 170.
Treaty Establishing the European Community (Rome, 25 March 1957)	<i>Ibid.</i> , vol. 294, No. 4300, p. 3. See also <i>Official Journal of the European Union</i> , C 325 (24 December 2002), p. 33.
Convention between Denmark, Finland, Norway and Sweden concerning the waiver of passport control at the intra-Nordic frontiers (Copenhagen, 12 July 1957)	<i>Ibid.</i> , vol. 322, No. 4660, p. 290.
European Convention on Extradition (Paris, 13 December 1957)	<i>Ibid.</i> , vol. 359, No. 5146, p. 273.

Source

European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe (Paris, 13 December 1957)	Council of Europe, <i>European Treaty Series</i> , No. 25.
Convention between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands on the transfer of controls of persons to the external frontiers of Benelux territory (Brussels, 11 April 1960)	United Nations, <i>Treaty Series</i> , vol. 374, No. 5323, p. 3.
Convention of application of articles 55 and 56 of the Treaty instituting the Benelux Economic Union (Brussels, 19 September 1960)	<i>Ibid.</i> , vol. 480, No. 5471, p. 432.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	<i>Ibid.</i> , vol. 596, No. 8638, p. 261.
Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 14 September 1963)	<i>Ibid.</i> , vol. 704, No. 10106, p. 219.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	<i>Ibid.</i> , vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 19 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	<i>Ibid.</i> , vol. 1144, No. 17955, p. 143.
European Convention on the Legal Status of Migrant Workers (Strasbourg, 24 November 1977)	Council of Europe, <i>European Treaty Series</i> , No. 093.
Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980)	United Nations, <i>Treaty Series</i> , vol. 1343, No. 22514, p. 89.
African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	<i>Ibid.</i> , vol. 1520, No. 26363, p. 217.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	<i>Ibid.</i> , vol. 1465, No. 24841, p. 85.
Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (Schengen Agreement) (Schengen, 14 June 1985)	<i>Official Journal of the European Communities</i> , L 239, 22 September 2000, p. 13.
Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities (Dublin, 15 June 1990)	<i>Ibid.</i> , C 254, 19 August 1997, p. 1.
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (New York, 18 December 1990)	United Nations, <i>Treaty Series</i> , vol. 2220, No. 39481, p. 3.
North American Free Trade Agreement (Mexico City, Ottawa, Washington, D.C., 17 December 1992)	North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Mexico, M. A. Porrua, SECOFI, 1993.
Arab Charter on Human Rights, Council of the League of Arab States (Cairo, 15 September 1994)	<i>Human Rights Law Journal</i> , vol. 18, 1997, p. 151.
Charter of fundamental rights of the European Union (Nice, 7 December 2000)	<i>Official Journal of the European Communities, Series C</i> , No. 364, 18 December 2000, p. 1.

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Introduction¹

1. In his fifth report on the expulsion of aliens,² the Special Rapporteur continued his study of the issues associated with protection of the human rights of persons who have been or are being expelled as limitations on the State's right of expulsion. The misunderstanding that had arisen in the Commission as a result of the approach taken by the Special Rapporteur in this connection was dispelled in the document entitled, "Draft articles on protection of the human rights of persons who have been or are being expelled, as restructured by the Special Rapporteur, Mr. Maurice Kamto, in the light of the plenary debate during the first part of the sixty-first session",³ which constitutes an attempt to incorporate various concerns expressed by members of the Commission during the plenary debates, and restructures the linkage of draft articles 8 to 15, while adding a new draft article extending the application of those draft articles to the State of transit. It was the Special Rapporteur's understanding that the draft articles in question, so amended, were to be sent to the Drafting Committee in accordance with the decision of the majority of members of the Commission.

2. During the consideration in the Sixth Committee of the General Assembly of the United Nations of the report of the International Law Commission on the work of its sixty-first session (2009),⁴ some delegations acknowledged the complexity of the subject of expulsion of aliens and expressed reservations regarding the relevance of codifying it. Attention was also drawn to the difficulties inherent in establishing general rules on the subject. While some delegations insisted on the need for the Commission to base its work on the practices being followed in States, others considered that some of the proposed draft articles were too general or were not supported by sufficient practices in terms of customary law.

3. While the hope expressed was that the Commission would make further progress on the topic during its sixty-second session, it was also suggested that discussions should take place within the Commission concerning the attitude to be taken to the topic under consideration, including the structure of the draft articles that were being elaborated, as well as the possible outcome of the Commission's work.

4. Some delegations sought a clear delimitation of the topic, taking particularly into account the various situations and measures to be covered. The view was expressed that issues such as denial of admission, extradition, other

transfers for law enforcement purposes and expulsions in situations of armed conflict should be excluded from the scope of the draft articles. Attention was also drawn to the distinction between the right of a State to expel aliens and the implementation of an expulsion decision through deportation. The need to distinguish between the situation of legal and illegal aliens was also underlined.

5. Regarding the non-expulsion of nationals, the view was expressed that the expulsion of nationals should be prohibited. That prohibition, it was also remarked, related as well to individuals having acquired one or several other nationalities.

6. With regard to the protection of the rights of persons being expelled, delegations welcomed the emphasis the Commission had placed on human rights protection in considering the subject. Some delegations emphasized the need to reconcile the right of States to expel aliens and the rights of the persons expelled, also taking into account the situation in the State of destination. While a preference was expressed for a comprehensive approach that would not be limited to a list of specific rights, according to another view the Commission's analysis should be limited to those rights that were specifically relevant in the event of expulsion, including the role of assurances given by the State of destination concerning respect for those rights.

7. Some other delegations expressed concern regarding the elaboration of a list of human rights to be respected in the event of an expulsion, particularly in the light of the fact that all human rights must be respected and it was not feasible to enumerate all of them in the draft articles. The inclusion of a provision stating the general obligation of the expelling State to respect the human rights of persons being expelled was thus favoured by several delegations. Furthermore, a number of delegations cautioned against differentiating, in relation to expulsion, between different categories of human rights, in particular by characterizing some of them as being "fundamental" or "inviolable".

8. It was further suggested that the Commission should rely on settled principles reflected in widely ratified instruments, as opposed to concepts or solutions derived from regional jurisprudence.

9. Some delegations mentioned a number of specific human rights guarantees to be afforded to persons being expelled, such as the right to life, the prohibition against expelling an individual to a State in which there was a risk that he or she would be subjected to torture or other cruel, inhuman or degrading treatment or punishment, and the right to family life. Attention was also drawn to the property rights of aliens being expelled, in particular in connection with the confiscation of their property, as well as to the right to compensation for unlawful expulsion. Furthermore, some delegations made reference to the need to examine the procedural rights of persons affected by expulsion, such as the right to contest the legality of an expulsion and the right to the assistance of counsel.

¹ The Special Rapporteur expresses his deep appreciation to Ms. Miranda Brusil Metou, professor of the Faculty of Law and Political Science of the University of Yaoundé II, for her help in gathering the documentation necessary for writing this report, as well as the secretariat of the Commission, author of the memorandum A/CN.4/565 (available on the website of the Commission), which has been very useful to him, in particular in respect to the study of national laws. However, the Special Rapporteur is solely responsible for the contents of this report.

² *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611, p. 127.

³ *Ibid.*, document A/CN.4/617.

⁴ See the topical summary prepared by the Secretariat of the discussion held in the Sixth Committee of the General Assembly during its sixty-fourth session, A/CN.4/620 and Add.1, paras. 27–39.

10. Opposing views were expressed as to whether the right to life entailed the obligation for the State, before expelling an individual, to obtain sufficient guarantees as to the non-imposition of the death penalty against that individual in the State of destination. Other delegations also expressed the view that States should not be placed in the situation of being responsible for anticipating the conduct of third parties which they could neither foresee nor control.

11. While the view was expressed that human dignity was the foundation of human rights in general, and while further elaboration on that concept was suggested, some delegations considered that the meaning and the legal implications of the rights to dignity were unclear.

12. A view was expressed supporting the inclusion of a provision on the protection of vulnerable persons, such as children, the elderly, persons with disabilities and pregnant women. It further suggested that the principle of the best interests of the child should be reaffirmed in the context of expulsion.

13. The point was made that the treatment to be given to the principle of non-discrimination in the context of expulsion was not clear. The view was expressed that the principle of non-discrimination applied only in relation to the expulsion procedure and was without prejudice to the discretion of States in controlling admission to their territories and establishing grounds for the expulsion of aliens under immigration law. Some delegations also raised some doubts as to the existence, in the context of expulsion, of an absolute prohibition of discrimination based on nationality.

14. Regarding grounds for expulsion, the view was expressed that the State had a sovereign right to expel aliens if they had committed a crime or an administrative offence, if their actions had violated its immigration laws or threatened its national security or public order, or if expulsion

was necessary for the protection of the life, health, rights or legitimate interests of its nationals. It was also said that expulsion must serve a legitimate purpose and satisfy the criterion of proportionality between the interests of the expelling State and those of the individuals being expelled.

15. It will be noted that the complexity of a subject cannot constitute sufficient grounds for not codifying it; on the contrary, it seems to the Special Rapporteur that one of the reasons why the Commission exists is to seek to shed light on topics that appear complex and are not yet the subject of a body of structured rules established by treaty in the international legal order.

16. As to the other comments and concerns indicated by members of the Sixth Committee, some of them are answered in the document referred to above, "Draft articles on protection of the human rights of persons who have been or are being expelled, as restructured by the Special Rapporteur, Mr. Maurice Kamto, in the light of the plenary debate during the first part of the sixty-first session", and others will be in the present report. In a new draft workplan⁵ containing, *inter alia*, a restructuring of the draft articles, the Special Rapporteur gave the Commission an overview of the treatment of the topic of expulsion of aliens, indicating the work which in his view remained to be done. The present report follows that plan, enlarging upon it with regard to the points in respect of which detail was lacking. Thus it fills out the last part of the plan, dealing with "General rules", by developing the aspect of the protection of the rights of persons who have been or are being expelled, which he had not been able to take up in previous reports. Thus the present report complements the "general rules" before taking up, in the second part of the examination of "expulsion procedures", and then culminating with the third part dealing with "Legal consequences of expulsion".

⁵ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/618, p. 173.

PART ONE

Additions to Part One of the restructured study plan (General rules)

17. These additions relate respectively to prohibited expulsion practices and protection of the rights of persons who have been or are being expelled.

CHAPTER I

Prohibited expulsion practices

18. The question of collective expulsion has already been considered. We shall revert to it briefly in order to allay certain misgivings expressed by some Commission members. We shall then consider two other prohibited practices, namely, disguised expulsion and extradition disguised as expulsion, and, lastly the grounds for expulsion.

A. Collective expulsion

19. This question was already addressed in the third report on the expulsion of aliens.⁶ Draft article 7 thereon

was sent to the Drafting Committee, which did the necessary editing work and adopted it at its last session. Just to complete the picture, it may be added that the issue of collective or mass expulsions was discussed by the International Law Association at its sixty-second conference, held in Seoul in August 1986, which approved a Declaration of Principles of International Law on the subject.⁷ In that Declaration, containing 20 principles, only principles 17 and 18 concern the mass expulsion of aliens. They do not rule out, on principle, the mass expulsion of

⁶ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581, p. 127.

⁷ International Law Association, "Declaration of principles of international law on mass expulsion"

aliens, but state simply that it must not be arbitrary and discriminatory in its application or serve as a pretext for genocide, confiscation of property or reprisal; the power of expulsion must, moreover, be exercised in accordance with the principles of good faith, proportionality and justice, while respecting the fundamental rights of the persons concerned.

20. The question of the collective expulsion of aliens is briefly reverted to in order simply to dispel a persistent concern on the part of certain Commission members with regard to paragraph 3 of this draft article 7, which deals with the possibility of expelling a group of persons acting as a group, in the event of armed conflict, for armed activities endangering the security of the State of residence engaged in conflict with their State of nationality. In its original version, the paragraph is worded as follows: "Foreign nationals of a State engaged in armed conflict shall not be subject to measures of collective expulsion unless, taken together as a group, they have demonstrated hostility towards the receiving State".⁸ The discussions on this paragraph in plenary continued in the Drafting Committee, which amended it as it deemed necessary.⁹ Some members of the Commission wished to be assured that such a provision was not contrary to international humanitarian law.

21. Various provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War may be invoked to address this concern. Some authors who have tackled this question of the collective or mass expulsion of aliens in time of armed conflict have considered it mainly with reference to deportations, transfers and evacuations,¹⁰ placing the emphasis on article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, the first paragraph of which prohibits "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not ..., regardless of their motive". Another author considers, however, that account should be taken rather of articles 35 to 46 of the aforementioned Convention, which in his view concern the treatment to be accorded to aliens in the territory of a State party to the conflict, and of articles 27 to 34, which are provisions common to the territories of the parties to the conflict and to occupied territories.¹¹

22. Admittedly, apart from the case of voluntary departures provided for by article 35 under the conditions laid down in article 36 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, there is a risk that aliens who have not been repatriated may subsequently be subject to a measure of collective or mass expulsion. It could be contended in this connection, first, that article 38 concerning persons who have not

been repatriated stipulates that "the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace", and, secondly, that article 45 concerning transfer to another Power regulates all individual or collective movement of protected persons by the Detaining Power.

23. It might indeed be thought from a combined reading of articles 45 and 4 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War that the aforementioned paragraph 3 of draft article 7 flies in the face of humanitarian law. Such is by no means the case.

24. Article 45 provides as follows: "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs". Protected persons are defined in article 4 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". The situation envisaged in draft article 7, paragraph 3, does not come within the scope of articles 45 and 4 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War. First, article 4 does not seem to refer clearly to the case of a group of aliens usually residing in the territory of a State in armed conflict with their State of nationality. And even assuming that a broad interpretation of the words "those ... in the hands of a Party to the conflict or Occupying Power of which they are not nationals" allows the inclusion in their number of the group of aliens in question, it will be noted that the said group of aliens would not come under the definition of "protected persons" within the meaning of the Convention insofar as they may be assimilated to "combatants" by virtue of their hostile armed activities that endanger the security of the expelling State, which is in this case the State of residence of the persons concerned. It will be recalled that, in international humanitarian law, combatants are taken to mean "members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention)" (art. 43, para. 2, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)). Secondly, insofar as the group of aliens in question carries out its hostile armed activities in the interest of the State of nationality of its members engaged in an armed conflict with the State of residence, the members of the group who have been or are being expelled cannot "fear persecution for [their] political opinions or religious beliefs". The mere fact of fighting for their country would shield them from such a risk.

25. As was rightly noted by one author:

In 1949, on the basis of experience in the war, the concern was to protect enemy civilians not so much from mass expulsion as from internment or forced labour, which could turn them into virtual hostages. Article 35 accordingly grants to all protected persons the right to leave the territory at the outset of or during a conflict.¹²

⁸ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581, p. 132.

⁹ The version finally adopted by the Drafting Committee will be duly submitted to the plenary by the Chair of that Committee.

¹⁰ See, in particular, Oppenheim and Lauterpacht, *International Law, A Treatise*, vol. 2, *Disputes, War and Neutrality*, pp. 441–442; Coles, "The problem of mass expulsion: a background paper", pp. 78–80; and Oda, "The Individual in International Law", p. 482.

¹¹ See Perruchoud, "L'expulsion en masse d'étrangers", particularly p. 687.

¹² *Ibid.*, p. 687.

It is therefore not surprising that expulsion, whether individual or collective, is not mentioned either in article 4 or in the other provisions discussed. From the foregoing considerations, the following conclusion has been drawn, confirming the position expressed by the Special Rapporteur during the deliberations on paragraph 3 of draft article 7, contained in his third report:

Thus, in the law of armed conflict, there is no specific provision relating to mass expulsion, whether in the case of international or of non-international armed conflict, and so we have to fall back on the general peacetime rules.¹³

26. Peacetime is not wartime, though, and some acts that would seem commonplace in peacetime take on a particular significance and import in wartime. Exceptional circumstances call for exceptional measures. The question of collective expulsion in the event of war needs to be considered from this standpoint, bearing in mind that it can apply only under the circumstances and conditions described in the third report, in the light of elements of the practice of States and case law referred to in that report.

27. It may also be usefully recalled that the Institute of International Law clearly provided for cases of collective expulsion in its resolution proposing “International Regulations on the admission and expulsion of aliens”, adopted on 9 September 1892 at its Geneva session. Under “extraordinary expulsion”, it distinguished between “definitive extraordinary (or *en masse*) expulsion” (art. 23) and “temporary extraordinary (or *en masse*) expulsion” applying to classes of individuals “as the result of war or serious disturbances arising in the country; it is effective only during the war or for a fixed period” (art. 24).¹⁴

28. For all the foregoing reasons, the Special Rapporteur does not think that paragraph 3 of draft article 7 is in contradiction with international humanitarian law. On the contrary, it is in keeping with the longstanding and recent practice of States, as was shown in his third report on the expulsion of aliens.

B. Disguised expulsion

29. The term “disguised expulsion” is often used in the writings of various organizations that defend the rights of aliens or those of members of certain professions such as journalists. A few recent examples include the “disguised expulsion” of the special correspondent for the Australian television network ABC and a team from the New Zealand network TV3. They were all forced to leave Fiji, on 14 April 2009, by the military junta that took power in Suva following a *coup d'état* in December 2006. The three journalists were not formally arrested by the Fijian security forces, but were left with no choice other than to leave the country after the security forces escorted them to the airport of the capital city.¹⁵ This was a case of *de facto* expulsion through the conduct of a State, without

a formal act of expulsion.¹⁶ Thus it can only be considered “disguised” on the understanding that expulsion can only occur through a formal act. Likewise, the non-renewal of the visas of French nationals residing in Madagascar, including the correspondent for Radio France Internationale and Deutsche Welle, was denounced as “disguised expulsion”. It was argued that the Malagasy authorities did not provide the grounds for their decision not to renew the visas, whereas such grounds must be provided, at least in the case of journalists.¹⁷ However, not only is such an obligation absent from the laws of Madagascar and those of most other countries, but the granting or renewal of visas is a sovereign prerogative of States recognized by international law.

30. The notion of disguised expulsion raises a few questions. First, what is the role of intention in the legality or illegality of such expulsion, particularly considering the requirement to provide the grounds for the act of expulsion? Second, to what extent is the State free to choose the procedure for compelling aliens to leave its territory, if in fact the aliens must be given the chance to present their case or defend their rights?

31. It is not always easy to distinguish between disguised or indirect expulsion and expulsion in violation of the procedural rules. The latter situation may cover not only cases of expulsion through the conduct of a State, but also cases of expulsion that are based on a measure taken by an authority that lacks competence, or are executed without complying with the various time limits stipulated in national legislation. By contrast, the disguised expulsion that may be akin to what has been termed “constructive expulsion”¹⁸ only concerns cases where, because the expulsion is feigned or masked, it is not in execution of a formal measure. Practical examples of disguised expulsion other than those mentioned above include “disguised expulsion” based on the confiscation or groundless invalidation of an alien’s legal residence permit; “disguised expulsion” based on “incentive” measures for a return that is “allegedly voluntary” but that in fact leaves the alien with no choice; and “disguised expulsion” resulting from the hostile conduct of a State towards an alien.

32. Disguised expulsion based on the confiscation or groundless invalidation of the legal residence permit of an alien may be illustrated by the case of Sylvain Urfer, a Jesuit priest who lived in Madagascar for 33 years. In 2007, he was notified that his permanent residence visa had been cancelled, and he thus had no choice other than to leave the country. The Malagasy Minister of the Interior reversed that disguised expulsion decision two years later, allowing the priest to return to Madagascar.¹⁹ This type of disguised expulsion also includes the cases,

¹³ *Ibid.*, pp. 687–688.

¹⁴ Institute of International Law, “Règles internationales sur l’admission et l’expulsion des étrangers” (Rapporteurs Louis-Joseph Delphin Féraud-Giraud and Ludwig von Bar).

¹⁵ See “Censure préalable et expulsion de journalistes étrangers: Un coup mortel à la liberté de la presse”, 14 April 2009, at <https://rsf.org/fr/actualites/censure-prealable-et-expulsion-de-journalistes-etrangers-un-coup-mortel-la-liberte-de-la-presse> (accessed 13 July 2016).

¹⁶ In his second report, the Special Rapporteur showed that expulsion could occur based solely on the “conduct” of a State, in the absence of a formal act (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573, p. 249, para. 189).

¹⁷ See *Courrier International*, 24 May 2005, which cites, *inter alia*, the Malagasy newspapers *La Gazette de la Grande Île*, *L’Express* and *Midi Madagasikara*.

¹⁸ See the memorandum by the Secretariat on the expulsion of aliens (A/CN.4/565), paras. 68–73, available on the website of the Commission.

¹⁹ See <http://www.madagascar-tribune.com>, 11 May 2007.

frequently seen in Africa in the past few years, where persons are arrested while their residence permits are still valid, or where the residence permits are destroyed or confiscated, leaving those persons with no choice other than to leave the country. Such cases have been reported in South Africa²⁰ and are recurrent in Equatorial Guinea.²¹

33. With regard to the refusal to readmit a legal alien returning from a trip abroad, the expelling State uses the alien's travel outside the country as a pretext for expulsion.

34. Meanwhile, where "incentive" measures for return that leave the alien with no choice are concerned, they form part of the new policies being adopted by certain States, notably in Europe, to control immigration and reduce the number of aliens they admit. Spain and France, for example, have instituted "voluntary" return or departure programmes that are in fact forcible return schemes. As Goodwin-Gill points out, "In practice, there may be little difference between forcible expulsion in brutal circumstances, and 'voluntary removal' promoted by laws which declare continued residence illegal and encouraged by threats as to the consequences of continued residence."²² He also indicates that "State authorities can also induce expulsion through various forms of threat and coercion ... In *Orantes-Hernandez v. Meese* [685 F. Supp. 1488 (C.D. Cor. 1988)], the court found that substantial numbers of Salvadoran asylum-seekers were signing 'voluntary departure' forms under coercion, including threats to detention, deportation, relocation to a remote place and communication of personal details to their government."²³

35. In Spain, as one of the measures to combat rising unemployment following the economic crisis, the Government has established a "voluntary return programme" for nationals of 20 countries with which Spain has signed social security agreements. That programme, which was validated on 19 September 2008, "encourages" unemployed legal immigrants to return to their country of origin. In return, the Government of Spain agrees to pay all the benefits to which they are entitled, in two instalments: 40 per cent before their departure, and 60 per cent one month after they return to their country. The persons in question, along with their families—if the families came to Spain under the family reunification programme—must leave Spanish territory within a few days following

the first payment of the benefits, and must give an undertaking that they will not return to Spain for the three years following their return to their country of origin.²⁴ But these persons, given that their status in Spain is legal, have the right to stay legally, work and receive unemployment benefits in that country. Of course, the Government insists that the decision to return is "voluntary", but this is obviously a clever legal subterfuge to hide disguised expulsion measures. For does not the mere fact of encouraging legal immigrants to return to their countries of origin in return for payment of their entitlements violate the right of residence guaranteed by their residence permit? Can the will of the persons in question be free in such a case, when they are caught between the pressure of unemployment and the prospect of receiving compensation (which they could have received in the form of unemployment benefits had they remained in Spain) if they decide to return to their countries of origin?

36. In France, "return assistance", established pursuant to the Stolér Act²⁵—named after the Minister of the Interior who introduced it but repealed by the Socialists when they came to power in 1981—resurfaces under the expression "humanitarian return". As the "control of migratory flows" had become the primary objective of immigration policies, the French Government came up with the solution of "forcible humanitarian returns", especially when faced with the "difficulty"—recognized by its Minister in charge of National Immigration—of having to "expel Romanians and Bulgarians", whose countries are now members of the EU. Those mechanisms for "humanitarian return" assistance, established by a circular of 2006, were used on several occasions to disguise operations designed to expel those new European citizens. GISTI, an association that defends the rights of foreign workers, points out, for example, that at Bondi on 26 September 2007, at Saint-Denis on 10 October, at Bagnolet on 24 October, and in other cities, the police carried out raids on sites occupied by Roma (Bulgarian and Romanian nationals), loaded the occupants onto specially chartered buses, and gave them the choice between "prison" and immediate departure to their countries of origin "with return assistance". They were not even allowed to take their belongings, or "to present documents that could have proved that they met all the conditions for a prolonged stay in France. Those who were in possession of their passports had them confiscated".²⁶ These forcible returns are all the more striking because the victims are European citizens who enjoy the right of free movement and residence within the EU.

37. In his second report, the Special Rapporteur noted that expulsion does not necessarily presuppose a formal measure, but that it can also derive from the conduct of a State which makes life in its territory so difficult that the alien has no choice other than to leave the country.²⁷ In this

²⁰ Such cases have been reported, notably in *The Sunday Independent* of 9 April 2000, cited by Afrik.com on 15 November 2005. According to the Amnesty International official Sarah Motha: "Police officers arrest all immigrants without discrimination. They pay little attention to the status of the asylum-seeker. We have been told of several cases where police officers pretended not to see the paper attesting to an ongoing application for asylum". There is also talk of "persons arrested while their residence permits were still valid, and of destroyed or confiscated documents".

²¹ See, *inter alia*, the daily *Mutations* (Quotidiennmutations.info), No. 2508, 13 October 2009, p. 5, which reports that "residence permits required from all foreigners, and purchased for about 600,000 CFA francs, were simply confiscated by the law enforcement officials of Equatorial Guinea. In this case, and based on the testimony of the foreigners upon their arrival in Douala, these documents are often torn up by dishonest officials".

²² Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 128.

²³ Goodwin-Gill, *The Refugee in International Law*, p. 155, especially footnote 172.

²⁴ See the Spanish daily *El País*, Madrid, 19 September 2008.

²⁵ For an overview of French legislation on immigration, see Lochak, "Les politiques de l'immigration au prisme de la législation sur les étrangers", available at www.gisti.org/doc/presse/1997/lochak/politique.html (accessed 13 July 2016).

²⁶ GISTI, "Les nouveaux retours humanitaires forcés: un nouveau concept! Un communiqué de GISTI", October 2007. Cheques in the amount of 153 euros for adults and 46 euros for children were offered to the passengers upon arrival in their respective countries of origin.

²⁷ See footnote 16 above.

connection, it is worth noting the decision rendered by the Iran-United States Claims Tribunal after examining various applications related to this form of expulsion which seems disguised. The Tribunal summarized the characteristics of such “constructive expulsion” as follows:

Such cases would seem to presuppose at least that the circumstances in the country of residence are such that the alien cannot reasonably be regarded as having any real choice, and that behind the events or acts leading to the departure there is an intention of having the alien ejected and these acts, moreover, are attributable to the State in accordance with principles of State responsibility.²⁸

38. In the *Eritrea v. Ethiopia* case, the Eritrea-Ethiopia Claims Commission also had to examine the issue of disguised expulsion, although it concluded that there was no disguised expulsion in that case. Ethiopia claimed that Eritrea was responsible for the “indirect” or “constructive” expulsion of Ethiopians, contrary to international law. In rejecting that claim, the Commission concluded that the Ethiopians were not expelled by the Eritrean Government or as a result of Government policy, but instead left for economic reasons or owing to dislocation associated with the war, reasons for which Eritrea was not responsible. The Commission noted that there was a spectrum of “voluntariness” in Ethiopian departures from Eritrea in 1999 and early 2000. Obviously, the evidence suggests that the trip back to Ethiopia or to other destinations could be harsh, particularly for those who had to cross the desert. “However, the evidence does not establish that this was the result of actions or omissions by Eritrea for which it is responsible. Accordingly, Ethiopia’s claims in this respect are dismissed”.²⁹

39. It can therefore be inferred from the foregoing, using *a contrario* reasoning, that the Commission would have accepted the thesis of “indirect” or “constructive” expulsion had the departure of the Ethiopians from Eritrea resulted from actions or omissions by Eritrea. Such conduct, which would have been tantamount to disguised expulsion, would have been contrary to international law.

40. Similarly, the definition of the term “expulsion” contained in the *Declaration of Principles of International Law on Mass Expulsion*, adopted by the International Law Association at its sixty-second conference, in Seoul, also covers situations in which the compulsory departure of individuals is achieved by means other than a formal decision or order by the State. This definition encompasses situations in which a State aids, abets or

tolerates acts committed by its citizens with the intended effect of provoking the departure of individuals from the territory of the State.³⁰

“Expulsion” in the context of the present Declaration may be defined as an act, or failure to act, by a State with the intended effect of forcing the departure of persons, against their will from its territory for reason of race, nationality, membership of a particular social group or political opinion. ...

A “failure to act” may include situations in which authorities of a State tolerate, or even aid and abet, acts by its citizens with the intended effect of driving groups or categories of persons out of the territory of that State, or where the authorities create a climate of fear resulting in panic flight, fail to assure protection to those persons or obstruct their subsequent return.³¹

41. Disguised expulsion is by its nature contrary to international law. First, it violates the rights of persons so expelled and hence the substantive rules pertaining to expulsion, which link a State’s right of expulsion with the obligation to respect the human rights of expelled persons. Second, it violates the relevant procedural rules which gave expelled persons an opportunity to defend their rights.

42. In the light of the above considerations, the following draft article can be proposed:

“Draft article A. Prohibition of disguised expulsion

“1. Any form of disguised expulsion of an alien shall be prohibited.

“2. For the purposes of this draft article, disguised expulsion shall mean the forcible departure of an alien from a State resulting from the actions or omissions of the State, or from situations where the State supports or tolerates acts committed by its citizens with a view to provoking the departure of individuals from its territory.”

43. It can be said that this draft article presents aspects both of the codification of a new inductive rule and the progressive development of international law. Although the provisions of this draft article are not based formally on existing treaty provisions or on an established rule of customary international law, they derive from two points. First, as we indicated earlier, the practice of disguised expulsion undermines both the obligation to respect the general guarantees offered to aliens, in particular aliens legally present in the host State, and the procedural rules for expelling such aliens. Second, the practice is widely criticized by civil society in the States in question.

C. Extradition disguised as expulsion

44. The expulsion of an alien may take the form of disguised extradition. Even when the two procedures lead to the same result, namely the removal of the alien from the territory of the State where he resides, they differ in many respects in terms of both substantive and procedural requirements. It should be recalled that extradition is an inter-State procedure whereby one State surrenders to another State, at the request of the latter, a person on its territory who is subject to “a criminal

²⁸ Harris, *Cases and Materials on International Law*, p. 502 (commenting on the decisions of the Iran-United States Claims Tribunal concerning “constructive expulsion”). See also Gaja, “Expulsion of aliens: some old and new issues in international law”, p. 290, which cited the following decisions of the Tribunal: *Short v. Iran*, judgement of 14 July 1987, 16 *Iran-United States Claims Tribunal Reports* (1987-III), pp. 85–86; *International Technical Products Corporation v. Iran*, judgement of 19 August 1985, 9 *Iran-United States Claims Tribunal Reports* (1985-II), p. 18; *Rankin v. Iran*, judgement of 3 November 1987, 17 *Iran-United States Claims Tribunal Reports* (1987-IV), pp. 147–148; Malanczuk, *Akehurst’s Modern Introduction to International Law*, p. 262; Crook, “Applicable law in international arbitration: the Iran-U.S. Claims Tribunal Experience”, pp. 308–309; and Cove, “State responsibility for constructive wrongful expulsion of foreign nationals”.

²⁹ *Eritrea-Ethiopia Claims Commission, Partial Award, Civilians Claims, Eritrea’s Claims*, 15, 16, 23 and 27–32, The Hague, 17 December 2004, para. 95. See also ILM, vol. 44 (2005), p. 630.

³⁰ See memorandum by the Secretariat (footnote 18 above), para. 72.

³¹ International Law Association (see footnote 7 above), p. 13.

prosecution or sentence by the second party and is sought to stand trial or to serve a sentence there".³² This is a procedure that can have far-reaching consequences for the human rights and individual freedoms of the person in question. In fact:

Ordinary law, as laid down in existing extradition conventions ... considers the surrender of an offender to foreign courts to be a serious action which, out of respect for individual freedom and honour to the State, must be subject to strict substantive and procedural safeguards.³³

This is why "disguised" extradition is generally condemned under international law. As one author has written:

Disguised extradition stems from seeming agreements and seemingly lawful agreements which in fact constitute an abuse of procedure. Their true purpose, kept secret, is to obtain an extradition by using a parallel procedure which generally has another purpose but which, in the particular case, achieves the same result.³⁴

45. First of all, the terminology must be clarified in the light of the distinction suggested by some authors between "disguised extradition" and "*de facto* extradition".³⁵ The expression "disguised extradition" may have a negative connotation since it implies an ulterior motive which may indicate an abuse of right or bad faith. In contrast, the term "*de facto* extradition" may have a neutral connotation since it implies the recognition of an additional consequence of the expulsion of an alien as a factual matter. One author has written the following on this subject:

It is undoubtedly true that, where the destination selected is one at which the authorities are anxious to prosecute or punish the deportee for a criminal offence, the deportation may result in a *de facto* extradition. Thus it has become usual to describe such deportation as "disguised extradition", but it would seem advisable to use this term with caution. A true "disguised extradition" is one in which the vehicle of deportation is used with the prime motive of extradition. This would appear most clearly, for example, where the fugitive, a national of A, enters the territory of B from State C, but is deported to State D, where he is wanted on criminal charges. Examples, however, of such blatant disguised extradition are rare. Where deportation is ordered to the State of embarkation or the national State, the description "disguised extradition" is really a conclusion drawn by the authors of it as to the mind of the deporting authorities. While the motive of restoring a criminal to a competent jurisdiction may indeed be uppermost in the intention of the deporting State, it may also in many cases be a genuine coincidence that deportation has this result. It is proposed therefore to use the neutral term "*de facto* extradition" here.³⁶

46. While the distinction between disguised and *de facto* extradition may be useful, it does not appear to have been uniformly recognized in practice. The notion of disguised extradition has been described as follows:

In the practice known as "disguised extradition", the usual procedure is for the individual to be refused admission at the request of a foreign State, and for him to be deported to that or any other State which wishes to prosecute or punish him. The effect is to override those usual provisions of municipal law which commonly permit the legality of extradition proceedings to be contested and allow for the submission of evidence to show that the individual is being pursued for political reasons.

While the legality of the resort to immigration laws for such purposes has long been controversial, it may also be argued that the immigration laws have a supporting role to play in the international control of criminals, and that therefore *de facto* extraditions made under those laws are justified. It may indeed be a little spurious to demand the use of extradition proceedings in a State which has already decided, as a matter of immigration policy, that the alien will not be allowed to remain. Be that as it may, the established and primary purpose of deportation is to rid the State of an undesirable alien, and that purpose is achieved with the alien's departure. His destination, in theory, should be of little concern to the expelling State, although in difficult cases it may put in issue the duty of another State to receive its national who has nowhere else to go. Unlike extradition, which is based on treaty, expulsion gives no rights to any other State and, again in theory, such State can have no control over the alien's destination.

... The case for simplified extradition procedures will continue to be strongly argued, particularly between allied or friendly States. Delay and expense are reduced, and expulsion under the immigration laws circumvents the inconveniences of a weak case, the absence of the offence charged from the extradition treaty, and even the lack of a treaty itself. Yet it is apparent that modern expulsion laws have been developed with some regard being paid to the requirements of due process and to the desirability of a right of appeal. To this extent, these laws reflect the growth of human rights principles and they may be taken as some evidence of contemporary State attitudes to the rights of individuals.³⁷

47. In fact, the issue of disguised extradition engaged the attention of judges and legal commentators at a very early stage. Shearer traces the use of the term "disguised extradition" to the decision of a French court in the mid-nineteenth century: "The term *extradition déguisée* was used as early as 1860 by a French court".³⁸ In 1892, the Institute of International Law declared that "the fact that extradition has been refused does not mean that the right to deport has been renounced" and that "a deportee who has taken refuge in a territory in order to avoid criminal prosecution may not be handed over, by devious means, to the prosecuting State unless the conditions for extradition have been duly met".³⁹ Much later, in 1983, the Institute of International Law recalled that the "fact that the extradition of an alien may be forbidden by municipal law should not prevent his expulsion by legal procedures".⁴⁰

48. There is no explicit statement in treaty law on the illegality of extradition disguised as expulsion and while national courts, as we shall see, offer an abundance of precedents on this issue, international case law here is in short supply. However, the European Court of Human Rights, following the French courts, unambiguously declared the illegality of such a practice in the case of *Bozano v. France*⁴¹ by referring to article 5, paragraph 1, of the European Convention on Human Rights.

49. These are the facts of the case: Mr. Bozano, an Italian national, was arrested by the Italian police on 9 May 1971, released on 12 May, then rearrested on 20 May, for abusing and murdering a 13-year-old Swiss girl, Milena Sutter, in Genoa, Italy, on 6 May 1971. He was also charged with indecency and assault with violence against four women. On 15 June 1973, after several months of

³² Cornu, *Vocabulaire juridique*, p. 395.

³³ Decocq, "La livraison des délinquants en dehors du droit commun de l'extradition", p. 412; see also Rouget, "Le respect du droit extraditionnel et les extraditions déguisées", p. 169.

³⁴ Lombois, *Droit pénal international*, p. 563.

³⁵ See memorandum by the Secretariat (footnote 18 above), paras. 432 and 433.

³⁶ Shearer, *Extradition in International Law*, p. 78.

³⁷ Goodwin-Gill, "The limits of the power of expulsion in public international law", pp. 91-93.

³⁸ Shearer (footnote 36 above), p. 78, footnote 2 (citing Decocq, footnote 33 above).

³⁹ Institute of International Law, "Règles internationales...".

⁴⁰ Institute of International Law, Resolution of 1 September 1983 on "New Problems of Extradition", art. VIII, para. 2.

⁴¹ ECHR, judgement of 18 December 1986, application No. 9990/82, *Series A*, No. 111. See also ILR, vol. 86, pp. 322 *et seq.*

hearings, the Genoa Assize Court sentenced him to two years and 15 days' imprisonment for offences committed against one of the four women and acquitted him of the other offences, including that committed against Milena Sutter, for lack of evidence. The prosecution appealed. However, following the commencement of the trial, the accused applied for an adjournment, arguing, on the basis of a medical certificate, that he had been hospitalized for ill health. The Genoa Assize Court of Appeal found that he was deliberately refusing to appear and proceeded with the trial. Following other procedural considerations, on 22 May 1975, the Court sentenced Mr. Bozano *in absentia* to life imprisonment for the offences committed against Milena Sutter and to four years' imprisonment for the other offences. The Court held that there were no extenuating circumstances. On 25 March 1976, the Italian Court of Cassation dismissed Mr. Bozano's appeal; the Public Prosecutor's Office of Genoa thereupon issued a committal order and an international arrest warrant was circulated by the Italian police on 1 April 1976.

50. In January 1979, the gendarmerie of France arrested Mr. Bozano in the *département* of Creuse during a routine check and, on the same day, he was taken into custody at Limoges Prison in the *département* of Haute-Vienne. On 15 May 1979, the Indictment Division of the Limoges Court of Appeal, to which the case had been submitted, ruled against the extradition of Mr. Bozano to Italy because it held that the procedure for trial *in absentia* followed by the Genoa Court of Appeal was incompatible with French public policy. Its ruling was final by virtue of article 17 of the French Act on the extradition of aliens dated 10 March 1927.

51. On the evening of 26 October 1979, at about 8.30 p.m., three plain-clothes policemen, at least one of whom was armed, stopped Mr. Bozano as he was returning home, handcuffed him and drove him to police headquarters. They served him with the following order, which had been made more than a month earlier and was signed by the Minister of the Interior and addressed to the Prefect of Haute-Vienne:

The Ministry of the Interior

Having regard to Article 23 of the Aliens (Conditions of Entry and Residence) Ordinance of 2 November 1945,

Having regard to the Decree of 18 March 1946,

Having regard to information obtained concerning Lorenzo BOZANO, born on 3 October 1945 in GENOA (Italy),

Deeming that the presence of the above-mentioned alien on French territory is likely to jeopardize public order (*ordre public*),

By this order requires:

1. the above-named to leave French territory;
2. the Prefects to execute this order.⁴²

52. Although Mr. Bozano opposed "deportation" and asked to be brought before the Appeals Board provided for in article 25 of the Ordinance of 2 November 1945, he was told that this was out of the question and that he "was going to be taken at once to Switzerland (and not

to the Spanish border, which was the nearest frontier)".⁴³ Accordingly, without being allowed to leave France for a country of his choice or to inform his wife or his lawyer, he was placed inside a vehicle in handcuffs and expelled to Switzerland via the frontier near Annemasse, where he was handed over to the Swiss police.

53. It should be recalled that in 1976, Italy, to which Switzerland is bound by the European Convention on Extradition, had requested Switzerland to extradite Mr. Bozano. Having been expelled by France to Switzerland, Mr. Bozano was then extradited to Italy on 18 June 1980 after the Swiss Federal Court had rejected his objection of 13 June.

54. However, in December 1979, Mr. Bozano's lawyer applied to the French courts in order to obtain his return to France. On 14 January 1980, the presiding judge of the *tribunal de grande instance* made an order preceded by reasons which read as follows:

The various events between Bozano's being apprehended and his being handed over to the Swiss police disclose manifest and very serious irregularities both from the point of view of French public policy (*ordre public*) and with regard to the rules resulting from application of Article 48 of the Treaty of Rome. Moreover, it is surprising that precisely the Swiss border was chosen as the place of deportation although the Spanish border is nearer Limoges. Lastly, it may be noted that the courts have not been given an opportunity of making a finding as to the possible infringements of the deportation order issued against him, because as soon as the order was served on him, Bozano was handed over to the Swiss police, despite his protests. The executive thus itself implemented its own decision.

It therefore appears that this operation consisted, not in a straightforward expulsion on the basis of the deportation order, but in a prearranged handing over to the Swiss police.⁴⁴

55. In its judgement of 18 December 1986, the European Court of Human Rights confirmed this reasoning, in particular the description of "disguised extradition", in the following terms:

Viewing the circumstances of the case as a whole and having regard to the volume of material pointing in the same direction, the Court consequently concludes that the applicant's deprivation of liberty in the night of 26 to 27 October 1975 was neither "lawful", within the meaning of Article 5 (1)(f), nor compatible with the "right to security of person". Depriving Mr. Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of 15 May 1979 by the Indictment Division of the Limoges Court of Appeal, and not to "detention" necessary in the ... ordinary course of "action ... taken with a view to deportation". The findings of the presiding judge of the Paris *tribunal de grande instance*—even if *obiter*—and of the Limoges Administrative Court, even if that court had only to determine the lawfulness of the order of 17 September 1979, are of the utmost importance in the Court's view; they illustrate the vigilance displayed by the French courts.

There has accordingly been a breach of Article 5 (1) of the Convention.⁴⁵

56. Doctrine shares this approach. The author of a commentary on article 5 of the European Convention on Human Rights, reflecting European Court of Human Rights jurisprudence in 1986, notes that the two requirements contained in article 5, paragraph 1, of the European Convention on Human Rights are, on the one hand,

⁴³ *Ibid.*, para. 25.

⁴⁴ *Ibid.*, para. 31.

⁴⁵ *Ibid.*, para. 60.

⁴² ECHR, judgement of 18 December 1986, application No. 9990/82, *Series A*, No. 111, para. 24.

respect for domestic law, which is incorporated in the Convention through the expression “in accordance with a procedure prescribed by law” and, on the other hand, compatibility with the purpose of this article, which is to “protect the individual from arbitrariness”, as stated by the Court in the *Bozano* case.⁴⁶ In this instance, arbitrariness arose from the circumstances in which the expulsion order was implemented: not informing Mr. Bozano about a decision taken one month earlier and implementing that decision at the same time that he received notification; not giving him the choice of host country⁴⁷ or taking him to the closest border; and, lastly, handing him over to Switzerland, to which Italy was bound by an extradition convention, which had been notified by the International Criminal Police Organization (INTERPOL) about his imminent expulsion and which was the State of nationality of the victim for whose murder Mr. Bozano had been sentenced in Italy. The author concludes:

This expeditious form of police cooperation is neither lawful within the meaning of article 5, nor is it compatible with the right to security; the deprivation of liberty imputable to France arises from its prerogative to expel and is merely arbitrary detention in the service of disguised extradition (*Bozano* case, paras. 55 to 60).⁴⁸

Another author states, more simply, that the first ruling against France by the European Court of Human Rights occurred with the *Bozano* case “in a particular judicial context involving ‘disguised extradition’ to Italy, where Mr. Bozano had been sentenced *in absentia* for a sordid crime”.⁴⁹

57. The issue of disguised extradition was raised again in the case of *Öcalan v. Turkey*.⁵⁰ In the light of the judgement handed down by the European Court of Human Rights in this case, the facts of the case may be summarized as follows: Mr. Abdullah Öcalan is a Kurd from Turkey. Prior to his arrest, he was the leader of the Kurdistan Workers’ Party (PKK). On 9 October 1998, Mr. Öcalan was expelled from the Syrian Arab Republic, where he had been living for many years. He arrived the same day in Greece, where the Greek authorities asked him to leave Greek territory within two hours and refused his application for political asylum. On 10 October 1998, he travelled to Moscow in an aircraft that had been chartered by the Greek secret services. His application for political asylum in the Russian Federation was accepted by the Duma, but the Russian Federation Prime Minister did not implement that decision. On 12 November, Mr. Öcalan went to Rome, where he made an application for political asylum. The Italian authorities initially detained

him but subsequently placed him under house arrest. Although they refused to extradite him to Turkey, they also rejected his application for refugee status. Mr. Öcalan had to bow to pressure for him to leave Italy. After spending one or two days in the Russian Federation, he returned to Greece, probably on 1 February 1999. The following day, 2 February 1999, he was taken to Kenya. He was met at Nairobi Airport by officials from the Greek Embassy and accommodated at the Greek Ambassador’s residence. He lodged an application with the Greek Ambassador for political asylum in Greece, but never received a reply. On 15 February 1999, the Kenyan Ministry of Foreign Affairs announced that Mr. Öcalan had been on board an aircraft that had landed at Nairobi and had entered Kenyan territory accompanied by Greek officials without declaring his identity or going through passport control. On the final day of his stay in Nairobi, he was informed by the Greek Ambassador, after the latter had returned from a meeting with the Kenyan Minister of Foreign Affairs, that he was free to leave for the destination of his choice and that the Netherlands was prepared to accept him. On 15 February 1999, Kenyan officials went to the Greek Embassy to take Mr. Öcalan to the airport. The Greek Ambassador said that he wished to accompany the applicant to the airport in person and a discussion between the Ambassador and the Kenyan officials ensued. In the end, Mr. Öcalan got into a car driven by a Kenyan official. On the way to the airport, this vehicle left the convoy and, taking a route reserved for security personnel in the international transit area of Nairobi Airport, took Mr. Öcalan to an aircraft in which Turkish officials were waiting for him. He was arrested after boarding the aircraft at approximately 8 p.m.⁵¹

58. The Turkish courts had issued seven warrants for Mr. Öcalan’s arrest, and a wanted notice (“Red Notice”) had been circulated by INTERPOL. In each of those documents he was accused of founding an armed gang in order to destroy the territorial integrity of the Turkish State and of instigating various terrorist acts that had resulted in loss of life.⁵²

59. During the proceedings before the European Court of Human Rights, the applicant pointed out that no extradition procedure had been initiated against him in Kenya, and that the Kenyan authorities had not accepted responsibility for transferring him to Turkey. Mere collusion between unauthorized Kenyan officials and the Government of Turkey could not be characterized as cooperation between States. According to the defendant, his arrest was the result of an operation planned in Turkey, Italy and Greece, as well as in other States. Citing the case of *Bozano v. France*, he stressed the need to protect the individual’s liberty and security from arbitrariness. He said that in the instant case “his forced expulsion had amounted to extradition in disguise and had deprived him of all procedural and substantive protection”.⁵³ He pointed out in that regard that the requirement of lawfulness under article 5, paragraph 1, applied to both international and domestic law. For the applicant, the decision of the European Commission of Human Rights in the case

⁴⁶ *Ibid.*, para. 54. See also Coussirat-Coustère, “La jurisprudence de la Cour européenne des droits de l’homme en 1986”, p. 245.

⁴⁷ As was underlined by Charles Rousseau during the *Klaus Barbie Case* (in that case, France had requested the extradition of Mr. Barbie for crimes against humanity; while the Supreme Court of Bolivia had opposed this in the absence of an extradition convention between the two States, Bolivia proceeded to expel Mr. Barbie to France): “Expulsion should leave expelled persons free to return to the country of their choice. It should not hand them over to representative of a foreign State for their subsequent arrest and transfer to the territory of that State” (Charles Rousseau, note on the judgement of the Criminal Division of the French Court of Cassation dated 6 October 1983, RGDIP, 1984, p. 510).

⁴⁸ See Coussirat-Coustère (footnote 47 above), p. 245.

⁴⁹ Decaux, “Le droit international, malgré tout ...”, p. 54.

⁵⁰ ECHR, application No. 46221/99, judgement of 12 May 2005, *Reports of Judgments and Decisions*, 2005-VI.

⁵¹ *Ibid.*, paras. 14, 15, 16 and 17.

⁵² *Ibid.*, para. 18.

⁵³ *Ibid.*, para. 77.

of *Ramirez Sánchez v. France*⁵⁴ was not relevant to the present case. Whereas in the aforementioned case there had been cooperation between France and the Sudan, the Kenyan authorities had not cooperated with the Turkish authorities in the instant case. In the former case, the European Commission of Human Rights had taken the view that Mr. Ramirez Sánchez was indisputably a terrorist. The extremely sensitive nature of the question touched upon in this case certainly was a factor in the decision of the Court. The extent to which terrorism has become a bogeyman is well known. The applicant and the Kurdistan Workers' Party stated that they had had recourse to the use of force in order to assert the right of the population of Kurdish origin to self-determination. Relying on the case law of various national courts,⁵⁵ the applicant maintained that the arrest procedures followed did not comply with Kenyan law or the rules established by international law, that his arrest amounted to abduction and that his detention and trial, which were based on that unlawful arrest, had to be regarded as null and void.

60. The Court accepted the Turkish Government's version of events rather than that of the applicant. According to the Government of Turkey, "The applicant had been apprehended by the Kenyan authorities and handed over to the Turkish authorities by way of cooperation between the two States". For the Government of Turkey, "There had been no extradition in disguise: Turkey had accepted the Kenyan authorities' offer to hand over the applicant, who was in any event an illegal immigrant in Kenya".⁵⁶ Following this line of argument, the Court stated:

86. The Convention does not prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that it does not interfere with any specific rights recognised in the Convention (*ibid.*, pp. 24–25, § 169).

87. As regards extradition arrangements between States when one is a party to the Convention and the other not, the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the States concerned are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the Court was lawful. The fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful or, therefore, give rise to any problem under Article 5 (see *Freda v. Italy*, No. 8916/80, Commission decision of 7 October 1980, DR 21, p. 250; *Altmann (Barbie) v. France*, No. 10689/83, Commission decision of 4 July 1984, DR 37, p. 225; and *Reinette v. France*, No. 14009/88, Commission decision of 2 October 1989, DR 63, p. 189).⁵⁷

The Court subsequently added:

Subject to it being the result of cooperation between the States concerned and provided that the legal basis for the order for the

fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an atypical extradition cannot as such be regarded as being contrary to the Convention (see *Ramirez Sánchez*, cited above).⁵⁸

61. Thus, the European Court of Human Rights believes that, in and of itself, disguised extradition does not run counter to the European Convention on Human Rights if it is the result of cooperation between the States involved and if the transfer is based on an arrest warrant issued by the authorities of the country of origin of the person concerned.⁵⁹ Despite this position taken by the Court, the facts seem to confirm its position in the *Bozano* case. It is highly likely that if the facts of the case had not been related to terrorism cases, the Court would have had no difficulty in confirming the case law set forth in *Bozano*.

62. United States practice seems to be consistent with this position confirmed in the *Öcalan* case rather than with the one asserted by the *Bozano* decision. Thus, in late 2001, the United States sought the cooperation of the European Union in the context of its immigration policies and anti-terrorism efforts, and requested that it explore "alternatives to extradition including expulsion and deportation, where legally available and more efficient".⁶⁰

63. The courts of a number of States have had occasion to assess whether an expulsion was in fact a disguised extradition.⁶¹ In some cases, these courts have considered the purpose of the expulsion and the intention of the States in order to issue an opinion.⁶²

⁵⁸ *Ibid.*, para. 89.

⁵⁹ See also European Commission of Human Rights, decision of 4 July 1984, *Klaus Altmann (Barbie) v. France*, appeal No. 10689/83, *Decisions and Reports* 37, p. 225; European Commission of Human Rights, decision of 24 June 1996, *Ramirez Sánchez v. France*, appeal No. 28780/95, *Decisions and Reports* 86-B; ECHR, judgement of 12 March 2003, *Öcalan v. Turkey*, para. 91, confirmed by the European Court of Human Rights, judgement of 12 May 2005, *Reports of Judgments and Decisions* 2005-IV, para. 89.

⁶⁰ Text of letter from the President of the United States George W. Bush with proposals for European Union cooperation, 16 October 2001, www.statewatch.org. For the complete text of the letter see www.statewatch.org/news/2001/nov/06Ausale.htm (accessed 8 September 2015). See also Champeil-Desplats, "Les conséquences du 11 septembre 2001 sur le droit des étrangers: perspective comparative".

⁶¹ See, for example, *Barton v. Commonwealth of Australia*, High Court, 20 May 1974, ILR, vol. 55, pp. 11–37; *Lülf v. State of the Netherlands*, The Hague Court of Appeal, 17 June 1976, *ibid.*, vol. 74, pp. 424–426; *R. v. Bow Street Magistrates, ex parte Mackeson*, High Court of England (Divisional Court), 25 June 1981, *ibid.*, vol. 77, pp. 336–345; *R. v. Guildford Magistrates' Court, ex parte Healy*, High Court of England (Divisional Court), 8 October 1982, *ibid.*, vol. 77, pp. 345–350; *Mackeson v. Minister of Information, Immigration and Tourism and Another*, Zimbabwe Rhodesia, High Court, General Division, 21 November 1979, *ibid.*, vol. 88, pp. 246–259; *Residence Prohibition Order Case (2)*, Federal Republic of Germany, Superior Administrative Court of Munster, 1 October 1968, *ibid.*, vol. 61, pp. 433–436; *Muller v. Superintendent, Presidency Jail, Calcutta, and Others*, Supreme Court of India, *ibid.*, vol. 22, pp. 497–500; *Mohamed and Another v. President of the Republic of South Africa and Others, ibid.*, vol. 22, p. 469. In analysing contested expulsions and their consequences, courts have looked in particular at the form, the substance and the purpose of disputed procedures. The examples of national case law referred to in paragraphs 63 to 68 of this report come from the memorandum by the Secretariat (footnote 18 above), paras. 438–442.

⁶² "[T]here was no question of veiled extradition, because there had been no evidence that the State had influenced West Germany's decision to withdraw the request for extradition, and the State reasonably

⁵⁴ Application No. 28780/95, decision of 24 June 1996, *Decisions and Reports*, vol. 86-B, p. 155.

⁵⁵ See, in particular, the United Kingdom House of Lords decision in *R. v. Horseferry Road Magistrates' Court, ex parte Bennett*, *Law Reports Appeal Cases* 1994, vol. 1, p. 42; the decision of the Court of Appeal of New Zealand in *Reg. v. Hartley*, *New Zealand Law Reports* 1978, vol. 2, p. 198; the decision of the United States Court of Appeals for the Second Circuit in *United States v. Toscanino* (1974), 500 F.2d 267, at pp. 267–268; the decision of 28 May 2001 of the Constitutional Court of South Africa in *Mohamed and Dalvie v. The President of the Republic of South Africa and Others*, *South African Law Reports* 2001, vol. 3, p. 893 (CC).

⁵⁶ *Öcalan v. Turkey*, *Reports of Judgments and Decisions* 2005-IV, para. 81.

⁵⁷ *Ibid.*, paras. 86 and 87.

64. In this regard, attention may be drawn to a case decided by the Constitutional Court of South Africa. The applicants challenged the lawfulness of the removal of Mr. Mohamed to the United States by invoking that such a deportation constituted a disguised extradition. The Court decided the case based on other considerations, namely the fact that the surrender of Mr. Mohamed to the United States, where he would face the death penalty, was contrary to the Constitution of South Africa. Nonetheless, the Court's consideration of the distinction between deportation and extradition may be of interest for present purposes:

Deportation and extradition serve different purposes. Deportation is directed to the removal from a state of an alien who has no permission to be there. Extradition is the handing over by one state to another state of a person convicted or accused there of a crime, with the purpose of enabling the receiving state to deal with such person in accordance with the provisions of its law. The purposes may, however, coincide where an illegal alien is "deported" to another country which wants to put him on trial for having committed a criminal offence the prosecution of which falls within the jurisdiction of its courts.

Deportation is usually a unilateral act while extradition is consensual. Different procedures are prescribed for deportation and extradition, and those differences may be material in specific cases, particularly where the legality of the expulsion is challenged. In the circumstances of the present case, however, the distinction is not relevant. The procedure followed in removing Mohamed to the United States of America was

(Footnote 62 continued.)

felt obliged to hand over the West German to the West German border police since only West Germany was bound to admit him, and the State was justified in assuming that no other country would be willing to admit him since he had no valid travel document" (*Lülf* (see preceding footnote), p. 426). "If, therefore, the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America because they had asked for him, then it would be unlawful. But if the Home Secretary's purpose was to deport him to his own country because the Home Secretary considered his presence here to be not conducive to the public good, then the Home Secretary's action is lawful. It is open to these courts to inquire whether the purpose of the Home Secretary was a lawful or an unlawful purpose" (*Reg v. Governor of Brixton Prison, ex parte Soblen*, ILR, p. 280). "There is no ground whatever for supposing the police have tried to persuade the United States' authorities to deport this applicant so that they could arrest him in this country and thus circumvent the provisions of the extradition treaty between the two countries" (*R. v. Guildford Magistrates' Court, ex parte Healy* (see preceding footnote), p. 348). "Put simply, the question is this: Was the power to detain the petitioner exercised for the purpose of ensuring the expulsion from this country of an undesirable inhabitant—a person whose continued presence is not conducive to public good? Or was such power exercised for the ulterior purpose of removing to the United Kingdom, in the interests of justice generally, a person accused of having transgressed the laws of that country?" (*Mackeson v. Minister of Information, Immigration and Tourism and Another* (see preceding footnote), p. 251). "Similarly, expulsion may not be ordered as a means of evading this prohibition against extradition. However, such expulsion is deemed inadmissible only where it has become evident that the intention of the authorities was to avoid the restrictive regulations on extradition" (*Residence Prohibition Order Case (2)* (see preceding footnote), p. 435). See also *Lopez de la Calle Gauna*, Conseil d'État, France, 10 April 2002 (expulsion to State of nationality is allowed even if criminal charges are pending there so long as no request for extradition has been submitted). But see, "[T]he fact that a request [for extradition] has been made does not fetter the discretion of the Government to choose the less cumbersome procedure [of expulsion] of the Aliens Act when a foreigner is concerned, provided always that in that event the person concerned leaves India a free man" (*Muller case* (see preceding footnote), p. 500). "If the petitioner, outside of our territory, were not left at liberty but were to be sent to Italy [where criminal charges for political activities were likely], there would really be carried out a true extradition which the Italian Government has not requested and which the Brazilian Government has not decided to grant" (*In re Esposito*, Federal Supreme Court of Brazil, 25 July 1932, *Annual Digest and Reports of Public International Law Cases*, 1933–1934, p. 333).

unlawful whether it is characterised as a deportation or an extradition. Moreover, an obligation on the South African government to secure an assurance that the death penalty will not be imposed on a person whom it causes to be removed from South Africa to another country cannot depend on whether the removal is by extradition or deportation. That obligation depends on the facts of the particular case and the provisions of the Constitution, not on the provisions of the empowering legislation or extradition treaty under which the "deportation" or "extradition" is carried out.⁶³

65. In an early case, the Supreme Court of India recognized the principle of the freedom of choice of the State in determining the procedure for compelling the departure of an alien from its territory:

The Aliens Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision limiting this discretion in the Constitution, an unrestricted right to expel remains.

...

The Aliens Act is not governed by the provisions of the Extradition Act. The two are distinct and neither impinges on the other. Even if there is a request and a good case for extradition, the Government is not bound to accede to the request ... Therefore, if it chooses not to comply with the request, the person against whom the request is made cannot insist that it should. The right is not his; and the fact that a request has been made does not fetter the discretion of the Government to choose the less cumbersome procedure of the Aliens Act when a foreigner is concerned, provided always that in that event the person concerned leaves India a free man. If no choice had been left to the Government, the position would have been different; but as the Government is given the right to choose, no question of lack of good faith can arise merely because it exercises the right of choice which the law confers. This line of attack on the good faith of the Government falls to the ground.⁶⁴

66. In the *Barton* case, the High Court of Australia examined the situation where the Government of Australia requested the extradition of an Australian national from Brazil. The Court noted that the Australian Government made the following request through its diplomatic channels:

In the absence of an Extradition Treaty between Brazil and Australia, the Embassy has the honour to request that the detention action be taken under the terms of Article 114 of decree law 66.689 of 11 June 1970. Although similar legislation does not exist in Australian law, there are deportation procedures under the Migration Act which, with the approval of Ministers, could be applied in the event of a fugitive being sought by Brazil from Australia.⁶⁵

67. While the Court held that the request for extradition was lawful, it held that the reciprocity requirement for extradition without an extradition treaty could not be satisfied by reference to provisions of law relating to deportation, since the two procedures were distinct. Chief Justice Barwick pointed out:

In contrast to extradition as a means of surrender, most countries exercise a right of expulsion of persons whose continued presence in the country is considered undesirable. Where this right of expulsion is the subject of statutory regulation, as it usually is in common law countries, there are limitations upon its exercise, often involving and limiting the purpose which may prompt the expulsion. At times, questions may arise as to whether the actual purpose of the expulsion is impermissible and whether in truth an unauthorized, or what a writer has called "disguised extradition" (see O'Higgins in 27 Mod LR 521), is on foot. Clearly, a power of expulsion, as for example under migration or immigration laws, is no equivalent of a power to extradite. It is an unsatisfactory practice, from an international as well as a domestic

⁶³ *Mohamed case* (footnote 61 above), pp. 486–487, paras. 41–42.

⁶⁴ *Muller case* (footnote 61 above), pp. 498–500.

⁶⁵ *Barton case* (footnote 61 above), p. 12.

point of view, to employ a power of expulsion as such a substitute. Further, an executive, being bound by statute as to the occasions for and purposes of expulsion, cannot validly agree to employ that power as a general equivalent to a power to extradite, however much on occasions the expulsion may serve as an extradition in an individual case because of its circumstances. There are obvious objections to the use of immigration or expulsive powers as a substitute for extradition: see Shearer, *Extradition in International Law*, pp. 19, 87–90; see also O'Higgins, *Disguised Extradition*, 27 Mod LR 521–539; *Hackworth's Digest of International Law*, vol. 4, p. 30.

...

Thus, where the power to surrender does not exist apart from statute, as is the case in Australia, the requesting country cannot with propriety offer reciprocity in respect of persons or crimes falling outside the scope of the relevant legislation or with States to which the legislation does not apply. Nor could a country pledge itself to use its power of expulsion as a power to extradite so as to satisfy the need of reciprocity. For reasons to which I have briefly adverted, the limited purpose for which the power of expulsion may properly be used renders it quite inadequate to support an assurance of extradition of any fugitive on request. Thus, in the case of Australia, the Migration Act 1958–1966 could not serve as an equivalent of the power of extradition, nor could that Act's existence warrant an assurance of reciprocal treatment in extradition. But, of course, it is for the requested State to decide for itself whether or not it is satisfied with an assurance of reciprocity.⁶⁶

68. With regard to the consequences of disguised extradition, the issue was raised in *R. v. Bow Street Magistrates, ex parte Mackeson*,⁶⁷ in which the High Court of England examined whether it could proceed in considering the case of an alien who had been expelled from Zimbabwe, with the purpose of effecting a disguised extradition. The Court stated as follows:

Whatever the reason for the applicant being at Gatwick Airport on the tarmac, whether his arrival there had been obtained by fraud or illegal means, he was there. He was subject to arrest by the police force of this country. Consequently the mere fact that his arrival there may have been procured by illegality did not in any way oust the jurisdiction of the Court.⁶⁸

69. Nevertheless, the Court exercised its discretion not to exercise jurisdiction over the case, as an equitable remedy.⁶⁹

70. The practice of extradition disguised as expulsion is nevertheless inconsistent with positive international law. It may be considered contrary to article 9, paragraph 1, of the International Covenant on Civil and Political Rights, which provides that:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

⁶⁶ *Ibid.*, pp. 14–16. “However, expulsion may under these circumstances be unlawful under municipal law. Should this be the case, as the Federal Court of Australia noted in *Schlieske v. Minister for Immigration and Ethnic Affairs*, the ‘distinction ... between a deportation for the purpose of extradition (‘disguised extradition’) and a deportation for immigration control purposes which incidentally effects a *de facto* extradition’ may be ‘difficult of practical application’” (Gaja (footnote 28 above), p. 299 (quoting judgement of 8 March 1988, *Australian Law Reports*, vol. 84, pp. 719–725)).

⁶⁷ *R. v. Bow Street Magistrates, ex parte Mackeson* (footnote 61 above), p. 343. In reaching its conclusion, the Court relied heavily on the findings of the Zimbabwe-Rhodesia High Court in the *Mackeson v. Minister of Information, Immigration and Tourism and Another* case (footnote 61 above).

⁶⁸ *R. v. Bow Street Magistrates, ex parte Mackeson* (footnote 61 above), p. 343.

⁶⁹ *Ibid.*, pp. 336–345.

Furthermore, article 13 authorizes the expulsion of an alien lawfully in the territory of a State party only “in pursuance of a decision reached in accordance with law”.

71. As regards case law, the judgement of the European Court of Human Rights in the *Bozano* case finds support in the decision of the Human Rights Committee in *Cañón García v. Ecuador*,⁷⁰ even though the explicit grounds for the decision were not disguised extradition. The latter case involved the expulsion of a Colombian national from Ecuador to the United States, where he had been charged with drug trafficking. It was found that the United States Government had not applied the provisions of the extradition treaty signed by the two countries concerned because it questioned whether the Ecuadorian authorities would agree to extradite the applicant. The party concerned was not able to speak to counsel or to request that an Ecuadorian judge examine the lawfulness of his expulsion. On the basis of the recognition by the authorities of the expelling State that the expulsion had involved procedural irregularities, the Committee found that articles 9 and 13 of the Covenant had been violated.⁷¹

72. A number of decisions have been handed down by international courts on the subject. Nevertheless, the clarity and relevance of the grounds invoked by national courts and, later, by the European Court of Human Rights to condemn the practice of extradition disguised as expulsion, as well as the support in the literature for this case law, reveal the *Bozano* decision as a trend indicator. Accordingly, rather than speaking of the codification of a customary rule prohibiting the practice of expulsion for extradition purposes, this rule could be established as part of progressive development.

“Draft article 8. Prohibition of extradition disguised as expulsion

“Without prejudice to the standard extradition procedure, an alien shall not be expelled without his or her consent to a State requesting his or her extradition or to a State with a particular interest in responding favourably to such a request.”

D. Grounds for expulsion

73. It is recognized that while the conditions for admission of aliens into the territory of a State fall under its sovereignty and therefore its exclusive competence, a State may not at will strip them of their right of residence. “An expulsion must be ordered only on the basis of good reason, on serious grounds of public interest and public necessity that render it imperative.”⁷² Most of the literature on the expulsion of aliens has been consistent with that position at least since the end of the nineteenth century.⁷³

⁷⁰ Report of the Human Rights Committee (A/47/40), views of 5 November 1991, *Edgar A. Cañón García v. Ecuador*, communication No. 319/1988, p. 285. Case cited by Rouget (footnote 33 above), p. 181.

⁷¹ See Ducroquetz, “L’expulsion des étrangers en droit international et européen”, p. 414.

⁷² See Martini, *L’expulsion des étrangers. Étude de droit comparé*, p. 54.

⁷³ See, in particular, von Bar, “L’expulsion des étrangers”, p. 93.

74. It is also established in international law that the expelling State “must, when occasion demands, state the reason of such expulsion”,⁷⁴ whether the request is made by the expelled person, the State of destination of the expelled person⁷⁵ or before an international tribunal.⁷⁶ In other words, the expulsion must be substantiated by the expelling State. The reasons provided, moreover, must not be arbitrary. “Just grounds must be provided in order to exercise the right of expulsion”, said Canonico,⁷⁷ a position that was supported by various authors of the late nineteenth century and early twentieth century.⁷⁸ These “just grounds” were thought to be “related to the basic notion that, consistent with a higher interest in conservation, the State may expel an alien whose presence in the territory poses a danger to the internal or external security of the State”.⁷⁹

75. The grounds or causes for expulsion have long been debated. The terminology used in national legislation, both old or recent, varies and is not always specific. Thus, reference is made to grounds of not only “public order”, “public security”, “internal and external security”, but also “public peace”, “public hygiene”, “public health” and so forth.

76. Based on the examination of current international conventions and international case law, there are in fact very few established grounds for the expulsion of aliens, the principal two being public order and public security.⁸⁰ The question is whether these are the only two grounds for expulsion permitted under international law, and whether they rule out all other grounds, despite the fact that, in practice, various other grounds are invoked by States for the expulsion of aliens.

77. The next challenge is to determine exactly what is covered by the two principal grounds for expulsion, that

⁷⁴ See *Boffolo* case (Mixed Claims Commission (Italy-Venezuela), 1903), UNRIIAA, vol. X (United Nations publication, Sales No. 1960.V.4), p. 528. See also Ralston, *Law and Procedure of International Tribunals*, pp. 287–288, para. 515.

⁷⁵ For example, a number of treaties concluded in the nineteenth century between France and several States in the Americas stipulated that before carrying out an expulsion, the Government of each State party would communicate the reasons for the expulsion to the diplomatic or consular envoys of the foreign States concerned. This is the case for the treaty of 9 December 1834 between France and Bolivia, the treaty of 6 June 1843 between France and Ecuador, the treaty of 8 March 1848 between France and Guatemala, the treaty of 22 February 1856 between France and El Salvador, and the treaty of 9 March 1861 between France and Peru. And by operation of the most favoured nation clause, these provisions extended to relations with other States (see Fauchille, *Traité de droit international public*, p. 878 and No. 450, p. 982; Despagnet and de Boeck, *Cours de droit international public*, p. 478; Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of Diplomatic Protection*, p. 56, para. 30).

⁷⁶ See aforementioned *Boffolo* case (footnote 74 above), and Ralston (footnote 74 above), pp. 287–288; Borchard (preceding footnote), pp. 56–57, footnote 4; Politis, *Le problème de la limitation de la souveraineté*.

⁷⁷ “De l’expulsion des étrangers en Italie”, p. 219.

⁷⁸ See, in particular, Martini (footnote 72 above), p. 54; de Boeck, “L’expulsion et les difficultés internationales qu’en soulève la pratique”, pp. 532–533.

⁷⁹ De Boeck (preceding footnote), p. 532.

⁸⁰ See the international conventions and case law cited in the second, third and fifth reports on the expulsion of aliens (respectively, *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573; *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581; and *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611).

is, public order and public security. This is all the more difficult in that the threat to public order and public security is assessed by individual States, in this case, expelling States, and that these two concepts are constantly evolving. The two concepts have been incorporated in most legal systems without a specific meaning, much less a determinable content. It is therefore important to establish a criterion to assess grounds for expulsion. A number of cases show that some States invoke grounds for expulsion that would be difficult to link to public order or public security. Such grounds must be assessed in the light of international law.

1. PUBLIC ORDER AND PUBLIC SECURITY

78. The concepts of public order and public security are often used as grounds for expulsion.⁸¹

79. As noted previously, article 32, paragraph 1, of the Convention relating to the Status of Refugees and article 31, paragraph 1, of the Convention relating to the status of Stateless Persons stipulate that Contracting States shall not expel a refugee or stateless person, as the case may be, lawfully in their territory “save on grounds of national security or public order”. Article 13 of the International Covenant on Civil and Political Rights makes a similar provision, although it refers only to “compelling reasons of national security”—and not to public order—as grounds for the expulsion of an alien lawfully in the territory of a State party. Similarly, article 3, paragraph 1, of the European Convention on Establishment provides that nationals of Contracting Parties lawfully residing in the territory of another Party may be expelled if they “endanger national security or offend against *ordre public*”. By extension, these two grounds for expulsion may be understood to extend to all aliens lawfully in the territory of the expelling State, in which case the violation of laws relative to the entry and residence of aliens is considered sufficient grounds for expelling aliens lawfully in the territory of the State. This is without prejudice to the protection offered by the domestic legislation of some States to certain categories of illegal aliens, depending on considerations that vary from State to State, as discussed below.

80. In any event, neither the aforementioned international conventions nor international case law specifically define the concepts of public order and public security. Domestic law and regional case law are therefore considered useful in that regard.

(a) Public order

81. Public order is not a uniform concept, and it has often been criticized for being malleable and easily manipulated because its content is not precise and immutable. Moreover, it appears that its meaning shifts depending on whether it is used in the domestic legal system of a State, or in the international legal system, or again in the European sense of “public policy”, for example. Its meaning also changes depending on the subject to which it is applied. As a case in point, the public order of the marketplace does not have the same content as public order in the “law and order” sense. It is in this latter context,

⁸¹ See Ducroquetz (footnote 71 above), p. 55.

which includes management of public freedoms and more specifically residence of aliens, that the concept of public order is used in the present report.

82. Significantly, the *Dictionnaire de droit international public* defines public order as “the set of principles of the domestic legal order of a given country” that are deemed fundamental at any given time and are non-derogable.⁸² As indicated above, international law as it pertains to the expulsion of aliens operates by reference to such principles. In this connection, the Protocol to the European Convention on Establishment provides that “Each Contracting Party shall have the right to judge by national criteria: 1. the reasons of ‘*ordre public*, national security, public health or morality’ ... 3. the circumstances which constitute a threat to national security or an offence against *ordre public* or morality”. Section III (a) of the Protocol provides that “The concept of ‘*ordre public*’ is to be understood in the wide sense generally accepted in continental countries.” In addition to the aforementioned international conventions, the European Court of Human Rights accepts that:

By reason of their particular gravity and public reaction to them, certain offences might give rise to a social disturbance capable of justifying pre-trial detention, at least for a time ... in so far as domestic law recognises ... the notion of disturbance to public order caused by an offence.⁸³

International private law precedents use the same technique of reference in deciding that the courts of a State are bound to apply a foreign law only if the application or respect for the rights acquired under that law “does not violate the principles or provisions of the State’s laws of the State which are considered essential for public order”.⁸⁴ It is also worth noting that in its written submissions before ICJ in the case of *Certain Norwegian Loans*, France pointed out that the Government of Norway, by extending the scope of application of the provisions which it felt were required by its national public order, exceeded its right “in that ... it subjects aliens living beyond its sovereignty to a domestic concept of public order that is not recognized by the laws of the countries of those aliens”.⁸⁵

83. More recently, in the *Diallo* case, ICJ merely pointed out that the respondent had indeed invoked the public order objection as a ground for the expulsion of the person in question, who was defended in that case by his State through diplomatic protection. The Court considered the following facts to be established:

On 31 October 1995, the Prime Minister of Zaire issued an expulsion Order against Mr. Diallo. The Order gave the following reason for the expulsion: Mr. Diallo’s “presence and conduct have breached public order in Zaire, especially in the economic, financial and monetary areas, and continue to do so”. On 31 January 1996, Mr. Diallo, already under arrest, was deported from Zaire and returned to Guinea by air. The removal from Zaire was formalized and served on Mr. Diallo in the shape of a notice of refusal of entry (*refoulement*) on account of “illegal

residence” (*séjour irrégulier*) that had been drawn up at the Kinshasa airport on the same day.⁸⁶

The Democratic Republic of the Congo gave this notion of “public order” such a vague content that it seemed to include all of Mr. Diallo’s actions that it found questionable. Indeed, it

adds that the decision expelling Mr. Diallo was justified by his “manifestly groundless” and increasingly exaggerated financial claims against Zairean public undertakings and private companies operating in Zaire and by the disinformation campaign he had launched there “aimed at the highest levels of the Zairean State, as well as very prominent figures abroad”. The DRC notes that “the total sum claimed by Mr. Diallo as owed to the companies run by him came to over 36 billion United States dollars ..., which represents nearly three times the [DRC’s] total foreign debt”. It adds: “the Zairean authorities also discovered that Mr. Diallo had been involved in currency trafficking and that he was moreover guilty of a number of attempts at bribery”. Mr. Diallo’s actions thus allegedly threatened seriously to compromise not only the operation of the undertakings concerned but also public order in Zaire.⁸⁷

The written submissions cited by the Court also state that it was those “activities [of Mr. Diallo], fraudulent and detrimental to public order, which motivated his removal from Zairean territory”.⁸⁸

84. In ruling on the preliminary objections, ICJ probably did not believe that it had to assess—at that stage of the proceedings—the components of the concept of public order that had been invoked, nor even to point out the contradiction between the invocation of “public order in Zaire” in the expulsion order and the reference to “illegal residence” in the notice of refusal of entry, still less to venture a definition of the concept of public order. It is highly likely that, by remaining silent on the issue, the Court intended to refer the matter implicitly to the domestic legal order. However, international law must develop some criteria for assessing the invocation of this ground—and that of “public security”—in order to avoid possible abuses in the exercise by States of a jurisdiction with international implications, without any control. In this connection, it is admitted in domestic law, such as that of France, that the administration must forestall threats to public order that it is aware of,⁸⁹ ensure that illegal situations do not persist⁹⁰ and, where applicable, assist the authorities in enforcing court rulings.⁹¹ This logical and common-sense obligation is “a condition for the rule of law, a corollary of State continuity and, quite simply, a requirement of life in society”.⁹²

85. In both domestic and international legal systems, the existence of a public order objective determines the legality of the acts or actions of the administrative police

⁸⁶ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582, at p. 591, para. 15.

⁸⁷ *Ibid.*, p. 592, para. 19.

⁸⁸ *Ibid.*, p. 612, para. 81.

⁸⁹ France, Conseil d’Etat, 23 October 1959, *Doublet*, *Recueil Lebon* 1959, p. 540, and Conseil d’Etat, 14 December 1962, *Doublet*, *ibid.*, 1962, p. 680; Conseil d’Etat, 27 October 1995, *Commune de Morsang-sur-Orge*, *ibid.*, 1995, p. 372. In general, see Bernard, *La notion d’ordre public en droit administratif*.

⁹⁰ Conseil d’Etat, 20 October 1972, *Ville de Paris v. Marabout*, *Recueil Lebon* 1972, p. 664.

⁹¹ Conseil d’Etat, 20 November 1923, *Couitéas*, *Recueil Sirey* 1923, p. 789.

⁹² Truchet, “L’autorité de police est-elle libre d’agir?”, p. 81.

⁸² Salmon, *Dictionnaire de droit international public*, p. 786. See in this respect the explanations provided on the concepts of “European public order” and “international public order” (*ibid.*, pp. 787 *et seq.*).

⁸³ ECHR, *Letellier v. France*, judgement of 26 June 1991, *Series A*, No. 207, para. 51.

⁸⁴ French Court of Cassation, *State of Russia v. Ropit*, judgement of 5 March 1928, *Journal du droit international (Clunet)*, January–February 1928, p. 674.

⁸⁵ I.C.J. Pleadings, *Certain Norwegian Loans*, Vol. I–II, Reply of the Government of the French Republic of 20 February 1957, p. 398.

authority. This authority must demonstrate that it is pursuing a public order objective and not only a general interest objective, in the broad sense, otherwise there would be abuse of power.⁹³

86. However, it should be noted that existing texts on the subject often only provide grounds for the jurisdiction of the police authority and rarely define the content of public order.⁹⁴ At most, they enumerate the components of this highly indeterminate “standard”.⁹⁵ The public order objective is particularly elusive because its assessment depends essentially on considerations of fact, and therefore on the circumstances.

87. There is no need here to enter into the distinction established in certain laws between “general” public order (where the police authorities exercise their jurisdiction on a given territory in respect of all activities and all persons) and “special” public order (where a specific text establishes the scope, content or terms of the exercise of police powers). It is worth noting, though, that certain national laws provide a non-exhaustive view of the content of public order. In France, for example, article L.2212-2 of the general code for territorial authorities states that public order comprises, “*inter alia*”, “good order, safety, security and health”. This text is a good illustration of the difficulty involved in trying to understand the concept, because it not only provides a manifestly non-exhaustive list of components, but also contains the concept of “public security”, which, in international law, is a separate ground for the expulsion of aliens.

88. Incidentally, paragraph 2 of article L.2212-2 associates the concept of “public peace” with that of “good order”, without indicating whether the two are synonymous. French case law also adds complementary elements such as public morality,⁹⁶ human dignity⁹⁷ and aesthetics⁹⁸ to the above-mentioned components.

⁹³ See Tchen, “Police administrative—Théorie générale”, p. 24, para. 64.

⁹⁴ In Cameroon, for example, article 40, paragraph 2, of Decree No. 2008/377 of 12 November 2008, to determine the powers and duties of the heads of administrative units and to lay down the organization and functioning of their services, provides that the Senior Divisional Officer can “in case of violation of the internal or external security of the State or of public order, personally carry out or require any competent agent or authority to carry out all Acts necessary to record crimes and offences committed and to deliver the perpetrators to the courts, in the forms and within the time limits specified by the texts in force”.

⁹⁵ See Tchen (footnote 93 above), p. 26.

⁹⁶ See a few old judgements addressing the concept of “moral hygiene”, Conseil d’Etat, 7 November 1924, *Club sportif indépendant châlonnais*, *Recueil Sirey*, 1924, p. 863; *Conclusion of Cahen-Salvador* (concerning boxing matches), *Dalloz Périodique*, 1924, part 3, p. 58; Conseil d’Etat, 30 September 1960, *Jauffret*, *Recueil Sirey*, Conseil d’Etat, 1960, p. 504 (for reasons of “decency”).

⁹⁷ See, *inter alia*, Conseil d’Etat, 27 October 1995, *Communes Morsang-sur-Orge et Aix-en-Provence*, *Recueil Sirey*, p. 372; Tribunal administratif de Versailles, 25 February 1992, *Société Fun Productions, Wachenein v. Commune Morsang-sur-Orge*, and the note of C. Vimbert, “Un maire peut-il interdire un spectacle de ‘lancer de nains’?” (*Actualité Juridique de Droit Administratif* 1992, p. 525); see also Flauss, “L’interdiction de spectacles dégradants et la Convention européenne des droits de l’homme”; see also Conseil Constitutionnel, 19 January 1995, Decision No. 94-359 D.C., preambular paragraph 6, and also Conseil Constitutionnel, 27 July 1994, Decision No. 94-343, preambular paragraph 2.

⁹⁸ See, *inter alia*, with regard to the legality of preserving the aesthetics of a public site: Conseil d’Etat, 2 August 1924, *Leroux*, *Recueil Sirey*, 1924, p. 780; Conseil d’Etat, 23 October 1936, *Union parisienne des syndicats de l’imprimerie*, *ibid.*, 1936, p. 906.

(b) Public security

89. The exception of “national security” or “essential security interests” is set forth in various international treaties on such varied subjects as international trade law (see, for example, the famous article XXI of the General Agreement on Tariffs and Trade or article 2102 of the North American Free Trade Agreement), or the law on the protection of international investments, freedom of transit or judicial assistance.⁹⁹ However, the Special Rapporteur essentially concerns himself with the human rights conventions, since the issue of the expulsion of aliens involves these rights rather than the questions just referred to. As with regard to the grounds relating to public order, the exception of public security is contained, *inter alia*, in the International Covenant on Civil and Political Rights (arts. 4 and 13), the Convention on the Status of Refugees (art. 32), the Convention relating to the Status of Stateless Persons (art. 31), the European Convention on Human Rights (art. 15), the American Convention on Human Rights (art. 27) and the African Charter on Human and Peoples’ Rights (art. 12).

90. The notion of public security is no more precise than that of public order. The difficulty of determining its content is complicated by a certain lack of terminological precision. Are the terms “public security”, “public safety” or “national” or “internal and external” and “national security” synonymous? National legislation does not help to answer this question. It maintains the state of confusion, giving the impression sometimes that these concepts are different and at other times that they are interchangeable. Article 13 of the Aliens Act of Poland of 25 June 1997 refers, *inter alia*, to participation in activities that threaten the independence, territorial integrity, political regime or defence capability of the State; terrorism; arms and drug trafficking; as well as any other reason involving a threat to State security or the need to protect law and order. In spite of these attempts to formulate a definition, it has been pointed out that these notions are vague and “catch-all” terms and set the stage for making an arbitrary judgement.¹⁰⁰ International law studies on the question do not seem to give particular attention to this problem of terminology, using the expressions “national security” and “public security” as equivalent terms.¹⁰¹ Thus, for practical convenience, we shall also opt for the approach that considers them as synonymous.

91. What then is public security, understood to mean the same thing as national security?

92. The term is used abundantly in all national legislation, without necessarily being defined. It is so vague, flexible and imprecise, an American author contends, that everything that happens to a country can be considered as impinging in one way or another on national security.¹⁰² According to an author, national security “covers ... any

⁹⁹ See Christakis, “L’État avant le droit? L’exception de ‘sécurité nationale’”, pp. 16–22. The analysis that follows is based to a large extent on this study.

¹⁰⁰ See the report of Manuela Aguiar, Rapporteur of the Committee on Migration, Refugees and Demography of the Parliamentary Assembly of the Council of Europe, the report of 27 February 2001, doc. 8986.

¹⁰¹ *Ibid.*

¹⁰² According to T. Emerson (“National Security and Civil Liberties: Introduction”, *Cornell Law Review*, vol. 69 (1984), p. 686), “The fact is that virtually anything that happens in the country can be said, in one

threat that may imperil the independence of a State or its sovereignty, or impair its institutions or democratic freedoms",¹⁰³ whereas public order covers "particularly grave offences".¹⁰⁴ The difficulty of defining this concept was also underscored by some national courts. Thus, the Supreme Court of the United States in its ruling in the case *United States v. United States District Court* observes that "Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." Similarly, the High Court of Australia emphasized the elasticity of this notion in the 1982 case *Church of Scientology Inc. v. Woodward*, in which the High Court stressed "that security is a concept with a fluctuating content, depending very much on circumstances as they exist from time to time".¹⁰⁵

93. Some elements for a definition of the "notion of national security" in a few countries have been found here and there; and, refraining from examining systematically how each legal system has attempted to fix the limits of this notion, Christakis writes:

For the time being, it suffices to note that: (a) it seems generally accepted that the term covers both external as well as internal threats; (b) Governments seem to be in no hurry to give a precise definition (or *a fortiori* a non-restrictive definition) of this term in order, probably, to maintain their freedom of action; and (c) the risks arising from the imprecise nature of the notion have often been denounced by civil society and at times even by national courts.¹⁰⁶

94. At the international level, since the international conventions which refer to public security as a ground for expulsion are silent¹⁰⁷ with regard to its definition, we should turn our attention to jurisprudence.

95. In recent years, the threat to national security resulting from international terrorism has been an increasingly frequent consideration in the expulsion of aliens on such a ground. Several States, such as France,¹⁰⁸ Germany,¹⁰⁹ Italy¹¹⁰ and the United States,¹¹¹ have amended their

national legislation in order to address this concern more effectively. The United Kingdom has announced a new policy with respect to deportation for activities relating to fomenting or provoking terrorism, and new legislation to that effect is pending.¹¹² The notion of "national security" may be broadly interpreted to encompass acts or threats directed against the existence or external security of the territorial State as well as possibly other States, as discussed below.

96. ICJ jurisprudence provides little assistance in defining this notion. On the other hand, that of other international or regional courts, such as the Court of Justice of the European Union, is of greater interest with regard to this question. Indeed, the Court has often had to render an opinion on the definition and content of the exception of "public security", clearly opting for a broad conception of this notion. For example, in the case *Svenska Journalistförbundet v. Council of the European Union*, the claimant suggested that, without a definition of the notion of public security in Council Decision No. 93/731, which applied this exception to the principle of disclosure of Council documents, the exception could be defined as applying to

documents or passages of documents whose access by the public would expose Community citizens, Community institutions or the member States' authorities to terrorism, crime, espionage, insurrection, destabilization and revolution, or would directly hinder the authorities in their efforts to prevent such activities.¹¹³

The Council of the European Union, supported by France, contended on the other hand

that there is in any case no need to adopt a restrictive definition of public security for the purpose of the application of Decision No. 93/731. "Public security" must be defined in a flexible way in order to meet changing circumstances.¹¹⁴

The Court of First Instance supported this position maintained by the Council. For the Court of First Instance, "The case-law of the Court of Justice shows that the concept of public security does not have a single and specific meaning".¹¹⁵

way or another, to touch on our 'national security' " (cited by Christakis (footnote 99 above), p. 10 and footnote 27).

¹⁰³ Berger, *La politique européenne d'asile et d'immigration—Enjeux et perspectives*, p. 197.

¹⁰⁴ *Ibid.*

¹⁰⁵ These two decisions were cited by Hanks, "National security—a political concept", p. 118, and taken up by Christakis (footnote 99 above), p. 11.

¹⁰⁶ Christakis (footnote 99 above), p. 12.

¹⁰⁷ See, for example, art. 6 of the Convention regarding the Status of Aliens in the respective Territories of the Contracting Parties.

¹⁰⁸ *Proposition de loi relative aux conditions permettant l'expulsion des personnes visées à l'article 26 de l'ordonnance No. 45-2658 du 2 novembre 1945*, adopted by the French National Assembly on first reading, No. 309, 17 June 2004.

¹⁰⁹ "German states such as Bavaria are making use of a January 1, 2005, federal law that allows them to expel legal foreign residents who 'endorse or promote terrorist Acts', or incite hatred against sections of the population" (Benjamin Ward, "Expulsion doesn't help", *International Herald Tribune*, 2 December 2005). See Germany, 2004 Act, articles 54, paras. 4 and 6, and 55, paras. 2 and 58 a, which incorporate the relevant anti-terrorism provisions.

¹¹⁰ "Italy has expelled at least five imams since 2003; and an antiterrorism law adopted on July 31, 2005, makes it even easier to do so" (article in *International Herald Tribune*, cited in the preceding footnote). See generally Italy, 2005 Law.

¹¹¹ See United States, Immigration and Nationality Act, sections 212 (a) (3) (B) and (F), 237 (a) (4) (B), and Title V generally, for relevant anti-terrorism provisions.

¹¹² Following the London transport system bombings of 7 July 2005, the British Home Secretary Charles Clark announced that he would use his powers to deport from the United Kingdom any non-United Kingdom citizen who attempts to foment terrorism or provokes others to commit terrorist Acts, by any means or medium, including: (1) writing, producing, publishing or distributing material; (2) public speaking, including preaching; (3) running a website; or (4) using a position of responsibility, such as teacher, community or youth leader to express views which: (a) foment, justify or glorify terrorist violence in furtherance of particular beliefs, (b) seek to provoke others to terrorist Acts, (c) foment other serious criminal Activity or seek to provoke others to serious criminal Acts, or (d) foster hatred which might lead to inter-community violence in the United Kingdom (Home Office Press Notice 118/2005, Exclusion or Deportation from the United Kingdom on Non-Conducive Grounds: Consultation Document, 5 August 2005). The Terrorism Bill pending before Parliament would, if enacted: "(1) outlaw encouragement or glorification of terrorism, (2) create a new offence to tackle extremist bookshops which disseminate radical material, (3) make it illegal to give or receive terrorist training or attend a 'terrorist training camp', (4) create a new offence to catch those planning or preparing to commit terrorist Acts, (5) extend the maximum limit of pre-charge detention in terrorist cases to three months, and (6) widen the grounds for proscription to include groups which glorify terrorism" (Home Office Press Notice 148/2005).

¹¹³ Court of First Instance decision of 17 June 1998, Case T-74/95, *European Court Reports 1998*, p. II-2318, para. 91.

¹¹⁴ *Ibid.*, p. II-2319, para. 95.

¹¹⁵ *Ibid.*, p. II-2326, para. 121.

97. It must indeed be said that, according to the consistent case-law of the Court of Justice since 1991, the notion of “public security” covers, as in the internal conception of most States, not only the domestic security of a State member of the European Union, but also its external security, with the latter, moreover, being viewed in a rather broad context, as can be seen from the *Leifer* judgement of 17 October 1995.¹¹⁶ This broad conception of the notion of public security is also found in the Court of Justice judgement of 10 July 1984, *Campus Oil (Ireland v. United Kingdom)*, relating to a case involving oil supplies.¹¹⁷ It seems to be shared by other courts, also in areas that do not directly relate to human rights. This is true of the four tribunals of ICSID, as demonstrated by the awards handed down between 12 May 2005 and 28 September 2007 within the framework of proceedings instituted by foreign investors against Argentina for measures taken by that State between 2000 and 2003 in order to address the serious financial crisis that it was undergoing at the time.¹¹⁸

98. In the field of the international protection of human rights, on the other hand, an attempt has sometimes been made to give a restrictive interpretation of what can be permitted under the exception of public security in order to prevent abuse, particularly in the context of combating terrorism. Thus, in a recent report to the General Assembly, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, observed that

national security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or the threat of force. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order, or used as a pretext for expulsion.¹¹⁹

In 1994, the Commission on Human Rights, while admitting that the notion of public order “is in itself somewhat vague”, specified that national security is in danger “in the most serious cases of a direct political or military threat to the entire nation”.¹²⁰

99. The vagueness of the notions of public order and public security may give rise to an arbitrary exercise of the power of assessing the conduct of aliens by the expelling State. In some cases, indeed, if the alien is considered undesirable, that will be sufficient grounds for expulsion for a breach of the peace or a threat to national security.

2. CRITERIA USED TO ASSESS PUBLIC ORDER AND PUBLIC SAFETY GROUNDS

100. The right of aliens to enter into, and to reside in, a State is therefore understood as being subject to

limitations justified on the grounds of public order and public safety. As has been seen, international practice refers to national legal systems to determine the meaning of these grounds. The question is whether the State nonetheless has absolute power of discretion in this area.

101. The answer to this question is negative in the light of doctrine, international jurisprudence and the position of certain States,¹²¹ as well as that of the European Commission, regarding the scope of public order reservations, which, in our view, could be extended to public safety grounds. Despite the broad discretion of States in assessing threats to national security, some authors believe that the national security ground for expulsion may be subject to a requirement of proportionality:

Some treaties require States not to expel aliens, unless there are specific reasons [e.g., national security] ... It would be difficult to deny the expelling State some discretion in establishing whether a danger to national security exists and whether in the specific case the presence of the concerned individual affects it. It is clear that the expelling State is in the best position to assess the existence of a threat to its own security and public order. The State will make an appreciation on the basis of the circumstances that are known at the time of expulsion; a later judgement based on hindsight would not seem fair.¹²²

Thus, from the point of view of a supervising body it seems justified to leave the expelling State a “margin of appreciation”—to borrow from the language used by the European Court of Human Rights and the Human Rights Committee. This margin does not only affect the power of review that a judicial or other body may have, but also the extent of the State’s obligation.

102. When the restrictions in question apply, proportionality is also required. In other words, “even when a State is entitled to consider that an alien represents a danger to national security, expulsion would nevertheless be excessive if the appraised danger is only minimal”.¹²³ It is true that international jurisprudence relating to the arbitral award delivered in the *J. N. Zerman v. Mexico* case confirmed the right of a State to expel an alien based on reasons relating to national security. However, this indicated that in a situation where there is no war, a State cannot expel an alien as a threat to national security without preferring charges against the alien or subjecting him or her to trial:

The umpire is of opinion that, strictly speaking, the President of the Republic of Mexico had the right to expel a foreigner from its territory who might be considered dangerous, and that during war or disturbances

¹¹⁶ Case C-83/94, *European Court Reports* 1995, p. I-3248, paras. 27–28.

¹¹⁷ *European Court Reports* 1984, p. 2730.

¹¹⁸ For these arbitration awards, see Christakis (footnote 99 above), pp. 14–16. See also, for example, the award of 12 May 2005 handed down in the case *CMS Gaz. Transmission Company v. The Argentine Republic* (*ibid.*, p. 15 and footnote 45).

¹¹⁹ A/61/267, 16 August 2006, para. 19.

¹²⁰ Commission on Human Rights, “Question of the human rights of all persons subjected to any form of detention or imprisonment”, fifty-first session, 19 December 1994, E/CN.4/1995/32, para. 48.

¹²¹ In France, for example, the administrative judge does not grant the police absolute power of discretion in matters of public order. He verifies whether the disturbance or threat of disturbance is “sufficiently serious” to justify the measure taken, and does not hesitate to substitute his assessment of the specific situation for that of the municipal authority. In this case, the judge makes discretion a condition of legality. See the case law of the Council of State, in particular the following judgements: *Benjamin* (Council of State, 19 May 1933, *Recueil Sirey* 1933, vol. 103, p. 541, Opinion of Michel); *Ville Brest v. Laurent* (Council of State, 8 December 1989, No. 71172, *Juris-Data*, No. 1979, tables, p. 653); *Bedat v. Commune de Borce* (Council of State, 29 June 1990, No. 75140, Opinion of Toutée, note by Cardon); the case law of the Administrative Court of Appeal of Bordeaux in the *Commune de Tarbes* judgement (Administrative Court of Appeal, 26 April 1999, No. 97BX01773); and de Laubadère and others, *Traité de droit administratif*.

¹²² Gaja (footnote 28 above), p. 296.

¹²³ *Ibid.*

it may be necessary to exercise this right even upon bare suspicion; but in the present instance there was no war, and reasons of safety could not be put forward as a ground for the expulsion of the claimant without charges preferred against him or trial; but if the Mexican Government had grounds for such expulsion, it was at least under the obligation of proving charges before the commission. Its mere assertion, however, or that of the United States consul in a dispatch to his government, that the claimant was employed by the imperialist authorities does not appear to the umpire to be sufficient proof that he was so employed or sufficient ground for his expulsion.¹²⁴

103. Indeed, it appears that, insofar as the Treaty establishing the European Community is concerned, public order does not provide States with general grounds for intervention and may not be invoked outside the situations expressly envisaged:

In order to avail themselves of article 36 [new article 30], member States must observe the limitations imposed by that provision both as regards the objective to be attained and as regards the nature of the means used to attain it.¹²⁵

Furthermore, as a consequence of the mixed nature of the public order concept now recognized by doctrine,¹²⁶ this concept, owing to its purpose, retains a strong national dimension, as the purpose *depends on the specific circumstances particular to a given place and time*;¹²⁷ however, within the European Community system, this “nonetheless does not mean that ... States are free to define and interpret the concept of public order in accordance with their own practices and traditions”.¹²⁸

104. Admittedly, this reasoning is consonant with a comprehensive legal system built on a treaty that is binding on all member States and cannot be mechanically transposed to the international system. In the light of State practice, it could therefore be agreed that, in contrast to the concept for assessing public order under European Community law, it seems that States are free to define and interpret the notion of public order in accordance with their own practices and traditions in the context of the rights of aliens. Nonetheless, States do not have absolute freedom to do so because, where human rights and freedoms are involved, any State act is necessarily limited by the requirement for conformity, or non-conflict, with the relevant norms of international law, particularly those related to the protection of human rights. For, in this instance, it is indeed international law which establishes public order and safety as grounds for expulsion, and thus as exceptions to the right of residence of aliens, particularly legal aliens. Thus, a State can determine the scope of these exceptions unilaterally

only insofar as there is compliance with international law or control under international law. Building on the ideas of Jean-Claude Venezia regarding “discretionary power”, the State must use its power of expulsion “taking into account the particular circumstances of each case before it, which requires a prior examination of the circumstances”.¹²⁹ Article 3, para. 1 of Directive 64/221/EEC, concerning provisions relating to removal from a territory on the grounds of public order or public safety, provides that such measures “shall be based exclusively on the personal conduct of the individual”,¹³⁰ which exactly reproduces article 27, paragraph 2, of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States.¹³¹ Similarly, the Court of Justice of the European Communities systematically recalls this rule in its case law.

105. In the *Bonsignore* case of 26 February 1975,¹³² the individual concerned was an Italian national, residing in the Federal Republic of Germany, who had been convicted for an offence against the firearms law and for causing death by negligence. The competent aliens authority had then ordered his expulsion. The Court of Justice of the European Communities, to which the Cologne Administrative Court had referred for a ruling on the validity of this deportation decision, recalled, first of all, that article 3, paragraph 1, of Directive 64/221/EEC provides that “measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual”.¹³³ It specified that measures adopted “on grounds extraneous to the individual case” could not be justified.¹³⁴ The Court of Justice of the European Communities then recalled that the purpose of the directive was to eliminate all discrimination “between the nationals of the State in question and those of other member States”¹³⁵ and concluded that “the concept of ‘personal conduct’ expresses the requirement that a deportation order may only be made for breaches of the peace which might be committed by the individual affected”.¹³⁶ A deportation therefore may not be ordered for the purpose of deterring other aliens from committing an offence similar to that of the case in question. In other words, a deportation order may only be made on grounds of a special preventive nature and not if it is based on reasons of a general preventive nature.¹³⁷

106. Directive 2004/38/EC embodies this case law of the Court of Justice of the European Communities by

¹²⁴ *J. N. Zerman v. Mexico*, cited in Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. IV, p. 3348.

¹²⁵ Court of Justice of the European Communities, 10 December 1968, Case 7/68, *Commission of the European Communities v. Italy*: *European Court Reports* 1968, p. 431.

¹²⁶ See, in particular, Picard, “L’influence du droit communautaire sur la notion d’ordre public”, p. 62; Poillot-Peruzzetto, “Ordre public et droit communautaire”, p. 177; Hubeau, “L’exception d’ordre public et la libre circulation des personnes en droit communautaire”, p. 212.

¹²⁷ See Picheral, “Ordre public et droit communautaire—Communautarisation des réserves d’ordre public”, *Jurisclasseur Europe Traité*, Fasc. 650, 5 February 2007, p. 6.

¹²⁸ European Commission communication on “the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health”, 19 July 1999, COM(1999) 372 final, p. 8.

¹²⁹ Venezia, *Le pouvoir discrétionnaire*, pp. 138–139.

¹³⁰ *Official Journal of the European Communities*, 850/64, 4 April 1964, p. 117.

¹³¹ *Official Journal of the European Union*, No. L 158, 30 April 2004, p. 114.

¹³² Court of Justice of the European Communities, judgement of 26 February 1975, *Carmelo Angelo Bonsignore v. Oberstadtdirektor der Stadt Köln*, Case 67/74, *European Court Reports* 1975, p. 297; Opinion of Advocate-General Mayras, delivered on 19 February 1975, p. 308.

¹³³ *Ibid.*, para. 5.

¹³⁴ *Ibid.*, para. 6.

¹³⁵ *Ibid.*, para. 5.

¹³⁶ *Ibid.*, para. 6.

¹³⁷ *Ibid.*, para. 7.

providing that “[j]ustifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted” (art. 27, para. 2). In any event, deportation must therefore be based on personal conduct and must not occur as a result of the adoption of general measures to maintain public order and public safety.

107. While pursuing research on this point regarding the basis in European Community law for the criteria used to assess the concept of public order and public safety grounds, it should be noted that the Council of the European Economic Community in recognition of the risks that discretionary derogation might present to the free movement of persons, adopted Directive 64/221/EEC, dated 25 February 1964, on the coordination of national provisions relating to measures which are justified on grounds of public policy, public security or public health.¹³⁸ While it did not define these concepts, the Council Directive nevertheless invoked several substantive and procedural requirements. This legal framework subsequently increased in clarity and scope in the light of the preliminary responses of the Court of Justice of the European Communities. The knowledge acquired in this area has now been codified and enhanced within the framework of Directive 2004/38/EC.

108. It should be noted that the Court of Justice of the European Communities explicitly recognizes in its case law that fundamental rights must be respected where public order is invoked. Indeed, according to the precedent established in the *Elliniki Radiophonia Tiléorassi (ERT)* case,¹³⁹ public order reservations must be implemented in a shared context of respect for human rights and democratic principles.¹⁴⁰ The case law underscores that, taken as a whole, the limitations placed on the power of States in respect of control of aliens are a specific manifestation of the more general principle, enshrined in various provisions of the European Convention on Human Rights, which provides that no restrictions shall be placed on the rights secured other than such as are necessary for the protection of public order or public safety “in a democratic society”.¹⁴¹ A State should therefore invoke these limitations only if the regulations or restrictive measures in question comply with fundamental rights.¹⁴²

109. One criteria for compliance with fundamental rights is striking a fair balance between protecting public order and the interests of the individual. The Court of Justice of the European Communities has ruled to this effect, particularly in the *Orfanopoulos and Oliveri* case,¹⁴³ by

basing its relevant case law on that of the European Court of Human Rights in the *Boultif* judgement.¹⁴⁴ According to the Court of Justice of the European Communities, to assess whether the restrictive measure is proportionate, account must be taken of the serious nature of the offence committed, the length of residence in the host member State, the period which has elapsed since the commission of the offence, the family circumstances of the person concerned and the seriousness of the difficulties which the spouse and any of their children risk facing in the country of origin of the person concerned.¹⁴⁵

110. It should be borne in mind that public order and public safety exceptions fall within the framework of the European Community, where the Court of Justice of the European Communities, the European Commission and several adherents to doctrine argue that the concept of European citizenship requires a stricter interpretation of the scope of these public order exceptions¹⁴⁶ to administrative law, namely legal or discretionary grounds unrelated to the conduct of the persons concerned.¹⁴⁷

111. There is no definition of personal conduct in the context of expulsion in any of the international and Community documents or in the national legislation available to the Special Rapporteur. The Court of Justice of the European Communities has been called upon to provide certain clarifications on this point. Accordingly, in the *Van Duyn* case, the Court held that association with a body or an organization, insofar as it reflects participation in their activities and identification with their aims, could be considered a voluntary act of the person concerned and, consequently, as an integral part of his personal conduct.¹⁴⁸ In the *Rutili* case—concerning a prohibition on residence in four French *départements* where the presence of the person concerned, according to the Ministry of the Interior, could have created disturbances in view of the trade union and political activities in which he had been engaged in 1967 and 1968—the Court of Justice of the European Communities acknowledged that the mere presence of the Community national could be perceived as such a danger to public order that it justified restricting the right to stay and move within the territory of member States.¹⁴⁹ These clarifications were neither reversed nor confirmed by Directive 2004/38/EC, which confined itself to recalling, in accordance with the case law of the Court of Justice of the European Communities, that “The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of

¹³⁸ See footnote 130 above.

¹³⁹ Case C-260/89, *European Court Reports* 1991, p. I-02925.

¹⁴⁰ See footnote 128 above.

¹⁴¹ Court of Justice of the European Communities, *Rutili*, 28 October 1975, Case 36-75, *European Court Reports* 1975, p. 1219, para. 32.

¹⁴² Court of Justice of the European Communities, *Elliniki* case (footnote 139 above), p. 2925, para. 43, on the freedom to provide services. For an application with respect to the overriding requirements of public interest in the free movement of goods see Court of Justice of the European Communities, 26 June 1997, Case C-368/95, *Vereinigte Familiapress*, *European Court Reports* 1997, p. I-3689, para. 24.

¹⁴³ Court of Justice of the European Communities, *Orfanopoulos and Oliveri*, 29 April 2004, Joined Cases C-482/01 and C-493/01, *European Court Reports* 2004, p. I-5257, paras. 96 and 97.

¹⁴⁴ ECHR, *Boultif v. Switzerland*, application No. 54273/00, 2 August 2001, *Reports of Judgments and Decisions* 2001-IX, para. 48.

¹⁴⁵ *Orfanopoulos and Oliveri* case (footnote 143 above), para. 99; see also Directive 2004/38/EC, art. 38.

¹⁴⁶ *Orfanopoulos and Oliveri* case (footnote 143 above), para. 65; COM(1999) 372 final (footnote 128 above), para. 8; Lhernould, “Les mesures nationales d’éloignement du territoire sont-elles conformes aux règles communautaires de libre circulation?”; and Karydis, “L’ordre public dans l’ordre juridique communautaire: un concept à contenu variable”, p. 8.

¹⁴⁷ See Distel, “Expulsion des étrangers, droit communautaire et respect des droits de la défense”, p. 169.

¹⁴⁸ See the Court of Justice of the European Communities, *Van Duyn*, 4 December 1974, Case 41/74, *European Court Reports* 1974, p. 1337.

¹⁴⁹ *Rutili* case (footnote 141 above), p. 1231.

the fundamental interests of society”¹⁵⁰ Indeed, according to the *Rutili* and *Bouchereau*¹⁵¹ precedents on free movement, the invocation of public order “presupposes, in any event, the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society”.

112. European Directive 2004/38/EC prohibits considerations of general prevention for the invocation of public order or public safety. Pursuant to article 27, paragraph 2, “Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.” The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. However, the Court’s attempt to clarify the concept of “threat” remains inadequate. What is understood by a “present” threat? What if a long time has elapsed, for example, between the adoption and execution of an expulsion decision? Neither the language in article 3 of Directive 64/221/EEC nor the case law of the Court of Justice provides clearer indications of the accepted date for determining the “present” nature of a threat. The Commission has referred to the role played by the existence of criminal convictions in assessing the threat that the person concerned could pose to public order and public safety. It has emphasized the fact that consideration should be given to the passage of time and developments in the situation of the person concerned. It considers that “the manner in which the situation of the person has evolved has particular importance in cases where the evaluation of threat is made long time after the acts threatening public order were committed, where there is a long lapse of time between the initial decision and its implementation and when the person uses his right of re-application. When the grounds for an expulsion ... of a national of another member State are examined, the good behaviour should have the same relevance as in the case of nationals”.¹⁵²

113. European Community legislators, wishing to limit as far as possible the misuse of public order by States for the purposes of expulsion, established in article 27, paragraph 2 (first subparagraph), of Directive 24/38/EC, that “Previous criminal convictions shall not in themselves constitute grounds” for measures based on public order or safety. In addition, and this contribution is significant, legislators stipulated that “if an expulsion order” issued as a penalty or legal consequence “is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued” (art. 33, para. 2). All expulsion must be justified on the basis of the continued threat posed to public order and safety, and must be considered in the light of the personal and present situation of the individual on whom it is imposed.¹⁵³

114. It was on the basis of these rules that the Court of Justice rendered its decision in the *Orfanopoulos and Oliveri* judgement,¹⁵⁴ whereby it interpreted the concept of a present threat. In this case, an expulsion decision was imposed on two European Union citizens, one of Greek nationality, the other of Italian nationality, on the grounds of serious offences and the risk of recidivism. The persons concerned had been lawfully residing in German territory. The Court first of all recalled that, according to Article 18 of the Treaty Establishing the European Community, “the principle of movement for workers must be given a broad interpretation, whereas derogations from the principle must be interpreted strictly”.¹⁵⁵ It further recalled that, in line with its own case law, an offence disturbs public order if it creates a genuine and sufficiently serious threat affecting one of the fundamental interest of society. In this instance, “while it is true that a Member State may consider that the use of drugs constitutes a danger for society”,¹⁵⁶ the public policy exception must, however, be interpreted restrictively, with the result that the existence of a previous criminal conviction can justify an expulsion only insofar as the circumstances which gave rise to that conviction “are evidence of personal conduct constituting a present threat to the requirements of public policy”.¹⁵⁷ However, the Court did not merely draw on its previous case law; it clarified, at the invitation of the Advocate General, that the present nature of the threat should be assessed on the basis of all relevant elements and factors. Indeed, as pointed out by Advocate General Stix-Hackl, the problem is that neither article 3 of Directive 64/221/EEC nor the Court’s case law specify what should be the accepted date for determining the “present” nature of a threat.¹⁵⁸ The Court responded that national jurisdictions should take into account factual matters which occurred after the decision on expulsion, insofar as they may point to “the cessation or the substantial diminution of the present threat”: such may be the case if a lengthy period has elapsed between the date of adoption of an expulsion order and the time that it is reviewed.¹⁵⁹ Therefore, account needs to be taken of all the circumstances, including factual matters having occurred after the decision on expulsion, which could have substantially diminished or eliminated the danger represented by the individual for the requirement of public policy. This solution was confirmed in the context of the case of a Turkish national challenging the expulsion procedure initiated against him by the German authorities.¹⁶⁰ The Court of Justice decided, in accordance with Directive 64/221/EEC, its own case law and the provisions of

¹⁵⁴ *Orfanopoulos and Oliveri* case (footnote 143 above), p. 5305 para. 20; Opinion of Advocate General Christine Stix-Hackl, delivered on 11 September 2003, p. I-5262.

¹⁵⁵ *Ibid.*, p. I-5317, para. 64.

¹⁵⁶ *Ibid.*, para. 67.

¹⁵⁷ *Ibid.*, p. I-5318, para. 67.

¹⁵⁸ See the Opinion of Advocate General Christine Stix-Hackl (footnote 154 above).

¹⁵⁹ *Orfanopoulos and Oliveri* case (footnote 143 above), p. 5322 para. 82.

¹⁶⁰ Court of Justice of the European Communities, *Inan Cetinkaya v. Land Baden-Württemberg*, Case C-467/02, judgement of 11 November 2004, *European Court Reports 2004*, p. I-10924; Opinion of Advocate General Léger, delivered on 10 June 2004, p. I-10898.

¹⁵⁰ Art. 27, para. 2, second part.

¹⁵¹ Court of Justice of the European Communities, 27 October 1977, Case 30/77, *European Court Reports 1977*, p. 2014.

¹⁵² See footnote 128 above.

¹⁵³ See Ducroquetz (footnote 71 above), p. 116.

the Association Agreement concluded between the European Economic Community and Turkey,¹⁶¹ that

national courts must take into consideration, in reviewing the lawfulness of the expulsion ..., factual matters which occurred after the final decision of the competent authorities which may point to the cessation or the substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public policy.¹⁶²

115. Indeed, the need to reconcile public order measures with the fundamental principle in European Community law of free movement of persons led the Court of Justice of the European Communities to hold that national authorities should not impose measures on Community nationals which cannot be “justified on grounds extraneous to the individual case”.¹⁶³ It follows that the person concerned may not be expelled as an example “for the purpose of deterring other aliens”, in this instance to enforce national legislation on the possession of arms,¹⁶⁴ and may not be denied a residency permit on the grounds that his or her activities would provide habitual support for banditry, unless contact with the underworld had been established in the particular case.¹⁶⁵ Similarly, the Institute of International Law, in its resolution of 1892 on the *Règles internationales sur l’admission et l’expulsion des étrangers*, stated:

Deportation must never be ordered for personal gain, to prevent legitimate competition or to halt a just claim or an action or appeal that has been filed in the proper manner with the courts or competent authorities.¹⁶⁶

116. Although the preceding reasoning essentially falls within the special legal order of the EC, the Special Rapporteur is of the view that it could be safely applied to the expulsion of aliens within the more general framework of international law.

117. National courts have also dealt with cases of expulsion on public order grounds.¹⁶⁷ Their assessment criteria do not deviate from those found in the aforementioned international and regional case law.

118. It therefore appears that the crucial factors in assessing or verifying the validity of public order and public safety grounds are the factual circumstances, the present nature of the threat and the specific context for the

personal conduct of the individual. The reason for this is that public order and safety exceptions, particularly in the context of the law relating to the expulsion of aliens, are grounds and not goals. The difference between goals and grounds is the following: “While the goal of an act is subsequent to this act, its grounds are an antecedent”.¹⁶⁸ An act committed with a goal in mind pursues the achievement of an objective, which may be general, while an act accomplished on the basis of a ground can be such only when this ground arises. Thus, the grounds for an administrative act are the legal or factual situation which led the administration to adopt this act. It follows from the preceding analysis that:

(a) The State does not have absolute discretion in the assessment of breaches, or threats of breaches, of public order or public safety; it must respect or take into account certain objective considerations;¹⁶⁹

(b) The validity of the invocation of public order or safety grounds depends on whether a certain number of criteria are taken into consideration:

—The specific circumstances and the circumstances of the factual situation contributing to or constituting a breach, or threat of breach, of public order or public safety; this is a general principle of the law relating to the expulsion of aliens;¹⁷⁰

—The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interest of society;

—A fair balance is struck between protecting public order and the interests of the individual.

3. OTHER GROUNDS FOR EXPULSION

119. Various other grounds for expulsion are invoked by States or are provided for in national legislation without public order and security grounds arising in every case.

(a) *Higher interest of the State*

120. The higher interest of the State may be considered as a relevant factor in determining the expulsion of an alien on the basis of the public order or welfare of a State rather than as a separate ground under international law.

121. However, national laws specify a variety of grounds for the expulsion of an alien, which may be grouped under the general heading of the “higher interests of the State”.¹⁷¹ In particular, a State may expel an

¹⁶¹ Signed in Ankara on 12 September 1963, concluded, approved and confirmed by Council Decision 64/732/EEC of 23 December 1963, *Official Journal of the European Communities*, No. 217 (29 December 1964), p. 3685 (in French, no English version available).

¹⁶² *Cetinkaya case* (footnote 160 above), para. 47.

¹⁶³ *Bonsignore case* (footnote 132 above), para. 6.

¹⁶⁴ *Ibid.*, para. 7.

¹⁶⁵ Court of Justice of the European Communities, *Rezguia Adoui v. Belgian State and City of Liège, Dominique Cornuaille v. Belgian State*, Joined Cases 115 and 116/81, judgement of 18 May 1982, *European Court Reports*, 1982, p. 1665, para. 10 at p. 1708.

¹⁶⁶ Institute of International Law, “*Règles internationales...*”, art. 14.

¹⁶⁷ See, for example, France, *Keledjian Garabed v. Public Prosecutor*, Court of Cassation (Criminal Division), 17 December 1937, *International Law Reports*, vol. 8, p. 305; Luxembourg, *Maffei v. Minister of Justice*, Conseil d’État (Comité du Contentieux), 12 November 1980, ILR, vol. 73, pp. 652–653; France, *In re Salon*, Conseil d’État, 3 April 1940, *Annual Digest and Reports of Public International Law Cases, 1919–1942* (supplementary vol.), case No. 105, pp. 198–199.

¹⁶⁸ De Fay, “Police municipale”, p. 26.

¹⁶⁹ See Goodwin-Gill, who believes that “public order cannot be a concept determined solely by reference to national criteria” (“The limits of the power of expulsion in public international law”, p. 154).

¹⁷⁰ See Darut, *L’expulsion des étrangers: Principe général—Application en France*, who writes, “It is not the mere fact of the disruption that he [the alien] causes that leads a State to expel him, it is the circumstances” (p. 64).

¹⁷¹ See preliminary report on the expulsion of aliens, *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/554, Annex I, p. 200.

alien who is perceived to endanger or threaten its national or public interests,¹⁷² fundamental interests,¹⁷³ substantial interests,¹⁷⁴ dignity (including that of the State's nationals),¹⁷⁵ national "utility"¹⁷⁶ or convenience,¹⁷⁷ social necessity,¹⁷⁸ public¹⁷⁹ or foreign policy,¹⁸⁰ international agreements¹⁸¹ or international relations with other States¹⁸² or generally.¹⁸³

122. A State may expressly base a determination under this heading partly or wholly on its obligations under international agreements,¹⁸⁴ its diplomatic relations,¹⁸⁵ or a consideration of the international relations of other States with which it has a special arrangement.¹⁸⁶ A State may also expressly seek to maintain political neutrality when dealing with the expulsion of aliens under this heading.¹⁸⁷ Grounds relating to the "higher interest of the State" may also apply to an alien on the basis of the alien's membership in an organization that engages in activities raising concerns about the State's interests.¹⁸⁸ Furthermore, a State's interest may affect the conditions or obligations imposed on the alien when entering or while staying in the State's territory.¹⁸⁹ Violation of the conditions for entry into the territory of the State may constitute a separate ground for expulsion.

Examination of national legislation on this subject is drawn from the memorandum by the Secretariat on the expulsion of aliens (footnote 18 above), paras. 377–379.

¹⁷² Australia, 1958 Act, art. 197AD; Bosnia and Herzegovina, 2003 Law, arts. 27 (1) (b) and 47 (1) (b); Brazil, 1981 Decree, art. 98, and 1980 Law, arts. 1–3, 7, 56 (2), 64 and 66; Canada, 2001 Act, arts. 34 (2), 35 (2) and 37 (2); Chile, 1975 Decree, arts. 2, 15 (1), 63 (2) and 65 (1) and (3); China, 1986 Rules, art. 7 (6); Guatemala, 1999 Regulation, art. 97; Japan, 1951 Order, arts. 5 (14) and 24 (4) (o); Kenya, 1967 Act, art. 3 (1) (g); Nigeria, 1963 Act, arts. 19 (2) and 35 (1); Poland, 2003 Act No. 1775, arts. 21 (1) and (6) and 88 (1) and (5); Portugal, 1998 Decree-Law, art. 99 (1) (c); Republic of Korea, 1992 Act, arts. 11 (1), (3) and (8); and Sweden, 1989 Act, sect. 4 (7) (2).

¹⁷³ France, Code, art. L521-3.

¹⁷⁴ Germany, 2004 Act, art. 55 (1).

¹⁷⁵ Portugal, 1998 Decree-Law, art. 99 (1) (c).

¹⁷⁶ Chile, 1975 Decree, arts. 64 and 66.

¹⁷⁷ Brazil, 1980 Law, art. 26; and Chile, 1975 Decree, arts. 64 and 66.

¹⁷⁸ Panama, 1960 Decree-Law, art. 38.

¹⁷⁹ Lithuania, 2004 Law, arts. 7 (5) and 126 (1) and (3); and Poland, 2003 Act No. 1775, arts. 21 (1) (6) and 88 (1) (5).

¹⁸⁰ United States, Immigration and Nationality Act, sect. 212 (a) (3) (C).

¹⁸¹ Czech Republic, 1999 Act, sect. 9 (1).

¹⁸² Chile, 1975 Decree, arts. 64 (3) and 66; Finland, 2004 Act, sect. 149; and Honduras, 2003 Act, art. 89 (3).

¹⁸³ Czech Republic, 1999 Act, sect. 9 (1); Finland, 2004 Act, sect. 11 (1) (5); and Italy, 1998 Decree-Law No. 286, arts. 4, 6 and 8, and 1998 Law No. 40, art. 4 (6).

¹⁸⁴ Italy, 1998 Decree-Law No. 286, arts. 4 (3) and (6) and 8, and 1998 Law No. 40, art. 4 (6); and Spain, 2000 Law, art. 26 (1).

¹⁸⁵ Guatemala, 1986 Decree-Law, art. 83; and South Africa, 2002 Act, art. 29 (1) (b).

¹⁸⁶ An example of such an arrangement is the Schengen Accord (see Portugal, 1998 Decree-Law, arts. 11 and 25 (1) and (2) (e)).

¹⁸⁷ Ecuador, 2004 Law, art. 3.

¹⁸⁸ Bosnia and Herzegovina, 2003 Law, arts. 27 (1) (b) and 47 (1) (b).

¹⁸⁹ Australia, 1958 Act, arts. 197AB and 197AG; Brazil, 1980 Law, art. 109; Republic of Korea, 1992 Act, art. 22; and United States, Immigration and Nationality Act, sect. 212 (f). The alien may be expressly required not to prejudice the interests of the State in the exercise of the alien's rights and freedoms (Belarus, 1993 Law, art. 3; and China, 1986 Law, art. 5).

(b) Violation of law

123. An alien is subject to the national law and jurisdiction of the State in which he or she is present under the principle of the territorial jurisdiction of a State.¹⁹⁰ Failure to comply with the national law of the territorial State may be a valid ground for expulsion. The validity of this ground for expulsion has been recognized in the European Union, State practice¹⁹¹ and literature.¹⁹² In some instances, this ground for expulsion may be extended to the unlawful activity of an alien in a State other than the territorial State.¹⁹³

124. The view has been expressed that the expulsion of an alien is a measure undertaken to protect the interests of the territorial State rather than to punish the alien.¹⁹⁴ Whereas criminal activity may be a ground for expelling an alien, the expulsion of the alien is to be determined based on the need to protect the interests of the territorial State rather than to punish the alien. Nonetheless, expulsion or deportation may be provided for as a punishment for a crime committed by an alien under the national

¹⁹⁰ As discussed previously, there are special categories of aliens, such as diplomats, who are entitled to special privileges and immunities. These aliens are not considered in the present section. "With his entrance into a state, an alien falls at once under its territorial supremacy, although he remains at the same time under the personal supremacy of his home state. He is therefore, unless he belongs to one of those special classes (such as diplomats) who are subject to special rules, under the jurisdiction of the state in which he stays, and is responsible to it for all Acts he commits on its territory ... Since an alien is subject to the territorial supremacy of the local state, it may apply its laws to aliens in its territory, and they must comply with and respect those laws" (Jennings and Watts, *Oppenheim's International Law*, pp. 904–905).

¹⁹¹ "The municipal law systems examined display a perhaps unremarkable consistency in their choice of grounds for expulsion. Generally, an alien will render himself liable to deportation if he qualifies under one or more of the following heads: ... 4. Involvement in criminal activities" (Goodwin-Gill, *International Law and the Movement of Persons between States*, pp. 255); "State practice accepts that expulsion is justified ... for involvement in criminal activities" (*ibid.*, p. 262); "Very commonly, an alien's deportation may be ordered ... on account of the alien's criminal behaviour" (Plender, *International Migration Law*, pp. 468 and 482, footnote 119 (referring to Denmark, 8 June 1983 Aliens Act No. 226, art. 25 (1)); Norway, 1956 Aliens Act, art. 13 (1) (d); Portugal, Decree-Law 264-B181, art. 42; Sweden, 1980 Aliens Act (*Utlänningslag*) No. 376, Prop. 1979/80:96, sect. 40; Turkey, 15 July 1980 Act on Residence and Travel of Aliens No. 5683, art. 22).

¹⁹² "It is accepted that expulsion is justified for activities in breach of the local law, and, further, that the content of that local law is a matter for the expelling State alone" (Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 206). See also Institute of International Law, "Règles internationales...", art. 28, paras. 5 and 6.

¹⁹³ "In some countries, e.g., in Belgium and Luxemburg, expulsion may be ordered for crimes committed abroad, presumably only when a conviction has been had" (Borchard (footnote 75 above), p. 52).

¹⁹⁴ "Deportation is, after all, intended not as a punishment but primarily as a method of relieving the expelling country of the presence of an individual considered to be undesirable" (Williams, "Denationalization", pp. 58–59). "Expulsion is a measure primarily directed to the protection of the interests of the State. It is not essentially a measure for the punishment of aliens, although obviously its effects may be devastating" (Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 257). "Expulsion is, in theory at least, not a punishment, but an administrative measure consisting in an order of the government directing a foreigner to leave the country" (Jennings and Watts (footnote 190 above), p. 945). "Expulsion of an alien is not a punishment, but an executive act comprising an order directing the alien to leave the state" (Oda (footnote 10 above), p. 482). "Expulsion is not a punishment and must therefore be executed with the utmost consideration and taking into account the individual's particular situation" (Institute of International Law, "Règles internationales...", art. 17).

criminal law—rather than the immigration law—of the State concerned.¹⁹⁵ It should be noted that different substantive and procedural law may apply with respect to a criminal proceeding in contrast to an expulsion proceeding. The relationship between the two proceedings may vary under the national laws of different States.

125. Within the European Union, recourse to expulsion as a penalty is limited in many respects.¹⁹⁶ According to article 33 of Directive 2004/38/EC, expulsion may not be inflicted as a penalty on Union Citizens or members of their family, unless such a measure satisfies the requirements of other provisions of the same Directive allowing expulsion for reasons of public order, public security or public health.

Article 33. Expulsion as a penalty or legal consequence

1. Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27,¹⁹⁷ 28¹⁹⁸ and 29.¹⁹⁹

2. If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued.

126. Failure to comply with the national law of the territorial State, including its criminal law, is a ground for expulsion according to the legislation of several States.

¹⁹⁵ “In particular, as a State is entitled to punish an alien who commits a gross violation of its laws while in its territory, in certain instances such punishment may include the expulsion or deportation of an alien convicted for a major crime” (Sohn and Buergenthal, *The Movement of Persons Across Borders*, p. 89). “The following features of recent developments in the exercise of the power of expulsion may be noted: It is used as a supplementary penalty against the alien for the more important crimes” (Borchard (footnote 75 above), p. 55).

¹⁹⁶ For an analysis of issues relating to expulsion as a double penalty in the national laws and practice of member States of the European Union, including Belgium, Denmark, France, Germany, Italy, Portugal and the United Kingdom, see “La double peine”, *Documents de travail du Sénat*, France, *Législation comparée* series, No. LC 117, February 2003.

¹⁹⁷ See memorandum by the Secretariat (footnote 18 above), paras. 340–362.

¹⁹⁸ Article 28 provides as follows:

“Protection against expulsion

“1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

“2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

“3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

“(a) have resided in the host Member State for the previous 10 years; or

“(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.”

¹⁹⁹ See memorandum by the Secretariat (footnote 18 above), paras. 392–400. This provision specifies the diseases that may justify expulsion on grounds of public health.

The convicting court may²⁰⁰ or may not²⁰¹ be required to be that of the expelling State. With respect to the substantive criminal standard, the relevant law may expressly require it to be that of the expelling State;²⁰² identify specific provisions whose violation provides grounds for expulsion;²⁰³ recognize violations of the law of a foreign State,²⁰⁴ sometimes subject to a comparison with the law of the expelling State;²⁰⁵ or not specify a particular criminal standard, but evaluate or categorize it in terms of the law of the expelling State.²⁰⁶

127. The national laws of some States do not specify the type of violation or proceeding which can lead to expulsion on this ground.²⁰⁷ In contrast, the national laws of other States provide for expulsion as a punishment for certain types of behaviour. For example, if the alien has assisted in the smuggling or illegal entry of other aliens (apart from cases of trafficking covered under morality), or if the alien belongs to an organization engaged in such activity,²⁰⁸ the relevant law may consider this grounds for expulsion,²⁰⁹ require a criminal sentence to have been passed for grounds to be found,²¹⁰ specify penalties in addition to expulsion,²¹¹ or impute a legal responsibility to the alien but not expressly impose expulsion.²¹² In cases not involving the smuggling of illegal entrants, the relevant legislation may specify that the expulsion shall take place upon fulfilment of the sentence imposed.²¹³ This ground for expulsion may be imputed to the alien’s entire family.²¹⁴

²⁰⁰ Argentina, 2004 Act, arts. 29 (f)–(g) and 62 (b); Australia, 1958 Act, arts. 201 (a) and 203 (1) (a); Bosnia and Herzegovina, 2003 Law, art. 57 (1) (h); and Chile, 1975 Decree, arts. 64 (1) and 66.

²⁰¹ Argentina, 2004 Act, art. 29 (c); Australia, 1958 Act, arts. 201 (a)–(c); and Canada, 2001 Act, arts. 36 (1)–(3).

²⁰² Australia, 1958 Act, art. 250 (1); Belarus, 1998 Law, arts. 14 and 28, and 1993 Law, art. 20 (3); Bosnia and Herzegovina, 2003 Law, arts. 27 (1) (a) and 47 (1) (a); Japan, 1951 Order, art. 5 (4), (8) and (9)–2; Poland, 2003 Act No. 1775, art. 88 (1) (9); Republic of Korea, 1992 Act, arts. 11 (1) (2), (1) (8), 46 (2), 67 (1) and 89 (1) (5); and Spain, 2000 Law, arts. 57 (7) and (8).

²⁰³ Australia, 1958 Act, art. 203 (1) (c); Denmark, 2003 Act, arts. 22 (iv)–(vi); and Germany, 2004 Act, art. 53 (2).

²⁰⁴ Colombia, Act, art. 89 (7); Japan, 1951 Order, art. 5 (4); and Kenya, 1967 Act, art. 3 (1) (d).

²⁰⁵ Canada, 2001 Act, arts. 36 (2) (b) and (c); Russian Federation, 2002 Law No. 115-FZ, arts. 7 (6), 9 (6) and 18 (9) (6), and 1996 Law, arts. 26 (3) and 27 (3); and Spain, 2000 Law, art. 57 (2).

²⁰⁶ Chile, 1975 Decree, arts. 15 (3), 16 (1) and 65 (1).

²⁰⁷ Bosnia and Herzegovina, 2003 Law, arts. 27 (1) (a) and 47 (1) (a); and Switzerland, 1931 Federal Law, art. 10 (4).

²⁰⁸ Canada, 2001 Act, art. 37 (1) (b).

²⁰⁹ Argentina, 2004 Act, art. 29 (c); Brazil, 1980 Law, arts. 124 (XII) and (XIII) and 127; Germany, 2004 Act, arts. 53 (3) and 54 (2); Greece, 2001 Law, art. 44 (1) (a); Hungary, 2001 Act, art. 32 (1) (c); Italy, 1998 Decree-Law No. 286, arts. 4 (3) and 8; and Paraguay, 1996 Law, arts. 108 (2) and 111. A State may expressly exempt from expulsion on such grounds certain types of persons such as religious persons or diplomats (Italy, 1998 Decree-Law No. 286, arts. 4 (3) and 8).

²¹⁰ Germany, Basic Law, arts. 53 (3) and 54 (2); and Greece, 2001 Law, art. 44 (1) (a).

²¹¹ Brazil, 1980 Law, arts. 124 (XII) and (XIII) and 125–127; and Paraguay, 1996 Law, arts. 108 (2) and 111.

²¹² Belarus, 1998 Law, art. 26.

²¹³ Chile, 1975 Decree, arts. 69 and 87; France, Code, arts. L621-1, L624-2 and L624-3; Italy, 1998 Decree-Law No. 286, arts. 16 (4) and (8); Paraguay, 1996 Law, arts. 108 (2) and 111; and United States, Immigration and Nationality Act, sect. 276 (c).

²¹⁴ Brazil, 1980 Law, art. 26 (2).

128. Where the legislation permits expulsion to follow an alien's sentencing,²¹⁵ a threshold in terms of the severity of punishment may have to be met.²¹⁶ The expulsion in such cases may be imposed as an independent or combined penalty,²¹⁷ discharge, replace or occur during a custodial or other sentence;²¹⁸ be ordered to occur after the alien fulfils a custodial or other sentence²¹⁹ or completes some other form of detention involving a potential or actual criminal prosecution;²²⁰ or be ordered for the express reason that the alien has received a sentence which does not include expulsion, or when the sentence was not otherwise followed by expulsion.²²¹

²¹⁵ Argentina, 2004 Act, arts. 6 (a) and (b); Australia, 1958 Act, arts. 200 and 201 (a)–(c); Austria, 2005 Act, art. 3.54 (2) (2); Bosnia and Herzegovina, 2003 Law, arts. 47 (4) and 57 (1) (h); Canada, 2001 Act, arts. 36 (1) (a)–(c); China, 1992 Provisions, arts. I (i) and II (i) and (ii); Colombia, Act, art. 89 (1); Denmark, 2003 Act, art. 22; Finland, 2004 Act, sect. 149 (2); France, Code, art. L521-2; Greece, 2001 Law, art. 44 (1) (a); Japan, 1951 Order, arts. 5 (4) and 24 (4) (g) and (i); Kenya, 1967 Act, art. 3 (1) (d); Norway, 1988 Act, sects. 29 (b) and (c); Panama, 1960 Decree-Law, art. 37 (f); Paraguay, 1996 Law, arts. 6, 7 (3) and 81 (5); Portugal, 1998 Decree-Law, art. 25 (2) (c); Republic of Korea, 1992 Act, art. 46 (1) (11); Spain, 2000 Law, art. 57 (1); Sweden, 1989 Act, sects. 4.2 (3) and 4.7; Switzerland, Penal Code, art. 55 (1); and United States, Immigration and Nationality Act, sects. 101 (a) (48) and (a) (50) (f) (7). This standard may include a requirement that the crime be of a specified type or quality, such as money-laundering or a premeditated or intentional crime (Argentina, 2004 Act, arts. 29 (c) and 62 (b); Brazil, 1981 Decree, art. 101, and 1980 Law, art. 67; Germany, 2004 Act, arts. 53 (1) and (2) and 54 (1); Hungary, 2001 Act, art. 32 (1) (e); Japan, 1951 Order, arts. 5 (9)-2, 24 (4) (f) and (4)-2; Nigeria, 1963 Act, art. 18 (1) (c); Poland, 2003 Act No. 1775, art. 88 (1) (9); and United States, Immigration and Nationality Act, sects. 212 (a) (2), 237 (a) (2) and 238 (c)).

²¹⁶ Argentina, 2004 Act, arts. 29 (c) and 62 (b); Australia, 1958 Act, arts. 201 (a)–(c); Austria, 2005 Act, art. 3.54 (2) (2); Bosnia and Herzegovina, 2003 Law, arts. 47 (4) and 57 (1) (h); Canada, 2001 Act, arts. 36 (1) (b) and (c); Denmark, 2003 Act, art. 22; Finland, 2004 Act, sect. 149 (2); France, Code, art. L521-2; Germany, 2004 Act, arts. 53 (1) and (2) and 54 (1) and (2); Greece, 2001 Law, art. 44 (1) (a); Hungary, 2001 Act, art. 32 (1) (e); Japan, 1951 Order, arts. 5 (4) and 24 (4) (g) and (i); Norway, 1988 Act, sects. 29 (b) and (c); Paraguay, 1996 Law, arts. 6 (4), 7 (3) and 81 (5); Portugal, 1998 Decree-Law, art. 25 (2) (c); Spain, 2000 Law, art. 57 (2) and (7); Sweden, 1989 Act, sect. 4.7; Switzerland, Penal Code, art. 55 (1); and United States, Immigration and Nationality Act, sect. 101 (a) (50) (f) (7). When expulsion may follow a sentence passed in the expelling State, the test of severity may look to the sentencing court's pronouncement (Australia, 1958 Act, arts. 201 (a)–(c); and Bosnia and Herzegovina, 2003 Law, art. 57 (1) (h)). Where a foreign court has passed the sentence, the relevant law may consider the sentence which the expelling State would have applied to the violation (Argentina, 2004 Act, arts. 29 (c) and 62 (b); Canada, 2001 Act, arts. 36 (1) (b) and (c); Hungary, 2001 Act, art. 32 (1) (e); Norway, 1988 Act, sects. 29 (b) and (c); Paraguay, 1996 Law, art. 7 (3); and Spain, 2000 Law, art. 57 (2)).

²¹⁷ China, 1978 Law, art. 35, 1998 Provisions, art. 336, and 1992 Provisions, art. I (i); and Republic of Korea, 1992 Act, art. 46 (1).

²¹⁸ Argentina, 2004 Act, arts. 64 (a)–(c); Italy, 1998 Decree-Law No. 286, arts. 16 (1), (4), (8) and (9); Japan, 1951 Order, arts. 62 (3)–(5) and 63; Republic of Korea, 1992 Act, art. 85 (2); Spain, 2000 Law, arts. 53 and 57 (1) and (7); and Switzerland, Penal Code, arts. 55 (2)–(4).

²¹⁹ Argentina, 2004 Act, art. 62 (b); Bosnia and Herzegovina, 2003 Law, art. 47 (4); Chile, 1975 Decree, art. 57; China, 1992 Provisions, arts. II (ii) and VI (i), and 1998 Provisions, art. 336; France, Code, art. L541-1; Honduras, 2003 Act, art. 89 (1); Japan, 1951 Order, arts. 62 (3) and 63 (2); Paraguay, 1996 Law, arts. 81 (5) and 111; Poland, 2003 Act No. 1775, art. 8 (1) (9); Republic of Korea, 1992 Act, arts. 84 (2), 85 (1) and (2) and 86 (2); Spain, 2000 Law, art. 57 (8); Switzerland, Penal Code, art. 55 (4); and United States, Immigration and Nationality Act, sect. 238 (a) (1).

²²⁰ Australia, 1958 Act, arts. 250 (3)–(5); and Belarus, 1998 Law, art. 14.

²²¹ Bosnia and Herzegovina, 2003 Law, arts. 47 (4) and 57 (1) (g)–(h); and Colombia, Act, art. 89 (1).

129. According to the relevant national legislation, grounds under this heading may also be found if the alien is convicted or otherwise found guilty,²²² charged,²²³ accused,²²⁴ wanted,²²⁵ being prosecuted²²⁶ or caught in a violation;²²⁷ has²²⁸ or is suspected²²⁹ of having committed a violation; has a criminal record;²³⁰ displays²³¹ or is dedicated to,²³² engaged in,²³³ intending²³⁴ or predisposed²³⁵ to criminal acts and behaviour; has been expelled from the State or another State pursuant to certain criminal provisions;²³⁶ or is a member of an organization deemed to be engaged in criminal activities.²³⁷

130. The expulsion of an alien on this ground may depend on whether the alien was a citizen at the time of the act's commission,²³⁸ has been granted permission

²²² Australia, 1958 Act, arts. 200 and 203 (1); Brazil, 1980 Law, art. 66; Colombia, Act, art. 89 (7); Honduras, 2003 Act, art. 89 (1); Paraguay, 1996 Law, art. 6 (5); and South Africa, 2002 Act, art. 29 (1) (b). This standard may include a requirement that the crime be of a specified type or quality, such as money-laundering or a premeditated or intentional crime (Austria, 2005 Act, art. 3.54 (2); Bosnia and Herzegovina, 2003 Law, art. 57 (1) (g); Canada, 2001 Act, arts. 36 (1) (a) and (b) and (2) (a) and (b); Chile, 1975 Decree, arts. 15 (3), 16 (1), 63 (1), 64 (1), 65 (1) and (2) and 66; France, Code, arts. L511-1 (5) and L541-1; Greece, 2001 Law, art. 44 (1) (a); Russian Federation, 2002 Law No. 115-FZ, arts. 7 (5), 9 (5) and 18 (9) (5); Spain, 2000 Law, arts. 57 (2), (7) and (8); Switzerland, 1931 Federal Law, art. 10 (1); and United States, Immigration and Nationality Act, sect. 101 (a) (50) (f) (8)). The possibility of appeal or review may affect the conviction's ability to serve as grounds for expulsion. (Compare Austria, 2005 Act, art. 3.54 (2) (1), which permits expulsion where the judgement is not final, with Nigeria, 1963 Act, art. 21 (2), which does not allow deportation pursuant to an expulsion recommendation until all avenues of appeal against the conviction are closed.)

²²³ Austria, 2005 Act, art. 3.54 (2) (2); and Chile, 1975 Decree, arts. 15 (3), 16 (1), 64 (1), 65 (1) and 66.

²²⁴ Panama, 1960 Decree Law, art. 37 (f).

²²⁵ South Africa, 2002 Act, art. 29 (1) (b).

²²⁶ Brazil, 1980 Law, art. 66.

²²⁷ Austria, 2005 Act, art. 3.54 (2) (2); and Japan, 1951 Order, art. 5 (4) (8).

²²⁸ China, 1978 Law, art. 35; Republic of Korea, 1992 Act, arts. 67 (1) and 89 (1) (5); and United States, Immigration and Nationality Act, sect. 212 (a) (2) (A). The relevant legislation may expressly include an act committed outside of the State's territory (Belarus, 1998 Law, art. 28).

²²⁹ Such an act can be of either a specified type (Belarus, 1998 Law, art. 14; Portugal, 1998 Decree-Law, art. 25 (2) (d); and Republic of Korea, 1992 Act, art. 11 (1) (2), (1) (8)) or an unspecified type (Australia, 1958 Act, art. 250 (1); and Belarus, 1993 Law, art. 20 (3)).

²³⁰ Argentina, 2004 Act, art. 29 (c); Germany, 2004 Act, art. 53 (1); Paraguay, 1996 Law, art. 6 (5); Russian Federation, 2002 Law No. 115-FZ, arts. 7 (6), 9 (6) and 18 (9) (6), and 1996 Law, arts. 26 (3) and 27 (3); and United States, Immigration and Nationality Act, sect. 212 (a) (2) (B).

²³¹ Argentina, 2004 Act, art. 62 (b).

²³² Chile, 1975 Decree, arts. 15 (2), 17, 63 (2) and 65 (1) and (3).

²³³ Honduras, 2003 Act, art. 89 (2); Panama, 1960 Decree-Law, art. 37 (b); and Sweden, 1989 Act, sect. 3.4 (2).

²³⁴ Portugal, 1998 Decree-Law, art. 25 (2) (e); and Sweden, 1989 Act, sects. 4.2 (3), 4.7 and 4.11.

²³⁵ Paraguay, 1996 Law, art. 6 (7).

²³⁶ Japan, 1951 Order, art. 5 (5)-2.

²³⁷ Bosnia and Herzegovina, 2003 Law, art. 57 (1) (g); Canada, 2001 Act, arts. 37 (1) and (2); and South Africa, 2002 Act, art. 29 (1) (e).

²³⁸ Australia, 1958 Act, arts. 201 (a) and (b), 203 (1) (a) and (b), (7), 204 (1) and (2) and 250 (1)–(3); and Brazil, 1980 Law, arts. 74, 75 and 76 (1).

to stay or reside in the State's territory,²³⁹ has been pardoned or had the relevant conviction quashed²⁴⁰ or has been rehabilitated,²⁴¹ the length of the alien's stay in the State's territory at the time the act was committed;²⁴² whether the alien's nationality is granted special treatment by the expelling State's law;²⁴³ whether the alien's State has a relevant special relationship with the expelling State;²⁴⁴ or the alien's method of arrival or location at the relevant time.²⁴⁵

131. The national legislation may expressly declare irrelevant the timing of the alien's conviction relative to the law's entry into force,²⁴⁶ and may²⁴⁷ or may not²⁴⁸ consider as grounds for inadmissibility the fact that the alien's entry was achieved with the help of a person or organization engaged in illegal activity.

132. Numerous cases in national courts have involved expulsions of aliens convicted²⁴⁹ of committing serious crimes.²⁵⁰

²³⁹ Australia, 1958 Act, arts. 201 (b) and 204; Austria, 2005 Act, art. 3.54 (2); Denmark, 2003 Act, art. 22; Japan, 1951 Order, arts. 5 (9)-2 and 24 (4)-2; Paraguay, 1996 Law, arts. 6 (4) and (5); Spain, 2000 Law, arts. 57 (5) and (7); Sweden, 1989 Act, sect. 4.2 (3); and United States, Immigration and Nationality Act, sect. 238 (b).

²⁴⁰ Canada, 2001 Act, art. 36 (3) (b).

²⁴¹ *Ibid.*, art. 36 (3) (c).

²⁴² Australia, 1958 Act, art. 201 (b); Austria, 2005 Act, art. 3.54 (2) (2); Denmark, 2003 Act, art. 22; Paraguay, 1996 Law, art. 81 (5); and Sweden, 1989 Act, sect. 4.2 (3). The period of the alien's imprisonment may affect the calculation of this length (Australia, 1958 Act, art. 204).

²⁴³ Australia, 1958 Act, art. 201 (b) (ii).

²⁴⁴ South Africa, 2002 Act, art. 29 (1) (b).

²⁴⁵ Australia, 1958 Act, art. 250 (1).

²⁴⁶ *Ibid.*, arts. 201 (a) and 203 (1) (a).

²⁴⁷ *Ibid.*, art. 250 (1) (a).

²⁴⁸ Canada, 2001 Act, art. 37 (2) (b).

²⁴⁹ In 1933, the Supreme Court of Canada was requested to rule on whether an individual who had served out their entire prison term or received a pardon (royal prerogative of mercy) could be declared a prohibited or undesirable person and expelled on the basis of said conviction. The Court held that the fulfilment of punishment for the commission of a criminal did not foreclose the possibility of being deported in a subsequent administrative proceeding. In *the Matter of a Reference as to the Effect of the Exercise by His Excellency the Governor General of the Royal Prerogative of Mercy upon Deportation Proceedings*, Reference to the Supreme Court of Canada, 15 and 29 March 1933, *Annual Digest and Reports of Public International Law Cases*, 1933 and 1934, case No. 135, pp. 328-330. See also *Sentenza No. 58*, Italy, La Corte Costituzionale, 1995 (*Gazzetta Ufficiale della Repubblica Italiana*, 24 February 1995) (declaring unconstitutional a provision for expelling aliens having served a term of imprisonment for a criminal conviction, absent a finding of continued dangerousness); *Sentenza No. 62*, (*ibid.*, 24 February 1994) (upholding the constitutionality of suspending a prison sentence of less than three years in connection with the expulsion of a convicted alien).

²⁵⁰ *Ceskovic v. Minister for Immigration and Ethnic Affairs*, Federal Court, General Division, 13 November 1979, ILR, vol. 73, pp. 627-634 (convicted for crimes of violence including malicious shooting with intent to do grievous bodily harm); *Deportation to U. Case*, Federal Republic of Germany, Superior Administrative Court (*Oberverwaltungsgericht*) of Rhineland-Palatinate, Federal Republic of Germany, 16 May 1972, *ibid.*, pp. 613-617 (convicted of manslaughter); South Africa, *Urban v. Minister of the Interior*, Supreme Court, Cape Provincial District, 30 April 1953, *ibid.*, vol. 20, pp. 340-342; Federal Republic of Germany, *Homeless Alien (Germany) Case*, Federal Administrative Supreme Court, 30 September 1958, *ibid.*, vol. 26, pp. 507-508. ("A foreign national who has been found guilty of a criminal offence is, as a general rule, expelled to his home State.") In *Leocal v. Ashcroft*, the Supreme Court of the United States ruled that

133. Thus, State practice would appear to recognize the validity of this ground for expulsion. However, divergent State practice with respect to some elements of this ground may require further consideration in terms of (a) a sufficiently serious violation of national law; (b) the type of unlawful conduct in terms of planning, preparing, inciting, conspiring or committing such a violation;²⁵¹ (c) the evidentiary requirement for such unlawful conduct ranging from mere suspicion to a final judgement;²⁵² (d) the right of the alien to have the opportunity to negate the allegations of unlawful conduct;²⁵³ and (e) the necessity of separate proceedings to determine the violation of national law and the expulsion of the alien.²⁵⁴

(c) Sentence of imprisonment

134. Among these different grounds, the commission of an offence by, or the imprisonment of, an alien has often been invoked, and it appears in the laws of several States. Moreover, this ground for expulsion is not new, as is clearly confirmed by relevant studies from the late nineteenth and early twentieth centuries. According to Martini, for example,

there is no doubt that convicted aliens may seriously compromise public security; hence, convictions constitute an essential cause for expulsion. In fact, a glance at decisions taken against individuals charged with violating the regulations applicable to them suffices to indicate that such aliens were almost always expelled following their conviction.²⁵⁵

Furthermore, an alien who was convicted even for a misdemeanour was liable to expulsion; the alien could thus be expelled following the very first conviction, even if it was a suspended sentence,²⁵⁶ unless the conviction was minor

State driving-under-the-influence offences similar to the one in Florida, which either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle, do not qualify as a "crime of violence" under a deportation statute (9 November 2004, No. 03-5830, *United States Reports*, vol. 543, p. 1). In some cases, national courts have considered convictions for serious crimes committed outside of the territorial State a sufficient ground for sustaining an order expulsion, based on considerations of public order.

²⁵¹ "It may expel from its territory one who commits acts that are forbidden by its laws, or who may be fairly regarded as a prospective violator of them, or who proclaims his opposition to them, regardless of the view of his conduct or anticipated conduct that is entertained by his own State" (Hyde, *International Law Chiefly as Interpreted by the United States*, vol. 1, p. 234).

²⁵² "Perhaps the most frequent cause of expulsion is conviction for crime. All countries reserve this right, although it is resorted to usually in flagrant cases only, where the presence of the alien may compromise the public safety. Where the public necessity is sufficiently great, especially where the crime is of a political nature, expulsion may take place on executive order without a judicial conviction" (Borchard (footnote 75 above), p. 52). "The power of expulsion or deportation may be exercised if an alien's conduct or activities after being admitted into the state violate certain basic rules. Such conduct or activities include ... 2. Conviction of a crime of a serious nature" (Sohn and Buergethal (footnote 195 above), pp. 90-91).

²⁵³ "To minimize the harsh and arbitrary use of the power, numerous treaties between states stipulate ... that the person expelled shall have an opportunity to clear himself of the charges against him." (Borchard (footnote 75 above), p. 56).

²⁵⁴ "It has been held that the right to prosecute criminally and the right to deport or expel are inconsistent as concurrent rights; the proceedings must be successive." (*ibid.*, p. 52) (citing *U.S. v. Lavoie*, 182 Fed. Rep. 943; and of Mgr. Montagnini in France, 14 RGDI (1907), p. 175; J. Challamel in *Journal des débats*, 12 March 1907, reprinted in 34 *Edouard Clunet* (1907), pp. 331-334).

²⁵⁵ Martini (footnote 72 above), p. 55.

²⁵⁶ *Ibid.*, pp. 55-56.

or was for an insignificant offence, or for an offence that did not constitute a danger to public order.²⁵⁷

135. The practice in most States has now become more flexible, probably owing to the development of human rights. As a result, although conviction of an alien remains a ground for expulsion in general, it is applied only when the alien is imprisoned for offences whose degree of seriousness may vary from one State to another.

136. A comparative study of legislation shows that such a ground exists in the laws of countries that include Belgium, Denmark, France, Germany, Italy, Portugal and the United Kingdom. In Belgium,²⁵⁸ Denmark,²⁵⁹ Germany,²⁶⁰ Italy,²⁶¹ Portugal²⁶² and the United Kingdom,²⁶³ some criminal convictions may constitute grounds for expulsion. The basis for an expulsion decision may be the existence of a sentence of imprisonment, the length of such a sentence, or conviction for a given offence. In France, aliens who commit an offence on French territory are not only liable to the punishment stipulated by law for the offence, but may also be returned to their countries of origin. It should be noted that the aliens in question are persons of full age who have a legal residence permit.

137. In general, it appears that the principle of double punishment, namely a prison sentence coupled with a judicial or administrative expulsion decision, is allowed in the countries studied,²⁶⁴ except in Belgium. Moreover, in Belgium and Germany, the criminal record of an alien may give rise to an expulsion measure on the ground of threat to public order.²⁶⁵ The determination of double punishment is generally left to the discretion of the relevant authority. However, German law spells out the offences that must give rise to expulsion, while the laws of Italy and Portugal prohibit double punishment for aliens belonging to protected categories,²⁶⁶ who may be expelled

only if they constitute a threat to public order. The criterion of breach or "serious breach" of public order also holds true in Belgium,²⁶⁷ Denmark,²⁶⁸ Italy,²⁶⁹ Portugal²⁷⁰

– Holders of a specific residence permit given for urgent humanitarian reasons. Alien family members of a German citizen are afforded the same protection.

²⁶⁷ The following categories are protected in Belgium:

- Aliens who have been ordinarily resident in Belgium for at least 10 years;
- Aliens who meet the conditions for acquiring Belgian nationality by choice or by declaration, or for recovering the nationality after losing it;
- Women who have lost their Belgian nationality after marriage, for example;
- Non-separated spouses of Belgian citizens;
- Aliens declared incapable of working.

A circular of July 2002 added the following: aliens who have been residing in Belgium for at least 20 years; those who were born in Belgium or arrived in the country before the age of 12; family heads sentenced to less than five years. Only exceptional cases (paedophilia, significant drug trafficking, organized crime, etc.) justify expulsion of these aliens.

The other elements of protection determined by the ad hoc advisory committee established by the Law of 1980 which renders an opinion on all requests for expulsion are: degree of integration of the person in question into Belgian society (employment, activity in associations, reputation, etc.), nature of the person's connection with his or her country of origin, probability of reoffending.

²⁶⁸ In Denmark, no category is protected *a priori*. Absence of such a provision is usually why there are different applications of judicial expulsion decisions based on the alien's length of stay in the country. Art. 26 of the Act also lists the elements to be considered before deciding on expulsion:

- Integration into Danish society (work, training, fluency in the language, participation in associations, etc.);
- Age when the person arrived in Denmark;
- Length of stay in Denmark;
- Age, health status and other personal data of the alien;
- Alien's relationship with Danish residents;
- Alien's ties with his or her country of origin;
- Risks faced by the person if returned to his or her country of origin or to another country.

The Act states, however, that these personal factors would not be taken into account if the expulsion is based on a conviction for violating the law on drugs or for one of the offences under the penal code contained in the Act, unless the alien has particularly strong ties with Danish society.

²⁶⁹ Pursuant to art. 19 of the Italian Legislative Decree of 1998 on immigration control, no judicial expulsion decision may be taken against aliens belonging to one of the following categories:

- Minors below the age of 18;
- Holders of a residence permit;
- Persons living under the same roof as their parents up to the fourth degree of Italian nationality;
- Spouses of Italian citizens;
- Pregnant women or women who gave birth to a child less than six months prior. An administrative expulsion decision may be taken against an alien only if it is based on the threat that they represent for public order and the security of the State.

²⁷⁰ In Portugal, the accessory penalty of expulsion is not applicable to aliens belonging to the following categories:

- Persons born in Portuguese territory who habitually reside there;
- Residents with minor children over whom they effectively had parental authority;
- Persons who have lived in Portugal since before the age of 10.

This provision did not exist prior to the adoption of the 2001 text, but was explicitly spelled out in the law of delegation adopted by the Assembly of the Republic in September 2000. The Parliament had then authorized the Government to amend the decree-law of 1998 on condition of excluding these three categories of aliens from the scope of the accessory penalty.

²⁵⁷ Circular of the French Minister of the Interior, dated 20 July 1893, cited by Martini, *ibid.*, footnote 1.

²⁵⁸ See Law of 15 December 1980 on access to the territory, stay, residence and deportation of aliens, in particular arts. 20–26.

²⁵⁹ See Aliens Act of 17 July 2002, in particular part IV.

²⁶⁰ See 1990 Aliens Act, in particular arts. 45–48.

²⁶¹ See Legislative Decree No. 286 of 25 July 1998 respecting the expulsion of aliens, amended by the law of 30 July 2002.

²⁶² See Decree-Law No. 244 of 8 August 1998, respecting the legal regime of aliens.

²⁶³ See 1971 Immigration Act, in particular arts. 3, 5, 6 and 7, and chap. 13.

²⁶⁴ See "La double peine" (footnote 196 above), p. 20.

²⁶⁵ *Ibid.*

²⁶⁶ In Germany, according to the 1990 law on aliens, protection depends primarily on the nature of the alien's residence permit. While protection does not preclude expulsion, it limits the application of the provisions on the deportation of aliens in cases where the alien represents a very serious threat to public security, and in particular in the cases envisaged by art. 47, para. 1. With regard to arts. 47 and 48, the aliens protected are those who are:

- Holders of an unlimited and unconditional residence permit;
- Holders of a residence permit of unlimited duration who were born in Germany or arrived in the country when they were minors;
- Holders of a residence permit of unlimited duration who are married to (or "cohabiting" with) an alien belonging to either of the preceding groups;
- Have been granted asylum or refugee status;

and the United Kingdom.²⁷¹ In other words, the categories of persons in question cannot suffer double punishment.

138. In all cases, the competent authority on expulsion has considerable discretion. In Germany, when the expulsion measure is not mandatory, the Administration must consider the length of the alien's period of residence and the consequences of the expulsion before ruling that the offender should be deported. The same applies in Italy and Portugal when the offender does not belong to a protected category. Likewise, in Belgium, Denmark and the United Kingdom, the laws governing aliens stipulate that no expulsion measure may be taken without considering the alien's degree of integration into the host society. The situation in the United Kingdom is unique in that an expulsion measure ordered by a criminal judge, but ultimately taken by the Secretary of State, may be extended to the offending alien's family members, provided they depend financially on him or her.²⁷²

139. It is apparent from both their former and their recent practice that many States clearly consider imprisonment a ground for expulsion. In their former practice, certain States included a variety of other grounds for expulsion, some of which are nowadays inadmissible in international law. In fact, the practice seems generally quite complex, varying often from one country to another. The principle of admission or prohibition of any ground is generally based on legal theory rather than on treaty provisions or on clearly established international case law. In the paragraphs below, we will present various old and recent grounds that are commonly invoked by States, and also examine the extent to which they are consonant with, acceptable to, or prohibited by positive international law.

140. The Institute of International Law had, in article 28 of its resolution of 1892 cited above, already drawn up a list of 10 grounds on which aliens may be expelled. That list, which reflected both practice drawn from domestic laws²⁷³ and the prevailing opinion of the day, deserves to be reproduced *in extenso* [French original]:

²⁷¹ In the United Kingdom, the Immigration Act 1971 does not allow any expulsion following a criminal offence for persons who were Commonwealth citizens and residents of the United Kingdom by 1 January 1973, provided that they had at the time of the conviction for the last five years been ordinarily resident in the United Kingdom.

With regard to the removal of an offender, the immigration rules require that the following elements should be considered:

- Age;
- Length of residence in the United Kingdom;
- Strength of connections with the United Kingdom;
- Personal history, including character, conduct and employment record;
- Domestic circumstances;
- Previous criminal record and the nature of any offence of which the person has been convicted;
- Compassionate circumstances;
- Any representations received on the person's behalf.

Still, according to the immigration rules, for the removal of family members, the following factors must also be taken into account: the ability of the persons to maintain themselves; and the effect of the removal on education.

²⁷² See "La double peine" (footnote 196 above), p. 21.

²⁷³ Cited by de Boeck (footnote 78 above), pp. 480–481, these include: France (Penal Code and Law of 3 December 1849); Belgium (Law of 9 February 1885; Law of 27 November 1891; Law

The following persons may be expelled:

1. Aliens who have entered into the territory fraudulently, in violation of regulations on the admission of aliens; however, if there are no other grounds for expulsion, once they have spent six months in the country they may no longer be expelled;
2. Aliens who have established their domicile or residence within the territory, in violation of a strict prohibition;
3. Aliens who, at the time they crossed the border, suffered from an illness that posed a threat to public health;
4. Aliens in a situation of begging or vagrancy, or dependent on public assistance;
5. Aliens convicted by the courts of the country for serious offences;
6. Aliens who have been convicted or are subject to prosecution abroad for serious offences which, according to the legislation of the country or under extradition agreements entered into by the State with other States, could give rise to their extradition;
7. Aliens who are guilty of incitement to commit serious offences against public safety even though such incitement is not in itself punishable under the territory's legislation and even though such offences were intended to be carried out only abroad;
8. Aliens who, in the territory of the State, are guilty or are strongly suspected of attacking, either in the press or by some other means, a foreign State or sovereign or the institutions of a foreign State, provided that such acts, if committed abroad by nationals and directed against the State itself, are punishable under the law of the expelling State;
9. Aliens who, during their stay in the territory of the State, are guilty of attacks or insults published in the foreign press against the State, the nation or the sovereign;
10. Aliens who, in times of war or when war is imminent, imperil the security of the State by their conduct.²⁷⁴

141. Most of these grounds are derived from or related to public order or public security, whether the connection is indicated clearly, as in the case of conviction for serious offences, or incidentally or even implicitly, as in the case of begging, vagrancy, debauchery and disorderliness.

142. The difficulty, however, stems from terminological inconsistencies in certain domestic laws, which sometimes add the ground of "public nuisance" to those of public order and public security, without indicating clearly that it can truly be distinguished from the ground of public order. By contrast, the distinction between public order and public security, on the one hand, and public health, on the other, seems more firmly established. In general, domestic laws contain a host of other more or less stand-alone grounds which should be presented as a whole, without prejudging the response to the question as to whether or not they are related to the grounds of public order or public security.

of 12 February 1897); Spain (Royal Decree of 17 November 1852, Royal Order of 26 June 1858); United Kingdom (Aliens Act of 11 August 1905); Greece (Penal Code of 24 June 1885); Italy (Penal Code of 1859, law of 22 December 1888; Decree of 30 June 1889 and Regulation; Royal Decree No. 1848 of 6 November 1926, approving the consolidated text of the public security laws (Title V: Of the residence and expulsion of aliens)); Luxembourg (Law of 30 December 1893); Netherlands (Law of 13 August 1849); Portugal (Law of 20 July 1912 and Decree of 1 July 1927); Romania (Law of 7 April 1881, Regulation of 2 August 1990); Switzerland (Order of 17 November 1919); United States (Acts of 20 February 1907, 1 May 1917, 16 October 1918, and 10 May and 5 June 1920); Cuba (Law of 19 February 1919); Costa Rica (Law of 18 July 1894); Brazil (Law of 7 January 1908); Bolivarian Republic of Venezuela (Law of 25 July 1925).

²⁷⁴ Institute of International Law, "Règles internationales..."

(d) *Failure to fulfil administrative formalities*

143. Some States cite failure to fulfil administrative formalities for the renewal of residence cards or any other identity documents as cause for expulsion of aliens who are legally resident in their territory. While general international law does not have rules on this subject and leaves the determination of this formality to the discretion of the States, the European Community takes a different approach, sanctioning the right of free movement of nationals of member States within Community space. Indeed,

just as criminal convictions cannot in themselves constitute a threat to public order for them to constitute automatically a ground for deportation, failure to fulfil administrative formalities cannot in itself disrupt public order or security enough to warrant deportation.²⁷⁵

European Community law concurs. Article 3, paragraph 3, of Directive 64/221/EEC provided:

Expiry of the identity card or passport used by the person concerned to enter the host country and to obtain a residence permit shall not justify expulsion from the territory.

This rule seemed obvious, given the provisions of the preceding paragraph of the directive²⁷⁶ and its explanation by the Court of Justice of the European Communities. However, its application also raised issues of interpretation and therefore required clarification.

144. Directive 64/221/EEC was thus at the heart of the *Royer* case of 1976.²⁷⁷ Mr. Royer, a French national, was residing in Belgium with his wife, who was running a café. As Mr. Royer failed to fulfil the necessary administrative formalities for his residence, the competent Belgian authorities ordered him to leave the territory. In considering a reference for a preliminary ruling, the Court of Justice of the European Communities held that the right of the nationals of a member State to enter the territory of and reside in another member State is “a right acquired under the Treaty”.²⁷⁸ Then, relying on Directives 68/360/EEC²⁷⁹ and 64/221/EEC, it concluded that the mere failure by a national of a member State to comply with the legal formalities concerning access, movement and residence of aliens “cannot therefore by itself justify a measure ordering expulsion or temporary imprisonment for that purpose”.²⁸⁰ It follows from the *Royer* case that “the expiry of the passport used [by an alien] to enter the national territory” of a member State other than his or her own or the absence of a residence permit cannot justify an expulsion order, in the light of those directives.²⁸¹ Likewise, failure to comply

with the reporting and registration administrative formalities prescribed by domestic regulations cannot give rise to an expulsion.²⁸² For persons protected by Community law, such expulsion would be incompatible with the provisions of the Treaty establishing the European Economic Community, as it would constitute denial of the right of free movement conferred and guaranteed by articles 39 to 55 of the Treaty and their implementation instruments.²⁸³

145. In the *Royer* case, the Court specified that such conduct could not in itself constitute a breach of public order or security. It stated that the public order and public security reservation is not “a condition precedent to the acquisition of the right of entry and residence”, but allows for “restrictions on the exercise of a right derived directly from the Treaty”.²⁸⁴ The Court then added that member States may “still expel from their territory a national of another member State where the requirements of public policy and public security are involved for reasons other than the failure to comply with formalities concerning the control of aliens”.²⁸⁵ In other words, non-compliance with legislation governing the terms of entry and residence “does not in itself constitute a threat to public order or public security”.²⁸⁶ Hence, any decision to expel a national of another member State based solely on such violation would be contrary to Community law.

146. Community case law on this point is sanctioned by Directive 2004/38/EC, notably article 15, paragraph 2, which, replicating the rule of article 3, paragraph 3 of Directive 64/221/EEC, provides that

[e]xpiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State.

In addition, article 5, paragraph 5 and article 8, by which a member State may require EU citizens to report their presence within its territory, for periods of residence longer than three months, states that failure to comply with this requirement may make the person concerned liable to “proportionate and non-discriminatory sanctions”.²⁸⁷ In other words, failure to comply with administrative

²⁷⁵ See Ducroquetz (footnote 71 above), p. 119. The analyses in this section are based on the work of this author (pp. 119–123).

²⁷⁶ Article 3, paragraph 2 of the Directive states: “Previous criminal convictions shall not in themselves constitute grounds for the taking of such measures [of public policy or of public security].”

²⁷⁷ Court of Justice of the European Communities, judgement of 8 April 1976, *Jean-Noël Royer*, Case C-48/75, *European Court Reports* 1976, p. 497; Conclusions of the Advocate General Mayras, presented on 10 March 1976, *ibid.*, p. 521.

²⁷⁸ *Ibid.*, para. 39.

²⁷⁹ Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, *Official Journal of the European Communities*, No. L 257, 19 October 1968, p. 13.

²⁸⁰ *Royer* case (footnote 277 above), para. 51.

²⁸¹ Karydis (footnote 146 above), p. 6, footnote 24. In 1997, the High-Level Panel on the Free Movement of Persons, chaired by Simone

Veil, still had to insist on the fact that, unlike the situation often found in the member States concerned, non-possession of a valid residence permit should never, in itself, give rise to a threat of deportation. See the panel’s review of the report, dated 18 March 1997, annexed to the Commission Communication to the European Parliament and the Council on the follow-up to the recommendations of the High-Level Panel on the Free Movement of Persons, COM(1998) 403 final (1 July 1998). A summary of the report may be found in Agence Europe, *Europe documents*, No. 2030, 9 April 1997; see also the note of F. Gazin, *Europe*, No. 5, May 1997, Commentary No. 133, p. 9.

²⁸² See Court of Justice of the European Communities, judgement of 7 July 1976, *Lynne Watson and Alessandro Belmann*, Case C-118/75, *European Court Reports* 1976, p. 1185; conclusions of the Advocate General Alberto Trabucchi, presented on 12 June 1976, *ibid.*, p. 1201.

²⁸³ *Ibid.*, in particular para. 20.

²⁸⁴ *Royer* case (footnote 277 above), para. 29.

²⁸⁵ *Ibid.*, para. 41.

²⁸⁶ Karydis (footnote 146 above), p. 6, footnote 24.

²⁸⁷ Article 5, paragraph 5 also holds true for family members who are not nationals of a member State. Concerning these family members, the same protection is provided in the case where they do not fulfil the obligation of applying for a residence card for periods of residence of more than three months or the permanent residence card (art. 9, para. 3 and art. 20, para. 2 of Directive 2004/38/EC).

formalities is not a sufficiently serious offence for the member State in question to be able to order an expulsion.

147. Following this position, the Court of Justice ruled against a Netherlands pre-expulsion detention measure taken against a French national pursuant to the Aliens Act of 2000 for failure to present an identity card. First, the Court noted that the presentation of an identity card is a mere “administrative formality the sole objective of which is to provide the national authorities with proof of a right which the person in question has directly by virtue of their status”.²⁸⁸ It then recalled that “detention and deportation based solely on the failure of the person concerned to comply with legal formalities concerning the monitoring of aliens impair the very substance of the right of residence directly conferred by Community law and are manifestly disproportionate to the seriousness of the infringement”.²⁸⁹ In fact, Directive 73/148/EEC “allows Member States to place restrictions on the right of residence of nationals of other Member States in so far as such restrictions are justified on grounds of public policy, public security or public health”.²⁹⁰ However, echoing its *Royer* case, the Court said: “Failure to comply with legal formalities pertaining to aliens’ access, movement and residence does not by itself constitute a threat to public policy or security”.²⁹¹ Accordingly, a measure to detain a national of another member State for the purposes of deportation taken on the ground of failure to present a valid identity card or passport constitutes an unjustified obstacle to the free provision of services, and hence contravenes article 49 of the Treaty establishing the European Economic Community.²⁹²

148. Moreover, the Court of Justice held in 2006 that automatic service of a deportation order for failure to produce within the prescribed period the documents required to obtain a residence permit, is contrary to Community law.²⁹³ This reasoning is consistent with EC law and cannot be extended to the right to expel non-Community

aliens. However, it is already indicative of a trend whose spread can all the more readily be foreseen, given the development of community integration in many regions of the world and the fact that European integration has often been a source of inspiration for other integration efforts of the same type.

(e) Public health

149. For expulsion purposes, what should this notion of public health include? Should it be taken that any person who is ill may for that reason be expelled? Or would only those persons who have a serious infection or who are voluntary or involuntary vectors of a contagious disease be affected? Public health appears in both old and recent texts as a specific ground for expulsion. For example, the Convention Respecting Conditions of Residence and Business and Jurisdiction contained in the Treaty of Peace between the British Empire, France, Italy, Japan, Greece, Roumania and the Serb-Croat-Slovene State and Turkey (Treaty of Lausanne), provided in article 7 that Turkey

reserves the right to expel, in individual cases, nationals of the other Contracting Powers, either under the order of Court or in accordance with the laws and regulations relating to public morality, public health or pauperism, or for reasons affecting the internal or external safety of the State. The other Contracting Powers agree to receive persons thus expelled, and their families, at any time. The expulsion shall be carried out in conditions complying with the requirements of health and humanity.

150. The State may have wide discretion in determining whether the expulsion of an alien is justifiable on public safety or public health grounds.²⁹⁴

151. National laws of the late nineteenth and early twentieth centuries had also dealt with the responses to these questions. Considering that public health is of vital importance for the preservation of the State,²⁹⁵ many of those laws provided that “aliens afflicted with epidemic or contagious diseases”²⁹⁶ could face expulsion. As a case in point, section 2 of the United States Immigration Act of 20 February 1907 provided:

The following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous; ... paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis; ... persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; ... anarchists; ... prostitutes ...; persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution; persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment ... to perform labor in this country of any kind, skilled or unskilled.²⁹⁷

²⁸⁸ Court of Justice of the European Communities, judgement of 17 February 2005, *Salah Oulane v. Minister of Alien Affairs and Integration*, Case C-215/03, para. 24, *European Court Reports* 2005, p. I-1245; conclusions of the Advocate General Philippe Léger, presented on 21 October 2004, *ibid.*, p. 1219. In Directive 2004/38/EC, the Community legislator considers the identity card or passport a formality (see preambular para. 9).

²⁸⁹ *Ibid.*, para. 40.

²⁹⁰ *Ibid.*, para. 41. In this regard, see Court of Justice of the European Communities, judgement of 16 January 2003, *Commission v. Italy*, Case C-388/01, *European Court Reports* 2003, p. I-721, para. 19. For the text Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, see the *Official Journal of the European Communities*, No. L 172 of 28 June 1973, p. 14.

²⁹¹ *Salah Oulane* case (see footnote 288 above), para. 42.

²⁹² F. Kauff-Gazin (“Précision juridictionnelle quant à la preuve de la nationalité d’un État membre”, *Europe*, No. 4, April 2005, Comm. No. 127, pp. 13–14) challenges the justification used by Community jurisdiction, namely Directive 73/148/EEC, to determine the right of movement and residence of a tourist, as since 28 June 1990 there has been a directive relating to the general right of residence.

²⁹³ Court of Justice of the European Communities, judgement of 23 March 2006, *Commission v. Kingdom of Belgium*, Case C-408/03, para. 72, *European Court Reports*, p. I-2663, at I-2687; Conclusions of the Advocate General Damaso Ruiz-Jarabo Colomer, presented on 25 October 2005, *ibid.*, p. I-2650. For EU citizens, under Directive 2004/38/EC, the residence card has been replaced by a registration certificate to be issued by the relevant authorities of the host member State (art. 8).

²⁹⁴ In the *Hochbaum* case, decided on 20 December 1934 by the Upper Silesian Arbitral Tribunal, it was held that when expulsion is based on grounds of public safety the Tribunal will not, as a rule, review the decision of the competent State authorities (*Annual Digest and Reports of Public International Law Cases*, 1933–1934, p. 325). See also *Re Rizzo and Others* (No. 2), ILR, pp. 500, 507; *Agee v. United Kingdom, Decisions and Reports of the European Commission of Human Rights* 7, p. 164; *R. v. Secretary of State for Home Affairs, ex parte Hosenball*, Court of Appeal of England, 29 March 1977, ILR, vol. 73, pp. 635–651, at pp. 638–639.

²⁹⁵ De Boeck (footnote 78 above), p. 545.

²⁹⁶ *Ibid.*

²⁹⁷ On this law, see, *inter alia*, Goulé, “L’immigration aux Etats-Unis et la loi du 20 février 1907”.

Naturally, aliens who violated those provisions faced deportation.²⁹⁸ While indicating that the measure “may appear inhumane, or at least strict”, Charles de Boeck nevertheless noted the following:

But the dominant trend today in America, and one that was adopted by Great Britain in 1905, is that of the system of selection and exclusion: instead of being expelled, aliens who represent a danger to public health are barred from entering the country.²⁹⁹

This practice of exclusion at the border was so systematic that there was no record of any alien with an illness being expelled from the United Kingdom in the first six years of implementation of the Aliens Act of 1905. But what explanation is there for the expulsion of aliens who were quite healthy when they first entered the country, but who ended up contracting an epidemic or contagious disease, victims of their environment rather than importers of deadly diseases? It is hard not to agree with de Boeck on this point: such expulsion “would be inhumane”.³⁰⁰

152. In recent years, the AIDS epidemic has raised new issues with respect to the expulsion of aliens based on considerations of public health. It has been noted that the international movement of persons has contributed to the spread of the global epidemic.³⁰¹ The fact that a person is infected with HIV/AIDS may be a valid public health concern for the refusal to admit aliens.³⁰² The extent to which these travel restrictions are justified³⁰³ has been questioned, as noted by Goodwin-Gill:

The World Health Organization has long maintained that HIV/AIDS constitutes no threat to public health ...

In this context, HIV screening appears to serve two functions, neither of which is dictated by health or economics ... In fact, its limitations with respect to the prevention of transmission of HIV are common knowledge, including the “window of uncertainty” between possible infection and the development of antibodies, and the notorious reluctance on the part of states to test citizens returning from abroad, even from “high risk” areas ... As one commentator has remarked, countries requiring HIV testing commonly accept refugees for resettlement having medical conditions likely to incur public expense far in excess of anything an HIV patient is likely to incur, and this rather negates the argument for screening on economic grounds.³⁰⁴

²⁹⁸ See Martini (footnote 72 above), p. 65.

²⁹⁹ See De Boeck (footnote 78 above), p. 545; and the examples given on pp. 545–549.

³⁰⁰ *Ibid.*, p. 550.

³⁰¹ “For with the exception of the relatively small contribution of blood and blood products to the global epidemic, HIV has largely been spread through the movement of people” (Haour-Knipe and Rector, *Crossing Borders: Migration, Ethnicity and AIDS*, p. viii).

³⁰² “A State may require a person seeking entry into its territory to be in possession of a certificate of medical fitness or a certificate of inoculation against specified contagious diseases. That document must comply with the national regulations of the State of entry, which are usually based on international health regulations of a general or regional health organization. Such regulations apply in particular to all travellers or travellers arriving from specific regions, and are intended to prevent the spread of those diseases ... The World Health Organization regulations provide for quarantine action which member nations may take with respect to four diseases, namely, cholera, the plague, yellow fever, and small pox ... To this list of communicable diseases, ‘AIDS’ (Acquired Immune Deficiency Syndrome) has now been added” (Sohn and Buergeth (footnote 195 above), p. 64).

³⁰³ The analysis that follows (paras. 152–165 below) is taken from the memorandum by the Secretariat (footnote 18 above), paras. 394–407.

³⁰⁴ Goodwin-Gill, “AIDS and HIV, migrants and refugees: international legal and human rights dimensions”, pp. 63–64.

153. The question arises as to whether an alien with this illness can be expelled on public health and safety grounds. It should be noted that the discretion of a State with respect to immigration controls for reasons of public health may be broader for the exclusion of aliens than for the expulsion of aliens.³⁰⁵ This question may require consideration of the relevant human rights of the alien.³⁰⁶ The relevant criteria would appear to include the state of the illness of the alien and the medical conditions or the possibility of treatment in the State of nationality to which the alien would presumably be expelled.³⁰⁷

154. Within the European Union, public health considerations are recognized as a valid ground for the expulsion of Union citizens and their family members. Public health grounds are referred to in article 27 of Directive 2004/38/EC. Article 29 of the same Directive provides indications concerning the diseases which may justify an expulsion for reasons of public health. It is worth noting that the diseases occurring after a three-month period from the date of the arrival of the individual in the territory of the host State may not justify an expulsion. Article 29 provides as follows:

Public health

1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.

2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.

3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine.

155. The national laws of several States recognize public health considerations as a valid ground for the expulsion of aliens.³⁰⁸ A State may expel or refuse entry to an alien who suffers from a disease that is listed or

³⁰⁵ “States also have wide discretion in establishing grounds for deportation or expulsion of those who have made an entry into national territory. As a matter of practice, the grounds for expulsion are typically more limited than grounds for barring entry. Contracting a contagious disease while on national territory is less likely to be *per se* a ground for deportation, for example, even though the same illness might well have blocked initial admission if the disease had developed before entry” (Martin, “The authority and responsibility of States”, p. 34).

³⁰⁶ See Palmer, “AIDS, expulsion and article 3 of the European Convention on Human Rights”; and Goodwin-Gill, “AIDS and HIV, migrants and refugees: international legal and human rights dimensions”.

³⁰⁷ Van Krieken, “Health and migration: the human rights and legal context”, said the following: “An important question arises under human rights law whether returning persons to countries where they may not have access to adequate health services constitutes inhuman or degrading treatment. These issues have been examined under the European Court of Human Rights in a variety of cases. More often than not, return has been allowed ... The benchmarks would thus appear to be the state of the illness and the conditions in the country of origin ... Finally, cases in which non-citizens contest expulsion based on a claim of illness and lack of facilities in the country of origin are likely to succeed only under special circumstances.”

³⁰⁸ The review of national laws and case law on this point is taken from the memorandum by the Secretariat (footnote 18 above), paras. 392–399.

enumerated,³⁰⁹ hereditary,³¹⁰ incapacitating,³¹¹ chronic,³¹² epidemic, infectious, contagious or communicable,³¹³ or makes the alien's presence undesirable for medical reasons;³¹⁴ HIV/AIDS,³¹⁵ tuberculosis,³¹⁶ leprosy³¹⁷ or venereal diseases,³¹⁸ physical defects,³¹⁹ a mental illness or handicap³²⁰ or retardation;³²¹ alcoholism, drug addiction or drug abuse;³²² old age;³²³ or a grave state of health.³²⁴ A State may do likewise if an alien threatens the health of the public³²⁵ or of the State's animals;³²⁶ comes

³⁰⁹ Belarus, 1998 Law, arts. 14–15 and 20; Chile, 1975 Decree, arts. 15 (5), 64 (4), 65 (1) and 66; China, 1986 Rules, arts. 7 (4) and 20; Greece, 2001 Law, art. 44 (1) (c); Japan, 1951 Order, arts. 5 (1) and 7 (4); Russian Federation, 2002 Law No. 115-FZ, arts. 7 (13), 9 (13) and 18 (9); and South Africa, 2002 Act, art. 29 (1) (a).

³¹⁰ Brazil, 1981 Decree, art. 52 (II); and Paraguay, 1996 Law, arts. 6 (3), 7 (2).

³¹¹ Brazil, 1981 Decree, art. 52 (III).

³¹² Paraguay, 1996 Law, arts. 6 (3), 7 (2).

³¹³ China, 1986 Rules, arts. 7 (4) and 20; Japan, 1951 Order, arts. 5 (1) and 7 (4); Panama, 1960 Decree-Law, art. 37 (d); Paraguay, 1996 Law, arts. 6 (1) and 7 (1); Republic of Korea, 1992 Act, arts. 11 (1) (1), (1) (8) and 46 (1) (2); Russian Federation, 2002 Law No. 115-FZ, arts. 7 (13), 9 (13) and 18 (9); South Africa, 2002 Act, art. 29 (1) (a); and United States, Immigration and Nationality Act, sects. 212 (a) (1) (A) and 232 (a).

³¹⁴ Kenya, 1967 Act, art. 3 (1) (c) (ii); and Nigeria, 1963 Act, art. 50 (d).

³¹⁵ China, 1986 Rules, arts. 7 (4) and 20; Russian Federation, 2002 Law No. 115-FZ, arts. 7 (13), 9 (13) and 18 (9); and United States, Immigration and Nationality Act, sects. 212 (a) (1) (A) (i), (g) (1) and 232 (a).

³¹⁶ China, 1986 Rules, arts. 7 (4) and 20.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ Brazil, 1981 Decree, art. 52 (IV). A State may consider as relevant only those physical defects which pose a threat to *ordre public* (United States, Immigration and Nationality Act, sects. 212 (a) (1) (A) (iii), (g) (3) and 232 (a)).

³²⁰ This can involve either any mental illness or handicap (Brazil, 1981 Decree, art. 52 (I); China, 1986 Rules, arts. 7 (4) and 20; Kenya, 1967 Act, art. 3 (1) (b); Nigeria, 1963 Act, arts. 18 (1) (b) and 39 (1)–(2); Panama, 1960 Decree-Law, art. 37 (e); Republic of Korea, 1992 Act, arts. 11 (1) (5), (1) (8) and 46 (1) (2)), or one which: (1) prevents discernment of right and wrong (Japan, 1951 Order, art. 5 (2)); (2) causes altered behaviour (Paraguay, 1996 Law, arts. 6 (2) and 7 (1)); (3) is otherwise debilitating (Paraguay, 1996 Law, arts. 6 (3) and 7 (2)); or (4) affects or threatens *ordre public* (Switzerland, 1931 Federal Law, art. 10 (1) (c) and (2); and United States, Immigration and Nationality Act, sects. 212 (a) (1) (A) (iii), (g) (3) and 232 (a)).

³²¹ Paraguay, 1996 Law, art. 6 (3), 7 (2).

³²² Brazil, 1981 Decree, art. 52 (V); Paraguay, 1996 Law, arts. 6 (6) and 7 (4); Republic of Korea, 1992 Act, arts. 11 (1) (1), (1) (8) and 46 (1) (2); Russian Federation, 2002 Law No. 115-FZ, arts. 7 (13), 9 (13) and 18 (9); and United States, Immigration and Nationality Act, sects. 101 (a) (50) (f) (1), 212 (a) (1) (A) (iv), 232 (a) and 237 (a) (2) (B) (ii).

³²³ Paraguay, 1996 Law, art. 35 (b).

³²⁴ *Ibid.*; compare France, Code, art. L521-3 (5), which does not permit expulsion when doing so would have consequences of an exceptional gravity for the alien's health.

³²⁵ Belarus, 1998 Law, arts. 14–15 and 20, 1993 Law, arts. 20 (2) and 25 (1); Brazil, 1981 Decree, art. 101, 1980 Law, art. 67; Canada, 2001 Act, art. 38 (1) (a); Czech Republic, 1999 Act, sect. 9 (1); Denmark, 2003 Act, art. 25 (ii); Finland, 2004 Act, sects. 11 (1) (5), 168 (1)–(2); Germany, 2004 Act, art. 55 (2) (5); Honduras, 2003 Act, art. 89 (3); Italy, 1998 Law No. 40, art. 45 (2) (b); Lithuania, 2004 Law, art. 7 (5); Madagascar, 1962 Law, art. 13; Panama, 1960 Decree-Law, arts. 18 and 36 (as amended by Act No. 6 (1980), para. 10), 38; Poland, 2003 Act No. 1775, art. 21 (1) (5); Republic of Korea, 1992 Act, arts. 11 (1) (1), (1) (8) and 46 (1) (2); and Russian Federation, 1996 Law, arts. 25.10 and 27.

³²⁶ Belarus, 1998 Law, art. 20.

from a region of epidemiological concern;³²⁷ fails specified health standards or conditions;³²⁸ is likely to place excessive demands on the State's health services;³²⁹ or fails to present vaccination records.³³⁰

156. The alien may be required to undergo a medical examination³³¹ (which may involve detention)³³² or to have sufficient funds to cover the alien's medical costs.³³³ The expulsion of an alien on this ground may be affected by the alien's compliance with the State's health authorities;³³⁴ or a special arrangement or relationship existing between the alien's State and the expelling State.³³⁵ Family connections to nationals of the State may³³⁶ or may not³³⁷ affect the alien's status under this heading, while grounds found under this heading may be extended to the alien's entire family.³³⁸ This heading may expressly apply to aliens with transitory status.³³⁹

157. It should be noted that some national courts have held that aliens suffering from severe medical conditions cannot be expelled where such an expulsion would constitute a violation of human rights.³⁴⁰

(f) *Morality*

158. Morality has been recognized as a valid ground for the expulsion of aliens in treaty law, State practice³⁴¹ and the literature.³⁴²

159. The European Convention on Establishment provides in article 3, paragraph 1, as follows:

Nationals of any Contracting Party lawfully residing in the territory of another Party may be expelled only if they endanger national security or offend against *ordre public* or morality.

³²⁷ *Ibid.*; and Italy, 1996 Decree-Law, art. 4 (2).

³²⁸ Brazil, 1980 Law, arts. 7 (V) and 26.

³²⁹ Canada, 2001 Act, art. 38 (1) (c), (2).

³³⁰ United States, Immigration and Nationality Act, sects. 212 (a) (1) (A) (ii), (B), (g) (2) and 232 (a).

³³¹ Belarus, 1998 Law, art. 20; Japan, 1951 Order, arts. 7 (1) and 9; Kenya, 1967 Act, art. 3 (1) (c) (i); Nigeria, 1963 Act, art. 50 (d); and United States, Immigration and Nationality Act, sects. 232 (a) and 240 (c) (1) (B).

³³² United States, Immigration and Nationality Act, sect. 232 (a).

³³³ Hungary, 2001 Act, art. 4 (1) (d); and Lithuania, 2004 Law, art. 7 (3).

³³⁴ Greece, 2001 Law, art. 44 (1) (c).

³³⁵ Finland, 2004 Act, sect. 168 (1)–(2); and Italy, 1998 Law No. 40, art. 45 (2) (b).

³³⁶ Canada, 2001 Act, art. 38 (2); Paraguay, 1996 Law, arts. 7, 35 (b); and United States, Immigration and Nationality Act, sect. 212 (a) (1) (B), (g) (1).

³³⁷ Panama, 1960 Decree-Law, art. 38.

³³⁸ Brazil, 1980 Law, art. 26 (2).

³³⁹ Panama, 1960 Decree-Law, art. 36 (as amended by Act No. 6 (1980), para. 10); and United States, Immigration and Nationality Act, sect. 232 (a).

³⁴⁰ See the case law provided in the memorandum by the Secretariat (footnote 18 above), paras. 578–584.

³⁴¹ "Very commonly, an alien's deportation may be ordered ... on account of the alien's ... immoral conduct (including prostitution and use of narcotics)" (Plender (footnote 191 above), pp. 467–468) (citing, *inter alia*, in footnote 191 above, Denmark, Aliens Act No. 226 of 8 June 1983, art. 25 (2); Nigeria, 1963 Act, sect. 17 (1) (g)–(h)).

³⁴² "The power of expulsion or deportation may be exercised if an alien's conduct or activities after being admitted into the State violate certain basic rules. Such conduct or activities include: ... 3. Engaging in activities which ... are prejudicial to ... morality" (Sohn and Buerenthal (footnote 195 above), pp. 90–91).

160. Expulsion on grounds of morality is contemplated in the national laws of several States.³⁴³ Thus, a State may expel an alien who has furthered, promoted or profited from prostitution or other sexual exploitation³⁴⁴ or from human trafficking.³⁴⁵ A State may do likewise if the alien has engaged in or is prone to prostitution;³⁴⁶ is otherwise involved in forbidden sexual behaviour³⁴⁷ or sexual crimes;³⁴⁸ has trafficked in human organs;³⁴⁹ has profited from,³⁵⁰ smuggled,³⁵¹ traded or trafficked in,³⁵² produced,³⁵³ possessed³⁵⁴ or otherwise been involved with³⁵⁵ drugs such as narcotics or other psychotropic or psychogenic substances; has abducted minors or otherwise involved them in illicit activities;³⁵⁶ has committed crimes of domestic violence;³⁵⁷ or has been a gambler or derived significant income from gambling.³⁵⁸

161. According to the legislation of some States, expulsion on grounds of morality may apply to an alien who is

³⁴³ The review of national laws on this subject is taken from the memorandum by the Secretariat (footnote 18 above), paras. 403–406.

³⁴⁴ Argentina, 2004 Act, art. 29 (h); Greece, 2001 Law, art. 44 (1) (a); Italy, 1998 Decree-Law No. 286, arts. 4 (3) and 8; Japan, 1951 Order, arts. 5 (7) and 24 (4) (j); Kenya, 1967 Act, art. 3 (1) (e); Nigeria, 1963 Act, art. 18 (1) (h), (3) (a), (e)–(g); Panama, 1960 Decree-Law, art. 37 (a); Paraguay, 1996 Law, art. 6 (6); and United States, Immigration and Nationality Act, sects. 212 (a) (2) (D) (ii) and 278.

³⁴⁵ Argentina, 2004 Act, art. 29 (h); Bosnia and Herzegovina, 2003 Law, art. 57 (1) (g); Chile, 1975 Decree, arts. 15 (2), 17, 63 (2) and 65 (1)–(3); Hungary, 2001 Act, art. 46 (2); Japan, 1951 Order, arts. 2 (7), 5 (7)–2 and 24 (4) (c); and United States, Immigration and Nationality Act, sects. 212 (a) (2) (D) (ii) and (H) (i), 278.

³⁴⁶ Austria, 2005 Act, art. 3.53 (2) (3); China, 1986 Rules, art. 7 (3); Japan, 1951 Order, arts. 5 (7), 24 (4) (j) and 62 (4); Kenya, 1967 Act, art. 3 (1) (e); Nigeria, 1963 Act, art. 18 (1) (g), (3) (g); Panama, 1960 Decree-Law, art. 37 (a); Paraguay, 1996 Law, art. 6 (6); and United States, Immigration and Nationality Act, sect. 212 (a) (2) (D) (i).

³⁴⁷ Italy, 1998 Decree-Law No. 286, arts. 4 (3) and 8.

³⁴⁸ Greece, 2001 Law, art. 44 (1) (a).

³⁴⁹ Paraguay, 1996 Law, art. 6 (6).

³⁵⁰ *Ibid.*

³⁵¹ Bosnia and Herzegovina, 2003 Law, arts. 27 (1) (b), and 47 (1) (b); and Hungary, 2001 Act, art. 32 (1) (b).

³⁵² Bosnia and Herzegovina, 2003 Law, art. 57 (1) (g); Chile, 1975 Decree, arts. 15 (2), 17, 63 (2) and 65 (1)–(3); China, 1986 Rules, art. 7 (3); Germany, 2004 Act, art. 54 (3); Greece, 2001 Law, art. 44 (1) (a); Hungary, 2001 Act, art. 46 (2); Panama, 1960 Decree-Law, art. 37 (a); Paraguay, 1996 Law, art. 6 (6); South Africa, 2002 Act, art. 29 (1) (b); and United States, Immigration and Nationality Act, sect. 212 (a) (2) (C).

³⁵³ Bosnia and Herzegovina, 2003 Law, arts. 27 (1) (b) and 47 (1) (b); Germany, 2004 Act, art. 54 (3); and Hungary, 2001 Act, art. 32 (1) (b).

³⁵⁴ Bosnia and Herzegovina, 2003 Law, arts. 27 (1) (b) and 47 (1) (b); and Japan, 1951 Order, art. 5 (6).

³⁵⁵ Denmark, 2003 Act, art. 22 (iv); Germany, 2004 Act, art. 53 (2); Italy, 1998 Decree-Law No. 286, arts. 4 (3) and 8; Japan, 1951 Order, arts. 5 (5) and 24 (4) (h); and United States, Immigration and Nationality Act, sects. 212 (a) (2) (A) (i) (II), (h) and 237 (a) (2) (B).

³⁵⁶ Greece, 2001 Law, art. 44 (1) (a); Italy, 1998 Decree-Law No. 286, arts. 4 (3) and 8; Japan, 1951 Order, art. 2 (7) (b)–(c); Nigeria, 1963 Act, art. 18 (1) (h) (ii)–(iv), (3) (b)–(d) and (f); and United States, Immigration and Nationality Act, sect. 212 (a) (10) (C). The United States may exempt a foreign government official from the application of this ground upon the discretionary decision of the United States Secretary of State, or if the child is located in a State party to the Convention on the Civil Aspects of International Child Abduction (United States, Immigration and Nationality Act, sect. 212 (a) (10) (C) (iii) (II)–(III)).

³⁵⁷ France, Code, art. L541-4; and United States, Immigration and Nationality Act, sect. 237 (a) (2) (E).

³⁵⁸ Panama, 1960 Decree-Law, art. 37 (b); and United States, Immigration and Nationality Act, sect. 101 (a) (50) (f) (4)–(5).

a member of an organization that engages in human trafficking³⁵⁹ or drugs;³⁶⁰ harms or threatens national or public morality;³⁶¹ commits a crime of moral turpitude;³⁶² gravely offends morals;³⁶³ engages in immoral conduct³⁶⁴ or is not of good moral character;³⁶⁵ operates in a morally inferior environment;³⁶⁶ is unable to lead a respectable life;³⁶⁷ or intends to engage in commercialized vice.³⁶⁸

162. This ground may be applied either once criminal procedures have begun,³⁶⁹ or once the alien has committed the relevant act or broken the relevant law.³⁷⁰ The relevant law may set forth penalties in addition to expulsion,³⁷¹ or specify that the expulsion shall occur after the alien completes a sentence or other detention³⁷² or if the alien's sentence did not include expulsion.³⁷³

163. The expulsion of an alien on grounds relating to morality may depend in part on the alien's residency status,³⁷⁴ or the residency status of the alien's family;³⁷⁵ eligibility for exemption from visa or other such

³⁵⁹ Bosnia and Herzegovina, 2003 Law, arts. 27 (1) (c) and 47 (1) (c); and Canada, 2001 Act, art. 37 (1) (b).

³⁶⁰ Bosnia and Herzegovina, 2003 Law, arts. 27 (1) (b), 47 (1) (b); and Hungary, 2001 Act, art. 32 (1) (b).

³⁶¹ Brazil, 1981 Decree, art. 101, 1980 Law, arts. 64 and 67; Chile, 1975 Decree, arts. 15 (2), 17, 63 (2) and 65 (1)–(3); Madagascar, 1962 Law, art. 13; Panama, 1960 Decree-Law, arts. 18 and 38; Republic of Korea, 1992 Act, art. 11 (1) (4), (1) (8); and Russian Federation, 1996 Law, art. 25.10.

³⁶² United States, Immigration and Nationality Act, sect. 212 (a) (2) (A) (i) (I), (ii).

³⁶³ Switzerland, 1949 Regulation, art. 16 (2).

³⁶⁴ Panama, 1960 Decree-Law, art. 37 (a).

³⁶⁵ United States, Immigration and Nationality Act, sect. 101 (a) (50) (f).

³⁶⁶ Paraguay, 1996 Law, art. 6 (7).

³⁶⁷ Sweden, 1989 Act, sect. 2.4. In Sweden, an alien may be granted a time-limited residence permit rather than a standard residence permit in view of the alien's anticipated lifestyle (Sweden, 1989 Act, sect. 2.4b).

³⁶⁸ United States, Immigration and Nationality Act, sect. 212 (a) (2) (D) (iii).

³⁶⁹ Argentina, 2004 Act, art. 29 (h); Bosnia and Herzegovina, 2003 Law, art. 57 (1) (g); Brazil, 1981 Decree, art. 101, 1980 Law, art. 67; Denmark, 2003 Act, art. 22 (iv); Germany, 2004 Act, art. 53 (2); Greece, 2001 Law, art. 44 (1) (a); Japan, 1951 Order, arts. 5 (5) and 24 (4) (h); South Africa, 2002 Act, art. 29 (1) (b); and United States, Immigration and Nationality Act, sects. 101 (a) (50) (f) (5) and 237 (a) (2) (B) (i), (E).

³⁷⁰ Argentina, 2004 Act, art. 29 (h); Austria, 2005 Act, art. 3.53 (2) (3); Bosnia and Herzegovina, 2003 Law, arts. 27 (1) (b)–(c), 47 (1) (b)–(c); Brazil, 1980 Law, art. 64; Germany, 2004 Act, art. 54 (3); Hungary, 2001 Act, art. 32 (1) (b); Italy, 1998 Decree-Law No. 286, arts. 4 (3), 8; Japan, 1951 Order, arts. 5 (6) and 24 (4) (h); Nigeria, 1963 Act, art. 18 (1) (g)–(h); (3) (a)–(g); Panama, 1960 Decree-Law, art. 37 (a); Paraguay, 1996 Law, art. 6 (6)–(7); and United States, Immigration and Nationality Act, sects. 101 (a) (50) (f) (3) and 212 (a) (2) (C)–(D).

³⁷¹ Italy, 1998 Decree-Law No. 286, art. 12 (3 *ter*), 1998 Law No. 40, art. 10 (3), 1996 Decree-Law, art. 8 (1); and United States, Immigration and Nationality Act, sect. 278.

³⁷² Bosnia and Herzegovina, 2003 Law, art. 47 (4).

³⁷³ *Ibid.*, art. 57 (1) (g).

³⁷⁴ Austria, 2005 Act, art. 3.53 (2) (3); Denmark, 2003 Act, art. 22 (iv); Italy, 1998 Decree-Law No. 286, art. 12; and United States, Immigration and Nationality Act, sect. 212 (h).

³⁷⁵ United States, Immigration and Nationality Act, sect. 212 (h) (1) (B).

requirements;³⁷⁶ length of stay in the State's territory at the time of the relevant act;³⁷⁷ having entered the State's territory prior to the grounds for expulsion becoming evident;³⁷⁸ threat to national interests;³⁷⁹ involvement of aliens from a State not having a special arrangement or relationship with the expelling State;³⁸⁰ status as a victim of trafficking when committing the relevant act;³⁸¹ or transitory status.³⁸² The alien's dependents may be subject to expulsion under this heading if grounds exist to expel the alien.³⁸³

164. The national courts of some States have upheld the expulsion of aliens on grounds of morality.³⁸⁴

(i) *Begging-vagrancy*

165. In the context of the right of expulsion, up until the start of the twentieth century, begging and vagrancy were also regarded as causes for expulsion, because beggars and vagrants were held to be "dangerous".³⁸⁵ For example, in France, article 272 of the penal code under the monarchy explicitly provided that "individuals declared vagabonds by a judgement, may, if they are foreigners, be conveyed, by order of the Government, out of the territory of the Kingdom".³⁸⁶ Measures of expulsion were taken against many persons in this category.

166. In Switzerland, "persons without resources" could be expelled.³⁸⁷ Likewise, article 6 of the Luxembourg Act of 17 December 1893 stated that a non-resident alien "found in a state of vagrancy or begging or in

contravention of the law on itinerant trades may be immediately escorted to the frontier by the police".³⁸⁸

167. These causes for expulsion can be linked to the ground of public order, which as we have seen can be very elastic; its content may even vary from one country to another. It could be linked to public tranquility.³⁸⁹ But does the latter form part of public order or does it constitute an autonomous ground? In any event, it may be doubted whether such causes are acceptable nowadays in the light of international law. Moreover, the domestic law of some States makes begging, for example, subject to the rules of local administration and considers that restrictions may be applied to begging on a public thoroughfare, but on condition that these restrictions are limited in space and time, taking the circumstances into account.³⁹⁰ Clearly, these are "restrictions" which moreover are spatio-temporally limited, and do not constitute prohibitions; still less could they, under these circumstances, constitute grounds for expulsion.

(ii) *Debauchery-disorderliness*

168. Some old legislations regarded debauchery and disorderliness, like begging and vagrancy, as grounds for expulsion. Older works refer, by way of illustration, to the expulsion of a three-member French family, the Bettingers, from the Canton of Solothurn in Switzerland towards the end of the nineteenth century, not only because the family had for a long time been a public charge, but also because the father and the son had fallen into complete dissoluteness and were no longer able to find anywhere to live, and all the members of the family had in addition become unfit for work.³⁹¹ Still in Switzerland, on 1 September 1885, a resident of Basel-Landschaft requested the Federal Council to expel one Georg Grüner, of Vienna, who, the author of the request alleged, "is engaging in immoral conduct and disturbing the peace of a number of families".³⁹² The Federal Council communicated the request to the Government of the Canton which was competent to decide the matter. Martini referred at the start of the twentieth century to the case of foreigners "expelled for contravention of the gaming laws",³⁹³ and also indicated that consuls could naturally take this measure where they had retained "the right to expel their nationals", as in China.³⁹⁴ Prostitution also forms part of this ground of debauchery and disorderliness. In the United Kingdom, for example, prostitution was an offence, and the Aliens Act of 1905 authorized the Secretary of State to issue an expulsion

³⁷⁶ Austria, 2005 Act, art. 3.53 (2) (3).

³⁷⁷ *Ibid.*; Denmark, 2003 Act, art. 22 (iv); and United States, Immigration and Nationality Act, sect. 212 (h).

³⁷⁸ China, 1986 Rules, art. 7 (3); compare Kenya, 1967 Act, art. 3 (1) (e); and Nigeria, 1963 Act, art. 18 (1) (h), which consider grounds to exist regardless of whether the Act was committed before or after the alien entered the State's territory, and the United States, Immigration and Nationality Act, sect. 212 (a) (2) (D) (i)-(iii), which finds grounds to exist if the alien committed prostitution within 10 years prior to entering United States territory, or intends to engage in such Activity while in United States territory.

³⁷⁹ Bosnia and Herzegovina, 2003 Law, art. 27 (1) (b).

³⁸⁰ Italy, 1996 Decree-Law, art. 8 (1).

³⁸¹ Canada, 2001 Act, art. 37 (2) (b); and Japan, 1951 Order, arts. 5 (7)-2 and 24 (4) (a).

³⁸² Japan, 1951 Order, art. 24 (4).

³⁸³ United States, Immigration and Nationality Act, sect. 212 (a) (2) (C) (ii), (H) (ii)-(iii).

³⁸⁴ See, e.g., Egypt, *Re Th. and D.*, Conseil d'État, 16 March 1953, ILR, vol. 18, p. 302 ("Art. 2 (2) of the Decree-Law of 22 June 1938, enumerates amongst the grounds justifying expulsion the fact of having committed an act contrary to public morality, and the applicants have undoubtedly committed such an act, an act which is against divine as well as human law; if the expulsion is based upon this ground it is certainly justifiable in law.") (involving concubinage); *Hecht v. McFaul and Attorney-General of the Province of Quebec*, Quebec Superior Court, 26 January 1961, *ibid.*, vol. 42, pp. 226-229 (expulsion for conviction of crimes of moral turpitude). See also Guyana, *Brandt v. Attorney-General of Guyana and Austin*, Court of Appeal, 8 March 1971, *ibid.*, vol. 71, p. 460 ("That which was not 'conducive to the public good' of a country might consist of not only opposition to its peace and good order, but also to its 'social' and 'material interests', thereby embracing a wider ambit than the limited category of 'peace and good order'").

³⁸⁵ Martini (footnote 72 above), p. 60.

³⁸⁶ Cited in *ibid.*, pp. 60-61.

³⁸⁷ *Ibid.*, p. 61.

³⁸⁸ Cited in *ibid.*

³⁸⁹ See article L 2213-4 of the Code générale des collectivités territoriales in France.

³⁹⁰ See in this regard, France, Tribunal administratif (T.A.) de Pau, 22 November 1995, *Conveinhes et autres c. Commune de Pau, Les Petites Affiches*, 31 May 1996, conclusions Madec; T.A. de Poitiers, 19 October 1995, *Massaoud Abderrezac c. Commune de La Rochelle, Revue française de droit administratif (RFDA)*, 1996, p. 377; Cour administrative d'appel (CAA) Bordeaux, 26 April 1999, No. 97BX01773, *Commune de Tarbes* (footnote 121 above).

³⁹¹ See *Journal du droit international privé (Clunet)*, 1893, vol. 20, pp. 661-662; and de Boeck (footnote 78 above), p. 543.

³⁹² De Boeck (footnote 78 above), p. 542.

³⁹³ Martini (footnote 72 above), p. 61.

³⁹⁴ *Ibid.*, pp. 61-62.

order if a court certified that it had convicted an alien of an offence as a prostitute.³⁹⁵ The United States Act of 20 February 1907, in section 2, excluded prostitutes and procurers from admission to its territory, and, in section 3, authorized the deportation of these two classes of persons.³⁹⁶ Similarly, although it did not explicitly mention prostitution, the Brazilian Law of 7 December 1907 provided in article 2 that “sufficient grounds for expulsion are ... duly established vagrancy, begging or procuring”.³⁹⁷ De Boeck wrote in 1927 that the principle according to which “notorious and repeated acts of debauchery and disorderliness constitute legitimate grounds for expulsion is tacitly accepted and established in the laws of all countries. It is universally applied”.³⁹⁸

169. Apart from the four cases discussed above, national legislations establish various other grounds for expulsion, sometimes unexpected ones. At the time, expulsions were noted for political causes as diverse as “anarchist machinations”, “praise of murder”,³⁹⁹ “nefarious incitement”,⁴⁰⁰ “espionage” or suspicion of espionage,⁴⁰¹ “intrigues and plots against the State”,⁴⁰² or against third powers,⁴⁰³ “resistance to the laws”,⁴⁰⁴ “violent antimilitarism”,⁴⁰⁵ “seditious slogans”⁴⁰⁶ and “tearing up flags”.⁴⁰⁷

170. These grounds for expulsion raise no particular problem in that they can easily be subsumed under the ground of public security or that of public order.

171. More unusual are two other grounds, one of which is relatively old and may be described as ideological, and the other, more recent, as cultural.

(g) *Ideological grounds and political activity*

(i) *Ideology*

172. This is associated with the advent of the socialist regime in Russia. The Law of 19 May 1903 there was replaced by the Decree on Expulsion of Aliens of the Government of the Union of Soviet Socialist Republics (USSR) of 29 August 1921, article 1 of which provided that

aliens whose way of life, activity or conduct are regarded as incompatible with the principles and way of life of a worker and peasant State may be expelled by the special committee (Cheka or GPU), or by order of a court, even if they have previously been authorized to stay in Russia.⁴⁰⁸

(ii) *Political activities*

173. Political considerations may be a relevant factor in determining the expulsion of aliens on the basis of public order or national security rather than as a separate ground under international law.⁴⁰⁹

174. The Parliamentary Assembly of the Council of Europe affirmed the prohibition of the expulsion of aliens, including illegal aliens, on political or religious grounds in recommendation 769 (1975).⁴¹⁰

175. The national laws of some States provide for the expulsion of an alien who takes part in the State’s domestic politics,⁴¹¹ such as by voting when not authorized to do so⁴¹² or by abusively interfering with the political participation rights which the State reserves for its nationals,⁴¹³ is a member of a totalitarian or fascist party, or a party

³⁹⁵ *Ibid.*, p. 82.

³⁹⁶ De Boeck (footnote 78 above), pp. 544–545.

³⁹⁷ *Ibid.*, p. 545.

³⁹⁸ *Ibid.*, p. 542.

³⁹⁹ Martini (footnote 72 above), p. 69.

⁴⁰⁰ See, for example, the expulsion from Switzerland in 1881 of Prince Kropotkin for having made “statements in public inciting the workers to seize property violently and overthrow the established order by force” and for having “glorified the assassination of Tsar Alexander II”, etc. (*ibid.*).

⁴⁰¹ See the case of Charles Hofmann, of Carlsbad (Bohemia), sentenced for fraud in Switzerland. Under the name of Baron Courtier, stating that he was a colonel in the reserves, he gained access to the military facilities at Thun (Switzerland); suspected of espionage, he was immediately expelled (*Journal du droit international privé (Clunet)*, 1893, vol. 20, pp. 671–672).

⁴⁰² See the case of the expulsion in 1718 of the Prince of Cellamare, Ambassador of Spain in Paris, for conspiring against the regent of France (see RGDIP, vol. XIV, 1907, p. 181).

⁴⁰³ See the case of the expulsion from Belgium, in 1872, of the Count of Chambord “after the secret meetings held by this pretender with his supporters in the Hotel Saint-Antoine in Antwerp” (*Journal du droit international privé (Clunet)*, 1889, p. 73).

⁴⁰⁴ See the case of the expulsion of Mgr. Montagnini, secretary of the Nunciature of the Holy See, “for having transmitted to three priests in Paris the order to violate the law on separation of church and State and led the clergy to battle in the name of the clerical party” (footnote 254 above).

⁴⁰⁵ See the case of the expulsion of Hugo Nanni (Martini (footnote 72 above), p. 73).

⁴⁰⁶ See the case of the expulsion from Switzerland, in 1901, of six Italians, including one student, who in the course of a public demonstration shouted “down with the army” (*ibid.*, p. 74).

⁴⁰⁷ See the case of the expulsion of Ghio, expelled from France for tearing up French flags in Le Canet (*ibid.*).

⁴⁰⁸ Cited by Fauchille (footnote 75 above), p. 978.

⁴⁰⁹ “The classical writers acknowledged a power to expel aliens but often asserted that the power may be exercised only for cause. Grotius wrote of the sovereign right to expel aliens who challenge the established political order of the expelling State and indulge in seditious activities there. Pufendorff echoed this sentiment. In early diplomatic correspondence the same principle is expressed with the same qualification.” (Plender (footnote 191 above), p. 461 (citing Grotius, *De Jure ac Pacis, Libri Tres*, 1651, Book II, Chap. II, p. xvi); and Pufendorf, *De Jure Naturae et Gentium, Libri Octo*, 1866, Book III, Chap. III, para. 10). “In addition to the economic and social grounds of undesirability, political reasons, especially war, have often been the basis of expulsion orders” (Borchard (footnote 75 above), p. 52). “The power of expulsion or deportation may be exercised if an alien’s conduct or activities after being admitted into the [S]tate violate certain basic rules. Such conduct or activities include: ... 4. Participating in undesirable political activities” (Sohn and Buergenthal (footnote 195 above), pp. 90–91). “Expulsion following judicial sentence and expulsion which is ordered by the executive on general political grounds are readily distinguishable [from an acceptable expulsion for violation of local law], but here too, in respect to the latter, it is accepted that the ‘policy’ of each nation must determine whether it will permit the continued residence of the alien” (Goodwin-Gill, *International Law and the Movement of Persons between States*, pp. 206–207).

⁴¹⁰ “An alien without a valid residence permit may be removed from the territory of a member [S]tate only on specified legal grounds which are other than political or religious” (Recommendation 769 (1975), principle 9).

⁴¹¹ A State may prohibit or restrict the alien’s participation in its domestic politics or public affairs (Brazil, 1980 Law, arts. 106–107; and Republic of Korea, 1992 Act, art. 17 (2)–(3)), or in its cultural or other organizations (Brazil, 1980 Law, arts. 107–109).

⁴¹² Brazil, 1980 Law, arts. 124 (XI), 127; and United States, Immigration and Nationality Act, sects. 212 (a) (10) (D) and 237 (a) (6).

⁴¹³ Portugal, 1998 Decree-Law, art. 99 (1) (d).

focused on worldwide revolution;⁴¹⁴ or presents ideologically false documents or other information to the State's authorities.⁴¹⁵ The relevant legislation may expressly permit the application of criminal penalties in addition to expulsion when grounds exist under this heading.⁴¹⁶

176. The national courts of some States have dealt with cases involving the expulsion of aliens for reasons relating to their political activities.⁴¹⁷ However, most of these expulsions have been justified on other grounds, such as public order or national security.⁴¹⁸

(h) The "cultural" ground

177. This consists of something which certain Arab Gulf States regard today as being an "identity threat". It is reported that in a recent column, Tarik Al-Maena of *Arab News* writes about the concern of the Arab countries over the "identity threat" posted by the presence of too many foreign workers in their territories. According to the Labour Minister of Bahrain, "In some areas of the Gulf, you can't tell whether you are in an Arab Muslim country or in an Asian district. We can't call this diversity and no nation on Earth could accept the erosion of its culture on its own land".⁴¹⁹ According to the columnist Al-Maena, the Labour Minister of Bahrain announced that his country would propose a six-year residency cap on all expatriates working in the Gulf. The proposal was to be submitted to the summit of the Gulf Cooperation Council (comprising social, moral and culture). According to the Labour Minister quoted above, "the majority of foreign workers in the region come from cultural and social backgrounds that cannot assimilate or adapt to the local cultures."⁴²⁰

⁴¹⁴ Belarus, 1998 Law, art. 14; and United States, Immigration and Nationality Act, sects. 101 (a) (37), (40), (50) (e) and 212 (a) (10) (D).

⁴¹⁵ Argentina, 2004 Act, arts. 29 (a) and 62 (a).

⁴¹⁶ Brazil, 1980 Law, arts. 124 (XI), 125–127; and Portugal, 1998 Decree-Law, art. 99 (2).

⁴¹⁷ See, e.g., *Perregaux*, Conseil d'État, France, 13 May 1977, *Recueil des décisions du Conseil d'Etat*, 1977, p. 216; Belgium, *Bujacz v. Belgian State (Minister of Justice)*, Conseil d'État, Belgium, 13 July 1953, ILR, vol. 20, 1953, pp. 336–337; United States, *Lopez v. Howe*, Immigration Commissioner, Circuit Court of Appeals, Second Circuit, 14 May 1919 (*Annual Digest of Public International Law Cases*, 1919–1922, pp. 252–253); *Ex Parte Pettine*, District Court, District of Massachusetts, 3 June 1919, *ibid.*, pp. 251–252; and *Galvan v. Press*, Officer in Charge, Immigration and Naturalization Service, United States Supreme Court, 24 May 1954, ILR, vol. 21, 1954, pp. 213–218.

⁴¹⁸ See, e.g., *Perregaux* (preceding footnote), p. 217 ("Behaviour of a political nature is not, of itself, sufficient to provide legal justification for the deportation of an alien whose presence on French territory does not constitute a threat to public order or public confidence."); *Bujacz* (preceding footnote), p. 337 ("The applicant claims that aliens are entitled to enjoy 'freedom of thought' and 'freedom of political association'; however, the enjoyment of these liberties by aliens is necessarily limited by legal provisions which, in application of Article 128 of the Constitution, permit activities deemed harmful to the safety of the country to be punished by expulsion."); Brazil, *In re Everardo Diaz*, Supreme Federal Tribunal of Brazil, 8 November 1919, *Annual Digest of Public International Law Cases*, 1919–1922, 255–256 ("The State had no obligation to be burdened with the difficult work, at times ineffective, of constant vigilance over the actions of foreigners putting their theory into practice. It need not await overt action on the part of such aliens.") (involving the expulsion of an anarchist).

⁴¹⁹ "Expatriates' impact on Gulf's labour, social situation", *Arab News*, 27 October 2007, available at www.arabnews.com/node/304988 (accessed 14 July 2016).

⁴²⁰ *Ibid.*

Moreover, they were taking away much-needed jobs from the locals. The Labour Minister of the United Arab Emirates, Ali Bin Abdullah Al Ka'abi, said that his country shared Bahrain's concern, and with over 14 million expatriates in the region, the issue would be on the top of the agenda for the Gulf Cooperation Council Summit referred to above. The columnist Al-Maena concluded as follows: "That would send a message to the 14 million or so expatriates currently living in the Gulf Cooperation Council that it is time now to consider other options. For some, such a scenario may be too painful to bear as they have brought up their families here and have made it their home".⁴²¹

178. Whatever the standpoint from which this ground for expulsion is considered, it is contrary to international law.

179. From the cultural standpoint, it clashes with the non-discrimination rules set forth in a number of international conventions, particularly those cited in the fifth report on expulsion of aliens.⁴²² It is not without interest in this connection to note that the Arab Charter of Human Rights, adopted by the Council of the League of Arab States on 15 September 1994, itself contains a number of provisions explicitly or implicitly setting forth this rule. In particular, article 2 provides:

Each State Party to the Charter undertakes to ensure to all individuals within its territory and subject to its Jurisdiction, the right to enjoy all the rights and freedoms recognized herein, without any distinction on grounds of race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status, and without any discrimination between men and women.

And article 3 in a sense reinforces this obligation when it provides:

(a) No restrictions shall be placed on the rights and freedoms recognized in the present Charter except where such is provided by law and deemed necessary to protect the national security and economy, public order, health or morals or the rights or freedoms of others;

(b) No State Party to the present Charter shall derogate from the fundamental freedoms recognized herein and which are enjoyed by the nationals of another State that shows less respect for those freedoms.

180. From the standpoint of the right of foreign workers, there can be no doubt that such a policy would clash with the relevant provisions of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, particularly article 7. What is more, it will be noted that "abundance of labour" has long been regarded as not constituting cause for expulsion. According to Martini, this issue was studied above all at the end of the nineteenth century, "when the Chinese were excluded from the United States, from 1888 to 1892".⁴²³ And relying on the authors of the period, "the science of international law does not accept that labour protection is a sufficient reason for ordering the expulsion of an entire category of individuals."⁴²⁴ This opinion remains good.

⁴²¹ *Ibid.*

⁴²² *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611, paras. 148 *et seq.*

⁴²³ Martini (footnote 72 above), p. 62.

⁴²⁴ Darut (footnote 170 above), p. 50. Darut also writes: "protection of labour is not of itself sufficient ground for non-admission, *a fortiori* for expulsion" (*ibid.*, p. 51).

(i) *Illegal entry*

181. Entry in violation of the immigration laws of the territorial State has been recognized as a valid ground for the expulsion of an alien in State practice and literature.⁴²⁵

182. The Special Rapporteur on the rights of non-citizens, David Weissbrodt, while stressing that illegal aliens should not be treated as criminals, recognized in general terms the right of a State to require their departure from its territory:

There is a significant scope for States to enforce their immigration policies and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may not be exercised arbitrarily. A State might require, under its laws, the departure of persons who remain in its territory longer than the time allowed by limited-duration permits.⁴²⁶

183. In the case of *Amnesty International v. Zambia*, the African Commission on Human and Peoples' Rights has recognized that an alien being illegally on the territory of the State was a valid reason for eviction:

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 competent national courts as this is contrary to the spirit and letter of the Charter and international law.⁴²⁷

184. While the national laws of some States provide that aliens who have entered the territory illegally may be subject to exclusion rather than expulsion in certain cases,⁴²⁸ the national laws of other States recognize illegal entry as a valid ground for the expulsion of an alien as noted by some authors.⁴²⁹ The ground of illegal entry can be applied when expelling someone who is staying or residing in the

State without having first received entry authorization, or who is otherwise inadmissible.⁴³⁰ The alien's unintentionally illegal entry, or the illegal entrant's accidental admission to the State, may or may not statutorily lead to the State's legitimation of the entry.⁴³¹ Stowaways, whether⁴³² or not⁴³³ defined as a special category of aliens in the relevant law, may be subject to expulsion either because of their status⁴³⁴ or on the same grounds as other aliens.

185. Among the specific grounds for expulsion relating to illegal entry are the situations in which an alien enters or attempts to enter when the borders have been closed temporarily to aliens⁴³⁵ or to a particular group of aliens,⁴³⁶ or at a place or time not designated as an authorized crossing point,⁴³⁷ evades, obstructs or attempts to evade or obstruct immigration controls or authorities,⁴³⁸ including with respect to an entry inspection⁴³⁹ or a required fee,⁴⁴⁰ lacks required documents,⁴⁴¹ or presents ones which are either

following heads: 1. Entry in breach of immigration law" (Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 255).

⁴³⁰ See, e.g., China, 2003 Provisions, art. 182; Nigeria, 1963 Act, arts. 19, 46; Paraguay, 1996 Law, art. 38; and United States, Immigration and Nationality Act, sect. 237 (a) (1) (A), (H).

⁴³¹ In Nigeria, an illegal entry permitted through an "oversight" by the relevant authorities can still be illegal and grounds for expulsion (1963 Act, art. 19 (2)). The United States permits the removal of a "preference immigrant" visa if the alien is found not to be such (Immigration and Nationality Act, sect. 206). In Brazil, an "irregular" entry may be deemed "unintentional", with the result that the alien has a shorter period in which to vacate the territory than would be the case if the alien had committed certain infractions (1981 Decree, art. 98).

⁴³² United States, Immigration and Nationality Act, sect. 101 (a) (49).

⁴³³ Kenya, 1967 Act, art. 8; and Nigeria, 1963 Act, art. 28 (1), 1963 Regulations (L.N. 93), arts. 1 (2) and 8 (2).

⁴³⁴ Kenya, 1967 Act, art. 8; and United States, Immigration and Nationality Act, sects. 212 (a) (6) (D) and 235 (a) (2).

⁴³⁵ Kenya, 1973 Act, art. 3 (1) (a); and Sweden, 1989 Act, sect. 12.4.

⁴³⁶ Australia, 1958 Act, arts. 177, 189–190, 198, 230, 249 (1) (a) and 251; and Nigeria, 1963 Act, art. 25.

⁴³⁷ Argentina, 2004 Act, arts. 29 and 37; Australia, 1958 Act, arts. 189–190; Chile, 1975 Decree, arts. 3 and 69; Czech Republic, 1999 Act, sect. 9 (1); Guatemala, 1986 Decree-Law, art. 74; Japan, 1951 Order, art. 2; Nigeria, 1963 Act, art. 16; Paraguay, 1996 Law, art. 79 (3); Tunisia, 1968 Law, art. 4; and United States, Immigration and Nationality Act, sects. 212 (a) (6) (A), 271 (b) and 275 (a) (1), (b).

⁴³⁸ Argentina, 2004 Act, arts. 29 and 37; Australia, 1958 Act, arts. 190, 230–231, 233; Brazil, 1980 Law, art. 124 (I); Chile, 1975 Decree, art. 69; Guatemala, 1986 Decree-Law, art. 74; Italy, 1998 Decree-Law No. 286, art. 13 (2) (a), 1998 Law No. 40, art. 11 (2); Japan, 1951 Order, art. 24 (2); Nigeria, 1963 Act, art. 46; Paraguay, 1996 Law, arts. 79 (3) and 81 (1); Portugal, 1998 Decree-Law, art. 99; United States, Immigration and Nationality Act, sect. 275 (a) (2). Persons may be characterized as stowaways on the basis of such acts (Australia, 1958 Act, arts. 230–231, 233). In order to identify and exclude such stowaways, a State may require landing ships to submit their manifests to the relevant authority (Australia, 1958 Act, art. 231; and Nigeria, 1963 Regulations (L.N. 93), art. 8 (2)), or permit a search of the ship by the relevant authority (Republic of Korea, 1992 Act, arts. 69–71).

⁴³⁹ Nigeria, 1963 Act, art. 16; Republic of Korea, 1992 Act, art. 46 (3); United Kingdom, 1971 Act, sect. 8 (1) (c); and United States, Immigration and Nationality Act, sect. 275 (a) (2).

⁴⁴⁰ Poland, 2003 Act No. 1775, art. 21 (1) (1).

⁴⁴¹ The alien may in this respect fail to hold, present or be eligible for any or all necessary documentation, including a passport or visa, or to provide any or all necessary information (Australia, 1958 Act, arts. 177, 190, 229 and 233A; Belarus, 1999 Council Decision, art. 2, 1993 Law, art. 20 (4); Brazil, 1980 Law, arts. 124 (VI) and 127; Chile, 1975 Decree, arts. 15 (7) and 65 (1); Czech Republic, 1999 Act, sect. 9 (1); France, Code, art. L511-1 (1); Italy, 1998 Decree-Law No. 286, art. 10, 1998 Law No. 40, art. 5; Japan, 1951 Order,

⁴²⁵ "State practice accepts that expulsion is justified: (a) for entry in breach of law" (Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 262). "An unlawful entry can result in the expulsion of the foreigner on the ground that the entry was not justified" (Doehring, "Aliens, expulsion and deportation", p. 108). "Very commonly, an alien's deportation may be ordered ... for breach of immigration law" (Plender (footnote 191 above), p. 467–468). "The alien can be expelled or deported at any time if it is discovered later that he or she entered the country illegally, unless the alien can benefit from a local statute of limitations, an amnesty or a pardon" (Sohn and Buergenthal, (footnote 195 above), p. 90). See also Institute of International Law, "Règles internationales...", art. 28, paras. 1 and 2. The analysis that follows of the grounds for expulsion listed as (i) to (n) are taken from the memorandum by the Secretariat (footnote 18 above), paras. 326–339, 377–380, 381–390, 408–417 and 422.

⁴²⁶ The rights of non-citizens, final report of the Special Rapporteur, David Weissbrodt. Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Prevention of Discrimination, E/CN.4/Sub.2/2003/23, para. 29.

⁴²⁷ African Commission on Human and Peoples' Rights, communication No. 159/96, *Union Interafricaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme v. Angola*, Eleventh Annual Activity Report, 1997–1998, para. 20.

⁴²⁸ See United States, *Seyoum Faisa Joseph v. U.S. Immigration and Naturalization Service*, 4th Circuit Court of Appeals, 20 May 1993, 993 F.2d 1537 ("Mr. Joseph arrived in this country as a stowaway and therefore is classified under the Immigration and Nationality Act as 'excludable'" (para. 10)).

⁴²⁹ "In most statutes governing immigration, the right of expulsion or deportation is a sanction for the provisions relating to exclusion, and numerous expulsions are founded on the charge of presence in the territory in violation of its laws or the regulations concerning the admission of foreigners" (Borchard (footnote 75 above), pp. 51–52). "The municipal law systems examined display a perhaps unremarkable consistency in their choice of grounds for expulsion. Generally, an alien will render himself liable to deportation if he qualifies under one or more of the

damaged or unusable;⁴⁴² presents forged or misleading documents or other information;⁴⁴³ fails, for whatever reason, after crossing the border to obtain the necessary entry documents, correct a violation or regularize the alien's status;⁴⁴⁴ violates the terms of the alien's transitory presence in the State's territory;⁴⁴⁵ or is considered to be undesirable⁴⁴⁶ or otherwise unsuitable for entry into the State's territory based either on the alien's lifestyle or perceived personal qualities,⁴⁴⁷ or on the alien's past breach of the State's conditions for entry or stay.⁴⁴⁸

(Footnote 441 continued.)

art. 24 (1)–(2); Kenya, 1967 Act, arts. 4 (2) and 7; Nigeria, 1963 Act, arts. 18 and 46 (3) (b); Panama, 1960 Decree-Law, arts. 58 and 60; Paraguay, 1996 Law, art. 79 (1); Poland, 2003 Act No. 1775, art. 21 (1); Tunisia, 1968 Law, art. 5; and United States, Immigration and Nationality Act, sects. 212 (a) (7) and 275 (a)). The alien's entry may also be illegal due to a visa or other necessary document that has been cancelled or is susceptible to cancellation prior to or upon the entry, even if the entry occurs during an otherwise legal stay (Australia, 1958 Act, arts. 229, 232 and 252; Bosnia and Herzegovina, 2003 Law, art. 47 (1) (d), (3); Chile, 1975 Decree, art. 65; Czech Republic, 1999 Act, sect. 9 (1); Portugal, 1998 Decree-Law, art. 13 (4); and Sweden, 1989 Act, sects. 2.9–2.10), or if the alien's visa is of insufficient duration to cover the whole of the alien's expected stay (Czech Republic, 1999 Act, sect. 9 (2)–(3)).

⁴⁴² Such documents can be illegible, damaged or otherwise physically incomplete, or ones to which the State cannot add necessary permits or marks (Bulgaria, 1998 Law, art. 3; Czech Republic, 1999 Act, sect. 9 (1)–(3)).

⁴⁴³ Argentina, 2004 Act, arts. 29 (a), 35; Australia, 1958 Act, arts. 233A, 234 and 236; Belarus, 1993 Law, art. 20 (4); Brazil, 1980 Law, arts. 64, 124 (XIII) and 127; Bulgaria, 1998 Law, art. 3; Canada, 2001 Act, art. 40 (1) (a)–(b); Chile, 1975 Decree, arts. 63 (3), 65 (1)–(2) and 68; China, 1986 Law, arts. 29–30; Czech Republic, 1999 Act, sect. 9 (1); Guatemala, 1999 Regulation, art. 97, 1986 Decree-Law, art. 73; Italy, 1998 Decree-Law No. 286, arts. 4, 8 and 10; Japan, 1951 Order, arts. 22–4 (1)–(4) and 24 (3); Kenya, 1967 Act, art. 7; Nigeria, 1963 Act, art. 46 (3) (a); Panama, 1960 Decree-Law, art. 61; Paraguay, 1996 Law, arts. 38, 79 (1), 81 (2), 108 (1) and 110–111; Poland, 2003 Act No. 1775, art. 21 (4); Portugal, 1998 Decree-Law, art. 13 (4); Republic of Korea, 1992 Act, arts. 46 (1–2), 89 (1)–(2); Russian Federation, 2002 Law No. 115-FZ, arts. 7 (4), 9 (4) and 18 (9) (4), 1996 Law, art. 26 (5); Sweden, 1989 Act, sects. 2.9–10 and 7.18; United Kingdom, 1971 Act, sects. 24A (1) (a) and 33 (1) (as amended by the Asylum and Immigration Act 1996); and United States, Immigration and Nationality Act, sects. 212 (a) (6) (C) and 275 (a) (3). An alien may be expressly defined on this basis as a stowaway (Japan, 1951 Order, art. 74).

⁴⁴⁴ Australia, 1958 Act, arts. 181 (2)–(3), 182 and 198; Ecuador, 2004 Law, chapter 7 (Transitional Provisions); Italy, 1998 Decree-Law No. 286, art. 13 (2) (b); Russian Federation, 1996 Law, art. 26 (1); and United States, Immigration and Nationality Act, sect. 206.

⁴⁴⁵ Belarus, 1998 Law, art. 26; Brazil, 1980 Law, arts. 56 (1), 124 (IX), 127; Chile, 1975 Decree, art. 85; China, 1986 Law, arts. 29–30; Iran (Islamic Republic of), 1931 Act, art. 11 (b); Japan, 1951 Order, arts. 16 (6)–(7) and 24 (4)–(6) and (6A); Nigeria, 1963 Act, arts. 11, 27; Panama, 1960 Decree-Law, art. 61; Republic of Korea, 1992 Act, art. 89 (1); Russian Federation, 1996 Law, art. 25.10, Administrative Code, chap. 18, art. 18.8; Sweden, 1989 Act, sect. 9.3; and United States, Immigration and Nationality Act, sects. 237 (a) and 252. An alien may be defined on this basis as a stowaway or akin thereto (Nigeria, 1963 Act, art. 28).

⁴⁴⁶ Australia, 1958 Act, arts. 5 and 16; Belarus, 1993 Law, art. 20 (6); Brazil, 1980 Law, art. 61; Czech Republic, 1999 Act, sect. 9 (1); Kenya, 1967 Act, art. 3 (1) (f); Paraguay, 1996 Law, art. 79 (5); Poland, 2003 Act No. 1775, art. 21 (1) (2); Russian Federation, 1996 Law, art. 25.10; and Switzerland, 1931 Federal Law, art. 13 (1). Nigeria permits its relevant Minister to refuse entry to any alien or class of alien if the Minister deems such a refusal to be for the public good (Nigeria, 1963 Act, art. 18 (2)).

⁴⁴⁷ The alien may in this respect be a practicing polygamist (France, Code, art. L521-2 (1); United States, Immigration and Nationality Act, sect. 212 (a) (10) (A)), or otherwise deemed ineligible for settlement or citizenship (Argentina, 2004 Act, art. 29 (j); and United States, Immigration and Nationality Act, sect. 212 (a) (8)).

⁴⁴⁸ The alien may in this respect have failed to comply during a previous stay with either the expelling State's exit requirements (Russian

186. The expulsion of an alien on this ground may be affected by the alien's route of arrival;⁴⁴⁹ international considerations such as a special arrangement between the alien's State and the State entered;⁴⁵⁰ any relevant international agreement or convention;⁴⁵¹ or the request or requirement of an international body;⁴⁵² intertemporal considerations such as the timing of the alien's entry relative to the entry into force of the relevant legislation,⁴⁵³ or the relevant law in force at the time of the alien's entry,⁴⁵⁴ or the amount of time that has passed since the alien's entry into the State's territory.⁴⁵⁵

187. The relevant national legislation may expressly permit the application of criminal penalties in addition to expulsion when grounds relating to illegal entry exist.⁴⁵⁶ It may likewise specify that the expulsion shall take place after the completion of the sentence imposed.⁴⁵⁷ A State may apply to the alien's dependents the grounds for the alien's expulsion relating to illegal entry.⁴⁵⁸

188. National practice in some jurisdictions, as exemplified by the rulings of national courts and tribunals, also supports the validity of expulsion on the ground of illegal entry or presence.⁴⁵⁹ However, where an individual has maintained a residence in the territorial State for an extended period of time, some national courts have ruled that mere illegal presence is not sufficient to support a decision of expulsion.⁴⁶⁰

Federation, 1996 Law, art. 26 (5)–(6)), or more generally with the laws or obligations placed upon aliens (Belarus, 1993 Law, art. 20 (3); and Czech Republic, 1999 Act, sect. 9 (1)).

⁴⁴⁹ Nigeria, 1963 Act, arts. 16, 25.

⁴⁵⁰ Czech Republic, 1999 Act, sect. 9; and Italy, 1998 Decree-Law No. 286, art. 4. This arrangement, for example, can be the Schengen Agreement (France, Code, art. L621-2; and Portugal, 1998 Decree-Law, arts. 13 (4), 25 (1), 120 and 126 (3)), or one under the Commonwealth (Nigeria, 1963 Act, arts. 10 (1) and 18 (4)), the European Union (Italy, 1998 Decree-Law No. 286, art. 5 (12), 1998 Law No. 40, art. 5 (7)) or the International Organization for Migration (Portugal, 1998 Decree-Law, art. 126A(1)).

⁴⁵¹ Czech Republic, 1999 Act, sect. 9 (1)–(3); Italy, 1998 Decree-Law No. 286, art. 5 (11), 1998 Law No. 40, art. 5 (6); Spain, 2000 Law, art. 26 (1); and Sweden, 1989 Act, sect. 4.2 (5).

⁴⁵² United Kingdom, 1971 Act, sect. 8B (5) (as amended by the Immigration and Asylum Act 1999).

⁴⁵³ Australia, 1958 Act, art. 251 (6) (c); Ecuador, 2004 Law, chap. 7 (Transitional Provisions); France, Code, art. L541-4; and Italy, 1998 Law No. 40, art. 11 (15).

⁴⁵⁴ Australia, 1958 Act, art. 14 (2); Kenya, 1967 Act, art. 3 (1) (i); and United States, Immigration and Nationality Act, sect. 237 (a) (1) (A).

⁴⁵⁵ Sweden, 1989 Act, sect. 4.2.

⁴⁵⁶ Chile, 1975 Decree, arts. 68–69; China, 1986 Law, art. 29; Paraguay, 1996 Law, art. 108 (1); Portugal, 1998 Decree-Law, art. 99 (2); and United Kingdom, 1971 Act, sect. 24 (1) (a).

⁴⁵⁷ Chile, 1975 Decree, art. 69; and Guatemala, 1986 Decree-Law, art. 74.

⁴⁵⁸ Canada, 2001 Act, art. 42 (a)–(b).

⁴⁵⁹ See, e.g., United States, *United States ex rel. Tom Man v. Murff*, District Director, INS, 264 F.2d 926 (2d Cir. 1959); South Africa, *Khan v. Principal Immigration Officer*, Supreme Court, Appellate Division, 10 December 1951, ILR, vol. 18 (1951), p. 303.

⁴⁶⁰ See, e.g., Costa Rica, *In re Rojas et al.*, Supreme Court of Costa Rica, 26 July 1938, *Annual Digest and Reports of Public International Law Cases*, 1938–1940, p. 389; Federal Republic of Germany, *Homeless Alien (Germany) Case*, Federal Administrative Supreme Court, 30 September 1958, ILR, vol. 26, p. 503; Argentina, *Lino Sosa case*, Supreme Court, 23 March 1956, pp. 395–397; *Re Leiva*, Cámara Nacional de Apelaciones de Resistencia, Argentina, 20 December 1957, ILR, vol. 24, 1957, pp. 490–491.

(j) *Breach of conditions for admission*

189. An alien may be lawfully admitted to the territory of a State in accordance with its national immigration law subject to certain conditions relating to the admission or the continuing presence of the alien in the State. Such a legal alien may acquire the status of an illegal alien by violating these conditions. Breach of the conditions for the admission or continuing presence of an alien has been recognized as a valid ground for expulsion in State practice.⁴⁶¹

190. The national laws of a number of States provide for the expulsion of aliens who have violated conditions for admission, such as those relating to the duration of their stay, the purpose of their stay and the permissible activities during their stay in the territory of the State.⁴⁶² A breach of the conditions for admission as a ground for expulsion may be broadly defined as illegal residence or presence,⁴⁶³ a lack of grounds to justify the alien's stay,⁴⁶⁴ the alien's undesirability,⁴⁶⁵ a violation of any part of the relevant law,⁴⁶⁶ or the violation of any condition of stay or residence.⁴⁶⁷ More specific instances include the alien's failure to depart after the expiry of the permit or authorized period of stay,⁴⁶⁸ defects in the

permit;⁴⁶⁹ the permit's revocation or refusal when protected status is not at stake;⁴⁷⁰ the alien's failure otherwise to seek, obtain, hold or be eligible for a required permit;⁴⁷¹ impediments to the alien settling in the State;⁴⁷² the insufficiency of the alien's marriage to establish a right to stay;⁴⁷³ or the presentation of forged or otherwise misleading documents or information for any purpose of stay not involving marriage.⁴⁷⁴

191. Grounds relating to the breach of conditions for admission may also exist when the alien fails to comply with integration or assimilation requirements or

⁴⁶¹ "The power of expulsion or deportation may be exercised if an alien's conduct or activities after being admitted into the [S]tate violate certain basic rules. Such conduct or activities include: 1. Residence or stay in the territory in violation of the conditions of entry" (Sohn and Buergenthal (footnote 195 above), pp. 90–91). "State practice accepts that expulsion is justified ... (b) for breach of the conditions of admission" (Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 262).

⁴⁶² "The municipal law systems examined display a perhaps unremarkable consistency in their choice of grounds for expulsion. Generally, an alien will render himself liable to deportation if he qualifies under one or more of the following heads ... 2. Breach of the conditions of entry; for example, working without a work permit" (Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 255). The review of national legislation and case law on this point is taken from the memorandum by the Secretariat (footnote 18 above), paras. 335–338.

⁴⁶³ China, 1986 Law, arts. 27 and 29–30, 1986 Rules, art. 42; Croatia, 2003 Law, art. 56; Kenya, 1967 Act, art. 4 (2); Lithuania, 2004 Law, art. 126 (1) (2); and Portugal, 1998 Decree-Law, art. 99 (1) (a).

⁴⁶⁴ Austria, 2005 Act, art. 3.54 (1) (2); Bulgaria, 1998 Law, art. 61 (1) (4); and Spain, 2000 Law, art. 28 (3) (c).

⁴⁶⁵ Australia, 1958 Act, arts. 5 and 16; and Russian Federation, 1996 Law, art. 25.10.

⁴⁶⁶ Argentina, 2004 Act, arts. 29 (k) and 62 (a); Belarus, 1993 Law, arts. 24 and 25 (3)–(4); Bosnia and Herzegovina, 2003 Law, arts. 27 (1) (a) and 47 (1) (a); Canada, 2001 Act, art. 41 (a); Chile, 1975 Decree, arts. 64 (5)–(6) and 66; Greece, 2001 Law, art. 44 (1) (b); Iran (Islamic Republic of), 1931 Act, art. 11 (a); Kenya, 1967 Act, art. 3 (1) (j); Nigeria, 1963 Act, art. 46 (1) (b); Norway, 1988 Act, sect. 29 (a); Paraguay, 1996 Law, arts. 34 (6) and 37; Republic of Korea, 1992 Act, art. 89 (1) (5); Russian Federation, 2002 Law No. 115-FZ, arts. 7 (7), 9 (7) and 18 (9) (7), 1996 Law, art. 26 (4); Spain, 2000 Law, art. 53 (e); Switzerland, 1931 Federal Law, art. 13 (1); and United States, Immigration and Nationality Act, sect. 237 (a) (1) (B). Paraguay also permits expulsion on the basis of special legislation (Paraguay, 1996 Law, art. 81 (6)).

⁴⁶⁷ Argentina, 2004 Act, art. 62 (d); Brazil, 1980 Law, arts. 124 (XVI) and 127; Bulgaria, 1998 Law, art. 61 (1) (4); Chile, 1975 Decree, arts. 64 (8) and 66; Republic of Korea, 1992 Act, arts. 46 (1), (7)–(8), 68 (1), (3) and 89 (1), (3); and Switzerland, 1931 Federal Law, art. 13 (1).

⁴⁶⁸ Bosnia and Herzegovina, 2003 Law, art. 57 (1) (a); Brazil, 1980 Law, arts. 124 (II) and 127; Chile, 1975 Decree, art. 71; Finland, 2004 Act, sect. 143 (3); France, Code, arts. L511-1 (2) and L621-1;

Guatemala, 1986 Decree-Law, art. 76; Italy, 1998 Decree-Law No. 286, art. 13 (2) (e); Japan, 1951 Order, art. 24-2 (3), (4) (b), (7); Madagascar, 1994 Decree, art. 18, 1962 Law, art. 12; Nigeria, 1963 Act, art. 19 (1), (4); Paraguay, 1996 Law, art. 81 (3); Russian Federation, 1996 Law, art. 25.10, Administrative Code, chap. 18, art. 18.8; Spain, 2000 Law, arts. 53 (a) and 57 (1); Sweden, 1989 Act, sect. 4.3; and United States, Immigration and Nationality Act, sect. 212 (a) (9) (B)–(C).

⁴⁶⁹ This can involve the expiration of circumstances or reasons which justified the prior decision to grant the permit (Argentina, 2004 Act, art. 62 (d); Australia, 1958 Act, arts. 198 (1A) and 198B; Belarus, 1993 Law, art. 24; Bosnia and Herzegovina, 2003 Law, arts. 27 (1) (e) and 47 (1) (e); Italy, 2005 Law, art. 2; Republic of Korea, 1992 Act, art. 89 (1) (4); Russian Federation, 2002 Law No. 115-FZ, art. 2; and Sweden, 1989 Act, sect. 8.16); or the discovery of grounds which, had they been earlier known, would have precluded the granting of the permit (Austria, 2005 Act, art. 3.54 (1) (1)).

⁴⁷⁰ Belarus, 1999 Council Decision, art. 2, 1998 Law, art. 28; Bosnia and Herzegovina, 2003 Law, arts. 47 (1) (h) and 57 (1) (b); Brazil, 1980 Law, arts. 124 (X), 127; China, 1992 Provisions, art. I (iii); Finland, 2004 Act, sect. 168 (1); France, Code, art. L511-1 (3), (6); Italy, 1998 Decree-Law No. 286, arts. 5 (10)–(11), 8 and 13 (2) (b), 1998 Law No. 40, arts. 5 (5)–(6), 11 (2) (b); Japan, 1951 Order, art. 24 (2)–2; Paraguay, 1996 Law, art. 81 (4); Republic of Korea, 1992 Act, art. 68 (1) (3); Russian Federation, 2002 Law No. 115-FZ, arts. 2 and 31 (1)–(2); Sweden, 1989 Act, sect. 4.3; Switzerland, 1931 Federal Law, art. 12 (3); and United States, Immigration and Nationality Act, sect. 237 (a) (1) (B).

⁴⁷¹ Chile, 1975 Decree, arts. 31 and 72; Croatia, 2003 Law, art. 52; Finland, 2004 Act, sects. 149 (1) (1) and 168 (2); Italy, 1998 Decree-Law No. 286, arts. 13 (2) (b) and 14 (5 *ter*)–(5 *quinques*), 1998 Law No. 40, arts. 5 (7) and 11 (2) (b); Nigeria, 1963 Act, art. 10 (5); Panama, 1960 Decree-Law, art. 58; Poland, 2003 Act No. 1775, art. 88 (1) (1); Russian Federation, 1996 Law, arts. 25.10 and 27 (4), Administrative Code, chap. 18, art. 18.8; Spain, 2000 Law, arts. 53 (a) and (g) and 57 (1); and United States, Immigration and Nationality Act, sects. 206 and 246. A State may, however, impose sanctions not expressly including expulsion for such infractions (Paraguay, 1996 Law, art. 112 (1); Russian Federation, Administrative Code, chap. 18, art. 18.8; and Spain, 2000 Law, arts. 53 and 57).

⁴⁷² Argentina, 2004 Act, art. 29 (j).

⁴⁷³ This can involve the invalidity, fraudulence or other defect of the marriage upon which the grant of the permit was conditioned (Belarus, 1998 Law, art. 15; Hungary, 2001 Act, art. 32 (2) (h); Russian Federation, 2002 Law No. 115-FZ, arts. 7 (12) and 9 (12); and United States, Immigration and Nationality Act, sects. 216 (b), 237 (a) (1) (G) and 275 (c)); or the general inability of a marriage to affect the alien's status (Madagascar, 1994 Decree, art. 18).

⁴⁷⁴ Argentina, 2004 Act, arts. 29 (a) and 62 (a); Belarus, 1998 Law, arts. 14–15; Bosnia and Herzegovina, 2003 Law, arts. 27 (1) (f) and 47 (1) (f); Brazil, 1980 Law, arts. 64 (a), 124 (XIII) and 127; Chile, 1975 Decree, arts. 64 (2) and 66; China, 1986 Law, arts. 29–30, 1986 Rules, art. 47; Nigeria, 1963 Act, art. 46 (3) (a) and (c); Panama, 1960 Decree-Law, art. 61; Paraguay, 1996 Law, arts. 81 (2), 108 (1), 110–111; Russian Federation, 2002 Law No. 115-FZ, arts. 7 (4), 9 (4) and 18 (9) (4); Spain, 2000 Law, arts. 53 (c) and 57 (1); Sweden, 1989 Act, sects. 2.9–2.10; Switzerland, 1931 Federal Law, arts. 9 (2) (a) and (4) (a); United Kingdom, 1971 Act, sect. 24A(1) (a); and United States, Immigration and Nationality Act, sects. 101 (a) (50) (f) (6); 212 (a) (6) (C), 237 (a) (3), 246 (a)–(b) and 266 (c).

expectations,⁴⁷⁵ a restriction on residence or place of stay,⁴⁷⁶ or an obligation or prohibition placed either on all aliens or on the alien individually or as a member of a class,⁴⁷⁷ such as one to register or notify authorities when so required, as when relevant documents are lost or when the alien changes residence, domicile or nationality,⁴⁷⁸ to present proof of identification or authorization for presence in the State's territory when required to do so,⁴⁷⁹ to refrain from travel to a forbidden area,⁴⁸⁰ not to take up residence or obtain permission to reside outside the State,⁴⁸¹ or not to depart from the State for longer than a certain period⁴⁸² or without authorization.⁴⁸³

192. The expulsion of an alien on this ground may be affected by a special arrangement between the alien's State and the State in which the alien is staying,⁴⁸⁴ or any relevant international agreement or convention.⁴⁸⁵ The relevant legislation may expressly permit the application of criminal penalties in addition to expulsion when grounds exist under this heading.⁴⁸⁶ It may likewise specify that the expulsion shall take place after the completion of the sentence imposed.⁴⁸⁷

⁴⁷⁵ Austria, 2005 Act, art. 3.54 (3)–(4); Japan, 1951 Order, art. 22-4 (5); and Switzerland, 1949 Regulation, art. 16 (2), 1931 Federal Law, art. 10 (1) (b).

⁴⁷⁶ Paraguay, 1996 Law, art. 34 (2); Republic of Korea, 1992 Act, art. 46 (1) (8); and Switzerland, 1931 Federal Law, art. 13e. Sanctions not expressly including expulsion may, however, be imposed for such infractions (France, Code, art. L624-4; and Hungary, 2001 Act, art. 46 (1) (d)).

⁴⁷⁷ Brazil, 1981 Decree, art. 104, 1980 Law, arts. 64 (d) and 70; Chile, 1975 Decree, arts. 63 (4), 64 (5)–(6), 65 (2) and 66; Honduras, 2003 Act, art. 89 (2); Nigeria, 1963 Act, arts. 11 (3), 19 (4), 24 (2) and 27 (3); Paraguay, 1996 Law, art. 34 (1)–(2); Russian Federation, Administrative Code, chap. 18, art. 18.8; and United States, Immigration and Nationality Act, sects. 212 (a) (6) (G) and 237 (a) (1) (C).

⁴⁷⁸ Brazil, 1980 Law, arts. 124 (III), (IV) and 127; Chile, 1975 Decree, art. 72; Republic of Korea, 1992 Act, art. 46 (1) (7) and (10); Russian Federation, 1996 Law, art. 25.10, Administrative Code, chap. 18, art. 18.8; Spain, 2000 Law, arts. 53 and 57; and United States, Immigration and Nationality Act, sects. 237 (a) (3) (A)–(B) and 266 (c).

⁴⁷⁹ China, 1986 Rules, art. 43; and Nigeria, 1963 Act, art. 46 (3) (b).

⁴⁸⁰ China, 1986 Law, arts. 29–30, 1986 Rules, art. 46; and Switzerland, 1931 Federal Law, art. 13e.

⁴⁸¹ Belarus, 1998 Law, art. 15; Bosnia and Herzegovina, 2003 Law, art. 48 (b); Russian Federation, 2002 Law No. 115-FZ, arts. 7 (10) and 9 (10); and Sweden, 1989 Act, sect. 2.12.

⁴⁸² Argentina, 2004 Act, art. 62 (c); Bosnia and Herzegovina, 2003 Law, art. 48 (a); Chile, 1975 Decree, art. 43; Paraguay, 1996 Law, art. 34 (5); and Russian Federation, 2002 Law No. 115-FZ, arts. 7 (11) and 9 (11).

⁴⁸³ Brazil, 1980 Law, arts. 124 (XIII) and 127; and Republic of Korea, 1992 Act, art. 46 (1) (9); compare Spain, 2000 Law, arts. 53 (g) and 57 (1), which classify unauthorized departures as serious infractions which may be fined, but not as grounds for expulsion.

⁴⁸⁴ This arrangement can, for example, be one established under the European Union (Finland, 2004 Act, sect. 168 (1)–(2); France, Code, art. L621-2; and Italy, 1998 Law No. 40, art. 5 (12), 1996 Decree-Law, art. 7 (3)), or the Commonwealth (Nigeria, 1963 Act, art. 10 (1)).

⁴⁸⁵ China, 1986 Law, art. 29; Italy, 1998 Decree-Law No. 286, art. 5 (11); and Portugal, 1998 Decree-Law, art. 99 (1)–(2).

⁴⁸⁶ Chile, 1975 Decree, arts. 63 (3) and 65 (2)–(3); China, 1986 Rules, art. 47; France, Code, arts. L621-1, L621-2; Italy, 2005 Law, arts. 10 (4) and 13 (1), 1998 Decree-Law No. 286, art. 14 (5 *ter*)–(5 *quinques*), 1996 Decree-Law, art. 7 (3); Panama, 1960 Decree-Law, arts. 61 and 108 (1); and Portugal, 1998 Decree-Law, art. 99 (2).

⁴⁸⁷ Bosnia and Herzegovina, 2003 Law, art. 47 (4).

193. The national courts of several States have upheld a breach of conditions for admission as a valid ground for the expulsion of aliens.⁴⁸⁸

194. Breach of conditions for admission as a valid ground for expulsion has also been addressed with respect to migrant workers, in particular, as discussed below.

(k) *Economic grounds*

195. Economic reasons may be considered as a relevant factor in determining the expulsion of an alien on the basis of the public order or welfare of a State (*ordre public*) rather than as a separate ground under international law. Economic reasons have been rejected, however, as a valid consideration with respect to the expulsion of EU citizens. Nonetheless, economic reasons have been recognized as a valid ground for the expulsion of aliens in the national laws of a number of States.⁴⁸⁹

196. The Protocol to the European Convention on Establishment recognizes economic reasons as a possible consideration in the expulsion of aliens on the ground of *ordre public*. The Protocol provides a definition of *ordre public* which includes situations in which aliens are unable to finance their stay in the country or intend to work illegally.⁴⁹⁰

⁴⁸⁸ See, e.g., United States, *INS v. Stevic*, 467 U.S. 407 (1984), 104 S.Ct. 2489, 81 L.Ed.2d 321 (appeal against deportation proceedings commenced when the respondent overstayed his six-week period of admission); *Hitai v. INS*, 343 F.2d 466 (2d Cir. 1965) (appellant violated the terms of his permission to enter territorial State by accepting employment); *United States ex rel. Zapp et al. v. District Director of Immigration and Naturalization*, 120 F.2d 762 (2d Cir. 1941) (appellants expelled for violating the conditions of their admission by ceasing to exercise the profession they were admitted to exercise); South Africa, *Urban v. Minister of the Interior*, Supreme Court, Cape Provincial District, 30 April 1953 (alien expelled for engaging in an occupation within the first three years of residence in South Africa other than that stated in the application form); Australia, *Simsek v. Minister of Immigration and Ethnic Affairs and Another*, High Court, 10 March 1982, *High Court of Australia* 7 (appellant expelled after overstaying a three-month temporary entry permit). In addition, a group of cases exists wherein a ship's crew members violated the conditions of their admission to the territorial State by remaining in the territorial State after the ship set sail. See also, e.g., *Re Immigration Act Re Vergakis*, British Columbia Supreme Court, 11 August 1964, ILR, vol. 42, p. 219; United States, *United States ex rel. Tie Sing Eng v. Murff, District Director, INS*, Southern District of New York, 6 October 1958, 165 F. Supp. 633, affirmed *per curiam*, 266 F.2d 957 (2d Cir. 1959), *certiorari* denied, 361 U.S. 840, 4 L.Ed.2d 79, 80 Sup. Ct. 73 (1959), in ILR, vol. 26 (1958-II), p. 509; *Sovich v. Esperdy*, Court of Appeals for the Second Circuit, 15 May 1963, 319 Federal Reporter, Second Series 21; Argentina, *Lino Sosa* case (footnote 460 above).

⁴⁸⁹ "The municipal law systems examined display a perhaps unremarkable consistency in their choice of grounds for expulsion. Generally, an alien will render himself liable to deportation if he qualifies under one or more of the following heads: ... 3. Becoming a 'public charge', to include illness and 'living off social security'" (Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 255). See also Institute of International Law, "Règles internationales..." art. 45. "As a rule expulsion is only resorted to in case where a person has committed some offence or has become a charge on public funds" (Grahl-Madsen, *Commentary on the Refugee Convention 1951: Articles 2–II, 13–37*, art. 33, para. (2)).

⁴⁹⁰ "The concept of '*ordre public*' is to be understood in the wide sense generally accepted in continental countries. A Contracting Party may, for instance, exclude a national of another Party for political reasons, or if there are grounds for believing that he is unable to pay the expenses of his stay or that he intends to engage in a gainful occupation without the necessary permits" (sect. III—Arts. 1, 2 and 3).

197. In contrast, within the European Union, Directive 2004/38/EC prohibits the expulsion of EU citizens and their family members on grounds of public policy, public security or public health with a view to serving economic ends. The Directive further provides in article 14, paragraph 3, as follows:

An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

198. Concerning the last point, preambular paragraph 16 of the same directive indicates:

As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.

199. At the domestic level, the national laws of several States include economic reasons as a ground for the expulsion of aliens.⁴⁹¹ The alien's dependents may be subject to expulsion under economic grounds if such grounds exist to expel the alien.⁴⁹² In particular, a State may expel or refuse entry to an alien who is in debt,⁴⁹³ a "gypsy",⁴⁹⁴ a vagrant or a person lacking or unable to show means of subsistence,⁴⁹⁵ homeless at a given time or for a prolonged period,⁴⁹⁶ or unable or unwilling to support the alien's dependents;⁴⁹⁷ requires or threatens to require social assistance;⁴⁹⁸ lacks a profession,

occupation or skills;⁴⁹⁹ is idle,⁵⁰⁰ or fails to undertake the job or activity for which the entry permit was granted;⁵⁰¹ cannot exercise the alien's chosen profession, or loses or leaves a job;⁵⁰² is disabled or handicapped and thus unable to work;⁵⁰³ or acts against or threatens the State's economic order⁵⁰⁴ or its national economy,⁵⁰⁵ industry,⁵⁰⁶ trade,⁵⁰⁷ workers⁵⁰⁸ or livelihood.⁵⁰⁹

200. National legislation may prohibit the expulsion of an alien on the basis of such grounds once the alien has been in the territory of the State for a certain period of time.⁵¹⁰ The expulsion of an alien on this ground may depend on whether the alien is a national of a State having a special arrangement with the expelling State.⁵¹¹ Depending on the relevant national legislation, these grounds may⁵¹² or may not⁵¹³ also apply to aliens with transitory status.

201. National jurisprudence has also recognized economic reasons as a valid ground for expulsion.⁵¹⁴

(1) Preventive measures and deterrent

202. The expulsion of aliens has been used to prevent or deter certain conduct. The expulsion of aliens on such grounds appears to have diminished by the early twentieth century.⁵¹⁵ As mentioned previously, in the *Bonsignore* case, the European Court of Justice held that public policy grounds for expulsion may only be invoked if they are related to the personal conduct of the individual concerned, and that reasons of a "general preventive nature"

⁴⁹¹ The review of national legislations and jurisdiction on this is taken from the memorandum by the Secretariat (footnote 18 above), paras. 412–414.

⁴⁹² Nigeria, 1963 Act, art. 47.

⁴⁹³ Italy, 1998 Law No. 40, art. 11 (4) (a).

⁴⁹⁴ Panama, 1960 Decree-Law, art. 37 (b).

⁴⁹⁵ Austria, 2005 Act, art. 3.53 (2) (4); Brazil, 1980 Law, art. 64 (c); Canada, 2001 Act, art. 39; China, 1986 Rules, art. 7 (5); Finland, 2004 Act, sect. 11 (1) (3); Hungary, 2001 Act, art. 4 (1) (d); Italy, 1998 Decree-Law No. 286, arts. 4 and 8; Japan, 1951 Order, art. 5 (3); Kenya, 1967 Act, art. 3 (1) (a); Lithuania, 2004 Law, art. 7 (3); Nigeria, 1963 Act, art. 18 (1) (a), 1963 Regulations (L.N. 93), arts. 5 (4) and 6 (4); Panama, 1960 Decree-Law, art. 37 (b); Paraguay, 1996 Law, arts. 6 (7) and 79; Poland, 2003 Act No. 1775, arts. 15 (1), 21 (1) (3) and 88 (1) (3); Portugal, 1998 Decree-Law, art. 14 (1); Republic of Korea, 1992 Act, art. 11 (1) (5), (1) (8); Russian Federation, 2002 Law No. 115-FZ, arts. 7 (8) and 9 (8), 1996 Law, art. 27 (6); Spain, 2000 Law, art. 25 (1); and Sweden, 1989 Act, sect. 4.2 (1).

⁴⁹⁶ Germany, 2004 Act, art. 55 (2) (5); and Russian Federation, 2002 Law No. 115-FZ, arts. 7 (9) and 9 (9).

⁴⁹⁷ Canada, 2001 Act, art. 39; Kenya, 1967 Act, art. 3 (1) (a); and Russian Federation, 2002 Law No. 115-FZ, arts. 7 (8) and 9 (8).

⁴⁹⁸ Such a public charge or need for social assistance may involve either the alien or the alien's dependents (Canada, 2001 Act, arts. 38 (1) (c) and (2), 39; Chile, 1975 Decree, arts. 15 (4), 17, 64 (4), 65 (1) and 66; Japan, 1951 Order, art. 5 (3); Nigeria, 1963 Act, art. 18 (1) (a); Panama, 1960 Decree-Law, art. 37 (e); Republic of Korea, 1992 Act, art. 11 (1) (5), (1) (8); Switzerland, 1931 Federal Law, art. 10 (1) (d) and (2)–(3); and United States, Immigration and Nationality Act, sects. 212 (a) (4), 237 (a) (5) and 250).

⁴⁹⁹ Paraguay, 1996 Law, art. 6 (7).

⁵⁰⁰ Switzerland, 1949 Regulation, art. 16 (2).

⁵⁰¹ Kenya, 1967 Act, art. 6 (1) (a); compare Argentina, 2004 Act, art. 65, which prohibits expulsion for failure to fulfil a work contract obligation unless it was a prerequisite for the grant of the permit.

⁵⁰² Chile, 1975 Decree, arts. 15 (4), 17, 64 (4), (7), 65 (1) and 66; and Kenya, 1967 Act, art. 6 (1) (b).

⁵⁰³ Brazil, 1981 Decree, art. 52 (III)–(IV); Panama, 1960 Decree-Law, art. 37 (e); and Paraguay, 1996 Law, art. 6 (3). An exception may be made where such disability or handicap only partially reduces the alien's ability to work (Paraguay, 1996 Law, art. 7 (2)).

⁵⁰⁴ Republic of Korea, 1992 Act, art. 11 (1) (4) and (1) (8).

⁵⁰⁵ Brazil, 1981 Decree, arts. 101 and 104, 1980 Law, arts. 64, 67 and 70; Honduras, 2003 Act, art. 89 (3); and Panama, 1960 Decree-Law, art. 38.

⁵⁰⁶ Japan, 1951 Order, art. 7 (2).

⁵⁰⁷ Panama, 1960 Decree-Law, art. 36.

⁵⁰⁸ Brazil, 1980 Law, arts. 2 and 64; and Panama, 1960 Decree-Law, arts. 36 and 37 (e).

⁵⁰⁹ Brazil, 1980 Law, arts. 2 and 64.

⁵¹⁰ Austria, 2005 Act, art. 3.53 (2) (5)–(6); Sweden, 1989 Act, sects. 2.11 and 4.2; and United States, Immigration and Nationality Act, sect. 237 (a) (5).

⁵¹¹ Sweden, 1989 Act, sect. 2.14.

⁵¹² Lithuania, 2004 Law, art. 7 (3); Nigeria, 1963 Regulations (L.N. 93), arts. 5 (4) and 6 (4); Poland, 2003 Act No. 1775, art. 15 (1); and Portugal, 1998 Decree-Law, art. 14 (1).

⁵¹³ Japan, 1951 Order, art. 24 (4) (a).

⁵¹⁴ See, for example, Belgium, the *Pieters* case, Conseil d'État, 30 September 1953, ILR, 1953, p. 339 ("In this case the order states that the presence of the complainant is considered harmful to the economy of the country. It appears from the file that the expulsion was ordered by reason of the non-payment by the complainant of taxes due from him").

⁵¹⁵ "The following features of recent developments in the exercise of the power of expulsion may be noted: ... it is now rarely used as a preventive measure" (Borchard (footnote 75 above), p. 55).

are not admissible.⁵¹⁶ Nonetheless, it has been suggested that international law does not prohibit this ground for expulsion in the absence of a treaty obligation.⁵¹⁷

(m) *Reprisal*

203. The expulsion of aliens has sometimes been used as a means of reprisal, particularly in cases of mass expulsion, which is considered separately. The expelling State may indicate other grounds for the expulsion of aliens which nonetheless appear to be reprisals.⁵¹⁸

204. The legality of the expulsion of aliens as a means of reprisal has been questioned in the literature.⁵¹⁹ Similarly, according to the Institute of International Law, retaliation or retorsion does not constitute a valid ground for expelling an alien who has been expressly authorized to reside in a country:

The following rules shall not apply in cases of retaliation or retorsion. Nevertheless, aliens residing in the country with the express authorization of the Government may not be deported on the grounds of retaliation or retorsion.⁵²⁰

⁵¹⁶ “The reply to the questions referred should therefore be that art. 3, paras. 1 and 2 of Directive 64/221/EEC prevents the deportation of a national of a [m]ember State if such deportation is ordered for the purpose of deterring other aliens, that is, if it is based, in the words of the national court, on reasons of a ‘general preventive nature’” (*European Court Reports*, para. 7).

⁵¹⁷ “States generally are not prevented from using expulsion as a deterrent measure, i.e. expelling an individual as a warning for others. Such actions, however, may be declared unlawful by treaties (e.g. by the Treaty establishing the European Economic Community, art. 48, as interpreted by the Court of Justice of the European Communities)” (Doehring (footnote 425 above), p. 111).

⁵¹⁸ “In the nineteenth century, collective expulsions were sometimes stated to be justifiable as a reprisal. Rolin Jacquelmyns, the distinguished Belgian jurist stated that the collective expulsion of aliens in peacetime is only permissible by way of reprisal: see in his article ‘Droit d’Expulsion des Étrangers’, *Revue de droit international* (1888) at p. 498. Indonesia justified her expulsion of Dutch nationals in 1957 on the grounds of Holland’s failure to negotiate over West Irian. Dahm rightly, it is submitted, considers this justification as having no foundation in international law, *Völkerrecht*, vol. 1, at p. 529, and it appears his view is correct” (Sharma and Wooldridge, “Some legal questions arising from the expulsion of the Ugandan Asians”, pp. 411–412, footnote 85). “When in December 1934 Yugoslavia expelled a great number of Hungarian subjects as a reprisal against alleged complicity of Hungarian authorities in the activities of terrorists, it was explained that, in view of a large measure of unemployment in Yugoslavia, the persons in question lived in Yugoslavia under periodically renewable permits only: Toynbee, *Survey*, 1934, pp. 573–577” (Jennings and Watts (footnote 190 above), p. 944, footnote 16). “General Amin did not state that the expulsions were a reprisal for Britain’s refusal to grant a larger number of special vouchers to her Ugandan citizens and nationals ... He did, however, state that he had been inspired by God, and intended to teach Britain a lesson when he made his original announcement concerning the expulsions” (Sharma and Wooldridge, *loc. cit.*, p. 411 and footnote 83).

⁵¹⁹ “From its function, it follows that the power of expulsion must not be ‘abused’. If its aim and purpose are to be fulfilled, the power must be exercised in good faith and not for some ulterior motive, such as ... an unlawful reprisal” (Goodwin-Gill, *International Law and the Movement of Persons between States*, pp. 307–308 and footnote 1 (the footnote stating that “[t]here are difficulties in determining when a reprisal is lawful. Brownlie observes that, in principle, it should be a reaction to a prior breach of legal duty and be proportionate: *Principles of Public International Law* (2nd ed., 1973), p. 524”). Reprisals which may be contrary to international *jus cogens* can hardly be permissible (Sharma and Wooldridge (preceding footnote), p. 411 and footnote 84 (referring to “the dissenting opinion of Judge Tanaka in the *South West Africa* cases (1966), *I.C.J. Reports* at para. 298, which states that human rights, being derived from natural law, are part of the *jus cogens*”)).

⁵²⁰ Institute of International Law, “Règles internationales...”, art. 4.

(n) *Other grounds*

205. There may be other grounds for the expulsion of aliens that are not as widely recognized or as relevant in contemporary practice, for example, bringing an unjust diplomatic claim.⁵²¹

206. Many old grounds, which represented the moral values of the day, are now obsolete. For example, although prostitution remains an offence in many countries around the world, expulsion on the ground of prostitution is not practised anywhere. The determination to protect victims of human trafficking or enforced prostitution could justify, at most, expulsion on the ground of assisting or benefiting from the prostitution of another. Another example is that no State today would seek expulsion on the ground of ill-health, regardless of its nature or seriousness. On the contrary, human rights associations are calling for illness to be recognized as a ground for non-expulsion, especially when the patient cannot receive appropriate care in his or her country or in the country to which he or she is expelled.⁵²² True, the European Court of Human Rights delivered a judgement on 27 May 2008 where it held that Great Britain, in expelling from its territory a Ugandan suffering from HIV/AIDS, did not violate human rights.⁵²³ According to the Court, the expulsion did not constitute “inhuman or degrading treatment” as set out in article 3 of the European Convention for Protection of Human Rights and Fundamental Freedoms. Nonetheless, the Court did not intend in any way to legitimize the ground of expulsion based on illness, however serious. It is the risky behaviour of the person involved which constituted a risk for another person that served as the ground for the expulsion, and it is that behaviour which the Court wanted to “punish”. That is why it considered that the same principles that applied in that case must also apply to expulsion of any person suffering from a naturally occurring illness, physical or mental.⁵²⁴ The idea that a patient may not constitute *per se* a ground for expulsion is corroborated by the domestic laws of some countries. The 2003 report of the *Observatoire du Droit à la santé des Étrangers* (ODSE) noted: “It is in 1997 that the non-expellability of aliens ‘suffering from a serious illness’ was first included in a law. Since the Chevènement law of 1998, legislative provisions have expanded the conditions for protection against deportation (art. 25.8) and have incorporated the right of residence, which is sanctioned by the issuance by statute of a ‘private and family life’ temporary residence card.”⁵²⁵

207. It is therefore highly likely that the cases examined above do not cover all the grounds for expulsion contained in different domestic laws, and any attempt to establish

⁵²¹ “In some countries of Latin-America the bringing of an unjust diplomatic claim against the State, unless it be adjusted in a friendly manner, is a ground for expulsion” (Borchard (footnote 75 above), p. 52, footnote 3 (Constitution of Nicaragua, art. 12)).

⁵²² See Lenoire, “La CEDH et les expulsions d’étrangers malades”, <http://doutagogo.over-blog.com/article-20349777.html> (accessed 8 July 2016).

⁵²³ *N. v. The United Kingdom*, ECHR, application No. 26565/05, judgement of 27 May 2008, *Reports of Judgments and Decisions*, 2008.

⁵²⁴ *Ibid.*, para. 45.

⁵²⁵ ODSE, *Rapport d’observation*, June 2003, Paris, 2003, p. 3.

an exhaustive list on the subject would be illusory. Darut noted in the early twentieth century that, in 1865, the Chamber of Representatives of Belgium rejected a proposal to indicate in a legislative text the cases where the right of expulsion will be exercised, justifying its decision as follows:

The importance of facts often depends on the events in which they occur; this is why circumstances vary as the external situation changes, such that an act may be dangerous today but not tomorrow. Only the Government can determine at any time what is in the public interest.⁵²⁶

As early as 1878, Pradier-Fodéré wrote on this subject: “The determination of grounds belongs to the State and its Government, which are the only entities that can exercise sovereignty within the territory”. Professor Lainé and Doctor Haenel then followed suit. When, during the same period, in a text published in 1893, Advocate General Desjardin wondered “how all the circumstances where public order and peace were compromised could be specified”, he replied by repeating almost word for word the argument raised by the Belgian Chamber of Representatives.⁵²⁷ In the same vein, Martini wrote: “It appears to us *impossible*, practically speaking, to list accurately the cases where expulsion should be invoked”.⁵²⁸ Like Darut, Piédelièvre says “that it depends on the circumstances; only the competent authority should decide on the factors for its determination”.⁵²⁹

208. The late-nineteenth-century authors who examined the issue of expulsion of aliens as well as contemporary practice of international courts on the subject all agree that the State has considerable latitude in making a determination based on the circumstances. However, the State does not have a free hand in this regard. With respect to an act that affects relations between States and the international legal order, international law cannot be indifferent to the manner in which the State justifies expulsion. It is the reference by which the international validity of the act of expulsion will be determined.

209. In this regard, contemporary law allows for judicial review of decisions concerning such acts. Expulsion does not fall within the scope of what some domestic laws call “governmental acts”⁵³⁰ which are not subject to any judicial review, because it involves the rules of human rights protection. Similarly, expulsion falls outside the ambit of what international law considers the exclusive jurisdiction of the State, which is not subject to international review. A judge may review the criteria that are used to determine grounds for expulsion, to verify whether they comply not only with the domestic laws of a State, but also with relevant rules of international law. In this regard, public order and public security, as we have seen, are established in domestic laws and are sanctioned in international law as legitimate grounds for the expulsion of aliens. The law of the European

Community, in particular the case law, provides some clarifications, and its evaluation criteria may be of great assistance for the purposes of codification and gradual development of rules governing the grounds for expulsion of aliens. The expelling State may invoke any other grounds, provided they do not breach the rules of international law.

210. Considering the aforementioned developments, the following single draft article on the grounds for expulsion may be proposed, and the analysis that led to its development may be reflected in the commentaries in order to clarify the scope of its provisions:

“Draft article 9. Grounds for expulsion

“1. Grounds must be given for any expulsion decision.

“2. A State may, in particular, expel an alien on the grounds of public order or public security, in accordance with the law.

“3. A State may not expel an alien on a ground that is contrary to international law.

“4. The ground for expulsion must be determined in good faith and reasonably, taking into account the seriousness of the facts and the contemporary nature of the threat to which they give rise, in the light of the circumstances and of the conduct of the person in question.”

E. Conditions in which the person being expelled is detained

211. Let us begin with a semantic clarification. National legislations do not necessarily use one and the same concept to describe the situation of an alien who is being detained in a given place, conceived specially for this purpose, pending his or her actual expulsion. While the majority of countries use the term “detention” to designate this situation, the preferred legal term in French is “*réten-tion*” or even “*maintien*”. In France, the term “*détention*” is reserved for situations in which the deprivation of liberty of origin is strictly punitive and is enforced in a penal establishment over a long or very long period, whereas “*réten-tion*” and “*retenue*” refer to a relatively brief confinement within the jurisdiction, not only of a punitive authority,⁵³¹ but also of a parapunitive⁵³² or an administrative authority.⁵³³ In the case of aliens “*retenus*” or “*maintenus*” at the border, the purpose is not to penalize a criminal offence but rather to take a precautionary step as part of an administrative procedure relating to an admission to or removal from the territory. Hence, “*réten-tion*” takes place, not in penitentiaries, but in facilities under the control of the police.⁵³⁴

⁵²⁶ See footnote 170 above, p. 64.

⁵²⁷ All these authors are cited by Martini (footnote 72 above), pp. 86–87.

⁵²⁸ *Ibid.*, p. 86.

⁵²⁹ Piédelièvre, *Précis de droit international*, vol. 1, No. 210, p. 182.

⁵³⁰ See, *inter alia*, in the case of France, Hauriou, *La jurisprudence administrative de 1892 à 1929*, note under *Vandelet et Faraut*, Conseil d’État, 18 December 1891, p. 129.

⁵³¹ For example, “*retenue*” of a minor between 10 and 13 years old authorized by article 4 of the ordinance of 2 February 1945.

⁵³² For example, “*retenue*” by customs.

⁵³³ For example, the placement in “*réten-tion*” of an illegal alien as specified by article L555-1 of the Code on the Entry and Stay of Aliens and on the Right to Asylum.

⁵³⁴ See Julien-Laferrrière, “La rétention des étrangers aux frontières françaises”.

212. However, as has been observed, the semantic propriety of the terms “*rétenion*” and “*retenue*” ill conceals the fact that, in all instances, the person is being subjected to a deprivation of liberty that *stricto sensu* is directly contrary to the right to security guaranteed by article 5 (of the European Convention on Human Rights).⁵³⁵ Accordingly, in the analysis that follows, the French term “*détention*” will be used in a generic sense that also covers the term “*rétenion*”, with both designating a situation of deprivation of liberty.

213. The conditions in which aliens are detained prior to expulsion are among the most criticized aspects of State practice with respect to expulsion. It is generally during this phase of expulsion that some of the worst violations of an alien’s rights occur. This report will illustrate the poor conditions with a few examples taken from the practice in certain States, before turning to the provisions of some national laws and to the international rules in this area.

1. EXAMPLES OF DETENTION CONDITIONS THAT VIOLATE THE RIGHTS OF ALIENS WHO ARE BEING EXPELLED

214. The Special Rapporteur wishes to emphasize that the cases presented here serve purely as illustrations. The selection has been dictated solely by the availability of information, not by personal preference. It is not the intent of this presentation to stigmatize the countries mentioned, nor, of course, is there any claim to comprehensiveness.

215. In Germany, the idea of interning expellees in specific locations seems to have gained ground slowly in the minds of Prussian and German leaders. The first cases of detention with a view to expulsion were *de facto* arrangements in which “the expellees were assembled in make-shift facilities”, their expulsion having been blocked by the refusal to readmit them into their country of origin. This is what happened during the mass expulsions of 1885–1890, when the authorities refused to allow into their territory some Poles and some Jews who were Russian subjects.⁵³⁶ A note by the Prussian Ministry of Foreign Affairs proposed that “the elements be placed in an internment camp, because that will make it possible to contain the housing shortage and discourage unauthorized immigration”.⁵³⁷ The assumption of power by Adolf Hitler and the installation of the Nazi dictatorship led, as we know, to a change in the scope and purpose of these internment ideas. It would be inappropriate to dwell here on detention as practised under this regime, whose excesses are well known. After the 1938 decree on the policing of aliens, which was the principal legal text on the subject until the 1965 Act, placement in detention centres was regulated by the Aliens Acts of 9 July 1990 and 30 June 1993. It has not been possible, however, to gain access to information on the conditions in those centres.

216. Spain, in recent years, has been the preferred country of destination for many immigrants, some legal but the majority clandestine. In January 2007, there were

approximately 10 official alien internment centres. They were situated in the provinces of Barcelona (Free Zone), Las Palmas (Matorral in Fuerteventura, Barranco Seco in Gran Canaria and Lanzarote), Tenerife (Hoya Fría), Málaga (Capuchinos), Madrid (Carabanchel), Valencia (Zapadores), Murcia (Sangonera la Verde) and Algeciras (La Piñera). There were also two temporary residence centres for immigrants (CETI), in Melilla and Ceuta, and the informal detention centres of questionable legality, such as those in the Straits, including the centre on Isla de Paloma (Tarifa), where sub-Saharan nationals are interned, the Las Heras centre (Algeciras), a former army barracks, the Almería centre, an industrial warehouse located in the fishing port and formerly used for cooking shellfish, where 113 immigrants rioted in November 2006 because of the conditions in which they were detained, and the centres in the Canary Islands. The following extracts represent the essence of the complaints made about the majority of the centres by a Spanish human rights association⁵³⁸ in reporting violations of basic rights by those centres:

Valencia: Zapadores Centre (former barracks)

Many non-governmental organizations have reported violations of immigration regulations, poor health and hygiene conditions, absence of a resident doctor or social workers and, frequently, a high occupancy rate. In August 2006, 50 immigrants mutinied at the centre.

Murcia: Sangonera la Verde Centre

Constant overcrowding owing to the availability of only 60 places. This is the Centre’s biggest problem, and it creates serious health and security risks for the detainees. The Centre has experienced considerable difficulties in recent years and has had to deal with uprisings by detainees, the suicide of a female detainee awaiting expulsion to Russia, and the escape of two inmates in March 2005.

Barcelona: Free-zone Centre

This Centre replaced the “notorious” “La Verneda” in the police station of the same name. It is described as “a cellar without natural light, poorly ventilated, lacking a courtyard ...” and has been “denounced by all the non-governmental organizations and even the Ombudsman” on account of the frequent ill-treatment meted out there. “The centre has made prominent use of penitentiary features: electromagnetic closure system, common areas and cells, screens to separate visiting relatives from detainees, camera surveillance system, cells with bars.”

Málaga: Capuchinos Centre (former barracks)

This is one of the centres that have received the most complaints and that have a truly sinister history. The Capuchinos Centre began functioning in 1990, with room for 80 people.

As early as 1992, the State Treasurer denounced the poor state of its facilities. This past summer, the scandalous abuse of inmates induced the media to reveal the long list of shortcomings accumulated throughout its history and denounced by social organizations on multiple occasions: poor food, overcrowding, lack of health care, medication provided by the police because of the lack of health personnel, lack of interpreters, serious hygiene problems and badly deteriorated facilities. Since its inception, there have been two “suicides” and five cases of arson (three of them documented). Despite the shortness of its existence, it has had to close twice for improvements to be made, but there has been no reduction in the number of complaints about poor conditions.

As early as 1994, 46 inmates led the first hunger strike to protest against conditions at the Centre. In 1995, a female inmate of Brazilian nationality filed the first of many complaints about sexual abuse. In the same year, 103 immigrants, after being tranquillized with haloperidol, left “Hotel Capuchinos”, as some officials liked to call it, and were

⁵³⁵ Koering-Joulin, “Droit à la sûreté”, p. 11.

⁵³⁶ See Weber, “Expulsion: genèse et pratique d’un contrôle en Allemagne (partie 1)”.

⁵³⁷ *Ibid.*

⁵³⁸ Asociación Pro Derechos Humanos de Andalucía (APDHA), *Centros de retención e internamiento en España, October 2008*.

flown in five military aircraft to Mali, Senegal, Cameroon and Guinea Conakry. Aznar, who had thus violated all manner of international standards, stated: "We had a problem and now we have solved it".

During the past month of June, the provincial police station in Málaga was unable to conceal any longer its discovery of goings-on which it itself described as being of a serious nature. They consisted of "night-time festivities in which the inmates participated and possibly ended up by having sexual relations with the officials". Six of the female inmates stated that they had been victims of sexual abuse. Seven members of the National Police Force were detained and six of them became the subjects of legal proceedings (three being accused of sexual assault and three others of failing to prosecute the offence). According to the record of proceedings, the female immigrants who did not go to the gatherings were insulted and threatened. The purpose of the gatherings was to "drink, dine and have sex", according to one of the victims. The head of security at the Alien International Centre was dismissed from his post, as was the director of the Centre, Luis Enrique López Moreno, who remains free but with charges against him. Two months later, a further incident occurred: an immigrant who was a witness to the sexual abuse described had an abortion at the Centre. The woman, of Brazilian origin, received no care for more than an hour after the police had been informed by other inmates, according to the only immigrant who was present and had not been deported at dawn of that same day. Moreover, the victim of the abortion would no longer be able to attend the abuse proceedings because she was subsequently deported, as were all the other female witnesses of sexual assaults. Her counsel accused the police of the crime of "failing in their duty to provide assistance". Lastly a delegation of non-governmental organizations accompanied Francisco Garrido, a deputy from the Green Party, in preparing a further report on the situation at the Centre.

Algeciras: Piñera Centre

The Asociación Pro Derechos Humanos de Andalucía (APDHA) reported the same problems at the majority of the centres: inadequate bathroom facilities and living accommodation, seasonal overcrowding, legal irregularities, shortcomings in the legal aid and interpretation service, a tightly restricted system of visits, difficulties of communication with the outside world... Moreover, as a former penitentiary centre, it has every appearance of being a prison.

Paloma Island Centre, in Tarifa

This "reception" centre for illegal immigrants is located in the former military base of Tarifa and has out-of-date, run-down facilities and grossly substandard conditions of habitability (the facilities were repaired for the visit of the United Nations Rapporteur in 2003). The Centre comes under the Civil Guard, and the responsibility for the identification and administrative aspects of expulsion lies with the National Police.

The use of this space was a temporary measure, adopted in 2002 by the Aznar government to accommodate the increased number of immigrants arriving at the Cádiz coastline. From being temporary, however, it became in actuality an extension of the alien internment centre in Algeciras.

According to the Spanish Police Confederation, the Ministry of the Interior is deceiving public opinion, the Red Cross, citizens and officials by trying to conceal the location of this clandestine internment centre. The barracks functions as an extension of the internment centre in Algeciras but fails to meet any of the requirements for this type of facility.

The immigrants sleep in two cells on mattresses placed on the floor. There is only one boiler with a two-hundred litre capacity for heating water to provide showers for approximately 120 people. When the pump breaks down, there is no running water.

Fuerteventura: Matorral Centre

This is probably the largest alien internment centre in Spain. It replaced the former centre located at the airport, which was severely criticized by Human Rights Watch, among others, in 2002 because of the terrible conditions experienced by the detainees.⁵³⁹

⁵³⁹ See Human Rights Watch, "La otra cara de las Islas Canarias. Violación de los derechos de los inmigrantes y los solicitantes de asilo", www.hrw.org/spanish/informes/2002/inmigrantes.html (accessed 8 July 2016).

According to the report on the visit by European Parliamentarians, the Centre resembles a real prison, the situation is appalling and the immigrants complained of not getting enough food. ...

Las Palmas: Barranco Seco Centre

The complaint was made to the United Nations Special Rapporteur that some of the migrants had only three minutes a week to speak with the lawyer and that they did not know the status of their files. ...

Tenerife: Las Raíces Barracks

In March 2006, Las Raíces Barracks was given temporary authority to accommodate 1,300 persons in tents. However, this number has been exceeded for virtually the entire year. Located near Las Raíces Airport, it is in a very cold and unpleasant place and in terms of habitability the conditions are substandard.

In September 2006, approximately 150 immigrants managed to escape from Las Raíces, only to be detained subsequently nearby, some of them hiding in refuse bins. ...

Gran Canaria: La Isleta military encampment

As reported by the Unified Police Syndicate in August [2006], rats live comfortably in the facility and refuse is everywhere. The facility "was full of excrement, of flies and of insects of every kind, because the water with which the inmates showered and washed their few clothes formed stagnant pools and rivers of mud. Since no part of the encampment was paved, the dust must constantly have found its way into the army stores".

The immigrants have to urinate into empty bottles and leftover cardboard packaging, which they must traverse in order to wash. This is an inhumane situation for the inmates of this overcrowded facility.

217. In the United States, the Border Patrol and the Immigration and Naturalization Service (INS) are required to apprehend undocumented immigrants and have processing and detention centres available to them for the purpose. There are 34 crossing points on the United States/Mexico border, each with its own centre for processing undocumented immigrants. Of the 17 centres in the United States, 7 are on the border with Mexico, and one is in a military camp, on a coast guard base in Boston.⁵⁴⁰ According to one author:

Many of those repatriated are said to be apprehended five, or even more, times in a single day... Moreover, since most of these immigrants are extremely poor, it seems quite unrealistic to expect them to be able to afford legal assistance. Such being the case, many of the victims of abuse by the Border Patrol or the INS have their expenses paid by philanthropic or political organizations.⁵⁴¹

218. In France, prior to 1 January 2009, there were 27 detention centres. It was planned that the number would increase to 30 after that date.⁵⁴² The deplorable conditions in the centres in which aliens destined for expulsion are detained prompted 17 deputies in the French National Assembly in 2008 to draft a resolution calling for "a commission of inquiry to evaluate and analyse the legal framework in place in the detention centres for the

⁵⁴⁰ The other centres are distributed as follows: Arizona, 1; California, 2; Texas, 4; Colorado, 1; Florida, 1; Louisiana, 1; Massachusetts, 1; New York, 2; Puerto Rico, 1; Washington, D.C., 1 (*Source*: United States Department of Justice, Immigration and Naturalization Service, *INS Fact Book*); and Schmidt, "Détentions et déportation à la frontière entre le Mexique et les Etats-Unis (partie 2)".

⁵⁴¹ Schmidt, *loc. cit.*

⁵⁴² See TF1 News, "Le juge met un coup d'arrêt à la réforme Hortefeux", 30 October 2008.

internment of migrant women, men and children”.⁵⁴³ The explanation of reasons for this proposed resolution warns of the threat of revolt at various detention centres, from Mesnil-Amelot in Vincennes to Satolas near Lyon and states:

Detainees are protesting about the fate in store for them and the veritable manhunt to which they are being subjected. These children, women and men live in an intolerable atmosphere of fear. Each alien becomes a potential criminal. This policy of stigmatizing “aliens”, which is contrary to all spirit of solidarity, foments xenophobia and hence is a gangrene affecting French society as a whole.⁵⁴⁴

Later, it continues:

The living conditions inside the detention centres are difficult. At Mesnil-Amelot, where most of the inmates are young men, medical care is inadequate; thus a detainee with heart problems has had no care since his arrival. The legal assistance is insufficient for the indispensable needs expressed. Many detainees show moral deterioration, with a profound feeling of solitude and abandonment (family visits last 15 minutes only).⁵⁴⁵

According to the 2006 report of the Commission Intermouvement des Evacués (CIMADE), which until 2007 was the only non-governmental organization mandated by the State to watch over the exercise of the rights of aliens:

The confinement of thousands of women and men is effected in a quasi-clandestine manner owing to minimal reporting requirements, lack of scrutiny from outside, very limited legal support in terms of both written texts and practice, and material conditions that are so wretched that at times they constitute inhuman and degrading treatment.⁵⁴⁶

Moreover, there are isolation rooms for detainees who are considered difficult. Isolation is carried out in humiliating conditions: those isolated “are handcuffed to a bench, behind the police guard room, next to the areas set aside for searches and visits”.⁵⁴⁷ Generally speaking, confinement affects parents as well as minors and pregnant women. As CIMADE has stated, “confinement has implications for children, who should not be in an alien detention centre”. It also noted:

At the Choisy-le-Roi centre, the female detainees are confined for 48 hours in a small unlit room of 4.5 square metres that contains two super-imposed bunk beds and provides no privacy (glass door). The room is very dirty. Even women who are six months pregnant have been put in this unhygienic room.⁵⁴⁸

CIMADE has no hesitation in denouncing the “excessiveness of the expulsion policy” and in stating that “some centres have become veritable camps” where “the withholding of liberty is established as a means of administering migrants”.⁵⁴⁹ The sponsors of the proposed resolution may therefore state: “Government policy is fertile ground for all sorts of excesses and becomes a potential source of inadmissible and unacceptable practices”.⁵⁵⁰

219. The situation is all the more disturbing in that some aliens destined for expulsion are detained in penitentiaries. As Robert Badinter, a former French Minister of Justice, said when summarizing the Louis Mermaz report in the National Assembly:

We must also take into account the very substantial number of aliens in local prisons. This is often the consequence of unmasking the use of the penitentiary establishment, which becomes a sort of general-purpose detention centre ... The question of detention centres and the living conditions in them, which international reports have denounced, in conjunction with penitentiary policies, is one that cannot be evaded. The transformation of administrative policies into punitive policies, and the resulting implications for local prisons, has gone too far. This issue requires close scrutiny.⁵⁵¹

In its 2004 *Etude*, the National Consultative Commission for Human Rights (Commission nationale consultative des droits de l’homme) noted:

Aliens find it hard to endure detention after leaving prison. They regard this further deprivation of liberty as an additional hardship... The situation becomes even worse when the removal of an alien causes the children to be placed in detention. The material conditions of detention are currently such that it is impossible for there to be compliance with the international conventions that protect the rights of the child.⁵⁵²

220. In the United Kingdom, it has been observed that “aliens being expelled experience a great deal of legal insecurity”. Some of them spend “up to 17 months in detention” in more than one camp.⁵⁵³ In, for example, the Dungavel Centre, located at approximately 30 kilometres from Glasgow, “the detainees are adult men for the most part; but some women, at times families and a few isolated minors are also inmates”. Detention for persons awaiting expulsion or asylum-seekers has ended tragically in a number of instances. In 2004, for example, the following occurred:

A Ukrainian asylum seeker at Harmondsworth Removal Centre was found hanged last Monday 19th July. There was subsequently a significant disturbance at Harmondsworth and detainees were transferred to other Removal Centres and to main-stream prisons. Days later on Friday 23rd July, a Vietnamese detainee who had been moved from Harmondsworth to Dungavel Removal Centre hung himself—he was taken to Hairmyres Hospital in East Kilbride, where he later died. A fellow Dungavel detainee is reported to have said that the Vietnamese man had been detained for over a year and simply gave up hope of being released.⁵⁵⁴

As regards asylum-seekers under the Immigration Act, 1971, the study published in 1996 stated that they

are placed in detention centres for immigrants or prisons for criminals or police-station cells. The Immigration Act, 1971, entitles the police and the immigration services to arrest people without a warrant. In the police cells and Her Majesty’s prisons, the detainees are treated like pre-trial prisoners. They can be locked up in small cells and deprived of recreation and exercise for 20 hours out of 24. The major difference that exists between common criminals and these detainees is that the latter can be detained indefinitely without a trial.⁵⁵⁵

⁵⁴³ See document No. 715, registered with the Presidency of the National Assembly on 13 February 2008 and circulated on 20 February 2008.

⁵⁴⁴ *Ibid.*, p. 3.

⁵⁴⁵ *Ibid.*, p. 6.

⁵⁴⁶ Cited in *ibid.*, p. 8.

⁵⁴⁷ *Ibid.*, p. 11.

⁵⁴⁸ 2006 CIMADE report, cited in *ibid.*, p. 12.

⁵⁴⁹ *Ibid.*, p. 13.

⁵⁵⁰ *Ibid.*, p. 8.

⁵⁵¹ Cited in the National Consultative Commission for Human Rights (Commission nationale consultative des droits de l’homme): *Étude sur les étrangers détenus. Propositions*, adopted by the plenary Assembly on 18 November 2004, p. 21.

⁵⁵² *Ibid.*, p. 25.

⁵⁵³ Elodie Michard, “Étrangers en Grande Bretagne: prisonniers à durée indéterminée”, 19 October 2004, www.echanges-partenariats.org.

⁵⁵⁴ See “Two deaths in UK Immigration Removal Centres” (available at <http://no-racism.net/article/899/> (accessed 8 July 2016)).

⁵⁵⁵ Harrel-Bond and Opondo, “La rétention des demandeurs d’asile dans la forteresse britannique (partie 1)”.

221. In Greece, the cases of *Dougoz*⁵⁵⁶ and *Peers*⁵⁵⁷ brought before the European Court of Human Rights gave some insight into the conditions which these individuals experienced while in detention awaiting expulsion. Following the judgements of the European Court in these cases, the Committee of Ministers of the Council of Europe adopted, on 7 April 2005, an interim resolution on those conditions of detention in which it invited the competent Greek authorities “to continue and intensify their efforts to align the conditions of detention with the requirements of the Convention [for the protection of human rights and fundamental freedoms], as set out in particular in the Court’s judgements and to look into the question of ensuring the availability of effective domestic remedies”.⁵⁵⁸ In communications from the Government of Greece at the time the cases were being considered by the Committee of Ministers, there was confirmation of the lamentable state of detention facilities in Greece. The Government of Greece wrote, for example:

With regard to the police detention centres and the prison in question in these cases, the Government notes that: the Alexandras Avenue police headquarters is no longer used for the detention of aliens awaiting expulsion; also, the Drapetsona police detention centre has been refurbished to create the best possible conditions of hygiene and decent living for detainees; finally, with regard to Koridallos prison, the biggest prison in Greece, necessary maintenance work is carried out there on a regular basis.⁵⁵⁹

It also stated: “The regularisation procedures, since 1998, for illegal immigrants in Greece have substantially eased the overcrowding of detention facilities because many were released to submit their requests provided they met the conditions of the law”.⁵⁶⁰ In *Tabesh v. Greece*, the European Court of Human Rights wrote at length about the conditions of detention experienced by the applicant pending his expulsion. The applicant claimed that the conditions of his detention did not comply with article 3 of the European Convention on Human Rights and the standards set by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).⁵⁶¹ He singled out for mention the total lack of physical exercise and contact with the outside world, the overcrowding of cells, and issues with hygiene and inadequate nutrition. In particular, he stated that the daily sum of 5.87 euros allocated for food was not sufficient to purchase three meals a day of satisfactory nutritional value. Before reviewing the conditions of detention themselves, the Court reaffirmed that article 3 of the Convention establishes one of the most basic values of democratic societies in that it prohibits in absolute terms that a person be subjected to torture or to inhuman or degrading treatment or punishment under any circumstance. The Court further stipulated:

The measures which deprive an individual of his or her freedom inevitably involve suffering and humiliation. This is a situation that cannot be avoided and that is not, in and of itself, a violation of article 3.

⁵⁵⁶ *Dougoz v. Greece*, application No. 40907/98, judgement of 6 March 2001, *Reports of Judgments and Decisions*, 2001-II.

⁵⁵⁷ *Peers v. Greece*, application No. 28524/95, judgement of 19 April 2001, *Reports of Judgments and Decisions*, 2001-III.

⁵⁵⁸ Resolution ResDH (2005) 21.

⁵⁵⁹ *Ibid.*, annex.

⁵⁶⁰ *Ibid.*

⁵⁶¹ *Tabesh v. Greece*, application No. 8256/07, judgement of 26 November 2009, *Reports of Judgments and Decisions*, 2001-III, para. 33.

Nevertheless, this article requires a State to ensure that the conditions in which a person is detained are compatible with respect for human dignity, that detention arrangements do not cause distress or hardship to a degree that exceeds the inevitable level of suffering inherent in such a measure, and that, in terms of the practical aspects of confinement, an individual’s health and well-being are provided for adequately.⁵⁶²

The Court added that, while States were authorized to detain potential immigrants by virtue of their “undeniable sovereign rights to control aliens’ entry into and residence in their territory” (*Amuur v. France*, 25 June 1996, para. 41, Reports 1996-III), that right “must be exercised in accordance with the provisions of the Convention”.⁵⁶³ To assess the truth of the applicant’s allegations about the conditions of detention at the premises of the immigration police subdirectorates in Thessalonika where he remained from 31 December 2006 to 28 March 2007, the Court noted that the allegations were corroborated by the statements in the report issued by the Ombudsman of the Republic in May 2007 and the reports issued by CPT following its visits in 2007 and 2008 to a number of police stations and immigrant detention centres in Greece. The Court observed:

The report relating to the 2008 visit referred to the conditions of detention on immigration police premises in Thessalonika, emphasizing that the detainees slept on dirty mattresses placed on the floor and also commenting on the absence of space for walking and exercising. Furthermore, it confirmed that each detainee was entitled to 5.87 euros a day with which to order meals for delivery from outside.⁵⁶⁴

This circumstance caused the Court to state:

Quite apart from the problems of promiscuity and hygiene as described by the report cited, it (the Court) considered that the arrangements for recreation and meals on the police premises where the applicant was detained posed a problem in terms of article 3 of the Convention. In particular, the applicant, having no opportunity to walk or pursue an activity in the open air might well feel cut off from the outside world, with potentially negative consequences for his physical and moral well-being.⁵⁶⁵

The Court noted:

The shortcomings with respect to recreational activities and appropriate meals for the applicant derived from the fact that the Thessalonika police premises were an unsuitable place for the period of detention which the applicant was required to undergo; that, by their very nature, the premises were intended to accommodate individuals for very short stays and were therefore altogether unfitted for a detention of three months, especially in the case of a person who was not serving a criminal sentence but instead awaiting the application of an administrative measure.⁵⁶⁶

The Court concluded that “holding the applicant in detention for three months on the premises of the immigration police subdirectorates in Thessalonika can be construed as degrading treatment within the meaning of article 3 of the Convention”.⁵⁶⁷

222. The situation is sometimes worse in Africa where few countries have centres in which to detain aliens prior to expulsion.

223. In South Africa, for example, where a wave of xenophobia occurred in 2005, many aliens, according to

⁵⁶² *Ibid.*, para. 36.

⁵⁶³ *Ibid.*, para. 37.

⁵⁶⁴ *Ibid.*, para. 40.

⁵⁶⁵ *Ibid.*, para. 41.

⁵⁶⁶ *Ibid.*, para. 43.

⁵⁶⁷ *Ibid.*, para. 44.

a number of associations, have been “subjected to acts of bullying, violence or humiliation before making their escape by train back to their native countries. Abuse has been suffered not only by clandestine workers but also by immigrants, refugees or asylum-seekers who are lawfully present.”⁵⁶⁸ Some of the aliens apprehended by the police are taken to Lindela, a repatriation centre at which aliens, whether illegal or awaiting regularization of their situation, are detained before being expelled. Some have been arrested before their residence permits have expired or following the destruction or confiscation of their papers, according to *The Sunday Independent*, a South African newspaper.⁵⁶⁹ Sarah Motha, the Human Rights Education Coordinator at Amnesty International South Africa, reports:

The police arrest all the immigrants indiscriminately, without regard to the status of the asylum-seeker. In several of the reported cases, the police claim not to have seen the document which states that an asylum application is pending... A number of testimonials state that the South African police ask asylum-seekers for bribes and sexual favours in return for not sending them to Lindela.⁵⁷⁰

The Sunday Independent of 9 April 2000 also describes the living conditions at Lindela as “absolutely deplorable”. The speakers describe in no particular order the filthy nappies, the food “which is unfit for a dog”, and the blatant absence of a doctor. Overcrowding is another problem: the Centre has room for 4,004 aliens, but it often accommodates many more. The lowest point in this regard was probably reached during an operation to deal severely with illegal immigrants launched in mid-March 2000. At the height of the raids, more than 7,000 persons were detained at Lindela, and thousands were presumably deported, although the media report that many escaped from detention in the course of the expulsion process, according to the letter sent to two South African ministers. Some “detainees” complain that they have been held at the Centre for longer than the law permits, a statement also made by some associations. But *The Sunday Independent*, on the basis of a letter faxed by Lindie Gouws, an administrator at Lindela, said that people are not detained at the Centre for more than one month, except by order of the High Court, and it is only in extreme cases that the Ministry of the Interior prolongs the period of detention to a maximum of 90 days. Most tragic of all are the unexplained deaths of refugees at the Centre. Since January 2005, approximately 50 persons have died, according to Sarah Motha of Amnesty International. Last August, the Zimbabwe Exiles Forum reported the deaths of 28 refugees at Lindela between January and July, most of them Zimbabwean.⁵⁷¹

224. In Equatorial Guinea, where the mass expulsion of aliens has been a recurring practice in recent years, many Africans, including a clear majority of Cameroonians, followed by Malians, have been expelled, irrespective of whether they were legal residents or in an unlawful situation, in deplorable circumstances and often pursued by the police. They fended for themselves or were deported to the border between Equatorial Guinea and Cameroon

in inhumane conditions. These expulsions occurred after the expiration of the ultimatum issued by the Equatorial Guinean Ministry of Foreign Affairs, Cooperation and la Francophonie on 12 May 2009, which urged all aliens in an unlawful situation to leave the country before 26 May. According to an information site on the Internet:

Approximately 300 Cameroonians living in Equatorial Guinea returned to their native country, having been compelled to do so. They arrived in makeshift canoes last Thursday at the Port of Limbé, 320 kilometres to the west of Yaoundé. Many were half-naked, dressed only in underpants, having lost their money and their property. Their return is part of a vast repatriation operation involving Cameroonians, but also Nigerians, Ghanaians and Congolese, which was launched on 6 March last by the Equatorial Guinean authorities and has affected the entire island of Bioko.⁵⁷²

225. The same source adds:

A version corroborated by Agence France Presse carries various testimonies by expelled Cameroonians, including that of Moïse Bessongo, a merchant in business for a number of years. He was stopped at midnight while on the way home. His place of residence was ransacked, and his passport, residence permit, Cameroonian identity card and diplomas were torn up by the police. He spent three days in a cell before being repatriated on Wednesday during the night. Many Cameroonians were arrested on 6 and 7 March and spent five days locked up at the military base in Malabo. Besides accounts of theft and extortion, many of the people describe being tortured and having the marks and scars to prove it.⁵⁷³

226. When questioned about these events, the Ambassador of Cameroon to Equatorial Guinea expressed concern about the situation. He went on to say:

We are not happy when we see Cameroonians maltreated. However, it is not for us to turn the knife in the wound. I do not deny that some of the actions are by individuals and are not known to and accepted by the Equatorial Guinean authorities. Cameroonians who are experiencing difficulties should come to the Embassy and the Consulate and we may find a way of helping them. Despite these incidents, Cameroonians will continue to go to Equatorial Guinea, but arrangements for these departures must be made so that they can live in dignity.⁵⁷⁴

227. In the *Diallo* case, Guinea complained about the circumstances in which its national was arrested and detained in the Democratic Republic of the Congo before being expelled. It claimed that Mr. Diallo was “secretly placed in detention, without any form of judicial process or even examination” on 5 November 1995; that he remained imprisoned for two months, before being released on 10 January 1996 further to intervention by the President [of Zaire] himself, only then to be “immediately rearrested and imprisoned for two [more] weeks before being expelled”. During a total detention of 75 days in all, Mr. Diallo was allegedly mistreated in prison and was deprived of the benefit of the Vienna Convention on Consular Relations.⁵⁷⁵ The Democratic Republic of the Congo rejected those allegations without argument, merely stating that “the duration and conditions of Mr. Diallo’s detention during the expulsion process were in conformity with Zairean law”.⁵⁷⁶

⁵⁷² “Chasse aux étrangers. La Guinée Equatoriale fait le ménage”, 15 March 2004, www.afrik.com.

⁵⁷³ *Ibid.*

⁵⁷⁴ “Expulsion de Camerounais en Guinée Equatoriale: une solution négociée en vue”, *Cameroon Tribune* (Government daily newspaper), 12 June 2009.

⁵⁷⁵ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007, para. 17.*

⁵⁷⁶ *Ibid.*, para. 19.

⁵⁶⁸ “Afrique du Sud: expulsion d’étrangers par dizaines de milliers. La xénophobie au cœur de cette politique”, 15 November 2005, available at www.afrik.com.

⁵⁶⁹ *Ibid.*

⁵⁷⁰ *Ibid.*

⁵⁷¹ *Ibid.*

2. CONDITIONS OF ENFORCEMENT OF EXPULSION

228. Expulsion may be rendered illegal by virtue of the way in which it is carried out.⁵⁷⁷ The expulsion of aliens must, in particular, comply with international human rights law, especially the prohibition of torture and other inhuman or degrading treatment.⁵⁷⁸ The requirement that aliens not be subjected to torture or to cruel, inhuman or degrading treatment is set forth in the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.⁵⁷⁹ This type of conduct in connection with the expulsion of an alien has been a common ground for complaint.⁵⁸⁰ This limitation on the

⁵⁷⁷ "An otherwise lawful deportation order may be rendered illegal if it is carried out in an unjust or harsh manner. Physical force which would cause or would be likely to cause bodily harm or injury should not be used in executing the order" (Sohn and Buergenthal (footnote 195 above), p. 96). "Every state is authorized, for reasons of public order, to expel foreigners who are temporarily residing in its territory. But when a state expels a foreigner without cause, and in an injurious manner, the state of which the foreigner is a citizen has the right to prefer a claim for this violation of international law" (Plender, "The Ugandan crisis and the right of expulsion under international law", p. 25 (quoting Calvo's *Dictionary of International Law*)). The analysis in this section is taken from the memorandum by the Secretariat (footnote 18 above), paras. 703–709.

⁵⁷⁸ "Expulsion should not be carried out with hardship or violence or unnecessary harm to the alien expelled" (Oda (footnote 10 above), p. 483). "Irrespective of the existence or non-existence of an unlimited right to expel foreigners, their ill-treatment, abrupt expulsion or expulsion in an offensive manner is a breach of the minimum standards of international law with which their home State may expect compliance. If a State chooses to exercise its sovereign discretion in contravention of this rule, it does not abuse its rights of sovereignty. It simply breaks a prohibitory rule by which its rights of exclusive jurisdiction are limited" (Schwarzenberger, "The fundamental principles of international law", pp. 309–310. See also Schwarzenberger, *International Law and Order*, pp. 89–90). "An expulsion amply justified in principle is nevertheless delictual under international law if it is conducted without proper regard for the safety and well-being of the alien. Once again, this is so either because the expulsion would amount to an abuse of rights, or because it would amount to violation of the 'minimum standard'. The proposition is so clear that it scarcely needs justification" (Plender (preceding footnote), p. 25). "[A] State, in executing an expulsion or deportation order, should act in accordance with standards upholding human rights and human dignity. These standards have a direct bearing on the power of a State to deport or expel an alien ... [T]here are various other norms and principles relating to human rights and human dignity which are recognized in multilateral instruments and are accepted by the vast majority of nations. These principles include ... the right of an individual not to be subjected to inhuman or degrading treatment" (Sohn and Buergenthal (footnote 195 above), p. 95). See also Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, p. 36.

⁵⁷⁹ General Assembly resolution 40/144, 13 December 1985, annex, art. 6.

⁵⁸⁰ "The most numerous cases arise because of the unduly oppressive exercise of the power of expulsion. It is fundamental that the measure should be confined to its direct object, getting rid of the undesirable foreigner. All unnecessary harshness, therefore, is considered a justification for a claim. Even where an expulsion is admitted to be justifiable, it should be effected with as little injury to the individual and his property interests as is compatible with the safety and interests of the country which expels him" (Borchard (footnote 75 above), pp. 59–60). "While the right of exclusion or expulsion is discretionary, a harsh, arbitrary, or unnecessarily injurious manner of exercising the discretion often gives rise to dispute" (Ilyomade, "The scope and content of a complaint of abuse of right in international law", p. 85). "Calvo [*Dictionary of International Law*] maintained that when a government expels a foreigner in a harsh inconsiderate manner ('avec des formes blessantes') the latter's State of nationality has a right to base a claim on the expulsion as a violation of international law" (Plender (footnote 191 above), p. 470). "[A] State engages international responsibility if it expels an alien ... in an unnecessarily injurious manner" (*op. cit.*, p. 459).

right of expulsion has been recognized in diplomatic practice⁵⁸¹ and by international tribunals.⁵⁸²

229. Annex 9 to the Convention on International Civil Aviation provides:

5.2.1 During the period when an inadmissible passenger or a person to be deported is under their custody, the state officers concerned shall preserve the dignity of such persons and take no action likely to infringe such dignity.

230. There are several other instances of practice supporting the requirement that a deportation be carried out humanely and with due respect to the dignity of the individuals involved.

231. The existence of such a requirement was implicitly affirmed in the *Lacoste* case, although it was held that the claimant had not been subjected to harsh treatment:

Lacoste further claims damages for his arrest, imprisonment, harsh and cruel treatment, and expulsion from the country ... The expulsion does not, however, appear to have been accompanied by harsh treatment, and at his request the claimant was allowed an extension of the term fixed for his leaving the country.⁵⁸³

Similarly, in the *Boffolo* case, the Umpire indicated in general terms:

Expulsion must be accomplished in the manner least injurious to the person affected.⁵⁸⁴

232. In the *Maal* case, the umpire stressed the sacred character of the human person and the requirement that an expulsion be accomplished without unnecessary indignity or hardship:

[H]ad the exclusion of the claimant been accomplished without unnecessary indignity or hardship to him the umpire would feel constraint

⁵⁸¹ "Diplomatic practice, too, demonstrates amply the principle that an expulsion contravenes international law if it is achieved without due regard for the alien's welfare" (Plender (footnote 577 above), p. 25). "Arbitrary expulsions ... under harsh or violent circumstances unnecessarily injurious to the person affected have given rise to diplomatic claims" (Borchard (footnote 75 above), p. 57). "Other instances have arisen in more recent years where the procedure applied in the course of expulsion has manifested a harsh treatment against which the United States has felt constrained to make emphatic protest" (Hyde (footnote 251 above), p. 233).

⁵⁸² "The principle that an expulsion must be carried out in a manner least injurious to the person affected has been enunciated on several occasions by international tribunals. Thus, summary expulsions ... by which they were subjected to unnecessary indignities, harshness or oppression, have all been considered by international commissions as just grounds for awards" (Borchard (footnote 75 above), p. 60 (citing, in footnote 5, *Maal (Netherlands) v. Venezuela*, 28 February 1903 [UNRIAA, vol. X, p. 730]; and *Boffolo (Italy) v. Venezuela* [*ibid.*, p. 528]; also referring to *Jaurett (U.S.) v. Venezuela*, Sen. Doc. 413, 60th Cong. 1st Sess., 20 *et seq.*, 559 *et seq.* (settled by agreement of 13 February 1909, For. Rel., 1909, 629)). "Arbitrary expulsions ... under harsh or violent circumstances unnecessarily injurious to the person affected have given rise to ... awards by arbitral commissions" (Borchard (footnote 75 above), p. 57). "Thus in cases concerning the expulsion of aliens, an international tribunal would normally accept as conclusive the reasons of a serious nature adduced by the State as justifying such action. It would, however, regard as unlawful measures of expulsion those which are ... accompanied by unnecessary hardship" (Cheng (footnote 578 above), p. 133).

⁵⁸³ *Lacoste v. Mexico* (Mexican Commission), award of 4 September 1875, in Moore (footnote 124 above), pp. 3347–3348.

⁵⁸⁴ *Boffolo* case, UNRIAA (footnote 74 above), p. 534 (Ralston, Umpire).

to disallow the claim ... From all the proof he came here as a gentleman and was entitled throughout his examination and deportation to be treated as a gentleman, and whether we have to consider him as a gentleman or simply as a man his rights to his own person and to his own undisturbed sensitivities is one of the first rights of freedom and one of the priceless privileges of liberty. The umpire has been told to regard the person of another as something to be held sacred, and that it could not be touched even in the lightest manner, in anger or without cause, against his consent, and if so done it is considered an assault for which damages must be given commensurate with the spirit and the character of the assault and the quality of the manhood represented in the individual thus assaulted.⁵⁸⁵

233. The Parliamentary Assembly of the Council of Europe has expressed its deep concern about incidents and ill-treatment occurring during deportations.⁵⁸⁶ Furthermore, it has stressed the subsidiary character of forced expulsion and the need to respect safety and dignity in all circumstances.

7. The Assembly believes that forced expulsion should only be used as a last resort, that it should be reserved for persons who put up clear and continued resistance and that it can be avoided if genuine efforts are made to provide deportees with personal and supervised assistance in preparing for their departure.

8. The Assembly insists that the Council of Europe's fundamental values will be threatened if nothing is done to combat the present climate of hostility towards refugees, asylum seekers and immigrants, and to encourage respect for their safety and dignity in all circumstances.⁵⁸⁷

234. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has also stressed that recourse to force when implementing an expulsion order should be limited to what is reasonably necessary, and has provided details concerning the means and methods of deportation that should not be used. The Committee has also insisted on the need for the establishment of internal and external monitoring systems and for proper documentation of deportation.

The CPT recognises that it will often be a difficult task to enforce an expulsion order in respect of a foreign national who is determined to stay on a State's territory. Law enforcement officials may on occasion have to use force in order to effect such a removal. However, the force used should be no more than is reasonably necessary. It would, in particular, be entirely unacceptable for persons subject to an expulsion order to be physically assaulted as a form of persuasion to board a means of transport or as punishment for not having done so. Further, the Committee must emphasise that to gag a person is a highly dangerous measure.⁵⁸⁸

The same Committee held that:

[I]t is entirely unacceptable for persons subject to a deportation order to be physically assaulted as a form of persuasion to board a means of transport or as a punishment for not having done so. The CPT welcomes the fact that this rule is reflected in many of the relevant instructions in the countries visited. For instance, some instructions which the CPT examined prohibit the use of means of restraint designed to punish the foreigner for resisting or which cause unnecessary pain. ...

[T]he force and the means of restraint used should be no more than is reasonably necessary. The CPT welcomes the fact that in some

countries the use of force and means of restraint during deportation procedures is reviewed in detail, in the light of the principles of lawfulness, proportionality and appropriateness. ...

The CPT has made it clear that the use of force and/or means of restraint capable of causing positional asphyxia should be avoided whenever possible and that any such use in exceptional circumstances must be the subject of guidelines designed to reduce to a minimum the risks to the health of the person concerned. ...

In addition to the avoidance of the risks of positional asphyxia referred to above, the CPT has systemically recommended an absolute ban on the use of means likely to obstruct the airways (nose and/or mouth) partially or wholly ... It notes that this practice is now expressly prohibited in many States Parties and invites States which have not already done so to introduce binding provisions in this respect without further delay.

It is essential that, in the event of a flight emergency while the plane is airborne, the rescue of the person being deported is not impeded. Consequently, it must be possible to remove immediately any means restricting the freedom of movement of the deportee, upon an order from the crew. ...

In the CPT's opinion, security considerations can never serve to justify escort staff wearing masks during deportation operations. This practice is highly undesirable, since it could make it very difficult to ascertain who is responsible in the event of allegations of ill-treatment.

The CPT also has very serious reservations about the use of incapacitating or irritant gases to bring recalcitrant detainees under control in order to remove them from their cells and transfer them to the aircraft. ...

[T]he importance has been highlighted of allowing immigration detainees to undergo a medical examination before the decision to deport them is implemented. This precaution is particularly necessary when the use of force and/or special measures is envisaged.

Operations involving the deportation of immigration detainees must be preceded by measures to help the persons concerned to organise their return, particularly on the family, work and psychological fronts. ...

Similarly, all persons who have been the subject of an abortive deportation operation must undergo a medical examination as soon as they are returned to detention. ...

The importance of establishing internal and external monitoring systems in an area as sensitive as deportation operations by air cannot be overemphasised. ...

Deportation operations must be carefully documented. ...

Further, the CPT wishes to stress the role to be played by external supervisory (including judicial) authorities, whether national or international, in the prevention of ill-treatment during deportation operations. These authorities should keep a close watch on all developments in this respect, with particular regard to the use of force and means of restraint and the protection of the fundamental rights of persons deported by air.⁵⁸⁹

235. Respect for human dignity is also required by the legislation of the European Union concerning the expulsion or removal of a third country national. The Council Decision 2004/191/EC of 23 February 2004 indicates in its preamble:

This decision respects the fundamental rights and observes the principles reflected in particular in the Charter of Fundamental Rights of the European Union. In particular this Decision seeks to ensure full respect for human dignity in the event of expulsion and removal, as reflected in Articles 1, 18 and 19 of the Charter.⁵⁹⁰

⁵⁸⁹ CPT/Inf (2003), Deportation of foreign nationals by air, paras. 31–45.

⁵⁹⁰ Para. 5, Council Decision 2004/191/EC of 23 February 2004, setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals (*Official Journal of the European Union*, No. L 060, 27 February 2004, pp. 55–57). See Charter of Fundamental Rights of the European Union, art. 1 ("Human dignity—Human dignity is inviolable. It must be respected and protected."), art. 18 ("Right to

⁵⁸⁵ *Maal* case, UNRIAA (footnote 582 above), p. 732.

⁵⁸⁶ Council of Europe, Parliamentary Assembly, Recommendation 1547 (2002): Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, 22 January 2002, para. 6.

⁵⁸⁷ *Ibid.*, paras. 7 and 8.

⁵⁸⁸ Council of Europe, CPT/Inf (97) 10, 22 August 1997, "Foreign nationals detained under aliens legislation", para. 36. For the committee, see Larralde, "La protection du détenu par l'action du Comité européen pour la prévention de la torture".

236. In its *Règles sur l'admission et l'expulsion des étrangers*, the Institute of International Law enunciated the principle according to which

[d]eportation is not a punishment and must therefore be executed with the utmost consideration and taking into account the individual's particular situation.⁵⁹¹

3. CONDITIONS OF DETENTION OF ALIENS BEING EXPELLED

237. Several instances of practice support the view that detention pending deportation is not unlawful, provided that it is in conformity with certain requirements.⁵⁹²

238. In the *Ben Tillett* case, the arbitrator recognized the right of the expelling State to detain an alien with a view to ensuring his or her deportation. Moreover, the arbitrator was of the opinion that, depending on the circumstances of the case and, in particular, on the danger which the individual may represent for public order, a State may lawfully detain an alien even before a deportation order. The arbitrator also held that a State was under no obligation to provide special detention facilities for deportees:

Considering that while recognizing the right of a State to expel, it should not be denied the means to guarantee the effectiveness of its injunctions; that it has to be able to watch over aliens of whom it may see the presence as a hazard for the public order, and that it may keep them in custody if ever it fears that those who are banned from its territory might elude its surveillance;⁵⁹³

Considering that, since an expulsion order does normally not precede the events that justify it, if a State was not able to use the necessary means of coercion in order to keep in custody for a few hours, until the measure is officially adopted, an alien whose conduct has become a cause of trouble, the latter would have the opportunity to escape from the police, and the Government would find itself armless;⁵⁹⁴

Considering, on the other hand, in law, that it is impossible to force a State either to build special facilities which would be exclusively affected to the preventive detention of aliens from the time of their arrest until the enforcement of the expulsion measure, or to reserve to those aliens a special place in the facilities that already exist; that the Government of Belgium, by isolating Ben Tillett and then protecting him from contact with other accused, has satisfied the requirements of international courtesy.⁵⁹⁵

239. The Arbitrator also found that, given the circumstances of the case, Belgium had not acted unlawfully by

asylum—The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.”) and art. 19 (“Protection in the event of removal, expulsion or extradition—1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”).

⁵⁹¹ Institute of International Law, “*Règles internationales...*”, art. 17.

⁵⁹² See, however, Oda (footnote 10 above), p. 483 (“Compulsory detention of an alien under an expulsion order is to be avoided, except in cases where he refuses to leave or tries to escape from control of the state authorities.”). The analysis in this section 3 (Conditions of detention of aliens being expelled) is taken from the memorandum by the Secretariat (footnote 18 above), paras. 715–726.

⁵⁹³ *Affaire Ben Tillett (Grande-Bretagne/Belgique), sentence arbitrale du 26 décembre 1898*, in G. Fr. de Martens, *Nouveau Recueil Général de Traités et autres actes relatifs aux rapports de droit international*, Second Series, vol. XXIX, Leipzig, Librairie Dieterich Theodor Weicher, 1903, p. 269 (translated in this report from the original French). See also *Ben Tillett case (United Kingdom v. Belgium)*, arbitral award of 26 December 1898, in *Cases on International Law*, by Charles G. Fenwick (1935), p. 181.

⁵⁹⁴ *Ibid.*, p. 182.

⁵⁹⁵ *Ibid.*, p. 183.

detaining Mr. Tillett for 26 hours,⁵⁹⁶ and that the conditions of detention were acceptable.⁵⁹⁷

240. The Commission which delivered the decision in the *Daniel Dillon* case addressed the issue of the minimum standard of treatment prescribed by international law with respect to the detention of an alien pending deportation. The Commission held that the long period of detention and the lack of information given to the claimant with respect to the purpose of his detention constituted maltreatment incompatible with international law.

With regard to the question of mistreatment the Commission holds that there is not sufficient evidence to show that the rooms in which the claimant was detained were below such a minimum standard as is required by international law. Also the evidence regarding the food served him and the lack of bed and bed clothing is scanty. The long period of detention, however, and the keeping of the claimant *incommunicado* and uninformed about the purpose of his detention, constitute in the opinion of the Commission a maltreatment and a hardship unwarranted by the purpose of the arrest and amounting to such a degree as to make the United Mexican States responsible under international law.⁵⁹⁸

241. Commenting on article 13 of the International Covenant on Civil and Political Rights, the Human Rights Committee has pointed out that if a deportation procedure entails arrest, the State party shall grant the individual concerned the safeguards contained in articles 9⁵⁹⁹ and 10⁶⁰⁰ of the Covenant for the case of deprivation of liberty.⁶⁰¹

⁵⁹⁶ *Ibid.*

⁵⁹⁷ *Ibid.*, pp. 183–184.

⁵⁹⁸ *Daniel Dillon (U.S.A.) v. United Mexican States*, Mexico-U.S.A. General Claims Commission, Award of 3 October 1928, UNRIAA, vol. IV (United Nations publication, Sales No. 1951.V.1), p. 369.

⁵⁹⁹ Article 9 of the Covenant provides:

“1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

“2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

“3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

“4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

“5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

⁶⁰⁰ Article 10 of the Covenant provides:

“1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

“2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

“(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

“3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”

⁶⁰¹ Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-first Session, Supplement No. 40 (A/41/40)*, vol. I, annex VI, general comment No. 15: The Position of Aliens under the Covenant, 11 April 1986, para. 9.

242. The European Convention on Human Rights explicitly recognizes the right of a State to detain an alien pending his or her deportation. Article 5, paragraph 1, of the Convention provides as follows:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(f) the lawful arrest or detention ... of a person against whom action is being taken with a view to deportation.

243. In the case of *Chahal v. United Kingdom*, the European Court of Human Rights clarified in many respects the content of article 5, paragraph 1 (f). The Court held that this provision did not require that detention pending deportation be “reasonably considered necessary, for example, to prevent his committing an offence or fleeing”.⁶⁰² However, the Court indicated that detention was permitted only as long as deportation proceedings were in progress and provided that the duration of such proceedings was not excessive.

The Court recalls, however, that any deprivation of liberty under Article 5 paragraph 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 paragraph 1 (f) ... It is thus necessary to determine whether the duration of the deportation proceedings was excessive.⁶⁰³

244. In addition, according to the Court, detention pending deportation should be in conformity with law and subject to judicial review. In this regard, “lawfulness” refers to conformity to national law, but also requires “that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness”.⁶⁰⁴ Moreover, judicial review “should ... be wide enough to bear on those conditions which are essential for the ‘lawful’ detention of a person according to Article 5 paragraph 1”.⁶⁰⁵

245. Attention may also be drawn to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,⁶⁰⁶ especially Principle 8 concerning detention pending deportation. Generally speaking, of the 36 Principles contained in the annex, the 19 reproduced below seem relevant to an analysis of the conditions of detention of a person awaiting deportation:

Principle 1: All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 2: Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or person authorized for that purpose.

⁶⁰² ECHR, *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, application No. 22414/93, para. 112. The Court reiterated its position in the case of *Čonka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, application No. 51564/99, para. 38.

⁶⁰³ *Chahal* (preceding footnote), para. 113.

⁶⁰⁴ *Ibid.*, para. 118. See also the case of *Čonka v. Belgium* (footnote 602 above), para. 39.

⁶⁰⁵ *Čonka v. Belgium* (footnote 602 above), para. 127.

⁶⁰⁶ See General Assembly resolution 43/173, 9 December 1988, annex.

Principle 3: There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

...

Principle 5: 1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status. ...

Principle 6: No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

...

Principle 8: Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

Principle 9: The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

Principle 10: Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

Principle 11: 1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 12: 1. There shall be duly recorded:

(a) The reasons for the arrest;

(b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

(c) The identity of the law enforcement officials concerned;

(d) Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Principle 13: Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.

Principle 14: A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to this arrest.

Principle 15: Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16: ...2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization. ...

Principle 17: 1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

...

Principle 21: It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise.

Principle 22: No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

...

Principle 24: A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

...

Principle 33: 1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

246. The issue of detention pending deportation was raised by the Special Rapporteur on the human rights of migrants, Gabriela Rodríguez Pizarro. Among the aspects highlighted by the Special Rapporteur are the need for periodical review of decisions on detention, the existence of a right to appeal, the non-punitive character of administrative detention, the requirement that detention not last more than the time necessary for the deportation of the individual concerned, and the requirement that detention end when a deportation cannot be enforced for reasons that are not attributable to the migrant.

The right to judicial or administrative review of the lawfulness of detention, as well as the right to appeal against the detention/deportation decision/order or to apply for bail or other non-custodial measures, are not guaranteed in cases of administrative detention.⁶⁰⁷

Administrative deprivation of liberty should last only for the time necessary for the deportation/expulsion to become effective. Deprivation of liberty should never be indefinite.⁶⁰⁸

The Special Rapporteur is particularly concerned that recently enacted anti-terrorism legislation, allowing for the detention of migrants on the basis of vague, unspecified allegation of threats to national security, can lead to indefinite detention when migrants cannot be immediately deported because that would imply a threat to their security and human rights.⁶⁰⁹

Administrative detention should never be punitive in nature.⁶¹⁰

⁶⁰⁷ Commission on Human Rights, Migrant Workers, E/CN.4/2003/85, para. 20.

⁶⁰⁸ *Ibid.*, para. 35.

⁶⁰⁹ *Ibid.*, para. 37.

⁶¹⁰ *Ibid.*, para. 43.

247. The Special Rapporteur then made the following recommendation:

It is necessary to ensure that the law sets a limit on detention pending deportation and that under no circumstance is detention indefinite... The decision to detain should be automatically reviewed periodically on the basis of clear legislative criteria. Detention should end when a deportation order cannot be executed for other reasons that are not the fault of the migrant.⁶¹¹

248. In 1892, the Institute of International Law was of the view that a person expelled should not be deprived of her or his liberty pending deportation.⁶¹² Such an opinion now seems unrealistic in the majority of cases, and it is doubtful whether the Institute would be of the same mind today.

249. National laws vary considerably with respect to the legality and the conditions of detention pending deportation.⁶¹³ A State may detain an alien prior to deportation as a standard part of the deportation process,⁶¹⁴ or when the alien has evaded or threatens to evade deportation, or has violated conditions of provisional release from detention,⁶¹⁵ when the alien has committed certain criminal or other violations, or threatens the State's public order or national security,⁶¹⁶ to allow the relevant authorities to determine the alien's identity or nationality, or to ensure the alien's post-transfer security,⁶¹⁷ or when deemed necessary to fulfil the deportation, including with respect to the arrangement of transportation.⁶¹⁸ A State may prohibit the alien's detention

⁶¹¹ *Ibid.*, para. 75 (g).

⁶¹² "Règles internationales...", art. 32: "If the deportee is free no restriction shall be placed on such person during this period."

⁶¹³ The review of national legislation and jurisprudence on this subject is taken from the memorandum by the Secretariat (footnote 18 above), paras. 726–737.

⁶¹⁴ Argentina, 2004 Act, arts. 35 and 70–72; Australia, 1958 Act, arts. 196, 253 and 255; Austria, 2005 Act, art. 3.76 (2); Belarus, 1998 Law, art. 30; Bosnia and Herzegovina, 2003 Law, arts. 28 (3), 43 (5) and 68 (1); Brazil, 1980 Law, art. 60; Kenya, 1967 Act, art. 12 (2); Madagascar, 1962 Law, art. 17; Malaysia, 1959–1963 Act, arts. 31, 34 (1) and 35; Nigeria, 1963 Act, art. 23 (2); Russian Federation, 2002 Law No. 115-FZ, arts. 31 (9) and 34 (5); and United States, Immigration and Nationality Act, sects. 241 (a) (2), and 507 (b) (1), (2) (C) and (c). Such detention may be specifically imposed on an alien allegedly involved in terrorism, and may include the period of the alien's criminal trial and the alien's fulfilment of a resulting sentence (United States, Immigration and Nationality Act, sect. 507 (b) (1), (2) (C), (c)).

⁶¹⁵ Belarus, 1993 Law, art. 26; Bosnia and Herzegovina, 2003 Law, art. 68 (2); Colombia, 1995 Decree, art. 93; Czech Republic, 1999 Act, sect. 124 (1); Greece, 2001 Law, art. 44 (3); Hungary, 2001 Act, art. 46 (1) (a)–(b); Italy, 1998 Law No. 40, art. 11 (6), 1996 Decree-Law, art. 7 (3); Japan, 1951 Order, art. 55 (1); Poland, 2003 Act No. 1775, art. 101 (1); Republic of Korea, 1992 Act, art. 66 and 1993 Decree, art. 80; and Switzerland, 1931 Federal Law, art. 13b (1) (c).

⁶¹⁶ Bosnia and Herzegovina, 2003 Law, art. 68 (2); Colombia, 1995 Decree, art. 93; Czech Republic, 1999 Act, sect. 124 (1); Greece, 2001 Law, art. 44 (3); Hungary, 2001 Act, art. 46 (1) (c)–(e), (2), (9); and United States, Immigration and Nationality Act, sect. 241 (a) (6).

⁶¹⁷ Austria, 2005 Act, art. 3.80 (4) (1); Brazil, 1980 Law, art. 60; China, 2003 Provisions, art. 184; Italy, 1998 Decree-Law No. 286, art. 14 (1), 1998 Law No. 40, art. 12 (1), 1996 Decree-Law, art. 7 (3); and Nigeria, 1963 Act, art. 31 (3).

⁶¹⁸ China, 2003 Provisions, art. 184; Croatia, 2003 Law, art. 58; France, Code, art. L551-1; Germany, 2004 Act, art. 62 (1); Italy, 1998 Decree-Law No. 286, art. 14 (1), 1998 Law No. 40, art. 12 (1); Japan, 1951 Order, arts. 13-2 and 52 (5); Kenya, 1967 Act, art. 8 (2) (b), (3)–(4); Malaysia 1959–1963 Act, art. 34 (1); Nigeria, 1963 Act, arts. 31 (3) and 45; Panama, 1960 Decree-Law, arts. 59 and 83; Poland, 2003 Act No. 1775, art. 101 (4); Portugal, 1998 Decree-Law, arts. 22 (4) and 124 (2); Republic of Korea, 1992 Act, art. 63 (1); Switzerland, 1931 Federal Law, art. 13b (1) (a)–(b); and United States, Immigration and Nationality Act, sect. 241 (a) (1) (C). Such detention may be expressly permitted during wartime (Nigeria, 1963 Act, art. 45).

when the alien has been ordered to depart voluntarily,⁶¹⁹ or permit the alien's detention or other restrictions on the alien's residence or movements prior to the alien's voluntary departure.⁶²⁰

250. The relevant law may establish a detention's term, relevant procedures, or the rights and recourses available to the alien.⁶²¹ A State may specifically provide for the detention of minors,⁶²² potentially protected persons,⁶²³ or aliens allegedly involved in terrorism.⁶²⁴ A State may allow for the alien to post bail.⁶²⁵ A State may restrict the alien's residence or activities, or impose supervision, in lieu of detention or without otherwise specifically providing for detention.⁶²⁶ A State may arrange for the transfer of the alien's custody between itself and another State.⁶²⁷ A State may require the alien to pay for the detention,⁶²⁸ or expressly bind itself to pay for it.⁶²⁹ A State may expressly characterize the alien's removal as not constituting a detention.⁶³⁰

251. In its Recommendation 1547 (2002), Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, the Parliamentary

⁶¹⁹ Portugal, 1998 Decree-Law, art. 100 (1).

⁶²⁰ Japan, 1951 Order, art. 55-3 (3); and Portugal, 1998 Decree-Law, art. 123 (2).

⁶²¹ Argentina, 2004 Act, art. 70–72; Australia, 1958 Act, arts. 196, 253–254, 255 (6); Austria, 2005 Act, arts. 3.76 (3)–(7) and 3.78–3.80; Belarus, 1998 Law, art. 30, 1993 Law art. 26; Bosnia and Herzegovina, 2003 Law, arts. 65 (4), 69–71; Brazil, 1980 Law, art. 60; Croatia, 2003 Law, art. 58; Czech Republic, 1999 Act, sect. 24 (2); France, Code, arts. L551-2, L551-3, L552-1, L-552-2, L552-3, L552-6, L552-7, L552-8, L552-9, L552-10, L552-11, L552-12, L553-1, L553-2, L553-3, L553-4, L553-5, L553-6, L554-1, L554-2, L554-3, L555-1, L555-2 and L561-1; Germany, 2004 Act, art. 62 (1)–(3); Greece, 2001 Law, art. 44 (3); Hungary, 2001 Act, art. 46 (3)–(7); Italy, 1998 Decree-Law No. 298, art. 14 (1)–(5bis), (7) and (9), 1998 Law No. 40, art. 12 (1)–(7) and (9), 1996 Decree-Law, art. 7 (3); Japan, 1951 Order, arts. 2 (15)–(16), 13-2, 54, 55 (2)–(5), 61-3, 61-3-2, 61-4, 61-6 and 61-7; Malaysia, 1959–1963 Act, arts. 34 (1), (3) and 35; Nigeria, 1963 Act, art. 31; Panama, 1960 Decree-Law, art. 59; Poland, 2003 Act, No. 1775, art. 101 (1)–(2), (3) (1), (4)–(7); Republic of Korea, 1993 Decree, arts. 77 (1) and 78; Russian Federation, 2002 Law No. 115-FZ, arts. 31 (9) and 34 (5); Sweden, 1989 Act, sects. 6.18–6.31; Switzerland, 1931 Federal Law, art. 13b (2)–(3), 13c, 13d; and United States, Immigration and Nationality Act, sects. 241 (g) and 507 (b) (2) (D), (c) (2), (d)–(e).

⁶²² Austria, 2005 Act, art. 3.79 (2)–(3); and Sweden, 1989 Act, sects. 6.19 and 6.22.

⁶²³ Austria, 2005 Act, art. 3.80 (5); and Switzerland, 1931 Federal Law, arts. 13a (a), (d) and 13b (1) (d).

⁶²⁴ United States, Immigration and Nationality Act, sect. 507 (b) (2) (D), (c) (2) and (d)–(e).

⁶²⁵ Belarus, 1998 Law, art. 30; Japan, 1951 Order, art. 54 (2)–(3), 55 (3); Malaysia, 1959–1963 Act, art. 34 (1); Republic of Korea, 1992 Act, art. 65, 66 (2)–(3) and 1993 Decree, arts. 79–80; and United States, Immigration and Nationality Act, sect. 241 (c) (2) (C).

⁶²⁶ China, 1986 Rules, art. 15; France, Code, arts. L513-4, L552-4, L552-5, L552-6, L552-7, L552-8, L552-9, L552-10, L552-11, L552-12 and L555-1; Hungary, 2001 Act, art. 46 (8); Japan, 1951 Order, art. 52 (6); Madagascar, 1962 Law, art. 17; Nigeria, 1963 Act, art. 23 (2); Republic of Korea, 1992 Act, art. 63 (2) and 1993 Decree, art. 78 (2)–(3); and United States, Immigration and Nationality Act, sect. 241 (a) (3).

⁶²⁷ Australia, 1958 Act, art. 254.

⁶²⁸ *Ibid.*, arts. 209 and 211.

⁶²⁹ Italy, 1998 Decree-Law No. 286, art. 14 (9), 1998 Law No. 40, art. 12 (9); Switzerland, 1999 Ordinance, art. 15 (2)–(3); and United States, Immigration and Nationality Act, sects. 103 (a) (11) and 241 (c) (2) (B).

⁶³⁰ Australia, 1958 Act, art. 198A (4).

Assembly of the Council of Europe recommended that the Committee of Ministries urge member States to adapt without delay their legislation and practices regarding detention prior to expulsion, in order to:

(a) Limit the length of detention in waiting or transit zones to a maximum of 15 days;

(b) Limit the length of detention in police stations to the amount of time strictly necessary for any arrest and to separate foreigners awaiting expulsion from people being questioned for common law crimes;

(c) Limit prison detention to those who represent a recognized danger to public order or safety and to separate foreigners awaiting expulsion from those detained for common law crimes;

(d) Avoid detaining foreigners awaiting expulsion in a prison environment, and in particular to:

—Put an end to detention in cells;

—Allow access to fresh air and to private areas and to areas where foreigners can communicate with the outside world;

—Not hinder contacts with the family and non-governmental organizations;

—Guarantee access to means of communication with the outside world, such as telephones and postal services;

—Ensure that during detention foreigners can work, in dignity and with proper remuneration, and take part in sporting and cultural activities;

—Guarantee free access to consultation and independent legal representation;

(e) Guarantee, under regular supervision by the judge, the strict necessity and the proportionality of the use and continuation of detention for the enforcement of the deportation order, and to set the length of detention at a maximum of one month;

(f) Favour alternatives to detention which place fewer restrictions on freedom, such as compulsory residence orders or other forms of supervision and monitoring, such as the obligation to register; and to set up open reception centres;

(g) Ensure that detention centres are supervised by persons who are specially selected and trained in psycho-social support and to ensure the permanent, or at least regular, presence of “inter-cultural mediators”, interpreters, doctors and psychologists as well as legal protection by legal counsellors.

252. Some national courts have recognized that right to detain aliens pending deportation.⁶³¹ With respect to the

⁶³¹ United States: “At the same time, however, this Court has recognized detention during deportation proceedings as a constitutionally

length of detention, numerous national courts have indicated that an alien may be detained only as long as is reasonably necessary to arrange the alien's deportation.⁶³² In

valid aspect of the deportation process", *Charles Demore, District Director, San Francisco District of Immigration and Naturalization Service et al. v. Hyung Joon Kim*, 538 U.S. 510 (2003), at p. 523. Russian Federation: "By virtue of article 22 (part 2) of the Constitution of the Russian Federation, an alien or stateless person present in the territory of the Russian Federation may, in the event of forcible deportation from the Russian Federation, be subjected, prior to a court decision, to detention for the period necessary for the deportation, but not for more than 48 hours", *Ruling No. 6, Case of the review of the constitutionality of a provision in the second part of article 31 of the USSR Act of 24 July 1981, "On the legal status of aliens in the USSR" in connection with the complaint of Yahya Dashti Gafur*, Constitutional Court of the Russian Federation, 17 February 1998. Netherlands: "Ex abundanti, the Court of appeal holds that if, in the opinion of the State, it would be in the interests of public order or safety that M could not be released from custody pending his possible expulsion to a country other than Yugoslavia, or that other restrictive measures be taken against him, it is the responsibility of the State to take such measures as are necessary and possible within the law", *SM v. State Secretary for Justice*, Netherlands Court of Appeal of The Hague, 29 May 1980, ILR, vol. 99, pp. 7–13, para. 13. Brazil: "It is understood that detention of the expelled individual is lawful, if the public interest demands it, during the time necessary to arrange his embarkation or transportation abroad", *In re de Souza*, Federal Supreme Court, 29 October 1934, *Annual Digest and Reports of Public International Law Cases*, 1933–1934, Hersch Lauterpacht, ed., case No. 139, p. 334. Argentina: "The charge that there is an obligation to set the illegal immigrant at liberty while his case is under consideration is manifestly incompatible with the above views; such a charge would be equivalent to weakening or even to annulling the exercise of power recognized above. Should the Office of Immigration decide not to deport the alien or should the appellant not choose this solution, there remains no other alternative than to hold him in custody in the place of detention for immigrants until the necessary requisites for his admission to the country have been completed", *In re Grunblatt*, Supreme Court, Argentina, 7 April 1948, *Annual Digest and Reports of Public International Law Cases*, 1948, case No. 84, p. 278. Argentina: "By the second [provision], the Executive Power is enabled to order the detention of more dangerous aliens for the period up to the moment of embarkation, when the public safety requires this", *In re Bernardo Groisman*, Federal Supreme Court, Argentina, 22 July 1935, ILR, vol. 8, pp. 345–346, at p. 346. United Kingdom: "In *R. v. Governor of Durham Prison, ex parte Singh* [1984] 1 All ER 983, [1984] 1 WLR 704 it was held, in a decision which has never been questioned (and which was followed by the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1996] 4 All ER 256, [1997] AC 97), that such detention was permissible only for such time as was reasonably necessary for the process of deportation to be carried out", *A and others v. Secretary of State for the Home Department*, United Kingdom House of Lords, [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169, 16 December 2004 (Lord Bingham of Cornhill); and *Rex v. Governor of H.M. Prison at Brixton and the Secretary of State for Home Affairs*, ex parte *Sliwa*, Court of Appeal of England, 20 December 1951, ILR, vol. 18, case No. 95, pp. 310–313. South Africa: *Aronowicz v. Minister of the Interior*, Supreme Court, Appellate Division, 15 November and 12 December 1949, ILR, vol. 18, pp. 258–259. Australia: *Al-Kateb v Godwin*, High Court of Australia, [2004] HCA 37, 6 August 2004.

⁶³² See, e.g., Brazil, *In re de Souza* (footnote 631 above), p. 334: "It is understood that detention of the expelled individual is lawful, if the public interest demands it, during the time necessary to arrange his embarkation or transportation abroad." United States: *Kestutis Zadvydas, Petitioner v. Christine G. Davis*, United States Supreme Court, 533 U.S. 678, 28 June 2001: "In answering that basic question, the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal." Argentina: "However justifiable may be the reasons of public order which determined the Executive to decree the removal of an inhabitant of this territory, it is beyond doubt that the deprivation of liberty to that end may not be continued beyond the period in which that precautionary measure is changed into a punishment without the law", *In re Flaumemberbaum*, Cámara Criminal de la Capital, 24 June 1941, *Annual Digest and Reports of Public International Law Cases*, 1941–1942, Hersch Lauterpacht, ed., case No. 94, pp. 313–315, at p. 313.

some cases, courts have held extensive periods of detention pending deportation to be excessive.⁶³³

253. In a recent series of cases,⁶³⁴ national courts have considered the question of whether aliens can be detained indefinitely where expulsion is not possible in the foreseeable future. In a case decided in 1998,⁶³⁵ the Constitutional Court of the Russian Federation examined, in the context of the expulsion of a stateless alien, the constitutionality of a statute which would allow the alien's indefinite detention. The Court concluded:

6. By virtue of article 22 (part 2) of the Constitution of the Russian Federation, an alien or stateless person present in the territory of the Russian Federation may, in the event of forcible deportation from the Russian Federation, be subjected, prior to a court decision, to detention for the period necessary for the deportation, but not for more than 48

⁶³³ See, e.g., Constitutional Court of the Russian Federation Ruling No. 6 (footnote 631 above). Argentina: "It is not possible to interpret that decision [*In re Bernardo Groisman*] as a recognition of the right of the Executive to prolong the detention in the country of a person domiciled here, even for the purpose of making effective his legal expulsion, beyond the period in which such precautionary measure is transformed into a penalty not authorized by law, in this case nineteen months, without judgement or hearing, and under a branch of government which even in a state of siege does not have such power (National Constitution, Arts. 23, 29, and 95). On the contrary, it is for the courts in each case to inquire whether or not the detention exceeds the proper limits", *In re Cantor*, Federal Supreme Court, Argentina, 6 April 1938, *Annual Digest and Reports of Public International Law Cases*, 1938–1940, Hersch Lauterpacht, ed., case No. 143, pp. 392–393. Venezuela: *In re Hely*, Venezuelan Federal Court of Cassation, 16 April 1941 (Per ILR, 1941–42, p. 313) (alien should be set at liberty, having already been in confinement longer than the penalty (six months to one year) provided by law for the offence with which he was charged). Brazil: *In re de Souza* (footnote 631 above), pp. 333–334 (detention of seven months is unlawful). But see Argentina, *In re Bernardo Groisman* (footnote 631 above), pp. 345–347 (detention could exceed three days). South Africa: "As a result, negotiations on the reception of a deportee tended to be prolonged, and Aronowicz's seven weeks in custody could not be considered excessive. There was no evidence that the Minister had acted in bad faith, and therefore he had not exceeded his powers", *Aronowicz v. Minister of the Interior* (footnote 631 above), pp. 258–259. Canada: *Re Janoczk*, Manitoba Court of Appeal, Canada, 4 August 1932, *Annual Digest of Public International Law Cases*, 1931–1932, Hersch Lauterpacht, ed., case No. 154, pp. 291–292 (no undue delay for nine months' detention while negotiating admission to other State). United States: "The period of time which Judges have found to be appropriate in peace-time varies from one month to four months. Perhaps, under war-time circumstances, a longer period might be justified", *United States ex rel. Janivaris v. Nicolls*, District Court, District of Massachusetts, 20 October 1942, *Annual Digest and Reports of Public International Law Cases*, 1941–1942, Hersch Lauterpacht, ed., case No. 95, p. 317.

⁶³⁴ Earlier cases addressing the question of the indefinite detention of aliens pending deportation include the following: "The right to arrest and hold or imprison an alien is nothing but a necessary incident of the right to exclude or deport. There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as a punishment for crime. Slavery was abolished by the Thirteenth Amendment. It is elementary that deportation or exclusion proceedings are not punishment for crime." United States: *Petition of Brooks*, District Court, District of Massachusetts, 28 April 1925, *Annual Digest of Public International Law Cases*, 1927–1928, Arnold D. McNair and Hersch Lauterpacht, eds., case No. 232, p. 340. Brazil: "Indefinite imprisonment, however, finds no support in the law, because it contravenes the principles of defence of liberty and the imperatives of justice embodied in our legislation". Brazil: *In re de Souza* (footnote 631 above), pp. 333–334; *In re Forster*, Supreme Federal Tribunal of Brazil, 28 January 1942 (the former legislation which limited the time of imprisonment had been abrogated, and there was now no limit, except at the discretion of the Ministry of Justice), ILR, vol. 12, p. 235.

⁶³⁵ Constitutional Court of the Russian Federation, *Ruling No. 6* (footnote 631 above).

hours. The person may remain in detention for a longer period only on the basis of a court decision and only if the deportation order cannot be implemented without such detention.

Thus a court decision is required to give the person protection not only from arbitrary extension of the period of detention beyond 48 hours but also from unlawful detention as such, since the court in any case evaluates the lawfulness and validity of the use of detention for the person concerned. It follows from article 22 of the Constitution of the Russian Federation, read in conjunction with article 55 (parts 2 and 3), that detention for an indefinite period cannot be considered an admissible restriction of everyone's right to liberty and security of person and is essentially a derogation of that right. For that reason, the provision of the USSR Act on the legal status of aliens in the USSR concerning detention for the period necessary for deportation, which the complainant is contesting, should not be considered grounds for detention for an indefinite period, even when the solution of the question of deportation of a stateless person may be delayed because no State agrees to receive the person being deported.

Otherwise detention as a measure necessary to ensure implementation of the deportation decision would become a separate form of punishment, not envisaged in the legislation of the Russian Federation and contradicting the above-mentioned norms of the Constitution of the Russian Federation.⁶³⁶

254. In *Zadvydas v. Davis*,⁶³⁷ the Supreme Court of the United States was asked to decide the constitutionality of a statute according to which an alien present in the United States⁶³⁸ could be kept in detention indefinitely pending deportation.⁶³⁹ Rather than invalidating the statute, the Court noted that:

[I]t is a cardinal principle of statutory interpretation, however, that when an Act of Congress raises "a serious doubt" as to its constitutionality, "this Court will first ascertain whether a construction of the statute is fairly possibly by which the question may be avoided".⁶⁴⁰

The Court subsequently noted:

A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's due Process Clause forbids the Government to "depriv[e]" any "person ... of ... liberty ... without due process of law". Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." See *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).⁶⁴¹

The statute, according to the Government, had two regulatory goals:

⁶³⁶ The Court also held that the statute, to the extent it allowed detention for more than 48 hours without a court order, was unconstitutional, *ibid.*

⁶³⁷ *Zadvydas* case (footnote 632 above) and *Immigration and Naturalization Service v. Kim Ho Ma*, United States Supreme Court, 28 June 2001, Nos. 99-7791 and 00-38.

⁶³⁸ Rather than an alien seeking admission into the United States. See discussion on *Clark v. Martinez*, United States Supreme Court, *Zadvydas* from other cases in which it had seemingly allowed for indefinite detention, such as *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (involving a once lawfully admitted alien who left the United States, returned after a trip abroad, was refused admission, and was left on Ellis Island, indefinitely detained there because the Government could not find another country to accept him), on this basis.

⁶³⁹ "[The statute] sets no 'limit on the length of time beyond the removal period that an alien who falls within one of the Section 1231 (a) (6) categories may be detained'", *Zadvydas* case (footnote 632 above), p. 689.

⁶⁴⁰ *Ibid.*, p. 689 (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932); see also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994); *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); cf. *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (construction of statute that avoids invalidation best reflects congressional will)).

⁶⁴¹ *Zadvydas* case (footnote 632 above), p. 690.

Ensuring the appearance of aliens at future immigration proceedings" and "[p]reventing danger to the community". Brief for Respondents in No. 99-7791, p. 24. But by definition the first justification—preventing flight—is weak or nonexistent where removal seems a remote possibility at best. As this Court said in *Jackson v. Indiana*, 406 U.S. 715 (1972), where detention's goal is no longer practically attainable, detention no longer "bear[s] [a] reasonable relation to the purpose for which the individual [was] committed". *Idem.*, p. 738.⁶⁴²

Accordingly, the Court held that:

In answering that basic question [of whether a set of particular circumstances amounts to detention within, or beyond, a period reasonably necessary to secure removal is determinative of whether the detention is, or is not, pursuant to statutory authority], the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's basic purpose, namely assuring the alien's presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute. In that case, of course, the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions. ...

We realize that recognizing this necessary Executive leeway will often call for difficult judgments. In order to limit the occasions when courts will need to make them, we think it practically necessary to recognize some presumptively reasonable period of detention. ...

While an argument can be made for confining any presumption to 90 days, we doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time. We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months. (See *Juris. Statement of United States in United States v. Witkovich*, O. T. 1956, No. 295, pp. 8–9.) Consequently, for the sake of uniform administration in the federal courts, we recognize that period. After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable as the period of prior post-removal confinement grows, what counts as the "reasonably foreseeable future" conversely would have to shrink. This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.⁶⁴³

255. In a subsequent decision, *Clark v. Martinez*,⁶⁴⁴ the Supreme Court of the United States extended to aliens who are the object of an expulsion order its ruling that an alien may be detained only as long as may be reasonably necessary to effect removal. As a consequence, it held that:

Since the Government has suggested no reason why the period of time reasonably necessary to effect removal is longer for an admissible alien, the 6-month presumptive detention period we prescribed in *Zadvydas* applies. (See 533 U.S., at 699–701.) Both Martinez and Benitez were detained well beyond six months after their removal orders became final. The Government having brought forward nothing to indicate that a substantial likelihood of removal subsists despite the passage of six months (indeed, it concedes that it is no longer even involved in repatriation negotiations with Cuba); and the District Court

⁶⁴² *Ibid.* The Court, however, limited the scope of its decision to expulsion of lawful immigrants and specifically noted that "Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgements of the political branches with respect to matter of national security" (*ibid.*, pp. 690 and 696).

⁶⁴³ *Ibid.*, pp. 699–701.

⁶⁴⁴ United States Supreme Court [543 U.S. 371] (footnote 638 above).

in each case having determined that removal to Cuba is not reasonably foreseeable; the petitions for habeas corpus should have been granted.⁶⁴⁵

256. A similar question was addressed by the High Court of Australia in *Al-Kateb v. Godwin*,⁶⁴⁶ in which the Court considered whether administrative detention of unlawful non-citizens could continue indefinitely. The Court upheld the constitutionality of the contested statute. Judge McHugh noted:

A law requiring the detention of the alien takes its character from the purpose of the detention. As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive.⁶⁴⁷

257. Several of the Lords also distinguished the judgments rendered in the *Zadvydas v. Davis* case of the Supreme Court of the United States, the *R. v. Governor of Durham Prison, ex parte Hardial Singh* case⁶⁴⁸ of the Queen's Bench Division in the United Kingdom, and *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* case⁶⁴⁹ of the Privy Council for Hong Kong, in which indefinite detention had been found unlawful. They pointed out that indefinite detention had already survived a legal challenge in the *Lloyd v. Wallach* case,⁶⁵⁰ involving the War Precautions Act of 1914 (Cth), and *Ex parte Walsh*,⁶⁵¹ regarding the National Security (General) Regulations of 1939 (Cth).

258. In *Al-Kateb*, it was also noted that, while the statute was constitutional, no consideration was given to the question of whether the statute conformed with Australia's international obligations. The Court specifically addressed the contention that the Constitution should be interpreted in conformity with principles of public international law by stating that the rules of international law which existed at the time might in some cases help to explain the meaning of a constitutional provision.⁶⁵²

259. In the United Kingdom, in the case of *A. and others v. Secretary of State for the Home Department*,⁶⁵³ the House of Lords of the United Kingdom considered whether the United Kingdom could, pursuant to a derogation to Article 5 of the European Convention on Human Rights, detain indefinitely aliens subject to an expulsion order but whose deportation was not possible.

⁶⁴⁵ *Ibid.*, pp. 386–387.

⁶⁴⁶ 2004 *High Court of Australia* 37 (footnote 631 above).

⁶⁴⁷ *Ibid.*, para. 45.

⁶⁴⁸ “Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorize detention if the individual is detained in one case pending the making of a deportation order and, in the other case, pending his removal ... Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose” (1984, *All England Law Reports*, p. 985).

⁶⁴⁹ Privy Council of Hong Kong, 27 March 1997, AC 97.

⁶⁵⁰ *Australia*, 20 CLR 299 (1915).

⁶⁵¹ *Australia*, [1942] “The Argus” Law Reports, p. 359.

⁶⁵² “Finally, contrary to the view of Kirby J, courts cannot read the Constitution by reference to the provisions of international law that have become accepted since the Constitution was enacted in 1900. Rules of international law at that date might in some cases throw some light on the meaning of a constitutional provision” (2004 *High Court of Australia* 37 (footnote 631 above), para. 62 (Gleeson)).

⁶⁵³ [2004] UKHL 56 (footnote 631 above).

260. It was noted that, pursuant to the prior ruling of the House of Lords in *R. v. Governor of Durham Prison ex parte Singh*, individuals subject to expulsion could be detained “only for such time as was reasonably necessary for the process of deportation to be carried out”.⁶⁵⁴ Moreover, it was recalled that, in accordance with the ruling of the European Court of Human Rights in the *Chahal* case (para. 243 above), some individuals involved in international terrorism could not be expelled from the United Kingdom. Hence, a formal notice of derogation had been submitted with regard to Article 5.

261. The House of Lords ruled that the provisions of the challenged statute allowing for the indefinite detention of aliens without charge or trial were unlawful despite the derogation requested. The provision was considered disproportionate and discriminatory, since it applied differently to non-nationals and nationals suspected of involvement in terrorism. Lord Bingham of Cornhill pointed out:

Article 15 requires any derogating measures to go no further than is strictly required by the exigencies of the situation and the prohibition of discrimination on grounds of nationality or immigration status has not been the subject of derogation. Article 14 remains in full force. Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. What has to be justified is not the measure in issue but the difference in treatment between one person or group and another. What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another.⁶⁵⁵

4. DURATION OF THE DETENTION

262. The duration of detention has an undeniable impact on the conditions of detention. The duration of the detention is the time which elapses between the day a person is placed in detention pending his expulsion and the day he is released or actually expelled. There are no international conventions which specify with any precision the authorized duration of a detention pending expulsion. While international jurisprudence recommends a reasonable period of detention and considers some periods excessive, it does not state what exactly the limits should be. It should be noted, however, that the duration of detention can be calculated only when the expulsion procedure is regular. In *Hokic and Hrustic v. Italy*, the European Court of Human Rights stated:

A period of detention is in principle regular when it takes place pursuant to a judicial decision. Under national law, a subsequent declaration by the judge that there has been a breach does not necessarily affect the validity of the detention undergone in the meantime.⁶⁵⁶

263. The majority of national legislations place limits on the duration of detention pending expulsion. The limits vary from State to State and are renewable. However,

⁶⁵⁴ *Ibid.*, para. 8 (Lord Bingham of Cornhill). Lord Nicholls of Birkenhead pointed out that “[I]ndefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified” (para. 74).

⁶⁵⁵ *Ibid.*, para. 68.

⁶⁵⁶ ECHR, *Hokic and Hrustic v. Italy*, judgement of 1 December 2009, para. 22.

fulfilling these requirements in practice may be difficult because, as one author remarks:

The stay at the detention centre serves two purposes. First, it provides the time necessary to establish the identity of the detained alien and to issue him or her the appropriate documents (passport, pass or laissez-passer...). Secondly, the time can be used to try to modify the detainee's attitude to his or her expulsion with a view to, for example, enlisting his or her assistance in the arrangements for his or her own expulsion by giving, say, some information about himself or herself (personal data, country of transit...).⁶⁵⁷

Opinions regarding the placement of an alien in detention pending his or her expulsion may differ among the authorities of the same State. Under national law, an alien may be detained as a result of an administrative or court decision. In general, the decision includes a direct enforcement clause. Normally, it is for the authority which issued the decision on placement in detention to rule on time limits and extensions.

264. In Germany, article 57 (3) of the Aliens Acts of 9 July 1990 provides that "[d]etention on ground of safety [*Sicherungshaft*] can be ordered for six months". The same legislation allows this period to be extended by 12 months if the alien "opposes" his or her expulsion, making a total of 18 months' detention. Decisions on extension must be taken by the same procedure as the initial decisions on placement in detention. In practice, as the courts of first instance are not specialized in the law pertaining to aliens,⁶⁵⁸ they generally endorse the position of the authorities and deliver decisions requiring placement in detention which are valid for three months and can be renewed if necessary. Placement in a detention centre is regulated by article 57 of the Aliens Acts of 9 July 1990 and 30 June 1993.

265. In Belgium, the duration of the detention is in principle limited to five months by the law of 15 December 1980, with the possibility of an eight-month extension if this is warranted by considerations of public order or national security. In practice, the length of confinement has no limits in Belgium, since a new time period begins to run if a person opposes his or her expulsion. But a duration of one year appears to be the exception.⁶⁵⁹ However, the data on duration of detention provided by the Ministry of Internal Affairs do not give the full picture. This is because of the way in which the duration of detention is calculated. The only figures transmitted by the Aliens Office relate to average duration of detention per centre, not per detainee. There is therefore no record of the total amount of time that each person actually spends in detention, since transfers between centres are not recorded. And there are many transfers between centres. For example, the 2006 report of centre "127 bis" notes:

Of the 2,228 persons registered, 126 came from other centres. In 2006, 176 residents were transferred to another closed centre. A detainee who spent, say, two months at centre "127" then three months at centre "127 bis" and 24 hours at "INAD" before being repatriated will appear three times in the statistics. To the authorities, the statistics show, not one person who has spent over five months in detention, but rather

three persons for whom the duration of detention recorded by centre is, respectively, two months, three months and 24 hours. Paradoxically, because of this detainee, who will have spent five months in several closed centres, the authorities' statistics on duration of detention will be considerably lower than if there had been no transfers.⁶⁶⁰

...

According to various NGOs, despite the five-month limit on the duration of detention imposed by law in Belgium, detention is sometimes far longer in reality. Thus, some detainees have already spent over one year, without interruption, in various closed centres. The psychological effects of such a long detention are devastating for the person concerned.⁶⁶¹

266. In Denmark, the total duration of detention is not restricted. Decisions on extension are taken by the same procedure as the initial decisions on placement in detention. They must observe the principle of proportionality: the judge must verify that progress is being made in meeting the formal requirements for expulsion and that expulsion is possible within a "reasonable" time frame.

267. In Spain, the duration of detention, limited to the minimum necessary, may not exceed 40 days. The decision on placement in detention may be the subject of an application for review by the judge who took the decision in the three days following that decision or, alternatively, by the higher court. The application is without suspensive effect. At the end of 40 days, any aliens whom it has not been possible to expel—for example, because they have no papers or because the authorities in their countries refuse to cooperate—are released. They cannot be placed in detention again on the same grounds, but they are marginalized by the expulsion order delivered to them, as it prevents them from finding housing or lawful employment.

268. In Italy, the Constitutional Court held in 2001 that detention constituted a deprivation of liberty incompatible with article 13 of the Constitution. That article states: "no restriction of individual liberty is allowed unless ordered in a substantiated decision by a judicial authority in such cases and forms as are provided for by law". Accordingly, decisions to place a person in detention must be validated by a judge. The duration of the detention is restricted to 30 days. It may, at the request of the police, be extended by 30 days by the judge. The decision on extension may also be the subject of an application for judicial review, without suspensive effect. The application must be filed within 60 days.

269. In Switzerland, article 76 of the Aliens Act provides, with respect to detention pending return or expulsion, that:

2. The duration of the detention referred to in paragraph 1 (b) 5 may not exceed 20 days.

3. The duration of the detention referred to in paragraph 1 (a) (b) 1 to 4 may not exceed 3 months; if any particular obstacles prevent the return or the expulsion from being enforced, detention may, subject to the agreement of the cantonal judicial authority, be extended by a maximum of 15 months or, in the case of a minor aged from 15 to 18 years, a maximum of 9 months. The number of days of detention referred to in paragraph 2 must be included when determining the duration of maximum detention.

⁶⁵⁷ Weber (footnote 536 above).

⁶⁵⁸ Cases involving aliens are within the jurisdiction of administrative tribunals.

⁶⁵⁹ European Parliament, Committee on Civil Liberties, Justice and Home Affairs (LIBE), Rapport de la délégation de la commission LIBE sur la visite aux centres fermés pour demandeurs d'asile et immigrés de Belgique du 11 octobre 2007, Rapporteur: Giusto Catania, p. 3.

⁶⁶⁰ *Ibid.*, p. 4.

⁶⁶¹ *Ibid.*, p. 7.

270. Article 554-1 of the Code on the Entry and Stay of Aliens in France provides:

An alien may not be placed or held in detention for longer than is strictly necessary for his departure. The authorities must take all necessary steps to that end.

It would therefore seem important for the authorities to publish the duration of detention for each detainee, and not solely for each centre, a step which appears to be technically feasible. The involvement of both the administrative authorities and the judges in decisions on the detention of persons being expelled creates confusion and loss of control over periods of detention. Moreover, the possibility that the detention may be renewed makes for a more complicated calculation of the duration of detention.

271. In calculating the duration of the detention, international jurisdictions, and in the present instance the European Court of Human Rights, take into consideration the period which elapses between the day on which an alien is placed in detention with a view to his or her expulsion and the day of his or her release.⁶⁶² The calculation of periods of detention is not feasible when an expulsion procedure is irregular or an authority abuses its powers.

272. Besides jurisprudence and doctrine, the international institutions also agree on the need to keep detention pending expulsion relatively short so as not to prolong the confinement of the expellee. In paragraph 13 of recommendation 1547 (2002), "Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity", the Parliamentary Assembly of the Council of Europe recommends that the Committee of Ministers urge member States:

To adapt without delay their legislation and practices regarding holding prior to expulsion, in order to:

(a) Limit the length of detention in waiting or transit zones to a maximum of 15 days;

(b) Limit the length of detention in police stations to the amount of time strictly necessary for any arrest and to separate foreigners awaiting expulsion from people being questioned for common law crimes.

273. The duration of the detention must be consistent with legislative provisions. This is what the European Court of Human Rights stated in the case of *Shamsa*, which concerned two Libyan nationals who were staying illegally in Poland and who were the subject of an expulsion decision because of a breach of public order. They were detained with a view to their expulsion and, after various fruitless efforts to expel them, the border police kept them in detention at Warsaw airport in the transit area. Commenting on the arbitrary nature of this deprivation of liberty, and hence its incompatibility with article 5, paragraph 1, of the European Convention on Human Rights, the Court stated that the general principle of legal certainty must be observed and that

it is [therefore] essential that the conditions of deprivation of liberty under internal law should be clearly defined and that the law itself should be predictable in its application, so as to fulfil the criterion of "legality" established by the Convention.⁶⁶³

⁶⁶² See footnote 656 above.

⁶⁶³ ECHR, *Shamsa v. Poland*, judgement of 27 November 2003, application Nos. 45355/99 and 45357/99, para. 49.

In this case, the detention of the applicants exceeded the period provided for under Polish law, which does not specify whether that type of detention is possible. The Court therefore held that Polish law failed to meet the condition of "predictability" required by article 5, paragraph 1, of the Convention and that, as the decision to expel had continued to be enforced in the absence of any legal basis,⁶⁶⁴ the deprivation of liberty was not in accordance with a procedure prescribed by law as provided in that article.

274. As regards extensions of detention, the European Court of Human Rights has held that an extension must be decided by a court or a person authorized to exercise judicial power.⁶⁶⁵ In paragraph 59 of the judgement in the *Shamsa* case, the Court inferred this rule from article 5 as a whole, and in particular paragraphs 1 (c)⁶⁶⁶ and 3.⁶⁶⁷ The Court also referred to

the right of *habeas corpus* contained in article 5, paragraph 4, of the Convention to support the idea that detention extended beyond the initial period as envisaged in paragraph 3 calls for the intervention of a court as a guarantee against arbitrariness.⁶⁶⁸

In its Proposal for a Directive on return of 1 September 2005, the Commission of the European Communities provided in article 14, paragraph 4, that "temporary custody [for the purpose of removal] may be extended by judicial authorities" but may not exceed six months.⁶⁶⁹

275. Article 7 of the American Convention on Human Rights prohibits arbitrary arrest or imprisonment and to that end provides procedural guarantees.⁶⁷⁰ On this basis, the Inter-American Commission on Human Rights has

⁶⁶⁴ *Ibid.*, para. 53. For another example of detention without any legal basis, see ECHR, *Denizci and others v. Cyprus*, judgement of 23 May 2001, *Reports of Judgments and Decisions*, 2001-V (detention of Cypriot nationals with a view to their expulsion from the Republic of Cyprus to the northern part of Cyprus).

⁶⁶⁵ *Ibid.*

⁶⁶⁶ Article 5, paragraph 1 (c), reads as follows: "[No one shall be deprived of his liberty save in the following cases ...] the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

⁶⁶⁷ Article 5, paragraph 3, establishes that "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial".

⁶⁶⁸ Case of *Shamsa* (footnote 663 above), para. 59.

⁶⁶⁹ Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, 1 September 2005, COM(2005) 391 final.

⁶⁷⁰ According to article 7 of the American Convention on Human Rights of 22 November 1969:

"1. Every person has the right to personal liberty and security; ...

"3. No one shall be subject to arbitrary arrest or imprisonment;

"4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him;

"5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial."

held that “there is no international legal rule that justifies prolonged detention on the basis of emergency powers, far less one that justifies imprisoning someone without bringing charges against that person for presumed violations of national security or other laws while depriving him or her of the right to exercise the guarantees that ensure a fair and equitable trial”.⁶⁷¹

276. In the light of the foregoing analysis, the Special Rapporteur proposes the following draft article, whose provisions derive from various international legal instruments, firmly established international jurisprudence, especially arbitral jurisprudence, and abundant concordant national legislation and case-law, all of the above elements being buttressed by doctrine:

“Draft article B. Obligation to respect the human rights of aliens who are being expelled or are being detained pending expulsion

“1. The expulsion of an alien must be effected in conformity with international human rights law. It must be

accomplished with humanity, without unnecessary hardship and subject to respect for the dignity of the person concerned.

“2. (a) The detention of an alien pending expulsion must be carried out in an appropriate place other than a facility in which persons sentenced to penalties involving deprivation of liberty are detained; it must respect the human rights of the person concerned.

“(b) The detention of an alien who has been or is being expelled must not be punitive in nature.

“3. (a) The duration of the detention may not be unrestricted. It must be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out. All detention of excessive duration is prohibited.

“(b) The extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power.

“4. (a) The decision to place an alien in detention must be reviewed periodically at given intervals on the basis of specific criteria established by law.

“(b) Detention shall end when the expulsion decision cannot be carried out for reasons that are not attributable to the person concerned.”

⁶⁷¹ Inter-American Commission on Human Rights, *Ten Years of Activities—1971–1981*, Washington, OAS, 1982, p. 320, reference cited by the International Federation for Human Rights, Report No. 429 of October 2005, “L’anti-terrorisme à l’épreuve des droits de l’homme: les clés de la compatibilité”. This report was supplemented a month later by a second report, entitled “Violations des droits de l’homme en Afrique sub-saharienne au motif de la lutte contre le terrorisme: une situation à hauts risques”, Report No. 429-A, November 2005.

PART TWO

Expulsion proceedings

277. Aside from some rare provisions—moreover, very general in nature—concerning the rights of aliens lawfully present in a State contained in some international instruments, strictly speaking there are no detailed rules in international law establishing expulsion proceedings and reconciling the rights of the individual subject to expulsion and the sovereign right of the expelling State. The matter of expulsion is not entirely regulated in the legal system and the procedural rules applicable to this matter, whether in form or in substance—for example,

the possibility of review offered to those concerned, are discerned for the most part from a detailed analysis of national laws and jurisprudence. From this analysis it is clear that there is a need for a distinction between the procedure applied to expulsion of aliens who entered the territory of a State legally and those who may have entered illegally. In the latter category, some national laws specify separate treatment for aliens who, although they entered the State illegally, have resided there for some time.

CHAPTER II

Preliminary considerations: Distinction between “legal aliens” and “illegal aliens”

A. Grounds for the distinction between “legal aliens” and “illegal aliens”

278. At the outset, a brief clarification of the terminology is needed. Ordinary language uses images in its vocabulary to distinguish among foreign migrants as a function of their legal status in the State of residence. Thus, there are references to “clandestine immigrants” as opposed to “legal” or “lawful”. Nor do legal documents use uniform terminology. In some cases, they distinguish between “legal” aliens and “illegal” aliens or aliens “lawfully” in the territory of a State, as opposed to those who

are there “unlawfully”. Others speak of “legal aliens” as opposed to “illegal aliens” in the territory of a State. However, all of these terms describe one single reality: immigrants residing in a State in conformity with laws on the entry and residence of foreigners and those who are in violation of those laws. Therefore, the terms referring to aliens lawfully or legally in the territory of a State and illegal or unlawful aliens will be used as synonyms.

279. International instruments that expressly state the principle of a distinction between aliens legally and illegally present in a State are nevertheless rare. It appears,

moreover, that the Convention relating to the Status of Refugees is the only one explicitly to state such a distinction. Article 31, entitled “Refugees unlawfully in the country of refuge”, governs the treatment of this category of refugee by the Contracting States, while article 32, devoted to “Expulsion”, only prohibits Contracting States from expulsion of “a refugee lawfully in their territory”.

280. This distinction is all the more necessary because its basis is implicit in various other international legal instruments. It can, in fact, be noted in article 13 of the International Covenant on Civil and Political Rights, which states:

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 the law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for that purpose before, the competent authority or a person or persons especially designated by the competent authority.

281. This provision covers only the alien “legally” in the territory of a State, which means, on the contrary, that it excludes those who are in the territory “illegally”, thus suggesting that there are two categories of aliens and they cannot be treated in the same way.

282. The distinction between “legal” and “illegal” aliens in the territory of a State can also be inferred from article 20, paragraph 2, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which states:

No migrant worker or member of his or her family shall be deprived of his or her authorization of residence or work permit or expelled merely on the ground of failure to fulfil an obligation arising out of a work contract unless fulfilment of that obligation constitutes a condition for such authorization or permit.

283. Here as well there is reason to believe that this provision concerns only legal migrant workers, as does the Convention as a whole. Indeed, assuming that a migrant worker can, if necessary, be “deprived of his or her authorization of residence” or “work permit” also assumes that he or she already has such an authorization, which in many States is a condition for the granting of a “work permit”. Thus there is no doubt that here only legal migrant workers under the laws on entry and residence of the receiving State are intended, as opposed to illegal workers commonly called “clandestine workers” or “undeclared workers”.

284. It is also true that article 31, paragraph 1, of the Convention Relating to the Status of Stateless Persons stipulates that the Contracting States “shall not expel a stateless person lawfully in their territory”.

285. Alien “protected persons” make up a category most often found in national legislation rather than international instruments. This category benefits from specific guarantees that the law does not offer to recent illegal immigrants, who are subjected to the procedure of *refoulement* or removal for violating the rules on entry into the territory of a State. As can be seen below, the laws of most States provide for a summary procedure of *refoulement* or removal of such aliens, the modalities of which can vary from one State to another.

286. It should be noted that, while the distinction between these different categories of aliens may be necessary in an attempt at codification and perhaps progressive development, taking into account both the guidance provided by international law and that arising from State practice, it is not at all required in respect of the rights of expelled persons. They remain human beings whatever the conditions under which they entered the expelling State, and as such have the same right to protection of the fundamental rights inherent to human beings, in particular the right to respect for human dignity.

B. Semantic clarification of the concept of “resident” alien or an alien “lawfully” or “unlawfully” in the territory of a State

287. Article 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms states in paragraph 1:

An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with the law.

In its explanatory report on this article, the Steering Committee for Human Rights of the Council of Europe explained that the word “resident” did not include an “alien who has arrived at a port or other point of entry but has not yet passed through the immigration control or who has been admitted to the territory for the purpose only of transit or for a limited period for a non-residential purpose”.⁶⁷² Concerning the word “lawfully”, the Steering Committee noted that each State determined the conditions that an alien must fulfil in order for his or her presence in the territory to be considered lawful. Also, article 1 of Protocol No. 7 “applies not only to aliens who have entered lawfully but also to aliens who have entered unlawfully and whose position has been subsequently regularised”.⁶⁷³ On the contrary, a person who no longer meets the conditions for admission and stay as determined by the laws of the State party concerned “cannot be regarded as being still lawfully present”.⁶⁷⁴

288. Other texts adopted by the Council of Europe give a more precise definition of the term “lawful residence”. Subparagraph (b) of section II of the Protocol to the European Convention on Establishment states briefly that “nationals of a Contracting Party shall be considered as lawfully residing in the territory of another Party if they have conformed to the regulations [governing the admission, residence and movement of aliens]”. In 1993, the European Commission on Human Rights declared that article 1, paragraph 1, of Protocol No. 7 did not apply to “an alien whose residence permit has expired ... while he is awaiting a decision on his request for political asylum or for a residence permit”.⁶⁷⁵ The article in question also did not apply when the individual did not have a residence

⁶⁷² Council of Europe, Explanatory Report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, second paragraph of para. 9. See also Ducroquetz (footnote 71 above).

⁶⁷³ *Ibid.*, art. 1, para. 10.

⁶⁷⁴ *Ibid.*, art. 1, third paragraph of para. 9.

⁶⁷⁵ European Commission on Human Rights, decision of 13 January 1993, *Voulfovitch and others v. Sweden*, application No. 19373/92, *Decisions and Reports* 74, p. 199.

permit, once his application for asylum had been definitively rejected.⁶⁷⁶

289. The European Court of Human Rights also had the opportunity to rule on the modalities for application of this provision, in particular in the *Sejdovic* case, where it considered that

at the time when the Italian authorities decided to expel the applicants, they were not “lawfully” in Italy, given that they were not in possession of a valid residence permit, and that article 1 of Protocol No. 7 did not apply in that case.⁶⁷⁷

On the other hand, in the *Bolat* judgement of 5 October 2006 concerning the expulsion of a Turkish national from the Russian Federation, the Court noted that article 1 of Protocol No. 7 was applicable to the extent that, in the case at hand, the applicant “had been lawfully admitted to Russian territory for residence purposes and had been issued with a residence permit, which was subsequently extended pursuant to a judicial decision in his favour”.⁶⁷⁸

290. For its part, the Human Rights Committee, in its general comment No. 15 of 1986, explained that the condition of legality stipulated in article 13 of the 1966 Covenant implies that national law concerning the requirements for entry and stay must be taken into account “in determining the scope of [the protection provided to aliens], and that illegal entrants and aliens who have stayed longer

than the law or their permits allow, in particular, are not covered by its provisions”.⁶⁷⁹ Nevertheless, it adds that, if the legality of an alien’s entry or stay is in dispute, any decision leading to expulsion ought to be taken “in accordance with article 13”.

291. Therefore:

(a) An alien is considered a “resident” of a State when he or she has passed through immigration controls at the entry points, including ports, airports and border posts, of that State;

(b) On the other hand, an alien is not considered a resident if he or she was admitted to the territory of a State solely for purposes of transit or as a non-resident for a limited period;

(c) An alien is considered to be “legal” or “lawfully” in the territory of a State if he or she fulfils the conditions for entry or stay established by law in that State;

(d) On the other hand, an alien is considered to be “illegal” or “unlawfully” in the territory of a State if he or she does not fulfil or no longer fulfils the conditions for entry or stay as established by law in that State.

292. In the view of the Special Rapporteur, these explanations of the terminology could contribute to the improvement and enrichment of the definitions contained in draft article 2, which was sent by the Commission to the Drafting Committee in 2007.⁶⁸⁰

⁶⁷⁶ European Commission of Human Rights, decision of 8 February 1993, *S.T. v. France*, application No. 20649/92.

⁶⁷⁷ ECHR, decision on admissibility of 14 March 2002, *Sejdovic and Sulemanovic v. Italy*, application No. 57575/00, point 8, case stricken from the Court’s list by an order of 8 November 2002.

⁶⁷⁸ ECHR, judgement of 5 October 2006, *Bolat v. Russia*, application No. 14139/03, para. 77.

⁶⁷⁹ See footnote 601 above.

⁶⁸⁰ *Yearbook ... 2007*, vol. II (Part Two) (A/62/10), p. 61, para. 188.

CHAPTER III

Procedures for the expulsion of aliens illegally entering the territory of a State

A. Aliens who have recently entered illegally the territory of the expelling State

293. In most countries, the administrative authorities alone are competent to make decisions regarding the expulsion of aliens entering the territory of the State illegally. Indeed, many countries do not involve a judge in the expulsion proceeding for an illegal alien. In France, a study conducted by the Senate on the expulsion of illegal aliens in certain European States shows this to be widely the case.⁶⁸¹ The study underlines the disparate nature of national legislation on the issue.

294. In Germany, the rules on the expulsion of illegal aliens stem from the Act of 30 July 2004 regarding the stay, employment and integration of aliens in federal territory. It entered into force on 1 January 2005 and, on this issue, reproduced most of the provisions of the Aliens Act

of 1990. The Act favours the voluntary departure of illegal aliens. No specific decision is required for expulsion; as a result, it cannot be contested. On the other hand, the decision to place an individual in administrative detention, taken by a judge at the request of the administration, can be appealed. In that State, expulsion measures do not require a specific decision because expulsion is simply a way of executing the obligation of any illegal alien to leave the territory. For illegal aliens, the obligation to leave the territory is enforceable immediately in all cases: solely through the Aliens Act when the absence of a residence permit is the result of illegal entry or because the alien has not requested a residence permit, or on the basis of the administrative act denying residency. In that State, the enforcement of the Aliens Act falls to the administration responsible for immigration in the *Länder* (federal States).

295. The possibility for forced removal, provided in the Aliens Act, exists in a general manner in German administrative law. According to the Administrative Enforcement Act of 1953, an administrative act containing an obligation

⁶⁸¹ See France, *Documents de travail du Sénat* (série Législation comparée), “L’expulsion des étrangers en situation irrégulière”, No. LC 162, April 2006.

or prohibition is not only binding but can also be directly enforced by the administration, without the intervention of a judge. The binding obligation to leave the territory can be imposed on all aliens without residence permits: either solely on the basis of the Aliens Act or on the basis of an administrative act notifying them that their right to remain in the territory of Germany has expired. In cases where the lack of a residence permit results from unlawful entry or from the fact that an alien has not requested a permit, the Aliens Act states that the obligation to leave the territory can be enforced without the need for an administrative decision. In other cases, the Aliens Act gives rise to an obligation to leave the territory, either because the administration refuses to issue a residence permit, or as a result of another administrative act (withdrawal of the permit issued or limitation of its period of validity, for example). The obligation to leave the territory can be enforced only once the administrative act providing the grounds for it has itself entered into force, i.e. as soon as the appeals⁶⁸² relating to that act have been definitively rejected. Enforcement of the obligation to leave the territory is therefore not subject to the issuance of a specific administrative act since it is directly enforceable.

296. There are two procedures for the expulsion of illegal aliens. The first, a summary procedure and comparable to *refoulement* at the border, is applicable to aliens who entered Germany illegally within the previous six months. They can be expelled without prior injunction and without written notice. However, it is not possible to expel an illegal alien to a country where the person is at risk of persecution. The law provides for the possibility of guaranteeing the expulsion of certain aliens by placing them in detention (*Abschiebungshaft*: expulsion-related detention). It lists the reasons justifying such a measure, which include having entered the territory of Germany without valid documentation. Aliens who entered Germany illegally within the previous six months and who meet the criteria for the first expulsion procedure can therefore be placed in administrative detention. The second procedure, which offers more guarantees to individuals, is addressed to other illegal aliens. This category includes those who entered the country legally but have not obtained a residence permit, as well as those who entered the country illegally and have remained there over six months because they have not been the subject of any removal order during the first six months of their stay in Germany. The expulsion procedure for this category of aliens will be addressed in more detail below in the chapter on the expulsion procedure for “illegal aliens who are long-term residents”. In both cases, the execution of the expulsion order can be guaranteed via the transfer of the persons concerned to a transit centre or detention centre.

297. In Belgium, the rules on the expulsion of illegal aliens stem from the Law of 15 December 1980 on access to the territory, stay, residence and deportation of aliens, and from the Royal Decree of 8 October 1981, implementing it. These two texts have been revised many times since their entry into force. The Law favours the voluntary departure of illegal aliens in such a way that expulsion is only ordered if the person concerned has not complied with an order to leave the territory by a certain deadline.

All expulsion-related measures, including placement in detention, are taken by the administration. Indeed, according to the Law of 1980, expulsion decisions are taken by the minister responsible for immigration matters, i.e. the Minister of the Interior. However, the decree from the Minister of the Interior dated 17 May 1995 delegating ministerial powers relating to access to the territory, stay, residence and deportation of aliens provides that decisions regarding the expulsion of aliens who entered Belgium by eluding border controls can be made by officials of the Aliens Office⁶⁸³—on the condition that they hold a certain rank—by mayors and municipal employees responsible for policing aliens,⁶⁸⁴ by judicial police officers and by non-commissioned officers of the *gendarmerie*. Expulsion decisions for other aliens liable to expulsion (for example, those who have been refused the right to asylum who did not leave the country when they should have) can only be taken by officials of the Aliens Office holding a certain rank. Appeals for annulment and petitions to suspend expulsion decisions can be made before the State Council, whereas custodial measures are challenged before a court judge.

298. In Cameroon, regarding aliens who enter Cameroon illegally, article 59 of decree No. 2000/286 of 12 October 2000 specifying entry, stay and departure conditions for visitors to Cameroon provides clearly that:

The measure of *refoulement* is taken upon entry to the national territory, by the Chief of the border post or immigration office.

299. In Denmark, the principal rules on expulsion stem from the Aliens Act. It has been revised frequently in recent years. The text currently in force is Act No. 826 of 24 August 2005. The ministry responsible, the Ministry for Refugees, Immigrants and Integration, has specified the legislation in several circulars. The Act encourages the voluntary return of illegal aliens to their own countries, so that expulsion is ordered only if the individual does not cooperate with the authorities and leave the country. With the exception of custodial decisions, which fall under the jurisdiction of a judge,⁶⁸⁵ all decisions relating to expulsion are taken by the administration and can be subject only to administrative review without suspensive effect. When they relate to illegal aliens, expulsion decisions are taken by the Aliens Agency, which reports to the Ministry for Refugees, Immigrants and Integration and is responsible for the implementation of the Aliens Act.

300. An expulsion decision from the Aliens Agency is communicated and executed by the police. This decision must take into account the alien's personal situation, with particular regard for their level of integration into Danish society, age and health, ties with persons living

⁶⁸³ The Aliens Office is part of the Federal Domestic Civil Service, which is the administration governed by the Minister of the Interior. The Aliens Office is responsible for the implementation of the Aliens Act. In particular, it has a “deportation” department.

⁶⁸⁴ In larger communes, there is a separate office with responsibility for aliens, whereas, in others, the population department deals with issues regarding aliens.

⁶⁸⁵ There is only one type of jurisdiction, made up of 82 courts, two courts of appeal and the Supreme Court. There is no administrative jurisdiction: disputes between the administration and citizens are generally resolved by specialized bodies before being submitted to the ordinary jurisdictions, where necessary.

⁶⁸² These appeals have no suspensive effect.

in Denmark, etc. It must also mention the deadline by which the person must leave the country; the Aliens Act specifies that no fewer than 15 days must be allowed. In accordance with the general rules expressed in the law on administrative acts, there must be grounds for an expulsion decision and it must mention the means of review available to the alien and provide practical information on that subject. The police notify the person concerned of the decision taken by the Aliens Agency. The notification must be translated, unless there is no doubt as to the alien's understanding of Danish. In order to guarantee the proper execution of the expulsion decision, even before such a decision is taken, the police can adopt control measures. They can require illegal aliens to surrender their identity papers, post bail, be transferred to one of the three transit centres⁶⁸⁶ or report to them regularly. The measure used most often is transfer to a transit centre, with the obligation to report to the police twice a week. These control measures can be appealed without suspensive effect before the Minister for Integration. If necessary, the alien can be placed in administrative detention (*frihedsberøvelse*: deprivation of liberty). The Aliens Act restricts the use of this measure to cases where other control mechanisms are insufficient to guarantee the presence of the person concerned and to cases where the alien does not cooperate with regard to departure, for example, by refusing to provide information about his or her identity.

301. In Spain, the rules on expulsion of illegal aliens are derived from Organic Law No. 4 of 11 January 2000 concerning the Rights and Freedoms of Foreigners in Spain (Aliens Act). This law has been amended several times since its entry into force, in particular by Organic Law No. 8 of 22 December 2000. In the original version of Organic Law No. 4 of 11 January 2000, illegal aliens were subject only to an administrative fine. Royal Decree No. 2393 of 30 December 2004 further developed the provisions of the law on aliens, in particular, the articles relating to expulsion. The expulsion of aliens is an administrative measure that is immediately enforceable. However, the alien can request suspension of the expulsion order while waiting for a decision to be reached on its annulment. On the other hand, the decision for placement in administrative custody is taken by a court judge at the request of the administration. The expulsion decision is taken by the administration, delegated by the Government, meaning by the representative of the national government in the province. In the autonomous communities made up of just one province, the Government representative has competence. These administrative structures include units specializing in the enforcement of the Aliens Act. A decision on expulsion may be preceded by a police investigation. After passage of the Law on Foreigners, being in Spain without a residence permit represents a serious administrative violation.⁶⁸⁷ Those who commit such a violation are subject to an administrative fine of 301 to 6,000 euros, the amount being determined by the financial status of the individual. However, rather than a fine, illegal aliens may also incur the penalty of expulsion. The expulsion of illegal aliens is not decided according to an administrative procedure under

common law, but under a summary procedure whereby expulsions can be ordered within 48 hours. The summary procedure, nevertheless, follows various procedural steps under common law. The police notify the illegal alien that an expulsion proceeding has been initiated by providing him with a "preliminary report" on the grounds for expulsion. The individual then has 48 hours to provide any relevant information. He can in particular provide evidence of integration into Spanish society and dispute the validity of the use of the summary procedure, which in theory is reserved for exceptional cases where it is appropriate to order expulsion as soon as possible.

302. Once the expulsion proceeding has begun, the alien has the right to the assistance of a lawyer free of charge, and if necessary, an interpreter. If the police investigating the proceedings do not accept the individual's observations or if there is no response, the preliminary report is transmitted as such to the competent administration to issue the expulsion order and the alien is so informed. Otherwise, if the alien's observations are verified within the three-day period, a new report is sent to the individual, who has a further 48 hours to provide information. Once that time has elapsed, the report is sent to the competent administration. The decision on expulsion must be taken within six months from the date on which the proceedings were initiated. During this period, the individual can be subjected to control measures listed in the Aliens Act: confiscation of his passport, regular reporting to the authorities, house arrest, 72 hours of "precautionary detention"⁶⁸⁸ and placement in administrative custody. Once it has become final, the individual is notified of the decision on expulsion. The avenues of review available to the foreigner must also be presented. The decision is immediately enforceable.⁶⁸⁹

303. In the United Kingdom, matters having to do with expulsion are dealt with by the members of the immigration service, but the Home Secretary has the ability to take the decision himself, independent of any particular case, for example, to speed up the proceeding. The rules on expulsion of illegal aliens are derived from various laws on aliens currently in force: the Immigration Act 1971; the Immigration and Asylum Act 1999; the 2002 Nationality, Immigration and Asylum Act; and the 2004 Act on Processing of Asylum and Immigration Requests, including their various amendments. Their provisions were complemented by implementing regulations. In addition, an instruction manual for staff of the immigration service details the modalities of implementation of the legislative and regulatory provisions concerning expulsion.

304. The expulsion of an illegal alien is an administrative measure that, as a general rule, is immediately enforceable. Only persons entering the United Kingdom legally may file a suspensive appeal. Other aliens must leave the country before filing their appeal. Appeals are considered

⁶⁸⁶ These transit centres also accommodate asylum seekers, until their requests are heard, and those who have been refused the right to asylum, while they are waiting to leave the country.

⁶⁸⁷ The Law on Foreigners establishes three categories of administrative violations: minor, serious and very serious.

⁶⁸⁸ This is a measure of deprivation of liberty reserved for illegal aliens which differs from pretrial detention. The law limits its duration to 72 hours, but there is no possibility of appeal against this deprivation of liberty, which is not ordered by a judge. Consequently, a foreigner so detained may, like any person detained illegally, demand *habeas corpus*, in order to appear before a judge as quickly as possible.

⁶⁸⁹ On the other hand, common law procedures, applicable, for example, to aliens working without the necessary authorizations, give the individual 72 hours to leave the territory.

by an independent agency specializing in immigration disputes, the Asylum and Immigration Tribunal (AIT), whose decisions can be disputed only on the grounds of an error of law. Furthermore, multiple appeals as a delaying tactic are impossible: in principle, an alien may appear before AIT only once. In the absence of new evidence, appeals against decisions on denial of residence preclude review of expulsion decisions. Like all matters concerning immigration, expulsion decisions are under the competence of the Home Office. They are taken by an official of the immigration service. The Immigration Act 1971 stipulates that foreigners who have entered the United Kingdom by evading border controls can be expelled on the basis of a decision by an Immigration Service official, while the Immigration and Asylum Act 1999 states that foreigners who entered lawfully but have overstayed their entitlement may also be expelled by a decision of the same administrative authority. The instruction manual for the immigration services specifies that cases of expulsion of illegal aliens are dealt with by officials with a certain level of competence and experience or by designated inspectors who have received a specific delegation of powers. This rule applies in the simplest cases, for example:

—The alien has resided in the United Kingdom for less than 10 years;

—His route to the United Kingdom is easy to trace;

—He has no particular ties to the United Kingdom, for example, no family;

—There are no exceptional circumstances justifying his presence in the United Kingdom.

305. In the most complex cases, the decision can be taken only with the agreement of a high-level official, even the Home Secretary if the matter is sensitive, for example, if a member of Parliament has intervened or if the case is likely to be reported in the media or to have an impact on relations with the community of which the alien is a member. Since 2000, the jurisprudence considers that an individual who enters British territory without authorization is not necessarily illegal. That is why the instruction manual for the Immigration Service henceforth states that an official can only declare an illegal entry if he is convinced, given the information gathered, that this is indeed the case and that his decision will not subject the person concerned to unwarranted harm. The official must draft a short note explaining his evaluation process. In all cases, a decision on expulsion may be taken by the Home Secretary, who may have access to any dossier at any time for reasons of ease or effectiveness, for example, when it is clear that the proceedings will not be resolved without his intervention.

306. In Italy, Legislative Decree No. 286 of 25 July 1998,⁶⁹⁰ referred to as the “single text on

immigration”, and its principal implementing regulation, Presidential Decree No. 394 of 31 August 1999, set out the rules on the expulsion of illegal aliens. Originally, the single text combined several texts, including Law No. 40 of 6 March 1998 establishing various measures on immigration and the status of aliens, referred to as the Napolitano-Turco Law. It was amended several times, in particular by Law No. 189 of 30 July 2002 amending the relevant provisions on immigration and asylum, referred to as the Bossi-Fini Law. The current provisions dealing with expulsion result from two contradictory trends: on the one hand, the determination to control the entry of aliens into the country and to combat clandestine immigration, evidenced mainly by the amendments to the single text stemming from the Bossi-Fini Law, and, on the other hand, the need to guarantee aliens—even illegal ones—the fundamental rights set forth in the Constitution. This requirement led the legislature to amend the single text on several occasions starting in 2002, after the Constitutional Court, which had been petitioned to consider the exception of unconstitutionality, had found some paragraphs of the single text to be unconstitutional.

307. Unlike in other States, the judge intervenes in the administrative decision of expulsion because a judge must validate the decision before it can be enforced. Since 2002, accompanying the alien to the border under police escort is the rule for any administrative expulsion. When petitioned to consider the exception of unconstitutionality, the Constitutional Court held that this measure violated personal freedom and should therefore be validated by a judge. In addition, the Constitutional Court does not require this validation to follow a written procedure requiring, for example, that a judicial trial must be held or that the alien must be assisted by counsel. Since 2004, justices of the peace—non-professional judges—of the location where the expulsion decision is taken have been responsible for validating the administrative decision of expulsion. The validation hearings take place within 48 hours following the expulsion decision and the alien cannot be accompanied to the border under police escort unless the validation decision has been taken. This decision may be appealed before the Court of Cassation and that appeal is not suspensive.

308. The expulsion of illegal aliens, whether they entered the country by evading border controls or remain in the country although their residence permits have expired or have been withdrawn, is an administrative decision taken by the Prefect. Grounds for the expulsion decision must be provided; the facts justifying the expulsion must be spelled out clearly; and a copy of the expulsion decision must be delivered to the alien in person by a law enforcement official. If the alien cannot be found, he or she shall be notified of the decision at his or her last known residence. If the alien does not understand Italian, the decision must be accompanied by a “summary” written in a language understood by the alien, or in English, French or Spanish. According to case law, translation is an integral part of the right to defence. If the expulsion decision is not translated into the language of the alien, reasons must be given for the absence of a translation, otherwise the expulsion decision would be voided. The English, French or Spanish translation is admissible only if the administration does not know the country of origin, and hence the language,

⁶⁹⁰ Legislative decrees are legislative texts adopted by the Government under authority delegated to it by Parliament through the adoption of an enabling legislation, whereas decree-laws are texts adopted by the Government in cases of emergency and later converted into laws by Parliament. During the conversion, Parliament may amend the provisions adopted by the Government. Several amendments of the single text on immigration stem from decree-laws.

of the alien. At the same time as the expulsion decision is communicated to the alien, the alien shall be informed of his or her rights: assistance of counsel, possibly through legal aid, in all legal proceedings related to expulsion, and the possibility of appealing the expulsion decision. Under the Napolitano-Turco law, the expulsion decision included both the order to leave the territory within 15 days, and the order to observe certain travel restrictions and to report to border police. Nonetheless, in certain cases, the expulsion decision could include accompanying the alien to the border by the police. This possibility was essentially limited to cases where the alien had not complied with a previous expulsion decision and to those where the Administration suspected that the alien would not comply. Under the Bossi-Fini law, accompanying the alien to the border under police escort has become the rule. Only when the ground for expulsion is that more than 60 days have elapsed since the expiration of the residence permit would the alien be ordered to leave the territory within 15 days. Nonetheless, even in this case, if the Administration fears that the alien would not comply with the expulsion decision, accompanying the alien to the border under police escort may be considered. The expulsion decision shall be immediately enforceable by the police.

309. In general, it is apparent from national laws that a summary or special expulsion procedure may be applied when the alien manifestly has no chance of obtaining entry authorization,⁶⁹¹ or when grounds for expulsion may exist with respect to illegal entry,⁶⁹² or certain breaches of admission conditions.⁶⁹³ A special procedure may also apply when the alien is not a national of a State having a special arrangement or relationship with the expelling State.⁶⁹⁴

B. Illegal aliens who are long-term residents of the expelling State

310. As indicated above, some laws make a distinction between recent and long-term illegal aliens, which may give rise to some variations in expulsion procedures. The first group is subject to a summary procedure, while the second group is subject to a procedure that guarantees some of their rights, in particular the possibility of arguing their case before a competent authority. For example, aliens who enter Germany clandestinely and have not been issued a deportation order during the first six months of their stay in the country are subject to this procedure. They are under the obligation to leave the territory; no written order is required. They must do so as quickly as possible, unless they have been given a time limit within which to leave the territory,⁶⁹⁵ the law having set a maximum time limit of six months for an illegal

alien to leave the territory. The Administration established this time limit to give the alien enough time to prepare his or her departure and to avoid expulsion by leaving the country voluntarily. One month is generally considered sufficient. Strictly speaking, the expulsion procedure is applicable only if the alien being expelled cannot leave the territory on his own initiative, or if circumstances justify monitoring of the alien's departure. Doubts concerning the voluntary departure of the alien must be based on concrete elements, for instance, failure to notify the landlord of departure. Moreover, the circumstances justifying the need to monitor the alien's departure are spelled out by law. They include the lack of financial resources, lack of identity papers, expression of the desire to remain in Germany, and providing incorrect information to the Administration. The expulsion proceeding starts with a written notification sent to the alien, which must state the date by which the alien must leave the territory. This is not additional time, but the time limit by which the alien must leave the territory. The notification must also indicate the State of destination and the consequences of the alien's refusal to leave the territory within the prescribed time limit. The notification is an integral administrative act, and as such may be subject to a prior administrative appeal and an appeal for annulment before an administrative judge. Nonetheless, these appeals have no effect on the expulsion itself. They can be taken into account only if the notification violates the alien's rights. Although the absence of notification makes the expulsion illegal, some of the case law shows that the formality of notification is not necessary if the alien entered the territory of Germany without authorization.

311. We have also seen that in countries such as Denmark, the expulsion decision must take into account a number of elements, in particular the level of integration of the alien into Danish society and ties with Danish residents, and that Spain, Italy and the United Kingdom afford major procedural guarantees to their illegal aliens. But overall, there are few laws that provide for the application of the same rules of procedure for illegal immigrants—even long-term ones—as for aliens who entered the territory of the expelling State legally.

312. In the United States, it is quite the contrary, in the precedent-setting case of *Harisiades v. Shaughnessy*:

The Supreme Court held that the United States had the power to expel an alien notwithstanding his long residence, that the exercise of this power violated neither due process nor freedom of speech, and that deportation because of membership of a "subversive organization" prior to the effective date of the statute did not constitute an *ex post facto* law within the constitutional prohibition. In addition, the alien who is subject to the "civil" procedure of deportation cannot rely upon the otherwise far-reaching implications of the Supreme Court decision in the *Miranda* case. In criminal prosecutions this decision precludes the use of statements made by a person in custody unless he is first told of his right to remain silent and of his right to have a lawyer present at his interrogation.⁶⁹⁶

313. In any event, such distinction and its possible legal procedural ramifications are a matter of State sovereignty. The Federal Court of Cassation of Venezuela agreed as much when it ruled in 1941:

⁶⁹¹ Switzerland, 1949 regulation, art. 17 (i).

⁶⁹² Belarus, 1999 Council Decision, art. 3. If an international agreement does not institute between the States concerned a special procedure for the return of an expelled alien, the alien may be handed over to the authorities of the expelling State, who would then proceed with his or her expulsion. Nigeria, 1963 Law, art. 25 (1) and (2).

⁶⁹³ Brazil, 1981 Decree, art. 104, 1980 Law, art. 70; Italy, 1998 Decree-Law No. 286, arts. 13 (4)–(5), (5bis)–(5ter), 15; and Sweden, 1989 Act, sect. 4.6.

⁶⁹⁴ France, Code, art. L531-3.

⁶⁹⁵ This is particularly the case of aliens who have been denied a residence permit or whose residence permit has been withdrawn. The administrative decision concerning the residence permit sets out the obligation to leave the territory within a given time frame.

⁶⁹⁶ Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 239.

The right of expulsion of undesirable foreigners as well as of exclusion or expulsion of ineligible aliens, being based on the free exercise by the State of its sovereignty, it is natural that there should be no right of appeal on any ground against it... But by a Venezuelan provision, as a safeguard against possible error committed in a decree of expulsion with regard to the nationality of the person to be expelled, the law permits the allegation that he is a Venezuelan. It is easy to see that such allegation does not affect in any way the actual right of expulsion, which is a categorical manifestation of national sovereignty. It is, indeed, an implicit confirmation of the essential unimpeachability of the decree for the expulsion of pernicious foreigners.⁶⁹⁷

314. It should simply be noted that whenever a deportation decision concerns a second-generation immigrant or a long-term illegal immigrant, the debate about its discriminatory nature is rekindled. The Parliamentary Assembly of the Council of Europe joined this debate following a report by its Committee on Migration, Refugees and Demography of 27 February 2001, which described the expulsion of long-term immigrants convicted in criminal proceedings as being discriminatory, “because the state cannot use this procedure against its own nationals who have committed the same breach of the law”.⁶⁹⁸

315. Be that as it may, in the light of the few cases described above, State practices seem so varied and depend so much on the specific national conditions of each State that it appears virtually impossible to determine uniform rules of procedure for the expulsion of aliens lawfully in the territory of the expelling State, and any attempt to codify those rules would be risky. The

⁶⁹⁷ *In re Krupnova*, Venezuela, Federal Court of Cassation, 27 June 1941, *Annual Digest and Reports of Public International Law Cases*, 1941–1942, case No. 92, p. 309.

⁶⁹⁸ Non-expulsion of long-term immigrants, document 8986 (footnote 100 above), pt. I-3.

Special Rapporteur therefore believes that, as the rules on the conditions of entry and residence of aliens are a matter of State sovereignty, it is legally and politically appropriate to leave the establishment of such rules up to the legislation of each State. With regard to the procedure for expelling aliens, we believe that the exercise of codification, possibly even the progressive development of international law, should be limited to the formulation of rules that are established indisputably in international law and in international practice, or that derive from the clearly dominant trend of State practice. These rules may constitute the ordinary law of the procedure for the expulsion of aliens lawfully in the territory of a State, without prejudice to the freedom of each State to apply them also to the expulsion of illegal aliens, in particular those who have been residing in the territory of the expelling State for some time or who have a special status in that country.

316. In the light of these considerations, we propose a specific draft article devoted to the determination of the scope of the rules of procedure which would be outlined in the present section of the draft rules. It reads as follows:

**“Draft article A1. Scope
of (the present) rules of procedure**

“1. The draft articles of the present section shall apply in case of expulsion of an alien legally [lawfully] in the territory of the expelling State.

“2. Nonetheless, a State may also apply these rules to the expulsion of an alien who entered its territory illegally, in particular if the said alien has a special legal status in the country or if the alien has been residing in the country for some time.”

CHAPTER IV

Procedural rules applicable to aliens lawfully in the territory of a State

A. General considerations

317. An alien facing expulsion may claim the benefit of the procedural guarantees contained in the various human rights conventions. For example, the alien can claim various possible violations of his or her rights in case of return to the State of destination.⁶⁹⁹ To that end, the right of appeal must exist at both the national and the international levels. In general, such claims may be submitted to the administrative or legal authorities. Opinions rendered by national bodies specializing in immigration, even if they cannot be imposed on the competent authorities, may be useful in order to avoid a summary expulsion.⁷⁰⁰ Judicial review is allowed in most States, but “the effectiveness of the right of appeal mainly depends on its suspensive effect”,⁷⁰¹ which is obviously not systematic in all States.

⁶⁹⁹ On all guarantees, both substantive and procedural, see Puéchavy, “Le renvoi des étrangers à l’épreuve de la Convention européenne des droits de l’homme”.

⁷⁰⁰ Committee on Migrations, Refugees and Demography of the Council of Europe, document 8986 (footnote 100 above), pt. III-27.

⁷⁰¹ *Ibid.*, pt. III-30.

318. It is understood that the expulsion of an alien, in particular when the alien is lawfully present in the territory of the expelling State, must meet the necessary procedural requirements.⁷⁰² An expulsion, even if founded on a just cause, may be tainted by the manner in which it is carried out. The requirements for the lawful expulsion of aliens have evolved over the centuries. The procedural requirements for the lawful expulsion of aliens can be found in international jurisprudence⁷⁰³ and the practice of States, which have placed general limitations such as the prohibition of arbitrariness or abuse of power.⁷⁰⁴

319. As expulsion proceedings are generally not characterized as criminal proceedings, the procedural guarantees

⁷⁰² Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 263; similarly, Arnold, “Aliens”, p. 104; Sohn and Buergenthal (footnote 195 above), p. 89; Jennings and Watts (footnote 190 above), p. 940.

⁷⁰³ See Plender (footnote 191 above), p. 459; Borchard (footnote 75 above), pp. 55–56 [citing, in footnote 1, *Casanova (U.S.) v. Spain*, 12 February 1871, Moore’s Arb. 3353]; Jennings and Watts (footnote 190 above), p. 945.

⁷⁰⁴ See memorandum by the Secretariat (footnote 18 above), paras. 201–209 and 227–239.

in expulsion proceedings are therefore not as extensive as those for criminal proceedings, because expulsion is, in theory at least, not a punishment, but an administrative measure consisting in an order of the Government directing a foreigner to leave the country.⁷⁰⁵ A study on the expulsion of immigrants prepared by the Secretariat over 50 years ago noted that there was a contrary opinion at the time. According to the study:

It has been stated that "deportation is a punishment. It involves first an arrest, a deprivation of liberty; and second: a removal from home, from family, from business, from property ... Everyone knows that to be forcibly taken away from home, and family, and friends and business, is punishment..." It is even "a penalty more severe than the loss of freedom by imprisonment for a period of years".⁷⁰⁶

320. Yet the same study noted:

Procedure in matters of expulsion has developed in various countries under the impact of the principle that expulsion does not constitute a punishment, but a police measure taken by the government in the interest of the State.⁷⁰⁷

In 1930, Blondel, relying on the rules of European and United States public international law, wrote:

Expulsion is always an administrative or government measure; it follows therefore that expulsion ... remains a police measure left at the discretion of the executive or administrative authorities and is not a punishment, even when the expulsion [decision is taken following a conviction].⁷⁰⁸

Likening expulsion to punishment is, in any event, no longer applicable, and in general, national laws try not to apply, by mere transposition, the principles of both substantive and procedural criminal law to expulsion. For example, the vital principle of non-retroactivity in criminal law is not found in the laws of most countries concerning immigration and expulsion of aliens. With regard to procedural guarantees, article 13 of the International Covenant on Civil and Political Rights merely requires that the procedure established by law should be respected and that the alien should "be allowed to submit the reasons against his expulsion". It simply states that the alien should have the right "to have his or her case reviewed by a competent authority and to be represented before the latter".⁷⁰⁹ The

view has been expressed that States retain a wide margin of discretion with respect to the procedural guarantees in expulsion proceedings.⁷¹⁰ This approach has been subject to criticism. According to one author who has studied the legal aspects of international migration extensively, "it is both undesirable and unnecessary to adopt the habit of certain municipal courts, which is to characterize deportation as 'not punishment', and from that characterization to deduce certain consequences, such as the absence of a right of appeal".⁷¹¹

321. The procedural requirements for the expulsion of aliens were considered in the above-mentioned study by the Secretariat on the expulsion of immigrants, which noted:

Since expulsion is thus considered as a more or less routine administrative process, the legislative provisions on expulsion in many countries do not contain rules for the procedure to be followed in the issuance of expulsion orders and/or their implementation; or these provisions are restricted to very general indications which aim rather at keeping the machinery of expulsion functioning properly than at affording protection to the persons concerned.⁷¹²

The study also states:

Together with the proposal to restrict by international law the discretionary power of States to expel aliens (see chapter V, section I), and with the definition in various national laws of cases in which expulsion is admissible, suggestions have been put forward for a close association of judicial authorities with expulsion proceedings and for according to the persons involved all the guarantees which are provided to those on trial for criminal offences. It has been maintained that conferring the responsibility in this field on such authorities would contribute to ensuring that individual consideration would be given to each case and that thereby the danger of disregarding the legitimate interests of the human beings involved would be removed. This would be particularly justified in cases where the alleged behaviour for which expulsion is envisaged constitutes a statutory penal offence and where the decision as to whether such reason exists in the particular case should be given by a court rather than left to the discretion of an administrative organ.⁷¹³

322. It appears that as a result of these suggestions, statutory procedural rules have been adopted in some countries to protect persons under the threat of expulsion, by making administrative and related decisions subject to review, ensuring that the merits of the case are considered by judicial or semi-judicial authorities either before the expulsion order is made or after, by way of appeal, etc.⁷¹⁴

323. This development, however, is far from being complete, the various national laws having failed in many respects to provide the person under the threat of expulsion with the same level of protection and procedural guarantees. It cannot be stated, therefore, that there are rules of customary law on the subject, but only that there are dominant trends that can be gleaned from a comparative analysis of State practices.

⁷⁰⁵ See Martin (footnote 305 above), p. 39; see also Goodwin-Gill, *International Law and the Movement of Persons between States*, pp. 238–239 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Kaoru Yamataya v. Fisher*, 189 U.S. 86 (1903) (The Japanese Immigrant Case); *Ludeck v. Watkins*, 335 U.S. 160 (1948); *Netz v. Ede* [1946] Ch. 224; *R. v. Bottrill*, ex parte *Küchenmeister* [1947] K.B. 41). See also, for example, *Muller* (footnote 61 above); *Bugajewitz v. Adams*, 228 U.S. 589 (1913); and the elements provided in the memorandum by the Secretariat (footnote 18 above).

⁷⁰⁶ United Nations, "Study on Expulsion of Immigrants" (ST/SOA.22, March 1955) (United Nations publication, Sales No. 1955.IV.6), paras. 45–48 (quoting, respectively, Justice Brewer, in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), dissenting opinion; and Justice Rutledge, in the case of *Knauer v. United States*, 328 U.S. 654 (1946), dissenting opinion).

⁷⁰⁷ *Ibid.*

⁷⁰⁸ Blondel, "Expulsion", p. 109.

⁷⁰⁹ See Jennings and Watts (footnote 190 above), p. 945 and footnote 2 (citing *Artukovic v. Immigration and Naturalization Service* (1982), ILR, vol. 79, pp. 378, 381). But Goodwin-Gill has shown that, according to the Supreme Court of the United States, provisions with retroactive effect in laws on expulsion do not make such laws unconstitutional. See Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 239 (citing *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Mandel v. Mitchell*, 325 F. Supp. 620 (1971);

reversed, *sub nom. Kleindienst v. Mitchell*, 408 U.S. 753 (1972); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Pang v. INS*, 368 F.2d 637 (1966); *Lavoie v. INS*, 418 F.2d 732 (1969), cert. denied, 400 U.S. 854 (1970); *Valeros v. INS*, 387 F.2d. 921 (1967); and *Kung v. District Director*, 356 F. Supp. 571 (1973)).

⁷¹⁰ See Martin (footnote 305 above), p. 39; Oda (footnote 10 above), pp. 482–483.

⁷¹¹ Goodwin-Gill, *International Law and the Movement of Persons between States*, pp. 257–258, footnote 3.

⁷¹² "Study on Expulsion of Immigrants" (footnote 706 above), para. 45.

⁷¹³ *Ibid.*, para. 46.

⁷¹⁴ *Ibid.*, para. 47.

324. It should be noted that, while these national practices were widely disparate and based on rudimentary, often inconsistent legislation in the end of the nineteenth and the first half of the twentieth centuries, the development of international human rights law in the twentieth century led to the establishment of more stringent procedural requirements for the legal expulsion of aliens. It has been observed that

[i]n many countries, the power of expulsion or deportation is regulated by statute which specifies the grounds on which it may be exercised and the procedural safeguards that should be followed. These statutes usually apply the generally accepted principles of international human rights.

Thus, it is usually provided: that no person be expelled or deported from the territory of a State except on reasonable grounds and pursuant to a written order conforming to law; that the order be communicated to the person sought to be expelled or deported along with the grounds on which it is based; and that the alien be afforded a reasonable opportunity to challenge the legality or the validity of the order in appropriate proceedings before a court of law. The requirement that an order of deportation or expulsion should be in writing and in accordance with the law of the State is designed to safeguard against an arbitrary exercise of power.⁷¹⁵

The fundamental procedural requirements for the expulsion of aliens have been addressed in treaty law and international jurisprudence. More specific procedural requirements are generally to be found in national legislation. The national laws of some States provide in expulsion proceedings even greater procedural safeguards which are similar to those applicable in criminal proceedings. The view has been expressed that

many states go significantly beyond the protections offered by the procedural principles provided for by article 13 of the International Covenant on Civil and Political Rights, such as entitling aliens in expulsion proceedings access to a court independent of the initial decision-maker, the right to be represented by counsel, and the right to present evidence and examine evidence used against him.⁷¹⁶

More specifically, “most developed nations in fact apply procedures that go far beyond these minimums”.⁷¹⁷

325. It may be possible to glean general principles from the divergent national laws with respect to the necessary procedural guarantees for expulsion proceedings. The question is to what extent the guarantees contained in international instruments with respect to criminal proceedings may be applicable *mutatis mutandis* in cases of expulsion.

B. Nature of the proceedings

326. In a number of States, expulsion proceedings may be administrative or judicial and in some cases, the two types of proceedings are combined. Some authors do not distinguish between an administrative expulsion and a judicial expulsion, which is considered a punishment, on the grounds that they have identical consequences for the expelled person.⁷¹⁸ In fact, national laws on the subject differ considerably. In some States, expulsion may

even be the result of different proceedings depending on the nature of the expulsion concerned (e.g. political, criminal or administrative).⁷¹⁹ A State may reserve to an executive authority the right to decide an expulsion or its revocation,⁷²⁰ or otherwise establish instances in which an administrative rather than judicial decision is sufficient to expel the alien.⁷²¹ A State may expressly permit an authority below the national level to order an expulsion.⁷²² A State may specify instances in which a court judgement or order is necessary or sufficient for an expulsion to occur⁷²³ and instances in which expulsion matters may be given judicial priority over other cases.⁷²⁴

327. In many States, the administrative authorities are the first to act in cases of expulsion. In most cases, expulsion proceedings are instituted by an order issued by the administrative authorities of the alien's place of residence. As it is not considered punishment requiring judicial proceedings, the expulsion is entirely subject to evaluation by those authorities, whose discretionary power can easily become arbitrary.

328. In addition to the European States already examined within the framework of the expulsion of illegal aliens, the following cases may also be mentioned by way of illustration:

—In Cameroon, article 63 of the aforementioned decree of 12 October 2000, which specifies the conditions for entry, stay and departure of aliens in Cameroon, states that “expulsions are decided by order of the Prime Minister, Head of Government”.

—In Lebanon, article 17 of the law regulating the conditions for entry, stay and departure of aliens in Lebanon, in force since 10 July 1962, states that: “The expulsion of an alien from Lebanon will be decided by the Director of General Security, in the event that his or her presence is considered a threat to public security. The Director of General Security must submit immediately to the Minister of the Interior a copy of the decision. The expulsion will be carried out either by notifying the person concerned

⁷¹⁹ In Switzerland, for example, prior to 1 January 2007 (on which date expulsion was abolished as an accessory penalty imposed by a criminal court judge), the legal order established three different procedures for the expulsion of an alien, which corresponded to three different kinds of expulsion: (1) political expulsion (Federal Constitution, art. 121, para. 2); (2) administrative expulsion (1931 Federal Law, arts. 10 and 11); and (3) penal, judicial expulsion (Penal Code, former art. 55, and Military Penal Code, former art. 40).

⁷²⁰ Bosnia and Herzegovina, 2003 Law, art. 28 (1)–(2); Brazil, 1980 Law, art. 65; France, Code, art. L522-2; Madagascar, 1994 Decree, art. 37, 1962 Law, arts. 14, 16; Panama, 1960 Decree-Law, arts. 85–86; and Portugal, 1998 Decree-Law, art. 119.

⁷²¹ Bosnia and Herzegovina, 2003 Law, arts. 21 (1), 28 (1); Nigeria, 1963 Act, art. 25; Paraguay, 1996 Law, art. 84; Portugal, 1998 Decree-Law, art. 109; Spain, 2000 Law, art. 23 (3) (b)–(c); Sweden, 1989 Act, sects. 4.4–5; and United States, Immigration and Nationality Act, sects. 235 (c) (1), 238 (a) (1), (c) (2) (C) (4), 240.

⁷²² China, 2003 Provisions, art. 187.

⁷²³ Bosnia and Herzegovina, 2003 Law, arts. 27 (2), 47 (2); Canada, 2001 Act, art. 77 (1); China, 2003 Provisions, art. 183; Italy, 1998 Decree-Law No. 286, art. 16 (6); Nigeria, 1963 Act, arts. 19 (1), 44, 48 (1); Paraguay, 1996 Law, arts. 38, 84; Portugal, 1998 Decree-Law, arts. 102, 109, 126 (1); Spain, 2000 Law, arts. 23 (3) (a), 57 (7); and Sweden, 1989 Act, sects. 4.8–9.

⁷²⁴ Nigeria, 1963 Act, art. 43 (1).

⁷¹⁵ Sohn and Buergenthal (footnote 195 above), p. 91.

⁷¹⁶ Aleinikoff, “International legal norms and migration: a report”, p. 19.

⁷¹⁷ Martin (footnote 305 above), p. 39.

⁷¹⁸ See Guerrière, “Double peine et police des étrangers”, p. 829; Rolin, “La double peine, une punition de la nationalité”, p. 210.

of the order to leave Lebanon by the deadline set by the Director of General Security or by having the expelled person escorted to the border by the Internal Security Forces”.

329. A State may commence expulsion proceedings upon the finding or involvement of an official,⁷²⁵ or upon the introduction of an international arrest warrant,⁷²⁶ a final and binding court decision,⁷²⁷ or relevant operational information available to State authorities.⁷²⁸ The relevant legislation may specify the form, content or manner of an application or other formal submission made with respect to the alien’s potential expulsion.⁷²⁹ A State may expressly provide for the cancellation of a visa or other permit upon the alien’s expulsion.⁷³⁰

C. Procedural guarantees

330. Procedural guarantees are provided for in the expulsion of legal aliens, although their extent varies from one legal system to another. Such guarantees are provided for in both universal and regional systems for the protection of human rights, as well as in national legislation. Generally speaking, these procedural guarantees can vary from international legal instruments to national laws; the latter are not uniform themselves. Because European Community law exhibits some particularities in this area, as in many others, it should be considered separately.

1. PROCEDURAL GUARANTEES IN INTERNATIONAL LAW AND DOMESTIC LAW

(a) *Conformity with the law*

331. The requirement that an expulsion measure must be in conformity with the law is above all a logical principle, since it is recognized that expulsion is exercised under the law. Indeed, as the Special Rapporteur noted in his preliminary report:

A logical rule holds that if a State has the right to regulate the conditions for immigration into its territory it must nevertheless do so without ... infringing any rule of international law, [and] in conformity with the rules which it has adopted or to which it has agreed [on the matter].⁷³¹

(i) *Recognition in the universal system for the protection of human rights*

332. More generally, article 8 of the Universal Declaration of Human Rights of December 1948 provides that “[e]veryone has the right to an effective remedy by the

competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”. Likewise, article 13 of the International Covenant of Civil and Political Rights of 1966 provides that

[a]n 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 his 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.

Article 13 applies to all procedures aimed at obliging an alien to leave the territory of a State, “whether described in national law as expulsion or otherwise”.⁷³² Article 22, paragraph 2, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted by the United Nations General Assembly in its resolution 45/158 of 18 December 1990) further provides that: “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”.

333. More specifically regarding refugee law, article 32, paragraph 2, of the Geneva Convention relating to the Status of Refugees provides that the expulsion of a refugee lawfully in the territory of a Contracting State

shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

Article 31 of the 1954 Convention relating to the Status of Stateless Persons reproduces the full text of that provision in the case of stateless persons.

334. In 1977, a Greek political refugee suspected of being a potential terrorist was expelled from Sweden to her country of origin. She then claimed that the decision to expel her had not been taken “in accordance with law” and therefore was in violation of article 13 of the International Covenant on Civil and Political Rights. The Human Rights Committee took the view that the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned and that it is not within the powers or functions of the Committee

to evaluate whether the competent authorities ... have interpreted and applied the domestic law correctly in the case before it ..., unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power.⁷³³

(ii) *Recognition in regional instruments*

335. At the regional level, a number of human rights conventions contain provisions on expulsion proceedings. These instruments also require such proceedings to be carried out in accordance with law. Article 12, paragraph 4,

⁷²⁵ Australia, 1958 Act, art. 203 (2), (4)–(7); Nigeria, 1963 Act, art. 19 (3); and Republic of Korea, 1992 Act, arts. 58, 67.

⁷²⁶ Bosnia and Herzegovina, 2003 Law, arts. 27 (2), 47 (2).

⁷²⁷ *Ibid.*

⁷²⁸ *Ibid.*

⁷²⁹ Belarus, 1999 Council Decision, art. 3, 1998 Law, art. 15; Brazil, 1981 Decree, art. 101; Cameroon, 2000 Decree, art. 62 (1); Canada, 2001 Act, arts. 44 (1), 77 (1); Japan, 1951 Order, arts. 62, 65; Portugal, 1998 Decree-Law, art. 111 (2); and United States, Immigration and Nationality Act, sects. 238 (c) (2) (A)–(B), 503 (a) (1)–(2).

⁷³⁰ Belarus, 1999 Council Decision, art. 5, 1998 Law, art. 15; Brazil, 1981 Decree, art. 85 (II), 1980 Law, art. 48 (II); Paraguay, 1996 Law, art. 39; and Spain, 2000 Law, art. 57 (4).

⁷³¹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/554, para. 198, para. 23.

⁷³² A/41/40 (see footnote 601 above), annex VI, para. 9.

⁷³³ Report of the Human Rights Committee, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40)*, annex XVII, *Anna Maroufidou v. Sweden*, communication No. 58/1979 of 5 September 1979, para. 10.1.

of the African Charter on Human and Peoples' Rights stipulates that:

A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

Article 22, paragraph 6, of the American Convention on Human Rights imposes the same requirement by providing that:

An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.

Under the Pact of San José, Costa Rica, the interested party may contest the expulsion order against him or her before a competent jurisdiction if it has not been taken in accordance with law. According to article 25, paragraph 1,

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention.

In Europe, article 1, paragraph 1, of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which was adopted by the Council of Europe in Strasbourg on 22 November 1984 and entered into force on 1 November 1988,⁷³⁴ provides that:

An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law.

336. It follows from the foregoing that the main guarantee to aliens against whom an expulsion order is issued is that it must be carried out in accordance with law. In that respect, the Steering Committee for Human Rights of the Council of Europe states that expulsion decisions must be taken "by the competent authority in accordance with the provisions of substantive law and with the relevant procedural rules".⁷³⁵

(iii) Recognition in national legislation

337. The legislation of various States agrees on the minimum requirement based on which expulsions may be deemed in accordance with law or legal requirements. For

instance, article 14, paragraph 5, of the Czech Republic's Charter of Fundamental Rights and Freedoms specifically provides: "An alien may be expelled only in cases specified by law". Article 58, paragraph 2, of the Constitution of Hungary provides: "Aliens residing lawfully in the territory of the Republic of Hungary shall be removed only in pursuance of a decision reached in accordance with law". Article 23, paragraph 5, of the Constitution of Slovakia provides: "An alien may be expelled only in cases provided by law". Section 9 of the Constitution of Finland in turn provides: "The right of foreigners to enter Finland and remain in the country is regulated by an Act".

338. This requirement concerning conformity with the law appears as a general principle underpinning the rule of law and according to which a State is expected to observe its own rules: *patere legem/regulam quam fecisti*. This rule is the counterpart of *pacta sunt servanda*, which applies to domestic contractual law and international treaty law, as well as unilateral acts, under the rule *acta sunt servanda*.

339. In terms of the expulsion of aliens, the requirement for conformity with the law is based on the implicit requirement for domestic procedural rules of expulsion to be in conformity with the relevant international norms and standards. A State is thus not free to establish procedural rules that are inconsistent with the latter. It is a general rule of human rights law that States cannot derogate from the requirement for conformity with the law except to establish rules that further protect the rights of aliens against whom an expulsion order has been issued.

340. The foregoing demonstrates that the requirement for conformity with the law is well established in universal and regional treaty law as well as in the legislation of many States. In the light of these considerations, the following draft article can be proposed:

"Draft article B1. Requirement for conformity with the law"

"An alien [lawfully] in the territory of a State Party may be expelled therefrom only in pursuance of a decision reached in accordance with law."

341. The African Charter on Human and Peoples' Rights and the American Convention on Human Rights do not provide for procedural guarantees beyond the requirement for conformity with the law. However, the instruments of the United Nations and Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms list additional guarantees:

—The first guarantee, as noted previously, is the right of the alien against whom an expulsion order has been issued to "submit the reasons against his expulsion"⁷³⁶ or to "submit evidence to clear himself".⁷³⁷ In that regard, the Steering Committee for Human Rights of the Council of

⁷³⁴ Some States have signed, but not yet ratified, Protocol No. 7. Those States are Belgium, Germany, the Netherlands and Turkey. The United Kingdom has not signed this Protocol. Not all European States have ratified it. In that regard, Sweden declared that "an alien who is entitled to appeal against an expulsion order, may, pursuant to Section 70 of the Swedish Aliens Act (1980:376), make a statement (termed a declaration of acceptance) in which he renounces his right of appeal against the decision. A declaration of acceptance may not be revoked. If the alien has appealed against the order before making a declaration of acceptance, his appeal shall be deemed withdrawn by reason of the declaration" (Declaration made by Sweden at the time of deposit of the instrument of ratification, on 8 November 1985). Belgium and the Republic of San Marino also made a declaration relative to article 1 of Protocol No. 7. Switzerland made the following reservation: "When expulsion takes place in pursuance of a decision of the Federal Council taken in accordance with Article 70 of the Constitution on the grounds of a threat to the internal or external security of Switzerland, the person concerned does not enjoy the rights listed in paragraph 1 even after the execution of the expulsion" (Reservation contained in the instrument of ratification, on 24 February 1988).

⁷³⁵ Explanatory report on Protocol No. 7 (footnote 672 above), para. 11.

⁷³⁶ International Covenant on Civil and Political Rights (art. 13), or "submit the reasons against his expulsion", Protocol No. 7 (art. 1, para. 1 (a)).

⁷³⁷ Convention relating to the Status of Refugees (art. 32, para. 2), or "submit evidence to clear himself", Convention relating to the Status of Stateless Persons (art. 31, para. 2).

Europe clearly indicated that an alien could exercise this guarantee prior to the second guarantee.⁷³⁸

—The second guarantee is the right of the person concerned to “have his case reviewed”⁷³⁹ or to “appeal”.⁷⁴⁰ The Steering Committee stated that this does not necessarily require “a two-stage procedure before different authorities”.⁷⁴¹

—The third guarantee is the right to counsel for persons against whom an expulsion order has been issued. Specifically, the alien concerned has the right to have his case presented on his behalf to the competent authority or a person or persons designated by that authority. The “competent authority” may be administrative or judicial and does not necessarily have to be the authority with whom the final decision in the question of expulsion rests.⁷⁴²

342. The *Handbook on Procedures* of UNHCR also contains a number of procedural guarantees.⁷⁴³ In the Handbook, UNHCR suggests that asylum seekers should be permitted to remain in the territory of the country of refuge while their appeal to the national authority is pending. As stated in the *Handbook*, “Due to the fact that the matter is not specifically regulated by the 1951 Convention, procedures adopted by States parties ... vary considerably”.⁷⁴⁴ Procedures should therefore “satisfy certain basic requirements”, including giving rejected asylum seekers “a reasonable time to appeal for a formal reconsideration of the decision”, as well as permitting him or her to “remain in the country while an appeal to a higher administrative authority or to the courts is pending”.⁷⁴⁵

343. Furthermore, the various guarantees outlined above are not the only ones available. Various other procedural rights—which also do not form an exhaustive list—granted to aliens subject to expulsion, are provided for in a proposal made in 2001 by the Parliamentary Assembly of the Council of Europe to the member States, on the recommendation of the Committee on Migration, Refugees and Demography.⁷⁴⁶ This proposal invites the member States to adopt legislation to grant long-term immigrants subject to expulsion access to a number of procedural safeguards.⁷⁴⁷ These safeguards are: the right to a judge; the right to a trial in the presence of all parties; the right to assistance by counsel; and the right to an

appeal with suspensive effect, because of the irreversible consequences of enforcing the expulsion. In supporting this recommendation, the Committee of Ministers even recommended the right to a fair hearing and a reasoned decision, which goes further than the requirements of article 1 of Protocol No. 7.⁷⁴⁸ Admittedly, these safeguards were being considered within the framework of newly developing European citizenship, but they could serve to inspire rules of more universal application.

344. The alien against whom an expulsion order has been issued must be able to exercise his rights before implementation of that order.

(b) *Right to receive notice of expulsion proceedings*

345. The Report of the Inter-American Commission of Human Rights on the human rights situation in Chile of 9 September 1985⁷⁴⁹ states that:

26. Expulsion from the national territory has been applied pursuant to the legal mechanisms established for that purpose, that is to say, Decree Law No. 604 of 1974 and, subsequently, transitory provision 24 of the Constitution.

27. In many cases, the person affected normally did not know that this sentence had been imposed on him since there had been no previous proceedings against him in which specified charges had been made and in which the person affected could have exercised his right of defense.

28. In general, the person concerned learns of the expulsion only after he has been taken to the airport or by land to the border. For its part his family has made every effort to obtain information about his fate and to send him money, documents or personal articles he needs before the expulsion takes place, but normally it does not succeed.

29. In the main, the persons affected have been connected with organizations for the defense and promotion of human rights or have been important political or trade union leaders that have been accused of endangering the security of the State.⁷⁵⁰

In all of these cases, the expulsion orders are not only being issued, but carried out, in violation of the rules relating to the protection of human rights.

346. As has already been shown above, under both international law and European Community law, reasons must be provided for any expulsion. The present document therefore will not dwell on demonstrating the existence of that obligation under international law.

347. With regard to the right of aliens subject to expulsion to be informed of that measure, treaty law requires that the reasons for the decision should be communicated to them, as should any available avenues for review. In that connection, it is worth recalling that the provisions of the American Convention on Human Rights are very clear—article 7, paragraph 4, states:

⁷⁴⁸ See the reply of the Committee of Ministers of the Council of Europe to Recommendation 1504 (2001) of 14 March 2001 of the Parliamentary Assembly, adopted at the 820th meeting of the Ministers' Deputies, document 9633, 5 December 2002 and, in the appendix, the opinion of the Steering Committee for Human Rights on Recommendation 1504 (2001), adopted at its 54th meeting, 1–4 October 2002, point 13.

⁷⁴⁹ OEA/Ser.L/V/II/66, document 17, 9 September 1985, chap. VI.

⁷⁵⁰ This report relies on examples of trials to demonstrate the truth of the assertion that aliens expelled from Chile are not informed of the decision concerning them.

⁷³⁸ Explanatory report on Protocol No. 7 (footnote 672 above).

⁷³⁹ International Covenant on Civil and Political Rights (art. 13), or “have his case reviewed”, Protocol No. 7 (art. 1, para. 1 (b)).

⁷⁴⁰ Convention relating to the Status of Refugees (art. 32, para. 2) or “appeal”, Convention relating to the Status of Stateless Persons (art. 31, para. 2).

⁷⁴¹ Explanatory report on Protocol No. 7 (footnote 672 above), para. 13.2.

⁷⁴² *Ibid.*, para. 13.3.

⁷⁴³ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, 1992. The rules are not binding.

⁷⁴⁴ *Ibid.*, para. 191.

⁷⁴⁵ *Ibid.*, para. 192.

⁷⁴⁶ See footnote 100 above.

⁷⁴⁷ Recommendation 1504 (2001) of 14 March 2001 of the Parliamentary Assembly of the Council of Europe on the non-expulsion of long-term immigrants.

Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

Moreover, European Community law in particular states that any decision on detention that was taken while expulsion proceedings were ongoing “should be considered null and void if, at the moment of the notification, the person concerned is not informed, in writing and in a language that he or she understands, of his or her rights in these circumstances and advised on how to gain access to free legal advice and representation”.⁷⁵¹

348. Such notification fulfils the obligation to respect the right to defence. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 22, paragraph 3, states that the decision to expel should be communicated to those affected in a language they understand. Article 5, paragraph 2, of the European Convention on Human Rights states:

Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

These provisions are intended to allow an individual deprived of freedom to present an informed defence. His right of appeal cannot be effective “unless he is promptly and adequately informed of the facts and legal authority relied on to deprive him of his liberty”.⁷⁵² His defence can be effective only if the notification is worded in a language understood by the alien who is subject to removal. According to the European Court of Human Rights, by virtue of that provision, any person arrested “must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4”.⁷⁵³

349. At the theoretical level, the Institute of International Law expressed the view as early as 1892 that “the expulsion order should be notified to the expellee”.⁷⁵⁴ Moreover, “if the expellee is entitled to appeal to a superior judicial or administrative court, the expulsion order must indicate this and state the deadline for filing the appeal”.⁷⁵⁵

350. The requirement that the alien should be notified of the decision to expel is also set forth in the legislation of a number of States.⁷⁵⁶ Such a notification would usually take the form of a written decision.⁷⁵⁷ Depending on the

relevant legislation, the notification shall include the manner of the alien’s deportation,⁷⁵⁸ the destination State,⁷⁵⁹ a State to which the protected alien shall not be sent,⁷⁶⁰ or the deadline for expulsion.⁷⁶¹

351. It is worth pointing out that, whereas international instruments make no distinction with regard to the requirement to notify, national legislation differs according to whether the alien is lawfully present, and whether the alien has just entered the country or has lived there unlawfully for some time. According to one author, there are some authorities upholding the right of an alien, including an illegal alien, to be informed of the reasons for his or her expulsion.⁷⁶²

352. Notification of the expulsion measure extends to the reason for expulsion. In the *Amnesty International v. Zambia* case, the African Commission on Human and Peoples’ Rights held that Zambia had violated the right of the alien concerned to receive information, by omitting to supply him with the reasons of his expulsion. According to the Commission, “To the extent that neither Banda nor Chinula were supplied with reasons for the action taken against them means that the right to receive information was denied to them (Article 9 (1))”.⁷⁶³

353. Concerning the EU, attention may be drawn to article 30, paragraph 2 of Directive 2004/38/EC. According to that provision, the notification of an expulsion measure affecting a citizen of the European Union or his or her family members shall include the grounds for the expulsion, unless this is “contrary to the interests of State security”.⁷⁶⁴ The Court of Justice of the European Communities confirmed that the individual expelled should be notified of the reasons of the expulsion, unless grounds relating to national security make this unreasonable. The Court indicated that “The notification of the grounds relied upon to justify an expulsion measure or a refusal to issue a residence permit must be sufficiently detailed and precise to enable the person concerned to defend his interests”.⁷⁶⁵

354. However, it should be noted that the right of an alien to be informed of the reasons for his or her

⁷⁵¹ Recommendation 1624 (2003) of 30 September 2003 of the Parliamentary Assembly of the Council of Europe concerning common policy on migration and asylum.

⁷⁵² ECHR, *X v. the United Kingdom*, application No. 7215/75, judgement of 5 November 1981.

⁷⁵³ ECHR, case of *Čonka v. Belgium* (footnote 602 above), para. 50.

⁷⁵⁴ “Règles internationales...”, art. 30.

⁷⁵⁵ *Ibid.*, art. 31.

⁷⁵⁶ France, Code, arts. L512-3, L514-1 (1); Guatemala, Decree-Law of 1986, art. 129; Iran (Islamic Republic of), Act of 1931, art. 11; Japan, Order of 1951, art. 48 (8); and Republic of Korea, Act of 1992, arts. 59 (1), 60 (4); see also the relevant legislation of Belgium, Italy and the United Kingdom. Such notification may be with specific respect to a decision not to expel the alien (Republic of Korea, Act of 1992, arts. 59 (1), 60 (4)).

⁷⁵⁷ “In many countries, the power of expulsion or deportation is regulated by statute which specifies the grounds on which it may be exercised and the procedural safeguards that should be followed. These

statutes usually apply the generally accepted principles of international human rights. Thus it is usually provided: that no person be expelled or deported from the territory of a State except ... pursuant to a written order conforming to law; that the order be communicated to the person sought to be expelled or deported along with the grounds on which it is based... The requirement that an order of deportation or expulsion should be in writing and in accordance with the law of the State is designed to safeguard against an arbitrary exercise of power” (Sohn and Buergenthal (footnote 195 above), p. 91).

⁷⁵⁸ Bosnia and Herzegovina, Law of 2003, art. 62 (3).

⁷⁵⁹ *Ibid.*, art. 64 (2).

⁷⁶⁰ Portugal, Decree-Law of 1998, art. 114 (1) (d).

⁷⁶¹ Iran (Islamic Republic of), Act of 1931, art. 11.

⁷⁶² “There is, however, some support for the proposition that a decision to deport an alien from a territory in which he is not lawfully present is arbitrary, save where there are overwhelming considerations of national security to the contrary, unless he is informed of the allegations against him” (Plender (footnote 191 above), p. 472).

⁷⁶³ African Commission on Human and Peoples’ Rights, communication 212/98, *Amnesty International v. Zambia*, Twelfth annual report, 1998–1999, para. 33.

⁷⁶⁴ See footnote 130 above.

⁷⁶⁵ *Adoui* case (footnote 165 above), para. 13.

expulsion is not consistently recognized at the national level. National laws differ as to whether and to what extent they grant the individual expelled the right to be informed of the reasons and justification of the expulsion. A State may require,⁷⁶⁶ expressly not require,⁷⁶⁷ or require only in certain circumstances,⁷⁶⁸ a relevant decision to provide reasons or explanations. A State may require that the decision's reasoning correspond to the decision's consequences.⁷⁶⁹ A State may require a decision to be written⁷⁷⁰ or provided to the alien.⁷⁷¹ A State may permit either the alien or the Government to require that reasons for a decision be provided.⁷⁷² A State may provide notice to the alien concerning potential, intended or commenced expulsion proceedings,⁷⁷³ proceedings which may affect the alien's protected status,⁷⁷⁴ or the alien's placement on a list of prohibited persons.⁷⁷⁵ A State may require that the notice provide (a) information on potential or

upcoming procedures, and the alien's rights or options in their respect;⁷⁷⁶ or (b) findings or reasons behind preliminary decisions.⁷⁷⁷ A State may also specify a location⁷⁷⁸ or manner⁷⁷⁹ in which notice is to be given.

355. At the level of case law, some national courts have also upheld the duty to inform an alien of the grounds on which the order of expulsion is based.⁷⁸⁰ However, it has normally not been required that the alien be informed prior to the issuance of the order to expel.⁷⁸¹

356. In view of these considerations, there appears to be little doubt that the obligation to inform the alien subject to expulsion of the decision to expel, and subsequently of the grounds for expulsion, has been confirmed both in legal theory and, albeit with qualifications, by numerous domestic legal systems. Indeed, that requirement is surely the very condition for aliens to invoke the other procedural guarantees.

(c) *Right to submit reasons against expulsion*

(i) *General considerations*

357. The right of an alien to submit reasons against the expulsion has been recognized in treaties and other international instruments, as well as in national law and literature.⁷⁸²

358. Article 13 of the International Covenant on Civil and Political Rights provides the individual expelled, unless "compelling reasons of national security otherwise require", with the right to submit the reasons against his or her expulsion. This article provides:

⁷⁶⁶ Canada, Act of 2001, art. 169 (b); France, Code, arts. L213-2, L522-2, L551-2; Italy, Decree-Law No. 286 (1998), arts. 13 (3), 16 (6), Law No. 40 (1998), art. 11 (3), Decree-Law of 1996, art. 7 (3); Japan, Order of 1951, arts. 10 (9), 47 (3); Madagascar, Decree of 1994, art. 37; Portugal, Decree-Law of 1998, arts. 22 (2), 114 (1) (a); Republic of Korea, Decree of 1993, arts. 72, 74; Spain, Law of 2000, art. 26 (2); Sweden, Act of 1989, sect. 11.3; Switzerland, Regulation of 1949, art. 20 (1), Federal Law of 1931, art. 19 (2); and United States, Immigration and Nationality Act, sect. 504 (c) (5) (j). Such a requirement may be imposed specifically when the decision concerns the alien's claim of protected status (Bosnia and Herzegovina, Law of 2003, art. 75 (5); and Canada, Act of 2001, art. 169 (c)–(d)), when the alien is allegedly involved in terrorism (United States, Immigration and Nationality Act, sect. 504 (c) (5) (j)), or when the alien comes from a State having a special arrangement or relationship with the expelling State (Sweden, Act of 1989, sect. 11.3).

⁷⁶⁷ Bosnia and Herzegovina, Law of 2003, art. 28 (1).

⁷⁶⁸ Sweden, Act of 1989, sect. 11.3.

⁷⁶⁹ Czech Republic, Act of 1999, sect. 9 (3).

⁷⁷⁰ France, Code, arts. L213-2, L551-2; Japan, Order of 1951, art. 47 (3); Republic of Korea, Decree of 1993, arts. 72, 74; Switzerland, Federal Law of 1931, art. 19 (2); United States, Immigration and Nationality Act, sect. 504 (c) (5) (j). Such a requirement may be imposed specifically when the decision concerns the alien's claim of protected status (Canada, Act of 2001, art. 169 (c)–(d)), or when the alien is allegedly involved in terrorism (United States, Immigration and Nationality Act, sect. 504 (c) (5) (j)). A State may allow for the removal of any sensitive information from the decision when the alien is alleged to be involved in terrorism (United States, Immigration and Nationality Act, sect. 504 (c) (5) (j)).

⁷⁷¹ France, Code, arts. L522-2, L551-2; Italy, Decree-Law No. 286 (1998), art. 16 (6); Japan, Order of 1951, arts. 10 (9), 47 (3), 48 (8); Portugal, Decree-Law of 1998, arts. 22 (2), 120 (2); Republic of Korea, Act of 1992, art. 59 (1), Decree of 1993, art. 74; United States, Immigration and Nationality Act, sect. 504 (c) (5) (j).

⁷⁷² Canada, Act of 2001, art. 169 (e).

⁷⁷³ Australia, Act of 1958, art. 203 (2); Belarus, Council Decision of 1999, art. 17, Law of 1998, art. 29; Bosnia and Herzegovina, Law of 2003, art. 8 (2); Canada, Act of 2001, arts. 170 (c), 173 (b); Chile, Decree of 1975, art. 90; Czech Republic, Act of 1999, sect. 124 (1)–(2); France, Code, arts. L213-2, L512-2, L522-1 (1), L522-2, L531-1; Hungary, Act of 2001, art. 42 (1); Iran (Islamic Republic of), Act of 1931, art. 11, Regulation of 1973, art. 16; Italy, Decree-Law No. 286 (1998), arts. 13 (5), (7), 16 (6), Law No. 40 (1998), art. 11 (7), Decree-Law of 1996, art. 7 (3); Japan, Order of 1951, arts. 47 (3)–(4), 48 (1), (3); Madagascar, Decree of 1994, art. 35, Law of 1962, art. 15; Malaysia, Act of 1959–1963, art. 9 (3); Nigeria, Act of 1963, art. 7 (1); Panama, Decree-Law of 1960, arts. 58, 85–86; Paraguay, Law of 1996, art. 35 (a); Portugal, Decree-Law of 1998, arts. 22 (2), 120 (1)–(2); Republic of Korea, Act of 1992, arts. 59 (3), 60 (5), 89 (3); Spain, Law of 2000, arts. 26 (2), 57 (9); United Kingdom, Act of 1971, sect. 6 (2); and United States, Immigration and Nationality Act, sects. 238 (b) (4) (A), (D), (c) (2) (A), (3) (B) (5), 239 (a), 240 (b) (5) (A)–(D), (c) (5), 504 (b) (1)–(2).

⁷⁷⁴ Canada, Act of 2001, art. 170 (c).

⁷⁷⁵ Portugal, Decree-Law of 1998, arts. 114 (2), 120 (2).

⁷⁷⁶ Belarus, Council Decision of 1999, art. 17, Law of 1998, art. 29; Bosnia and Herzegovina, Law of 2003, art. 8 (2); Italy, Decree-Law No. 286 (1998), arts. 13 (5), (7), 16 (6), Law No. 40 (1998), art. 11 (7), Decree-Law of 1996, art. 7 (3); Japan, Order of 1951, arts. 47 (4), 48 (3); Panama, Decree-Law of 1960, art. 58; Paraguay, Law of 1996, art. 35 (a); Portugal, Decree-Law of 1998, arts. 22 (2), 120 (2); Republic of Korea, Act of 1992, arts. 59 (3), 89 (3); South Africa, Act of 2002, art. 8 (1); Spain, Law of 2000, arts. 26 (2), 57 (9); United States, Immigration and Nationality Act, sects. 238 (b) (4) (A), (c) (2) (A), (3) (B) (5), 239 (a), 240 (b) (5) (A)–(D), (c) (5), 504 (b) (1)–(2).

⁷⁷⁷ Belarus, Council Decision of 1999, art. 17; Czech Republic, Act of 1999, sect. 124 (2); France, Code, arts. L222-3, L522-2, L531-1; Japan, Order of 1951, art. 47 (3); Portugal, Decree-Law of 1998, art. 22 (2); Republic of Korea, Act of 1992, art. 89 (3); Spain, Law of 2000, art. 26 (2); United States, Immigration and Nationality Act, sect. 504 (b) (1).

⁷⁷⁸ Guatemala, Decree-Law of 1986, art. 129.

⁷⁷⁹ Bosnia and Herzegovina, Law of 2003, art. 75 (5); France, Code, art. L512-3; Nigeria, Act of 1963, art. 7 (1)–(5); Panama, Decree-Law of 1960, arts. 85–86; Republic of Korea, Act of 1992, art. 91 (1)–(3); and United States, Immigration and Nationality Act, sects. 239 (c), 240 (b) (5) (A)–(B). The relevant legislation may require that delivery be made in person when the notice concerns the decision made on the alien's claim of protected status (Bosnia and Herzegovina, Law of 2003, art. 75 (5); and Canada, Act of 2001, art. 169 (d)).

⁷⁸⁰ See memorandum by the Secretariat (footnote 18 above), para. 656 and the case law cited in the first footnote of this paragraph.

⁷⁸¹ See *Oudjit v. Belgian State (Minister of Justice)*, Conseil d'État, 10 July 1961, ILR, vol. 31, 1966, pp. 353–355, at p. 355; *Brandt v. Attorney-General of Guyana and Austin* (footnote 384 above, p. 468).

⁷⁸² See, in particular, Sharma and Wooldridge (footnote 518 above), pp. 405–406 (citing the *Chevreau* case, UNRIAA, vol. II, p. 361 (1113)); and Plender (footnote 191 above), pp. 471–472 (citing case No. 17/74, *Tansocean Marine Paint v. Commission* [1974] ECR 1063, at p. 1080).

An alien lawfully in the territory of a State Party to the present Covenant ... shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion.⁷⁸³

The same guarantee is contained in article 7 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live:

An alien lawfully in the territory of a State ... shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled.⁷⁸⁴

359. Article 1, paragraph 1 (a), of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that an alien who is lawfully resident in the territory of a State and is subject to a decision to expel should be allowed “to submit reasons against his expulsion”. The same guarantee is contained in article 3, paragraph 2, of the European Convention on Establishment, which provides that a national of any Contracting Party

who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion.

360. Attention may also be drawn to article 7 of the Convention of Application of Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union, which provides:

Nationals of any Contracting Party who have been authorized to settle in the territory of another Contracting Party may be expelled only after notification of the Minister of Justice of the country of residence by a competent authority of that country, before which the persons concerned may avail themselves of their means of defence.

361. The right to submit reasons against the expulsion is also recognized in national laws. According to the relevant national legislation, an alien may be allowed to present any supporting reasons or evidence;⁷⁸⁵ to cross-examine or otherwise question witnesses;⁷⁸⁶ or to review

evidence in all⁷⁸⁷ or certain⁷⁸⁸ cases, or only when public order or security concerns so allow.⁷⁸⁹ However, a State may deny an alien alleged to be involved in terrorism the right to suppress illegally obtained evidence.⁷⁹⁰

(ii) Right to a hearing

362. The right of an alien to submit arguments against his or her expulsion may be exercised through several means, including a hearing. Although article 13 of the International Covenant on Civil and Political Rights does not expressly grant the alien the right to a hearing, the Human Rights Committee has expressed the view that a decision on expulsion adopted without the alien having been given an appropriate hearing may violate article 13 of the Covenant:

The Committee is concerned that the Board of Immigration and the Aliens Appeals Board may in certain cases yield their jurisdiction to the Government resulting in decisions of expulsion or denial of immigration or asylum status without the affected individuals having been given an appropriate hearing. In the Committee’s view, this practice may, in certain circumstances, raise questions under article 13 of the Covenant.⁷⁹¹

363. In the context of expulsion, the right to a hearing is not as far-reaching as in criminal proceedings pursuant to article 14 (3) of the International Covenant on Civil and Political Rights. The formulation “to submit evidence to clear himself”, which was adopted from article 32 (2) of the Convention relating to the Status of Refugees, was replaced in the Covenant with “to submit the reasons against his expulsion”, although this did not change the substance of the right. Commenting on certain decisions of the Human Rights Committee with regard to articles 13 and 14 of the Covenant, Manfred Nowak writes:

Even though the reasons against a pending expulsion should, as a rule, be asserted in an oral hearing, Article 13 does not, in contrast to Article 14 (3) (d), give rise to a right to personal appearance. However, in the case of a Chilean refugee against the Netherlands, the Committee rejected the communication with the reasoning that the author had been given sufficient opportunity to submit the reasons against his expulsion in formal proceedings, which included oral hearings. In the *Hammel* and *Giry* cases, a violation of Article 13 was found because the authors had been given no opportunity to submit the reasons arguing against their expulsion and extradition, respectively.⁷⁹²

Such authorization may be specifically granted when the alien is alleged to be involved in terrorism (United States, Immigration and Nationality Act, sect. 504 (d) (1)). In such circumstances, a State may, subject to conditions, bind itself to pay for the attendance of a witness called by the alien (United States, Immigration and Nationality Act, sect. 504 (d) (2)).

⁷⁸⁷ Bosnia and Herzegovina, Law of 2003, art. 76 (2); United States, Immigration and Nationality Act, sect. 238 (b) (4) (C), (c) (2) (D) (i).

⁷⁸⁸ Sweden, Act of 1989, sect. 11.2.

⁷⁸⁹ Switzerland, Federal Law of 1931, art. 19 (2); United States, Immigration and Nationality Act, sects. 240 (b) (4) (B), 504 (c) (3), (d) (5), (e).

⁷⁹⁰ United States, Immigration and Nationality Act, sect. 240 (e) (1) (B).

⁷⁹¹ Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40 (A/51/40)*, Sweden, para. 88.

⁷⁹² Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, pp. 228–229 (citing *Chilean refugee case*, No. 173/1984, para. 4; *V.M.R.B. v. Canada*, No. 236/1987; *Hammel case*, No. 155/1983, paras. 19.2, 20; and *Giry case* (footnote 783 above), paras. 5.5 and 6).

⁷⁸³ See the report of the Human Rights Committee, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40)*, vol. II, *Pierre Giry v. Dominican Republic*, communication No. 193/1985, 20 July 1990. (The Committee found that the Dominican Republic had violated art. 13 of the Covenant by omitting to take a decision “in accordance with law”, to give the person concerned an opportunity to submit the reasons against his expulsion and to have his case reviewed by a competent authority.)

⁷⁸⁴ General Assembly resolution 40/144, 13 December 1985, annex.

⁷⁸⁵ Such permission can be given: (a) when the alien contests an expulsion or refusal of entry (Bosnia and Herzegovina, Law of 2003, art. 76 (2); France, Code, art. L522-2; Japan, Order of 1951, art. 10 (3); Madagascar, Law of 1962, art. 16; Sweden, Act of 1989, sect. 6.14; United States, Immigration and Nationality Act, sects. 238 (b) (4) (C), (c) (2) (D) (i), 240 (b) (4) (B)); (b) subject to conditions, when the alien is alleged to be involved in terrorism (United States, Immigration and Nationality Act, sect. 504 (c) (2), (e)–(f)); or (c) when the alien requests permission to re-enter the State after having been expelled (France, Code, art. L524-2).

⁷⁸⁶ Canada, Act of 2001, art. 170 (e); Japan, Order of 1951, art. 10 (3); United States, Immigration and Nationality Act, sects. 238 (c) (2) (D) (i), 240 (b) (4) (B). Such permission may be specifically granted when the process concerns the alien’s claim of protected status (Canada, Act of 2001, art. 170 (e)) or, subject to conditions, when the alien is alleged to be involved in terrorism (United States, Immigration and Nationality Act, sect. 504 (c) (3), (e)). A State may permit the relevant authority to order the presence of witnesses requested by the alien (Japan, Order of 1951, art. 10 (5); United States, Immigration and Nationality Act, sect. 504 (d) (1)).

364. The national laws of several States grant the alien expelled a right to a hearing in the context of an expulsion procedure.⁷⁹³ More specifically, a State may give the alien a right to a hearing,⁷⁹⁴ or identify conditions under which a hearing need not be conducted.⁷⁹⁵ The hearing may be required to be public,⁷⁹⁶ closed⁷⁹⁷ or held in camera only when secrecy is required owing to the nature of the evidence.⁷⁹⁸ If the alien does not attend the hearing, the relevant authorities or court may be permitted to proceed when the alien so consents⁷⁹⁹ or per statutory authorization.⁸⁰⁰ A State may reimburse the alien's expenses with respect to the hearing⁸⁰¹ or require that a deposit be made to insure the alien's compliance with conditions relating to the hearing.⁸⁰²

365. Numerous national tribunals have recognized that right on the basis of national constitutional, jurisprudential or statutory law.⁸⁰³ For example, the Supreme Court of the United States explained the reasons for such a hearing, as well as its requirements, in *Wong Sang Yung* as follows:

When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.⁸⁰⁴

⁷⁹³ The following analysis of legal systems and national case law is drawn from the memorandum by the Secretariat (footnote 18 above), paras. 621–623.

⁷⁹⁴ Australia, Act of 1958, art. 203 (3); Belarus, Law of 1998, art. 29; Bosnia and Herzegovina, Law of 2003, art. 76 (2); Canada, Act of 2001, arts. 44 (2), 78 (a), 170 (b), 173 (a), 175 (1) (a); France, Code, arts. L213-2, L223-3, L512-2, L522-1 (1) (2), L524-1; Italy, Decree-Law No. 286 (1998), arts. 13 (5bis), 13 bis, 14 (4), 17, Law No. 40 (1998), art. 15 (1); Japan, Order of 1951, arts. 10, 47 (4), 48 (1)–(8); Madagascar, Decree of 1994, arts. 35–36, Law of 1962, art. 15; Portugal, Decree-Law of 1998, arts. 22 (1), 118 (1)–(2); Republic of Korea, Act of 1992, art. 89 (2); Sweden, Act of 1989, sect. 6.14; United States, Immigration and Nationality Act, sects. 216A (b) (2), 238 (c) (2) (D) (i), 240 (b) (1), 504 (a) (1). Such a right may be specifically conferred on an alien allegedly involved in terrorism (United States, Immigration and Nationality Act, sect. 504 (c) (5) (g)).

⁷⁹⁵ Canada, Act of 2001, arts. 44 (2), 170 (f); United States, Immigration and Nationality Act, sects. 235 (c) (1), 238 (c) (5).

⁷⁹⁶ France, Code, arts. L512-2, L522-2; United States, Immigration and Nationality Act, sect. 504 (a) (2).

⁷⁹⁷ Madagascar, Decree of 1994, art. 37, Law of 1962, art. 16.

⁷⁹⁸ Canada, Act of 2001, art. 166; Sweden, Act of 1989, sect. 6.14.

⁷⁹⁹ United States, Immigration and Nationality Act, sect. 240 (b) (2) (A) (ii).

⁸⁰⁰ Belarus, Law of 1998, art. 29; and France, Code, art. L512-2.

⁸⁰¹ Sweden, Act of 1989, sect. 6.15.

⁸⁰² Canada, Act of 2001, art. 44 (3).

⁸⁰³ See, e.g., United States, *Wong Yang Sung v. McGrath*, Attorney-General et al., Supreme Court, 20 February 1950, ILR, vol. 17, pp. 252–256; *Nicoli v. Briggs*, Court of Appeals, Tenth Circuit, 7 April 1936, *Annual Digest and Reports of Public International Law Cases*, 1935–1937, case No. 162, p. 345; Guyana, *Brandt* (footnote 384 above), p. 468; Canada, *Re Hardayal and Minister of Manpower and Immigration*, Federal Court of Appeal, 20 May 1976, ILR, vol. 73, pp. 617–626; *Gooliah v. Reginam and Minister of Citizenship and Immigration*, Court of Appeal of Manitoba, 14 April 1967, ILR, vol. 43, pp. 219–224. In France, a hearing is required except in cases of urgency. See, e.g., *Mihoubi*, Conseil d'État, 17 January 1970, ILR, vol. 70, p. 358.

⁸⁰⁴ *Wong Yang Sung* (preceding footnote), pp. 254 and 255.

366. Other courts have held that no such hearing was required.⁸⁰⁵ For Commonwealth countries, such a conclusion normally relates to a holding that the expulsion decision is purely administrative and not judicial or quasi-judicial.⁸⁰⁶

(iii) *Right to be present*

367. Although international instruments do not set forth an explicit rule in that regard, the presence of an alien in the expulsion proceedings is either guaranteed or required in the legislation of several States. A State may give the alien a right to appear personally during consideration of the alien's potential expulsion,⁸⁰⁷ or summon or otherwise require the alien to attend a relevant hearing.⁸⁰⁸ A State may likewise permit the presence of the alien's family member or acquaintance.⁸⁰⁹ A State may penalize the alien's failure to attend a hearing by ordering the alien's expulsion and inadmissibility for a set length of time.⁸¹⁰ An alien's absence may be excused if it is due to the alien's mental incapacity,⁸¹¹ or if the alien did not receive notice of the hearing or otherwise presents exceptional circumstances justifying the absence.⁸¹² However, the alien's failure to attend in person does not prevent expulsion proceedings, especially given that the alien can be represented by a lawyer. In any event, State practice is too limited for it to be possible to infer any rule on the topic.

(d) *Right to effective review*

368. Another of the most important procedural rules is that the alien subject to expulsion must be given the opportunity to defend himself before a competent body. However, as is well known, the receiving State can derogate from that rule for “compelling reasons of national security”. The Human Rights Committee regularly examines that justification. Two cases can serve as an illustration. In the case *Eric Hammel*,⁸¹³ the author was a lawyer of French nationality who had been based in Madagascar for almost 20 years. He had defended political prisoners and the principal leaders of the political opposition. On

⁸⁰⁵ See South Africa, *Urban* case (footnote 250 above); Lesotho, *Smith v. Minister of Interior and Others*, High Court, 8 July 1975, ILR, vol. 70, p. 370.

⁸⁰⁶ See the preceding footnote.

⁸⁰⁷ Belarus, Law of 1998, art. 29; Bosnia and Herzegovina, Law of 2003, art. 76 (2)–(3); Canada, Act of 2001, arts. 78 (a) (i), 170 (e); France, Code, arts. L223-2, L512-2, L522-1 (1) (2), L524-1; Italy, Decree-Law No. 286 (1998), arts. 13 (5bis), 14 (4), 17, Law No. 40 (1998), art. 15 (1); Japan, Order of 1951, art. 10 (3); Madagascar, Decree of 1994, arts. 35–36, Law of 1962, arts. 15–16; Portugal, Decree-Law of 1998, art. 118 (2); Republic of Korea, Act of 1992, art. 89 (2)–(3); Sweden, Act of 1989, sect. 6.14; United States, Immigration and Nationality Act, sects. 238 (c) (2) (D) (i), 240 (b) (2) (A)–(B), 504 (c) (1). Such a right may be specifically conferred on an alien allegedly involved in terrorism (United States, Immigration and Nationality Act, sect. 504 (c) (1)). (See memorandum by the Secretariat (footnote 18 above), para. 624.)

⁸⁰⁸ Australia, Act of 1958, art. 203 (3); Portugal, Decree-Law of 1998, art. 118 (1). A State may likewise require the alien's presence when the legality of the alien's detention is being reviewed (Canada, Act of 2001, art. 57 (3)).

⁸⁰⁹ Japan, Order of 1951, art. 10 (4).

⁸¹⁰ United States, Immigration and Nationality Act, sects. 212 (a) (6) (B), 240 (b) (5) (A), (E), (7).

⁸¹¹ *Ibid.*, art. 240 (b) (3).

⁸¹² *Ibid.*, sect. 240 (b) (5) (C) (e) (1).

⁸¹³ Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40)*, annex VIII, communication No. 155/1983.

several occasions, he had represented individuals before the Human Rights Committee. He was arrested and detained for three days. After being given only two hours to gather his belongings, he was expelled from Malagasy territory. According to the Supreme Court of Madagascar, the activities of the individual concerned and his continued presence in the country disturbed public order and public safety. The Human Rights Committee examined the case and, considering whether article 13 of the International Covenant on Civil and Political Rights had been violated, noted that “the author was not given an effective remedy to challenge his expulsion and that the State party has not shown that there were compelling reasons of national security to deprive him of that remedy”.⁸¹⁴ The Committee specified that its views took into account its general comment No. 15 of 1986, which stated that an “alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one”, and that the procedural rules set forth in article 13 for the benefit of lawful aliens subject to expulsion “can be departed from only when compelling reasons of security so require”.⁸¹⁵

369. In the same general comment, the Committee pointed out that if a deportation procedure entails arrest, the State party shall also grant the individual concerned the safeguards contained in the Covenant.⁸¹⁶ The guarantees are those contained in articles 9 and 10 of the Covenant. Article 10 addresses the conditions of detention. Article 9 sets forth procedural guarantees that extend to anyone deprived of their liberty. Article 9, paragraph 4, provides:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Whatever the objective of the deprivation of liberty, a court must be able to rule on its legality. In 2002, the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment recalled that “such procedures should function expeditiously”.⁸¹⁷ In the case *Ahani v. Canada*, the individual concerned was detained as a result of a certificate stating that he posed a threat to internal security. He was kept in detention until his expulsion. The Human Rights Committee noted that the individual had been detained without being convicted of any crime or sentenced to a term of imprisonment. It therefore took the view that by virtue of article 9, paragraph 4, he should have access to judicial review, “that is to say, review of the substantive justification of detention, as well as sufficiently frequent review”.⁸¹⁸

⁸¹⁴ *Ibid.*, para. 19.2.

⁸¹⁵ *Ibid.* See also A/41/40 (footnote 601 above), vol. I, annex VI, general comment No. 15: The Position of Aliens under the Covenant, para. 10.

⁸¹⁶ See also A/41/40 (footnote 601 above), para. 9.

⁸¹⁷ Interim report of 2 July 2002 of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, Theo van Boven, submitted to the General Assembly in accordance with resolution 56/143 of 19 December 2001 (A/57/173), para. 16.

⁸¹⁸ Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. II, communication No. 1051/2002 of 10 January 2002, para. 10.2. See also the note on this case by Gerald Heckman, “International Decisions”, *AJIL*, vol. 99, No. 3 (July 2005), p. 669.

(e) *Non-discrimination in procedural guarantees*

370. The principle of non-discrimination appears to affect not only the decision of whether an alien may be expelled,⁸¹⁹ but also the procedural guarantees that should be respected. Commenting on article 13 of the International Covenant on Civil and Political Rights, the Human Rights Committee stressed that “discrimination may not be made between different categories of aliens in the application of article 13”.⁸²⁰

371. For its part, the Committee on the Elimination of Racial Discrimination expressed concern regarding cases of racial discrimination in relation to the expulsion of foreigners, including in matters of procedural guarantees.⁸²¹ In its general recommendation No. 30, the Committee recommended that States parties to the International Convention on the Elimination of All Forms of Racial Discrimination, *inter alia*,

[e]nsure that ... non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies.⁸²²

372. Similarly, the Human Rights Committee stressed the prohibition of gender discrimination with respect to the right of an alien to submit reasons against his or her expulsion:

States parties should ensure that alien women are accorded on an equal basis the right to submit arguments against their expulsion and to have their case reviewed, as provided in article 13. In this regard, they should be entitled to submit arguments based on gender-specific violations of the Covenant such as those mentioned in paragraphs 10 and 11 above.⁸²³

(f) *Right to consular protection*

373. An alien under an expulsion order may be entitled to consular protection in accordance with international and national law,⁸²⁴ as set forth in articles 36 and 38 of

⁸¹⁹ See *Yearbook ... 2009*, vol. II (Part One), documents A/CN.4/611 and A/CN.4/617.

⁸²⁰ Human Rights Committee, A/41/40 (footnote 601 above), vol. I, annex VI, general comment No. 15: The Position of Aliens under the Covenant, para. 10.

⁸²¹ See, in particular, the concluding observations of the Committee on the Elimination of Racial Discrimination: France, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 18 (A/49/18)*, para. 144:

“Concern is expressed that the implementation of these laws [laws on immigration and asylum] could have racially discriminatory consequences, particularly in connection with the imposition of limitations on the right of appeal against expulsion orders and the preventive detention of foreigners at points of entry for excessively long periods.”

⁸²² *Ibid.*, *Fifty-ninth Session, Supplement No. 18 (A/59/18)*, general recommendation No. 30, para. 25.

⁸²³ Human Rights Committee, *ibid.*, *Fifty-fifth Session, Supplement No. 40 (A/55/40)*, general comment No. 28 concerning article 3 (equality of rights between men and women), 29 March 2000, para. 17. The gender-specific violations referred to in paragraphs 10 and 11 include female infanticide, the burning of widows and dowry killings, domestic and other types of violence against women, including rape, forced abortion and sterilization and genital mutilation.

⁸²⁴ See Vienna Convention on Consular Relations (arts. 5 (a), (d), (e), (g), (h) and (i) and arts. 36 and 37); see also the analysis by Sohn and Buergethal (footnote 195 above), p. 95; Jennings and Watts (footnote 190 above), pp. 1140–1141, para. 547, footnotes 1 and 4 (citing the *Chevreau* case, 9 June 1931, UNRIAA, vol. 2, pp. 1113, 1123–1124); *Faulkner v. United Mexican States* (1926), UNRIAA, vol. 4.

the Vienna Convention on Consular Relations.⁸²⁵ Article 36, paragraph 1 (a), guarantees the freedom of communication between consular officers and nationals of the sending State. As this guarantee is formulated in general terms, it would also apply within the context of expulsion procedures. Paragraph 1 (b), dealing with the situation of individuals in prison, custody or detained in any other manner, sets forth an obligation for the receiving State to inform the consular post of the sending State at the request of the person concerned and to inform the latter of his or her rights in this respect. Paragraph 1 (c) recognizes the right of consular officers to visit a national of the sending State who is in detention.

374. ICJ has applied article 36 of the Vienna Convention on Consular Relations in the *LaGrand*⁸²⁶ and *Avena* cases.⁸²⁷ The Court noted that “Article 36, paragraph 1 (b), spells out the obligations the receiving State has towards the detained person and the sending State”⁸²⁸ and that “[t]he clarity of these provisions, viewed in their context, admits of no doubt”.⁸²⁹

375. Article 38 of the Vienna Convention on Consular Relations allows consular officers to communicate with the authorities of the receiving State.

376. Attention may be drawn to the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144. Article 10 of the Declaration expresses the right of any alien to communicate at any time with the diplomatic or consular mission of his or her State:

Any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in the absence thereof, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides.⁸³⁰

377. Given that such a right is affirmed in the Declaration in general terms, it appears to be applicable also in the event of an expulsion.

378. Some national laws explicitly recognize the right of an alien to seek consular protection in case of expulsion.⁸³¹ More precisely, a State may permit the alien to communicate with diplomatic or consular representatives of the alien's State, or of any State providing representation services for the alien's State,⁸³² when (a) the alien receives notice of the State's intent to pursue the

alien's expulsion;⁸³³ (b) the alien is kept in a specific zone or location,⁸³⁴ or is otherwise held by the State;⁸³⁵ (c) the alien is detained and allegedly involved in terrorism;⁸³⁶ or (d) a final expulsion decision has been made and the alien faces deportation.⁸³⁷ A State may permit diplomatic or consular personnel to arrange for the alien's departure or extension of stay, including when the alien has violated the terms of his or her transitory status.⁸³⁸

(g) Right to counsel

379. Both treaty law and national law have recognized to some extent the right of an alien to be represented by counsel in expulsion proceedings.⁸³⁹

380. Article 13 of the International Covenant on Civil and Political Rights provides that an alien expelled, “except where compelling reasons of national security otherwise require, be allowed ... to have his case reviewed by, and be represented for the purpose before, the competent authority”. Such a right is expressly guaranteed by the Covenant only in appeal proceedings. It follows from the wording of article 13, which was adapted from article 32, paragraph 2, of the Convention relating to the Status of Refugees, that this right is expressly guaranteed only in the proceedings before the appeals authority. A comparison of article 13 with article 14, paragraph 3 (d), further shows that a person threatened with expulsion is not entitled to legal counsel or to the appointment of an attorney. However, the right to designate one's representative follows from the right to have oneself represented; this representative may be an attorney at the cost of the person concerned. Because an expulsion implicates the basic rights of the aliens concerned, a group in particular need of legal counsel, the right to representation by a freely selected attorney is of fundamental importance. Practice before the Human Rights Committee shows that most authors were in fact represented by counsel during the appeal proceedings.⁸⁴⁰ Article 7 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live⁸⁴¹ contains the same wording as article 13 of the Covenant.

381. As for Europe, article 1, paragraph 1 (c), of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms requires that an alien lawfully resident in the territory of a State be allowed “to be represented ... before the competent authority” in expulsion proceedings. Similarly, article 3, paragraph 2, of the European Convention on Establishment provides:

⁸³³ United States, Immigration and Nationality Act, sect. 507 (e) (2); France, Code, arts. L512-1, L531-1 and L551-2; Portugal, 1998 Decree-Law, art. 24 (1).

⁸³⁴ Portugal, 1998 Decree-Law, art. 24 (1).

⁸³⁵ France, Code, art. L551-2.

⁸³⁶ See footnote 832 above.

⁸³⁷ Belarus, 1999 Council Decision, art. 18.

⁸³⁸ Chile, 1975 Decree, art. 85.

⁸³⁹ See, for example, Haney, “Deportation and the right to counsel”, p. 190, citing the United States Supreme Court decision in *In re Gault*, 387 U.S. 1, 50, 68 (1967).

⁸⁴⁰ See Nowak (footnote 792 above), p. 231.

⁸⁴¹ See footnote 579 above.

⁸²⁵ See, for example, the comments by Aleinikoff (footnote 716 above), p. 9 (quoting article 36 of the Convention); Plender (footnote 191 above), p. 471 (citing article 36 of the Convention); *Bigelow v. Princess Zizianoff*, *Gazette du Palais*, 4 March 1928; Cahier and Lee, “Vienna Conventions on diplomatic and consular relations”, p. 63).

⁸²⁶ *LaGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports* 2001, p. 466 *et seq.*, paras 64–91.

⁸²⁷ *Avena and other Mexican Nationals (Mexico v. United States of America)*, *I.C.J. Reports* 2004, pp. 39 *et seq.*, paras 49–114.

⁸²⁸ *LaGrand*, p. 494, para. 77.

⁸²⁹ *Ibid.*

⁸³⁰ See footnote 579 above.

⁸³¹ See memorandum by the Secretariat (footnote 18 above), para. 631.

⁸³² United States, Immigration and Nationality Act, sect. 507 (e) (2).

Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, *and be represented for the purpose before**, a competent authority or a person or persons specially designated by the competent authority.

382. Also worth mentioning is article 7 of the Convention of Application of Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union, which reads as follows:

Nationals of any Contracting Party who have been authorized to settle in the territory of another Contracting Party may be expelled only after notification of the Minister of Justice of the country of residence by a competent authority of that country, before which the persons concerned may avail themselves of their means of defence *and cause themselves to be represented or assisted by counsel of their own choice**.

383. In its assessment of *Josu Arkauz Arana v. France*, the Committee against Torture stressed the importance of giving the individual expelled the possibility to contact his or her family or lawyer in order to avoid possible abuse, which may give rise to a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to the Committee:

The deportation was effected under an administrative procedure ... without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer. That ... placed the author in a situation where he was particularly vulnerable to possible abuse and therefore constitutes a violation ... of article 3.⁸⁴²

384. The legislation of several States also guarantees the right to counsel in the event of an expulsion. A State may entitle the alien to be assisted by a representative,⁸⁴³ including specifically legal counsel⁸⁴⁴ or a person other than legal counsel,⁸⁴⁵ during expulsion proceedings, including with respect to the alien's detention. A State may expressly permit the alien free choice of counsel.⁸⁴⁶ A State may designate a representative for minors or other persons unable to appreciate the nature of the proceedings.⁸⁴⁷ A State may establish the inviolability of mail sent

to the alien from the alien's lawyers or public counsel, or from relevant international bodies.⁸⁴⁸

385. Some national courts, interpreting national legislation, have also upheld the right of an alien to be represented by counsel.⁸⁴⁹

(h) Legal aid

386. With respect to the right of the expellee to be granted legal aid, attention may be drawn to the relevant legislation of the European Union, in particular to Council Directive 2003/109/EC of 25 November 2003, dealing with the situation of third-country nationals who are long-term residents. Article 12 of the Directive provides:

4. Where an expulsion decision has been adopted, a judicial redress procedure shall be available to the long-term resident in the Member State concerned.

5. Legal aid shall be given to long-term residents lacking adequate resources, on the same terms as apply to nationals of the State where they reside.⁸⁵⁰

387. Mention can also be made of the concerns expressed by the Committee on the Rights of the Child about "ill-treatment of children by police during forced expulsion to the country of origin where, in some cases, they were deported without access to legal assistance".⁸⁵¹

388. The right to legal aid in relation to an expulsion procedure is provided in the legislation of several States. Thus, a State may provide legal counsel or assistance to the alien at public expense.⁸⁵² A State may also waive court fees if the alien is unable to pay them.⁸⁵³

389. Although treaty law does not explicitly provide a basis for the right to legal aid, the Special Rapporteur believes that such a basis could be established, in line with progressive development of international law, by drawing on European Community law, and also acknowledge an important trend in State practice, as had been revealed by the analysis of national legislation.

⁸⁴² Committee against Torture, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 44 (A/55/44)*, *Josu Arkauz Arana v. France*, communication No. 63/1997, 9 November 1999, paras. 11.5 and 12 (pp. 87–88).

⁸⁴³ Japan, 1951 Order, art. 10 (3); Panama, 1960 Decree-Law, art. 85.

⁸⁴⁴ Argentina, 2004 Act, art. 86; Bosnia and Herzegovina, 2003 Law, art. 76 (3); Canada, 2001 Act, art. 167 (1); France, Code, arts. L221-4, L221-5, L222-3, L512-1, L512-2, L522-2, L551-2, L555-3; Italy, 1998 Decree-Law No. 286, art. 13 (5), (8), 14 (4), 1998 Law No. 40, arts. 11 (10), 15 (1); Madagascar, 1994 Decree, art. 36, 1962 Law, art. 15; Norway, 1988 Act, sect. 42; Portugal, 1998 Decree-Law, art. 24 (2); Republic of Korea, 1992 Act, art. 54; Spain, 2000 Law, art. 26 (2); Sweden, 1989 Act, sects. 6.26, 11.1b, 11.8; United States, Immigration and Nationality Act, sects. 238 (a) (2), 239 (a) (1) (E), (b), 504 (c) (1), 507 (e) (1). This right may be specifically accorded to minors (France, Code, art. L222-3), or to an alien allegedly involved in terrorism (United States, Immigration and Nationality Act, sects. 504 (c) (1), 507 (e) (1)).

⁸⁴⁵ Bosnia and Herzegovina, 2003 Law, art. 76 (3); France, Code, art. L522-2.

⁸⁴⁶ France, Code, art. L213-2; Madagascar, 1994 Decree, art. 36; Portugal, 1998 Decree-Law, art. 24 (2); United States, Immigration and Nationality Act, sects. 238 (b) (4) (B), 239 (a) (1), 240 (b) (4) (A), 292.

⁸⁴⁷ Canada, 2001 Act, art. 167 (1); France, Code, arts. L221-5, L222-3; and Sweden, 1989 Act, sects. 11.1b, 11.8.

⁸⁴⁸ Sweden, 1989 Act, sect. 6.26.

⁸⁴⁹ See Belgium, *Oudjit v. Belgian State (Minister of Justice)* (footnote 781 above), p. 353. *Re Immigration Act, Re Kokorinis*, Court of Appeal of British Columbia, 3 May 1967, ILR, vol. 43, pp. 225–229; *Re Vinaroo*, Court of Appeal of British Columbia, 17 January 1968, *ibid.*, vol. 44, p. 166.

⁸⁵⁰ *Official Journal of the European Union*, No. L 16, 23 January 2004, pp. 44–53.

⁸⁵¹ CRC/C/118, 3 September 2002, concluding observations, Spain, para. 512 (a).

⁸⁵² Argentina, 2004 Act, art. 86; France, Code, arts. L221-5, L222-3, L522-2, L555-3; Italy, 1998 Decree-Law No. 286, art. 13 (8), 1998 Law No. 40, art. 11 (10); Norway, 1988 Act, sect. 42; Spain, 2000 Law, art. 26 (2); Sweden, 1989 Act, sects. 6.26, 11.1b, 11.8–10; United States, Immigration and Nationality Act, sect. 504 (c) (1). Such a right may be specifically conferred on an alien allegedly involved in terrorism (United States, Immigration and Nationality Act, sect. 504 (c) (1)). A State may, in standard expulsion cases, provide to the alien a list of legal counsel willing to work pro bono, without conferring on the alien a right to free representation (United States, Immigration and Nationality Act, sect. 239 (b) (2)–(3)). In contrast, a State may establish that the alien must bear the costs of counsel; see Canada, 2001 Act, art. 167 (1); and United States, Immigration and Nationality Act, sects. 238 (b) (4) (B), 240 (b) (4) (A), (5) (A), 292.

⁸⁵³ Argentina, 2004 Act, arts. 87–88; Norway, 1988 Act, sect. 42.

(i) *Translation and interpretation*

390. With respect to the right to translation and interpretation in the expulsion proceedings, mention can be made of the concerns expressed by the Committee on the Rights of the Child about

ill-treatment of children by police during forced expulsion to the country of origin where, in some cases, they were deported without access to... interpretation.⁸⁵⁴

391. The legislation of several States provides the alien expelled with the right to translation or interpretation. As has been mentioned (para. 308 above), in Italy, for example, if the alien does not understand Italian, the expulsion decision must be accompanied by a “summary” of the decision in a language he or she understands, or failing this, in English, French or Spanish. National jurisprudence confirms such translation as an integral part of due process. If the expulsion decision has not been translated into the language of the person concerned, a reason must be provided for this omission, without which the expulsion decision is invalid. Furthermore, a translation into English, French or Spanish is only admissible if the administration cannot determine the alien’s country of origin, and therefore his or her native language. When the expulsion decision is communicated, the alien is also informed of the right to assistance by counsel in all legal proceedings pertaining to the expulsion, which may be furnished through legal aid, and the right to appeal the expulsion order.

392. Overall, a State may in relevant situations provide translation or interpretation assistance to the alien;⁸⁵⁵ entitle the alien to receive communications in a language which the alien understands;⁸⁵⁶ use a language which the alien understands throughout the relevant proceedings;⁸⁵⁷ use the language of the place in which the relevant authority sits;⁸⁵⁸ pay a private interpreter’s compensation and expenses;⁸⁵⁹ or place legal obligations on the interpreter with respect to the form of the printed record.⁸⁶⁰

⁸⁵⁴ See footnote 851 above.

⁸⁵⁵ Argentina, 2004 Act, art. 86; Australia, 1958 Act, arts. 258 B, 261 A–C; Bosnia and Herzegovina, 2003 Law, arts. 8 (3), 76 (3); France, Code, arts. L111-8, L221-4, L221-7, L222-3, L223-3, L512-2, L522-2; Italy, 1998 Decree-Law No. 286, art. 13 (7); Portugal, 1998 Decree-Law, art. 24 (1); Republic of Korea, 1992 Act, arts. 48 (6)–(7), 58; Spain, 2000 Law, art. 26 (2). Such a right may be specifically accorded to minors (France, Code, art. L222-3), or with respect to an identification test or other investigation (Australia, 1958 Act, arts. 258 B, 261 A–C; and Republic of Korea, 1992 Act, arts. 48 (6)–(7), 58).

⁸⁵⁶ Australia, 1958 Act, arts. 258 B, 261 A–C; Belarus, 1999 Council Decision, art. 17; France, Code, arts. L213-2, L221-4; Italy, 1998 Decree-Law No. 286, arts. 2 (6), 4 (2), 13 (7), 1998 Law No. 40, arts. 2 (5), 11 (7), 1996 Decree-Law, art. 7 (3); United States, Immigration and Nationality Act, sect. 240 (b) (7).

⁸⁵⁷ France, Code, art. L111-7. A State may expect the alien to indicate which language or languages the alien understands (France, Code, art. L111-7), or to indicate a preference from among the languages offered (Italy, 1998 Decree-Law No. 286, art. 2 (6), 1998 Law No. 40, art. 2 (5)). A State may establish a default language or languages when the alien does not indicate a language (France, Code, art. L111-7), or when it is otherwise impossible to provide the alien’s indicated language (Italy, 1998 Decree-Law No. 286, arts. 2 (6), 4 (2), 13 (7), 1998 Law No. 40, arts. 2 (5), 11 (7), 1996 Decree-Law, art. 7 (3)).

⁸⁵⁸ Switzerland, 1949 Regulation, art. 20 (3).

⁸⁵⁹ Sweden, 1989 Act, sect. 11.5.

⁸⁶⁰ Republic of Korea, 1992 Act, arts. 59 (2), 60 (1)–(2).

393. In Italy, the Constitutional Court upheld the constitutionality of issuing an expulsion decree in English, French or Spanish, where it was not possible to notify the alien in his or her native language or another language actually spoken by the alien. The Court reasoned that such a procedure met certain reasonably functional criteria, and guaranteed to a reasonable degree that the contents of such a decree would be understandable to the recipient.⁸⁶¹

2. PROCEDURAL GUARANTEES UNDER EUROPEAN COMMUNITY LAW

394. The procedural regime for expulsion of aliens in the European Community was established by European Council Directive 64/221/EEC of 25 February 1964. The procedural safeguards provided by the Directive were twofold: the host member State has an obligation to notify the individual concerned of a decision on expulsion, and must also grant the individual the right to redress. This Directive was repealed by Council Directive 2004/38/EC of 29 April 2004,⁸⁶² which further strengthens the protective aspects of this dual guarantee.

(a) *Notification of the expulsion decision*

395. The persons concerned must always be notified of expulsion decisions. The notification of the decision must be given “in writing ... in such a way that they [the persons concerned] are able to comprehend its contents and the implications for them”.⁸⁶³ Regarding the language that should be used, the Court of Justice of the European Communities has specified that the notification must be done in such a way that the individual concerned understands not only its content but also its effects.⁸⁶⁴ Article 6 of the Directive 64/221/EEC required member States to notify the individual of the public policy, public security or public health grounds for an expulsion decision, unless such communication could affect State security. The Court decided that the notification “must be sufficiently detailed and precise”⁸⁶⁵ to enable the person concerned to provide an adequate defence.⁸⁶⁶ Article 7 of the 1964 Directive also required that the notification state

[t]he period allowed for leaving the territory, specifying that this period shall be not less than fifteen days if the person concerned has not yet been granted a residence permit and not less than one month in all other cases.

Directive 2004/38/EC provides that individuals must be notified, in writing, of the court or administrative authority with which they may lodge an appeal, as well as the time limit for the appeal. The notification should also specify the time allowed to leave the territory of the

⁸⁶¹ See *Sentenza No. 257, Gazzetta Ufficiale della Repubblica Italiana*, 28 July 2004.

⁸⁶² The repeal of Directive 64/221/EEC took effect on 30 April 2006, after a period of two years from the effective date of the new text.

⁸⁶³ Directive 2004/38/EC, article 30, para. 1..

⁸⁶⁴ *Adoui* case (footnote 165 above), para. 13; Opinion of Advocate-General F. Capotorti, delivered on 16 February 1982, *European Court Reports* 1982, p. 1714.

⁸⁶⁵ *Ibid.*, para. 13.

⁸⁶⁶ See also Court of Justice of the European Communities, *Rutili* case, (footnote 141 above), para. 39; Opinion of Advocate-General H. Hayras delivered on 14 October 1975, *European Court Reports* 1975, p. 1237.

host member State, which, with the exception of cases of urgency, should be not less than one month from the date of notification. Regarding the last point, the European Council no longer distinguishes between individuals with residence permits and those without, and now requires cases of urgency to be duly substantiated.

396. Article 30 of Directive 2004/38/EC ("Notification of decisions"), provides in paragraph 1 that European Union citizens or their family members affected by any decision taken under article 27, paragraph 1, to restrict their freedom of movement and residence, "shall be notified in writing ... in such a way that they are able to comprehend its content and the implications for them". Paragraph 3 indicates:

The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

(b) *Right of effective review*

397. Article 8 of Directive 64/221/EEC states:

The person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration.

Since its ruling on the *Pecastaing* case of 1980, the Court of Justice of the European Communities has consistently reiterated that decisions covered by the Directive are considered "acts of the administration". Therefore, any person affected by such decisions must have access to the same legal remedies as are available to nationals in respect of acts of the administration.⁸⁶⁷ Accordingly, a member State cannot render such persons remedies subject to "particular requirements as to form or procedure which are less favourable than those pertaining to ... nationals".⁸⁶⁸ Therefore, a remedy must be available to any individual "covered by the Directive against any decision which may lead to expulsion before the decision is executed".⁸⁶⁹ Regarding the court from which remedies should be sought, the Court states:

If, in a member State, remedies against acts of the administration may be sought from the ordinary courts, the persons covered by Directive No. 64/221/EEC must be treated in the same way as nationals with regard to rights of appeal to such courts in respect of acts of the administration.⁸⁷⁰

In addition, if, in a given member State, ordinary courts are empowered to grant a stay of execution, for example,

of a deportation decision, while administrative courts do not have such power, the State must permit persons covered by the Directive to apply for a stay of execution from the former, "on the same conditions as nationals".⁸⁷¹

398. Regarding the suspensive effect of such legal remedies, the Court made clear in its preliminary ruling on the 1976 *Royer* case that "the decision ordering expulsion may not be executed before the party concerned is able to avail himself of the remedy".⁸⁷² Member States are obligated not only to provide persons covered by the Directive the possibility of taking legal action before an expulsion decision is executed, but also to allow such persons to effectively apply to the competent court. It is not enough for a legal remedy to simply exist as a possibility; the persons concerned must actually have the means to access such a remedy. However, a member State is not obligated to maintain in its territory a Community national subject to an expulsion measure throughout the entire course of the appeal process. In this respect, the Court of Justice of the European Communities affirms that member States must only "ensure that the safeguard of the right of appeal is in fact available to anyone against whom a restrictive measure of this kind has been adopted"⁸⁷³ and that "this guarantee would become illusory if member States could, by the immediate execution of a decision ordering expulsion, deprive the person concerned of the opportunity of effectively making use of the remedies which he is guaranteed".⁸⁷⁴ The Court concluded unequivocally that "a decision ordering expulsion cannot be executed, save in cases of urgency which have been properly justified ... until the party concerned has been able to exhaust the remedies guaranteed by articles 8 and 9 of [the] Directive".⁸⁷⁵

399. Furthermore, Directive 64/221/EEC states in its article 9, paragraph 1:

Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, a decision ... ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for.

The text specifies that the "competent authority" should not be the same as the authority empowered to order expulsions. These measures are to be taken to ensure that nationals of the Community enjoy procedural guarantees when they face expulsion.

400. The requirements are different when a Community national is illegally present in a member State. The Court faced this issue in the case of an Irish national who was expelled from the United Kingdom in connection with terrorist activities related to Northern Ireland. Based on consistent Court jurisprudence, the right to freedom of movement should be interpreted in a manner favourable to

⁸⁶⁷ Court of Justice of the European Communities, judgement of 5 March 1980, *Josette Pecastaing v. Belgian State*, Case C-98/79, para. 10, *European Court Reports* 1980, p. 691; Opinion of Advocate-General M. G. Reischl, delivered on 31 January 1980, *ibid.*, p. 680. See also Court of Justice of the European Communities, judgement of 18 October 1990, *Massam Dzodzi v. Belgian State*, Joined Cases C-297/88 and C-197/89, *European Court Reports* 1990, para. 58; Opinion of Advocate-General M. M. Darmon, delivered on 3 July 1990, *European Court Reports*, p. I-3763.

⁸⁶⁸ *Pecastaing* case (preceding footnote), para. 11.

⁸⁶⁹ *Ibid.*

⁸⁷⁰ *Ibid.*

⁸⁷¹ *Ibid.* See also Court of Justice of the European Communities, judgement of 18 October 1990, *Dzodzi* (footnote 867 above), para. 59.

⁸⁷² *Royer* case (footnote 277 above), para. 60.

⁸⁷³ *Ibid.*, para. 55.

⁸⁷⁴ *Ibid.*, para. 56.

⁸⁷⁵ *Ibid.*, para. 62.

Community nationals. The Court judge therefore logically issued a broad interpretation of article 9, paragraph 1, of Directive 64/221/EEC, deciding that it actually covered nationals “of a Member State who [are] already lawfully residing within the territory of another Member State,”⁸⁷⁶ including persons holding a residence permit, as well as citizens who, according to the legislation of the host State, are not required to hold a residence permit. In other words, article 9, paragraph 1, applies to decisions on expulsion of nationals of member States who are legally residing in a host member State, even if they are not obligated to hold a residence permit. In its ruling on *Pecastaing*, the Court explained that intervention by a “competent authority” should compensate for an absence of recourse through the courts; enable a detailed examination of a given case, “including the appropriateness of the measure contemplated, before the decision is finally taken”; and allow the person concerned to request, and obtain as appropriate, a stay of execution of the expulsion, failing an opportunity to obtain such a stay from the courts.⁸⁷⁷ While paragraph 1 of article 9 concerns the rights of persons holding residence permits, affirming that an administrative authority cannot order their expulsion or refuse to renew a residence permit without obtaining the opinion of another authority, paragraph 2 addresses individuals who have already been affected by a restrictive administrative decision. Migrants who hold a residence permit are therefore better protected than those who do not.

401. Article 9 of Directive 64/221/EEC does not require the “competent authority” to be a court or even to be composed of members of the judiciary.⁸⁷⁸ Its members do not have to be appointed “for a specific period”.⁸⁷⁹ The Court stressed that the authority must operate “in absolute independence” and that member States are free to designate the authority,⁸⁸⁰ which may consist of “any public authority independent of the administrative authority called on to adopt any of the [expulsion] measures ... organised in such a way that the person concerned has the right to be represented and to defend himself before it”.⁸⁸¹ The most important point, therefore, is that the person concerned is able to defend himself or herself as set forth in the Directive, and that the authority act in complete independence and not be subject to the power of the authority responsible for ordering the measure.

402. The foregoing analysis of procedural rights granted to aliens facing expulsion demonstrates that such rights have an adequate legal basis in international law and in the legislation and case law of several States, with the exception of the right to be present, which has not been

established in international law and varies greatly, and is even at times contradictory, across national legislation. Such procedural rights are also largely supported by the majority of specialists on the rights of aliens. The right to legal aid in particular is based on several elements that favour its establishment as part of progressive development. Accordingly, the Special Rapporteur proposes the following draft article:

**“Draft article C1. Procedural rights
of aliens facing expulsion**

“1. An alien facing expulsion enjoys the following procedural rights:

“(a) The right to receive notice of the expulsion decision;

“(b) The right to challenge the expulsion [the expulsion decision];

“(c) The right to a hearing;

“(d) The right of access to effective remedies to challenge the expulsion decision without discrimination;

“(e) The right to consular protection;

“(f) The right to counsel;

“(g) The right to legal aid;

“(h) The right to interpretation and translation into a language he or she understands.

“2. The rights listed in paragraph 1 above are without prejudice to other procedural guarantees provided by law.”

D. Implementation of the expulsion decision

403. The implementation of expulsion decisions raises a number of problems. States are divided between their desire for effectiveness and the necessary respect for the fundamental rights of the individual concerned by the expulsion decision and for the international conventions to which they are parties. If the expulsion order is not annulled or challenged in court, the party concerned is obliged to leave the territory of the expelling State. In addition to the obligation to leave the territory, the legislations of most States, among them Belgium, Cameroon, Denmark, Germany, Spain and the United Kingdom,⁸⁸² also include a ban on return.

1. VOLUNTARY DEPARTURE

404. The voluntary departure of the alien facing expulsion permits greater respect for human dignity while being easier to manage administratively. The implementation of this expulsion process is negotiated between the expelling State and the alien subject to the expulsion order. In 2005, the Committee of Ministers of the Council of

⁸⁷⁶ Court of Justice of the European Communities, judgement of 30 November 1995, *The Queen v. Secretary of State for the Home Department, ex parte John Gallagher*, case No. C-175/94, pt. 14, *Reports of the Court*, p. 1-4275. See the analysis on this ruling by Luby “Libre circulation des personnes et des services”, pp. 535–538.

⁸⁷⁷ *Pecastaing* case (footnote 867 above), para. 15.

⁸⁷⁸ Court of Justice of the European Communities, *Adoui* case (footnote 165 above), para. 16. See also the case of *Dzodzi* (footnote 867 above), para. 65.

⁸⁷⁹ *Adoui* case (footnote 165 above), para. 16.

⁸⁸⁰ *Regina v. Secretary of State for Home Affairs*, case No. 131/79, pt. 19, *European Court Reports*, p. 631; Opinion of Advocate-General J. P. Warner, presented on 27 February 1980, *European Court Reports* 1980, p. 1585.

⁸⁸¹ *Orfanopoulos and Oliveri* case (footnote 143 above), para. 114.

⁸⁸² “L’expulsion des étrangers en situation irrégulière”, *Documents de travail du Sénat*, France (série législation comparée), No. LC 162, April 2006.

Europe placed the emphasis on voluntary departure, saying that “The host state should take measures to promote voluntary returns, which should be preferred to forced returns”.⁸⁸³ Similarly, in its proposal for a directive on return of 1 September 2005, the European Commission indicated that “the return decision shall provide for an appropriate period for voluntary departure of up to four weeks, unless there are reasons to believe that the person concerned might abscond during such a period”.⁸⁸⁴

2. FORCIBLE IMPLEMENTATION

405. Forcible implementation takes place when the alien facing expulsion refuses to leave by his or her own accord, for example, by offering physical resistance or by making an unacceptable choice of country of destination. As the Parliamentary Assembly of the Council of Europe considered, forced expulsion “should be reserved for persons who put up clear and continued resistance and ... can be avoided if genuine efforts are made to provide deportees with personal and supervised assistance in preparing for their departure”.⁸⁸⁵ A return may be thwarted, not by the refusal of the party concerned to obey an expulsion order, but by the refusal of the State of destination to receive, and especially of his State of origin to readmit, him or her. To facilitate readmissions, the European Union concludes bilateral agreements with third States. Return sometimes requires the collaboration of one or more other States, called transit States. As a result, the European Union is also trying to implement a set of rules for those cases.

406. In its guidelines on forced return of illegal aliens adopted in May 2005, the Committee of Ministers of the Council of Europe recalled:

If the state of return is not the state of origin, the removal order should only be issued if the authorities of the host state are satisfied, as far as can reasonably be expected, that the state to which the person is returned will not expel him or her to a third state where he or she would be exposed to a real risk [of death or mistreatment].⁸⁸⁶

3. CONDITIONS FOR THE RETURN OF THE EXPELLED PERSON

407. It is not enough for decisions to expel aliens to be in order; they must also be carried out and be in conformity with a number of rules. As has also been noted, the implementation of the expulsion may require “auxiliary measures”.⁸⁸⁷

(a) *Auxiliary measures in the return*

408. A number of steps must be taken to ensure the orderly return of the expelled person to the country of destination. Most expulsions are effected by air, and

international conventions on aviation contain specific provisions that may apply in certain situations or to certain persons, such as expellees. Annex 9 to the Convention on International Civil Aviation contains provisions related to inadmissible persons and deportees. Those provisions contain obligations for contracting States. The flight chosen by the expelling State must be, if possible, a direct non-stop flight. Prior to the flight, this State must inform the expellee of the State of destination. To ensure the security of the flight, the expelling State must determine whether the return journey is to be made with or without an escort. To that end, it must evaluate whether the physical and mental health of the person concerned permits return by air, whether the person agrees or refuses to be returned and whether he or she behaves or has behaved violently. The expelling State must provide this information, in addition to the names and nationalities of any escorts, to the operator in question.

409. The dignity of the alien subject to expulsion must be respected during the flight. In the case of flights with transit stops, the Convention on International Civil Aviation regime stipulates that contracting States shall ensure that the escort(s) remain(s) with the deportee to his or her final destination, unless suitable alternative arrangements are agreed, in advance of arrival, by the authorities and the operator involved at the transit location. States must also provide the necessary travel documents for their own nationals because if they refuse to do so, or otherwise oppose their return, they would render them stateless.⁸⁸⁸ The provisions of the Convention on Offences and Certain Other Acts Committed on Board Aircraft⁸⁸⁹ apply when a person, who may be an alien subject to expulsion, jeopardizes safety in flight by his actions.⁸⁹⁰ Pursuant to the Convention, when a person on board has committed or is preparing to commit an offence or act that could jeopardize the good order or safety of the aircraft or other travellers, the commander may impose upon such person measures of restraint so that good order and discipline are maintained on board.⁸⁹¹ He may also land the person concerned or deliver him to competent authorities.⁸⁹²

410. Before an aircraft with a person being expelled on board lands in the territory of a State, the commander must alert that State to the presence of such a person. Contracting States shall authorize and assist the commander of an aircraft registered in another contracting State to disembark such persons. Pursuant to its legislation on the admission of aliens, the contracting State in question may, however, refuse such persons entry into its territory.⁸⁹³

⁸⁸⁸ It should be noted that many illegal immigrants do not always make things easy. They travel without identity or travel (passport) documents and do not enable the expelling State to determine beyond any doubt their State of nationality, or they name a State they prefer but to which they have no nationality ties whatsoever, causing problems for the State in question which is then obliged to receive persons who are not its nationals and who do not meet the requirements for entry and stay in its territory.

⁸⁸⁹ On this Convention, see Richard, *La Convention de Tokyo: Étude de la Convention de Tokyo relative aux infractions et à certains autres actes survenant à bord des aéronefs*.

⁸⁹⁰ The Convention does not apply to aircraft used in military, customs and police services.

⁸⁹¹ Art. 6, para. 1.

⁸⁹² *Ibid.*

⁸⁹³ Art. 15, para. 2.

⁸⁸³ Principle 1, Twenty guidelines of the Committee of Ministers of the Council of Europe on forced return, 925th meeting, 4 May 2005, documents of the Committee of Ministers, CM(2005) 40 final, 9 May 2005.

⁸⁸⁴ Art. 6, para. 2. See footnote 669 above.

⁸⁸⁵ Recommendation No. 1547 (2002) (footnote 586 above), para. 7.

⁸⁸⁶ Twenty guidelines... (footnote 883 above), guideline No. 2. After the adoption of this decision, the Permanent Representative of the United Kingdom indicated that his Government reserved the right to comply or not with this guideline.

⁸⁸⁷ Ba, *Le droit international de l'expulsion des étrangers: une étude comparative de la pratique des États africains et de celle des États occidentaux*, p. 610.

411. Where the European Union is concerned, in 2002 the Council and the European Parliament adopted a regulation establishing common rules in the field of civil aviation security.⁸⁹⁴ This regulation provided for the development of security measures for potentially disruptive passengers, without defining disruption. In order to simplify, harmonize and clarify the established rules and to raise security levels, in 2006 the Council proposed to repeal that regulation.⁸⁹⁵ Without prejudice to the provisions of the Convention on Offences and Certain Other Acts Committed on Board Aircraft, the new text should also cover “security measures that apply on board an aircraft, or during a flight, of Community air carriers”.⁸⁹⁶ A “potentially disruptive passenger” is considered to be “a passenger who is either a deportee, a person deemed to be inadmissible for immigration reasons or a person in lawful custody”.⁸⁹⁷ It is specified that potentially disruptive passengers shall be subjected to appropriate security measures before departure.⁸⁹⁸

(b) *Respect for the fundamental rights of the expelled person during the return travel*

412. During travel to the State of destination, the fundamental rights and dignity of persons being expelled must be respected. Not infrequently, individuals die during return travel. In a report published on 10 September 2001, the Council of Europe’s Committee on Migration, Refugees and Demography referred to the violence and ill-treatment suffered by many aliens during their expulsion from European countries, as well as cases of death.⁸⁹⁹ Persons subject to expulsion have also been drugged and beaten.⁹⁰⁰ From 1998 to 2001, 10 aliens died during expulsion from Austria, Belgium, France, Germany, Italy and Switzerland⁹⁰¹ after such treatment. Alerted to the situation by NGOs, including Amnesty International, the Parliamentary Assembly of the Council of Europe drew the attention of the member States of the Council of Europe

to this situation.⁹⁰² Those serious incidents are apparently the result of the violent and dangerous methods used by the officials responsible for enforcing expulsions⁹⁰³ and by carriers. As the Parliamentary Assembly noted, aliens do not face the risk of ill-treatment only while awaiting expulsion.⁹⁰⁴ It may also occur during the implementation of the measure, in the course of transport by plane or boat, or on arrival in the State of destination.⁹⁰⁵ The European Court acknowledges the “immense difficulties faced by States in modern times in protecting their communities from terrorist violence”,⁹⁰⁶ but considers that recourse to physical force against a person suspected or accused of such an act must be “made strictly necessary” by his own conduct”.⁹⁰⁷ In 2001, the Commissioner for Human Rights recommended that “holding centre staff and immigration and expulsion officers must receive proper training so as to minimise the risk of violence”.⁹⁰⁸

413. The Parliamentary Assembly also noted that police and security forces are not normally trained to carry out these duties.⁹⁰⁹ In its opinion, members of escorts, in particular, should be informed of the coercive means that may be used. The Assembly proposed that the Committee of Ministers of the Council of Europe establish a working party to draw up guidelines for good conduct in the field of expulsion, as guidance for States with a view to the adoption of national standards in the field. The Committee of Ministers adopted 20 guidelines on forced return.⁹¹⁰ Though not opposed to the application of various forms of restraint to expellees, it finds acceptable only those that constitute responses “strictly proportionate ... to the actual ... resistance” of the returnee.⁹¹¹ These guidelines were prepared in co-operation with the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.⁹¹² The Committee recognizes that it is a “difficult task”⁹¹³ to enforce an expulsion order in respect of a foreign national and that the use of force is sometimes unavoidable. However, it believes that “the force used must be no more than is reasonably necessary. It would, in particular, be entirely unacceptable for

⁸⁹⁴ Regulation (EC) No. 2320/2002 of the European Parliament and of the Council of 16 December 2002 establishing common rules in the field of civil aviation security, *Official Journal of the European Communities*, No. L 335 of 30 December 2002, p. 1. This regulation was adopted in response to the criminal acts committed in the United States on 11 September 2001. It was amended by Regulation (EC) No. 849/2004 of the European Parliament and of the Council of 29 April 2004 amending Regulation (EC) No. 2320/2002 establishing common rules in the field of civil aviation security, *Official Journal of the European Union*, No. L 158 of 30 April 2004, p. 1, corrigendum to *Official Journal of the European Union*, No. L 229 of 29 June 2004, p. 3.

⁸⁹⁵ Common Position (EC) No. 3/2007, adopted by the Council on 11 December 2006 with a view to the adoption of a Regulation of the European Parliament and of the Council on common rules in the field of civil aviation security and repealing Regulation (EC) No. 2320/2002, *Official Journal of the European Union*, No. C 70E of 27 March 2007, p. 21.

⁸⁹⁶ Preamble paragraph 7.

⁸⁹⁷ Art. 3, para. 18.

⁸⁹⁸ For the rules related to transport in Europe see, for example, Gard, *L’Europe des transports*.

⁸⁹⁹ Committee on Migration, Refugees and Demography of the Council of Europe, report on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, 10 September 2001, document 9196.

⁹⁰⁰ Lambert, *The position of aliens in relation to the European Convention on Human Rights*, p. 31.

⁹⁰¹ Recommendation No. 1547 (2002) (footnote 586 above).

⁹⁰² *Ibid.* The analysis that follows, on the observations and proposals of the Parliamentary Assembly, is taken from the thesis of Ducroquetz (footnote 71 above), pp. 395 *et seq.*

⁹⁰³ In practice, special law enforcement agencies are responsible for preparing and carrying out expulsions: border police in France and Germany, foreign nationals police in Greece and the Netherlands, security forces in Austria (Committee on Migration, Refugees and Demography of the Council of Europe, document 9196 (footnote 899 above)).

⁹⁰⁴ Recommendation No. 1547 (2002) (footnote 586 above).

⁹⁰⁵ *Ibid.*

⁹⁰⁶ *Öcalan v. Turkey* (footnote 56 above), para. 218. In that case, the applicant was forcibly transferred by aircraft from Kenya to Turkey. During the flight, he was sedated, handcuffed and blindfolded.

⁹⁰⁷ ECHR, judgement of 4 December 1995, *Ribitsch v. Austria*, para. 38, *Series A*, No. 336, cited by Lambert (footnote 900 above), p. 31.

⁹⁰⁸ Recommendation of 19 September 2001 of the Commissioner for Human Rights of the Council of Europe concerning the right of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders, CommDH(2001)19, recommendation 16.

⁹⁰⁹ Recommendation No. 1547 (2002) (footnote 586 above).

⁹¹⁰ Twenty guidelines... (footnote 883 above).

⁹¹¹ *Ibid.*, guideline 19, para. 1.

⁹¹² Council of Europe, CPT/Inf(2005)17.

⁹¹³ Council of Europe, CPT/Inf(97)10, para. 36.

persons subject to an expulsion order to be physically assaulted as a form of persuasion to board a means of transport or as punishment for not having done so".⁹¹⁴ In the case of deportation by air, the Committee noted that a manifest risk of inhuman and degrading treatment exists both during "preparations for deportation and during the actual flight".⁹¹⁵ It said that risk arose from the moment the alien to be expelled was taken from the detention centre, because escorts sometimes used irritant gases or immobilized the person concerned in order to handcuff him. The Committee also noted that the risk arose when the alien, aboard the aircraft, refused to sit and struggled with escort staff. It recommended that escorts be "selected with the utmost care and receive appropriate, specific training designed to reduce the risk of ill-treatment to a minimum".⁹¹⁶ Furthermore, it invited States to establish control and/or surveillance systems for operations of forced deportation. In that connection, means of restraint used and incidents occurring should be recorded.⁹¹⁷

414. The Commissioner for Human Rights considered that the use of objects that could cause asphyxia—cushions, adhesive tape, gags, helmets—of dangerous gas, and of medicines or injections without a doctor's prescription must be prohibited.⁹¹⁸ The Commissioner also prohibited the use of handcuffs during take-off and landing in the case of deportations by air. In this connection, the Commission of the European Communities believes that even when the person concerned offers physical resistance, it must be possible to effect removal, and recognizes that it is sometimes necessary to resort to coercive measures.⁹¹⁹ However, it believes that they must have their limits, respecting the physical integrity and psychological condition of the alien. It has suggested the use of guidelines in the field of expulsion and escorts, and especially those of the International Air Transport Association/Control Authorities Working Group (IATA/CAWG).⁹²⁰ The goal of IATA was to provide States with a guide to best practice for expulsions conducted in deportation cases via commercial air services, having due regard for annex 9 of the Convention on International Civil Aviation. Rules are established for cooperation among operators and the States concerned.⁹²¹ Direct

flights are to be used whenever possible and, in the case of transit stops, it is recommended that escorts remain with the deportee and that delays be as short as possible.⁹²² In the interest of flight safety, the pilot, having been advised of the presence of one or more deportees and possibly an escort, may refuse to take deportees on board.⁹²³ The pilot must justify refusal based on objective reasons related to the behaviour of the passenger at the time of boarding or at a subsequent time.⁹²⁴

415. It is not just the dignity of the expelled person that must be respected. The safety of the other passengers must also be ensured while the removal of the alien in question is being carried out. In that regard, the Committee of Ministers of the Council of Europe has stated that "the safety of the other passengers, of the crew members and of the returnee himself/herself"⁹²⁵ should be guaranteed. The IATA/CAWG guidelines state that deportees requiring physical restraints should be boarded as discreetly as possible.⁹²⁶

416. As we have seen, the measures that need to be taken when transporting an expelled alien to the receiving State stem from either the Convention on International Civil Aviation and the Convention on Offences and Certain Other Acts Committed on Board Aircraft, or from proposals made in the Parliamentary Assembly of the Council of Europe, based on reports of human rights violations and violations of the rights of expelled persons during the course of their removal, particularly violations of their human dignity. The deficiencies that have been observed in that regard are sometimes very serious, in some cases resulting in the death of the persons concerned. The Special Rapporteur does not, however, consider that a specific draft article on the protection of the human rights of these persons during this stage of the deportation process needs to be drawn up, even in the name of progressive development. It seems to him that the necessary protection in these cases is afforded by the general obligation to treat the alien being expelled with dignity and protect his or her human rights, as contained in draft articles 8 and 9, which were first proposed in the fifth report on the expulsion of aliens,⁹²⁷ and subsequently referred by the Commission to the Drafting Committee as revised by the Special Rapporteur in Draft articles on protection of the human rights of persons who have been or are being expelled, as restructured by the Special Rapporteur, Mr. Maurice Kamto, in the light of the plenary debate during the first part of the sixty-first session.⁹²⁸ The implementation of this obligation may require, for example, the use of the aforementioned IATA/CAWG Guidelines on Deportation and Escort. However, the question that warrants the greatest attention, since this is the stage of expulsion at which violence against the persons concerned generally occurs, is that of a general draft article regarding the conditions of return to the receiving State

⁹¹⁴ *Ibid.*

⁹¹⁵ Council of Europe, CPT/Inf(2003)35, para. 31.

⁹¹⁶ *Ibid.*, para. 42.

⁹¹⁷ *Ibid.*, paras. 44 and 45.

⁹¹⁸ Recommendation of the Commissioner for Human Rights (footnote 908 above), recommendation 17.

⁹¹⁹ Communication from the Commission to the Council and the European Parliament on a community return policy on illegal residents, COM(2002) 564 final, 14 October 2002. See also art. 10, para. 1, of the proposal for a directive of the European Parliament and of the Council of 1 September 2005 on common standards and procedures in Member States (footnote 669 above). And, broadly, see Ducroquet (footnote 71 above), pp. 395–396.

⁹²⁰ IATA/CAWG, *Guidelines on Deportation and Escort*, October 1999, reviewed without change May 2003. The guidelines define deportee as a person who had legally been admitted to a State by its authorities or who had entered a State illegally, and who at some later time is formally ordered by the authorities to be removed from that State (para. 2.1).

⁹²¹ For example, the guidelines provide that the deporting State should provide to the operator the name, age, country of citizenship and State of destination of the deportee and the name and nationality of any escorts (*ibid.*, para. 3.4).

⁹²² *Ibid.*, paras. 3.6, 4.6 and 8.7.

⁹²³ *Ibid.*, paras. 1.2 and 3.10.

⁹²⁴ *Ibid.*, para. 8.5.

⁹²⁵ Twenty guidelines... (footnote 883 above).

⁹²⁶ *Guidelines on Deportation and Escort* (footnote 920 above), para. 6.4.

⁹²⁷ See footnote 2 above.

⁹²⁸ See footnote 3 above.

of expelled persons, containing a reference to the relevant international instruments, as proposed below:

“Draft article D1. Return to the receiving State of the alien being expelled

“1. The expelling State shall encourage the alien being expelled to comply with the expulsion decision voluntarily.

“2. In cases of forcible implementation of an expulsion decision, the expelling State shall take the necessary measures to ensure, as far as possible, the orderly transportation to the receiving State of the alien being expelled, in accordance with the rules of international law, in particular those relating to air travel.

“3. In all cases, the expelling State shall give the alien being expelled appropriate notice to prepare for his/

her departure, unless there is reason to believe that the alien in question could abscond during such a period.”

417. While the provisions of paragraphs 1 and 2 of this draft article have already been codified—in that they are derived from, in particular, the universal international instruments on air travel, including the IATA/CAWG Guidelines on Deportation and Escort—the provisions of paragraph 3 are part of the progressive development of international law. First, they demonstrate a concern for the protection of the rights of the person being expelled; in addition, they are backed up by Directive 2008/115/EC,⁹²⁹ although that Directive cannot be said to be well established in general international law.

⁹²⁹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *Official Journal of the European Union*, No. L 348 of 24 December 2008, p. 98.

CHAPTER V

Appeals against the expulsion decision

A. Basis in international law and domestic law

418. In the present report, the right of the alien being expelled to an effective review was mentioned briefly as one of the procedural guarantees, within the context of the broader right to submit reasons against the expulsion decision. This chapter will deal with the right of appeal in more detail, both to establish its basis in international law and in the domestic laws of States, and to look at its effectiveness against the expulsion decision and the avenues available to the alien for the full exercise of this right.

419. In the “draft regulations on the expulsion of aliens” introduced by Féraud-Giraud in 1891 at the Hamburg session of the Institute of International Law, the study commission set up to address the rights of admission and expulsion of aliens indicated that each State should determine the guarantees and appeals to which this measure is subject and cannot deny the right of direct action sufficient to satisfy just complaints, thereby divesting itself of its responsibility to satisfy those complaints, in accordance with international public law. The State can ensure that acts of expulsion are enforced by prosecuting and punishing expelled persons who contravene them, following which the expelled person shall be forced to leave the territory.⁹³⁰

420. In general, aliens facing expulsion can claim the benefit of the guarantees contained in international human rights instruments. In that regard, article 8 of the Universal Declaration of Human Rights provides:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

In the same way, article 13 of the European Convention on Human Rights provides:

⁹³⁰ “Droit d’admission et d’expulsion”, p. 279.

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

421. In the same way, the aforementioned article 13 of the International Covenant on Civil and Political Rights gives aliens lawfully in the expelling State a right to appeal the expulsion, although it does not specify the type of body that should hear the appeal. The Human Rights Committee has noted that the right of appeal and the other guarantees provided in article 13 can only be removed when “compelling reasons of national security” so require. It has also highlighted that the remedy available to the expelled alien should be effective:

An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when “compelling reasons of national security” so require.⁹³¹

422. During its consideration of the report of the Syrian Arab Republic in 2001, the Human Rights Committee specified that a protest lodged with the diplomatic or consular mission of the expelling State was not a satisfactory solution in terms of article 13 of the Covenant:

In the Committee’s opinion, the discretionary power of the Minister of the Interior to order the expulsion of any alien, without safeguards, if security and the public interest so require poses problems with regard to article 13 of the Covenant, particularly if the alien entered Syrian territory lawfully and has obtained a residence permit. Protests lodged by the expelled alien with Syrian diplomatic and consular missions abroad are not a satisfactory solution in terms of the Covenant.⁹³²

⁹³¹ A/41/40 (footnote 601 above), vol. I, annex VI, general comment No. 15: The Position of Aliens under the Covenant, 11 April 1986, para. 10. In *Eric Hammel v. Madagascar* (footnote 813 above), para. 19.2, the Committee found that the appellant had not been able to exercise an effective appeal against his expulsion.

⁹³² Concluding observations of the Human Rights Committee: Syrian Arab Republic, 5 April 2001, *Official Records of the General*

423. Article 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms states that “An alien lawfully resident in the territory of a State” shall be allowed “to have his case reviewed”. Likewise, article 83 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and article 9, paragraph 5, of the European Convention on the Legal Status of Migrant Workers also contain the requirement that there be a possibility of review of a decision on expulsion.

424. The right to a review procedure has also been recognized, in terms which are identical to those of article 13 of the International Covenant on Civil and Political Rights, by the General Assembly in article 7 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live:

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 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.⁹³³

425. In its general recommendation No. 30 (para. 371 above), the Committee on the Elimination of Racial Discrimination stressed the need for an effective remedy in case of expulsion and recommended that States parties to the International Convention on the Elimination of All Forms of Racial Discrimination

[e]nsure that ... non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies.⁹³⁴

426. As indicated above (para. 420), article 13 of the European Convention on Human Rights recognizes a right to an effective remedy with respect to a violation of any right or freedom set forth in the Convention. This provision, which is applicable if an expulsion violates any such right or freedom,⁹³⁵ states:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

According to the European Court of Human Rights, the effect of this article is “to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. However, article 13 does not go so far as to require any particular form of remedy”.⁹³⁶

Assembly, Fifty-sixth Session, Supplement No. 40, vol. I (A/56/40), para. 81 (22), p. 75.

⁹³³ See footnote 579 above.

⁹³⁴ See footnote 822 above. See also Concluding observations of the Committee on the Elimination of Racial Discrimination: France (footnote 821 above), para. 144 (recognizing the right of appeal).

⁹³⁵ However, the applicability of article 6 of the European Convention on Human Rights in cases of expulsion seems less clear; see Gaja (footnote 28 above), pp. 309–310.

⁹³⁶ *Chahal* case (footnote 602 above), para. 145.

427. The Council of Europe has specified that the remedy must be accessible, meaning that if the subject does not have sufficient means to pay for Counsel, he or she should be given it free of charge.⁹³⁷

428. With regard to the suspensive effect of an appeal, the Committee of Ministers of the Council of Europe has said that, if legislation does not provide for it, “a request to suspend the execution of any expulsion decision should be duly examined with regard to the necessities of national security”.⁹³⁸

429. The scope of review may be limited to the legality of the expulsion decision rather than the factual basis for the decision.⁹³⁹ In this regard, a distinction has been drawn between a hearing which deals with questions of fact and law and an appeal which may be limited to questions of law.⁹⁴⁰

430. With regard to the particular case of refugees, the Convention relating to the Status of Refugees sets forth certain procedural requirements for the expulsion of those lawfully present in the territory of a State, including (a) a decision reached in accordance with due process of law,⁹⁴¹ as we have already seen; (b) the right of the refugee to submit evidence to clear himself or herself; (c) an appeal before a competent authority; and (d) representation for purposes of the appeal. As we know, these procedural guarantees do not apply where “compelling reasons of national security” so require.⁹⁴²

431. The procedural guarantees listed above are discussed in Robinson’s commentary to the Convention. With regard to the refugee’s right to submit evidence to clear himself or herself, he writes:

He must furthermore be granted the right to appeal to and be represented by a counsel before the authority which, under domestic law is either called upon to hear such appeals or is the body superior to the one which has made the decision; if the decision is made by authorities from whose decision no appeal is permitted, a new hearing instead of appeal must be provided. The authority in question may assign officials to hear the presentation. However, these guarantees may be obviated by “compelling reasons of national security”, for instance, when a decision must be reached in the interests of national security in such a short time as does not permit the authority to allow the refugee the necessary time to collect evidence or to transport him to the required place, or where a hearing may be prejudiced to the interests of national security (for instance, in case of espionage). Since paragraph 2 speaks of “compelling” reasons, they must really

⁹³⁷ Twenty guidelines ... (footnote 883 above).

⁹³⁸ See footnote 748 above.

⁹³⁹ See Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 274 (quoting the *Neer* case, UNRIIAA, vol. IV, p. 60 (1926)).

⁹⁴⁰ *Ibid.*, p. 265.

⁹⁴¹ In the *Cesovic* case (footnote 250 above), an Australian court considered whether the term “due process” in article 32 should be interpreted in the light of United States jurisprudence. It held that “the definition of ‘due process’ would appear to be in accordance with the rest of the paragraph quoted [art. 32, para. 2], and in those circumstances ‘due process’ was accorded the plaintiff”. Thus, reference did not need to be made to external definitions of due process, when the text of the Convention provided an adequately precise definition of what the term meant in its context.

⁹⁴² “Being an exception, this provision is subject to restrictive interpretation” (Grahl-Madsen (footnote 489 above), commentary to art. 32, para. (8)).

be of a very serious nature and the exception to sentence one cannot be applied save very sparingly and in very unusual cases.⁹⁴³

432. In *Pagoaga Gallastegui v. Minister of the Interior*, the French Conseil d'Etat considered the right of a refugee who is subject to expulsion to be granted a hearing and a right of appeal under the relevant national legislation, as follows:

Independently of the right to appeal against the decision to make a deportation order, which is available in the circumstances envisaged in the Law of 25 July 1952, the refugee must be heard in advance of the decision to make the order by the Special Commission set up before the Prefect by Article 25 of the Ordinance of 2 November 1945. It follows from this that the decision to make a deportation order cannot normally be taken in accordance with the law save in compliance with the procedure set out in Article 3 of the Decree of 18 March 1946, as amended by the Decree of 27 December 1950. However, an exception is made to this rule by Article 25 of the Ordinance of 2 November 1945 in cases or circumstances of the utmost urgency which make it impossible to postpone the implementation of a deportation order until after the completion of the formalities envisaged in the foregoing legislative and regulatory provisions.⁹⁴⁴

433. As for asylum-seekers, in 1998, the Council of Europe's Committee of Ministers, having regard to the case law of the European Court of Human Rights in relation to article 13 in conjunction with article 3 of the European Convention on Human Rights, as it concerns rejected asylum-seekers who face expulsion, adopted a recommendation on the right of such asylum-seekers to an effective remedy.⁹⁴⁵ The Committee recommended that member States, while applying their own procedural rules, should ensure that a number of guarantees are complied with "in their legislation or practice",⁹⁴⁶ stating that "a remedy before a national authority is considered effective when ... the execution of the expulsion order is suspended" until that authority has taken a decision on the case brought by a rejected asylum-seeker who "presents an arguable claim that he or she would be subjected to torture or inhuman or degrading treatment or punishment".⁹⁴⁷ The Committee recalled that suspensive effect in 2005.⁹⁴⁸

434. The right of an alien to have an expulsion decision reviewed by a competent body has been recognized in treaty law, international jurisprudence, national law and literature.⁹⁴⁹ It has been suggested that this does not necessarily require review by a judicial body. It has also been suggested that the expulsion must be suspended pending the review procedure.⁹⁵⁰ It has further been suggested that

the alien must, as has already been noted, be informed of the right of review.⁹⁵¹

435. The requirement that the alien expelled be provided with a review procedure has also been stressed by the African Commission on Human and Peoples' Rights with respect to illegal immigrants (para. 183 above):

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 competent national courts as this is contrary to the spirit and letter of the Charter and international law.⁹⁵²

436. Similarly, in the *Amnesty International v. Zambia* case, the African Commission on Human and Peoples' Rights held that Zambia had violated the African Charter on Human and Peoples' Rights by not giving an individual the opportunity to challenge an expulsion order:

36. Zambia has contravened Article 7 of the Charter in that he was not allowed to pursue the administrative measures, which were opened to him in terms of the Citizenship Act.

...

38. John Lyson Chinula was in an even worse predicament. He was not given any opportunity to contest the deportation order. Surely, government cannot say that Chinula had gone underground in 1974 having overstayed his visiting permit. Chinula, by all account, was a prominent businessman and politician. If government wished to act against him they could have done so. That they did not, does not justify the arbitrary nature of the arrest and deportation on 31 August 1994. He was entitled to have his case heard in the Courts of Zambia. Zambia has violated Article 7 of the Charter.⁹⁵³

437. Recalling article 7, paragraph 1 (a), the Commission concluded:

53. The Zambia government by denying Mr. Chinula the opportunity to appeal his deportation order has deprived him of a right to fair hearing which contravenes all Zambian domestic laws and international human rights laws.⁹⁵⁴

438. The Parliamentary Assembly of the Council of Europe recommended that aliens expelled from the territory of a Member of the Council of Europe be entitled to a suspensive appeal which should be considered within three months from the date of the decision on expulsion:

With regard to expulsion:

...

2. any decision to expel a foreigner from the territory of a Council of Europe member State should be subject to a right of suspensive appeal;

3. if an appeal against expulsion is lodged, the appeal procedure shall be completed within three months of the original decision to expel.⁹⁵⁵

⁹⁵¹ See Nowak (footnote 792 above), p. 231 (citing, respectively, case Nos. 27/1978 (*Pinkney v. Canada*), paras. 6 and 12–16, and 319/1988 (*Cañón García*), para. 2.4).

⁹⁵² Communication No. 159/96 (footnote 427 above), para. 20.

⁹⁵³ Communication No. 212/98 (footnote 763 above).

⁹⁵⁴ *Ibid.*

⁹⁵⁵ Recommendation 1624 (2003) (footnote 751 above), para. 9. Moreover, the Parliamentary Assembly of the Council of Europe considered that the right to a review should also apply to illegal aliens (recommendation 769 (1975) on the legal status of aliens):

⁹⁴³ Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation*, p. 159. See also Grahl-Madsen (footnote 489 above), para. (7).

⁹⁴⁴ *Pagoaga Gallastegui v. Minister of the Interior*, France, Conseil d'État, 27 May 1977, ILR, vol. 74, pp. 430–444.

⁹⁴⁵ Recommendation No. R (1998) 13 of 18 September 1998 of the Committee of Ministers of the Council of Europe to Member States on the Right of Rejected Asylum Seekers to an Effective Remedy against Decisions on Expulsion in the context of Article 13 of the European Convention on Human Rights.

⁹⁴⁶ *Ibid.*, preamble.

⁹⁴⁷ *Ibid.*, paras. 1 and 2.

⁹⁴⁸ Twenty guidelines... (footnote 883 above).

⁹⁴⁹ See the memorandum by the Secretariat (footnote 18 above), paras. 658–687 and the references cited in the first footnote of para. 657; Sohn and Buergenthal (footnote 195 above), p. 91; Plender (footnote 191 above), p. 472; Borchard (footnote 75 above), pp. 50, 52 and 55.

⁹⁵⁰ See also Council of Europe, CPT/Inf (97) 10, 22 August 1997.

439. Similarly, article 3, paragraph 2, of the European Convention on Establishment provides:

Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority.

440. The right to challenge an expulsion has also been stressed by the Special Rapporteur on the rights of non-citizens of the Human Rights Commission, Davis Weissbrodt, even with respect to aliens suspected of terrorism:

Non-citizens suspected of terrorism should not be expelled without allowing them a legal opportunity to challenge their expulsion.⁹⁵⁶

441. The ILO pointed out that Ethiopia had denied some expelled workers the right to appeal to an independent body:

Turning to the issue of the right of appeal provided for in Article 4, the Committee notes that the existence of a right of appeal, while constituting a necessary condition for the application of the exception to the principle of the Convention, is not sufficient in itself. There must be an appeals body that is separate from the administrative or governmental authority and which offers a guarantee of objectivity and independence. This body must be competent to hear the reasons for the measures taken against the person in question and to afford him or her the opportunity to present his or her case in full. Noting the Government's statement that the deportees had the right to appeal to the Review Body of the Immigration Department, the Committee points out that this body forms part of the governmental authority. The Committee further notes that, while the Government of Ethiopia indicated that at least some of the individuals concerned appealed the deportation orders, no information was provided regarding the occurrence of the proceedings themselves or the outcomes. Accordingly, the Committee cannot conclude that the persons deported were provided the effective right of appeal within the meaning of Article 4 of the Convention.⁹⁵⁷

442. Attention may also be drawn to the relevant legislation of the European Union dealing with the expulsion of EU citizens as well as third country nationals. Regarding EU citizens, article 31 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 provides:

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member

State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

—where the expulsion decision is based on a previous judicial decision; or

—where the persons concerned have had previous access to judicial review; or

—where the expulsion decision is based on imperative grounds of public security under Article 28 (3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.⁹⁵⁸

443. Concerning third country nationals, mention can be made of Council Directive 2001/40/EC of 28 May 2001, whose article 4 provides:

The Member States shall ensure that the third country national concerned may, in accordance with the enforcing Member State's legislation, bring proceedings for a remedy against any measure referred to in Article 1 (2) [expulsion decision].⁹⁵⁹

In addition, article 12, paragraph 4, of Council Directive 2003/109/EC (para. 386 above) provides:

Where an expulsion decision has been adopted, a judicial redress procedure shall be available to the long-term resident in the Member State concerned.⁹⁶⁰

444. Doctrinally, the Institute of International Law pointed out, as early as in 1892, with respect to the expulsion of aliens, the desirability of a review procedure enabling the individual to appeal to an independent authority which should be competent to examine the legality of the expulsion. However, the Institute was of the view that an expulsion may be carried out provisionally notwithstanding an appeal and that no appeal needs to be granted to "aliens who, in times of war or when war is imminent, imperil the security of the State by their conduct" (art. 28, para. 10, of the rules adopted by the Institute):

Any individual whose expulsion is ordered has the right, if he or she claims to be a national or asserts that the expulsion contravenes a law or an international agreement that prohibits or expressly rules out expulsion, to appeal to a superior judicial or administrative court that rules in full independence from the government. Expulsion may, however, be effected provisionally, notwithstanding the appeal.⁹⁶¹

"9. An alien without a valid residence permit may be removed from the territory of a member [S]tate only on specified legal grounds which are other than political or religious. He shall have the right and the possibility of appealing to an independent appeal authority before being removed. It should be studied if also, or alternatively, he shall have the right to bring his case before a judge. He shall be informed of his rights. If he applies to a court or to a high administrative authority, no removal may take place as long as the case is pending;

"10. A person holding a valid residence permit may only be expelled from the territory of a member [S]tate in pursuance of a final court order."

⁹⁵⁶ Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Prevention of Discrimination, The rights of non-citizens, Final report of the Special Rapporteur (E/CN.4/Sub.2/2003/23), para. 28.

⁹⁵⁷ ILO, Report of the Committee set up to examine the representation alleging non-observance by Ethiopia of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Termination of Employment Convention, 1982 (No. 158), made under article 24 of the ILO Constitution by the National Confederation of Eritrean Workers (NCEW), document GB.279/18/2, 2000, para. 50.

⁹⁵⁸ See footnote 131 above.

⁹⁵⁹ *Official Journal of the European Communities*, No. L 149, 2 June 2001, p. 34.

⁹⁶⁰ See footnote 850 above.

⁹⁶¹ "Règles internationales..." , art. 21.

445. National laws⁹⁶² differ as to whether they permit⁹⁶³ or do not permit⁹⁶⁴ review of a decision on expulsion. A State may likewise allow a motion to reopen or reconsider the relevant decision,⁹⁶⁵ including with respect to a new claim of protected status;⁹⁶⁶ expressly grant the Government a right of appeal;⁹⁶⁷ prohibit an appeal or certain forms of relief from deportation when the expelled alien threatens the public order or national security of the State, or is allegedly involved in terrorism;⁹⁶⁸ allow certain appeals to be raised only by aliens located outside the State;⁹⁶⁹ confer a right of appeal specifically on permanent residents⁹⁷⁰ or protected persons;⁹⁷¹ or reserve review to

⁹⁶² The following analysis of national legislation and case law draws on paragraphs 680–687 of the memorandum by the Secretariat (footnote 18 above).

⁹⁶³ Argentina, 2004 Act, arts. 74–75, 77–81, 84–85; Australia, 1958 Act, art. 202 (2) (c), (3) (c); Belarus, 1999 Council Decision, art. 20, 1998 Law, arts. 15, 29; Bosnia and Herzegovina, 2003 Law, arts. 8 (2), 21 (2), 62 (5), 76 (6); Canada, 2001 Act, arts. 63 (2)–(3), (5), 64, 66–67, 72–74; Chile, 1975 Decree, art. 90; Czech Republic, 1999 Act, sect. 172; France, Code, arts. L213-2, L513-3, L514-1 (2), L524-2, L524-4, L555-3; Greece, 2001 Law, art. 44 (5); Guatemala, 1986 Decree-Law, art. 131; Hungary, 2001 Act, art. 42 (1); Iran (Islamic Republic of), 1931 Act, art. 12, 1973 Regulation, art. 16; Italy, 2005 Law, art. 3 (4), (5), 1998 Decree-Law No. 286, arts. 13 (3), (5*bis*), (8), (11), 13 *bis* (1), (4), 14 (6), 1998 Law No. 40, art. 11 (8)–(11), 1996 Decree-Law, art. 7 (1), (3); Japan, 1951 Order, arts. 10 (9)–(10), 11 (1), 48 (8)–(9), 49; Lithuania, 2004 Law, art. 136; Malaysia, 1959–1963 Act, arts. 9 (8), 33 (2); Nigeria, 1963 Act, art. 21 (2); Panama, 1960 Decree-Law, art. 86 (1)–(2); Portugal, 1998 Decree-Law, arts. 22 (2), 23, 121; Republic of Korea, 1992 Act, art. 60 (1), 1993 Decree, arts. 74, 75 (1); South Africa, 2002 Act, art. 8 (1)–(2); Spain, 2000 Law, art. 26 (2); Sweden, 1989 Act, sects. 7.1–7.8, 7.11–7.18; Switzerland, 1949 Regulation, art. 20 (2), 1931 Federal Law, art. 20; United States, Immigration and Nationality Act, sects. 210 (e) (3), 235 (b) (3), 238 (a) (3) (A), (b) (3), (c) (3), 242 (a) (1), (5), (b) (9), (c)–(g), 505. Such a right may be conferred specifically when: the alien allegedly poses a national security threat (Australia, 1958 Act, art. 202 (2) (c), (3) (c); Italy, 2005 Law, art. 3 (4), (5); United States, Immigration and Nationality Act, sect. 505); the decision concerns the alien's claimed protected status (Bosnia and Herzegovina, 2003 Law, art. 76 (6); and Sweden, 1989 Act, sects. 7.4–7.5); or the appealed decision is a denial of the expelled alien's request to re-enter the State (Belarus, 1998 Law, art. 29; and France, Code, art. L524-2).

⁹⁶⁴ Bosnia and Herzegovina, 2003 Law, arts. 28 (2), 44 (1), 49 (3), 71 (6), 78 (1), 84 (2); Canada, 2001 Act, art. 64; Malaysia, 1959–1963 Act, art. 33 (2); Nigeria, 1963 Act, art. 30 (2); United States, Immigration and Nationality Act, sect. 242 (a) (2)–(3). Review of the expulsion decision is specifically ruled out when that decision involves the recognition of protected status or the granting of a permit on humanitarian grounds (Bosnia and Herzegovina, 2003 Law, arts. 49 (3), 78 (1), 84 (2)). It may likewise be established when certain grounds exist for the alien's expulsion or refusal of entry (Canada, 2001 Act, art. 64; and Malaysia, 1959–1963 Act, art. 33 (2)).

⁹⁶⁵ Brazil, 1980 Law, art. 71; Guatemala, 1986 Decree-Law, art. 130; United States, Immigration and Nationality Act, sect. 240 (b) (5) (C)–(D), (c) (6)–(7).

⁹⁶⁶ United States, Immigration and Nationality Act, sect. 240 (c) (6)–(7).

⁹⁶⁷ Canada, 2001 Act, arts. 63 (4), 70 (1)–(2), 73; Switzerland, 1931 Federal Law, art. 20 (2); United States, Immigration and Nationality Act, sects. 235 (b) (3), 238 (c) (3) (A) (i), 505 (c). Such a right may be specifically granted with respect to claims of protected status (Canada, 2001 Act, art. 73), or to actions concerning aliens alleged to be involved in terrorism (United States, Immigration and Nationality Act, sect. 505 (c) (1)).

⁹⁶⁸ Canada, 2001 Act, art. 64 (1); United States, Immigration and Nationality Act, sects. 242 (a) (1) (B) (ii), 504 (k).

⁹⁶⁹ Argentina, 2004 Act, art. 35; France, Code, art. L524-3. Such an appeal may include a request that the prohibition on the alien's re-entry be lifted (France, Code, arts. L541-2, L541-4).

⁹⁷⁰ Canada, 2001 Act, art. 63 (2).

⁹⁷¹ *Ibid.*, art. 63 (3).

a domestic court, including with respect to claims raised under the terms of international conventions.⁹⁷²

446. A State may require that a decision inform the alien about any available rights of appeal.⁹⁷³ The period for seeking review may begin when the expulsion decision is taken,⁹⁷⁴ or when notice or the decision's reasoning is provided.⁹⁷⁵ A State may or may not⁹⁷⁶ stay execution of the decision during the pendency of the appeal.⁹⁷⁷ A State may grant a stay when the alien has been or is likely to be expelled;⁹⁷⁸ or upon the request of a relevant international body unless there are extraordinary reasons not to issue the stay.⁹⁷⁹ A State may imprison an official for deporting an alien unless a final and binding decision has been taken to expel the alien.⁹⁸⁰ A State may establish that if no review decision has been taken by a given deadline, the appeal may be considered to have been tacitly rejected.⁹⁸¹

447. The scope of review in relevant situations may be limited to due process and reasonableness;⁹⁸² whether the challenged decision is wrong in law, fact or both,⁹⁸³ whether natural justice has been observed;⁹⁸⁴ the objection's reasonableness⁹⁸⁵ or well-groundedness,⁹⁸⁶ or abuse of discretion or whether the decision's conclusions are manifestly

⁹⁷² United States, Immigration and Nationality Act, sect. 242 (a) (4)–(5).

⁹⁷³ Bosnia and Herzegovina, 2003 Law, arts. 8 (2), 76 (6); France, Code, art. L213-2; Japan, 1951 Order, arts. 10 (9), 48 (8); Portugal, 1998 Decree-Law, arts. 22 (2), 120 (2); Republic of Korea, 1993 Decree, art. 74; Spain, 2000 Law, arts. 26 (2), 57 (9); Switzerland, 1931 Federal Law, art. 19 (2). Such a requirement may be imposed specifically with respect to claims of protected status (Bosnia and Herzegovina, 2003 Law, art. 76 (6)).

⁹⁷⁴ Argentina, 2004 Act, art. 35; United States, Immigration and Nationality Act, sects. 238 (b) (3), 240 (b) (1).

⁹⁷⁵ Argentina, 2004 Act, arts. 75, 84; Belarus, 1998 Law, art. 15; Bosnia and Herzegovina, 2003 Law, arts. 21 (2), 43 (1), 62 (5), 70 (1); Canada, 2001 Act, arts. 72 (2) (b), 169 (f); Hungary, 2001 Act, art. 42 (1); Iran (Islamic Republic of), 1973 Regulation, art. 16; and Panama, 1960 Decree-Law, art. 86.

⁹⁷⁶ Argentina, 2004 Act, art. 82; Belarus, 1999 Council Decision, art. 20, 1998 Law, art. 31; Bosnia and Herzegovina, 2003 Law, arts. 43 (2), 44 (2), 49 (4), 58 (1), 78 (2), 84 (3)–(4); Canada, 2001 Act, arts. 49 (1), 68, 70 (1)–(2); Chile, 1975 Decree, art. 90; France, Code, art. L513-3; Iran (Islamic Republic of), 1931 Act, art. 12; Italy, 1998 Decree-Law No. 286, art. 16 (7); Japan, 1951 Order, arts. 11 (1), 49 (1); Malaysia, 1959–1963 Act, art. 33; Nigeria, 1963 Act, art. 21 (2); Panama, 1960 Decree-Law, art. 87; Republic of Korea, 1992 Act, art. 60 (1); South Africa, 2002 Act, art. 8 (2) (b); Sweden, 1989 Act, sects. 8.10, 11.4; United States, Immigration and Nationality Act, sects. 101 (a) (47) (B), 242 (f). A stay may be entered subject to conditions (Canada, 2001 Act, art. 68; France, Code, art. L513-3; Iran (Islamic Republic of), 1931 Act, art. 12; United States, Immigration and Nationality Act, sect. 242 (f)). A refusal of the requested stay may entail the dismissal of the related appeal (Canada, 2001 Act, art. 69 (1)).

⁹⁷⁷ Bosnia and Herzegovina, 2003 Law, arts. 21 (3), 62 (6), 70 (2); Czech Republic, 1999 Act, sect. 172 (4); Italy, 2005 Law, art. 3 (4)–(4*bis*), 1998 Decree-Law No. 286, art. 13 (5*bis*); South Africa, 2002 Act, art. 8 (2) (a); Sweden, 1989 Act, sects. 8.7–9. Such a prohibition may be imposed specifically when the alien is allegedly involved in terrorism (Italy, 2005 Law, art. 3 (4)–(4*bis*)).

⁹⁷⁸ Australia, 1958 Act, arts. 151, 153.

⁹⁷⁹ Sweden, 1989 Act, sect. 8.10a.

⁹⁸⁰ Paraguay, 1996 Law, arts. 108, 110.

⁹⁸¹ Argentina, 2004 Act, art. 76.

⁹⁸² *Ibid.*, art. 89.

⁹⁸³ Canada, 2001 Act, art. 67 (1) (a).

⁹⁸⁴ *Ibid.*, arts. 67 (1) (b), 71.

⁹⁸⁵ Japan, 1951 Order, arts. 11 (3), 49 (3).

⁹⁸⁶ Republic of Korea, 1992 Act, art. 60 (3).

contrary to law or the clear and convincing facts in the record.⁹⁸⁷ When the alien is alleged to be involved in terrorism, a court may conduct a *de novo* review of the legal issues and apply a “clearly erroneous” standard in reviewing the facts.⁹⁸⁸ A State may limit the scope of review if the alien has already departed the State.⁹⁸⁹ A State may limit the reviewing body’s right to apply humanitarian considerations unless the alien is specifically eligible for such treatment.⁹⁹⁰ Furthermore, a State may expressly allow an expulsion decision to remain in force if no new circumstances are thereafter presented during the alien’s prohibition from the State’s territory.⁹⁹¹

448. Numerous national courts have recognized the right to a review procedure for a decision on expulsion.⁹⁹² The Supreme Court of the United States, in the case of *St. Cyr*, held that the right of an alien to appeal an expulsion order was protected by the United States Constitution, and that a deportation Statute should not be interpreted to deny such a right:

Article I, §9, cl. 2, of the Constitution provides: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it”. Because of that Clause, some “judicial intervention in deportation cases” is unquestionably “required by the Constitution”. *Heikkila v. Barber*, 345 U.S. 229, 235 (1953) ...

It necessarily follows that a serious Suspension Clause issue would be presented if we were to accept the INS’s submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise ... Moreover, to conclude that the writ is no longer available in this context would represent a departure from historical practice in immigration law.⁹⁹³

449. Some national courts have noted, however, that the scope of such review is often limited. For instance, in the United Kingdom:

The adjudicator hearing the appeal is required by section 19 (1) to allow the appeal if he considers that the decision was “not in accordance with the law or with any immigration rules applicable to the case” or, where the decision involved the exercise of a discretion by the Secretary of State, “that the discretion should have been exercised differently”. Otherwise, the appeals must be dismissed.⁹⁹⁴

450. In some national systems, the scope of judicial review over expulsion decisions is further limited when the decision is based on grounds of national security or public order.⁹⁹⁵ However, in the United Kingdom, an exclusion of the right

to appeal when an expulsion was based on national security was removed in response to the *Chahal* ruling of the European Court of Human Rights.⁹⁹⁶

451. The submission of an individual appeal against an expulsion order is therefore clearly established under international law, particularly since the end of the Second World War and the subsequent creation of various institutions for the protection of human rights. The Special Rapporteur believes it now has the force of customary law.⁹⁹⁷

B. Impact of judicial review on expulsion decisions

1. TIME FRAME FOR REVIEWING AN APPEAL

452. A court before which an appeal for annulment of an expulsion order has been filed must take a decision speedily in order to deliver its judgement swiftly. This “short period” is determined on a case-by-case basis, in the light of the circumstances of each case.⁹⁹⁸ In the *Sanchez-Reisse* case, the European Court of Human Rights held that the obligation to take decisions speedily had been violated when the judge took 46 days to rule on the legality of a detention imposed as part of extradition proceedings.⁹⁹⁹ Most often, courts make rulings not on the formal validity of the detention order, but on the “lawfulness of detention pending expulsion”.¹⁰⁰⁰ Nevertheless, there is no legal provision that allows national courts to review administrative decisions to expel certain aliens from the national territory, particularly when the issues of national security and public order are in question.

2. SUSPENSIVE EFFECT OF REMEDIES

453. In 1892, the Institute of International Law suggested that “expulsion may be carried out provisionally, notwithstanding an appeal”.¹⁰⁰¹ As a general rule, the fact that a remedy is effective does not imply that it has suspensive effect. However, article 22, paragraph 4, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that, pending review of an appeal against an expulsion decision, “the person concerned shall have the right to seek a stay of the decision of expulsion”. Both the European Commission of Human Rights and the European Court of Human Rights consider that a remedy is effective within the meaning of this article only when it is suspensive. In that case, the suspension of the expulsion decision does not need to relate directly to the risk of torture or other ill-treatment that the alien subject to the measure may face if

⁹⁸⁷ United States, Immigration and Nationality Act, sects. 210 (e) (3) (B), 240 (b) (4) (C)–(D).

⁹⁸⁸ *Ibid.*, sect. 505 (a) (3), (c) (4) (C)–(D).

⁹⁸⁹ Austria, 2005 Act, art. 3.57.

⁹⁹⁰ Canada, 2001 Act, arts. 65, 67 (1) (c).

⁹⁹¹ Poland, 2003 Act No. 1775, art. 21 (1) (7).

⁹⁹² See the national case law of Belgium, Brazil, Canada, the Russian Federation and the United States referred to in relation to this matter in the memorandum by the Secretariat (footnote 18 above), footnote 1599.

⁹⁹³ *Immigration and Naturalization Service v. St. Cyr*, No. 00-767, 533 U.S. 289 (2001), pp. 300 and 305.

⁹⁹⁴ *Secretary of State for the Home Department v. Rehman*, ILR, vol. 124, p. 540, para. 34 (Lord Hoffman).

⁹⁹⁵ See, for instance, the case of *Rehman* (preceding footnote): “On the other hand, §4 provided as follows: ‘This procedure shall not be applicable if the expulsion order is based on reasons connected with public order or national security, of which the Minister for the Interior or préfets of frontier départements shall be the sole judges’”) *In re Salom*, France, Conseil d’État (footnote 167 above)).

⁹⁹⁶ *Rehman* case (footnote 994 above), pp. 531–532.

⁹⁹⁷ On the value of the obligation to afford judicial protection, see *Ba* (footnote 887 above), pp. 561–565.

⁹⁹⁸ ECHR, *Winterwerp v. The Netherlands*, application No. 6301/73, judgement of 24 October 1979, *Series A*, No. 33, para. 60. In the *Sanchez-Reisse* case (footnote 999 below), the Court recognized that the proceedings could be entirely in written form.

⁹⁹⁹ ECHR, *Sanchez-Reisse v. Switzerland*, application No. 9862/82, judgement of 21 October 1986, *Series A*, No. 107.

¹⁰⁰⁰ Sudre, “*Le contrôle des mesures d’expulsion et d’extradition par les organes de la Convention européenne de sauvegarde des droits de l’homme*”, p. 257.

¹⁰⁰¹ “*Règles internationales...*”, art. 21, para. 2.

the decision is executed.¹⁰⁰² Consequently, as soon as a remedy is sought against an expulsion decision, the execution of that decision must be suspended pending a ruling by the national court from which the remedy has been sought.¹⁰⁰³ This is all the more necessary when the applicant subject to the expulsion decision is an asylum seeker, since the greatest risk for such an applicant is that of being subjected to ill-treatment in the receiving State. In the *Chahal* judgement, article 13 of the European Convention on Human Rights being applicable and the claim under article 3 being arguable, the European Court of Human Rights had stated that “given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised ... the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3”.¹⁰⁰⁴ The Court added, in the case of *Jabari*, that “the notion of an effective remedy under Article 13 requires ... the possibility of suspending the implementation of the [expulsion order decision]”.¹⁰⁰⁵

454. In 2001, the Commissioner for Human Rights advised the States members of the Council of Europe:

It is essential that the right of judicial remedy within the meaning of Article 13 of the [Convention] be not only guaranteed in law but also granted in practice when a person alleges that the competent authorities have contravened or are likely to contravene a right guaranteed by the [Convention]. The right of effective remedy must be guaranteed to anyone wishing to challenge a *refoulement* or expulsion order. It must be capable of suspending enforcement of an expulsion order, at least where contravention of Articles 2 or 3 of the [Convention] is alleged.¹⁰⁰⁶

455. In its *Čonka* judgement of 5 February 2002, the European Court of Human Rights recalled that “the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible”¹⁰⁰⁷ and that “it is [consequently] inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether

they are compatible with the Convention”.¹⁰⁰⁸ It then affirmed that, although the States parties to the Convention are free to decide the manner in which they conform to their obligations under article 13:

It is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has ... to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion.¹⁰⁰⁹

456. The effectiveness of remedies can be ensured only if the appeals filed by aliens threatened with expulsion produce a suspensive effect on the expulsion measures. This is not an automatic suspensive effect, but rather an effect that purports to ensure that the proceedings are fully effective and enables the sometimes disastrous consequences of an expulsion that is recognized as illegal by a national or international court to be averted. In its 2005 *Mamatkulov* judgement, the European Court of Human Rights stressed in more general terms “the importance of having remedies with suspensive effect ... in deportation or extradition proceedings”.¹⁰¹⁰

457. It is clear that the suspensive effect of a remedy against an expulsion decision is really recognized only in the context of the interpretation of article 13 of the European Convention on Human Rights. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families merely gives a migrant worker subject to expulsion the right to request a stay of the decision of expulsion; it does not specify that such a request should have a suspensive effect. Even the literature does not appear favourable to such an effect, as demonstrated in particular by the position long held by the Institute of International Law. Furthermore, the balance that needs to exist between the State’s right to expel an alien and the right of the alien in question to have his or her human rights respected would be upset if the principle of the suspensive effect of a remedy were to be recognized. The formulation of a general rule regarding the suspensive effect of a remedy against an expulsion decision would in effect allow the action of the expelling State to be blocked, something that, for most States, would be particularly hard to accept in cases where an expulsion decision had been issued on the grounds of public order, or even more so, of national security. For all these reasons, the Special Rapporteur doubts whether the proposal for a draft article on this issue is justified.

C. Remedies against a judicial expulsion decision

458. A judicial expulsion decision is a court sentence that results in the removal of the alien from the territory in question and prevents him or her from returning to that territory for a certain period of time. This sentence is either passed as the primary penalty or as an accessory penalty accompanying a prison sentence and/or a fine.

¹⁰⁰² Sarolea, “Les droits procéduraux du demandeur d’asile au sens des articles 6 et 13 de la Convention européenne des droits de l’homme”, pp. 136–140.

¹⁰⁰³ The European Court of Human Rights has long imposed this rule only in cases where article 13 has been invoked in support of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See, for example, with regard to article 3, European Commission of Human Rights, decision of 27 February 1991, *A. v. France*, application No. 17262/90, *Decisions and Reports*, vol. 68, p. 330. In order to note the distinction between this article and others in respect of which the remedy is not required to have suspensive effect, see, regarding an alleged breach of article 8 of the European Convention on Human Rights not accepted by the Court: ECHR, *Klass and Others v. Germany, Judgment (Merits)*, 6 September 1978, application No. 5029/71, judgement of 6 September 1978, *Series A*, No. 28.

¹⁰⁰⁴ *Chahal* case (footnote 602 above), para. 151.

¹⁰⁰⁵ ECHR, *Jabari v. Turkey*, application No. 40035/98, judgement of 11 July 2000, *Reports of Judgments and Decisions 2000-VIII*, para. 50. The case concerned an Iranian national who contended that expulsion to her State of origin would expose her to ill-treatment prohibited under article 3 of the European Convention on Human Rights.

¹⁰⁰⁶ Recommendation of the Commissioner for Human Rights (footnote 908 above), recommendation 11.

¹⁰⁰⁷ ECHR, *Čonka v. Belgium*, application No. 51564/99, judgement of 5 February 2002, *Reports of Judgments and Decisions 2002-I*, para. 79.

¹⁰⁰⁸ *Ibid.*

¹⁰⁰⁹ *Ibid.*, para. 82.

¹⁰¹⁰ ECHR, *Mamatkulov and Askarov v. Turkey*, application Nos. 46827/99 and 46951/99, judgement of 4 February 2005, *Reports of Judgments and Decisions 2005-I*, para. 124.

A judicial expulsion decision in fact generally accompanies a sentence passed against an alien who has committed any offence in the expelling State.

459. The right to appeal a judicial expulsion decision exists in the legislation of many States. In France, for example, there are three types of remedy against a judicial expulsion decision:

(a) An alien subject to a judicial expulsion decision may lodge an appeal with the registry of the Court of Appeal within two months of receiving notification of the decision;

(b) An alien subject to a judicial expulsion decision may also apply to have the decision lifted by filing a request with the criminal court (Correctional Court or Court of Appeal) that issued the expulsion decision. However, such an application is admissible only if expulsion is not the primary penalty. The application must be submitted by mail or through a lawyer and may not be made until six months after sentencing;

(c) Presidential pardon: if the application to have the expulsion decision lifted is rejected by the court to which it was submitted, the alien still has the possibility of requesting a pardon from the President of the Republic.

460. In Switzerland, where the great majority of foreign prisoners are subject to an expulsion decision,¹⁰¹¹ article 55 of the previous Penal Code provided: "A judge may expel from Swiss territory, for a term of 3 to 15 years, any alien sentenced to penal servitude or a prison term. In the event of a subsequent conviction, the alien may be expelled for life." However, this form of expulsion has been removed from the new Penal Code that came into force on 1 January 2007. Nonetheless, article 10, paragraph 1 (a), of the Federal Law of 26 March 1931 on residence and settlement by foreign nationals still provides that an alien may be expelled from Switzerland or a canton by the authorities responsible for the control of aliens (art. 15) if the alien has been

convicted by a judicial authority for an indictable offence. A remedy against a judicial expulsion decision may be sought from a regional court of human rights once domestic remedies have been exhausted. In *Emre v. Switzerland*, the European Court of Human Rights states in the facts of the case that

on 13 August 2002, the Neuchâtel district court sentenced [the individual] to a fixed prison term of five months for rioting and violation of weapons legislation, offences committed on 5 March 2000. The suspension of sentence passed on 10 November 1999 was also revoked. Furthermore, the court ordered the individual's expulsion from Swiss territory, without deferment, for a period of seven years. This sentence was confirmed on 6 March 2003 by the Court of Criminal Cassation of the canton of Neuchâtel.¹⁰¹²

The district court and the Court of Criminal Cassation of the canton of Neuchâtel had ordered the applicant's expulsion for a period of seven years, while the administrative expulsion decision did not specify any time limit. However, since the appeal was directed against the administrative expulsion decision and not the judicial expulsion decision, the Court did not rule on the term of the expulsion, which amounted to double punishment.

461. Clearly, there is no basis in international law for establishing any rule regarding remedies against an expulsion decision, even as part of progressive development. Admittedly, European human rights law does underline the need for a right of appeal against an expulsion decision. But in general, the issue falls clearly within the scope of the domestic legislation of States, and it is hard to see how a generally applicable rule could be established under international law regarding a matter in respect of which, as has been demonstrated, national legislation varies so much. Even if a comprehensive study of all national legislations were available and revealed a dominant trend, it would not seem appropriate for international law to interfere in what is strictly a matter for the legal proceedings of each individual State, each State being best placed to determine whether such proceedings are appropriate. The right to appeal an expulsion decision must be understood as it has been established by international human rights jurisprudence. No specific rule is therefore required.

¹⁰¹¹ Montero Pérez de Tudela, "L'expulsion judiciaire des étrangers en Suisse: La récidive et autres facteurs liés à ce phénomène".

¹⁰¹² ECHR, *Emre v. Switzerland*, application No. 42034/04, judgment of 28 May 2008, para. 11.

CHAPTER VI

Relations between the expelling State and the transit and receiving States

462. Cooperation is needed between the expelling State, the receiving States, and in some cases the transit States, in order for the expulsion order to be fully executed. This cooperation generally involves the signature of bilateral agreements between the States concerned. In that regard, the European Union has developed a system of administrative and technical cooperation among its member States, as will be described below, with a view to facilitating the execution of expulsion orders. Several directives have been adopted to that end, purporting in particular to ensure that a decision to expel an alien from the territory of one member State is recognized by the other States.

A. Freedom to receive or to deny entry to the expelled alien

1. PRINCIPLE

463. In the *Ben Tillett* case, the Arbitral Tribunal expressly recognized, as noted previously, the right of a State to deny entry to an alien who, based on its sovereign appreciation of the facts, appears to represent a threat to national security:

Whereas one may not contest the State's authority to ban from its territory aliens when it considers their activities or presence would compromise its security;

Whereas it also understands in the fullness of its sovereignty the implication of the facts underlying this ban.¹⁰¹³

464. The European Court of Human Rights has also stated, in various cases, that the right of States to control the entry of aliens into their territory is a well-established principle of international law:

...Contracting States' concern to maintain public order, in particular in exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens.¹⁰¹⁴

465. As early as 1891, the Supreme Court of the United States had ruled that, under international law, every sovereign nation had the power to decide which aliens to admit to its territory and under what conditions:

It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.¹⁰¹⁵

466. In 1906, in Canada, the right of a State to decide whether to admit aliens, even those who are nationals of friendly States, was recognized by the Judicial Committee of the Privy Council (predecessor of the Supreme Court) in the *Cain* case:

One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests.¹⁰¹⁶

2. LIMITATION: THE RIGHT OF ANY PERSON TO RETURN TO HIS OR HER OWN COUNTRY

(a) General rule

467. As early as 1892, the Institute of International Law had expressed the idea that a State could not refuse access to its territory by its former nationals, including those who had become stateless persons. Article 2 of the *Règles internationales sur l'admission et l'expulsion des étrangers* provides as follows:

In principle, a State may not prohibit either its nationals or persons who are no longer nationals of that State but have not acquired

the nationality of any other State from entering or remaining in its territory.¹⁰¹⁷

468. As is well-known, the right of any person to enter or return to his or her own country is now enshrined in the main universal human rights instruments, in particular the Universal Declaration of Human Rights,¹⁰¹⁸ the International Covenant on Civil and Political Rights¹⁰¹⁹ and the African Charter on Human and Peoples' Rights.¹⁰²⁰ This right is also enshrined with regard to the State of nationality in Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended by Protocol No. 11,¹⁰²¹ and in the American Convention on Human Rights.¹⁰²²

469. The Human Rights Committee has considered the meaning of the phrase "his own country" contained in article 12, paragraph 4, of the International Covenant on Civil and Political Rights. In its general comment No. 27, it indicated that the meaning of that phrase was broader than that of "country of nationality", since it included cases where an individual, although not a national of the country in question, had "close and enduring connections" with it.¹⁰²³

20. The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country". The scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law

...

21. In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.¹⁰²⁴

¹⁰¹³ See footnote 593 above.

¹⁰¹⁴ *Moustaquim v. Belgium*, application No. 12313/86, judgement of 18 February 1991, *Series A*, No. 193, para. 43. See also *Vilvarajah and Others v. the United Kingdom*, judgement of 30 October 1991, *Series A*, No. 215, para. 102; *Chahal* (footnote 602 above), para. 73; *Ahmed v. Austria*, judgement of 17 December 1996, application No. 25964/94, *Reports of Judgments and Decisions*, 1996-VI, para. 38; *Bouchelkia v. France*, ECHR, judgement of 29 January 1997, *Reports of Judgments and Decisions*, 1997-I, para. 48; and *H. L. R. v. France*, application No. 24573/94, judgement of 29 April 1997, *Reports of Judgments and Decisions*, 1997-III, para. 33.

¹⁰¹⁵ *Nishimura Ekiu v. United States et al.*, 142 U.S. 651 (1892). See also *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), at 603, 604 ("Jurisdiction over its own territory to that extent [to exclude aliens] is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.").

¹⁰¹⁶ *Attorney-General for the Dominion of Canada and Everett E. Cain*, *The Law Reports*, 1906, A.C. 542, p. 546.

¹⁰¹⁷ "Règles internationales...".

¹⁰¹⁸ Art. 13, para. 2.

¹⁰¹⁹ Art. 12, para. 4.

¹⁰²⁰ Art. 12, para. 2.

¹⁰²¹ Art. 3, para. 2. According to the Court of Justice of the European Communities: "It is a principle of international law ... that a State is precluded from refusing its own nationals the right of entry or residence" (*Van Duyn* case (footnote 148 above), para. 22). (This case concerned freedom of movement rather than expulsion.)

¹⁰²² Art. 22, para. 5.

¹⁰²³ Hannum, *The Right to Leave and Return in International Law and Practice*, pp. 62 and 63.

¹⁰²⁴ Report of the Human Rights Committee, A/55/40 (footnote 823 above), annex VI, general comment No. 27: Freedom of movement (Art. 12), paras. 20 and 21.

470. The question is whether the former State of nationality has a duty to admit its former nationals. The right of a person to return to his or her own country under the relevant human rights instruments may, as has been seen, be broadly interpreted to include a former State of nationality. Furthermore, the former State of nationality may have a duty to admit its former national in order to avoid depriving a third State of its right to expel aliens from its territory. An examination of the practice of States, including their treaty practice, shows, however, that customary international law does not impose on the State of former nationality a duty of readmission. This was manifested by the proceedings of the Hague Codification Conference of 1930 relating to nationality¹⁰²⁵ and explains the existence of repatriation treaties (e.g. Convention between Belgium and the Netherlands concerning Assistance to and Repatriation of Indigent Persons).¹⁰²⁶ Moreover, the deprivation of the nationality of a person who is present in the territory of a third State has been described as an abuse of power or *excès de pouvoir* because of the burden imposed on the territorial State with respect to the continuing presence of an alien.¹⁰²⁷

471. The refusal of the former State of nationality to admit its former national may preclude the right of the territorial State to expel the alien if no other State is willing to admit the person.¹⁰²⁸

The effective expulsion of an alien normally calls for co-operative acquiescence by the State of which he is a national. Thus it is generally deemed to be its duty to receive him if he seeks access to its territory. Nor can it well refuse to receive him if during his absence from its domain he has lost its nationality without having acquired that of another State. Conversely, it is not apparent how a State, having put an end to the nationality of an individual owing allegiance to itself, may reasonably demand that any other State whose nationality he has not subsequently acquired, shall receive him into its domain when attempt is made as by banishment to cause him to depart the territory of the former. It may be greatly doubted whether a State is precluded from expelling an alien from its domain by the circumstance that he has been denationalized by the country of origin and has subsequently failed to attain the nationality of any other. No international legal duty rests upon the State which has recourse to expulsion to allow the alien to remain within its limits until a particular foreign State evinces willingness to receive him within its domain.¹⁰²⁹

¹⁰²⁵ League of Nations, *Acts of the Conference for the Codification of International Law* (The Hague, 13 March–12 April 1930), vol. 2, Minutes of the First Committee: Nationality, document No. C.351 (a).M.145 (a).1930.V.

¹⁰²⁶ Signed at The Hague, 15 May 1936 (League of Nations, *Treaty Series*, vol. CLXXIX, 1937–1938, No. 4131, p. 41). See also Hofmann, “Denationalization and forced exile”, p. 1005.

¹⁰²⁷ See Donner, *The Regulation of Nationality in International Law*, p. 153; Martin (footnote 305 above), p. 41.

¹⁰²⁸ “It cannot be concluded that the refusal to receive is countenanced by international law. There is no dissent from the proposition that every [S]tate possesses the power of expulsion, as the corollary to its right to determine the conditions for entry upon its territory. This right is destroyed if another [S]tate refuses to fulfil the conditions which it presupposes, and which are essential to its exercise” (Preuss, “International law and deprivation of nationality”, p. 272 (referring to the duty of a State to receive its former nationals who are stateless)). “In addition to the effect of denationalization and exile on the individual concerned, it has effects on other States by the resulting status of statelessness imposed on the individual. Other States find themselves either in the position of being forced to grant residence to a person not their national or forcing that person to remain in constant motion between States, until some Government relents” (MacDermot, “Loss of Nationality and Exile”, *The Review: International Commission of Jurists*, No. 12, 1974, p. 23).

¹⁰²⁹ Hyde (footnote 251 above), pp. 231–232; see also Williams (footnote 194 above), p. 61.

472. The 1930 Special Protocol concerning Statelessness addresses the duty of a State to admit its former national who is stateless in article 1, as follows:

If a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose nationality he last possessed is bound to admit him, at the request of the State in whose territory he is:

(i) if he is permanently indigent either as a result of an incurable disease or for any other reason; or

(ii) if he has been sentenced, in the State where he is, to not less than one month's imprisonment and has either served his sentence or obtained total or partial remission thereof.

In the first case the State whose nationality such person last possessed may refuse to receive him, if it undertakes to meet the cost of relief in the country where he is as from the thirtieth day from the date on which the request was made. In the second case the cost of sending him back shall be borne by the country making the request.¹⁰³⁰

(b) *Specific case of refugees*

473. A refugee who is subject to expulsion may be given an opportunity to seek admission to a State other than his or her State of origin before the expulsion decision is implemented. The Convention relating to the Status of Refugees requires that a refugee lawfully present in the territory of the State be allowed in the event of his or her expulsion a reasonable period of time in order to seek legal admission in another State. Article 32, paragraph 3, provides as follows:

The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

474. As explained in Robinson's commentary to the Convention relating to the Status of Refugees, this provision concerns the status of a refugee after a final decision on expulsion has been taken against him. According to the same commentary, although not explicitly required by the Convention, the refugee expelled must be granted the facilities provided for in article 31, paragraph 2, of the Convention.¹⁰³¹ Furthermore, the internal measures which a State party is allowed to take during that period must not make it impossible for the refugee to secure admission elsewhere.

Paragraph 3 [of article 32] deals with the status of the refugee after a final decision of expulsion has already been taken. It does not permit the State to proceed to actual expulsion at once but enjoins it to grant him sufficient time to find a place to go. Although para. 3 does not say so explicitly, it must be assumed that the refugee must also be granted the necessary facilities prescribed in Art. 31 (2), because without such facilities no admission into another country can be obtained. The second sentence of para. 3 is less liberal than Art. 31, para. 2, first sentence: the former speaks of measures as “they may deem necessary” (in French

¹⁰³⁰ Article 2, paragraph 2, provides, *inter alia*, as follows: “The inclusion of the above-mentioned principles and rules in the said article shall in no way be deemed to prejudice the question whether they do or do not already form part of international law.”

¹⁰³¹ This provision, which deals with the situation of refugees unlawfully present in the territory of the State, indicates: “The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.”

“qu’ils jugeront opportune”) while the latter mentions measures “which are necessary” (in French “qui sont nécessaires”). The difference is in the subjective appraisal of the measures: in the case of Art. 31, they must appear to be necessary to an objective observer; in that of Art. 32, it suffices if the competent authorities consider them to be required. But even so, they cannot be of such nature as to make it impossible for the refugee to secure admission elsewhere because the Convention considers expulsion a measure to be taken only if the refugee is unable to leave the country on his own motion.¹⁰³²

475. As noted by the author cited above, the Convention relating to the Status of Refugees does not indicate what constitutes a “reasonable period” for purposes of article 32, paragraph 2. According to national jurisprudence, two months is not sufficient. “The present Convention does not indicate what would be a reasonable period. According to the judgement of the German Bundesverwaltungsgericht in *Hodzic v. Land Rheinland-Pfalz*, a period of two months is too short.”¹⁰³³

476. As further noted by the same author, this provision would not apply in cases in which another State has a duty to readmit the refugee. In such a case, the refugee can be expelled without further delay. As noted by Grahl-Madsen, “The provision does not apply if another country of refuge has a duty to readmit the refugee, in which case he may be returned to that country without delay.”¹⁰³⁴

B. Determination of the State of destination

1. FREEDOM OF THE EXPELLEE TO DETERMINE HIS OR HER STATE OF DESTINATION

477. In principle, the expellee must be able to choose a State of destination for himself or herself. The Rapporteur of the Institute of International Law, Mr. Féraud-Giraud, in the draft regulations for the expulsion of aliens of 1891, wrote that he believed that “normally ... an alien who is subject to expulsion ... must be escorted to the border of the territory of the nation to which he or she belongs, or to the closest border”.¹⁰³⁵ However, he or she must always be free to choose to leave the territory through a crossing point on a border other than the border of the State of which he or she is a national.¹⁰³⁶ Finally, in article 33 of its International Regulations on the admission and expulsion of aliens, the Institute of International Law determined that “it is up to the alien who is ordered to leave the territory ... to designate the crossing point at which he or she wishes to leave”.¹⁰³⁷ That way of addressing the issue was only relevant when expulsion was almost exclusively conducted over land borders. It is no longer valid in a context in which, like today’s, expulsion is primarily conducted by air. In that context, the question is that of the choice of the State of destination, rather than the designation of a border exit from the expelling State.

478. Certain international conventions contain this principle of free choice of the State of destination. The International Convention on the Protection of the Rights

of All Migrant Workers and Members of Their Families provides in paragraph 7 of article 22:

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.

The Convention relating to the Status of Refugees also contains that precise rule:¹⁰³⁸ a refugee whom a host State has ordered to leave its territory for reasons of national security or public order and who, as is known, cannot be deported or returned to territories where his or her life or freedom would be threatened must be able to seek a country that agrees to admit him or her and which will respect them. Indeed, article 32, paragraph 3, of the Convention provides for the execution of the expulsion order against a refugee and provides that “the Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country”. However, difficulties arise that sometimes render fruitless the search for a country able to admit the refugee in question. The UNHCR Executive Committee has advised States that “in cases where the implementation of an expulsion measure is impracticable, States should consider giving refugee delinquents the same treatment as national delinquents”.¹⁰³⁹

2. SUBSTITUTION OF THE EXPELLING STATE FOR THE EXPELLEE IN CHOOSING A STATE OF DESTINATION

479. As has just been seen, a person is normally expelled to his or her State of nationality. However, when the alien believes that he or she will be tortured in his or her own country, there is a problem of choice of the State to which he or she is to be expelled. Indeed, removal of an alien to a country where such a risk exists could result in irreparable harm. In that regard, there is no general practice, but certain steps are taken in several parts of the world to ensure the choice of the State of destination in the event of expulsion.

480. In Europe, a general practice was instituted after the adoption of the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities (Dublin Convention) in 1990. That Convention provided for certain steps designed to have an application for asylum examined by one of the member States instead of its being successively sent from one member State to another. Articles 4 to 8 set forth the criteria for determining which member State was responsible for examining an application for asylum. Pursuant to article 7, the member State responsible for controlling the entry of the alien into the territory of the member States was responsible for examining applications for asylum. In relation to this Convention, a member State asked to provide asylum by an alien whose first application submitted in the member State legally responsible had been rejected, would therefore have the right to expel the applicant to the member State that had issued the rejection order. However, this measure can pose a

¹⁰³² Robinson (footnote 943 above), pp. 159–160.

¹⁰³³ Grahl-Madsen (footnote 489 above), para. (11).

¹⁰³⁴ *Ibid.*

¹⁰³⁵ “Droit d’admission et d’expulsion des étrangers”, p. 280, para. XV.

¹⁰³⁶ *Ibid.*

¹⁰³⁷ “Règles internationales...”

¹⁰³⁸ Chetail, “Le principe de non refoulement et le statut de réfugié en droit international”, p. 49.

¹⁰³⁹ Conclusion No. 7 (XXVIII) (1977) of the UNHCR Executive Committee, quoted by Chetail (preceding footnote), pp. 49–50.

problem in relation to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The European Court of Human Rights examined the links between the provisions of the Dublin Convention and article 3 of the European Convention on Human Rights, which bans torture, in *T. I. v. United Kingdom*. In that case, the applicant was threatened with *refoulement* to Germany, where an expulsion order had previously been issued with a view to his removal to Sri Lanka. The applicant was not, “as such, threatened with any treatment contrary to Article 3 in Germany”. His removal to that State was, however, “one link in a possible chain of events which might result in his return to Sri Lanka where it was alleged that he would face the real risk of such treatment”. The Court therefore found that “indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to article 3 of the Convention”. It also said that “where States establish ... international agreements, to pursue cooperation in certain fields of activities, there may be implications for the protection of fundamental rights”. According to the Court, it would be incompatible with “the purpose and object” of the European Convention on Human Rights “if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution”. However, it found that “it is not established that there is a real risk that Germany would expel the applicant to Sri Lanka in breach of article 3 of the Convention”. Consequently, despite its decision to remove the applicant to another member State of the Union, “the United Kingdom have not failed in their obligations under this provision”.¹⁰⁴⁰

481. When the European Court of Human Rights realizes that the alien whose application is before it risks being exposed to ill-treatment in the State of destination, it sometimes invites the expelling State to take interim measures, such as suspending expulsion procedures.

482. Under some legislations the alien has a separate right of appeal with respect to the determination of the State of destination in the case of expulsion, but not of *refoulement*.

In exclusion proceedings, States generally assume a greater latitude in regard to the destination to which the individual is to be removed, and it is not uncommon to secure his removal to the port of embarkation. The wide choice available to State authorities and accepted in practice must be reviewed against the fact that the excluded alien will only rarely be entitled to appeal against the proposed destination or to arrange for his own departure. Once he has passed the frontier, however, State practice frequently allows him to benefit from certain procedural guarantees. Thus, he may be able to appeal, not only against the expulsion itself, but also against the proposed destination, and he may be given the opportunity of securing entry to another country of his choice. Of course, in the final analysis, if no other State is willing to receive him, then the only State to which the alien can lawfully be removed is his State of nationality or citizenship. If he is unable to secure admission elsewhere, his appeal against removal will commonly fail.¹⁰⁴¹

¹⁰⁴⁰ ECHR, *T. I. v. United Kingdom*, application No. 43844/98, Decision of 7 March 2000, *Reports of Judgments and Decisions 2000-III*.

¹⁰⁴¹ Goodwin-Gill, *International Law and the Movement of Persons between States*, pp. 223–224; see also *R. v. Governor of Brixton Prison*, ex parte *Sliwa* [1952] 1 All E.R. 187 (cited in footnote 3).

483. However, the existence of such a right under international law is unclear. Indeed, the existence of such a rule would hinder a State’s exercise of its sovereign right to expulsion, which is only limited by the obligation to respect the human rights of the alien who is subject to expulsion, whether it is a question, as has been seen, of substantive or procedural rights. In order for its choice to conform to the relevant requirements of international law, it is enough for the expelling State, in exercising this right of expulsion, to ensure in particular that the alien expelled will not undergo torture or inhuman or degrading treatment in the State of destination. It might be obliged to respect the choice of the alien subject to expulsion only if it cannot determine his or her State of nationality, or if there is a risk that the alien in question might be subject to torture or inhuman or degrading treatment in the State of nationality, and if the alien is able to secure the consent of a third State to admit him or her to its territory.

C. State capable of receiving an expelled alien

484. As was apparent from the Special Rapporteur’s fifth report,¹⁰⁴² the State capable of receiving an alien expelled by another State must meet certain criteria so as to guarantee to the alien that his fundamental rights, such as the right not to be subjected to torture, will be respected. International instruments and the case law are in agreement on this point.

1. EMERGENCE AND ESTABLISHMENT OF THE “SAFE COUNTRY” CONCEPT

485. The “safe country” concept first appeared in Germany, in article 16 of its Basic Law,¹⁰⁴³ which provides that an alien’s application for asylum shall be rejected if the alien entered Germany from a country of origin or third country which is considered safe. Safe countries of origin are countries in which there is no political persecution and no violation of human rights. The list of these safe countries is established by law.¹⁰⁴⁴ Safe third countries are countries that are deemed to comply with the Convention relating to the Status of Refugees and the European Convention on Human Rights¹⁰⁴⁵ and, by presumption, member States of the European Union. The Netherlands has also enacted laws on and established modifiable lists of safe countries of origin and safe third countries.¹⁰⁴⁶ The “safe country” concept has been incorporated into European Community legislation. Article 3, paragraph 5, of the Dublin Convention states:

Any Member State shall retain the right, pursuant to its national laws, to send an applicant for asylum to a third State, in compliance with the provisions of the Geneva Convention, as amended by the New York Protocol.

¹⁰⁴² See footnote 2 above.

¹⁰⁴³ Berger (footnote 103 above), p. 185.

¹⁰⁴⁴ France, Senate, “L’immigration et le droit d’asile”, summary note available at www.senat.fr/lc/lc34/lc34.html (accessed 11 July 2016).

¹⁰⁴⁵ Ghana and Senegal, for example, are included in this list, which may be amended by a legislative text.

¹⁰⁴⁶ Laws of 1 December 1994 and 2 February 1995. France, Senate, “L’immigration et le droit d’asile” (footnote 1044 above).

Similar language is used in article 3, paragraph 3, of the Council of the European Union of Regulation (EC) No. 343/2003,¹⁰⁴⁷ which replaced the Dublin Convention.

486. In 1992, the European Ministers responsible for immigration adopted a resolution in which they defined the “safe third country” concept.¹⁰⁴⁸ According to the resolution, a State shall be considered “safe” if it does not threaten the life or freedom of persons in violation of the provisions of the Convention relating to the Status of Refugees; if it does not commit any act of torture or inhuman or degrading treatment; and if it respects the principle of *non-refoulement*. This is how the concept is enshrined in European law. At the 609th meeting of Ministers’ Deputies, the Committee of Ministers of the Council of Europe adopted recommendation R (97) 22 of 25 November 1997, containing guidelines for the application of the “safe third country” concept. The recommendation adopts the following guidelines for determining whether a country is a safe third country to which an asylum-seeker may be sent, without prejudice to other international instruments applicable between member States: (a) observance by the third country of international human rights standards relevant to asylum as established in universal and regional instruments, including compliance with the prohibition of torture, inhuman or degrading treatment or punishment; (b) observance by the third country of international principles relating to the protection of refugees as embodied in the Convention and Protocol relating to the Status of Refugees, with special regard to the principle of *non-refoulement*; (c) the third country will provide effective protection against *refoulement* and the possibility to seek and enjoy asylum; (d) the asylum-seeker has already been granted effective protection in the third country or has had the opportunity, at the border or within the territory of the third country, to make contact with that country’s authorities in order to seek protection there before moving on to the member State where the asylum request is lodged or, as a result of personal circumstances of the asylum-seeker, including his or her prior relations with the third country, there is clear evidence of the admissibility of the asylum-seeker to the third country. In the London resolution, the member States also defined the concept of third host country to which asylum-seekers may be sent. An asylum applicant may be sent to a third country if: the life or freedom of the asylum applicant is not threatened in the third country; the asylum applicant is not exposed to torture or inhuman or degrading treatment in the third country; the asylum applicant has already been granted protection in the third country, or there is clear evidence of his admissibility to the third country; the asylum applicant is afforded effective protection in the third country against *refoulement*.

¹⁰⁴⁷ Council Regulation (EC) No. 343/2003 of 18 February 2003, establishing the criteria and mechanisms for determining the member State responsible for examining an asylum application lodged in one of the member States by a third-country national (*Official Journal of the European Union*, No. L 50, 25 February 2003, p. 1). Commission Regulation (EC) No. 1560/2003 of 2 September 2003 deals with the procedures for the application of Council Regulation (EC) No. 343/2003, *ibid.*, No. L 222 of 5 September 2003, p. 3.

¹⁰⁴⁸ Resolution of the Ministers responsible for immigration of 30 November–1 December 1992, on a harmonized approach to questions concerning host third countries, SN 4823/92.

487. The “safe country” concept therefore allows the member States to establish a review procedure which, while respecting the guarantee of individual treatment, is accelerated when the originating State is recognized as “safe”. Nonetheless, as States retain considerable latitude in defining the “safe country” concept, a uniform interpretation of “safety” criteria is not readily attainable. Where such risks exist, the expelling State must therefore seek to determine their significance, and it cannot cite public order as a ground for expelling the alien. When a member State rejects an alien’s application for asylum, it is thus required to expel the alien to a safe country, which may be the alien’s country of origin or a third country.¹⁰⁴⁹

488. To establish the parameters which an expelling State should use in assessing the situation in a State of destination, the Council of the European Union must establish a modifiable minimum common list of third countries which member States of the European Union consider safe countries of origin. This list must be drawn up on the basis of information obtained from member States, UNHCR, the Council of Europe and other relevant national organizations. The list does not prevent States from designating other list countries of origin as safe, but they must notify the Commission accordingly. The establishment of this list should help speed up consideration of asylum applications. Article 36 of Directive 2005/85/EC stipulates that a third European country shall be considered safe if it has ratified and observes the provisions of the Convention relating to the Status of Refugees and the European Convention on Human Rights; has in place an asylum procedure prescribed by law; and has been so designated by the Council. Nonetheless, according to the directive:

The designation of a third country as a safe country of origin ... cannot establish an absolute guarantee of safety for nationals of that country ... [Accordingly], it is important that, where an applicant shows that there are serious reasons to consider the country not to be safe in his/her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her.¹⁰⁵⁰

489. This approach has been criticized by some authors. Julien-Laferrrière notes in this regard:

European States intend to limit to the extent possible the entry and residence of aliens in their territories, including when those aliens are seeking asylum. To this end, they try to establish mechanisms for keeping asylum-seekers in their countries of origin or residence, or at the very least in the countries or geographical areas closest to their countries of origin. The “safe third country” concept performs this function perfectly.¹⁰⁵¹

The conclusion of return agreements or the insertion of return clauses into international agreements is designed in part to facilitate implementation of these policies of expulsion to “safe countries”.

¹⁰⁴⁹ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member States for granting and withdrawing refugee status (*Official Journal of the European Union*, No. L 326 of 13 December 2005, p. 13).

¹⁰⁵⁰ Para. 21 of the preamble to Directive 2005/85/EC (see preceding footnote).

¹⁰⁵¹ Julien-Laferrrière, “La compatibilité de la politique d’asile de l’Union européenne avec la Convention de Genève du 28 juillet 1951 relative au statut des réfugiés”, p. 282.

490. This concept, which was introduced only recently and is confined for the time being to European practice, cannot yet be formulated as a draft general rule, particularly since it is still evolving.

2. STATE OF DESTINATION

491. There may be various possibilities with respect to the State of destination for aliens who are subject to expulsion, including the State of nationality; the State of residence; the State which issued the travel documents to the alien; the State of debarkation; State party to a treaty; consenting State as well as other States. The national laws of States often provide for the expulsion of aliens to various States depending on the circumstances of a particular case.¹⁰⁵² The determination of the State of destination may involve consideration of the admissibility of an alien to a particular State.

(a) *State of nationality*

492. The State of nationality appears to be the natural, and in any event the most common, destination for nationals who have been expelled from the territory of other States. The State of nationality has a duty to admit its nationals under international law. This duty has been recognized in the Convention regarding the Status of Aliens in the respective Territories of the Contracting Parties.¹⁰⁵³ But an alien may oppose his or her expulsion to his or her State of nationality if he or she faces a risk of torture or because of the state of his or her health. International instruments and case law are unanimous in that regard. Article 22, paragraph 7, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides:

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.

493. The duty of a State to admit its nationals has also been considered in the literature.¹⁰⁵⁴ As early as 1892, the Institute of International Law had recognized that a State may not prohibit its nationals from entering its territory.¹⁰⁵⁵ Some authors have described the duty of a State to admit its nationals as a necessary corollary of the right of a State to expel aliens in order to ensure the effectiveness of this right.¹⁰⁵⁶

¹⁰⁵² "National law commonly makes provision for the deportation or expulsion of aliens to a wide variety of jurisdictions" (Plender (footnote 191 above), p. 468).

¹⁰⁵³ Article 6, paragraph 2, provides that: "States are required to receive their nationals expelled from foreign soil who seek to enter their territory."

¹⁰⁵⁴ See Doebring (footnote 425 above), p. 111; Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 255; Harris (footnote 28 above), p. 505; Plender (footnote 577 above), p. 26; and Shearer (footnote 36 above), p. 78. See also Agrawala, *International Law: Indian Courts and Legislature*, p. 103.

¹⁰⁵⁵ "Règles internationales...", art. 2: "In principle, a State must not prohibit access into or a stay in its territory either to its subjects or to those who, after having lost their nationality in said State, have acquired no other nationality."

¹⁰⁵⁶ See Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 136 (citing Schwarzenberger, *International Law*, vol. I, p. 361; Oppenheim, *International Law* (8th ed., 1955), vol. I, pp. 645 and 646); Jennings and Watts (footnote 190 above), p. 944; and Plender (footnote 191 above), p. 459.

494. The question arises whether a State has a duty to admit a national who has been subject to unlawful expulsion.¹⁰⁵⁷ In other words, does a State have a duty to admit its nationals in cases in which the expelling State does not have a right to expel the individuals or does so in violation of the rules of international law? This question may require consideration of the relationship between the right of the host State to expel aliens from its territory and the duty of the State of nationality to receive its nationals who have been expelled from other States. This question may also require consideration of the possible legal consequences of an unlawful expulsion in terms of remedies. The traditional view would appear to be that a State has a duty to admit its nationals as a consequence of their nationality, independently of the lawfulness or unlawfulness of the expulsion or any other circumstances which may have influenced the return of its nationals.¹⁰⁵⁸

495. Attention has been drawn to the possibility of the State of nationality imposing requirements for the admission of nationals, such as proof of nationality in the form of a passport or other documentation. Practical problems may arise in situations in which the national cannot provide such information. It has been suggested that a person claiming a right of return should be given a reasonable opportunity to establish nationality and the possibility of a review of a denial of nationality. After taking stock of the situation as reflected in the laws of several countries, Sohn and Buergenthal concluded:

Whatever may be the case, a person claiming the right of return must be given an opportunity to establish national status and the matter must be determined objectively through application of due process. In the event of a refusal of a claim to national status and, consequently, the right to enter, a review of such decision by appropriate judicial or administrative authorities should be available.¹⁰⁵⁹

496. The question has been raised as to whether the duty to admit a national applies in the case of dual (or multiple) nationality as between the respective States of nationality. As the Special Rapporteur mentioned in his third and fourth reports,¹⁰⁶⁰ this question may be governed by the rules of international law relating to nationality and therefore be beyond the scope of the present topic. It should be noted, however, that nationalities are equal and afford the same rights to holders of dual or multiple nationality.

497. The national laws of some States¹⁰⁶¹ provide for the expulsion of an alien to the State of nationality or another State with special ties to the individual. Thus, the expelling

¹⁰⁵⁷ "Moreover, it is far from clear that a State is under a duty to receive those of its nationals who have been unlawfully expelled from another State, at least in so far as the duty to admit is one which is owed between States alone" (Goodwin-Gill, *International Law and the Movement of Persons between States*, pp. 201–202).

¹⁰⁵⁸ See Sohn and Buergenthal (footnote 195 above), pp. 39–40 (citing the judgments of ICJ in *Nottebohm (Liechtenstein v. Guatemala)*, *I.C.J. Reports 1955*, p. 4; *Yvonne van Duyn v. Home Office*, Court of Justice of the European Communities, Case 41/74, judgement of 4 December 1974, *European Court Reports 1975*, p. 1337).

¹⁰⁵⁹ Sohn and Buergenthal (footnote 195 above), p. 47; Harris (footnote 28 above), p. 506.

¹⁰⁶⁰ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581 and *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/594, respectively.

¹⁰⁶¹ The analysis of these national laws and elements of domestic case law is taken from the memorandum by the Secretariat (footnote 18 above), paras. 511–513.

State may return an alien to the State of which the alien is a citizen or national,¹⁰⁶² or a native;¹⁰⁶³ to which the alien “belongs”;¹⁰⁶⁴ which is the alien’s State of “origin” (when this State is clearly distinguished from the State of nationality);¹⁰⁶⁵ or which was the alien’s birthplace.¹⁰⁶⁶ The expelling State may establish this destination as the primary option,¹⁰⁶⁷ an alternative primary option,¹⁰⁶⁸ a secondary option that it may choose,¹⁰⁶⁹ or an alternative secondary option.¹⁰⁷⁰

498. The national courts of States have, in general, upheld the right of a State to expel an alien to his or her State of nationality.¹⁰⁷¹ Moreover, some national courts have indicated that there is a presumption that the State of nationality would accept an expelled national.¹⁰⁷²

¹⁰⁶² Belarus, 1998 Law, arts. 19, 33; Brazil, 1980 Law, art. 57; France, Code, arts. L513-2 (1), L532-1; Japan, 1951 Order, art. 53 (1); Nigeria, 1963 Act, arts. 17 (1) (c) (i), 22 (1); Republic of Korea, 1992 Law, art. 64 (1); United States, Immigration and Nationality Act, sects. 241 (b) (1) (C) (i), (2) (D), 250.

¹⁰⁶³ United States, Immigration and Nationality Act, sect. 250.

¹⁰⁶⁴ Italy, 1998 Decree-Law No. 286, art. 13 (12), 1998 Law No. 40, art. 11 (12), 1996 Decree-Law, art. 7 (3); Kenya, 1967 Act, art. 8 (2) (a).

¹⁰⁶⁵ Bosnia and Herzegovina, 2003 Law, art. 64 (1); Guatemala, 1986 Decree-Law, art. 88; Honduras, 2003 Act, art. 3 (23); Paraguay, 1996 Law, art. 78; Sweden, 1989 Act No. 529, sect. 8.5; Switzerland, 1999 Ordinance, art. 9.

¹⁰⁶⁶ Japan, 1951 Order, art. 53 (2) (4)–(5); Republic of Korea, 1992 Act, art. 64 (2) (1); United States, Immigration and Nationality Act, sect. 241 (b) (1) (C) (ii), (2) (E) (iv)–(vi).

¹⁰⁶⁷ Belarus, 1998 Law, art. 19; France, Code, arts. L513-2 (1), L532-1; Italy, 1996 Decree-Law, art. 7 (3); Japan, 1951 Order, art. 53 (1); Nigeria, 1963 Act, art. 17 (1) (c); Republic of Korea, 1992 Act, art. 64 (1).

¹⁰⁶⁸ Belarus, 1998 Law, art. 33; Bosnia and Herzegovina, 2003 Law, art. 64 (1); Brazil, 1980 Law, art. 57; Guatemala, 1986 Decree-Law, art. 88; Honduras, 2003 Act, art. 3 (23); Kenya, 1967 Act, art. 8 (2) (a); Nigeria, 1963 Act, art. 22 (1); Paraguay, 1996 Law, art. 78; Sweden, 1989 Act No. 529, sect. 8.5; Switzerland, 1999 Ordinance, art. 9; United States, Immigration and Nationality Act, sect. 250. A State may: expressly allow the alien to choose this option (United States, Immigration and Nationality Act, sect. 250); expressly leave the choice to the relevant Minister (Kenya, 1967 Act, art. 8 (2) (a); Nigeria, 1963 Act, art. 22 (1); and Paraguay, 1996 Law, art. 78); or not specify who shall make the choice (Belarus, 1998 Law, art. 33; Bosnia and Herzegovina, 2003 Law, art. 64 (1); Brazil, 1980 Law, art. 57; Guatemala, 1986 Decree-Law, art. 88; Honduras, 2003 Act, art. 3 (23); Sweden, 1989 Act No. 529, sect. 8.5; Switzerland, 1999 Ordinance, art. 9).

¹⁰⁶⁹ United States, Immigration and Nationality Act, sect. 241 (b) (1) (C), (2) (D) (but only when the destination State is the alien’s State of nationality).

¹⁰⁷⁰ A State may not allow the alien to choose this option (Republic of Korea, 1992 Act, art. 64 (2) (1)–(2)), or may not specify who shall make the choice (Portugal, 1998 Decree-Law, art. 21 (1)).

¹⁰⁷¹ See, for example, Zimbabwe, *Mackeson v. Minister of Information, Immigration and Tourism and Another* (footnote 61 above), p. 252; South Africa, *Mohamed* (footnote 61 above), Germany, *Residence Prohibition Order Case (I)*, (footnote 61 above), pp. 431–433; Canada, *Chan v. McFarlane*, ILR, vol. 42, pp. 213–218; United States, *United States Ex Rel. Hudak v. Uhl*, District Court, Northern District, New York, 1 September 1937, *Annual Digest and Reports of Public International Law Cases*, years 1935–1937, case No. 161, p. 343 (“It is a strange contention that there are any limitations upon the power of a sovereign nation to deport an alien to his native country, who has unlawfully entered the United States, whether such entry was directly from his native country or through some other country”).

¹⁰⁷² See, e.g., *United States Ex Rel. Tom Man v. Shaughnessy*, United States, District Court, Southern District, New York, 16 May 1956, ILR, vol. 23, p. 400 (“While in most cases it might be presumed that ‘the country in which he was born’ had consented to accept a deportable alien, such a presumption, by itself, could not withstand the facts of this case”).

Nonetheless, it should be noted that in other cases, courts that have had to deal with the matter have pointed out that the State of nationality is not always willing to admit its nationals.¹⁰⁷³ These are, however, just a few exceptions to what appears to be the dominant trend, and one that is even becoming the rule on this topic.

(b) *State of residence*

499. The national laws of some States provide for the expulsion of aliens to the State in which the alien has a residence or in which the alien resided prior to entering the expelling State.¹⁰⁷⁴ The expelling State may establish this destination as the primary option,¹⁰⁷⁵ or a secondary option that it may choose.¹⁰⁷⁶

(c) *State of passport issuance*

500. An alien may be returned to the State which issued his or her passport in two different situations. The passport may be evidence of the nationality of the alien. In such a case, the alien is in fact returned to the State of nationality. However, States may issue passports to non-nationals. In such a case, the alien may be returned to the State that issued the passport since returnability would appear to be considered an essential element of a valid passport. Noting in this regard that the Supreme Court of Brazil found that the expulsion of a Romanian national could not be implemented because of the Romanian Government’s refusal to issue a passport to him, one author writes:

Today there exists a strong body of authority for the proposition that the actual possession of a passport indicates the existence of a duty, binding on the issuing State, to readmit the holder if he is expelled from another State and has nowhere else to go. This duty is often recognized in treaties.¹⁰⁷⁷

501. The issue of returnability is, therefore, clearly related to the question of the passport, but the passport cannot constitute sufficient evidence of nationality. In fact, there is

¹⁰⁷³ See South Africa, the case of *Aronowicz* (footnote 631 above), p. 259 (“He pointed out that not all States were now willing to receive back their nationals when another State wished to repatriate them.”); United States, *Ngai Chi Lam v. Esperdy*, Court of Appeals, Second Circuit, 4 June 1969, ILR, vol. 53, pp. 536–538 (State of nationality declined to accept deportee).

¹⁰⁷⁴ Belarus, 1998 Law, art. 19; Japan, 1951 Order, art. 53 (2) (1)–(2); Republic of Korea, 1992 Act, art. 64 (2) (1); United States, Immigration and Nationality Act, sect. 241 (b) (1) (C) (iii), (2) (E) (iii). A State may establish this destination as a tertiary option that it may choose (United States, Immigration and Nationality Act, sect. 241 (b) (2) (E) (iii)).

¹⁰⁷⁵ Belarus, 1998 Law, art. 19.

¹⁰⁷⁶ Republic of Korea, 1992 Act, art. 64 (2) (1)–(2); United States, Immigration and Nationality Act, sect. 241 (b) (1) (C) (but only when the State of destination is also the State of nationality of the alien).

¹⁰⁷⁷ Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 45. The author cites, *inter alia*, the following cases and documents: *Feldman v. Justica Publica*, 27 September 1939, ILR, vol. 9, p. 393; Exchange of notes constituting an agreement concerning the acceptance of persons at the frontier between Austria and the Federal Republic of Germany, Bonn, 19 July 1961 (United Nations, *Treaty Series*, 1961, vol. 414, No. 5974, p. 211); 1954 Agreement between Sweden and the Federal Republic of Germany (*ibid.*, vol. 200, p. 39); 1954 Agreement between Denmark and the Federal Republic of Germany (*ibid.*, vol. 200, p. 53); 1958 Agreement between Belgium and the Netherlands (*ibid.*, vol. 330, p. 84); 1962 Agreement between Austria and France (*ibid.*, vol. 463, p. 173); art. 5 of the European Agreement on the Movement of Persons between Member States of the Council of Europe (*European Treaty Series*, No. 25).

no rule of customary international law which prohibits the issue of passports to non-nationals. Indeed, passports may be issued to individuals who have been granted asylum or who, for political reasons, are unable to obtain one from their own State of nationality. In fact, although a passport is itself a sufficient guarantee of returnability, the fact of possessing a passport “in no way assures the entry of the holder into the State of issue, for the guarantee of returnability demanded by the rule of customary international law relates to obligations owed between States alone”.¹⁰⁷⁸

502. The national laws of some States provide for the expulsion of aliens to any State which issued travel documents¹⁰⁷⁹ to the alien. The expelling State may establish this destination as the primary option,¹⁰⁸⁰ an alternative primary option¹⁰⁸¹ or an alternative secondary option.¹⁰⁸²

(d) *State of embarkation*

503. The national laws of some States¹⁰⁸³ provide for the expulsion of aliens to the State of embarkation.¹⁰⁸⁴ The expelling State may return an alien to the State from which the alien entered the expelling State's territory or that in which the alien boarded the entry vessel.¹⁰⁸⁵ As one author states:

A common practice of national immigration authorities is to look first to the place where the alien embarked for the territory of the deporting State. Apart from being a logical course, this choice is sometimes dictated by the legal obligation of the carrier to the deporting State, which extends no further than retransportation of deportees to the place whence they joined that carrier. Where the country of embarkation indicates in advance that it is unwilling to receive the alien, other destinations must be sought.¹⁰⁸⁶

The expelling State may establish this destination as the primary option,¹⁰⁸⁷ an alternative primary option,¹⁰⁸⁸ the

secondary option,¹⁰⁸⁹ an alternative secondary option that the alien may choose¹⁰⁹⁰ or a tertiary option that the alien may choose.¹⁰⁹¹

504. A State may limit the range of choices under this heading to those destination States falling under a special arrangement or agreement.¹⁰⁹² A State may place conditions on the choice of a contiguous or adjacent State,¹⁰⁹³ specifically apply this heading to aliens holding transitory status,¹⁰⁹⁴ and, in the case of protected persons, choose an alternative State if the destination State has rejected the alien's claim for refugee protection.¹⁰⁹⁵

505. The State of embarkation may be distinguished from a transit State. The latter is the State where the alien facing expulsion legally resided for a certain period. It has been affirmed that this State

is not obligated by general international law to accept return of someone who passed through that territory, or even who remained for a fairly lengthy period.¹⁰⁹⁶

Nonetheless, some consider that the many bilateral or regional readmission treaties that have been concluded in recent decades, applicable to such transit situations, often in connection with broader regimes determining the State responsible for considering an asylum application such as the Dublin Convention of 1990, are viewed as helping to enforce an asserted principle of the country of first asylum, but no clear principle of this type is supported by State practice. In fact, even in the absence of a readmission agreement, a State may take an asylum applicant's prior stay in a third State into account in deciding whether to grant asylum, such grant decisions being ultimately discretionary. This was illustrated as follows:

State C, asked to provide asylum to a national who is at risk of persecution in State A, might properly take into account that person's sojourn and apparent protection in State B, and could deny asylum on that ground. But in these circumstances, State B is under no obligation, absent some other specific readmission pledge, to accept return. The principle of *non-refoulement*, as embodied in article 33 of the

¹⁰⁷⁸ Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 50.

¹⁰⁷⁹ France, Code, art. L513-2 (2); Italy, 1998 Decree-Law No. 286, art. 10 (3), 1998 Law No. 40, art. 8 (3); Nigeria, 1963 Act, art. 17 (1) (c) (ii); Portugal, 1998 Decree-Law, art. 21 (1); Tunisia, 1968 Law, art. 5.

¹⁰⁸⁰ Italy, 1996 Decree-Law, art. 7 (3); Nigeria, 1963 Act, art. 17 (1) (c).

¹⁰⁸¹ Italy, 1998 Law No. 40, art. 8 (3). A State may not specify who shall make the choice (Italy, 1998 Law No. 40, art. 8 (3)).

¹⁰⁸² A State may not specify who shall make the choice (Portugal, 1998 Decree-Law, art. 21 (1)).

¹⁰⁸³ Memorandum by the Secretariat (footnote 18 above), para. 516.

¹⁰⁸⁴ See Shearer (footnote 36 above), pp. 77–78; see also O'Connell, *International Law*, pp. 710–711.

¹⁰⁸⁵ Belarus, 1998 Law, arts. 19, 33; Bosnia and Herzegovina, 2003 Law, art. 64 (1); Canada, 2001 Act, art. 115 (3); Guatemala, 1986 Decree Law, art. 88; Honduras, 2003 Act, art. 3 (23); Italy, 1998 Decree-Law No. 286, arts. 10 (3), 13 (12), 1998 Law No. 40, arts. 8 (3), 11 (12), 1996 Decree Law, art. 7 (3); Japan, 1951 Order, art. 53 (2) (3); Kenya, 1967 Act, art. 8 (2) (a); Panama, 1960 Decree-Law, art. 59; Paraguay, 1996 Law, art. 78; Portugal, 1998 Decree-Law, art. 21 (1); Republic of Korea, 1992 Act, art. 64 (2) (3); Sweden, 1989 Act No. 529, sect. 8.5; Switzerland, 1999 Ordinance, art. 9; United States, Immigration and Nationality Act, sects. 241 (b) (1) (A)–(B), (2) (E) (i)–(ii), 250.

¹⁰⁸⁶ Shearer (footnote 36 above), pp. 77–78; see also O'Connell (footnote 1084 above), pp. 710–711.

¹⁰⁸⁷ Canada, 2001 Act, art. 115 (3); Portugal, 1998 Decree-Law, art. 21 (1); United States, Immigration and Nationality Act, sect. 241 (b) (1) (A)–(B).

¹⁰⁸⁸ Belarus, 1998 Law, art. 33; Bosnia and Herzegovina, 2003 Law, art. 64 (1); Brazil, 1980 Law, art. 57; Guatemala, 1986 Decree Law,

art. 88; Honduras, 2003 Act, art. 3 (23); Italy, 1998 Law No. 40, art. 8 (3); Kenya, 1967 Act, art. 8 (2) (a); Lithuania, 2004 Law, art. 129 (1); Panama, 1960 Decree-Law, art. 59; Paraguay, 1996 Law, art. 78; Sweden, 1989 Act No. 529, sect. 8.5; Switzerland, 1999 Ordinance, art. 9; United States, Immigration and Nationality Act, sect. 250. A State may expressly allow the alien to choose this option (United States, Immigration and Nationality Act, sect. 250); expressly leave the choice to the relevant Minister (Kenya, 1967 Act, art. 8 (2) (a), (3); Panama, 1960 Decree-Law, art. 59; Paraguay, 1996 Law, art. 78); or not specify who shall make the choice (Belarus, 1998 Law, art. 33; Bosnia and Herzegovina, 2003 Law, art. 64 (1); Brazil, 1980 Law, art. 57; Guatemala, 1986 Decree Law, art. 88; Honduras, 2003 Act, art. 3 (23); Italy, 1998 Law No. 40, art. 8 (3); Lithuania, 2004 Law, art. 129 (1); Sweden, 1989 Act No. 529, sect. 8.5; Switzerland, 1999 Ordinance, art. 9).

¹⁰⁸⁹ Italy, 1998 Decree-Law No. 286, art. 13 (12), 1998 Law No. 40, art. 11 (12), 1996 Decree Law, art. 7 (3).

¹⁰⁹⁰ Japan, 1951 Order, art. 53 (2) (3); Republic of Korea, 1992 Act, art. 64 (2) (3).

¹⁰⁹¹ United States, Immigration and Nationality Act, sect. 241 (b) (2) (E) (i)–(ii).

¹⁰⁹² Italy, 1996 Decree Law, art. 7 (3).

¹⁰⁹³ United States, Immigration and Nationality Act, sect. 241 (b) (2) (B).

¹⁰⁹⁴ Italy, 1998 Decree-Law No. 286, art. 10 (3).

¹⁰⁹⁵ Canada, 2001 Act, art. 115 (3).

¹⁰⁹⁶ Martin (footnote 305 above), p. 42 (citing, *inter alia*, the Dublin Convention).

Convention relating to the Status of Refugees, would not permit State C to return the individual to State A. He may well wind up remaining indefinitely on the territory of C, despite the refusal of asylum.¹⁰⁹⁷

(e) *State party to a treaty*

506. A State may assume the obligation to receive aliens who are nationals of other States parties to a treaty.¹⁰⁹⁸ Such an obligation can in certain cases be the result of a bilateral treaty. The States parties to such a treaty may retain the right to deny admission or entry to such aliens under certain circumstances provided for in the relevant treaty. Thus, the nature and extent of the duty of a State to admit aliens would depend upon the terms of the treaty, which may vary.¹⁰⁹⁹

507. Some conventions founding international organizations may also create the right of foreigners to freely enter the territories of the States members of the organization, as in the case of the European Economic Community.¹¹⁰⁰ The Treaty Establishing the European Community guarantees in article 39, paragraph 3, among others, freedom of movement for workers within the Community. Such freedom of movement entails “the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment”, and “the right, subject to limitations justified on grounds of public policy, public security or public health”, among other things:

(b) to move freely within the territory of Member States ...;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

508. In addition, article 43 of the Treaty establishes that “restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State [are] prohibited”.

509. The Convention between Denmark, Finland, Norway and Sweden concerning the waiver of passport control at the intra-Nordic frontiers, provides for the waiver of passport control with respect to their frontiers in cases involving the expulsion of their respective nationals as follows:

¹⁰⁹⁷ *Ibid.*

¹⁰⁹⁸ See Jennings and Watts (footnote 190 above), pp. 898–899 (referring to, *inter alia*, the Treaty establishing the EEC, 1957; the Protocol between the Governments of Denmark, Finland, Norway and Sweden concerning the exemption of nationals of these countries from the obligation to have a passport or residence permit while resident in a Scandinavian country other than their own, 1954 (Iceland acceded in 1955); the Convention between Denmark, Finland, Norway and Sweden concerning the waiver of passport control at the intra-Nordic frontiers, 1957 (Iceland became a party effective from 1966), as modified by a further agreement in 1979: RG, 84 (1980), p. 376; and the Convention between Belgium, Luxembourg and the Netherlands on the transfer of controls of persons to the external frontiers of Benelux territory, 1960).

¹⁰⁹⁹ See Brownlie, *Principles of Public International Law*, p. 498 (quoting a treaty between the United States and Italy of 1948); Arnold (footnote 702 above), p. 104.

¹¹⁰⁰ Doehring (footnote 425 above), pp. 108 and 109.

Article 9

A Contracting State shall not allow an alien who has been expelled (*utvisad*) from another Contracting State to enter without a special permit. Such a permit is, however, not required if a State which has expelled an alien wishes to expel him via another Nordic State.

If an alien who has been expelled from one Nordic State has a residence permit for another Nordic State, that State is obliged, on request, to receive him.

Article 10

Each Contracting State shall take back an alien who, in accordance with Article 6 (a) and, as far as entry permit is concerned, 6 (b), as well as 6 (f), ought to have been refused entry by the State concerned at its outer frontier and who has travelled from that State without a permit into another Nordic State.

Likewise an alien shall be taken back who, without a valid passport or a special permit, if such is required, has travelled directly from one Nordic State to another.

The foregoing shall not apply in the case of an alien who has stayed in the State wishing to return him for at least one year from the time of his illegal entry into that State or who has, after entering illegally, been granted a residence and/or work permit there.

...

Article 12

What has been stipulated in this Convention about an expelled (*utvisad*) alien shall also apply to an alien who, according to Finnish or Swedish law, has been turned away or expelled in the other manners stipulated in the said laws (*förvisning* or *förpassning*), without a special permit to return.

(f) *Consenting and other States*

510. The national laws of some States¹¹⁰¹ provide for the expulsion of aliens to consenting and other States. A State may return an alien to any State,¹¹⁰² or to one which will accept the alien or which the alien has a right to enter.¹¹⁰³ A State may provide such a destination when the alien would face persecution in the original destination State,¹¹⁰⁴ or when the alien holds protected status in the expelling State and the original destination State has rejected the alien's claim for refugee status.¹¹⁰⁵ A State may establish this destination as an alternative primary option,¹¹⁰⁶ an alternative secondary option¹¹⁰⁷ or an option of last resort.¹¹⁰⁸

¹¹⁰¹ The following analyses of national laws are drawn from the memorandum by the Secretariat (footnote 18 above), para. 523.

¹¹⁰² Canada, 2001 Act, art. 115 (3); Sweden, 1989 Act No. 529, sect. 8.5; Switzerland, 1999 Ordinance, art. 9.

¹¹⁰³ Brazil, 1980 Law, art. 57; Guatemala, 1986 Decree Law, art. 88; Honduras, 2003 Act, art. 3 (23); Kenya, 1967 Act, art. 8 (2) (a); Lithuania, 2004 Law, art. 129 (1); Nigeria, 1963 Act, art. 22 (1); Panama, 1960 Decree-Law, art. 59; Paraguay, 1996 Law, art. 78; Portugal, 1998 Decree-Law, arts. 21 (1), 104 (3); United States, Immigration and Nationality Act, sects. 241 (b) (1) (C) (iv), (2) (E) (vii), 507 (b) (2) (B).

¹¹⁰⁴ Belarus, 1998 Law, art. 33; Portugal, 1998 Decree-Law, art. 104 (3).

¹¹⁰⁵ Canada, 2001 Act, art. 115 (3).

¹¹⁰⁶ Brazil, 1980 Law, art. 57; Guatemala, 1986 Decree Law, art. 88; Honduras, 2003 Act, art. 3 (23); Kenya, 1967 Act, art. 8 (2) (a); Lithuania, 2004 Law, art. 129 (1); Panama, 1960 Decree-Law, art. 59; Paraguay, 1996 Law, art. 78; Switzerland, 1999 Ordinance, art. 9. A State may: (1) require the alien's consent to the destination State selected (Kenya, 1967 Act, art. 8 (2) (a)); (2) leave the choice to the relevant Minister (Nigeria, 1963 Act, art. 22 (1); Panama, 1960 Decree-Law, art. 59; Paraguay, 1996 Law, art. 78); or (3) not specify who shall make the choice (Brazil, 1980 Law, art. 57; Guatemala, 1986 Decree Law, art. 88; Honduras, 2003 Act, art. 3 (23); Lithuania, 2004 Law, art. 129 (1); Switzerland, 1999 Ordinance, art. 9).

¹¹⁰⁷ Portugal, 1998 Decree-Law, art. 21 (1), which does not specify who shall make the choice.

¹¹⁰⁸ Canada, 2001 Act, art. 115 (3); Sweden, 1989 Act, sect. 8.5; United States, Immigration and Nationality Act, sect. 241 (b) (1) (C) (iv), (2) (E) (vii).

511. The right of a State to decide whether to permit aliens to enter its territory is consistent with the principles of the sovereign equality and the political independence of States recognized in Article 2, paragraphs 1 and 4, of the Charter of the United Nations. Jennings and Watts write:

By customary international law no state can claim the right for its nationals to enter into, and reside on, the territory of a foreign state. The reception of aliens is a matter of discretion, and every state is, by reason of its territorial supremacy, competent to exclude aliens from the whole, or any part, of its territory.¹¹⁰⁹

They later add that: "Since a state need not receive aliens at all, it can receive them only under certain conditions".¹¹¹⁰ A State does not therefore have a duty to admit aliens into its territory in the absence of a treaty obligation,¹¹¹¹ such as those relating to human rights or economic integration.¹¹¹²

512. The right of a State to decide whether to admit an alien is also recognized in general terms in article I of the Convention on Territorial Asylum:

Every State has the right, in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable, without, through the exercise of this right, giving rise to complaint by any other State.

In addition, the Convention regarding the Status of Aliens in the respective Territories of the Contracting Parties, adopted by the Sixth International Conference of American States, signed at Havana on 20 February 1928, recognizes that all States have the right to establish the conditions under which foreigners may enter their territory.¹¹¹³ It was on that basis that, as we have seen, the Arbitral Tribunal expressly recognized, in the *Ben Tillet* case, the right of a State to deny entry to an alien who, based on a sovereign appreciation of the facts, appears to represent a threat to national security.¹¹¹⁴

513. In the same way, in *Moustaquim*, the European Court of Human Rights characterized the right of a State to determine the entry of aliens as a matter of well-established international law as follows:

The Contracting States' concern to maintain public order, in particular in exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens.¹¹¹⁵

¹¹⁰⁹ Jennings and Watts (footnote 190 above), pp. 897–898.

¹¹¹⁰ *Ibid.*, p. 899.

¹¹¹¹ See United States, case of *Nishimura Ekiu* (footnote 1015 above); de Vattel, *Le Droit des gens*; Oda (footnote 10 above), p. 481; Brownlie (footnote 1099 above), p. 498; Hackworth, *Digest of International Law*, p. 717. See also Hannum (footnote 1023 above), p. 61; Kelsen, *Principles of International Law*, p. 366; Sohn and Buergenthal (footnote 195 above), p. 46.

¹¹¹² See Lambert (footnote 900 above), p. 11.

¹¹¹³ Article 1: "States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory".

¹¹¹⁴ See footnote 593 above.

¹¹¹⁵ ECHR, *Moustaquim v. Belgium*, judgement of 18 February 1991, *Series A, No. 193*, para. 43. See also the cases of *Chahal*, para. 73 (footnote 602 above); and of *Vilvarajah*, para. 102; *Ahmed*, para. 38; *Bouchelkia*, para. 48; *H.L.R. v. France*, para. 33 (footnote 1014 above).

514. As noted in the present report (para. 465 above), in terms of domestic law, as early as 1891, the Supreme Court of the United States held that every sovereign nation had the power to decide whether to admit aliens and under what conditions as a matter of international law.¹¹¹⁶ In the same vein, also noted in the present report (para. 466 above), in 1906, the right of a State to decide whether to admit aliens, even those who are nationals of friendly States, was recognized by the Judicial Committee of the Privy Council (predecessor of the Supreme Court of Canada) in the *Cain* case.¹¹¹⁷

D. Expulsion to a State which has no duty to admit

515. For there to be a return, the country to which the person will be expelled must accept the entry of the person into their territory. As a first priority, aliens should be returned to their country of origin. However, when it is not possible to return them to "their own country" if there is too great a risk to their life or physical integrity, or because the authorities of that country refuse to readmit them, they must be sent to a third country. The expelling State must then ensure that the State of destination will accept them and that they will not be at risk of mistreatment there.

516. There are different views as to whether a State incurs responsibility for an internationally wrongful act by expelling an alien to a State which is under no duty and has not otherwise agreed to receive the alien. The view has been expressed that the broad discretion of the expelling State to determine the destination of the expelled person is not inconsistent with the right of the receiving State to refuse to admit this person in the absence of any duty to do so:

The breadth of discretion conferred upon the national authorities is in no way inconsistent with the general principle that an alien cannot be deported to a State other than that of his nationality against the will of such State. Indeed, it happens not infrequently that national authorities, acting in accordance with a power undoubtedly expressed in national law, expel an alien to a third State where the national authorities exercise a power, equally undoubted under domestic law, to remit him whence he came.¹¹¹⁸

What is more, it is further suggested that the expelling State does not violate international law by expelling an alien to a State which does not have a duty to receive this person since the receiving State can still exercise its right to refuse to admit the alien.¹¹¹⁹ Plender also writes:

The act of sending an alien to a country which is unwilling and under no obligation to admit him does not in normal circumstances engage international responsibility, either towards the State to which he is conducted or towards any State having an interest (by treaty or otherwise) in the maintenance of the alien's fundamental rights.¹¹²⁰

He believes that the repeated expulsion of an alien to States unwilling to accept him may entail a breach of the specific obligations undertaken by the expelling State in a convention designed to protect human rights. In particular,

¹¹¹⁶ *Nishimura Ekiu* and *Chae Chan Ping* cases (footnote 1015 above).

¹¹¹⁷ See footnote 1016 above.

¹¹¹⁸ Plender (footnote 191 above), p. 468.

¹¹¹⁹ *Ibid.*, p. 469.

¹¹²⁰ *Ibid.*, p. 468–469.

it would entail a breach of the Geneva Convention on the Legal Status of Refugees

if he is a refugee and is returned in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, nationality, membership of a particular social group or political opinion.¹¹²¹

517. Conversely, the view has been expressed that such conduct by the expelling States is inconsistent with the general rule that a State has no duty to admit aliens into its territory. According to O'Connell:

A State may not just conduct an alien to its frontier and push him over without engaging itself in responsibility to the State to which he is thus forcibly expelled. It may, therefore, only deport him to a country willing to receive him, or to his national country.¹¹²²

Moreover:

Expulsion which causes specific loss to the national state receiving groups without adequate notice would ground a claim for indemnity as for incomplete privilege.¹¹²³

Plender himself reaches the following conclusion:

From the proposition that a State is in general under no obligation to admit aliens to its territory, it follows that a State may not in principle expel him other than to his country of nationality, unless the State of destination agrees to accept him.¹¹²⁴

518. These positions of doctrine are founded on the unchallengeable rule of international law that each State has the sovereign power to set the conditions of entry to and exit from its territory. Forcing a State to admit an alien against its will would constitute, as previously noted, an infringement of its sovereignty and political independence. It is because of this rule, which derives in particular from the principle of territorial sovereignty, as well as all the previous comments with regard to the destination State, that the following draft article is proposed, which is undoubtedly a matter of codification:

**“Draft article E1. State of destination
of expelled aliens**

“1. An alien subject to expulsion shall be expelled to his or her State of nationality.

¹¹²¹ *Ibid.*, p. 469.

¹¹²² O'Connell (footnote 1084 above), p. 710.

¹¹²³ Brownlie (footnote 1099 above), p. 499.

¹¹²⁴ Plender (footnote 191 above), p. 468.

“2. Where the State of nationality has not been identified, or the alien subject to expulsion is at risk of torture or inhuman and degrading treatment in that State, he or she shall be expelled to the State of residence, the passport-issuing State, the State of embarkation, or to any other State willing to accept him or her, whether as a result of a treaty obligation or at the request of the expelling State or, where appropriate, of the alien in question.

“3. An alien may not be expelled to a State that has not consented to admit him or her into its territory or that refuses to do so, unless the State in question is the alien's State of nationality.

E. State of transit

519. In general, priority is given to direct return, without transit stops in the ports or airports of other States. However, the return of illegal residents may require use of the airports of certain States in order to make the connection to the third destination State.¹¹²⁵ It would therefore seem useful to establish a specific legal framework for this type of procedure. This framework could be determined either by bilateral agreements or by a multilateral legal instrument. In any case, its elaboration goes beyond the scope of the issue at hand.

520. On the other hand, since the principle of protecting the human rights of aliens subject to expulsion has been raised, it should be expressly affirmed here that the rules on protecting the human rights of such aliens in the expelling State apply *mutatis mutandis* in the transit State. Accordingly, the following draft article is proposed:

**“Draft article F1. Protecting the human rights
of aliens subject to expulsion in the transit State**

“The applicable rules that apply in the expelling State to protection of the human rights of aliens subject to expulsion shall apply also in the transit State.”

¹¹²⁵ European Commission, Green Paper on a community return policy on illegal residents, 10 April 2002, COM(2002) 175 final, section 3.3.

PART THREE

Legal consequences of expulsion

CHAPTER VII

The rights of expelled aliens

**A. Protecting the property rights and
similar interests of expelled aliens**

**1. PROHIBITION OF EXPULSION FOR
THE PURPOSE OF CONFISCATION**

521. Some authors refer to expulsion practices explicitly targeted at the confiscation of goods from aliens subject to expulsion decisions. In that regard they note,

for example, that in Germany, economic pretexts were put forward to justify certain expulsions in the past,¹¹²⁶ with the State of Bavaria going the furthest in this direction, in that, between 1919 and 1921, Bavarian leaders decreed a number of expulsions of aliens that affected Jews. In 1923, von Kahr, vested with full powers by the Bavarian Government, began the most spectacular wave

¹¹²⁶ Weber (footnote 536 above).

of expulsions in the Weimar period. Foreign Jews, as well as other aliens from Baden and Prussia, were expelled. Along with the notices of expulsion, simultaneous orders were given to sequester the homes, and in some cases the businesses, of the expelled persons. According to the instructions given by von Kahr to the Ministry of the Interior:

Economically damaging behaviour is sufficient reason to proceed with the expulsion of aliens. If the head of the family is subject to an expulsion order, the measure should be extended to the other members of the family living in that household ... the apartments and residences of expelled aliens shall be considered seized.¹¹²⁷

522. After the Second World War, several western States had to address the issue of the property of Germans expelled by the Nazis. In Czechoslovakia, several presidential decrees, known as the “Beneš decrees”, were issued on 21 June 1945. Decree No. 12 concerned the “confiscation and expedited distribution of the agricultural goods and land of Germans, Magyars, and traitors and enemies of the Czech and Slovak peoples”. The decrees mandated the expropriation of agricultural land belonging to ethnic Germans and Hungarians, excepting those who “had taken an active part in the struggle to preserve the integrity of and liberate the Czech Republic”.¹¹²⁸ The expropriation was decreed without explicit reference to the issue of the expulsion of German land owners. It was the Potsdam Agreement, signed on 2 August 1945 by the United Kingdom (Attlee), the United States (Truman) and the Union of Soviet Socialist Republics (Stalin), that later legitimized the expulsion and transfer of German people to Germany. Article XII of the Agreement addresses the transfer of German populations out of Eastern Europe, stating:

The Three Governments, having considered the question in all its aspects, recognize that the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken. They agree that any transfers that take place should be effected in an orderly and humane manner.

The movement of populations, both flight and expulsion, began with the liberation of the territories occupied by the Nazis and the westward advance of the Soviet army.

523. Under chapter 6 of the multilateral Convention on the Settlement of Matters Arising out of the War and the Occupation,¹¹²⁹ signed at Bonn on 26 May 1952, Germany undertook that it would “in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany”. Article 3, paragraph 3, of chapter 6 (Reparations) stipulates:

No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures

referred to in paragraph 1 and 2 of this Article, or against international organisations, foreign governments or persons who have acted upon instructions of such organisations or governments.

Finally, article 5 of the same chapter stipulates:

The Federal Republic [of Germany] shall ensure that the former owners of property seized pursuant to the measures referred to in Articles 2 and 3 of this Chapter shall be compensated.¹¹³⁰

524. Beginning in the 1950s, Sudeten organizations (*Sudetendeutsche Landsmannschaft*) in the Federal Republic of Germany made demands for restitution of confiscated property and compensation for damage suffered as a result of expulsions. These requests have hardly changed today, but the post-Cold-War context has renewed their momentum:

—Claim to a *Heimatrecht*, that is, a right of return for Germans who were expelled, enabling them to settle in the Czech Republic, automatically receive Czech citizenship and benefit from the specific rights of national minorities in the Czech Republic. The admission of the Czech Republic into the European Union and, in this context, the application of the right of residence for all citizens of the Union, only partially address this claim, as the new residents are not guaranteed “different” rights from those of other residents;

—Demand for restitution of expropriated property and compensation for damage suffered due to expulsion;

—Demand for repeal of the Beneš decrees concerning Germans in Czechoslovakia.¹¹³¹

525. Since 1989, German Government administrations have refused to officially support the claims of Germans from Sudetenland. Chancellor Schröder clearly laid out the position of the Social-Democrat Government in a speech delivered in Berlin on 3 September 2000 to a meeting of *Vertriebenen* (expellees) during the Conference on *Heimat* (homeland). Although he recognized the “unjust and unjustifiable” nature of expulsion in any form, the Chancellor recalled that Germany did not have “any territorial claims on any of its neighbours” and that the Government would not raise any issues of ownership with the Czech Republic, adding that the “validity of many measures taken after the Second World War, such as the Beneš decrees, had become obsolete”. Although Chancellor Schröder decided to postpone an official visit to the Czech Republic in early 2002, at the federal level, the issue was generally perceived as marginal given the challenges of expanding the Union or of Germany’s relations with Eastern Europe. One source suggests that expellee

¹¹²⁷ Reiner Pommerin, “Die Ausweisungen von ‘Ostjuden’ aus Bayern 1923”, *Vierteljahrshefte für Zeitgeschichte*, No. 3, 1986, cited by Weber (footnote 536 above), footnote 31.

¹¹²⁸ See Bazin, “Les Décrets Beneš et l’intégration de la République tchèque dans l’Union européenne”.

¹¹²⁹ This Convention is still in force.

¹¹³⁰ A “reparations Act” (*Lastenausgleichsgesetz*) was passed by the Federal Republic of Germany on 16 May 1952. This law entitled expelled persons to receive from the Government of the Federal Republic of Germany compensation for losses and damage suffered as a result of their transfer. The total amount of compensation provided to Germans expelled from the territories of the East is estimated to be 146 billion Deutsche Marks. In the German Democratic Republic, “refugees” were not accorded a special status and the Government did not have the kind of resources offered by the “reparations Act” to assist those who had been expelled and had settled in the German Democratic Republic. However, after the reunification of the country, they or their descendants received a sum from the German Government under the *Lastenausgleichsgesetz*.

¹¹³¹ Bazin (footnote 1128 above), p. 4.

organizations would be hard pressed to gain the sympathy of the majority of the German public, which considers them to be nostalgic for a past from which it rightly wishes to separate itself.¹¹³²

526. Outside the context of international conflict such as the Second World War, there have been other such cases of apparent “confiscatory expulsions” or cases in which aliens may have been expelled in order to facilitate the unlawful seizure of their property. Instances are the *Nottebohm* case,¹¹³³ the expulsion of Asians by Uganda,¹¹³⁴ and the expulsion of British nationals from Egypt.¹¹³⁵ The lawfulness of such expulsions has been questioned from the perspective of the absence of a valid ground for expulsion¹¹³⁶ as well as human rights relating to property interests discussed below.

2. PROTECTION OF PROPERTY OF ALIENS, INCLUDING
THOSE WHO HAVE BEEN LAWFULLY EXPELLED

527. An alien facing expulsion who has resided and worked continuously in a State generally has assets that require protection in the context of the expulsion. The expulsion should be carried out in conformity with international human rights law governing the property rights and other economic interests of aliens. It should not deprive the alien of the right to own and enjoy his or her property. Article 17, paragraph 2, of the Universal Declaration of Human Rights states:

No one shall be arbitrarily deprived of his property.

Article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that:

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.

...

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.

528. At the regional level, article 14 of the African Charter on Human and Peoples’ Rights states:

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

¹¹³² *Ibid.* It should be noted that the Beneš decrees would seem to be valid insofar as they were never formally repealed, although they have apparently fallen into abeyance, in that they are no longer implemented.

¹¹³³ *Second Phase, Judgment, I.C.J. Reports 1955*, p. 4. See details in Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 211.

¹¹³⁴ *Ibid.*, pp. 212–216.

¹¹³⁵ *Ibid.*, p. 216.

¹¹³⁶ See Sohn and Baxter, “Responsibility of States for injuries to the economic interests of aliens”, p. 566, referring to the draft convention on the international responsibility of States for injuries to aliens, including articles 10 (Taking and deprivation of use or enjoyment of property) and 11 (Deprivation of means of livelihood) prepared by the authors. Attention may also be drawn to article 11, paragraph 2 (b), of the draft convention prepared by the Harvard Law School in 1961, which prohibits expulsion when it is intended to deprive an alien of his or her livelihood. This document is reproduced in the first report on State responsibility of the Special Rapporteur, Roberto Ago, *Yearbook ... 1969*, vol. II (A/CN.4/217 and Add. 1), annex VII, p. 142.

529. The American Convention on Human Rights states in article 21 on the right to property:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

3. Usury and any other form of exploitation of man by man shall be prohibited by law.

530. Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms essentially guarantees the right to property. The protection offered by this provision is applicable when the State itself confiscates property as well as when the enforced transfer of an individual’s property has been effected by request and to the benefit of another individual under the conditions established by law.

531. Expulsions that have involved illegal confiscations,¹¹³⁷ destruction or expropriation,¹¹³⁸ as well as “summary expulsions, by which individuals were compelled to abandon their property, subjecting it to pillage and destruction, or by which they were forced to sell it at a sacrifice”¹¹³⁹ may be considered illegal expulsions.

532. The unlawful taking of property may be the undeclared aim of an expulsion. “For example, the ‘right’ of expulsion may be exercised ... in order to expropriate the alien’s property ... In such cases, the exercise of the power cannot remain untainted by the ulterior and illegal purpose.”¹¹⁴⁰ In this connection, attention may be drawn to article 9 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, which provides:

No alien shall be arbitrarily deprived of his or her lawfully acquired assets.¹¹⁴¹

533. The national laws of some States¹¹⁴² contain provisions aimed at protecting the property and economic interests of aliens in relation to expulsion. The relevant

¹¹³⁷ “When taxation becomes confiscatory, it becomes illegal. In like manner, it is reasonable to conclude that where expulsion becomes confiscatory, it also becomes illegal” (Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 217).

¹¹³⁸ “According to *Hollander*, an alien should not be expelled without being given the opportunity to make arrangements for his family and business ... It does not seem that the *Hollander* case must be interpreted to mean that there is a rule of international customary law stating that the property of expellees may not be expropriated, or that dispositions of property undertaken by them may not be retrospectively invalidated” (Sharma and Wooldridge (footnote 518 above), p. 412 (citing *Hollander, U.S. v. Guatemala*, IV *Moore’s Digest* 102)).

¹¹³⁹ Borchard (footnote 75 above), p. 60. These types of expulsion “have all been considered by international commissions as just grounds for awards”, citing *Gardiner (U.S.) v. Mexico*, 3 March 1849, opinion 269; *Jobson (U.S.) v. Mexico*, 3 March 1849, opinion 553; *Gowen and Copeland (U.S.) v. Venezuela*, 5 December 1885, *Moore’s Arb.* 3354–3359. See also *Iluyomade* (footnote 580 above), pp. 47–92; *Doehring* (footnote 425 above), p. 111.

¹¹⁴⁰ Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 209; see also pp. 216, 307–308.

¹¹⁴¹ See footnote 579 above.

¹¹⁴² Analysis drawn from the memorandum by the Secretariat (footnote 18 above), para. 481.

legislation may expressly establish that expulsion will not affect any rights acquired by the alien under the State's legislation, including the right to receive wages or other entitlements¹¹⁴³ or provide for the transfer of work entitlement contributions to the alien's State.¹¹⁴⁴

534. Other national laws may provide that any acquisition of property by the State as a result of the alien's expulsion, or in excess of an amount owed to the State, shall be compensated by agreement or, failing such, with a reasonable amount determined by a competent court.¹¹⁴⁵ In order to secure a debt that is or may be owed by the alien, a State may attach the alien's property either unilaterally for so long as the law permits,¹¹⁴⁶ or by order of a competent court.¹¹⁴⁷ A State may authorize its officers to seek out, seize and preserve the alien's valuables pending a determination of the alien's financial liability and the resolution of any debt.¹¹⁴⁸ A State may also allow the seizure,¹¹⁴⁹ disposition¹¹⁵⁰ or destruction¹¹⁵¹ of forfeited items.

3. PROPERTY RIGHTS AND SIMILAR INTERESTS

535. There are several authorities supporting the view that an alien expelled should be given a reasonable opportunity to protect the property rights and other interests that he or she may have in the expelling State. As early as 1892, the Institute of International Law adopted a provision indicating that aliens who are domiciled or resident, or have a commercial establishment in the expelling State, shall be given the opportunity to settle their affairs and interests before leaving the territory of that State:

Deportation of aliens who are domiciled or resident or who have a commercial establishment in the territory shall only be ordered in a manner that does not betray the trust they have had in the laws of the State. It shall give them the freedom to use, directly where possible or by the mediation of a third party chosen by them, every possible legal process to settle their affairs and their interests, including their assets and liabilities, in the territory.¹¹⁵²

536. According to some authors:

Except in times of war or imminent danger to the security of the State, adequate time should be given to the [expelled] alien ... to wind up his or her personal affairs. The alien should be given a reasonable opportunity to dispose of property and assets, and permission to carry or transfer money and other assets to the country of destination; in no circumstances should the alien be subjected to measures of expropriation or be forced to part with property and assets.¹¹⁵³

Schwarzenberger states:

Abrupt expulsion or expulsion in an offensive manner is a breach of the minimum standards of international law with which their home State may expect compliance. If a State chooses to exercise its sovereign

discretion in contravention of this rule, it does not abuse its rights of sovereignty. It simply breaks a prohibitory rule by which its rights of exclusive jurisdiction are limited.¹¹⁵⁴

Failure to give the alien such opportunity has resulted in international claims. For example, in *Hollander*, the United States claimed compensation from Guatemala for the summary expulsion of one of its citizens, pointing out that Mr. Hollander

was literally hurled out of the country, leaving behind wife and children, business, property, everything dear to him and dependent upon him... The Government of Guatemala, whatever its laws may permit, had not the right in time of peace and domestic tranquillity to expel Hollander without notice or opportunity to make arrangements for his family and business, on account of an alleged offense committed more than three years before.¹¹⁵⁵

537. More than a century later, the Iran-United States Claims Tribunal held, in the case of *Rankin*, that an expulsion was unlawful if it denied the alien concerned a reasonable opportunity to protect his or her property interests:

The implementation of this policy could, in general terms, be violative of both procedural and substantive limitations on a State's right to expel aliens from its territory, as found in the provisions of the Treaty of Amity and in customary international law ... For example ... by depriving an alien of a reasonable opportunity to protect his property interests prior to his expulsion.¹¹⁵⁶

538. Such considerations are taken into account in national laws. The relevant legislation may expressly afford the alien a reasonable opportunity to settle any claims for wages or other entitlements even after the alien departs the State,¹¹⁵⁷ or provide for the winding up of an expelled alien's business.¹¹⁵⁸ The relevant legislation may also provide for the necessary actions to be taken in order to ensure the safety of the alien's property while the alien is detained pending deportation.¹¹⁵⁹

539. In its partial award on Eritrea's civilian claims,¹¹⁶⁰ the Eritrea-Ethiopia Claims Commission addressed the property rights of enemy aliens in wartime. The Commission noted that the parties were in agreement with respect to the continuing application of peacetime rules barring expropriation. The Commission, however, emphasized the relevance of *jus in bello* concerning the treatment of enemy property in wartime. The Commission reviewed the evolution of this area of law since the late eighteenth

¹¹⁵⁴ Schwarzenberger (footnote 578 above), pp. 309–310. See also Borchard (footnote 75 above), p. 56 (citing, in particular, in footnote 1, the case of *Hollander v. Guatemala* (*Foreign Relations*, 1895, II, 776)) and several cases from the end of the nineteenth century: *Scandella v. Venezuela* (1898); *Jobson (U.S.) v. Mexico* (footnote 1139 above); *Gowen and Copeland (U.S.) v. Venezuela* (footnote 1139 above); and in note 5 the cases of *Maal, Boffolo and Jaurett* (see footnote 582 above). See, in addition, Hershey, *The Essentials of International Public Law and Organization*, p. 375.

¹¹⁵⁵ Moore (footnote 124 above), p. 107. See also Harris (footnote 28 above), p. 503, citing *Breger* (expelled from Rhodes in 1938, six months notice probably sufficient), letter from United States Department of State to a Congressman, 1961, 8 Whiteman 861.

¹¹⁵⁶ *Jack Rankin v. the Islamic Republic of Iran, Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1988), vol. 17, p. 147, para. 30, and footnote 20.

¹¹⁵⁷ Argentina, 2004 Act, art. 68.

¹¹⁵⁸ Nigeria, 1963 Act, art. 47.

¹¹⁵⁹ Belarus, 1999 Council Decision, art. 17.

¹¹⁶⁰ *Eritrea-Ethiopia Claims Commission, Partial Award, Civilians Claims, Eritrea's Claims*, 15, 16, 23 and 27, 32, 17 December 2004.

¹¹⁴³ Argentina, 2004 Act, art. 67.

¹¹⁴⁴ Italy, 1996 Decree Law, art. 5.

¹¹⁴⁵ Australia, 1958 Act, arts. 3B, 261 H(3) (b) (ii), (6).

¹¹⁴⁶ *Ibid.*, art. 223 (1)–(8).

¹¹⁴⁷ *Ibid.*, arts. 222, 223 (9)–(14); and Belarus, 1999 Council Decision, art. 26.

¹¹⁴⁸ Australia, 1958 Act, arts. 223 (14)–(20), 224.

¹¹⁴⁹ *Ibid.*, arts. 261B (1)–(2), 261D.

¹¹⁵⁰ *Ibid.*, arts. 261F–261I, 261K.

¹¹⁵¹ *Ibid.*, art. 261E (1)–(2).

¹¹⁵² “Règles internationales...”, art. 41.

¹¹⁵³ See Sohn and Buergenthal (footnote 195 above), p. 96; and Oda (footnote 10 above), p. 483.

century. The Commission recognized that belligerents have broad powers to deal with the property of enemy aliens in wartime. However, it further recognized that these powers are not unlimited. The Commission found that a belligerent has a duty as far as possible to ensure that the property of enemy aliens is not despoiled or wasted. The Commission also found that freezing or other impairment of private property of enemy aliens in wartime must be done by the State under conditions providing for its protection and its eventual return to the owners or disposition by post-war agreement.

540. The Commission noted that the claims related not to the treatment of enemy property in general, but rather to the treatment of the property of enemy aliens who were subject to expulsion. The Commission therefore considered specific measures taken with respect to the property of enemy aliens who were subject to expulsion as well as the cumulative effect of such measures. The Commission considered the substance of the measures to determine whether they were reasonable or arbitrary or discriminatory. The Commission also considered whether the procedures relating to such measures met the minimum standards of fair and reasonable treatment necessary in the special circumstances of wartime.

541. In particular, the Commission considered in depth the lawfulness of the powers of attorney system established for the preservation of property, the compulsory sale of immovable property, taxation measures; the foreclosure of loans, and the cumulative effect of the various measures relating to the property of expelled enemy aliens. Paragraphs 124–129, 133, 135–136, 140, 142, 144–146 and 151–152 of that ruling are pertinent to these points. The text is not reproduced here in whole given its length, but an overview of the Commission's major views and conclusions on the issue follows. According to the Commission:

The modern *jus in bello* thus contains important protections of aliens' property, beginning with the fundamental rules of discrimination and proportionality in combat operations, which protect both lives and property.¹¹⁶¹

542. In their arguments, both Parties concurred that "customary international law rules (limit) States' rights to take aliens' property in peacetime" and "agreed that peacetime rules barring expropriation continued to apply".¹¹⁶² It should be noted, however, that the events at issue largely occurred during an international armed conflict and should therefore be considered in the light of the *jus in bello*, which is outside the scope of this study to the extent that, in many respects, different legal regimes apply in peacetime and wartime.

For example, under the *jus in bello*, the deliberate destruction of aliens' property in combat operations may be perfectly legal, while similar conduct in peacetime would result in State responsibility.¹¹⁶³

However, some aspects of the award also shed light on the rules applicable to the protection of the property of aliens expelled in peacetime.

543. In this specific case:

Eritrea did not contend that Ethiopia directly froze or expropriated expellees' property. Instead, it claimed that Ethiopia designed and carried out a body of interconnected discriminatory measures to transfer the property of expelled Eritreans to Ethiopian hands. These included:

—Preventing expellees from taking effective steps to preserve their property;

—Forcing sales of immovable property;

—Auctioning of expellees' property to pay overdue taxes; and

—Auctioning of expellees' mortgaged assets to recover loan arrears.

Eritrea asserts that the cumulative effect of these measures was to open up Eritrean private wealth for legalized looting by Ethiopians.¹¹⁶⁴

544. With regard to the preservation of property by power of attorney, the Eritrea-Ethiopia Claims Commission, while recognizing "the enormous stresses and difficulties besetting those facing expulsion" and acknowledging that "there surely were property losses related to imperfectly executed or poorly administered powers of attorney", noted:

Particularly in these wartime circumstances, where the evidence shows Ethiopian efforts to create special procedures to facilitate powers of attorney by detainees, the shortcomings of the system of powers of attorney standing alone do not establish liability.¹¹⁶⁵

545. Concerning the compulsory sale of immovable property, the Commission states that:

Prohibiting real property ownership by aliens is not barred by general international law; many countries have such laws. The Commission accepts that dual nationals deprived of their Ethiopian nationality and expelled pursuant to Ethiopia's security screening process could properly be regarded as Eritreans for purposes of applying this legislation. Further, Ethiopia is not internationally responsible for losses resulting from sale prices depressed because of general economic circumstances related to the war or other similar factors.

Nevertheless, the Commission has serious reservations regarding the manner in which the prohibition on alien ownership was implemented. The evidence showed that the Ethiopian Government shortened the period for mandatory sale of deportees' assets from the six months available to other aliens to a single month. This was not sufficient to allow an orderly and beneficial sale, particularly for valuable or unusual properties. Although requiring Eritrean nationals to divest themselves of real property was not contrary to international law, Ethiopia acted arbitrarily, discriminatorily, and in breach of international law in drastically limiting the period available for sale.¹¹⁶⁶

546. With regard to the location value tax, the Commission concluded that "the 100% 'location tax' was not a tax generally imposed, but was instead imposed only on certain forced sales of expellees' property" and that "such a discriminatory and confiscatory taxation measure was contrary to international law".¹¹⁶⁷ However, it did not find that "the measures to collect overdue loans were in themselves contrary to international law".¹¹⁶⁸ With regard to Ethiopia's requirement that expellees should settle their tax liabilities, on the other hand, the Commission considered that international law did not prohibit the country from imposing such a requirement, but that it "required that this be done in a reasonable and principled way", which, according to the Commission, had not been the

¹¹⁶⁴ *Ibid.*, para. 129.

¹¹⁶⁵ *Ibid.*, para. 133.

¹¹⁶⁶ *Ibid.*, paras. 135 and 136.

¹¹⁶⁷ *Ibid.*, para. 140.

¹¹⁶⁸ *Ibid.*, para. 142.

¹¹⁶¹ *Ibid.*, para. 126.

¹¹⁶² *Ibid.*, para. 124.

¹¹⁶³ *Ibid.*

case. Since the amount demanded was simply an estimate, there was no effective means for most expellees to review or contest that amount. Furthermore, there was very little time between issuance of the tax notice and deportation and there was no assurance that expellees or their agents received the notices. Moreover,

[i]f they did, the payment of the taxes could be impossible because of bank foreclosure proceedings against assets and the array of other economic misfortunes befalling expellees. Viewed overall, the tax collection process was approximate and arbitrary and failed to meet the minimum standards of fair and reasonable treatment necessary in the circumstances.¹¹⁶⁹

547. Considering the collective impact of all Ethiopia's measures, the Eritrea-Ethiopia Claims Commission concluded that

[a] belligerent is bound to ensure insofar as possible that the property of protected persons and of other enemy nationals are not despoiled and wasted. If private property of enemy nationals is to be frozen or otherwise impaired in wartime, it must be done by the State, and under conditions providing for the property's protection and its eventual disposition by return to the owners or through post-war agreement.¹¹⁷⁰

548. What is valid here in wartime is equally valid in peacetime—or perhaps even more so. There would be no justification, in peacetime, for leaving the property of expelled persons to be despoiled or wasted or for failing to return such property to its owners at their request. The obligation incumbent on the expelling State in this regard should therefore be deemed established in both wartime and peacetime.

549. The award of the Eritrea-Ethiopia Claims Commission found Ethiopia liable to Eritrea for the following violations of international law involving acts or omissions by its civilian officials, military personnel or others for whose conduct it is responsible:

11. For limiting to one month the period available for the compulsory sale of Eritrean expellees' real property;

12. For the discriminatory imposition of a 100% "location tax" on proceeds from some forced sales of Eritrean expellees' real estate;

13. For maintaining a system for collecting taxes from Eritrean expellees that did not meet the required minimum standards of fair and reasonable treatment; and

14. For creating and facilitating a cumulative network of economic measures, some lawful and others not, that collectively resulted in the loss of all or most of the assets in Ethiopia of Eritrean expellees, contrary to Ethiopia's duty to ensure the protection of aliens' assets.¹¹⁷¹

550. In the partial award on Ethiopia's civilian claims, responsibility was reversed; this time Eritrea was found liable. The Eritrea-Ethiopia Claims Commission stated:

The evidence showed that those Ethiopians expelled directly from Eritrean detention camps, jails and prisons after May 2000 did not receive any opportunity to collect portable personal property or otherwise arrange their affairs before being expelled. Accordingly, Eritrea is liable for those economic losses (suffered by Ethiopians directly expelled from detention camps, jails and prisons) that resulted from their lack of opportunity to take care of their property or arrange their affairs before being expelled.

...

¹¹⁶⁹ *Ibid.*, para. 144.

¹¹⁷⁰ *Ibid.*, para. 151.

¹¹⁷¹ *Ibid.*, section XIII.E, para. 14.

The Commission, however, was struck by the cumulative evidence of the destitution of Ethiopians arriving from Eritrea, whether expelled directly from detention post-May 2000 or otherwise. Although this may be partially explained by the comparatively low-paying jobs held by many in the original Ethiopian community, the Commission finds it also reflected the frequent instances in which Eritrean officials wrongfully deprived departing Ethiopians of their property. The record contains many accounts of forcible evictions from homes that were thereafter sealed or looted, blocked bank accounts, forced closure of businesses followed by confiscation, and outright seizure of personal property by the police. The Commission finds Eritrea liable for economic losses suffered by Ethiopian departees that resulted from Eritrean officials' wrongful seizure of their property and wrongful interference with their efforts to secure or dispose of their property.¹¹⁷²

551. The award of the Eritrea-Ethiopia Claims Commission found Eritrea liable for the following violations of international law involving acts or omissions by its civilian officials, military personnel or others for whose conduct it is responsible:

For allowing the seizure of property belonging to Ethiopians departing other than from detention camps, prisons and jails, and otherwise interfering with the efforts of such Ethiopians to secure or dispose of their property.¹¹⁷³

552. There is no doubt that the expelling State's obligation to protect the property of expelled aliens and to guarantee their access to the said property is established in international law: it is provided for in some international treaties and confirmed by international case law; it is also unanimously supported by the literature and incorporated in the national legislation of many countries. Accordingly, the Special Rapporteur proposes the following draft article:

"Draft article G1. Protecting the property of aliens facing expulsion"

"1. The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

"2. The expelling State shall protect the property of any alien facing expulsion, shall allow the alien [to the extent possible] to dispose freely of the said property, even from abroad, and shall return it to the alien at his or her request or that of his or her heirs or beneficiaries."

B. Right of return in the case of unlawful expulsion

553. In principle, any alien illegally expelled from a State has a claim to return to the said State. In particular, if an expulsion decision is annulled, the expelled alien should be able to apply to benefit from such a right of return to the expelling State without the State being able to invoke the expulsion decision against him or her. With regard to migrant workers and members of their families in particular, article 22, paragraph 5, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides:

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.

¹¹⁷² *Ibid.*, *Partial Award, Civilian Claims, Ethiopia's Claim 5*, paras. 133 and 135 (referencing the Convention respecting the Laws and Customs of War on Land). See also ILM, vol. 44 (2005), p. 630.

¹¹⁷³ *Ibid.*, section VIII.D, para 12.

554. At the regional level, the right of return in the case of unlawful expulsion was recognized by the Inter-American Commission on Human Rights in a case involving the arbitrary expulsion of a foreign priest. The Commission resolved

[t]o recommend to the Government of Guatemala: *a*) that Father Carlos Stetter be permitted to return to the territory of Guatemala and to reside in that country if he so desires; *b*) that it investigates the acts reported and punish those responsible for them; and *c*) that it inform the Commission in 60 days on the measures taken to implement these recommendations.¹¹⁷⁴

555. There are similar provisions in the national legislation of some countries. Article L524-4 of the French Code on the Entry and Stay of Aliens and on the Right to Asylum provides:

Except in the case of a threat to public order, duly substantiated, aliens residing outside France who have obtained a repeal of the expulsion order to which they were subject shall be granted a visa to re-enter France when, on the date of the expulsion order, subject to the reservations contained in these articles, they fell within one of the categories mentioned in article L521-3, paragraphs 1 to 4, and came under the scope of article L313-11, paragraph 4 or 6, or that of book IV.

If the alien in question has been convicted in France of violence or threats against a parent, spouse or child, the right to obtain a visa shall be subject to the agreement of his or her parents, spouse and children living in France.

This article shall apply only to aliens who were subject to an expulsion order before the entry into force of Act No. 2003-1119 of 26 November 2003 on immigration control, stay of aliens in France and nationality.

French legislation therefore provides for a right of return for expelled aliens, although subject to some restrictions, as can be seen.

556. In its response to the request for information contained in the Commission's report on its sixty-first session, regarding, *inter alia*, the question of "whether a person who has been unlawfully expelled has a right to return to the expelling State",¹¹⁷⁵ Germany made the following comments:

This constellation is only conceivable if the expulsion decision is not yet final and absolute, and it emerged during principal proceedings conducted abroad that the expulsion was unlawful.

A final and absolute expulsion (that is, an expulsion against which the alien concerned did not (within the prescribed period) lodge an appeal) also constitutes grounds for a prohibition on entry and residence if it is lawful; a right to return only arises if the effects of the expulsion were limited in time (which under German law occurs regularly upon application of section 11, paragraph 1, third sentence, of the Residence Act), this deadline has passed and there is a legal basis for re-entry (for example, the issuing of a visa).

This principle always applies unless the expulsion is null and void, for example, if it contains a particularly grave and clear error. If an appeal procedure is successfully pursued within the set period, the expulsion is revoked; insofar as the person was previously in possession of a residence permit which was to be nullified by the expulsion, the person can re-claim his/her residence permit thereby making re-entry possible.¹¹⁷⁶

557. Similarly, the Netherlands, while indicating that its national legislation contains no specific provisions on the issue, stated that a right of return would exist in the event that a lawful resident had been unlawfully expelled.¹¹⁷⁷

558. The right of return of an unlawfully expelled alien is also recognized in Romanian legal practice, as indicated by Romania's response to the Commission's questionnaire:

If the order is annulled or revoked through a special appeals procedure after expulsion is carried out, the judge is competent to rule on how to respond to the situation, granting the best available redress. In principle, in the event of annulment or revocation of an expulsion order, Romanian legal practice is that the alien must be allowed entry (pertinent domestic practice may be found in the *Kordoghliazar* decision).¹¹⁷⁸

559. Malaysian practice appears to require unlawfully expelled aliens to submit to the ordinary immigration procedures established by legislation. In its response to the Commission's questionnaire, Malaysia indicates that any person subject to an expulsion order may, within 14 days of notification of the order, apply to the High Court to have the order set aside on the ground that he is a Malaysian citizen or an exempted person by law, provided that the person concerned is still in Malaysia:

However, it must be noted that when a person is banished and leaves Malaysia, even if he manages to set aside the expulsion order within 14 days of the order, he does not have the right of return to Malaysia. This is because he will now be subjected to section 6 of the Immigration Act 1959/63 (Act No. 155). In other words, he will only be allowed to enter Malaysia if he possesses a valid entry permit or pass.¹¹⁷⁹

560. It would be contrary to the very logic of the right of expulsion to accept that an alien expelled on the basis of erroneous facts or mistaken grounds as established by the competent courts of the expelling State or an international court does not have the right to re-enter the expelling State on the basis of a court ruling annulling the disputed decision. To do so would effectively deprive the court ruling of any legal effect and confer legitimacy on the arbitrary nature of the expulsion decision. It would also amount to a violation of the expellee's right to justice. This is why, in the opinion of the Special Rapporteur, the idea of a right of re-entry contained in article 22, paragraph 5, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which is supported by domestic practice in most of the States that completed the Commission's questionnaire on this point, could be expressed as a general rule on expulsion, even if only as part of the progressive development of international law on the topic.

561. The following draft article may therefore be proposed:

¹¹⁷⁴ Inter-American Commission on Human Rights, resolution 30/81, para. 3, case No. 7378 (Guatemala), 25 June 1981, *Annual Report of the Inter-American Commission on Human Rights 1980-1981*, OEA/Ser.L/V/II.54, doc. 9, rev.1, 16 October 1981.

¹¹⁷⁵ *Yearbook ... 2009*, vol. II (Part Two), para. 29 (c).

¹¹⁷⁶ Document A/CN.4/628 and Add.1, reproduced in the present volume.

¹¹⁷⁷ See *Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee*, 21st meeting (A/C.6/64/SR.21), para. 89.

¹¹⁷⁸ Document A/CN.4/628 and Add.1, reproduced in the present volume. For the case of *Kordoghliazar v. Romania*, see ECHR, application No. 8776/05, judgement of 20 May 2008..

¹¹⁷⁹ Document A/CN.4/628 and Add.1, reproduced in the present volume.

“Draft article H1. Right of return to the expelling State

“An alien expelled on mistaken grounds or in violation of law or international law shall have the right of return to the expelling State on the basis of the annulment of the expulsion decision, save where his or her return constitutes a threat to public order or public security.”

562. It should be noted that, in this proposal, not all grounds for annulment of the expulsion decision confer the right of re-entry. An annulment founded on a purely procedural error cannot confer that right. The right must be granted for substantive reasons relating to the ground of expulsion itself. In this case, there are only two possibilities.

With regard to “mistaken”, hence erroneous, grounds, the alien cannot be made to suffer as a result of an act which he or she did not commit and which is wrongly attributed to him or her. In the case of a ground “contrary to international law”, the entire legal thinking that underlines this study on the expulsion of aliens, which is shared unanimously by the members of the Commission, is that the right of expulsion is indeed a sovereign right of the State, but one that is limited by international law, in particular as it pertains to the expellee’s human rights. To deny that person the right to return to the expelling State in the event of an expulsion decision for breach of international law being annulled would be to overlook the other side of the right of expulsion and transform it from a relative right to an absolute right, with the concomitant real risk of arbitrariness.

CHAPTER VIII

Responsibility of the expelling State as a result of an unlawful expulsion

563. A State which expels an alien in breach of the rules of international law incurs international responsibility. That responsibility may be established following legal proceedings initiated by the State whose national is expelled, in the context of diplomatic protection, or following proceedings brought before a special human rights court to which the expellee has direct or indirect access. This is a principle of customary international law which has always been reaffirmed by international courts.

A. Affirmation of the principle of the responsibility of the expelling State

564. Responsibility is the direct consequence of conduct contrary to the rule of law. According to Anzilotti:

As States are required to observe certain rules established by international law regarding the legal status of foreign nationals who are present in their territory, violation of these rules may indeed constitute an act contrary to international law which can engage the State’s responsibility.¹¹⁸⁰

565. The Commission completed its draft articles on State responsibility for internationally wrongful acts in 2001.¹¹⁸¹ These draft articles outline the relevant rules for determining the legal consequences of an internationally wrongful act,¹¹⁸² including unlawful expulsion. The intent of the present report is not to duplicate the remarkable work of the Special Rapporteur, James Crawford, by re-examining the legal regime of responsibility applied in the case of unlawful expulsion. Rather, the points recalled below are designed, more modestly, to show that the issue of expulsion of aliens has provided a considerable body of international case law for the study of State responsibility for internationally wrongful acts, and that reference to the

general regime of State responsibility established by the articles of the Commission on the topic is justified in law.

566. The unlawful character of an expulsion may result from the violation of a rule contained in an international treaty to which the expelling State is a party; a rule of customary international law; or a general principle of law.¹¹⁸³ A State may incur international responsibility in the following situations: (a) the expulsion is unlawful as such; (b) the applicable procedural requirements have not been respected; or (c) the expulsion has been enforced in an unlawful manner. Attention may be drawn in this respect to a draft article dealing specifically with the international responsibility of a State in relation to the unlawful expulsion of an alien under municipal law, which was proposed to the Commission by the Special Rapporteur, Mr. F. V. García Amador. The draft article provided as follows:

The State is responsible for the injuries caused to an alien who has been expelled from the country, if the expulsion order was not based on grounds specified in municipal law or if, in the execution of the order, serious irregularities were committed in the procedure established by municipal law.¹¹⁸⁴

567. The internationally wrongful act of the expelling State may also consist in the expulsion of the alien to a State where he or she would be exposed to torture. As one author puts it:

Depending on the particular circumstances, breach of the rule will therefore involve international responsibility towards other contracting parties, towards the international community as a whole, or towards regional institutions.¹¹⁸⁵

568. The principle whereby a State that expels an alien in breach of the rules of international law incurs

¹¹⁸⁰ Anzilotti, “La responsabilité internationale des États à raison des dommages soufferts par des étrangers”, p. 6.

¹¹⁸¹ The text of the draft articles on State responsibility for internationally wrongful acts was adopted by the Commission at its fifty-third session in 2001 and submitted to the General Assembly in the report of the Commission on its work at that session. The report, which also features commentaries on the draft articles, is contained in *Yearbook ... 2001*, vol. II (Part Two), p. 30, para. 77.

¹¹⁸² Arts. 28–54.

¹¹⁸³ See draft article 1 on State responsibility drawn up by the International Law Commission (“Responsibility of a State for internationally wrongful acts—Every internationally wrongful act of a State engages the State’s international responsibility” (*ibid.*, p. 26)), and Art. 38, paras. 1 (a), (b) and (c) of the Statute of the International Court of Justice.

¹¹⁸⁴ See *Yearbook ... 1961*, vol. II, p. 52, art. 5, para. 1.

¹¹⁸⁵ Goodwin-Gill, “The limits of the power of expulsion in public international law”, p. 88.

international responsibility has been established for a very long time. In the *Boffolo* case, the Umpire, after having stressed that “the (Italian-Venezuelan) Commission may inquire into the reasons and circumstances of the expulsion”,¹¹⁸⁶ observed that the State must accept the consequences of not giving any reason, or giving an inefficient reason, to justify an expulsion, when so required by an international tribunal:

The country exercising the power must, when occasion demands, state the reason of such expulsion before an international tribunal, and an inefficient reason or none being advanced, accepts the consequences.¹¹⁸⁷

569. As has been seen (para. 102 above), the same approach was taken in *Zerman v. Mexico*. The Commission found that if the expelling State had grounds for expelling the claimant, it was under the obligation of proving charges before the Commission.

570. In its partial award with respect to Eritrea’s civilian claims, the Eritrea-Ethiopia Claims Commission said the following, with regard to the obligation for the expelling State to protect the assets of expellees:

The record shows that Ethiopia did not meet these responsibilities. As a result of the cumulative effects of the measures discussed above, many expellees, including some with substantial assets, lost virtually everything they had in Ethiopia. Some of Ethiopia’s measures were lawful and others were not. However, their cumulative effect was to ensure that few expellees retained any of their property. Expellees had to act through agents (if a reliable agent could be found and instructed), faced rapid forced real estate sales, confiscatory taxes on sale proceeds, vigorous loan collections, expedited and arbitrary collection of other taxes, and other economic woes resulting from measures in which the Government of Ethiopia played a significant role. By creating or facilitating this network of measures, Ethiopia failed in its duty to ensure the protection of aliens’ assets.¹¹⁸⁸

As seen earlier, in its partial award with respect to Eritrea’s civilian claims, the Eritrea-Ethiopia Commission also found that Eritrea was liable for similar facts (see paras. 550 and 551 above).

571. The Eritrea-Ethiopia Claims Commission also found that Ethiopia was liable to Eritrea for “the following violations of international law involving acts or omissions by its civilian officials, military personnel or others for whose conduct it is responsible”:

For permitting local authorities to forcibly to expel to Eritrea an unknown, but considerable, number of dual nationals for reasons that cannot be established.¹¹⁸⁹

B. Expellee’s right to diplomatic protection

572. The goal here is not to revisit the law of diplomatic protection, which has been competently analysed by the

Special Rapporteur for the topic, Mr. John Dugard, and on which the Commission adopted draft articles on second reading in 2006.¹¹⁹⁰ It is, more modestly, to examine the extent to which this mechanism may be used to protect expellees, particularly since contemporary international case law provides a useful example in this regard with the case of *Diallo*¹¹⁹¹ before ICJ.

573. This case, as the proceedings currently stand, shows that when the expelling State is to be held liable as a result of court proceedings for diplomatic protection, especially before ICJ, some requirements must first be met. In the *Diallo* case, Guinea sought to

exercise its diplomatic protection on behalf of Mr. Diallo in respect of the DRC’s alleged violation of his rights as a result of his arrest, detention and expulsion, that violation allegedly constituting an internationally wrongful act by the (Democratic Republic of the Congo) giving rise to its responsibility.¹¹⁹²

The Court responded that it had to ascertain whether the Applicant had met the requirements for the exercise of diplomatic protection, that is to say, whether Mr. Diallo was a national of Guinea and whether he had exhausted the local remedies available in the Democratic Republic of the Congo.¹¹⁹³ In that connection, the Court found without difficulty that Mr. Diallo’s nationality was that of Guinea and that he had continuously held that nationality from the date of the alleged injury to the date the proceedings were initiated.¹¹⁹⁴

574. The requirement that local remedies must be exhausted has, in general, given rise to heated debate both in the literature and in international contentious proceedings. As ICJ stated in the *Interhandel* case:

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.¹¹⁹⁵

However, while States do not question the requirement to exhaust local remedies, there are often lively and intense discussions to determine whether there are indeed local remedies in a State’s legal system which an alien should have exhausted before his or her cause could be espoused by the State of which he or she is a national. In matters of diplomatic protection, the Court has said that “it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust

¹¹⁸⁶ *Boffolo* case (footnote 74 above), p. 534 (Umpire Ralston).

¹¹⁸⁷ *Ibid.*, p. 537, para. 3 (Umpire Ralston). A different opinion is expressed by the Venezuelan Commissioner in *Oliva*: “The Government of Venezuela considered the foreigner, Oliva, objectionable, and made use of the right of expulsion, recognized and established by the nations in general, and in the manner which the law of Venezuela prescribes. Italy makes frequent use of this right. The undersigned does not believe that Venezuela is under the necessity of explaining the reasons for expulsion” (*Oliva*, Mixed Claims Commission Italy-Venezuela, 1903, UNRIIAA, vol. X, pp. 600–609, at pp. 604–605).

¹¹⁸⁸ *Partial Award, Civilian Claims, Eritrea’s Claims 15, 16, 23 and 27–32*, para. 152.

¹¹⁸⁹ *Ibid.*, section XIII.E, para. 7.

¹¹⁹⁰ The text of the draft articles and the commentaries thereto is published in *Yearbook ... 2006*, vol. II (Part Two), p. 26, para. 50.

¹¹⁹¹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582, p. 591, para. 15.

¹¹⁹² *Ibid.*, p. 599, para. 40.

¹¹⁹³ *Ibid.*

¹¹⁹⁴ *Ibid.*, para. 41.

¹¹⁹⁵ *Interhandel (Switzerland v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1959, p. 27.

available local remedies”.¹¹⁹⁶ The Court refers to its judgment in the case of *Elettronica Sicula S.p.A. (ELSI)*.¹¹⁹⁷ It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted.¹¹⁹⁸

575. In the *Diallo* case, ICJ found it necessary to address the question of local remedies solely in respect of Mr. Diallo’s expulsion. It recalled:

The expulsion was characterized as a “refusal of entry” when it was carried out, as both Parties have acknowledged and as is confirmed by the notice drawn up on 31 January 1996 by the national immigration service of Zaïre. It is apparent that refusals of entry are not appealable under Congolese law. Article 13 of Legislative Order No. 83-033 of 12 September 1983, concerning immigration control, expressly states that the “measure [refusing entry] shall not be subject to appeal”. The Court considers that the (Democratic Republic of the Congo) cannot now rely on an error allegedly made by its administrative agencies at the time Mr. Diallo was “refused entry” to claim that he should have treated the measure as an expulsion. Mr. Diallo, as the subject of the refusal of entry, was justified in relying on the consequences of the legal characterization thus given by the Zaïrean authorities, including for purposes of the local remedies rule.¹¹⁹⁹

The Court noted, however:

Even if this was a case of expulsion and not refusal of entry, as the (Democratic Republic of the Congo) maintains, the (Democratic Republic of the Congo) has also failed to show that means of redress against expulsion decisions are available under its domestic law. The (Democratic Republic of the Congo) did, it is true, cite the possibility of requesting reconsideration by the competent administrative authority ... The Court nevertheless recalls that, while the local remedies that must be exhausted include all remedies of a legal nature, judicial redress as well as redress before administrative bodies, administrative remedies can only be taken into consideration for purposes of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Thus, the possibility open to Mr. Diallo of submitting a request for reconsideration of the expulsion decision to the administrative authority having taken it—that is to say the Prime Minister—in the hope that he would retract his decision as a matter of grace cannot be deemed a local remedy to be exhausted.¹²⁰⁰

576. Having failed to prove the existence in its domestic legal system of available and effective remedies allowing an alien facing arbitrary expulsion to challenge his expulsion, a State cannot cite this requirement as a cause of inadmissibility of an appeal before ICJ. This was, in fact, the conclusion that the Court came to after considering the various arguments of the parties in respect of this requirement.¹²⁰¹

577. Furthermore, an alien who is unlawfully expelled may take proceedings before specialized human rights courts to invoke the responsibility of the expelling State. Although ICJ has not yet ruled on the international responsibility of a State for the unlawful expulsion of an alien (perhaps it will do so in the *Diallo* case, which is now before the Court), arbitral tribunals and courts charged with enforcing human rights conventions frequently establish such responsibility and oblige the defaulting State to make reparation for the injury caused.

¹¹⁹⁶ *Ahmadou Sadio Diallo* (footnote 1191 above), para. 44.

¹¹⁹⁷ *Elettronica Sicula S.p.A. (ELSI)* (*United States of America v. Italy*), I.C.J. Reports 1989, p. 15.

¹¹⁹⁸ *Ahmadou Sadio Diallo* (footnote 1191 above), p. 582.

¹¹⁹⁹ *Ibid.*, p. 600, para. 46.

¹²⁰⁰ *Ibid.*, p. 601, para. 47.

¹²⁰¹ *Ibid.*, para. 48.

C. Proof of unlawful expulsion

578. Proof of unlawful expulsion is not easily established. The question of the burden of proof with respect to an allegedly wrongful expulsion appears to be unclear as a matter of international law. It has been addressed in some arbitral awards, although not in a uniform manner. As we have seen in this sixth report, among the requirements for a lawful expulsion are that it be based on a ground which is valid according to international law and that the expelling State has a duty to give the reasons for it.

579. In *Oliva*, the Italian Commissioner put the burden of proof of the facts justifying the expulsion on the expelling State:

The Venezuelan Commissioner finds that Mr. Oliva has not proved his innocence. It is not his place to prove this innocence. Every man is considered innocent until the proof of the contrary is produced. It was therefore the Venezuelan Government that should have proved that the claimant was guilty and this is just what it has not done. When expulsion is resorted to in France or Italy the proofs are at hand. Mere suspicions may justify measures of surveillance, but never a measure so severe as that of forbidding the residence in a country of a man who has important interests therein.¹²⁰²

580. In contrast, the Venezuelan Commissioner was of the view that it was sufficient that the expelling State had well-founded reasons to believe that the alien concerned was a revolutionist: “As to how far it was ascertained that Oliva was a revolutionist is not a matter for discussion. It was sufficient that there existed well-founded reasons in order that the Government of Venezuela might so believe, and this appears to be proved.”¹²⁰³

581. In *Zerman*, the umpire considered that, in a situation in which there was no war or disturbance, the expelling State had the obligation of proving charges before the Commission, and that mere assertions could not be considered as sufficient.

582. In contrast, the Iran-United States Claims Tribunal has imposed the burden of proof on the claimant alleging wrongful expulsion. In *Rankin v. The Islamic Republic of Iran*, the Tribunal concluded that the claimant had failed to do so and therefore dismissed his claims:

A claimant alleging expulsion has the burden of proving the wrongfulness of the expelling State’s action, in other words that it was arbitrary, discriminatory, or in breach of the expelling State’s treaty obligations.¹²⁰⁴

The Tribunal notes that the Claimant bears the burden of proving that he was wrongfully expelled from Iran by acts attributable to the Government of Iran. In the absence of any explanation of this conflicting evidence, the Tribunal concludes that the Claimant has failed to prove his intention.¹²⁰⁵

Consequently, the Tribunal finds that the Claimant has not satisfied the burden of proving that the implementation of the new policy of the Respondent ... was a substantial causal factor in the Claimant’s decision to leave.¹²⁰⁶

¹²⁰² *Oliva*, Mixed Claims Commission (Italy–Venezuela), 1903, UNRIIAA, vol. X, pp. 600–609, at p. 607 (Agnoli, Commissioner).

¹²⁰³ *Ibid.*, p. 605 (Zuloaga, Commissioner).

¹²⁰⁴ *Rankin* (footnote 1156 above), p. 142, para. 22.

¹²⁰⁵ *Ibid.*, p. 151, para. 38.

¹²⁰⁶ *Ibid.*, para. 39.

583. With respect to the *Rankin* case, however, it should be noted that the main issue was not whether there were grounds for the expulsion of Mr. Rankin, but whether the claimant had been compelled to leave the territory of the Islamic Republic of Iran by acts attributable to the authorities or whether he had left voluntarily.

D. Reparation for injury caused by unlawful expulsion

584. Violation by the expelling State of a legal obligation with respect to expulsion gives rise to an obligation to make reparation. An alien who has been wrongfully expelled may seek reparation for injury caused by the expulsion either in domestic courts or in the international tribunals charged with enforcing human rights conventions. A distinction must be made, however, between cases in which the State of nationality of an expelled alien opts to exercise diplomatic protection on behalf of its national in an international court and cases in which an individual who has been the victim of unlawful expulsion seeks reparation in a specialized human rights tribunal.

585. If a claim for reparation of injury suffered as a result of unlawful expulsion is made in the context of diplomatic protection proceedings, reparation is made to the State exercising diplomatic protection on behalf of its national. In *Ben Tillet*, the Government of the United Kingdom, claiming that Belgium had violated its own law by expelling Mr. Tillet, a British national, demanded damages of 75,000 Belgian francs. The arbitrator found that the claim was unfounded and dismissed it.¹²⁰⁷

586. According to the Inter-American Court of Human Rights:

Reparations consist in measures aimed at eliminating, moderating or compensating the effects of the violations committed. Their nature and amount depend on the characteristics of the violation and, at the same time, on the pecuniary and non-pecuniary damage caused.¹²⁰⁸

1. GROUNDS FOR REPARATION

587. Article 22, paragraph 5, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families accords migrant workers and members of their families the right “to seek compensation according to the law”.

588. Article 63, paragraph 1, of the American Convention on Human Rights provides:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

589. The form to be taken by just reparation for any injury caused by unlawful expulsion is also decided by the courts. According to article 41 of the European Convention on Human Rights:

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

2. FORMS OF REPARATION

590. The fundamental principle of full reparation by the State for injury caused by an internationally wrongful act for which it is responsible is set out in article 31 of the draft articles on Responsibility of a State for its internationally wrongful acts. The various forms of reparation are listed in article 34.¹²⁰⁹

(a) Restitution

591. Restitution as a form of reparation is addressed in article 35 of the draft articles on Responsibility of a State for its internationally wrongful acts. It does not appear to have been frequently awarded as a form of reparation in cases of unlawful expulsion. It may be reasonable to consider this form of reparation only in cases when it is the expulsion of the alien (grounds) rather than the manner in which the expulsion is carried out (procedure) that is unlawful. In particular, this form of reparation may be envisaged when, as a result of unlawful expulsion, the expelling State has interfered with the movable or immovable property of the expelled person. If, owing to unlawful expulsion, the person concerned has lost movable and immovable property that he or she possessed in the expelling State, then that person has grounds for demanding that the State restore such property. Similarly, if the property was damaged because of unlawful expulsion, the person can always demand *restitutio in integrum*. In that situation, in principle, the State that was responsible for the unlawful expulsion must restore the property to its previous condition.

(b) Compensation

592. Compensation is the most common form of reparation for unlawful expulsion when the damage caused to an alien is indemnifiable. It usually takes the form of monetary damages.

(i) Forms of indemnifiable damage

a. Material damage

593. Reparation for material damage is usually given in the event of unlawful or unduly lengthy detention or unlawful expulsion. The Inter-American Court of Human Rights has defined pecuniary damages as

loss of or detriment to the victim's income, expenses incurred as a result of the facts and the monetary consequences that have a causal nexus with the facts of the *sub judice* case.¹²¹⁰

In *Emre v. Switzerland* considered by the European Court of Human Rights, the applicant complained of

having suffered material harm owing to work incapacity resulting from the expulsion order, as reparation for which he requested the sum of 153,000 Swiss francs (about 92,986 euros). By letter dated 15 November 2007, he also requested the sum of 700,000 Swiss francs (about 425,426 euros) as compensation for the partial work

¹²⁰⁷ See footnote 593 above.

¹²⁰⁸ Inter-American Court of Human Rights, judgements in *Vargas-Areco v. Paraguay*, Series C, No. 155, 26 September 2006, para. 142; and *La Cantuta v. Peru*, Series C, No. 162, 29 November 2006, para. 202.

¹²⁰⁹ *Yearbook ... 2001*, vol. II (Part Two), p. 28.

¹²¹⁰ Inter-American Court of Human Rights, *Bámaca Velásquez v. Guatemala (Reparations)*, Series C, No. 91, 22 February 2002, para. 43.

incapacity which he claimed he would experience in future owing to his health problems, which he attributed to the threat of expulsion and its implementation.¹²¹¹

Since the applicant could not prove that he had suffered loss of earnings as a result of his expulsion, the Court determined that “the link between his expulsion and the alleged future loss of earnings was pure speculation. Accordingly, no monies shall be payable for this purpose”.¹²¹²

b. Moral damage

594. Moral damage entails any suffering or harm experienced by the expelled person, an offence against his or her dignity or alteration in his or her living conditions. In such situations, it is very often difficult to evaluate the exact amount of the damage and to award the corresponding pecuniary compensation to the victim. On this point, the Inter-American Court of Human Rights has determined:

It is human nature for any person who is subjected to arbitrary detention, forced disappearance or extra-legal execution to experience deep suffering, distress, terror, impotence and insecurity, which is why no proof of such damage is required.¹²¹³

Moral damage thus consists of psychological trauma resulting from deprivation of liberty, lack of distractions, the emotional impact of detention, sorrow, deterioration in living conditions, vulnerability owing to the lack of social and institutional support, humiliation and threats from visitors while in detention, fear and insecurity ... The ample case law of the Inter-American Court reverts repeatedly to the “suffering, anguish and feelings of insecurity, frustration and impotence in light of the failure by the authorities to fulfil their obligations”.¹²¹⁴

595. In the case of *Emre*, the applicant requested the sum of 20,000 Swiss francs (about 12,155 euros) for moral damage which, in his view, comprised “the consequences of the severe depression he underwent owing to the expulsion decision and his resulting forced separation from his loved ones. This moral suffering was expressed quite tangibly in his attempts at self-mutilation and suicide”.¹²¹⁵ On this point, the Court found:

The person in question undoubtedly experienced such feelings of frustration and anguish—not only upon his first expulsion but also with the prospect of the second—that a finding of violation or publication of the present decision would not suffice as reparation. Basing its decision on grounds of just satisfaction, in accordance with article 41 of the Convention, the Court awards this person the sum of 3,000 euros.¹²¹⁶

In the *Ben Salah* case,¹²¹⁷ the applicant considered that he had suffered moral injury as a result of the decision on expulsion to a State in which he was in danger of

suffering ill-treatment, but did not ask for specific monetary amounts in compensation. Without referring to the injury suffered by the applicant, the Court held: “The fact that if the expulsion was carried out, it would constitute a violation of article 3 of the Convention, is adequate grounds for just satisfaction.”¹²¹⁸

c. The emergence of particular damages for the interruption of the life plan

596. In some cases the expulsion can cause an interruption of the expelled person’s life plan, particularly if it was decided and carried out arbitrarily when the person had already commenced certain activities (notably studies, economic activities, family life) in the expelling State. The Inter-American Court of Human Rights has provided a new angle on the right to compensation by including interruption of the “life plan” within the category of damages suffered by the victims of human rights violations. It was thus able to distinguish between the material damages quantifiable according to objective economic criteria and the interruption of the life plan, stating, in its landmark judgement in *Loayza Tamayo*, that:

The concept of a “life plan” is akin to the concept of personal fulfilment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself. Strictly speaking, those options are the manifestation and guarantee of freedom.¹²¹⁹

In that case, the petitioner, who had been arbitrarily detained and subjected to inhuman treatment, had been released and instructed to leave her country to live abroad in difficult economic conditions, which had led to a considerable deterioration in her physical and psychological health and had prevented her from “achieving the personal, family and professional goals that she had reasonably set for herself”.¹²²⁰ Without calculating the reparations due for this type of damage suffered by the individual, the Court merely awarded the victim a symbolic reparation, stating that the life plan must be “reasonable and attainable in practice”, and that any damage to it would naturally be “reparable only with great difficulty”.¹²²¹

597. However, in the *Cantoral Benavides* judgement, the Inter-American Court of Human Rights better defined the reparations due for this type of damage, taking into account that it

dramatically altered the course that Luis Alberto Cantoral Benavides’ life would otherwise have taken. The pain and suffering that those events inflicted upon him prevented the victim from fulfilling his vocation, aspirations and potential, particularly with regard to his preparation for his chosen career and his work as a professional.¹²²²

As a result, the Court ordered the State to provide the victim with a study grant, enabling him to resume his studies (at a centre of higher education chosen in mutual agreement with the Government) and therefore the course of his life.¹²²³ In the *Wilson Gutiérrez* judgement, the same

¹²¹¹ *Emre v. Switzerland* (footnote 1012 above), para. 95.

¹²¹² *Ibid.*, para. 99.

¹²¹³ Inter-American Court of Human Rights, judgements in *La Cantuta v. Peru* (footnote 1208 above), para. 217; *Mapiripán v. Colombia, Series C, No. 134*, 15 September 2005, para. 283; and *Villagrán Morales v. Guatemala, Series C, No. 77*, 26 May 2001.

¹²¹⁴ See, for example, Inter-American Court of Human Rights, judgements in *Mapiripán v. Colombia* (preceding footnote); and *Pueblo Bello v. Colombia, Series C, No. 140*, 31 January 2006.

¹²¹⁵ *Emre v. Switzerland* (footnote 1012 above), para. 96.

¹²¹⁶ *Ibid.*, para. 100.

¹²¹⁷ ECHR, *Ben Salah v. Italy*, application No. 38128/06, judgement of 14 September 2009, paras. 57 *et seq.*

¹²¹⁸ *Ibid.*, para. 59.

¹²¹⁹ Inter-American Court of Human Rights, *Loayza Tamayo v. Peru, Series C, No. 42*, judgement of 27 November 1998, para. 148.

¹²²⁰ *Ibid.*, para. 152.

¹²²¹ *Ibid.*, para. 150.

¹²²² Inter-American Court of Human Rights, *Cantoral Benavides v. Peru, Series C, No. 88*, judgement of 3 December 2001, para. 60.

¹²²³ *Ibid.*, para. 80.

Court recognized that the violations of the person's rights had prevented him from achieving his personal development expectations and caused irreparable damage to his life, forcing him to sever family ties and go abroad, in solitude, in financial distress, physically and emotionally broken down, such that it permanently lowered his self-esteem and his ability to have and enjoy intimate relations of affection. The Court found that "the complex and all-encompassing nature of damage to the 'life project' calls for action securing satisfaction and guarantees of non-repetition that go beyond the financial sphere".¹²²⁴

(ii) *The form of compensation*

598. Compensation is a well-recognized means of reparation for the damage caused by an unlawful expulsion to the alien expelled or to the State of nationality. Indeed, it is stated that "An expulsion without cause or based on insufficient evidence has been held to afford a good title to indemnity".¹²²⁵

599. Damages have been awarded by several arbitral tribunals to aliens who had been victims of unlawful expulsions. In *Paquet*, the umpire held that given the arbitrary nature of the expulsion enforced by the Government of Venezuela against Mr. Paquet, compensation was due to him for the direct damages he had suffered therefrom:

The general practice amongst governments is to give explanations to the government of the person expelled if it asks them, and when such explanations are refused, as in the case under consideration, the expulsion can be considered as an arbitrary act of such a nature as to entail reparation, which is aggravated in the present case by the fact that the attributes of the executive power, according to the Constitution of Venezuela, do not extend to the power to prohibit the entry into the national territory, or expelling therefrom the domiciled foreigners whom the Government suspects of being prejudicial to the public order;

That, besides, the sum demanded does not appear to be exaggerated.

Decides that this claim of Mr. Paquet is allowed for 4,500 francs.¹²²⁶

600. Damages were also awarded by the umpire in *Oliva* to compensate the loss resulting from the break of a concession, although these damages were limited to those related to the expenditures which the alien had incurred and the time he had spent in order to obtain the contract.¹²²⁷ Commissioner Agnoli had considered that the arbitrary nature of the expulsion would have justified by itself a demand for indemnity and that:

An indemnity of not less than 40,000 bolivars should be conceded, independently of any sum which might justly be found due him for losses resulting from the arbitrary rupture of the contract aforementioned, since there can be no doubt that, even had he not obtained the concession referred to, the sole fact of his arbitrary expulsion would furnish sufficient ground for a demand of indemnity.¹²²⁸

¹²²⁴ Inter-American Court of Human Rights, *Gutiérrez Soler v. Colombia, Series C, No. 132*, judgement of 12 September 2005, para. 89.

¹²²⁵ Goodwin-Gill, *International Law and the Movement of Persons between States*, pp. 278–280. See also Borchard (footnote 75 above), p. 57.

¹²²⁶ *Paquet* (Expulsion), Mixed Claims Commission (Belgium–Venezuela), 1903, UNRIAA, vol. IX (Sales No. 1959.V.5), p. 325 (Filtz, Umpire).

¹²²⁷ *Oliva* (see footnote 1202 above), pp. 608–610 (Ralston, Umpire), containing details about the calculation of damages in the particular case.

¹²²⁸ *Ibid.*, p. 602.

601. In other cases, it was the unlawful manner in which the expulsion had been enforced (including the duration and conditions of a detention pending deportation) that gave rise to compensation. In the *Maal* case, the umpire awarded damages to the claimant because of the harsh treatment he had suffered. Given that the individuals who had carried out the deportation had not been sanctioned, the umpire considered that the sum awarded needed to be sufficient in order for the State responsible to "express its appreciation of the indignity" inflicted to the claimant:

The umpire has been taught to regard the person of another as something to be held sacred, and that it could not be touched even in the lightest manner, in anger or without cause, against his consent, and if so done it is considered an assault for which damages must be given commensurate with the spirit and the character of the assault and the quality of the manhood represented in the individual thus assaulted ... And since there is no proof or suggestion that those in discharge of this important duty of the Government of Venezuela have been reprimanded, punished or discharged, the only way in which there can be an expression of regret on the part of the Government and a discharge of its duty toward the subject of a sovereign and a friendly State is by making an indemnity therefor in the way of money compensation. This must be of a sufficient sum to express its appreciation of the indignity practiced upon this subject and its high desire to fully discharge such obligation.

In the opinion of the umpire the respondent Government should be held to pay the claimant Government in the interest of and on behalf of the claimant, solely because of these indignities the sum of five hundred dollars in gold coin of the United States of America, or its equivalent in silver at the current rate of exchange at the time of the payment; and judgment may be entered accordingly.¹²²⁹

602. In the case of *Daniel Dillon*, damages were awarded to compensate maltreatment inflicted on the claimant due to the long period of detention and the conditions thereof. The arbitral body that heard this case wrote:

The long period of detention, however, and the keeping of the claimant incommunicado and uninformed about the purpose of his detention, constitute in the opinion of the Commission a maltreatment and a hardship unwarranted by the purpose of the arrest and amounting to such a degree as to make the United Mexican States responsible under international law. And it is found that the sum in which an award should be made, can be properly fixed at \$2,500, U.S. currency, without interest.¹²³⁰

603. In *Yeager*, the Iran-United States Claims Tribunal awarded the claimant compensation for the loss of personal property that he had to leave behind because he had not been given sufficient time to leave the country;¹²³¹ and for the money seized at the airport by the "Revolutionary Komitehs".¹²³²

604. Likewise, the European Court of Human Rights habitually authorizes the payment of compensation to the victims of unlawful expulsion. In several cases, it has allocated a sum of money as compensation for non-pecuniary damages resulting from an unlawful expulsion. For example, in *Moustaquim*, although the Court disallowed a claim for damages based on the loss of earnings resulting from an expulsion which had violated article 8 of the European

¹²²⁹ *Maal* case, UNRIAA (footnote 582 above), pp. 730–733 (Plumley, Umpire).

¹²³⁰ *Daniel Dillon (U.S.A.) v. United Mexican States, Mexico–U.S.A.* General Claims Commission, Award of 3 October 1928, UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 368–371, at p. 369.

¹²³¹ *Yeager v. The Islamic Republic of Iran*, Iran–United States Claims Tribunal, Award of 2 November 1987, *Iran–United States Claims Tribunal Reports*, vol. 17, pp. 92–113, paras. 51–59.

¹²³² *Ibid.*, p. 110, paras. 61–63.

Convention on Human Rights, noting the absence of a causal link between the violation and the alleged loss of earnings, it did however award the applicant, on an equitable basis, 100,000 Belgian francs as a compensation for non-pecuniary damages resulting from having to live away from his family and friends, in a country where he did not have any ties.¹²³³ In the same way, in *Čonka*, the European Court of Human Rights awarded the sum of 10,000 euros to compensate non-pecuniary damages resulting from a deportation which had violated article 5, paragraphs 1 and 4, of the Convention for the Protection of Human Rights and Fundamental Freedoms (right to liberty and security), article 4 of Protocol No. 4 to that Convention (prohibition of collective expulsion), as well as article 13 of the Convention (right to an effective remedy) taken in conjunction with article 4 of Protocol No. 4.¹²³⁴

(c) Satisfaction

605. Satisfaction as a form of reparation is addressed in article 37 of the draft articles on State responsibility for internationally wrongful acts.¹²³⁵ This form of reparation may be applied in case of unlawful expulsion.¹²³⁶ On this subject, Hyde writes:

As Secretary Root declared in 1907, “the right of a government to protect its citizens in foreign parts against a harsh and unjustified expulsion must be regarded as a settled and fundamental principle of international law. It is no less settled and fundamental that a government may demand satisfaction and indemnity for an expulsion in violation of the requirements of international law.”¹²³⁷

In this regard, the Special Rapporteur, Mr. García Amador, indicated that:

In cases of arbitrary expulsion, satisfaction has been given in the form of the revocation of the expulsion order and the return of the expelled alien.¹²³⁸

Mr. García Amador referred in this context to the cases of *Lampton* and *Wiltbank* (concerning two United States citizens expelled from Nicaragua in 1894) and to the case of four British subjects who had also been expelled from Nicaragua.¹²³⁹

606. Satisfaction has been applied in particular in situations where the expulsion order had not yet been enforced. In such cases, the European Court of Human Rights considered that a judgement determining the unlawfulness of the expulsion order was an appropriate form of satisfaction and, therefore, abstained from awarding

non-pecuniary damages. Attention may be drawn in this respect to the cases of *Beldjoudi*,¹²⁴⁰ *Chahal*,¹²⁴¹ and *Ahmed*.¹²⁴² The Inter-American Court of Human Rights does not use awarding compensation to victims of unlawful expulsion as its only form of reparation, considering that “the reparations that must be made by the State necessarily include effectively investigating the facts [and] punishing all those responsible”.¹²⁴³

607. In the case of *Chahal*, the applicant claimed compensation for non-pecuniary damage for the period of detention suffered. The Court, noting that the Government of the United Kingdom had not violated article 5, paragraph 1, of the European Convention on Human Rights, ruled that the findings that his deportation, if carried out, would constitute a violation of article 3 and that there have been breaches of article 5, paragraph 4, and article 13 constitute sufficient just satisfaction.¹²⁴⁴

608. As has been said previously, these considerations have no other goal than to serve as a reminder that, on the one hand, the general regime of the responsibility of States for internationally wrongful acts is applicable to the unlawful expulsion of aliens, and on the other hand that, in that regard, the State of nationality has the ability recognized in international law to exercise its diplomatic protection, as reconfirmed very recently by ICJ in the *Diallo* case. In addition, the following draft articles are clauses referring to the legal regimes of those two well-established international law institutions: the responsibility of States and diplomatic protection.

“Draft article II. The responsibility of States in cases of unlawful expulsion

“The legal consequences of an unlawful [illegal] expulsion are governed by the general regime of the responsibility of States for internationally wrongful acts.”

“Draft article JI. Diplomatic protection

“The expelled alien’s State of nationality may exercise its diplomatic protection on behalf of the alien in question.”

¹²⁴⁰ ECHR, *Beldjoudi v. France*, application No. 12083/86, judgement of 26 March 1992, *Series A, No. 234-A*, para. 86: “The applicant must have suffered non-pecuniary damages, but the present judgement provides them with sufficient compensation in this respect.”

¹²⁴¹ *Chahal* case (footnote 602 above), para. 158: “In view of its decision that there has been no violation of Article 5, para. 1, ... the Court makes no award for non-pecuniary damages in respect of the period of time Mr. Chahal has spent in detention. As to the other complaints, the Court considers that the findings that his deportation, if carried out, would constitute a violation of Article 3 and that there have been breaches of paragraph 4 of Article 5 and of Article 13, constitute sufficient just satisfaction.”

¹²⁴² *Ahmed* case (footnote 1014 above). The Court disallowed a claim for compensation for loss of earnings because of the lack of connection between the alleged damages and the conclusion of the Court with regard to article 3 of the Convention (para. 50). The Court then said: “The Court considers that the applicant must have suffered non-pecuniary damage but that the present judgement affords him sufficient compensation in that respect” (para. 51).

¹²⁴³ Inter-American Court of Human Rights, *Bámaca-Velásquez v. Guatemala* (footnote 1210 above), para. 73.

¹²⁴⁴ *Chahal* case (footnote 602 above), para. 158.

¹²³³ *Series A, No. 193* (footnote 1014 above), paras. 52–55.

¹²³⁴ *Čonka v. Belgium* (footnote 1007 above), p. 99, para. 42.

¹²³⁵ *Yearbook... 2001*, vol. II (Part Two), p. 28.

¹²³⁶ Hyde (footnote 251 above), p. 231, footnote 5 (quoting Communication to the Minister in Caracas, 28 February 1907, *Foreign Relations* 1908, 774, 776, Hackworth, Dig., III, 690).

¹²³⁷ *Ibid.*

¹²³⁸ *Yearbook... 1961*, vol. II, p. 25, para. 99.

¹²³⁹ *Ibid.*, footnote 159. In *Lampton* and *Wiltbank*, the Nicaraguan Government expelled two American citizens and subsequently permitted them to return upon request of the United States. In the case of the four British subjects expelled from Nicaragua, Great Britain demanded of Nicaragua “the unconditional cancellation of the decrees of expulsion”, to which Nicaragua replied that “there was no occasion for the revocation of the decree of expulsion, as all the persons guilty of taking part in the Mosquito rebellion had been pardoned” (Moore, (footnote 124 above), p. 101).