

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION

2010

Volume II
Part One

Documents of the sixty-second session

UNITED NATIONS



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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the year (for example, *Yearbook ... 2009*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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The reports of the special rapporteurs and other documents considered by the Commission during its sixty-second session, which were originally issued in mimeographed form, are reproduced in the present volume, incorporating the corrigenda issued by the Secretariat and the editorial changes required for the presentation of the final text.

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ABBREVIATIONS

ASEAN	Association of Southeast Asian Nations
AU	African Union
EC	European Community
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EU	European Union
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICPO–INTERPOL	International Criminal Police Organization
ICRC	International Committee of the Red Cross
IFRC	International Federation of Red Cross and Red Crescent Societies
ILC	International Law Commission
IMO	International Maritime Organization
IOM	International Organization for Migration
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
OAS	Organization of American States
OAU	Organization of African Unity
OCHA	Office for the Coordination of Humanitarian Affairs
OECD	Organization for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
SAARC	South Asian Association for Regional Cooperation
UNHCR	Office of the United Nations High Commissioner for Refugees
UPU	Universal Postal Union
WHO	World Health Organization
WTO	World Trade Organization

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* *

AC	Appeals Court
AFDI	<i>Annuaire français de droit international</i> (Paris)
AJIL	<i>American Journal of International Law</i> (Washington, D.C.)
BYBIL	<i>The British Year Book of International Law</i> (London)
ECHR	European Court of Human Rights
<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
<i>I.C.J. Pleadings</i>	ICJ, <i>Pleadings, Oral Arguments, Documents</i>
ILM	<i>International Legal Materials</i> (Washington, D.C.)
ILR	<i>International Legal Reports</i> (Cambridge)
LGDJ	Librairie générale de droit et de jurisprudence
OJ L	<i>Official Journal of the European Communities</i> , L Series
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1–24: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Collection of Advisory Opinions</i> (Nos. 40–80: beginning in 1931)
<i>P.C.I.J., Series B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (Nos. 1–18: up to and including 1930)
<i>P.C.I.J., Series C</i>	PCIJ, <i>Pleadings, Oral Arguments, Documents</i> (Nos. 52–88: beginning in 1931)
RGDIP	<i>Revue générale de droit international public</i> (Paris)
UKHL	United Kingdom House of Lords
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>
WLR	<i>Weekly Law Reports</i>

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In the present volume, the “International Tribunal for the Former Yugoslavia” refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and the “International Tribunal for Rwanda” refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.

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NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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The Internet address of the International Law Commission is <http://legal.un.org/ilc/>.

**FILLING OF CASUAL VACANCIES IN THE COMMISSION
(ARTICLE 11 OF THE STATUTE)**

[Agenda item 2]

DOCUMENT A/CN.4/632 and Add.1

Note by the Secretariat

[Original: English]
[30 June 2010]

1. Following the election of Ms. Hanqin Xue to the International Court of Justice on 29 June 2010 and her subsequent resignation from the International Law Commission, one seat on the Commission has become vacant.

2. In this case, article 11 of the Statute of the Commission is applicable. It prescribes that:

In the case of a vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 of this statute.

Article 2 reads:

1. The Commission shall consist of thirty-four members who shall be persons of recognized competence in international law.
2. No two members of the Commission shall be nationals of the same State.
3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 8 reads:

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal systems of the world should be assured.

3. The term of the member to be elected by the Commission will expire at the end of 2011.

RESERVATIONS TO TREATIES

[Agenda item 3]

DOCUMENT A/CN.4/624 and Add.1–2

Fifteenth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur

[Original: French]
[31 March, 26 May and 31 May 2010]

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Multilateral instruments cited in the present report

	<i>Source</i>
Covenant of the League of Nations (Versailles, 28 June 1919)	<i>British and Foreign State Papers</i> , 1884–1885, vol. LXXVI, p. 4.
General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) (Paris, 27 August 1928)	League of Nations, <i>Treaty Series</i> , vol. XCIV, No. 2137, p. 57.
Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930)	<i>Ibid.</i> , vol. CXLIII, No. 3313, p. 257.
Convention providing a Uniform Law for Cheques (Geneva, 19 March 1931)	<i>Ibid.</i> , vol. CXLIII, No. 3316, p. 355.

Source

American Treaty on Pacific Settlement (Pact of Bogota) (Bogota, 30 April 1948)	United Nations, <i>Treaty Series</i> , vol. 30, No. 449, p. 83.
Protocol amending the International Convention relating to Economic Statistics, signed at Geneva on 14 December 1928 (Paris, 9 December 1948)	<i>Ibid.</i> , vol. 20, No. 318, p. 229.
Convention on the prevention and punishment of the crime of genocide (New York, 9 December 1948)	<i>Ibid.</i> , vol. 78, No. 1021, p. 277.
Revised General Act for the Pacific Settlement of International Disputes (New York, 28 April 1949)	<i>Ibid.</i> , vol. 71, No. 912, p. 101.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	<i>Ibid.</i> , vol. 75, Nos. 970–973.
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	<i>Ibid.</i> , p. 31.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	<i>Ibid.</i> , p. 85.
Geneva Convention relative to the Treatment of Prisoners of War	<i>Ibid.</i> , p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War	<i>Ibid.</i> , p. 287.
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 No. 7 to the above-mentioned Convention (Strasbourg, 22 November 1984)	<i>Ibid.</i> , vol. 1525, No. 2889, p. 195.
Customs Convention on the Temporary Importation of Private Road Vehicles (New York, 4 June 1954)	<i>Ibid.</i> , vol. 282, No. 4101, p. 249.
Convention on the Continental Shelf (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 499, No. 7302, p. 311.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	<i>Ibid.</i> , vol. 500, No. 7310, p. 95.
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, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i>
Second Optional Protocol to the International Covenant on Civil and Political Rights (New York, 15 December 1989)	<i>Ibid.</i> , vol. 1642, No. 14668, p. 414.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 993, No. 14531, p. 3.
International Sugar Agreement, 1968 (Geneva, 24 October 1968)	<i>Ibid.</i> , vol. 654, No. 9369, p. 3.
Vienna Convention on the law of treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	<i>Ibid.</i> , vol. 1144, No. 17955, p. 123.
Convention on special missions (New York, 8 December 1969)	<i>Ibid.</i> , vol. 1400, No. 23431, p. 231.
Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (New York, 14 December 1973)	<i>Ibid.</i> , vol. 1035, No. 15410, p. 167.
Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) (Geneva, 14 November 1975)	<i>Ibid.</i> , vol. 1079, No. 16510, p. 89.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	<i>Ibid.</i> , vol. 1249, No. 20378, p. 13.
Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with protocols) (Geneva, 10 October 1980)	<i>Ibid.</i> , vol. 1342, No. 22495, p. 137.

Source

Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), (Geneva, 10 October 1980)	<i>Ibid.</i> , p. 171.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Ibid.</i> , vol. 1833, No. 31363, p. 3.
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.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	United Nations, <i>Treaty Series</i> , vol. 1582, No. 27627, p. 95.
Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel, 22 March 1989)	<i>Ibid.</i> , vol. 1673, No. 28911, p. 57.
Convention on the Rights of the Child (New York, 20 November 1989)	<i>Ibid.</i> , vol. 1577, No. 27531, p. 3.
European Charter for Regional or Minority Languages (Strasbourg, 5 November 1992)	<i>Ibid.</i> , vol. 2044, No. 35358, p. 575.
United Nations Convention against Corruption (New York, 31 October 2003)	<i>Ibid.</i> , vol. 2349, No. 42146, p. 41.
Convention on the Rights of Persons with Disabilities (New York, 13 December 2006)	<i>Ibid.</i> , vol. 2515, No. 44910, p. 3.

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Effects of reservations and interpretative declarations (*continued*)

A. Effects of reservations, acceptances and objections (*continued*)

1. VALID RESERVATIONS (*continued*)

(a) *Effects of an objection to a valid reservation*

1. Unlike acceptance of a valid reservation, an objection to a reservation may produce a variety of effects as between the author of the reservation and the author of the objection. The choice is left to a great extent (but not entirely) to the latter, which can vary the potential legal effects of the reservation–objection pair. For example, it may choose—in accordance with article 20, paragraph 4 (*b*), of the Vienna Convention on the Law of Treaties (hereinafter “the 1969 Vienna Convention”) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter “the 1986 Vienna Convention”)—to have the treaty not enter into force as between itself and the reserving State by “definitely” expressing that intention. But the author of the objection may also elect not to oppose the entry into force of the treaty as between itself and the author of the reservation or, to put it more accurately, may refrain from expressing a contrary intention. In that case, if the treaty does, in fact, enter into force for the two parties,¹ the treaty relations between the author of the reservation and the author of the objection are modified in accordance with article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions (hereinafter “the Vienna Conventions”). Thus, objections to a valid reservation may have a number of effects on the very existence of treaty relations or on their content, and those effects may vary with regard to one and the same treaty.

2. The primary function and the basic effect of every objection are, however, very simple. Unlike acceptance, an objection constitutes its author’s rejection of the reservation. As ICJ clearly stated in its 1951 advisory opinion, “no State can be bound by a reservation to which it has not consented”.² This is the fundamental effect of the same principle of consent that underlies all treaty law and, in particular, the reservations regime: the treaty is the consensual instrument par excellence, drawing its strength from the *will* of States. Reservations are “consubstantial” with the State’s consent to be bound by the treaty.³

3. Thus, objections may be analysed first and foremost as the objecting State’s refusal to consent to the reservation and, as such, they prevent the establishment of the reservation with respect to the objecting State or international organization within the meaning of article 21, paragraph 1, of the Vienna Conventions and of guideline 4.1.⁴

¹ On the issue of when the treaty enters into force for the author of the reservation, see guideline 4.2.1 (Status of the author of an established reservation) (*Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 250) and paras. 7–29 below.

² *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 26.

³ See, for example, *Yearbook ... 1997*, vol. II (Part Two), p. 49, para. 83.

⁴ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, paras. 199–206.

As the Commission stressed in its commentary to guideline 2.6.1 (Definition of objections to reservations): “The refusal to accept a reservation is precisely the purpose of an objection in the full sense of the word in its ordinary meaning”.⁵

4. Unlike acceptance, an objection makes the reservation inapplicable as against the author of the objection. Clearly, this effect can be produced only where the reservation has not already been accepted (explicitly or tacitly) by the author of the objection. Acceptance and objection are mutually exclusive, definitively so, at least insofar as the effects of acceptance are concerned. In that regard, guideline 2.8.12 states: “Acceptance of a reservation cannot be withdrawn or amended”.⁶

5. In order to highlight this function of objections, which is both primary and fundamental, guideline 4.3, which begins the section of the Guide to Practice on the effects of an objection to a valid reservation, might reaffirm, on the one hand, that acceptance of a reservation is irrevocable and, on the other, that an objection makes the reservation inapplicable as against the objecting State:

“4.3 *Effect of an objection to a valid reservation*

“The formulation of an objection to a valid reservation renders the reservation inapplicable as against the objecting State or international organization unless the reservation has been established with regard to that State or international organization.”

6. However, the inapplicability of the reservation as against the objecting State or international organization is far from resolving the entire question of the effect of an objection. Inapplicability can have several different effects, both with respect to the entry into force of the treaty and, once the treaty has entered into force for the author of the reservation and the author of the objection, with respect to the actual content of the treaty relations thus established.

(i) *Entry into force of the treaty*

a. Presumption of entry into force of the treaty as between the reserving State and the objecting State

7. It is clear from article 20, paragraph 4 (*b*), of the 1986 Vienna Convention—which except for its references to a contracting international organization is identical to the corresponding provision of the 1969 Vienna Convention—that, in general, an objection to a reservation results in the entry into force of the treaty as between the objecting State and the reserving State:

An objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization.

⁵ *Yearbook ... 2005*, vol. II (Part Two), p. 78, para. (13) of the commentary.

⁶ *Yearbook ... 2009*, vol. II (Part Two), p. 91.

While such a “simple” or “minimum-effect” objection⁷ does not have as its immediate effect the entry into force of the treaty in relations between the two States, as is the case with an acceptance,⁸ it does not preclude it.

8. That is not, however, a presumption that can be reversed by the author of the objection. Article 20, paragraph 4 (b), of the 1986 Vienna Convention continues: “... unless a contrary intention is definitely expressed by the objecting State or organization”. Thus, the author of the objection may also elect to have no treaty relations with the author of the reservation, provided that it does so “definitely”.

9. The system established by the Vienna Conventions corresponds to the approach taken by ICJ in 1951: “each State objecting to it will or will not ... consider the reserving State to be a party to the Convention”.⁹

10. The nature of the presumption is surprising. Traditionally, in keeping with the principle of consent, the immediate effect of an objection was that the reserving State could not claim to be a State party to the treaty;¹⁰ this is what is commonly called the “maximum” effect of an objection. That outcome was necessary under the system of unanimity, in which even a single objection compromised the unanimous consent of the other contracting States; no derogation was possible. The reserving State was required either to withdraw or to modify its reservation in order to become a party to the treaty. This rule was so self-evident that the Commission’s first special rapporteurs, who held to the system of unanimity, did not even formulate it in any of their reports.

11. The “revolution” introduced by the “flexible” system advocated by Sir Humphrey Waldock¹¹ did not, however, lead to a rejection of the traditional principle whereby “the objections shall preclude the entry into force of the treaty”.¹² The Special Rapporteur did, however, allow for one major difference as compared with the traditional system since he considered that objections had only a relative effect; rather than preventing the reserving State from becoming a party to the treaty, an objection came into play only in relations between the reserving State and the objecting State.¹³

12. Nonetheless, to align the draft with the solution proposed in the 1951 advisory opinion of ICJ,¹⁴ and in

⁷ *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, p. 47, para. 95. See also Riquelme Cortado, *Las reservas a los tratados: lagunas y ambigüedades del Régimen de Viena*, pp. 279–280; and Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, pp. 170–172.

⁸ Provided that the treaty itself is in force or becomes so as a result of accession by the accepting State (see guidelines 4.2.1 to 4.2.3 and *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, paras. 239–252).

⁹ See footnote 2 above.

¹⁰ Imbert, *Les réserves aux traités multilatéraux*, pp. 155 and 260.

¹¹ Pellet, “Article 19 (1969)”, pp. 664–668, paras. 44–55.

¹² See draft article 19, para. 4 (c), presented by Sir Humphrey in 1962 in his first report on the law of treaties (*Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 62). This solution is, moreover, frequently offered as the only one that makes sense. See, for example, Reuter, *Introduction au droit des traités*, 2nd ed., p. 75, para. 132.

¹³ On this point, see also the Commission’s commentary to draft article 20, para. 2 (b) (*Yearbook ... 1962*, vol. II, p. 181, para. (23)).

¹⁴ See footnote 2 above.

response to the criticisms and misgivings expressed by many Commission members,¹⁵ the radical solution proposed by Waldock was abandoned in favour of a simple presumption of maximum effect, leaving minimum effect available as an option. Draft article 20, paragraph 2 (b), as adopted on first reading, provided:

An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.¹⁶

13. However, during the debate on the Commission’s draft in the Sixth Committee of the General Assembly, the Czechoslovak and Romanian delegations argued that the presumption should be reversed, so that the rule would “be more likely to broaden treaty relations among States and to prevent the formation of an undesirable vacuum in the legal ties between States”.¹⁷ Nonetheless, despite the favourable comments of some Commission members during the second reading of the draft,¹⁸ this position was not retained in the Commission’s final draft.

14. The issue arose again, however, during the United Nations Conference on the Law of Treaties. The proposals of Czechoslovakia,¹⁹ the Syrian Arab Republic²⁰ and the Union of Soviet Socialist Republics²¹ were aimed at reversing the presumption adopted by the Commission. Although it was characterized by some delegations²² as innocuous, reversal of the presumption constituted a major shift in the logic of the mechanism of acceptances and objections.²³ That was why the notion of reversing the presumption had been rejected in 1968.²⁴ During the second session of the Conference, the Union

¹⁵ See, for example, Tunkin (*Yearbook ... 1962*, vol. I, 653rd meeting, p. 156, para. 26; and 654th meeting, p. 161, para. 11), Rosenne (*ibid.*, 653rd meeting, para. 30), Jiménez de Aréchaga (*ibid.*, p. 158, para. 48), de Luna (*ibid.*, p. 160, para. 66), Yasseen (*ibid.*, 654th meeting, p. 161, para. 6). The Special Rapporteur was also in favour of introducing the presumption (*ibid.*, pp. 162, paras. 17 and 20).

¹⁶ *Yearbook ... 1962*, vol. II, p. 176 and p. 181, para. (23).

¹⁷ See the summary of the Czechoslovak and Romanian observations in the fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 48.

¹⁸ See comments by Tunkin (*Yearbook ... 1965*, vol. I, 799th meeting, p. 167, para. 39) and Lachs (*ibid.*, 813th meeting, p. 268, para. 62).

¹⁹ A/CONF.39/C.1/L.85, in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969*, Documents of the Conference (A/CONF.39/11/Add.2) (United Nations publication, Sales No. E.70.V.5), p. 135.

²⁰ A/CONF.39/C.1/L.94, *ibid.*

²¹ A/CONF.39/C.1/L.115, *ibid.*, p. 133.

²² The United Arab Republic considered, for example, that those amendments were purely drafting amendments (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna 26 March–24 May 1968* (Summary records of the plenary meetings and of the meetings of the Committee of the Whole) (A/CONF.39/11) (United Nations publication, Sales No. E.68.V.7), 24th meeting, p. 127, para. 24).

²³ See comments of Sweden on this subject, who noted that “the International Law Commission’s formula might have the advantage of dissuading States from formulating reservations” (*ibid.*, 22nd meeting, p. 117, para. 35). Poland supported the amendments precisely because they favoured the acceptance of reservations and the establishment of a contractual relationship (*ibid.*), which for Argentina “would be going too far in applying the principle of flexibility” (*ibid.*, 24th meeting, p. 129, para. 43).

²⁴ *Ibid.*, 25th meeting, p. 135, paras. 35 *et seq.*

of Soviet Socialist Republics once again submitted a similar amendment,²⁵ debated at length, insisting on the sovereign right of each State to formulate a reservation and relying on the Court's 1951 advisory opinion.²⁶ That amendment was finally adopted²⁷ and the presumption of article 20, paragraph 4 (b), of the Convention, as proposed by the Commission, was reversed.

15. The difficulties that the Conference encountered in adopting the amendment of the Union of Soviet Socialist Republics show clearly that reversal of the presumption was not as innocuous as Sir Humphrey Waldock, then Expert Consultant to the Conference, indicated. The problem is not merely that of “formulating a rule one way or the other”:²⁸ this new formula, in particular, is at the root of the doubts often expressed about the function of an objection and the real differences that exist between acceptance and objection.²⁹

16. Nonetheless, the presumption has never been called into question since the adoption of the 1969 Vienna Convention. It was simply transposed by the Commission during the drafting of the 1986 Vienna Convention. In the *travaux* on reservations to treaties, it seemed neither possible nor truly necessary to undo the last-minute compromise that had been struck at the United Nations Conference on the Law of Treaties—however odd it might be. According to the presumption that is now part of positive international law, the rule remains that an objection does not preclude the entry into force of a treaty except for cases where there is no treaty relationship between the author of the objection and the author of the reservation.

- b. Effect of an objection with maximum effect: exclusion of treaty relations between the author of the objection and the author of the reservation

17. Article 20, paragraph 4 (b), of the Vienna Conventions leaves no doubt as to the effect of an objection accompanied by the definitely expressed intention not to apply the treaty as between the author of the objection and the author of the reservation, in accordance with guideline 2.6.8 (Expression of intention to preclude the entry into force of the treaty).³⁰ In this case, the objection produces its “maximum effect”.

²⁵ A/CONF.39/L.3, *ibid.*, *First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969*, Documents of the Conference, A/CONF.39/11/Add.2, p. 135, para. 179 (v) (a).

²⁶ Notably the answer to the second question, in which the Court held that the State that has formulated an objection “can in fact consider that the reserving State is not party to the Convention” (*I.C.J. Reports 1951*, p. 30).

²⁷ By 49 votes to 21, with 30 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April–22 May 1969*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, A/CONF.39/11/Add.1 (United Nations publication, Sales No. E.70.V.6), 10th plenary meeting, p. 35, para. 79).

²⁸ *Ibid.*, p. 34, para. 74. See also Imbert, *op. cit.* (footnote 10 above), pp. 156–157.

²⁹ Horn, *op. cit.* (footnote 7 above), pp. 172–173.

³⁰ This guideline reads as follows: “When a State or international organization making an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them”. (*Yearbook ... 2008*, vol. II (Part Two), para. 123.)

18. This rule is the subject of guideline 4.3.4, which basically echoes the language of article 20, paragraph 4 (b), of the 1986 Vienna Convention:

“4.3.4 *Non-entry into force of the treaty as between the author of the reservation and the author of an objection with maximum effect*

“An objection by a contracting State or by a contracting international organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization, unless a contrary intention has been definitely expressed by the objecting State or organization [in accordance with guideline 2.6.8].”

19. The purpose of the phrase in square brackets is to refer to a guideline that is closely related to this one. However, this clarification may perhaps be relegated to the commentary.

20. As the Commission has indicated in the commentary to guideline 2.6.8, the Vienna Conventions do not give any indication regarding the time at which the objecting State or international organization must definitely express its intention to oppose the entry into force of the treaty.³¹ The Commission has concluded, however, that according to the presumption of article 20, paragraph 4 (b), of the Vienna Conventions, an objection not accompanied by a clear expression of that intention does not preclude the entry into force of the treaty as between the author of the objection and the author of the reservation and, in certain cases, the entry into force of the treaty itself. This legal effect cannot be called into question by the subsequent expression of a contrary intention. The same idea has already been expressed in guideline 2.6.8, which states that the intention to oppose the entry into force of the treaty must have been expressed “before the treaty would otherwise enter into force” between [the author of the objection and the author of the reservation].³² However, the latter guideline concerns the procedure for formulating the required intention and not its effects. It may be useful to reiterate this principle in the part of the Guide to Practice concerning the legal effect of a maximum-effect objection. Nonetheless, guideline 4.3.4 uses the expression “does not preclude the entry into force”, which implies that the treaty is not in force as between the author of the objection and the author of the reservation when the objection is formulated.

21. Concretely, the consequence of the non-entry into force of the treaty as between the author of the reservation and the author of the objection is that no treaty relationship exists between them even if, as is often the case, both parties could be considered contracting parties to the treaty within the meaning of the Vienna Conventions. The mere fact that one party rejects the reservation and does not wish to be bound by the provisions of the treaty in its relations with the author of the reservation does not necessarily mean that the latter cannot become a contracting party in accordance with guideline 4.2.1. It is sufficient, under the general regime, for another State or another international organization to accept the reservation expressly or tacitly

³¹ *Ibid.*, para. (4) of the commentary.

³² See footnote 30 above and *ibid.*, para. (5) of the commentary to guideline 2.6.8.

for the author of the reservation to be considered a contracting party to the treaty. The absence of a treaty relationship between the author of the maximum-effect objection and the author of the reservation does not *a priori* produce any effect except between them.³³

c. Effect of other objections on the entry into force of the treaty

22. In the absence of a definite expression of the contrary intention, an objection—which can be termed “simple”—to a valid reservation does not *ipso facto* result in the entry into force of the treaty as between the author of the reservation and the author of the objection, as is the case for acceptance. This, in fact, is one of the fundamental differences between objection and acceptance, one which, along with other considerations, makes an objection not “tantamount to acceptance”, contrary to what has often been asserted.³⁴ Pursuant to article 20, paragraph 4 (b), of the Vienna Conventions, reproduced in guideline 4.3.4, such an objection “does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or international organization”. But, while such an objection does not preclude the entry into force of the treaty, it remains neutral on the question as to whether or not the reserving State or organization becomes a contracting party to the treaty, and does not necessarily result in the entry into force of the treaty as between the author of the objection and the author of the reservation.

23. This effect—or rather the lack of an effect—of a simple objection on the establishment or existence of a treaty relationship between the author of the objection and the author of the reservation derives directly from the wording of article 20, paragraph 4 (b), of the Vienna Conventions, as States sometimes point out when formulating an objection. The objection by the Netherlands to the reservation formulated by the United States of America to the International Covenant on Civil and Political Rights is a particularly eloquent example:

Subject to the proviso of article 21, paragraph 3 of the Vienna Convention on the Law of Treaties, these objections do not constitute an *obstacle** to the entry into force of the Covenant between the Kingdom of the Netherlands and the United States.³⁵

³³ ICJ recognized in its advisory opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* in 1951 that “such a decision will only affect the relationship between the State making the reservation and the objecting State”. (*I.C.J. Reports 1951*, p. 26) See, however, para. 27 below.

³⁴ See comments by Mr. Yasseen (*Yearbook ... 1965*, vol. I, 814th meeting, p. 271, para. 5) and the doubts expressed by Mr. Tsu-ruoka (*ibid.*, 800th meeting, p. 174, para. 40); Koh, “Reservations to multilateral treaties: how international legal doctrine reflects world vision”, p. 102; Coccia, “Reservations to multilateral treaties on human rights”, p. 35; Gaja, “Unruly treaty reservations” pp. 326–329; Klabbers, “Accepting the unacceptable? A new Nordic approach to reservations to multilateral treaties”, p. 181; Ruda, “Reservations to treaties”, pp. 198–199; Sucharipa-Behrmann, “The legal effects of reservations to multilateral treaties”, p. 74; Zemanek, “Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties”, pp. 332–333. See also the first report on the law and practice relating to reservations to treaties, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 146, para. 123.

³⁵ *Multilateral Treaties Deposited with the Secretary-General, Status as at 1 April 2009* (United Nations publication, Sales No. E.09.V.3) (ST/LEG/SER.E/26), chap. IV.4, available from <https://treaties.un.org> (Status of Treaties Deposited with the Secretary-General).

The Netherlands deemed it useful to reiterate that its objection did not constitute an “obstacle” to the entry into force of the treaty with the United States, and that if the treaty came into force, their treaty relationship would have to be determined in accordance with article 21, paragraph 3, of the 1969 Vienna Convention.

24. This effect—or lack of an effect—of a simple objection on the entry into force of the treaty could be spelled out in guideline 4.3.1 which, apart from a few minor changes, faithfully reproduces the language of article 20, paragraph 4 (b), of the 1986 Vienna Convention:

“4.3.1 *Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of the reservation*

“An objection by a contracting State or by a contracting organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization, except in the case mentioned in guideline 4.3.4.”

25. For the treaty effectively to enter into force as between the author of the objection and the author of the reservation, it is both necessary and sufficient for the treaty to enter into force and for both the author of the reservation and the author of the objection to be contracting parties thereto. In other words, the reservation must be established by the acceptance of another State or international organization, within the meaning of guideline 4.2.1. Hence, apart from the scenario envisaged in guideline 4.3.2, the effective entry into force of the treaty as between the author of the objection and the author of the reservation is in no way dependent on the objection itself, but rather on the establishment of the reservation, which is completely beyond the control of the author of the objection.

26. In concrete terms, a treaty that is subject to the general regime of consent as established in article 20, paragraph 4, of the Vienna Conventions enters into force for the reserving State or international organization only if the reservation has been accepted by at least one other contracting party (in accordance with article 20, paragraph 4 (c) of the Vienna Conventions). Only if the reservation is thus established may treaty relations be established between the author of the reservation and the author of a simple objection. Their treaty relations are, however, restricted in accordance with article 21, paragraph 3, of the Vienna Conventions.³⁶ Guideline 4.3.2 seeks to clarify the point at which the treaty effectively enters into force between the author of the objection and the author of the reservation:

“4.3.2 *Entry into force of the treaty as between the author of the reservation and the author of the objection*

“The treaty enters into force as between the author of the reservation and the objecting contracting State or contracting organization as soon as the treaty has entered into force and the author of the reservation has become a contracting party in accordance with guideline 4.2.1.”

³⁶ See paragraphs 31–64 below.

27. The situation is, however, different in cases where, for one reason or another, unanimous acceptance by the contracting parties is required in order to “establish” the reservation, as in the case of treaties with limited participation,³⁷ for example. In that case, any objection—simple or qualified—has a much more significant effect with regard to the entry into force of the treaty as between all the contracting parties, on the one hand, and the author of the reservation, on the other. The objection, in fact, prevents the reservation from being established as such. Even if article 20, paragraph 4 (b), of the Vienna Conventions were to apply to this specific case—which is far from certain in view of the chapeau of the paragraph³⁸—the reservation could not be established and, consequently, the author of the reservation could never become a contracting party. The objection—whether simple or qualified—in this case constitutes an insurmountable obstacle both for the author of the reservation and for all the contracting parties in relation to the establishment of treaty relations with the author of the reservation. Only the withdrawal of the reservation or the objection would resolve the situation.

28. Although such a solution is already implied by guidelines 4.1.2 and 4.2.1, it is worth recalling this significant effect of an objection to a reservation that requires unanimous acceptance:

“4.3.3 *Non-entry into force of the treaty for the author of the reservation when unanimous acceptance is required*

“If unanimous acceptance is required for the establishment of the reservation, any objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty for the reserving State or organization.”

29. The situation can be envisaged where a State or organization member of an international organization formulates an objection to a reservation formulated by another State or another international organization to the constituent instrument of the organization. However, such an objection, regardless of its content, would be devoid of legal effects. The Commission has already adopted guideline 2.8.11, according to which:

Guideline 2.8.7 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.³⁹

(ii) *Content of treaty relations between the author of the reservation and the author of the objection*

30. The potential effects of an objection are quite diverse.⁴⁰ The outright non-application of the treaty

between the author of the reservation and the author of the objection is the most straightforward hypothesis (objection with maximum effect (sect. d below)) but it is now infrequent, owing in particular to the reversal of the presumption in article 20, paragraph 4 (b), of the Vienna Conventions.⁴¹ The vast majority of objections are now intended to produce a very different effect: rather than opposing the entry into force of the treaty *vis-à-vis* the author of the reservation, the objecting State seeks to modify the treaty relations by adapting them to its own position. Under article 21, paragraph 3, of the Vienna Conventions, bilateral relations in such cases are characterized in theory by the partial non-application of the treaty (objection with minimum effect (sect. a below)). State practice, however, has developed other types of objections with effects other than those envisaged by article 21, paragraph 3, of the Vienna Conventions, either by excluding the application of certain provisions of the treaty that are not (specifically) related to the reservation (objection with intermediate effect (sect. b below)), or by claiming that the treaty applies without any modification (objection with “super-maximum” effect (sect. c below)).

a. Effect of an objection with minimum effect on treaty relations

31. Under the traditional system of unanimity, it was unimaginable that an objection could produce an effect other than non-participation by the author of the reservation in the treaty:⁴² the objection undermined unanimity and prevented the reserving State from becoming a party to the treaty. Since at the time that notion seemed self-evident, neither James Brierly nor Sir Gerald Fitzmaurice discussed the effects of objections to reservations, while Sir Hersch Lauterpacht touched on them only briefly in his proposals *de lege ferenda*.⁴³

32. Nor did Sir Humphrey Waldock find it necessary in his first report to address the effects of an objection to a reservation. This is explained by the fact that, according to his draft article 19, paragraph 4 (c), the objection precluded the entry into force of the treaty in the bilateral relations between the reserving State and the objecting State.⁴⁴ Despite the shift away from this categorical approach in favour of a mere presumption, the draft articles adopted on first reading said nothing about the specific effect of an objection that did not preclude the entry into force of the treaty as between the author of the objection and the reserving State. Few States, however, expressed concern at that silence.⁴⁵

33. Nevertheless, a comment by the United States⁴⁶ drew the problem to the attention of the Special Rapporteur and the Commission. Although a situation where

³⁷ “In cases not falling under the preceding paragraphs and unless the treaty otherwise provides ...”; see *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, paras. 223–233.

³⁸ “In cases not falling under the preceding paragraphs and unless the treaty otherwise provides...”

³⁹ For the commentary to this guideline, see *Yearbook ... 2009*, vol. II (Part Two), pp. 105–106. Guideline 2.8.7 reads “When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization”.

⁴⁰ See paragraph 1 above.

⁴¹ See *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 192, and paragraphs 7–16 above.

⁴² See Greig, “Reservations: equity as a balancing factor?” p. 146; Horn, *op. cit.* (footnote 7 above), p. 170.

⁴³ Alternative drafts C and D of art. 9, in his first report on the law of treaties (A/CN.4/63), *Yearbook ... 1953*, vol. II, p. 92.

⁴⁴ See paragraph 11 above.

⁴⁵ Only two States explicitly raised the issue. See the comments of Denmark (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 46) and the comments of the United States (*ibid.*, p. 47 and p. 55).

⁴⁶ *Ibid.*, p. 55.

treaty relations were established despite an objection was deemed “unusual”,⁴⁷ which was certainly true at the time, the United States still considered it necessary to cover such a situation and suggested the addition of a new paragraph, as follows:

Where a State rejects or objects to a reservation but considers itself in treaty relations with the reserving State, the provisions to which the reservation applies shall not apply between the two States.⁴⁸

34. The arguments put forward by the United States convinced Sir Humphrey of the “logical” need to include this situation in draft article 21. He proposed a new paragraph, the wording of which differed significantly from the United States proposal:

Where a State objects to the reservation of another State, but the two States nevertheless consider themselves to be mutually bound by the treaty, the provision to which the reservation relates shall not apply in the relations between those States.⁴⁹

ICJ expressed a similar view in its 1951 advisory opinion:

Finally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.⁵⁰

35. The Commission engaged in a very lively debate on the proposed text of paragraph 3. The view of Erik Castrén, who considered that the case of a reservation in respect of which a simple objection had been raised was already covered by draft article 21, paragraph 1 (b),⁵¹ was not shared by the other Commission members. Most members⁵² considered it necessary, if not “indispensable”⁵³ to introduce a provision “in order to forestall ambiguous situations”.⁵⁴ However, members of the Commission had different opinions regarding how to explain the intended effect of the new paragraph proposed by the United States and the Special Rapporteur. Whereas Sir Humphrey’s proposal emphasized the consensual basis of the treaty relationship established despite the objection, the provision proposed by the United States seemed to imply that the intended effect originated only from the unilateral act of the objecting State, that is, from the objection, without the reserving State having a real choice. The two positions had their supporters within the Commission.⁵⁵

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, p. 55, Observations and proposals of the Special Rapporteur on art. 21, para. 3.

⁵⁰ *I.C.J. Reports 1951*, p. 27.

⁵¹ *Yearbook ... 1965*, vol. I, 800th meeting, p. 172, para. 15.

⁵² Mr. Ruda (*ibid.*, para. 13); Mr. Ago (*ibid.*, 814th meeting, pp. 271 and 272, paras. 7 and 11); Mr. Tunkin (*ibid.*, p. 271, para. 8) and Mr. Briggs (*ibid.*, p. 272, para. 14).

⁵³ See the statement made by Mr. Ago (*ibid.*, p. 271, para. 7).

⁵⁴ *Ibid.*

⁵⁵ Mr. Yasseen (*ibid.*, 800th meeting, p. 171, para. 7; p. 172, paras. 21–23; and p. 173, para. 26), Mr. Tunkin (*ibid.*, p. 172, para. 18) and Mr. Pal (*ibid.*, pp. 172–173, para. 24) expressed the same doubts as the Special Rapporteur (*ibid.*, p. 173, para. 31); in contrast, Mr. Rosenne, supported by Mr. Ruda (*ibid.*, p. 172, para. 13) considered that “the United States unilateral approach to the situation it had mentioned in its observations concerning paragraph 2 was more in line with the general structure of the Commission’s provisions on reservations and preferable to the Special Rapporteur’s reciprocal approach” (*ibid.*, para. 10).

36. The text that the Commission finally adopted on a unanimous basis,⁵⁶ however, was very neutral and clearly showed that the issue was left open by the Commission. The Special Rapporteur in fact stated that he was able to “agree with both currents of opinion about the additional paragraph” since “the practical effect of either of the two versions would be much the same and in that particular situation both States would probably be ready to regard the treaty as being in force between them without the reserved provisions”.⁵⁷

37. During the debate at the United Nations Conference on the Law of Treaties on what would become article 21, paragraph 3, almost no problems were raised apart from a few unfortunate changes which the Conference fairly quickly reconsidered.

38. The episode is, however, relevant for understanding article 21, paragraph 3. The Conference Drafting Committee, chaired by Mr. Mustafa Kamil Yasseen—who, within the Commission, had expressed doubts regarding the difference between the respective effects of acceptance and objection on treaty relations⁵⁸—proposed an amended text for article 21, paragraph 3, in order to take account of the new presumption in favour of the minimum effect of an objection, which had been adopted following the Soviet amendment. The amended text stated that:

When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, *the reservation has the effects provided for in paragraphs 1 and 2*.⁵⁹

It would thus have been very clear that a simple objection was assumed to produce the same effect as an acceptance. Although the provision was adopted at one point by the Conference,⁶⁰ a joint amendment was submitted by India, Japan, the Netherlands and the Union of Soviet Socialist Republics⁶¹ a few days before the end of the Conference, with a view to replacing the last part of the sentence by the words originally proposed by the Commission and thereby restoring the distinction between the effects of an objection and an acceptance.

39. The joint amendment was incorporated into the text by the Drafting Committee and adopted by the Conference.⁶² Mr. Yasseen explained that it was “necessary to distinguish between cases where a State objected to a reservation but agreed that the treaty should nevertheless come into force, and cases in which the reservation was accepted”.⁶³

⁵⁶ *Ibid.*, 816th meeting, p. 284.

⁵⁷ *Ibid.*, 800th meeting, p. 173, para. 31.

⁵⁸ *Ibid.*, 814th meeting, p. 271, para. 5.

⁵⁹ *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April–22 May 1969*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11/Add.1), 11th plenary session, p. 36.

⁶⁰ *Ibid.*, para. 10 (94 votes to none).

⁶¹ A/CONF.39/L.49, in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Session, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969*, document A/CONF.39/11/Add.1, p. 273.

⁶² *Ibid.*, *Second Session, Vienna, 9 April–22 May 1969*, (A/CONF.39/11/Add.1), 33rd plenary meeting, 21 May 1969, p. 181, para. 12.

⁶³ *Ibid.*, para. 2.

40. The *travaux préparatoires* therefore leave no doubt that:

The view that the institution of objections is in the end void of any special effect is discomfiting as it was intended by the framers of the Vienna Convention to be the means by which the parties to a treaty safeguarded themselves against unwelcome reservations.⁶⁴

The reinstatement of the text initially proposed by the Commission restores the true meaning and effects of objections and silences the doctrinal voices that question the distinctive nature of the institution of objections as opposed to acceptances.⁶⁵

41. Paragraph 3 of article 21 of the 1969 Vienna Convention was not, however, an exercise in codification *stricto sensu* at the time of its adoption by the Commission, then by the United Nations Conference on the Law of Treaties. It had been included by the Commission “for the sake of completeness”,⁶⁶ but not as a rule of customary law.⁶⁷ Although the Commission had drafted paragraph 3 in something of a hurry and the paragraph had led to debate and proposed amendments right up to the final days of the 1969 Vienna Conference, during the *travaux préparatoires* for the draft that became the 1986 Vienna Convention, some members of the Commission nonetheless considered the provision clear⁶⁸ and acceptable.⁶⁹ That seems to have been the position of the Commission as a whole, since the paragraph was adopted on first reading with only the editorial changes necessary in 1977. That endorsement demonstrated the customary nature acquired by paragraph 3 of article 21,⁷⁰ which was confirmed by the decision of the Franco-British Court of Arbitration responsible for settling the dispute concerning the delimitation of the continental shelf in the *English Channel* case, which was rendered several days later.⁷¹ The provision is part of the “flexible” system of reservations to treaties.

42. What was henceforth to be considered the “normal” effect of an objection to a valid reservation is therefore set forth in article 21, paragraph 3, of the Vienna Conventions. This provision, in its fuller 1986 version, provides:

When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

43. Despite the apparent complexity of the wording, the sense of the provision is clear: as soon as the treaty has effectively entered into force in the bilateral relations between the author of the reservation and the author of the

objection—a detail that article 21, paragraph 3, does not specify but which is self-evident—the provision or provisions to which the reservation relates shall be excised from their treaty relations to the extent of the reservation. Article 21, paragraph 3, however, calls for three remarks.

44. First, the intended effect of an objection is, in fact, diametrically opposed to that of an acceptance. Acceptance has the effect of modifying the legal effect of the provisions to which the reservation relates to the extent of the reservation, whereas an objection excludes the application of those provisions to the same extent. Even though in certain specific cases the actual effect on the treaty relationship established despite the objection may be identical to that of an acceptance,⁷² nonetheless the legal regimes of the reservation/acceptance pair and the reservation/objection pair are, in law, distinctly different.

45. Secondly, it is surprising—and regrettable—that paragraph 3 does not in any way limit its scope only to reservations that are “valid”, that is, in accordance with articles 19 and 23, as is the case in paragraph 1.⁷³ It is nonetheless highly unlikely that an objection to an invalid reservation could produce the effect specified in paragraph 3, even though that seems to be allowed in State practice. States often object to reservations that they consider to be impermissible as being incompatible with the object and purpose of a treaty without opposing the entry into force of the treaty or indeed expressly state that their objection does not preclude the entry into force of the treaty in their relations with the reserving State.

46. A telling example is that of the objection of Germany to the reservation formulated by Myanmar to the Convention on the Rights of the Child:

The Federal Republic of Germany considers that the reservations made by the Union of Myanmar regarding articles 15 and 37 of the Convention on the Rights of the Child are incompatible with the object and purpose of the Convention (art. 51, para. 2) and therefore objects to them.

This objection shall not preclude the entry into force of the Convention as between the Union of Myanmar and the Federal Republic of Germany.⁷⁴

This example is far from isolated; there are numerous objections with “minimum effect” which, in spite of the conviction expressed by their authors as to the impermissibility of the reservation, do not oppose the entry into force of the treaty and say so clearly.⁷⁵ Simple objections

⁷² On this question, see paragraph 61 below.

⁷³ “1. A reservation established with regard to another party in accordance with articles 19, 20 and 23...”; see *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 205.

⁷⁴ *Multilateral Treaties...* (footnote 35 above) chap. IV.11.

⁷⁵ See also, among many examples, the objections of Belgium to the reservations of Egypt and Cambodia to the Vienna Convention on Diplomatic Relations (*ibid.* chap. III.3) or the objections of the Federal Republic of Germany to several reservations to the same Convention (*ibid.*). It is, however, interesting to note with regard to the objection by Germany, which considers certain reservations to be “incompatible with the letter and spirit of the Convention”, that the Government of Germany has stated only for certain objections that they do not preclude the entry into force of the treaty between Germany and the respective States, without expressly taking a position in the other cases where it objected to a reservation for the same reasons. Numerous examples

(Continued on next page.)

⁶⁴ Horn, *op. cit.* (footnote 7 above), pp. 173–174.

⁶⁵ See the doctrinal references cited in footnote 34 above.

⁶⁶ *Yearbook ... 1966*, vol. II, p. 209, para. (2) of the commentary to draft article 19.

⁶⁷ Edwards, “Reservations to treaties”, p. 398.

⁶⁸ Mr. Calle y Calle, *Yearbook ... 1977*, vol. I, 1434th meeting, p. 98, para. 8.

⁶⁹ Mr. Tabibi, *ibid.*, para. 7.

⁷⁰ Edwards, *op. cit.* (footnote 67 above), p. 398; Gaja, “Unruly treaty reservations”, p. 308.

⁷¹ *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decision of 30 June 1977, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 3.

to reservations considered to be impermissible are therefore far from being just a matter of speculation.⁷⁶

47. The 1969 Vienna Convention does not resolve this thorny issue and seems to treat the effects of the objection on the content of treaty relations independently from the issue of the validity of reservations. On this point, it can be said that the Commission went further than necessary in disconnecting the criteria for the validity of reservations and the effects of objections. It is one thing to allow States and international organizations to raise an objection to any reservation,⁷⁷ whether valid or invalid, and it is quite another to assign identical effects to all these objections. It is highly doubtful whether article 21, paragraph 3, of the Vienna Conventions is applicable to objections to reservations that do not satisfy the conditions of articles 19 and 23.⁷⁸ For the time being, however, it is not necessary to reach a final decision on this issue: at this stage of the analysis, it is sufficient to consider the effects of a valid reservation.⁷⁹

48. Thirdly, although it is clear from article 21, paragraph 3, of the Vienna Conventions that the provisions to which the reservation relates do not apply *vis-à-vis* the author of the objection, the phrase “to the extent of the reservation” leaves one “rather puzzled”⁸⁰ and needs further clarification.

49. The decision of the Court of Arbitration in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (English Channel case)*⁸¹ clarifies the meaning to be given to this phrase. France had, at the time of ratification, formulated a reservation to article 6 of the 1958 Geneva Convention on the Continental Shelf, the relevant portion of which reads as follows:

(Footnote 75 continued.)

can be found in the objections to the reservations formulated to the International Covenant on Civil and Political Rights: in particular the objections raised to the reservation of the United States of America to article 6 of the Covenant by Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway, Portugal, Spain and Sweden (*ibid.*). All those States considered the reservation to be incompatible with the object and purpose of the Covenant, but nonetheless did not oppose the entry into force of the Covenant in their relations with the United States, unlike Germany, which did not stay silent on that point even though its objection was also motivated by the incompatibility of the United States reservation “with the text as well as the object and purpose of article 6” (*ibid.*). Nor is the phenomenon limited to human rights treaties: see also the objections of Austria, France, Germany and Italy to the reservation of Viet Nam to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (*ibid.*, chap. VI.19).

⁷⁶ Zemanek, *loc. cit.* (footnote 34 above), p. 331.

⁷⁷ See *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, paras. 96–100.

⁷⁸ See, for example, Gaja, “Il regime della Convenzione di Vienna concernente le riserve inammissibili”, pp. 349–361.

⁷⁹ See *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 196.

⁸⁰ As the representative of the United States of America expressed it at the Vienna Conference, *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April–22 May 1969*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11/Add.1), 33rd plenary meeting, p. 181, para. 9.

⁸¹ UNRIAA, vol. XVIII, p. 3.

The Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it:

—if such boundary is calculated from baselines established after 29 April 1958;

—if it extends beyond the 200-metre isobath;

—if it lies in areas where, in the Government’s opinion, there are “special circumstances” within the meaning of article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast.⁸²

The United Kingdom objected to this part of the French reservation, stating only that:

The Government of the United Kingdom are unable to accept the reservations made by the Government of the French Republic.⁸³

Before the Court of Arbitration, France maintained that on account of the combined effect of its reservation and the objection by the United Kingdom, and in accordance with the principle of mutuality of consent, article 6 as a whole was not applicable in relations between the two parties.⁸⁴ The United Kingdom took the view that, in accordance with article 21, paragraph 3, of the Vienna Conventions—which had at the time not entered into force and had not even been signed by the French Republic—“the French reservations cannot render Article 6 inapplicable *in toto*, but at the most ‘to the extent of the reservation’”⁸⁵

50. The Court found that:

The answer to the question of the legal effect of the French reservations lies partly in the contentions of the French Republic and partly in those of the United Kingdom. Clearly, the French Republic is correct in stating that the establishment of treaty relations between itself and the United Kingdom under the Convention depended on the consent of each State to be mutually bound by its provisions; and that when it formulated its reservations to Article 6 it made its consent to be bound by the provisions of that Article subject to the conditions embodied in the reservations. There is, on the other hand, much force in the United Kingdom’s observation that its rejection was directed to the reservations alone and not to Article 6 as a whole. In short, the disagreement between the two countries was not one regarding the recognition of Article 6 as applicable in their mutual relations but one regarding the matters reserved by the French Republic from the application of Article 6. The effect of the United Kingdom’s rejection of the reservations is thus limited to the reservations themselves.⁸⁶

The Court went on to say:

However, the effect of the rejection may properly, in the view of the Court, be said to render the reservations non-opposable to the United Kingdom. Just as the effect of the French reservations is to prevent the United Kingdom from invoking the provisions of Article 6 except on the basis of the conditions stated in the reservations, so the effect of their rejection is to prevent the French Republic from imposing the reservations on the United Kingdom for the purpose of invoking against it as binding a delimitation made on the basis of the conditions contained in the reservations. Thus, the combined effect of the French reservations and their rejection by the United Kingdom is neither to render Article 6 inapplicable *in toto*, as the French Republic contends, nor to render it applicable *in toto*, as the United Kingdom primarily contends. It is to render the Article inapplicable as between the two countries to the extent, but only to the extent, of the reservations; and this is precisely the effect envisaged in such cases by Article 21, paragraph 3 of

⁸² *Multilateral Treaties...* (footnote 35 above), chap. XXI.4.

⁸³ *Ibid.*

⁸⁴ UNRIAA, vol. XVIII, p. 40, para. 57.

⁸⁵ *Ibid.* p. 41, para. 58.

⁸⁶ *Ibid.*, para. 59.

the Vienna Convention on the Law of Treaties and the effect indicated by the principle of mutuality of consent.⁸⁷

51. This 1977 decision not only confirms the customary nature of article 21, paragraph 3 of the 1969 Vienna Convention,⁸⁸ but also shows that the objective of this provision—which derives from the same principle of mutuality of consent—is to safeguard as much as possible the agreement between the parties. One should not exclude the application of the entirety of the provision or provisions to which a reservation relates, but only of the parts of those provisions concerning which the parties have expressed disagreement.

52. In the case of France and the United Kingdom, that meant accepting that article 6 of the Convention on the Continental Shelf remained applicable as between the parties apart from the matters covered by the French reservation. This is what should be understood by “to the extent of the reservation”. The effect sought by paragraph 3 is to preserve the agreement between the parties to the extent possible by reducing the application of the treaty to the provisions on which there is agreement and excluding the others, or, as Jean Kyongun Koh explains:

Here the Vienna Convention seems to be overtly seeking to preserve as much of the treaty as possible even when parties disagree about a reservation. ... The Vienna Convention tries to salvage as much as is uncontroversial about the relations between reserving and opposing states.⁸⁹

53. Although the principle of article 21, paragraph 3, is clearer than is sometimes suggested, it is still difficult to apply, as noted by Bowett:

The practical difficulty may be that of determining precisely what part of the treaty is affected by the reservation and must therefore be omitted from the agreement between the two Parties. It may be a whole article, or a sub-paragraph of an article, or merely a phrase or word within the sub-paragraph. There can be no rule to determine this, other than the rule that by normal methods of interpretation and construction one must determine which are the “provisions,” the words, to which the reservation relates.⁹⁰

Moreover, as Horn rightly notes:

A reservation does not only affect the provision to which it directly refers but may have repercussions on other provisions. An “exclusion” of a provision, that is the introduction of an opposite norm, changes the context that is relevant for interpreting other norms. A norm seldom exists in isolation but forms an integrated part in a system of norms. The extent of a reservation does not necessarily comprise only the provision directly affected but also those provisions the application of which is influenced by the “exclusion” or the “modification”.⁹¹

54. Consequently, only an interpretation of the reservation can help in determining the provisions of the treaty, or the parts of these provisions, whose legal effect the reserving State or international organization purports to exclude or modify. Those provisions or parts of provisions are, by virtue of an objection, not applicable in treaty relations between the author of the objection and the author of the reservation. All the provisions or parts of provisions not affected by the reservation remain applicable as between the parties.

55. What should be excluded from relations between the two parties can easily be determined by asking what the reservation actually modifies in the treaty relations of its author *vis-à-vis* a contracting party that has accepted it. All this is excluded in relations with a contracting party that has objected to the reservation.

56. Hence, guideline 4.3.5, which determines the content of treaty relations between the author of a simple objection and the author of the reservation, reproduces the language of article 21, paragraph 3, of the 1986 Vienna Convention, which addresses precisely that question, except that the guideline specifies that the rule applies only to objections to a valid reservation. Moreover, in order to clarify that the effect of the objection is not to exclude automatically the application of the entire provision to which the reservation relates—as France had contended in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (English Channel case)*⁹²—it would be useful to point out that exclusion may concern only a part of a provision. The guideline could therefore read as follows:

“4.3.5 Content of treaty relations

“When a State or an international organization objecting to a valid reservation has not opposed the entry into force of the treaty as between itself and the reserving State or organization, the provisions or parts of provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.”

57. In order to clarify the content of treaty relations between the author of the reservation and the objecting State or international organization, it is useful to recall the distinction between “modifying reservations” and “excluding reservations” employed earlier to determine the effects of an established reservation.⁹³

58. In the case of excluding reservations, the situation is particularly straightforward. The above-mentioned Egyptian reservation to the Vienna Convention on Diplomatic Relations is a case in point. That reservation reads: “Paragraph 2 of article 37 shall not apply.”⁹⁴ The provision to which the reservation relates is clearly article 37, paragraph 2, of the Convention on Diplomatic Relations. In treaty relations between the author of the reservation and the author of a simple objection, therefore, the Vienna Convention on Diplomatic Relations will apply without paragraph 2 of article 37. This provision (or part of a provision) does not apply, to the extent of the reservation; that is, it does not apply at all. Its application is entirely excluded.

59. Cuba made a reservation purporting to exclude the application of article 25, paragraph 1, of the Convention on Special Missions:

⁸⁷ *Ibid.*, p. 42, para. 61.

⁸⁸ See paragraph 41 above.

⁸⁹ *Loc. cit.* (footnote 34 above), p. 102.

⁹⁰ Bowett, “Reservations to non-restricted multilateral treaties”, p. 86.

⁹¹ Horn, *op. cit.* (footnote 7 above), p. 178.

⁹² UNRIAA, vol. XVIII, p. 3.

⁹³ See *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 262.

⁹⁴ *Multilateral Treaties...* (footnote 35 above), chap. III.3. See also *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 264.

The Revolutionary Government of the Republic of Cuba enters an express reservation with regard to the third sentence of paragraph 1 of article 25 of the Convention, and consequently does not accept the assumption of consent to enter the premises of the special mission for any of the reasons mentioned in that paragraph or for any other reasons.⁹⁵

In this case, too, a (simple) objection results in the exclusion of the application of the third sentence of paragraph 1 of article 25 of the Convention. The rest of the provision, however, remains in force as between the two parties.

60. Nevertheless, some types of excluding reservations are much more complex. This is the case, for instance, with across-the-board reservations, that is, reservations that purport to exclude the legal effect of the treaty as a whole with respect to certain specific aspects.⁹⁶ The reservation of Guatemala to the Customs Convention on the Temporary Importation of Private Road Vehicles of 1954 thus states:

The Government of Guatemala reserves its right:

(1) To consider that the provisions of the Convention apply only to natural persons, and not to legal persons and bodies corporate as provided in chapter 1, article 1.⁹⁷

A purely mechanical application of article 21, paragraph 3, of the Vienna Conventions might suggest that the treaty relations established between the author of this reservation and an objecting State excludes the application of article 1—the provision to which the reservation refers. But the fact that only article 1 is expressly referred to does not mean that the reservation applies only to that provision. In the practical example of the reservation of Guatemala, it would be equally absurd to exclude only the application of article 1 of the Convention or to conclude that, because the reservation concerns all the provisions of the Convention (by excluding part of its scope of application *ratione personae*), a simple objection excludes all the provisions of the Convention. Only that which is effectively modified or excluded as a result of the reservation remains inapplicable in the treaty relations between the author of the reservation and the author of the simple objection: the application of the Convention as a whole to the extent that such application concerns legal persons.

61. In such cases, and only in such cases, an objection produces in concrete terms the same effects as an acceptance: the exclusion of the legal effect, or application, of the provision to which the reservation relates “to the extent of the reservation”; an acceptance and a simple objection therefore result in the same treaty relations between the author of the reservation and the author of the acceptance or of the simple objection. The literature agrees on this point.⁹⁸ The similarity in the effects of an acceptance

and a minimum-effect objection does not mean, however, that the two reactions are identical and that the author of the reservation “would get what it desired”.⁹⁹ Moreover, this similarity is observed only in the very specific case of excluding reservations, and never in the case of reservations by which an author purports to modify the legal effects of a treaty provision.¹⁰⁰ Furthermore, while an acceptance is tantamount to agreement, or at least to the absence of opposition to a reservation, an objection cannot be considered mere “wishful thinking”;¹⁰¹ it expresses disagreement and purports to protect the rights of its author much as a unilateral declaration (protest) does.¹⁰²

62. In the light of these observations, it would seem useful to clarify the concrete effect of an objection to an excluding reservation. A comparison of the effect of the establishment of such a reservation, on the one hand, and of a simple objection to that reservation, on the other, shows that the same rights and obligations are excluded from the treaty relations between the respective parties. Guideline 4.3.6 clarifies the similarity between the treaty relations established in the two cases. It is in no way intended to replace guideline 4.3.5, but rather to provide clarification in regard to specific categories of reservations.

“4.3.6 Content of treaty relations in the case of a reservation purporting to exclude the legal effect of one or more provisions of the treaty

“A contracting State or a contracting organization that has formulated a valid reservation purporting to exclude the legal effect of one or more provisions of the treaty and a contracting State or a contracting organization that has raised an objection to it but has not opposed the entry into force of the treaty as between itself and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates to the extent that they would not be applicable as between them if the reservation were established.”

“All other treaty provisions that would be applicable if the reservation were established remain applicable as between the two parties.”

63. In the case of modifying reservations, however, the difference between an objection and an acceptance is very clear. Whereas the establishment of such a reservation modifies the legal obligations between the author of the reservation and the contracting parties with regard to which the reservation is established, article 21, paragraph 3 excludes the application of all the provisions that potentially would be modified by the reservation, to the extent of the reservation. If a State makes a reservation that purports to replace one treaty obligation with another, article 21, paragraph 3, requires that the obligation potentially to be replaced by the reservation shall be excised

⁹⁵ United Nations, *Treaty Series*, vol. 1400, No. 23431, p. 231.

⁹⁶ See guideline 1.1.1 (Object of reservations) and the commentary thereon (*Yearbook ... 1999*, vol. II (Part Two), pp. 93–95).

⁹⁷ United Nations, *Treaty Series*, vol. 282, No. 4101, p. 249.

⁹⁸ See for example Clark, “The Vienna Convention reservations regime and the Convention on Discrimination against Women”, p. 308; Coccia, *loc. cit.* (footnote 34 above), p. 36; Gaja, *loc. cit.* (footnote 34 above), p. 327; Imbert, *op. cit.* (footnote 10 above), p. 157; Ruda, *op. cit.*, p. 199; Sinclair, *The Vienna Convention on the Law of Treaties*, p. 76. See also the explanations of the representative of the Netherlands in respect of the four-State amendment, *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna*,

9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11/Add.1), 32nd plenary meeting, p. 179, para. 55; Horn, *op. cit.* (footnote 7 above), p. 173; Klabbers, *loc. cit.* (footnote 34 above), pp. 186–187.

⁹⁹ Klabbers, *loc. cit.* (footnote 34 above), p. 179.

¹⁰⁰ See paragraph 63 below.

¹⁰¹ Imbert, *op. cit.* (footnote 10 above), p. 157, quoting Dehaussy.

¹⁰² Zemanek, *loc. cit.* (footnote 34 above), p. 332.

from the treaty relations between the author of the reservation and the author of the simple objection. Neither the initial obligation, nor the modified obligation proposed by the reservation, applies: the former because the author of the reservation has not agreed to it and the latter because the author of the objection has not agreed to it.

64. It is important to point out this difference between a modifying reservation that is accepted and one to which a simple objection is made. Like guideline 4.3.6, guideline 4.3.7 must be read in conjunction with guideline 4.3.5, which it is intended to clarify.

“4.3.7 Content of treaty relations in the case of a reservation purporting to modify the legal effect of one or more provisions of the treaty

“A contracting State or a contracting organization that has formulated a valid reservation purporting to modify the legal effect of one or more provisions of the treaty and a contracting State or a contracting organization that has raised an objection to it but has not opposed the entry into force of the treaty as between itself and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates to the extent that they would be modified as between them if the reservation were established.”

“All other treaty provisions that would be applicable if the reservation were established remain applicable as between the two parties.”

b. Effect of an objection with intermediate effect on treaty relations

65. There is now a well-established practice of objections the effects of which extend beyond the framework of article 21, paragraph 3, of the Vienna Conventions: objections with “intermediate effect”.¹⁰³ The point here is not whether such objections may or may not be formulated; in 2009, the Special Rapporteur proposed a guideline that directly addresses this point,¹⁰⁴ and it has already been referred to the Drafting Committee.¹⁰⁵ Rather, the question here is to determine what effects such an objection can actually produce, irrespective of its author’s original intent. How far can the author of an objection extend the effect of the objection, between a “simple” effect

¹⁰³ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 107.

¹⁰⁴ Guideline 3.4.2 proposed by the Special Rapporteur during the discussion of the fourteenth report, *Yearbook ... 2009*, vol. II (Part Two), footnote 372, reads as follows:

“3.4.2 Substantive validity of an objection to a reservation

“An objection to a reservation by which the objecting State or international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty not affected by the reservation is not valid unless:

“(a) The additional provisions thus excluded have a sufficient link with the provisions in respect of which the reservation was formulated;

“(b) The objection does not result in depriving the treaty of its object and purpose in the relations between the author of the reservation and the author of the objection.”

¹⁰⁵ *Ibid.*, para. 60; following an indicative vote, it was decided not to include in guideline 3.4.2 a provision concerning *jus cogens* in relation to the permissibility of objections to reservations (*ibid.*).

(article 21, paragraph 3, of the Vienna Conventions) and a “qualified” or “maximum” effect, which excludes the entry into force of the treaty as a whole in the relations between the author of the reservation and the author of the objection (article 20, paragraph 4 (b), of the Vienna Conventions)?

66. Clearly, the choice cannot be left entirely to the discretion of the author of the objection.¹⁰⁶ As ICJ emphasized in its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*:

It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application.¹⁰⁷

Therefore, an objection cannot under any circumstances exclude from the treaty relations between the objecting State or international organization and the author of the reservation provisions of the treaty that are essential for the realization of its object and purpose.¹⁰⁸ This clearly constitutes a limit not to be exceeded, and guideline 3.4.2 even makes it a criterion for the assessment of permissibility.¹⁰⁹

67. On the other hand, it is important not to lose sight of the principle of mutual consent, which is the basis for the law of treaties as a whole and which, as the Court of Arbitration rightly stressed in the *English Channel* case,¹¹⁰ is essential for determining the effects of an objection and of a reservation. As has been recalled many times during the Commission’s work on reservations to treaties: “No State can be bound by contractual obligations it does not consider suitable”.¹¹¹ This is true for both the reserving State (or international organization) and the objecting State (or international organization). However, in some situations, the effects attributed to objections by article 21, paragraph 3, of the Vienna Conventions may prove unsuited for the re-establishment of mutual consent between the author of the reservation and the author of the objection, even where the object and purpose of the treaty are not threatened by the reservation.

68. This is the case, for example, when the reservation purports to exclude or to modify a provision of the treaty which, based on the intention of the parties, is necessary to safeguard the balance between the rights and the obligations deriving from their consent to the entry into force of the treaty. This is also the case when the reservation not only undermines the consent of the parties to the

¹⁰⁶ *Ibid.*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 109.

¹⁰⁷ *I.C.J. Reports 1951*, p. 27.

¹⁰⁸ This fundamental observation provides a hint as to the solution to the problem posed by the transposition of article 21, paragraph 3, of the Vienna Conventions, in the case of objections to impermissible reservations.

¹⁰⁹ See footnote 104 above.

¹¹⁰ UNRIAA, vol. XVIII, p. 42, para. 61.

¹¹¹ Tomuschat, “Admissibility and legal effects of reservations to multilateral treaties”, p. 466; see also *Yearbook...1996*, vol. II (Part One), document A/CN.4/477 and Add.1, p. 57, paras. 97 and 99; and Müller, “Article 20”, pp. 809–811, paras. 20–24.

provision to which the reservation directly refers, but also upsets the balance achieved during negotiations on a set of other provisions. A contracting party may then legitimately consider that being bound by one of the provisions in question without being able to benefit from one or more of the others constitutes a contractual obligation it does not consider suitable.

69. These are the types of situations that objections with intermediate effect are meant to address. The practice has been resorted to mainly, if not exclusively, in the case of reservations and objections to the provisions of part V of the 1969 Vienna Convention, and this example makes it clear why authors of objections seek to expand the effects they intend their objections to produce.

70. Article 66 of the 1969 Vienna Convention and the annex thereto relating to compulsory conciliation provide procedural guarantees which many States, at the time the Convention was adopted, considered essential in order to prevent abuse of other provisions of part V.¹¹² The reaction of several States to reservations to article 66 of the 1969 Vienna Convention was aimed at safeguarding the package deal, which some States had sought to undermine through reservations and which could only be restored through an objection that went beyond the “normal” effects of the reservations envisaged by the Vienna Conventions.¹¹³

71. Hence, in order to restore what could be referred to as “consensual balance” between the author of the reservation and the author of the objection, the effect of the objection on treaty relations between the two parties should be allowed to extend to provisions of the treaty that have a specific link with the provisions to which the reservation refers.

72. In the light of these remarks, it would be useful to include in the Guide to Practice a guideline 4.3.8 stating that an objection may, under certain conditions, exclude the application of provisions to which the reservation does not refer.

“4.3.8 Non-application of provisions other than those to which the reservation relates

“In the case where a contracting State or a contracting organization which has raised an objection to a valid reservation has expressed the intention, any provision of the treaty to which the reservation does not refer directly but which has a sufficiently close link with the provision or provisions to which the reservation refers is not applicable in treaty relations between the author of the reservation and the author of the objection, provided the non-application of this provision does not undermine the object and purpose of the treaty.”

73. The Special Rapporteur is aware that this guideline duplicates, to some extent, guideline 3.4.2.¹¹⁴ However, guideline 3.4.2 addresses the issue only from the

standpoint of the permissibility of such an objection, whereas guideline 4.3.8 deals more directly with the possible effect of an objection. Its goal is not to “sanction” a possibly impermissible objection with intermediate effect, but only to note that an objection accompanied by the corresponding intention of its author produces this effect. The effects of an objection with intermediate effect can be determined objectively by combining the effects provided for in guidelines 4.3.5 and 4.3.8, without the need to state that the author of an objection with intermediate effect that goes beyond what is admissible would still benefit from the “normal” effect of the objection.

c. Case of objections with “super-maximum” effect

74. The much more controversial question of objections with “super-maximum” effect whereby the author of the objection affirms that the treaty enters into force in relations between it and author of the reservation without the latter being able to benefit from its reservation,¹¹⁵ can also be resolved logically by applying the principle of mutual consent.

75. It should be noted, however, that the practice of objections with super-maximum effect has developed not within the context of objections to valid reservations, but in reaction to reservations that are incompatible with the object and purpose of a treaty. A recent example is afforded by the Swedish objection to the reservation made by El Salvador to the Convention on the Rights of Persons with Disabilities:

[T]he Government of Sweden has examined the reservation made by the Government of the Republic of El Salvador upon ratifying the Convention on the Rights of Persons with Disabilities.

According to international customary law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of all States that treaties to which they have chosen to become parties, are respected as to their object and purpose by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden notes that El Salvador in its reservation gives precedence to its Constitution over the Convention. The Government of Sweden is of the view that such a reservation, which does not clearly specify the extent of the derogation, raises serious doubt as to the commitment of El Salvador to the object and purpose of the Convention.

The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Republic of El Salvador to the Convention on the Rights of Persons with Disabilities and considers the reservation null and void. This objection shall not preclude the entry into force of the Convention between El Salvador and Sweden. The Convention enters into force in its entirety between El Salvador and Sweden, without El Salvador benefiting from its reservation.¹¹⁶

76. Regardless of the consequences of such an objection with super-maximum effect in the case of invalid reservation, it is quite clear that such an effect of an objection is not only not provided for in the Vienna Conventions—which is also true of an objection with intermediate effect—but is also clearly incompatible with the principle of mutual consent. Accordingly, a super-maximum effect is excluded

¹¹² *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 117.

¹¹³ Müller, “Article 21”, pp. 927–928, para. 70.

¹¹⁴ See footnote 104 above.

¹¹⁵ See also *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 106.

¹¹⁶ *Multilateral Treaties...* (footnote 35 above) chap. IV.15.

in the case of a valid reservation: the author of an objection cannot force the author of the reservation to be bound by more than what it is prepared to accept. The objecting State or international organization cannot impose on a reserving State or international organization that has validly exercised its right to formulate a reservation any obligations which the latter has not expressly agreed to assume.

77. It would therefore be appropriate to point out in the Guide to Practice that the author of a validly formulated reservation cannot be bound to comply with the provisions of the treaty without the benefit of its reservation. That is the thrust of guideline 4.3.9:

“4.3.9 Right of the author of a valid reservation not to be bound by the treaty without the benefit of its reservation

“The author of a reservation which meets the conditions for permissibility and which has been formulated in accordance with the relevant form and procedure can in no case be bound to comply with all the provisions of the treaty without the benefit of its reservation.”

78. This does not mean, however, that an objection with super-maximum effect has no effect on the content of treaty relations between its author and the author of the reservation. As is the case with objections with intermediate effect that go beyond admissible effects, such objections are, above all, objections through which the author expresses its disagreement with the reservation. The application of guideline 4.3.5 is in no way limited to simple objections. It applies to all objections to a valid reservation, including objections with super-maximum effect.

d. Effect of objections with maximum effect on treaty relations (revisited)

79. In the case where the author of an objection has opposed the entry into force of a treaty in its relations with the author of a reservation—a right recognized by article 20, paragraph 4 (b), of the Vienna Conventions, the treaty is quite simply not in force as between the author of the objection and the author of the reservation.¹¹⁷ No rule deriving from the treaty applies to their mutual relations. In that case, there is no point in discussing the issue of the content of treaty relations, because they are by definition non-existent.

(b) *Effect of a valid reservation on extraconventional norms*

80. The definition of a reservation contained in article 2, paragraph 1 (d), of the Vienna Conventions and reproduced in guideline 1.1 of the Guide to Practice clearly establishes that a reservation “purports to exclude or to modify the legal effect of certain provisions of the treaty”. Likewise, article 21, paragraph 1, provides that an established reservation can only modify (or exclude) the “provisions of the treaty to which the reservation relates”.¹¹⁸

¹¹⁷ See paragraphs 17–21 above.

¹¹⁸ On the differences between art. 2, para. 1 (d), and art. 21, para. 1, of the Vienna Conventions, see Müller, *loc. cit.* (footnote 113 above), pp. 896–898, paras. 25–26.

Although article 21, paragraph 3, is not as precise on this point, it refers to the “provisions to which the reservation relates”, which, based on the definition of a reservation, can only mean “certain provisions of the treaty”.

81. The text of the Vienna Conventions therefore leaves no room for doubt: a reservation can only modify or exclude the legal effects of the treaty or some of its provisions. A reservation remains a unilateral statement linked to a treaty, the legal effects of which it purports to modify. It does not constitute a unilateral, independent act capable of modifying the obligations, still less the rights, of its author. Furthermore, the combined effect of a reservation and an objection cannot exclude the application of norms external to the treaty.

82. Although technically not a reservation to a treaty, the arguments put forward by France on its reservation to its declaration of acceptance of the jurisdiction of the Court under article 36, paragraph 2, of the ICJ Statute in the *Nuclear Tests* cases are quite instructive in this regard.¹¹⁹ In order to establish that the Court had no jurisdiction in those cases, France contended that the reservation generally limited its consent to the jurisdiction of the Court, particularly the consent given in the General Act of Arbitration. In their joint dissenting opinion, several judges of the Court rejected the French thesis:

Thus, in principle, a reservation relates exclusively to a State’s expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon, or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations.¹²⁰

This opinion is expressed in sufficiently broad terms not to be applicable exclusively to the specific situation of reservations to declarations of acceptance of the compulsory jurisdiction of the Court under the optional clause, but to any reservation to an international treaty in general. This approach was later endorsed by the Court itself in the *Border and Transborder Armed Actions (Nicaragua v. Honduras)* case, where Honduras sought to have its reservation to its declaration of acceptance of the compulsory jurisdiction of the Court under the optional clause take precedence over its obligations by virtue of article XXXI of the Pact of Bogotá. The Court, however, held that such a reservation:

... cannot in any event restrict the commitment which Honduras entered into by virtue of Article XXXI. The Honduran argument as to the effect of the reservation to its 1986 Declaration on its commitment under Article XXXI of the Pact therefore cannot be accepted.¹²¹

83. This relative effect of the reservation and of the reactions to the reservation, in the sense that they can modify

¹¹⁹ *Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, pp. 101–102, para. 18; *Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, pp. 137–138, para. 16.

¹²⁰ *Nuclear Tests (Australia v. France)*, Joint dissenting opinion of Justices Onyeama, Dillard, Jiménez de Aréchaga and Waldock, *I.C.J. Reports 1974*, p. 350, para. 83.

¹²¹ *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 88, para. 41.

or exclude only the legal effects of the treaty in regard to which they were formulated and made, results from the *pacta sunt servanda* principle. A State or international organization cannot release itself through a reservation, acceptance of a reservation or objection to a reservation from obligations it has elsewhere.

84. The purpose of guideline 4.4.1 is to highlight the absence of effect of a reservation, or acceptance of or objection to it, on treaty obligations under another treaty. Only the legal effects of treaty provisions to which the reservation relates can be modified or excluded.

“4.4 Effects of a reservation and extraconventional obligations

“4.4.1 Absence of effect on the application of provisions of another treaty

“A reservation, acceptance of it or objection to it neither modifies nor excludes the respective rights and obligations of their authors under another treaty to which they are parties.”

85. Just as a reservation cannot influence pre-existing treaty relations of its author, it cannot have an impact on other obligations, of any nature, binding on the author of the reservation apart from the treaty. This is especially clear with regard to a reservation to a provision reflecting¹²² a customary norm.¹²³ Certainly, as between the author of the reservation and the contracting parties with regard to which the reservation is established, the reservation has the “normal” effect provided for in article 21, paragraph 1, creating between those parties a specific regulatory system which may derogate from the customary norm concerned in the context of the treaty¹²⁴—for example, by imposing less stringent obligations. Nonetheless, the reservation in no way affects the obligatory nature of the customary norm as such. It cannot release its author from compliance with the customary norm, if it is in effect with regard to the author, outside these specific regulatory systems.¹²⁵ ICJ has clearly stressed in this regard that:

no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention.¹²⁶

The reason for this is simple:

The fact that the above-mentioned principles [of customary and general international law], recognized as such, have been codified or

¹²² On the use of the word “reflect” see *Yearbook ... 2007*, vol. II (Part Two), p. 89, para. (1) of the commentary to guideline 3.1.8.

¹²³ On the question of the admissibility of such reservations, see *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1, paras. 116–130, and guideline 3.1.8, para. 1 (*Yearbook ... 2007*, vol. II (Part Two), para. 153). See also Teboul, “Remarques sur les réserves aux conventions de codification”, pp. 679–717.

¹²⁴ Teboul, *loc. cit.* (footnote 123 above), p. 708, para. 32.

¹²⁵ Weil has stated that “the intention manifested by a [S]tate in regard to a given convention is henceforth of little account ... whether it enters reservations to such and such a clause or not, it will in any case be bound by any provisions of the convention that are recognized to possess the character of rules of customary or general international law” (“Towards relative normativity in international law”, p. 440).

¹²⁶ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 40, para. 65.

embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.¹²⁷

86. Modifying or excluding the application of a treaty provision that reflects a customary norm can indeed produce effects in the framework of treaty relations; however, it does not in any way affect the existence or obligatory nature of the customary norm *per se*.

87. Concretely, the effect of the reservation (and of the reactions to it—acceptance or objection) is to exclude application of the *treaty* rule that reflects a customary norm, which means that the author of the reservation is not bound *vis-à-vis* the other contracting parties to comply with the (treaty) rule within the framework of the treaty. For example, it is not required to have recourse to arbitration or an international judge for any matter of interpretation or application of the rule, despite a settlement clause contained in the treaty. Nonetheless, since the customary norm retains its full legal force, the author of the reservation is not, as such, free to violate the customary norm (identical by definition); it must comply with it as such. Compliance or the consequences of non-compliance with the customary norm are not, however, part of the legal regime created by the treaty but are covered by general international law and evolve along with it.

88. This approach, moreover, is shared by States, which do not hesitate to draw the attention of the author of the reservation to the fact that the customary norm remains in force in their mutual relations, their objection notwithstanding. See, for example, the Netherlands in its objection to several reservations to article 11, paragraph 1, of the Vienna Convention on Diplomatic Relations:

The Kingdom of the Netherlands does not accept the declarations by the People’s Republic of Bulgaria, the German Democratic Republic, the Mongolian People’s Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic and the People’s Democratic Republic of Yemen concerning article 11, paragraph 1, of the Convention. The Kingdom of the Netherlands takes the view that this provision remains in force in relations between it and the said States in accordance with international customary law.¹²⁸

89. The Commission has already adopted a guideline on this matter in the third part of the Guide to Practice on the validity of reservations. The guideline in question is 3.1.8, which reads as follows:

3.1.8 Reservations to a provision reflecting a customary norm

1. The fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation although it does not in itself constitute an obstacle to the formulation of the reservation to that provision.

2. A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State or

¹²⁷ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction of the Court and Admissibility of the Application, Judgment of 26 November 1984, I.C.J. Reports, 1984*, p. 424, para. 73.

¹²⁸ *Multilateral Treaties...* (footnote 35 above), chap. III.3. In essence, the validity of the remark by the Netherlands is unquestionable. However, the way it is framed is highly debatable; it is not the treaty provision which remains in force between the reserving States and the Netherlands, but the customary norm that the provision reflects.

international organization and other States or international organizations which are bound by that norm.¹²⁹

90. It is the view of the Special Rapporteur that paragraph 2 of this guideline addresses this question satisfactorily. However, one could ask whether the paragraph has been placed in the appropriate section of the Guide. It has more to do with the effects than with the validity of the reservation. Perhaps it would make sense, in that case, to turn paragraph 2 of guideline 3.1.8 into a new guideline 4.4.2:

“4.4.2 Absence of effect of a reservation on the application of customary norms

“A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of the customary norm, which shall continue to apply as between the reserving State or international organization and other States or international organizations which are bound by that norm.”

91. The fundamental principle then, is, that a reservation and the reactions to it neither modify nor exclude the application of other treaty rules or customary norms that bind the parties. This principle applies *a fortiori*, of course, when the treaty rule reflects a peremptory norm of general international law (*jus cogens*). On this subject, following intense debate, the Commission adopted guideline 3.1.9, which is based in part upon this issue:

3.1.9 Reservations contrary to a rule of jus cogens

A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.¹³⁰

92. Without reopening a lengthy discussion on the problem (if indeed it is one), the Special Rapporteur is of the view that it would be desirable for a provision on the effects (or absence of effects) of a reservation on a *jus cogens* norm to be included in the fourth part of the Guide to Practice. In 2006, some members of the Commission expressed the view that guideline 3.1.9 had more to do with the effects of a reservation than it did with the question of its validity.¹³¹

93. However, unlike what was suggested above¹³² with regard to reservations to a treaty provision reflecting a customary norm, the Special Rapporteur is not proposing simply to move guideline 3.1.9 to the fourth part of the Guide to Practice; as written, this guideline does not directly address the question of the effects of a reservation to a provision reflecting a peremptory norm of general international law.

94. As noted above,¹³³ there is no reason why the principle applicable to reservations to a provision reflecting a customary norm cannot be transposed to reservations to a provision reflecting a peremptory norm. Guideline 4.4.3 could therefore be worded along the same lines as guideline 4.4.2, to read as follows:

“4.4.3 Absence of effect of a reservation on the application of peremptory norms of general international law (jus cogens)

“A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of the norm in question, which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.”

95. In that case, the Special Rapporteur will leave it to the Commission to decide whether guideline 4.4.3 duplicates guideline 3.1.9 or whether the two guidelines could be retained in their respective parts of the Guide to Practice.

2. INVALID RESERVATIONS

(a) Invalid reservations and the Vienna Conventions

96. Neither the 1969 nor the 1986 Vienna Convention deals explicitly with the question of the legal effects of a reservation that does not meet the conditions of permissibility and validity established in articles 19 and 23, which, taken together, suggest that the reservation is established in respect of another contracting State as soon as that State has accepted it in accordance with the provisions of article 20. The *travaux préparatoires* for the provisions of these two Conventions that concern reservations are equally unrevealing as to the effects—or lack thereof—that result from the invalidity of a reservation.

97. The effects attributed to a non-established reservation by the Commission’s previous Special Rapporteurs arose implicitly from their adherence to the traditional system of unanimity: the author of the reservation could not claim to have become a party to the treaty. Moreover, it was not a question of determining the effects of a reservation that did not respect certain conditions of validity, since there were no such conditions under the wholly intersubjective system, but rather of determining the effects of a reservation which had not been accepted by all the other contracting States and which, for that reason, did not become “part of the bargain between the parties”.¹³⁴

98. From this perspective, the Special Rapporteur, Mr. Brierly, wrote in 1950 that:

the acceptance of a treaty subject to a reservation is ineffective unless or until every State or international organization whose consent is requisite to the effectiveness of that reservation has consented thereto.¹³⁵

Lauterpacht expressed the same idea: “A signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty”.¹³⁶ Thus, unless a reservation is established in this

¹²⁹ *Yearbook ... 2007*, vol. II (Part Two), para. 153.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, para. 154, commentary to guideline 3.1.9, para. (12).

¹³² See paragraph 90 above.

¹³³ See paragraph 92 above.

¹³⁴ First report on the law of treaties, *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 241, para. 96; see also *ibid.*, vol. I, 53rd meeting, p. 90, para. 3 (Brierly).

¹³⁵ Draft article 10, para. 3, in Brierly’s first report on the law of treaties, *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 241.

¹³⁶ Draft article 9 in Lauterpacht’s report on the law of treaties, *Yearbook ... 1953*, vol. II, document A/CN.4/63, p. 91.

manner, it produces no effect and nullifies the consent to be bound by the treaty. The League of Nations Committee of Experts for the Progressive Codification of International Law had already stressed that a “null and void” reservation had no effect:

In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void.¹³⁷

Under this system, the issue is the ineffectiveness, rather than the invalidity, of a reservation; consent alone established its acceptability or unacceptability to all the other contracting parties.

99. However, even Brierly, though a strong supporter of the system of unanimity, was aware that there might be reservations which, by their very nature or as a result of the treaty to which they referred, might *ipso jure* have no potential effect. In the light of treaty practice, he considered that some treaty provisions:

allow only certain reservations specified in the text, and prohibit all others; these do not bear on the position of a depository or the question of States being consulted in regard to reservations, for *such questions cannot arise as no reservations at that stage are permissible*.¹³⁸

It follows that States were not free to “agree upon any terms in the treaty”,¹³⁹ as he had maintained the previous year; there were indeed reservations that could not be accepted because they were prohibited by the treaty itself. Gerald Fitzmaurice endorsed this idea in paragraph 3 of his draft article 37, which stated: “In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted”.¹⁴⁰

100. The situation changed with Sir Humphrey Waldock’s first report. The fourth Special Rapporteur on the law of treaties, a supporter of the flexible system, deliberately made the sovereign right of States to formulate reservations subject to certain conditions of validity. Despite the uncertainty concerning his position on the permissibility of reservations that are incompatible with the object and purpose of the treaty,¹⁴¹ draft article 17, paragraph 1 (in his first report) “*accepts the view that, unless the treaty itself, either expressly or by clear implication, forbids or restricts the making of reservations, a State is free, in virtue of its sovereignty, to formulate such reservations as*

it thinks fit”.¹⁴² However, Sir Humphrey did not deem it appropriate to specify the effects arising from the formulation of a prohibited reservation; in other words, he set the criteria for the validity of reservations without establishing the regime governing reservations which did not meet them.¹⁴³

101. Sir Humphrey’s first report does, however, contain several reflections on the effects of a reservation that it is prohibited by the treaty:

... when a reservation is formulated which is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the reservation is one prohibited by the treaty, they have no need to do so, for they have already expressed their objection to it in the treaty itself.¹⁴⁴

While this explanation does not reply directly to the question of the effect of prohibited reservations, it has the advantage of suggesting that they are excluded from the scope of the provisions concerning the consent of the contracting States and, subsequently, of all the provisions concerning the effects of reservations with the exception of the potential validation of an otherwise invalid reservation through the unanimous consent of all the contracting States.¹⁴⁵

102. For a long time, the Commission gave separate—and rather confusing—treatment to the question of reservations that are incompatible with the object and purpose of the treaty, and that of prohibited reservations. Thus, draft article 20, paragraph 2 (b) (“Effects of reservations”), adopted by the Commission on first reading, envisaged the legal effect of a reservation only in the context of an objection to it made on the grounds of its incompatibility with the object and purpose of the treaty:

An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.¹⁴⁶

¹⁴² *Yearbook ... 1962*, vol. II, p. 65, para. (9) of the commentary to draft article 17 (emphasis Sir Humphrey’s). See also *ibid.*, p. 67, para. (15) of the commentary to draft article 18; and *Yearbook ... 1962*, vol. I, 651st meeting, p. 143, para. 64 (Mr. Yasseen) and the conclusions of the Special Rapporteur, *ibid.*, 653rd meeting, p. 159, para. 57 (Sir Humphrey).

¹⁴³ During the debate, Alfred Verdross expressed the view that the case of a “treaty which specifically prohibited reservations ... did not present any difficulties” (*ibid.*, 652nd meeting, p. 148, para. 33), without, however, taking a clear position regarding the effects of the violation of such a specific prohibition. The members of the Commission were, however, aware that the problem could arise, as seen from the debate on draft article 27 on the functions of a depository (*Yearbook ... 1962*, vol. I, 658th meeting, p. 191, para. 59 (Sir Humphrey); and *ibid.*, 664th meeting, p. 236, paras. 82–95).

¹⁴⁴ *Yearbook ... 1962*, vol. II, p. 65, para. (9) of the commentary to draft article 17. In that connection, see Brierly, report on the law of treaties, *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 239, para. 88.

¹⁴⁵ Draft article 17, para. 1 (b), in *Yearbook ... 1962*, vol. II, p. 60: “The formulation of a reservation, the making of which is expressly prohibited or impliedly excluded under any of the provisions of subparagraph (a), is inadmissible unless the prior consent of all the other interested States has been first obtained”. See also draft article 18 as proposed by Waldock in his 1965 report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/177 and Add.1–2, pp. 61–62. On the question of the unanimous consent of the contracting States and contracting organizations, see paras. 204–209 below.

¹⁴⁶ *Yearbook ... 1962*, vol. II, p. 176.

¹³⁷ League of Nations, *Official Journal*, eighth year, No. 1, annex 967, p. 881.

¹³⁸ Report on reservations to multilateral conventions, *Yearbook ... 1951*, vol. II, document A/CN.4/41, p. 3, para. 11. In annex C to his report, the Special Rapporteur provided examples from the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (1930), the Convention providing a Uniform Law for Cheques (1931) and the 1948 Protocol amending the International Convention on Economic Statistics, signed at Geneva on 14 December 1928.

¹³⁹ *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 239, para. 88.

¹⁴⁰ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115.

¹⁴¹ *Yearbook ... 1962*, vol. II, pp. 65–66, para. (10) of the commentary to draft article 17. See also paras. (2) and (3) of the commentary to guideline 3.1 (Permissible reservations) in *Yearbook ... 2006*, vol. II (Part Two), p. 145.

It is also clear from this statement that the effect of an objection—which was (at that time) also subject to the requirement that it must be compatible with the object and purpose of the treaty, in accordance with the advisory opinion of ICJ¹⁴⁷—was envisaged only in the case of reservations that were incompatible (or deemed incompatible) with the object and purpose of the treaty. In 1965, however, following criticism from several States of this restriction of the right to make objections to reservations, the Special Rapporteur proposed new wording¹⁴⁸ in order to make a clearer distinction between objections and the validity of reservations. But as a result, invalid reservations fell outside of the work of the Commission and the United Nations Conference on the Law of Treaties and would remain so until the adoption of the 1969 Vienna Convention.

103. The fact that the 1969 Vienna Convention contains no rules on invalid reservations is, moreover, a consequence of the wording of article 21, paragraph 1, on the effect of acceptance of a reservation: only reservations that are permissible under the conditions established in article 19, formulated in accordance with the provisions of article 23 and accepted by another contracting party in accordance with article 20¹⁴⁹ can be considered established under the terms of this provision. Clearly, a reservation that is not valid does not meet these cumulative conditions, regardless of whether it is accepted by a contracting party.

104. This explanation is not, however, included in article 21, paragraph 3, on objections to reservations. But that does not mean that the Convention determines the legal effects of an invalid reservation to which an objection has been made: under article 20, paragraph 4 (c), in order for such an objection to produce the effect envisaged in article 21, paragraph 3, at least one acceptance is required;¹⁵⁰ however, the effects of acceptance of an invalid reservation are not governed by the Convention.

105. The *travaux préparatoires* of the United Nations Conference on the Law of Treaties clearly confirm that

¹⁴⁷ In 1951, the Court stated: “it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 24). For a thorough analysis of the differences between the legal system adopted by the Commission and the Court’s 1951 advisory opinion, see Koh, *loc. cit.* (footnote 34 above), pp. 88–95.

¹⁴⁸ *Yearbook ... 1965*, vol. II, p. 52, para. 9, of the commentary to draft article 19. Draft article 19, paragraph 4, as proposed by Sir Humphrey, states:

“4. In other cases, unless the State [*sic*—read ‘the treaty’?] concerned otherwise specifies:

“(a) acceptance of a reservation by any party constitutes the reserving State a party to the treaty in relation to such party;

“(b) objection to a reservation by any party precludes the entry into force of the treaty as between the objecting and the reserving State.”

¹⁴⁹ See *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, paras. 199 *et seq.*

¹⁵⁰ See paragraphs 25 and 26 above.

the 1969 Vienna Convention says nothing about the consequences of invalid reservations, let alone their effects. In 1968, during the first session of the Conference, the United States proposed to add, in the introductory sentence of future article 20, paragraph 4, after “In cases not falling under the preceding paragraphs”, the following specification: “and unless the reservation is prohibited by virtue of [future article 19].”¹⁵¹ According to the explanation provided by Herbert W. Briggs, representative of the United States, in support of the amendment:

The purpose of the United States amendment to paragraph 4 was to extend the applicability of the prohibited categories of reservations set out in article 16 to the decisions made by States under paragraph 4 of article 17 in accepting or objecting to a proposed reservation. In particular, the proposal would preclude acceptance by another contracting State of a reservation prohibited by the treaty, and the test of incompatibility with the object or purpose of the treaty set out in subparagraph (c) of article 16 would then be applicable to such acceptance or objection. It was a shortcoming of subparagraph (c) that it laid down a criterion of incompatibility for a prohibited reservation, but failed to make it explicitly applicable to the acceptance or objection to a reservation.¹⁵²

106. Although it is unclear from Briggs’ explanations, which focus primarily on extending the criteria for the permissibility of a reservation to include acceptances and objections, the effect of the United States amendment would unquestionably have been that the system of acceptances of and objections to reservations established in article 20, paragraph 4, applied only to reservations that met the criteria for permissibility under article 19. Acceptance of and objection to an impermissible reservation are clearly excluded from the scope of this amendment,¹⁵³ even though no new rule concerning such reservations was proposed. The representative of Canada, Max H. Wershof, then asked: “[W]as paragraph C of the United States amendment (A/CONF.39/C.1/L.127) consistent with the intention of the International Law Commission regarding incompatible reservations?”¹⁵⁴ Sir Humphrey, in his capacity as Expert Consultant, replied: “The answer was ... Yes, since it would in effect restate the rule already laid down in article 16.”¹⁵⁵

107. The “drafting” amendment proposed by the United States was sent to the Drafting Committee.¹⁵⁶ However, neither the language that was provisionally adopted by the Committee and submitted to the Committee of the Whole on 15 May 1968,¹⁵⁷ nor the language that was ultimately

¹⁵¹ Document A/CONF.39/C.1/L.127, reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference (A/CONF.39/11/Add.2)*, para. 179 (v) (d), p. 136.

¹⁵² *Ibid.*, First Session, Vienna, 26 March–24 May 1968 (A/CONF.39/11), 21st plenary meeting of the Committee of the Whole, para. 11, p. 118.

¹⁵³ It is, however, not entirely clear why the same restriction should not apply to the cases covered by paragraph 2 (treaties that must be applied in their entirety) and paragraph 3 (constituent instruments of international organizations).

¹⁵⁴ *Ibid.*, 24th meeting, p. 144, para. 77.

¹⁵⁵ *Ibid.*, 25th meeting, p. 144, para. 4. Draft article 16 became article 19 of the Convention.

¹⁵⁶ *Ibid.*, pp. 135–136, para. 38.

¹⁵⁷ A/CONF.39/C.1/L.344, in *ibid.*, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference, A/CONF.39/11/Add.2, p. 137, para. 185.

adopted by the Committee of the Whole and referred to the plenary Conference,¹⁵⁸ contained the wording proposed by the United States, although this decision is not explained in the *travaux préparatoires* of the Conference. It is, however, clear that the Commission and the Conference considered that the case of impermissible reservations was not the subject of express rules adopted at the conclusion of their *travaux préparatoires* and that the provisions of the Vienna Convention did not apply, as such, to that situation.

108. During the Commission's work on the question of treaties concluded between States and international organizations or between two or more international organizations and the *travaux préparatoires* of the United Nations Conference on the Law of Treaties, the question of the potential effects of a formulated reservation that does not meet the conditions for permissibility was not addressed. Nevertheless, Paul Reuter, Special Rapporteur of the Commission on the topic, recognized that "[e]ven in the case of treaties between States, the question of reservations has always been a thorny and controversial issue, and even the provisions of the Vienna Convention have not eliminated all these difficulties".¹⁵⁹ Nonetheless, the Special Rapporteur "thought it wise not to depart from that Convention where the concept of reservations was concerned".¹⁶⁰

109. In its observations on general comment No. 24 of the Human Rights Committee, the United Kingdom also recognized, at least in principle,¹⁶¹ that the 1969 Vienna Convention did not cover the question of impermissible reservations:

The Committee correctly identifies articles 20 and 21 of the Vienna Convention on the Law of Treaties as containing the rules which, taken together, regulate the legal effect of reservations to multilateral treaties. The United Kingdom wonders however whether the Committee is right to assume their applicability to incompatible reservations. The rules cited clearly do apply to reservations which are fully compatible with the object and purpose but remain open for acceptance or objection (see para. 9 above). It is questionable however whether they were intended also to cover reservations which are inadmissible *in limine*.¹⁶²

110. Admittedly, neither the 1969 nor the 1986 Vienna Convention—which are quite similar, including in this respect—contains clear, specific rules concerning the

effects of an impermissible reservation.¹⁶³ As the Special Rapporteur stressed in introducing his tenth report on reservations to treaties, the question of the consequences of the "invalidity" of a reservation is:¹⁶⁴

[O]ne of the most serious lacunae in the matter of reservations in the Vienna Conventions, which were silent on that point. It had been referred to as a "normative gap", and the gap was all the more troubling in that the *travaux préparatoires* did not offer any clear indications as to the intentions of the authors of the 1969 Convention, but instead gave the impression that they had deliberately left the question open. However, what was acceptable in a general treaty on the law of treaties, in view of the disputes raised by the question, was not acceptable in a work whose purpose was precisely that of filling the gaps left by the Vienna Conventions in the matter of reservations.¹⁶⁵

111. In this area, it is particularly striking that:

[T]he 1969 Vienna Convention has not frozen the law. Regardless of the fact that it leaves behind many ambiguities, that it contains gaps on sometimes highly important points and that it could not foresee rules applicable to problems that did not arise, or hardly arose, at the time of its preparation... the Convention served as a point of departure for new practices that are not, or not fully, followed with any consistency at the present time.¹⁶⁶

Thus, in accordance with the method of work that has been proposed and followed by the Special Rapporteur and by the Commission in the context of preparation of the Guide to Practice,¹⁶⁷ treaty rules—which are silent on the question of the effects of impermissible reservations—should be taken as established and the Commission should "simply try to fill the gaps and, where possible and desirable, to remove their ambiguities while retaining their versatility and flexibility".¹⁶⁸

112. However, this does not mean that the Commission should enact legislation and create *ex nihilo* rules concerning the effects of a reservation that does not meet the criteria for permissibility. State practice, international jurisprudence and doctrine have already developed approaches and solutions on this matter which the Special Rapporteur considers perfectly capable of guiding the

¹⁶³ In that regard, see Gaja, "Il regime della Convenzione di Vienna concernente le riserve inammissibili", pp. 349–361; Simma, "Reservations to human rights treaties: some recent developments", pp. 667–668; and Tomuschat, "International law: ensuring the survival of mankind on the eve of a new century", p. 321.

¹⁶⁴ *Yearbook ... 2005*, vol. II (Part One), pp. 183–189, paras. 181–208.

¹⁶⁵ *Yearbook ... 2006*, vol. I, 2888th meeting, p. 132, para. 32.

¹⁶⁶ *Yearbook ... 1995*, vol. II (Part One), p. 152, para. 161.

¹⁶⁷ In 2006, during the Commission's consideration of the tenth report on reservations to treaties, "[i]t was even questioned whether the Commission should take up the matter of the consequences of the invalidity of reservations, which, perhaps wisely, had not been addressed in the 1969 and 1986 Vienna Conventions. Perhaps that gap should not be filled; the regime that allowed States to decide on the validity of reservations and to draw the consequences already existed, and there was no reason to change it" (*Yearbook ... 2006*, vol. II (Part Two), para. 142). In the Sixth Committee, however, this was said to be a key issue for the study (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 17th meeting (A/C.6/61/SR.17), para. 5 (France)). Several delegations supported the idea that impermissible reservations were null and void (A/C.6/61/SR.16, para. 43 (Sweden); *ibid.*, para. 51 (Austria); and A/C.6/61/SR.17, para. 7 (France)); it was hoped that the specific consequences arising from that nullity would be spelled out in the Guide to Practice (A/C.6/61/SR.16, para. 59 (Canada)). See also *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 14.

¹⁶⁸ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 152, para. 163.

¹⁵⁸ The language was approved by 60 votes to 15, with 13 abstentions, *ibid.*, *Second Session, Vienna, 9 April–22 May 1969* (A/CONF.39/11/Add.1), 85th meeting of the Committee of the Whole, p. 221, paras. 33–34. For the text of this provision, see *ibid.*, *First and Second Sessions Vienna, 26 March–24 May 1968 and 9 April–22 May 1969*, Documents of the Conference, A/CONF.39/11/Add.2, para. 57.

¹⁵⁹ Reuter, Tenth report on the question of treaties concluded between States and international organizations or between two or more international organizations, *Yearbook ... 1981*, vol. II (Part One), p. 56, para. 53. The Special Rapporteur referred to Imbert, *Les réserves aux traités multilatéraux*; and, by the same author, "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", pp. 29–58.

¹⁶⁰ *Yearbook ... 1977*, vol. I, 1434th meeting, p. 98, para. 4.

¹⁶¹ See footnote 209 below. While the United Kingdom considered that impermissible reservations were not covered by the Vienna Conventions, the solution that it proposed was, ultimately, simply to apply article 21, paragraph 3, of the Conventions to them.

¹⁶² Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, annex V.

Commission's work. It is a question, not of creating, but of systematizing, the applicable principles and rules in a reasonable manner and of preserving the general spirit of the Vienna system.

(b) *Nullity of an impermissible reservation and the consequences thereof*

(i) *Nullity of an impermissible reservation*

113. In his tenth report on reservations to treaties, the Special Rapporteur proposed the following draft guideline:

3.3.2 *Nullity of invalid reservations*

A reservation that does not fulfil the conditions for validity laid down in guideline 3.1 is null and void.¹⁶⁹

114. This proposal was justified by the following considerations:

It is too early for the Commission to take a position on whether the nullity of the reservation invalidates the consent to be bound itself: this issue divides the commentators and will be settled only when the role of acceptance of, and objections to, reservations has been studied in greater depth. Nonetheless, it seems reasonable to establish as of now the solution on which those who espouse permissibility and those who espouse opposability agree, which also accords with the positions taken by the human rights treaty bodies [*Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477/Add.1, pp. 72–74, paras. 194–201], namely that failure to respect the conditions for validity of formulation of reservations laid down in article 19 of the Vienna Conventions and repeated in draft guideline 3.1 nullifies the reservation. In other words, even if the Commission cannot yet decide on the consequences of the nullity of the reservation, it can still establish the principle of the nullity of invalid reservations in a draft guideline 3.3.2.¹⁷⁰

115. Several members of the Commission expressed the view that consideration of guideline 3.3.2 at that stage of the Commission's work on the topic was premature¹⁷¹ and that it should be postponed until the question of the legal effects of reservations was considered. Although the principle of the nullity of an impermissible reservation was not challenged and was deemed convincing and useful,¹⁷² it was stressed that the wording of guideline 3.3.2 seemed to imply that an impermissible reservation would have no effect on the reserving State's participation in the treaty.¹⁷³

116. Following the discussion in the Commission, consideration of guideline 3.3.2 was deferred, to be

¹⁶⁹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 187, para. 200.

¹⁷⁰ *Ibid.*

¹⁷¹ *Yearbook ... 2006*, vol. I, 2888th meeting, para. 52 (Mr. Matheson); 2889th meeting, para. 29 (Mr. Gaja); 2890th meeting, para. 10 (Mr. Fomba); *ibid.*, para. 33 (Mr. Yamada); *ibid.*, para. 48 (Mr. Mansfield).

¹⁷² *Yearbook ... 2006*, vol. I, 2890th meeting, para. 10 (Mr. Fomba); *ibid.*, para. 13 (Mr. Kemicha); *ibid.*, para. 16 (Mr. Economides); *ibid.*, para. 23 (Mr. Chee); *ibid.*, para. 33 (Mr. Yamada); *ibid.*, para. 48 (Mr. Mansfield); *ibid.*, para. 51 (Mr. Rodríguez Cedeño). There was one point of view which did not garner support, whereby it was suggested that proposals should not be included in the Guide to Practice if they would purport to undo the legal regime established by the 1969 Vienna Convention, which was deliberately silent on the question of the effects of an impermissible reservation, leaving the assessment of permissibility to the author of the reservation (2889th meeting, para. 12 (Mr. Rao)).

¹⁷³ *Yearbook ... 2006*, vol. I, 2889th meeting, para. 29 (Mr. Gaja). See also *ibid.*, 2890th meeting, para. 56 (Ms. Xue).

considered along with the question of the effects of an impermissible reservation.¹⁷⁴

117. While the nullity of a reservation and the consequences and effects of that nullity are certainly interdependent, they are two different issues. It is not possible first to consider the effects of an impermissible reservation and then to deduce its nullity: the fact that a legal act produces no effect does not necessarily mean that it is null and void. It is the characteristics of the act that influence its effects, not the other way around. In that regard, the nullity of an act is merely one of its characteristics, which, in turn, influences the capacity of the act to produce or modify a legal situation.

118. With regard to acts which are null and void under civil law, the great French jurist Marcel Planiol has explained:

[A] legal act is null and void when it is deprived of effect by law, even if it was in fact carried out and no obstacle renders it useless. Nullity presupposes that the act could produce all of its effects if the law allowed it to do so.¹⁷⁵

The *Dictionnaire du droit international public* defines “nullity” as a:

[c]haracteristic of a legal act or of a provision of an act, lacking legal value due to the absence of formal or substantive requirements necessary for its validity.¹⁷⁶

119. This is precisely the situation in the case of a reservation which does not meet the criteria for permissibility under article 19 of the Vienna Conventions: it does not meet the requirements for permissibility and, for this reason, has no legal value. However, had the reservation met the requirements for permissibility, it could have produced legal effects.

120. The very principle of nullity was, moreover, favourably received by several delegations during the Sixth Committee's consideration of the report of the Commission on its fifty-eighth session. Only China expressed the view that it would be difficult to conclude that a reservation was impermissible from the outset since the other contracting parties were free to decide whether to accept it.¹⁷⁷ This position,¹⁷⁸ which accurately reflects the school of “opposability”, nevertheless ignores the very existence of article 19 of the Vienna Conventions. Leaving it to the contracting parties to assess the permissibility of a reservation ultimately amounts to denying any useful effect to this provision, even though it is central to the Vienna regime and is formulated (*a contrario*, at least) not as a set of factors which States and international organizations should take into account, but in prescriptive language.¹⁷⁹

¹⁷⁴ *Yearbook ... 2006*, vol. II (Part Two), paras. 139 and 157.

¹⁷⁵ Cited by Guggenheim, “La validité et la nullité des actes juridiques internationaux”, p. 208.

¹⁷⁶ Salmon, ed., *Dictionnaire de droit international public*, p. 760 (nullity).

¹⁷⁷ *Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 16th meeting (A/C.6/61/SR.16), para. 65.

¹⁷⁸ See also the position of Portugal (*ibid.*, para. 79).

¹⁷⁹ “A State may ... formulate a reservation, unless ...” which clearly means “a State cannot formulate a reservation if ...”.

Furthermore, this argument assumes that States can, in fact, accept a reservation which does not meet the permissibility criteria established in the 1969 and 1986 Vienna Conventions; this is far from certain. On the contrary, it would seem that express acceptance of an impermissible reservation cannot make the reservation permissible¹⁸⁰ and is also impermissible.¹⁸¹

121. Several other States have expressed the view that an impermissible reservation should be considered null and void,¹⁸² while emphasizing that the specific consequences of this nullity must be spelled out.¹⁸³ The representative of Sweden, speaking on behalf of the Nordic countries, pointed out emphatically:

Article 19 of the Vienna Convention makes clear that reservations incompatible with the object and purpose of a treaty should not be part of treaty relations between States. An invalid reservation should therefore be considered null and void.¹⁸⁴

The same representative, Ms. Hammarskjöld, then continued:

The practice of severing reservations incompatible with the object and purpose of a treaty was fully in conformity with article 19 of the Vienna Convention, which made clear that such reservations were not to form part of the treaty relationship.¹⁸⁵

122. In no way does the nullity of an impermissible reservation fall into the *de lege ferenda* category;¹⁸⁶ it is solidly established in State practice.

123. It is not unusual for States to formulate objections to reservations which are incompatible with the object and purpose of the treaty while at the same time noting that they consider the reservation to be “null and void”. As early as 1982:

...[t]he Government of the Union of Soviet Socialist Republics does not recognize the validity of the reservation made by the Government of the Kingdom of Saudi Arabia on its accession to the 1961 Vienna Convention on Diplomatic Relations, since that reservation is contrary to one of the most important provisions of the Convention, namely, that “the diplomatic bag shall not be opened or detained”.¹⁸⁷

This is also true of Italy, which formulated an objection to the reservation to the International Covenant on Civil and Political Rights formulated by the United States:

In the opinion of Italy reservations to the provisions contained in article 6 are not permitted, as specified in article 4 paragraph 2 of the

¹⁸⁰ *Yearbook ... 2005*, vol. II (Part One), pp. 187–188, paras. 201 and 202.

¹⁸¹ *Yearbook ... 2009*, vol. II (Part Two), footnote 371. See also paragraphs 204–209 below.

¹⁸² Sweden, speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 16th meeting (A/C.6/61/SR.16), paras. 43–45; Austria, *ibid.*, para. 51; and France, *ibid.*, 17th meeting (A/C.6/61/SR.17), paras. 5–7. See also Sweden, speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *ibid.*, *Sixtieth Session, Sixth Committee*, 14th meeting (A/C.6/60/SR.14), paras. 22–23.

¹⁸³ Canada, *ibid.*, *Sixty-first Session, Sixth Committee*, 16th meeting, (A/C.6/61/SR.16), para. 59 and France *ibid.*, 17th meeting (A/C.6/61/SR.17), para. 5.

¹⁸⁴ *Ibid.*, 16th meeting, (A/C.6/61/SR.16), para. 44. See, however, Portugal, *ibid.*, 16th meeting (A/C.6/61/SR.16), para. 79.

¹⁸⁵ *Ibid.*, para. 45.

¹⁸⁶ See footnote 184 above.

¹⁸⁷ *Multilateral treaties...* (footnote 35 above), chap. III.3.

Covenant. Therefore this reservation is null and void since it is incompatible with the object and the purpose of article 6 of the Covenant.¹⁸⁸

In 1995, Finland, the Netherlands and Sweden made objections that were comparable to the declarations formulated by Egypt upon it acceding to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. In its objection, the Netherlands stated:

[t]he Kingdom of the Netherlands considers the declaration on the requirement of prior permission for passage through the territorial sea made by Egypt a reservation which is null and void.¹⁸⁹

Finland and Sweden also stated in their objections that they considered these declarations to be null and void.¹⁹⁰ The reactions of Sweden to reservations judged invalid frequently contain this statement, regardless of whether the reservation is prohibited by the treaty,¹⁹¹ was formulated late¹⁹² or is incompatible with the object and purpose of the treaty.¹⁹³ In the latter category, Sweden’s reaction to the declaration in respect of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment formulated by the German Democratic Republic¹⁹⁴ is particularly explicit:

The Government of Sweden has come to the conclusion that the declaration made by the German Democratic Republic is incompatible with the object and purpose of the Convention and therefore is invalid according to article 19 (c) of the Vienna Convention on the Law of Treaties.¹⁹⁵

124. This objection makes it clear that the nullity of the reservation is a consequence, not of the objection made by the Government of Sweden, but of the fact that the declaration made by the German Democratic Republic does not meet the requirements for the permissibility of

¹⁸⁸ *Ibid.*, chap. IV.4.

¹⁸⁹ *Ibid.*, chap. XXVII.3. Art. 26, para. 1, of the Basel Convention stipulates that “No reservation or exception may be made to this Convention.”

¹⁹⁰ *Ibid.*, chap. XXVII.3.

¹⁹¹ *Ibid.*

¹⁹² The objection of Sweden to the late declaration of Egypt to the Basel Convention was, however, justified by both the Convention’s prohibition of reservations and the fact that “these declarations were made almost two years after the accession by Egypt contrary to the rule laid down in article 26, paragraph 2 of the Basel Convention” (*ibid.*, footnote 8). Finland, however, justified its objection based solely on the fact that the declarations were, in any event, late (*ibid.*, chap. XVII.3). Italy also considered that the declarations formulated by Egypt were late and that “[f]or these reasons, the deposit of the aforementioned declarations cannot be allowed, regardless of their content” (*ibid.*).

¹⁹³ See the objections of Sweden to the reservations to the International Covenant on Civil and Political Rights formulated by Maldives and Mauritania (*ibid.*, chap. IV.4); its objections to the reservations to the Convention on the Elimination of All Forms of Discrimination against Women formulated by Bahrain, Brunei Darussalam, the Democratic People’s Republic of Korea, the Federated States of Micronesia, Oman and the United Arab Emirates (*ibid.*, chap. IV.8) and its objections to the reservation and interpretative declaration to the Convention on the Rights of Persons with Disabilities formulated by El Salvador and Thailand, respectively (*ibid.*, chap. IV.15).

¹⁹⁴ The German Democratic Republic had declared upon signing and ratifying the Convention that it “will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic” (*ibid.*, chap. IV.9). See also *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, p. 259, para. 217.

¹⁹⁵ *Multilateral treaties...* (footnote 35 above), chap. IV.9.

a reservation. This is an objective issue which does not depend on the reactions of the other contracting parties, even if they could help to assess the compatibility of the reservation with the requirements of article 19 of the Vienna Conventions as reflected in guideline 3.1 (permissible reservations).¹⁹⁶

125. It is not a question of granting the parties a competence which is clearly not theirs; individually, the contracting States and contracting organizations are not authorized to annul an impermissible reservation.¹⁹⁷ Moreover, this is not the purpose of these objections and they should not be understood in that manner. However, and this is particularly important in a system that lacks a control and annulment mechanism, these objections express the views of their authors on the question of the permissibility and effects of an impermissible reservation.¹⁹⁸ As the representative of Sweden pointed out in the Sixth Committee:

Theoretically, an objection was not necessary in order to establish that fact but was merely a way of calling attention to it. The objection therefore had no real legal effect of its own and did not even have to be seen as an objection *per se*; consequently, the time limit of twelve months specified in article 20, paragraph 5, of the Convention, should not apply. However, in the absence of a body that could authoritatively classify a reservation as invalid, such as the European Court of Human Rights, such “objections” still served an important purpose.¹⁹⁹

126. Guideline 3.3.2, proposed by the Special Rapporteur in his tenth report, should certainly be included in the Guide to Practice, as confirmed by the views of the majority of States on the problem of the effects (or absence thereof) of an impermissible reservation.

127. It might nevertheless be wondered whether this guideline should remain in part III of the Guide to Practice, which deals with matters relating to the permissibility of reservations and interpretative declarations, or whether it would ultimately make more sense to incorporate it into part IV of the Guide, on effects. From the purely theoretical standpoint, in the light of the meaning of the term “nullity”²⁰⁰—the issue is to determine what characterizes an impermissible act—it seems quite appropriate to leave this guideline where it was originally. “Nullity” is one of the “consequences of the non-permissibility”²⁰¹ of a reservation. This is not, in itself, a legal effect.

128. However, part III, and, in particular, the first three sections thereof, concern only the *permissibility* of reservations. There is no reason to exclude from the conditions for the validity of a reservation—which, if not met, render the reservation null and void—those which concern form. A reservation which was not formulated in writing,²⁰² was

not communicated to the other concerned parties²⁰³ or was formulated late²⁰⁴ is also, in principle, unable to produce legal effects; it is null and void. Thus, the reference only to guideline 3.1—which reflects article 19 of the Vienna Conventions—in guideline 3.3.2, as proposed, seems too limited. Upon reflection, this dual cause of nullity is also an argument for including this guideline in the fourth, rather than the third, part of the Guide.²⁰⁵

129. In principle, then, it is certainly worth mentioning, in the context of part IV of the Guide to Practice, that an impermissible or invalid reservation is null and void. The guideline, which will begin section 4.5 on the effects of an invalid reservation, might read:

“4.5 Effects of an invalid reservation

“4.5.1 Nullity of an invalid reservation

“A reservation that does not meet the conditions of permissibility and validity set out in parts II and III of the Guide to Practice is null and void.”

(ii) Effects of the nullity of an impermissible reservation

130. Simply to state that a reservation is null and void does not, however, resolve the question of the effects—or lack of effects—of this nullity on the treaty and on potential treaty relations between the author of the reservation and the other contracting parties; as seen from the preceding paragraphs, the Vienna Conventions are silent on this matter. We must therefore refer to the basic principles underlying all treaty law (beginning with the rules applicable to reservations) and, above all, to the principle of consent.

131. Many objections are formulated in respect of reservations that are considered impermissible, either because they are prohibited by the treaty or because they are incompatible with its object and purpose, without precluding the entry into force of the treaty. This practice is fully consistent with the principle set out in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions, although it may seem surprising that it was primarily (but not exclusively) the Western States which, at the United Nations Conference on the Law of Treaties, expressed serious misgivings regarding the reversal of the presumption that was strongly supported by the Eastern countries.²⁰⁶ But the fact that the *treaty* remains in force does not answer the question of the status of the *reservation*.

²⁰³ Art. 23, para. 1, of the Vienna Conventions. See also guideline 2.1.5 (Communication of reservations), *ibid*.

²⁰⁴ See guidelines 2.3 (Late reservations) and 2.3.1 (Late formulation of a reservation) to 2.3.5 (Widening the scope of a reservation), *Yearbook ... 2009*, vol. II (Part Two), para. 83, and *Yearbook ... 2004*, vol. II (Part Two), p. 104.

²⁰⁵ Furthermore, guideline 4.5 would be, for invalid reservations, the equivalent of guideline 4.1 for valid reservations (“Established reservations”): both deal with the two categories of conditions (permissibility and validity) for a reserve to be considered “established”, in one case (on the condition that it is also accepted by at least one other contracting State or contracting organization), or “invalid” in the second case.

²⁰⁶ See paragraphs 10–16 above. See also paragraph (1) of the commentary to guideline 2.6.8 (Expression of intention to preclude the entry into force of the treaty), *Yearbook ... 2008*, vol. II (Part Two), para. 124.

¹⁹⁶ See also paragraphs 192–223 below.

¹⁹⁷ See also Klabbers, *loc. cit.* (footnote 34 above), p. 184.

¹⁹⁸ See also guideline 3.2 (Assessment of the permissibility of reservations), *Yearbook ... 2009*, vol. II (Part Two), para. 83.

¹⁹⁹ Sweden, speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 14th meeting (A/C.6/60/SR.14)*, para. 22.

²⁰⁰ See paragraph 118 above.

²⁰¹ This is the title of guideline 3.3, the section in which it was proposed that guideline 3.3.2 would be inserted.

²⁰² Art. 23, para. 1, of the Vienna Conventions. See also guideline 2.1.1 (Written form), *Yearbook ... 2002*, vol. II (Part Two), p. 28.

132. The objection of Belgium to the reservations to the Vienna Convention on Diplomatic Relations made by the United Arab Republic and Cambodia raises this issue. Upon ratifying the Convention in 1968, Belgium stated that it considered “the reservation made by the United Arab Republic and the Kingdom of Cambodia to paragraph 2 of article 37 to be incompatible with the letter and spirit of the Convention”²⁰⁷ without drawing any particular consequences. But in 1975, in reaction to the confirmation of these reservations and to a comparable reservation by Morocco, Belgium explained:

The Government of the Kingdom of Belgium objects to the reservations made with respect to article 27, paragraph 3, by Bahrain and with respect to article 37, paragraph 2, by the United Arab Republic (now the Arab Republic of Egypt), Cambodia (now the Khmer Republic) and Morocco. The Government nevertheless considers that the Convention remains in force as between it and the aforementioned States, respectively, *except in respect of the provisions which in each case are the subject of the said reservations*.²⁰⁸

In other words, according to Belgium, despite the incompatibility of the reservations with “the letter and spirit” of the Convention, the latter would enter into force between Belgium and the authors of the impermissible reservations. However, the provisions to which the reservations referred would not apply as between the authors of those reservations and Belgium; this amounts to giving impermissible reservations the same effect as permissible reservations.

133. The approach taken in the objection of Belgium, which is somewhat unusual,²⁰⁹ appears to correspond to

²⁰⁷ *Multilateral treaties...* (footnote 35 above), chap. III.3.

²⁰⁸ *Ibid.*

²⁰⁹ See, however, the objection of the Netherlands to the reservation to the International Covenant on Civil and Political Rights formulated by the United States of America:

“The Government of the Kingdom of the Netherlands objects to the reservations with respect to capital punishment for crimes committed by persons below eighteen years of age, since it follows from the text and history of the Covenant that the said reservation is incompatible with the text, the object and purpose of article 6 of the Covenant, which according to article 4 lays down the minimum standard for the protection of the right to life.

“The Government of the Kingdom of the Netherlands objects to the reservation with respect to article 7 of the Covenant, since it follows from the text and the interpretation of this article that the said reservation is incompatible with the object and purpose of the Covenant.

“In the opinion of the Government of the Kingdom of the Netherlands this reservation has the same effect as a general derogation from this article, while according to article 4 of the Covenant, no derogations, not even in times of public emergency, are permitted.

“It is the understanding of the Government of the Kingdom of the Netherlands that the understandings and declarations of the United States do not exclude or modify the legal effect of provisions of the Covenant in their application to the United States, and do not in any way limit the competence of the Human Rights Committee to interpret these provisions in their application to the United States.

“*Subject to the proviso of article 21, paragraph 3 of the Vienna Convention of the Law of Treaties**, these objections do not constitute an obstacle to the entry into force of the Covenant between the Kingdom of the Netherlands and the United States” (*ibid.*, chap. IV.4).

In its observations on general comment No. 24 of the Human Rights Committee, the United Kingdom also gave some weight to the exclusion of the parties to the treaty to which a reservation relates: “[t]he United Kingdom is absolutely clear that severability would entail excising both the reservation and the parts of the treaty to which it applies. Any other solution they would find deeply contrary to principle, notably the fundamental rule reflected in Article 38 (1) of the Statute of the International Court of Justice, that international conventions establish

the one envisaged in article 21, paragraph 3, of the Vienna Conventions in the case of a simple objection.²¹⁰

134. It is, however, highly debatable; it draws no real consequence from the nullity of the reservation, but treats it in the same way as a permissible reservation by letting in “through the back door” what was excluded by the authors of the 1969 and 1986 Vienna Conventions.²¹¹ Unquestionably, nothing in the wording of article 21, paragraph 3, of the Vienna Conventions expressly suggests that it does not apply to the case of impermissible reservations, but it is clear from the *travaux préparatoires* that this question was no longer considered relevant to the draft article that was the basis for this provision.²¹²

135. As the representative of Sweden, speaking on behalf of the Nordic countries, rightly explained during the Sixth Committee’s discussion of the report of the Commission on the work of its fifty-seventh session,

A reservation incompatible with the object and purpose of a treaty was not formulated in accordance with article 19, so that the legal effects listed in article 21 did not apply. When article 21, paragraph 3, stated that the provisions to which the reservation related did not apply as between the objecting State and the reserving State to the extent of the reservation, it was referring to reservations permitted under article 19. It would be unreasonable to apply the same rule to reservations incompatible with the object and purpose of a treaty. Instead, such a reservation should be considered invalid and without legal effect.²¹³

136. Moreover, the irrelevance of the Vienna rules is clearly confirmed by the great majority of reactions by States to reservations that they consider impermissible. Whether or not they state explicitly that their objection will not preclude the entry into force of the treaty with the

rules “expressly recognized by” the Contracting States. The United Kingdom regards it as hardly feasible to try to hold a State to obligations under the Covenant which it self-evidently has not “expressly recognized” but rather has indicated its express unwillingness to accept” (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, p. 163, para. 14).

In its report to the eighteenth meeting of chairpersons of the human rights treaty bodies, the working group on reservations also did not completely rule out such an approach. In its recommendations, it suggested that “the only foreseeable consequences of invalidity are that the State could be considered as not being a party to the treaty, or *as a party to the treaty but the provision to which the reservation has been made would not apply**, or as a party to the treaty without the benefit of the reservation” (HRI/MC/2006/5/Rev.1, para. 16, recommendation No. 7*). This position was, however, subsequently modified (see footnote 213 below).

²¹⁰ See paragraphs 31–64 above.

²¹¹ See the observations of the United Kingdom on general comment No. 24 of the Human Rights Committee (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, pp. 162–163, para. 13). See also the Sub-Commission on the Promotion and Protection of Human Rights expanded working paper by Ms. Françoise Hampson on the question of reservations to human rights treaties, prepared in accordance with Sub-Commission decision 2001/17 (E/CN.4/Sub.2/2003/WP.2), para. 16.

²¹² See paragraphs 100–108 above.

²¹³ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 14th meeting (A/C.6/60/SR.14), para. 22. See also Malaysia, *ibid.*, 18th meeting (A/C.6/60/SR.18), para. 86, and Greece, *ibid.*, 19th meeting (A/C.6/60/SR.19), para. 39, as well as the report of the meeting of the working group on reservations to the nineteenth meeting of chairpersons of the human rights treaty bodies and the sixth inter-committee meeting of the human rights treaty bodies (HRI/MC/2007/5, para. 18): “[I]t cannot be envisaged that the reserving State remains a party to the treaty with the provision to which the reservation has been made not applying.”

author of the reservation, they nevertheless state unambiguously that an impermissible reservation has no legal effect.

137. For example, upon ratifying the Geneva Conventions for the protection of war victims, the United Kingdom made an objection to the reservations formulated by several Eastern European States:

Whilst they regard all the above-mentioned States as being parties to the above-mentioned Conventions, they do not regard the above-mentioned reservations thereto made by those States as valid, and will therefore regard any application of any of those reservations as constituting a breach of the Convention to which the reservation relates.²¹⁴

138. Belarus, Bulgaria, the Russian Federation and Czechoslovakia also made objections to the “interpretative declaration” of the Philippines to the United Nations Convention on the Law of the Sea, stating that this reservation had no value or legal effect.²¹⁵ Norway and Finland made objections to a declaration made by the German Democratic Republic in respect of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;²¹⁶ the declaration was broadly criticized by several States, which considered that “any such declaration is without legal effect, and cannot in any manner diminish the obligation of a government to contribute to the costs of the Committee in conformity with the provisions of the Convention”.²¹⁷ And although Portugal had expressed doubt regarding the nullity of an impermissible reservation,²¹⁸ it stressed in its objection to the reservation made by the Maldives to the Convention on the Elimination of All Forms of Discrimination against Women: “Furthermore, the Government of Portugal considers that these reservations cannot alter or modify in any respect the obligations arising from the Convention for any State party thereto”.²¹⁹

139. State practice is extensive—and essentially homogeneous—and is not limited to a few specific States. Recent objections by Finland,²²⁰ Sweden²²¹ other States—

²¹⁴ United Nations, *Treaty Series*, vol. 278, No. 973, p. 268. See also the identical objections to the four Geneva Conventions made by the United States of America. The objection to the Geneva Convention relative to the treatment of prisoners of war reads: “Rejecting the reservations which States have made with respect to the Geneva Convention relative to the treatment of prisoners of war, the United States accepts treaty relations with all parties to that Convention, except to the changes proposed by such reservations” (*ibid.*, vol. 213, No. 972, p. 383).

²¹⁵ *Multilateral treaties...* (footnote 35 above), chap. XXI.6.

²¹⁶ See footnote 194 above.

²¹⁷ *Multilateral treaties...* (footnote 35 above), chap. IV.9.

²¹⁸ See footnote 184 above.

²¹⁹ *Multilateral treaties...* (footnote 35 above), chap. IV.8.

²²⁰ See the objections by Finland to the reservation to the International Convention on the Elimination of All Forms of Racial Discrimination made by Yemen (*Multilateral treaties...* (footnote 35 above), chap. IV.2); the reservations to the Convention on the Elimination of All Forms of Discrimination against Women made by Kuwait, Lesotho, Malaysia, Pakistan and Singapore (*ibid.*, chap. IV.8); the reservations to the Convention on the Rights of the Child made by Malaysia, Oman, Qatar and Singapore (*ibid.*, chap. IV.11); and the reservation formulated by the United States of America upon consenting to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (*ibid.*, chap. XXVI.2).

²²¹ See the objection by Sweden to the reservation formulated by the United States of America upon consenting to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively

such as Belgium,²²² Spain,²²³ the Netherlands,²²⁴ the Czech Republic²²⁵ and Slovakia²²⁶—and even some international organizations²²⁷ quite often include a statement that the impermissible reservation is devoid of legal force.

140. The absence of any legal effect as a direct consequence of the nullity of an impermissible reservation—which, moreover, arises directly from the very concept of nullity²²⁸—was also affirmed by the Human Rights Committee in its general comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to

Injurious or to have Indiscriminate Effects (*ibid.*, chap. XXVI.2). Sweden specified, however, that “[t]his objection shall not preclude the entry into force of the Convention between the United States of America and Sweden. The Convention enters into force in its entirety between the United States of America and Sweden, without the United States of America benefiting from its reservation”.

²²² See the objection by Belgium to the reservation to the Convention on the Rights of the Child made by Singapore: “The Government considers that paragraph 2 of the declarations, concerning articles 19 and 37 of the Convention and paragraph 3 of the reservations, concerning the constitutional limits upon the acceptance of the obligations contained in the Convention, are contrary to the purposes of the Convention and are consequently without effect under international law” (*ibid.*, chap. IV.11).

²²³ See the objection by Spain to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women made by Qatar: “The Government of the Kingdom of Spain believes that the aforementioned declarations ... have no legal force and in no way exclude or modify the obligations assumed by Qatar under the Convention” (*ibid.*, chap. IV.8).

²²⁴ See the objection by the Netherlands to the reservation to the Convention on the Rights of Persons with Disabilities made by El Salvador: “It is the understanding of the Government of the Kingdom of the Netherlands that the reservation of the Government of the Republic of El Salvador does not exclude or modify the legal effect of the provisions of the Convention in their application to the Republic of El Salvador” (*ibid.*, chap. IV.15).

²²⁵ See the objection by the Czech Republic to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women made by Qatar: “[t]he Czech Republic, therefore, objects to the aforesaid reservations made by the State of Qatar to the Convention. This objection shall not preclude the entry into force of the Convention between the Czech Republic and the State of Qatar. The Convention enters into force in its entirety between the Czech Republic and the State of Qatar, without the State of Qatar benefiting from its reservation” (*ibid.*, chap. IV.8).

²²⁶ See the objection by Slovakia to the reservation to the International Covenant on Economic, Social and Cultural Rights made by Pakistan: “The International Covenant on Economic, Social and Cultural Rights enters into force in its entirety between the Slovak Republic and the Islamic Republic of Pakistan, without ... Pakistan benefiting from its reservation” (*ibid.*, chap. IV.3); and to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women made by Qatar: “This objection shall not preclude the entry into force of the Convention on the Elimination of All Forms of Discrimination Against Women between the Slovak Republic and the State of Qatar. The Convention (...) enters into force in its entirety between the Slovak Republic and the State of Qatar, without the State of Qatar benefiting from its reservations and declarations” (*ibid.*).

²²⁷ See the objections made jointly by the European Community and its members (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, the Netherlands and the United Kingdom) to the objections to the Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) made by Bulgaria and the German Democratic Republic. In the two identical objections, the authors noted: “The statement made (...) concerning article 52 (3) has the appearance of a reservation to that provision, although such reservation is expressly prohibited by the Convention. The Community and the Member States therefore consider that under no circumstances can this statement be invoked against them and they regard it as entirely void” (*ibid.*, chap. XI.A.16).

²²⁸ See paragraph 118 above.

declarations under article 41 of the Covenant, which reflects international jurisprudence as at 1994. The Committee considered that one aspect of the “normal consequence” of the impermissibility of a reservation was that its author did not have the benefit of the reservation.²²⁹ It is significant that, despite the active response to general comment No. 24 by the United States, France and the United Kingdom, none of the three States challenged this position.²³⁰

141. The Committee subsequently confirmed this conclusion from its general comment No. 24 during its consideration of the *Rawle Kennedy v. Trinidad and Tobago* communication. In its decision on the admissibility of the communication,²³¹ the Committee ruled on the permissibility of the reservation formulated by the State party on 26 May 1998 upon reaccessing to the First Optional Protocol to the International Covenant on Civil and Political Rights, having denounced the Optional Protocol on the same day. Through its reservation, Trinidad and Tobago sought to exclude the Committee’s jurisdiction in cases involving prisoners under sentence of death.²³² On the basis of the discriminatory nature of the reservation, the Committee considered that the reservation “cannot be deemed compatible with the object and purpose of the Optional Protocol”.²³³ The Committee concluded, “The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol”.²³⁴ In other words, according to the Committee, Trinidad and Tobago’s reservation did not exclude application of the Optional Protocol in respect of the applicant, who was a prisoner under sentence of death. It therefore produced neither the legal effect of an established reservation,²³⁵ nor that

of a permissible reservation to which an objection has been made.²³⁶ It produced no effect.

142. The Inter-American Court of Human Rights also stated that an impermissible reservation seeking to limit the Court’s competence could produce no effect. In *Hilaire v. Trinidad and Tobago*, the Court stressed:

Trinidad and Tobago cannot prevail in the limitation included in its instrument of acceptance of the optional clause of the mandatory jurisdiction of the Inter-American Court of Human Rights in virtue of what has been established in Article 62 of the American Convention, because this limitation is incompatible with the object and purpose of the Convention.²³⁷

143. The European Court of Human Rights took this approach in the principle invoked in *Weber v. Switzerland*,²³⁸ *Belilos v. Switzerland*²³⁹ and *Loizidou v. Turkey*.²⁴⁰ In all three cases, the Court, after noting the impermissibility of the reservations formulated by Switzerland and Turkey, applied the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) as if the reservations had not been formulated and, consequently, had produced no legal effect.

144. In the light of this general agreement, it seems essential to include the principle that an impermissible reservation has no legal effect on the treaty in a guideline 4.5.2, which might read:

“4.5.2 *Absence of legal effect of an impermissible reservation*

“A reservation that is null and void pursuant to guideline 4.5.1 is devoid of legal effects.”

(iii) *Effects of the nullity of a reservation on the consent of its author to be bound by the treaty*

145. Guideline 4.5.2—which is not the logical continuation of guideline 4.5.1 (and which might constitute the second paragraph of that provision)—does not, however, resolve all the issues concerning the effects of the nullity of an impermissible reservation. While it is established that such a reservation cannot produce legal effects, it is essential to answer the question of whether its author becomes a contracting party without the benefit of its reservation, or whether the nullity of its reservation also affects its consent to be bound by the treaty. Both approaches are consistent with the principle that the reservation has no legal effect: either the treaty enters into

²²⁹ Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/40)*, vol. I, pp. 151–152, para. 18. See also Françoise Hampson’s final working paper on reservations to human rights treaties (E/CN.4/Sub.2/2004/42), para. 57 (“A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty”) and para. 59 of her expanded working paper on the same topic (see footnote 211 above): “A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty.” The Human Rights Committee combined in a single statement the idea that an incompatible reservation cannot produce effects (which is not contested) and the question of the effect of that incompatibility on the author’s status as a party (which has been widely debated; see paras. 145–191 below).

²³⁰ See the observations of the United States of America (Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/40)*), vol. I, annex VI, pp. 154–158; the United Kingdom (*ibid.*, pp. 158–164) and France (*ibid.*, *Fifty-first Session, Supplement No. 10 (A/51/40)*), vol. I, annex VI, pp. 104–106.

²³¹ Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/40)*, vol. II, annex XI, communication No. 845/1999, decision of 2 November 1999 (CCPR/C/67/D/845/1999).

²³² Also in accordance with its conclusions in general comment No. 24, the Committee maintained that the State party remained bound by the Optional Protocol; this cannot be taken for granted, even if it is agreed that Trinidad and Tobago was able to withdraw from the treaty and immediately reaccessed to it (a point on which the Special Rapporteur will not, at this time, take a position). See paragraphs 165–191 below.

²³³ Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/40)*, vol. II, annex XI, communication No. 845/1999, decision of 2 November 1999 (CCPR/C/67/D/845/1999), para. 6.7.

²³⁴ *Ibid.*

²³⁵ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, paras. 262–267.

²³⁶ See paragraphs 1–79 above.

²³⁷ Preliminary objection, judgement of 1 September 2001, *Hilaire v. Trinidad and Tobago, Series C, No. 80*, para. 98. See also the Court’s judgement of 1 September 2001 on the preliminary objection in *Benjamin et al. v. Trinidad and Tobago, Series C, No. 81*, para. 89. In the latter judgement, the Court arrived at the same conclusions without, however, stating that the reservation was incompatible with the object and purpose of the Convention.

²³⁸ *Weber v. Switzerland*, sentence of 22 May 1990, *Series A, No. 177*, paras. 35–38.

²³⁹ *Belilos v. Switzerland*, sentence of 29 April 1988, *Series A, No. 132*, para. 60.

²⁴⁰ *Loizidou v. Turkey*, sentence of 23 March 1995, *Series A, No. 310*, paras. 89–98.

force for the author of the reservation without the latter benefiting from its impermissible reservation, which thus does not have the intended effects; or the treaty does not enter into force for the author of the reservation and, obviously, the reservation also does not produce effects since no treaty relations exist.²⁴¹ The Special Rapporteur believes that it is both desirable and possible to find a middle ground between these apparently irreconcilable positions (which the partisans of each position have, in the past, presented as irreconcilable).

a. The two alternatives

146. The first alternative, the severability of an impermissible reservation from the reserving State's consent to be bound by the treaty, is currently supported to some extent by State practice. Many objections have clearly been based on the impermissibility of a reservation and even, in many cases, have declared such a reservation to be null and void, and unable to produce effects; nevertheless, in virtually all cases, the objecting States have not opposed the treaty's entry into force and have even favoured the establishment of a treaty relationship with the author of the reservation. Since a reservation that is null and void has no legal effect, such a treaty relationship can only mean that the reserving State is bound by the treaty as a whole without benefit of the reservation.

147. This approach is confirmed by the practice, followed, *inter alia*, by the Nordic States,²⁴² of formulating what have come to be called objections with "super-maximum" effect (or intent),²⁴³ along the lines of the objection by Sweden to the reservation to the Convention on the Rights of Persons with Disabilities formulated by El Salvador:

The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Republic of El Salvador to the Convention on the Rights of Persons with Disabilities and considers the reservation null and void. This objection shall not preclude the entry into force of the Convention between El Salvador and Sweden. The Convention enters into force in its entirety between El Salvador and Sweden, without El Salvador benefiting from its reservation.²⁴⁴

148. Such objections, of which the Nordic States—though not the originators of this practice²⁴⁵—make frequent use, have been appearing for some 15 years and are used more and more often, especially by the European States. Apart from Sweden, Austria,²⁴⁶ the Czech

Republic²⁴⁷ and the Netherlands²⁴⁸ have also sought to give super-maximum effect to their objections to the reservations to the 2006 Convention on the Rights of Persons with Disabilities, made by El Salvador and Thailand.

149. More recently, in early 2010, several European States objected to the reservation formulated by the United States of America upon expressing its consent to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects. No fewer than five of these objections contain wording intended to produce so-called "super-maximum" effect.²⁴⁹ Likewise, Austria, the Czech Republic, Estonia, Latvia, Norway, Romania, Slovakia and Spain included in their objections to the reservation by Qatar to the Convention on the Elimination of All Forms of Discrimination against Women the proviso that those objections did not preclude the entry into force of the Convention as between those States and the reserving State, without the latter benefiting from the reservation.²⁵⁰ This largely European practice is undoubtedly influenced by the 1999 recommendation of the Council of Europe on responses to inadmissible reservations to international treaties, which includes a number of model response clauses for use by member States;²⁵¹ the above-mentioned objections closely mirror these clauses.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.* The Netherlands specified that "[i]t is the understanding of the Government of the Kingdom of the Netherlands that the reservation of the Government of the Republic of El Salvador does not exclude or modify the legal effect of the provisions of the Convention in their application to the Republic of El Salvador".

²⁴⁹ *Ibid.* (chap. XXVI.2): Austria ("The Government of Austria objects to the aforementioned reservation made by the United States of America to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol III). This position however does not preclude the entry into force in its entirety of the Convention between the United States of America and Austria."); Cyprus ("The Government of the Republic of Cyprus objects to the aforementioned reservation by the United States of America to Protocol III of the CCW. This position does not preclude the entry into force of the Convention between the United States of America and the Republic of Cyprus in its entirety."); Finland ("The Government of Finland therefore objects to the said reservation and considers that it is without legal effect between the United States of America and Finland. This objection shall not preclude the entry into force of Protocol III between the United States of America and Finland."); Norway ("The Government of the Kingdom of Norway objects to the aforesaid reservation by the Government of the United States of America to the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. However, this objection shall not preclude the entry into force of the Protocol in its entirety between the two States, without the United States of America benefiting from its reservation."); and Sweden ("The Government of Sweden objects to the aforesaid reservation made by the Government of the United States of America to Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects and considers the reservation without legal effect. This objection shall not preclude the entry into force of the Convention between the United States of America and Sweden. The Convention enters into force in its entirety between the United States of America and Sweden, without the United States of America benefiting from its reservation.").

²⁵⁰ *Multilateral treaties...* (footnote 35 above), chap. IV.8.

²⁵¹ Council of Europe, Committee of Ministers, recommendation No. Rec(99)13, 18 May 1999.

²⁴¹ See Greig (footnote 42 above), p. 52; Goodman, "Human rights treaties, invalid reservations, and State consent", p. 531.

²⁴² Concerning this practice, see, *inter alia*, Klabbbers (footnote 34 above), pp. 183–186.

²⁴³ See Simma (footnote 163 above), pp. 667–668. See also *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535/Add.1, p. 48, para. 96; and paras. 74–78 above.

²⁴⁴ See footnote 116 above. See also the objection by Sweden to the reservation to the same Convention formulated by Thailand (*Multilateral treaties...* (footnote 35 above), chap. IV.15).

²⁴⁵ One of the earliest objections that, while not explicit in this regard, can be termed an objection with "super-maximum" effect was made by Portugal in response to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women made by the Maldives (footnote 219 above).

²⁴⁶ *Multilateral Treaties ...*, chap. IV.15. In its objection, the Austrian Government stressed that "[i]his objection, however, does not preclude the entry into force, *in its entirety*", of the Convention between Austria and El Salvador".

150. It is clear that this practice is supported to some extent by the decisions of human rights bodies and regional courts, such as the European and Inter-American Courts of Human Rights.

151. In its landmark judgement in *Belilos v. Switzerland*,²⁵² the European Court of Human Rights, sitting in plenary session, not only reclassified the interpretative declaration formulated by the Swiss Government, but also had to decide whether the reservation (incorrectly referred to as an interpretative declaration) was valid. Having concluded that Switzerland's reservation was impermissible, particularly in relation to the conditions set out in article 64²⁵³ of the European Convention on Human Rights, the Court added: "At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration".²⁵⁴

152. In its judgement in *Weber v. Switzerland*,²⁵⁵ a chamber of the European Court of Human Rights was called upon to decide whether article 6, paragraph 1, of the European Convention on Human Rights was applicable, whether it had been violated by the respondent State and whether the reservation of Switzerland in respect of that provision—which, according to the respondent State, was separate from its interpretative declaration—was applicable. In this connection, Switzerland claimed that:

Switzerland's reservation in respect of Article 6 § 1 (art. 6-1) ... would in any case prevent Mr. Weber from relying on non-compliance with the principle that proceedings before cantonal courts and judges should be public.²⁵⁶

The Court went on to consider the permissibility of the reservation of Switzerland and, more specifically, whether it satisfied the requirements of article 64 of the Convention. It noted that the reservation:

...does not fulfil one of them, as the Swiss Government did not append "a brief statement of the law [or laws] concerned" to it. The requirement of paragraph 2 of Article 64 (art. 64-2), however, "both constitutes an evidential factor and contributes to legal certainty"; its purpose is to "provide a guarantee—in particular for the other Contracting Parties and the Convention institutions—that a reservation does not go beyond the provisions expressly excluded by the State concerned" (see the *Belilos* judgment previously cited, *Series A No. 132*, pp. 27–28, § 59). Disregarding it is a breach not of "a purely formal requirement" but of "a condition of substance" (*ibid.*). The material reservation by Switzerland must accordingly be regarded as invalid.²⁵⁷

In contrast to its practice in the *Belilos* judgement, the Court did not go on to explore whether the nullity of the reservation had consequences for the consent of Switzerland to be bound by the Convention. It simply confined itself to considering whether article 6, paragraph 1, of the Convention had in fact been violated, and concluded that "[t]here ha[d] therefore been a breach of Article 6 § 1 (art. 6-1)".²⁵⁸ Thus, without saying so explicitly, the Court considered that Switzerland remained bound by the European Convention, despite the nullity of its

reservation, and that it could not benefit from the reservation; that being the case, article 6, paragraph 1, was enforceable against it.

153. In its judgement on preliminary objections in *Loizidou v. Turkey*,²⁵⁹ a chamber of the European Court of Human Rights took the opportunity to develop its jurisprudence considerably. While in this case the issue of permissibility arose in respect not of a reservation to a provision of the European Convention on Human Rights, but of a "reservation" to the optional declaration whereby Turkey recognized the compulsory jurisdiction of the Court pursuant to articles 25 and 46 of the Convention, the lessons of the judgement can easily be transposed to the problem of reservations. Having found that the restrictions *ratione loci* attached to Turkey's declarations of acceptance of the Court's jurisdiction were "invalid", the Strasbourg judges pursued their line of reasoning by considering "whether, as a consequence of this finding, the validity of the acceptances themselves may be called into question".²⁶⁰ The Court noted:

93. In addressing this issue the Court must bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in Article 19 (art. 19), "to ensure the observance of the engagements undertaken by the High Contracting Parties".

94. It also recalls the finding in its *Belilos v. Switzerland* judgment of 29 April 1988, after having struck down an interpretative declaration on the grounds that it did not conform to Article 64 (art. 64), that Switzerland was still bound by the Convention notwithstanding the invalidity of the declaration (*Series A No. 132*, p. 28, para. 60).

95. The Court does not consider that the issue of the severability of the invalid parts of Turkey's declarations can be decided by reference to the statements of her representatives expressed subsequent to the filing of the declarations either (as regards the declaration under Article 25) (art. 25) before the Committee of Ministers and the Commission or (as regards both Articles 25 and 46) (art. 25, art. 46) in the hearing before the Court. In this connection, it observes that the respondent Government must have been aware, in view of the consistent practice of Contracting Parties under Articles 25 and 46 (art. 25, art. 46) to accept unconditionally the competence of the Commission and Court, that the impugned restrictive clauses were of questionable validity under the Convention system and might be deemed impermissible by the Convention organs.

It is of relevance to note, in this context, that the Commission had already expressed the opinion to the Court in its pleadings in the Belgian Linguistic (Preliminary objection) and *Kjeldsen, Busk Madsen and Pedersen v. Denmark* cases (judgments of 9 February 1967 and 7 December 1976, *Series A Nos. 5 and 23* respectively) that Article 46 (art. 46) did not permit any restrictions in respect of recognition of the Court's jurisdiction (see respectively, the second memorial of the Commission of 14 July 1966, *Series B No. 3*, vol. I, p. 432, and the memorial of the Commission (Preliminary objection) of 26 January 1976, *Series B No. 21*, p. 119).

The subsequent reaction of various Contracting Parties to the Turkish declarations... lends convincing support to the above observation concerning Turkey's awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46)—the latter subsequent to the statements by the Contracting Parties referred to above—indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves. Seen in this light, the *ex post facto* statements by Turkish representatives cannot be relied upon to detract from the respondent Government's basic—albeit qualified—intention to accept the competence of the Commission and Court.

²⁵² *Series A, No. 132* (footnote 239 above).

²⁵³ Now article 57.

²⁵⁴ *Ibid.*, para. 60.

²⁵⁵ *Series A, No. 177* (footnote 238 above).

²⁵⁶ *Ibid.*, para. 36.

²⁵⁷ *Ibid.*, para. 38.

²⁵⁸ *Ibid.*, para. 40.

²⁵⁹ *Series A, No. 310* (footnote 240 above).

²⁶⁰ *Ibid.*, para. 89.

96. It thus falls to the Court, in the exercise of its responsibilities under Article 19 (art. 19), to decide this issue with reference to the texts of the respective declarations and the special character of the Convention regime. The latter, it must be said, militates in favour of the severance of the impugned clauses since it is by this technique that the rights and freedoms set out in the Convention may be ensured in all areas falling within Turkey's "jurisdiction" within the meaning of Article 1 (art. 1) of the Convention.

97. The Court has examined the text of the declarations and the wording of the restrictions with a view to determining whether the impugned restrictions can be severed from the instruments of acceptance or whether they form an integral and inseparable part of them. Even considering the texts of the Article 25 and 46 (art. 25, art. 46) declarations taken together, it considers that the impugned restrictions can be separated from the remainder of the text leaving intact the acceptance of the optional clauses.

98. It follows that the declarations of 28 January 1987 and 22 January 1990 under Articles 25 and 46 (art. 25, art. 46) contain valid acceptances of the competence of the Commission and Court.²⁶¹

154. In its judgement on preliminary objections in *Hilaire v. Trinidad and Tobago*,²⁶² the Inter-American Court of Human Rights likewise noted that, in the light of the American Convention on Human Rights and its object and purpose, Trinidad and Tobago could not benefit from the limitation included in its instrument of acceptance of the Court's jurisdiction but was still bound by its acceptance of that compulsory jurisdiction.²⁶³

155. With the individual communication, *Rawle Kennedy v. Trinidad and Tobago*, a comparable problem concerning a reservation formulated by the State party upon reaccessing to the First Optional Protocol to the International Covenant on Civil and Political Rights was brought before the Human Rights Committee. Having found the reservation thus formulated to be impermissible by reason of its discriminatory nature, the Committee merely noted, "The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol".²⁶⁴ In other words, Trinidad and Tobago was still bound by the Protocol without benefit of the reservation.

156. This decision of the Human Rights Committee is consistent with its conclusions in general comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant,²⁶⁵ in which the Committee affirmed that:

The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.²⁶⁶

It should be noted at this stage that the wording adopted by the Committee does not suggest that this "normal" consequence is the only one possible or that other solutions may not exist.

²⁶¹ *Ibid.*, paras. 93–98.

²⁶² *Series C, No. 80* (footnote 237 above).

²⁶³ *Ibid.*, para. 98.

²⁶⁴ Report of the Human Rights Committee (A/55/40) (footnote 231 above), para. 6.7. See also paragraph 141 above.

²⁶⁵ Report of the Human Rights Committee (A/50/40) (footnote 230 above), pp. 119–126.

²⁶⁶ *Ibid.*, p. 124, para. 583.

157. In its observations on general comment No. 24 of the Human Rights Committee, France nonetheless stated categorically

that agreements, whatever their nature, are governed by the law of treaties, that they are based on States' consent and that reservations are conditions which States attach to that consent; it necessarily follows that if these reservations are deemed incompatible with the purpose and object of the treaty, the only course open is to declare that this consent is not valid and decide that these States cannot be considered parties to the instrument in question.²⁶⁷

158. This view, which reflects the second (and the only other) possible answer to the question of whether the author of an impermissible reservation becomes a contracting party is based on the principle that the nullity of the reservation affects the whole of the instrument of consent to be bound by the treaty. In a 1951 advisory opinion, ICJ answered, in response to the General Assembly's question I,

that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.²⁶⁸

This approach views the reservation as a *sine qua non* for the reserving State's consent to be bound by the treaty and seems to be the only approach that is consistent with the principle of consent. If the condition is not permissible, there is no consent on the part of the reserving State. In these circumstances, only the reserving State can take the necessary decisions to remedy the nullity of its reservation, and it should not be regarded as a party to the treaty until such time as it has withdrawn or amended its reservation.

159. The practice of the Secretary-General as depositary of multilateral treaties also seems to confirm this radical solution. The *Summary of Practice* explains in this respect:

191. If the treaty forbids any reservation, the Secretary-General will refuse to accept the deposit of the instrument. The Secretary-General will call the attention of the State concerned to the difficulty and shall not issue any notification concerning the instrument to any other State concerned....

192. If the prohibition is to only specific articles, or conversely reservations are authorized only in respect of specific provisions, the Secretary-General shall act, *mutatis mutandis*, in a similar fashion if the reservations are not in keeping with the relevant provisions of the treaty...

193. However, only if there is *prima facie* no doubt that the statement accompanying the instrument is an unauthorized reservation does the Secretary-General refuse the deposit. Such would evidently be the case if the statement, for example, read "State XXX shall not apply article YYY", when the treaty prohibited all reservations or reservations to article YYY.²⁶⁹

There is, however, no need to distinguish between reservations that are prohibited by the treaty and reservations that are impermissible for other reasons.²⁷⁰

²⁶⁷ Report of the Human Rights Committee (A/51/40), (footnote 230 above), p. 106, para. 13.

²⁶⁸ *I.C.J. Reports 1951*, p. 29.

²⁶⁹ *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/7/Rev.1) (United Nations publication, Sales No. E.94.V.15), p. 57, paras. 191–193.

²⁷⁰ See guideline 3.3 (Consequences of the non-permissibility of a reservation) and the commentary thereto (*Yearbook ... 2009*, vol. II (Part Two), para. 84).

160. State practice, while not completely absent, is still less consistent in this regard. For example, Israel, Italy and the United Kingdom objected to the reservation formulated by Burundi upon acceding to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. But whereas

[t]he Government of the State of Israel regards the reservation entered by the Government of Burundi as incompatible with the object and purpose of the Convention and is unable to consider Burundi as having validly acceded to the Convention until such time as the reservation is withdrawn,²⁷¹

the other two States that objected to the reservation of Burundi did not include such a statement in their objections.²⁷²

161. The Government in Taiwan, which ratified the Convention on the Prevention and Punishment of the Crime of Genocide in 1951,²⁷³ stated that it

objects to all the identical reservations made at the time of signature or ratification or accession to the Convention by Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics. The Chinese Government considers the above-mentioned reservations as incompatible with the object and purpose of the Convention and, therefore, by virtue of the Advisory Opinion of the International Court of Justice of 28 May 1951, would not regard the above-mentioned States as being Parties to the Convention.²⁷⁴

Only the Netherlands formulated a comparable objection, in 1966.²⁷⁵

²⁷¹ *Multilateral treaties...* (footnote 35 above), chap. XVIII.7. The objection of the United Kingdom reads: "The purpose of this Convention was to secure the world-wide repression of crimes against internationally protected persons, including diplomatic agents, and to deny the perpetrators of such crimes a safe haven. Accordingly the Government of the United Kingdom of Great Britain and Northern Ireland regard the reservation entered by the Government of Burundi as incompatible with the object and purpose of the Convention, and are unable to consider Burundi as having validly acceded to the Convention until such time as the reservation is withdrawn" (*ibid.*). Italy objected that "the purpose of the Convention is to ensure the punishment, world-wide, of crimes against internationally protected persons, including diplomatic agents, and to deny a safe haven to the perpetrators of such crimes. Considering therefore that the reservation expressed by the Government of Burundi is incompatible with the aim and purpose of the Convention, the Italian Government cannot consider Burundi's accession to the Convention as valid as long as it does not withdraw that reservation" (*ibid.*).

²⁷² The Federal Republic of Germany objected: "The Government of the Federal Republic of Germany considers the reservation made by the Government of Burundi concerning article 2, paragraph 2, and article 6, paragraph 1, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, to be incompatible with the object and purpose of the Convention" (*ibid.*). France, upon acceding to the Convention, stated that it "objects to the declaration made by Burundi on 17 December 1980 limiting the application of the provisions of article 2, paragraph 2, and article 6, paragraph 1" (*ibid.*).

²⁷³ This notification was made prior to the adoption, on 25 October 1971, of General Assembly resolution 2758 (XXVI), whereby the Assembly decided "to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations"; the Government of the People's Republic of China declared, upon ratifying the 1948 Convention on the prevention and punishment of the crime of genocide on 18 April 1983, that "[t]he ratification to the said Convention by the Taiwan local authorities on 19 July 1951 in the name of China is illegal and therefore null and void" (*ibid.*, chap. IV.1).

²⁷⁴ *Ibid.*

²⁷⁵ The objection by the Netherlands reads: "The Government of the Kingdom of the Netherlands declares that it considers the reservations

162. In the vast majority of cases, States that formulate objections to a reservation that they consider impermissible expressly state that their objection does not preclude the entry into force of the treaty in their relations with the reserving State, while seeing no need to elaborate further on the content of any such treaty relationship. Struck by this practice, which may seem inconsistent, the Commission in 2005 sought comments from the Member States of the United Nations on the following question:

States often object to a reservation that they consider incompatible with the object and purpose of the treaty, but without opposing the entry into force of the treaty between themselves and the author of the reservation. The Commission would be particularly interested in Governments' comments on this practice. It would like to know, in particular, what effects the authors expect such objections to have, and how, in Governments' view, this practice accords with article 19 (c) of the 1969 Vienna Convention on the Law of Treaties.²⁷⁶

163. The views expressed by several delegations in the Sixth Committee clearly show that there is no agreement on the approach to the thorny question of the validity of consent to be bound by the treaty in the case of an impermissible reservation. Several States²⁷⁷ have maintained that this practice was "paradoxical" and that, in any event, the author of the objection "could not simply ignore the reservation and act as if it had never been formulated".²⁷⁸ The French delegation stressed that

such an objection would create the so-called "super-maximum effect", since it would allow for the application of the treaty as a whole without regard to the fact that a reservation had been entered. That would compromise the basic principle of consensus underlying the law of treaties.²⁷⁹

Others, however, noted that it would be better to have the author of the reservation become a contracting State or contracting organization than to exclude it from the circle of parties. In that regard, the representative of Sweden, speaking on behalf of the Nordic countries, said:

The practice of severing reservations incompatible with the object and purpose of a treaty accorded well with article 19, which made it clear that such reservations were not expected to be included in the treaty relations between States. While one alternative in objecting to impermissible reservations was to exclude bilateral treaty relations altogether, the option of severability secured bilateral treaty relations and opened up possibilities of dialogue within the treaty regime.²⁸⁰

164. However, it should be noted that those who share this point of view have made the entry into force of the treaty conditional on the will of the author of the

made by Albania, Algeria, Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, India, Morocco, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics in respect of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature at Paris on 9 December 1948, to be incompatible with the object and purpose of the Convention. The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or which will make such reservation a party to the Convention" (*ibid.*).

²⁷⁶ *Yearbook ... 2005*, vol. II (Part Two), p. 14, para. 29.

²⁷⁷ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 14th meeting (A/C.6/60/SR.14), paras. 3 (United Kingdom) and 72 (France); and *ibid.*, 16th meeting (A/C.6/60/SR.16), paras. 20 (Italy) and 44 (Portugal).

²⁷⁸ *Ibid.*, 14th meeting (A/C.6/60/SR.14), para. 72 (France).

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*, para. 23 (Sweden). See also *ibid.*, 17th meeting (A/C.6/60/SR.17), para. 24 (Spain); *ibid.*, 18th meeting (A/C.6/60/SR.18), para. 86 (Malaysia); and *ibid.*, 19th meeting (A/C.6/60/SR.19), para. 39 (Greece).

reservation: “However, account must be taken of the will of the reserving State regarding the relationship between the ratification of a treaty and the reservation”.²⁸¹

b. Presumption of the will of the author of an impermissible reservation

165. Although the two approaches and the two points of view concerning the question of the entry into force of the treaty may initially appear diametrically opposed, both are consistent with the principle that underlies treaty law: the principle of consent. There is no doubt that the key to the problem is simply the will of the author of the reservation: does it purport to be bound by the treaty even if its reservation is impermissible—without benefit of the reservation—or is its reservation a *sine qua non* for its commitment to be bound by the treaty?

166. In the context of an issue which, while specific, is comparable to reservations to optional declarations accepting the compulsory jurisdiction of ICJ as envisaged in article 36, paragraph 2, of the Statute of the Court, Judge Lauterpacht, in his dissenting opinion to the Court’s judgment on the preliminary objection in the *Interhandel* case, stated:

If that reservation is an essential condition of the Acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the principal obligation, then it is not open to the Court to disregard that reservation and at the same time to hold the accepting State bound by the Declaration.²⁸²

Thus, the important issue is the will of the author of the reservation and its intent to be bound by the treaty, with or without benefit of its reservation. This is also true in the case of more classic reservations to treaty provisions.

167. In its judgement in the *Belilos* case, the European Court of Human Rights paid particular attention to Switzerland’s position with regard to the European Convention on Human Rights. It expressly noted: “At the same time, Switzerland was, and regarded itself as, bound by the Convention irrespective of validity of the declaration”.²⁸³ Thus, the Court clearly took into consideration the fact that Switzerland itself—the author of the impermissible “reservation”—considered itself to be bound by the Treaty despite the nullity of this reservation and had behaved accordingly.

168. In the *Loizidou* case, the European Court of Human Rights also based its judgement, if not on the will of the Turkish Government—which had submitted during the proceedings before the European Court of Human Rights that “if the restrictions attached to the Article 25 and 46

(art. 25, art. 46) declarations were not recognised to be valid, as a whole, the declarations were to be considered null and void in their entirety”²⁸⁴—then on the fact that Turkey had knowingly run the risk that the restrictions resulting from its reservation would be declared impermissible:

That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46)—the latter subsequent to the statements by the Contracting Parties referred to above—indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves.²⁸⁵

169. The “Strasbourg approach”²⁸⁶ thus consists of acting on the reserving State’s will to be bound by the treaty even if its reservation is impermissible.²⁸⁷ In so doing, the European Court of Human Rights did not, however, rely only on the express declarations of the State in question—as, for example, it did in the *Belilos* case²⁸⁸—it also sought to “re-establish” the will of the State. As Schabas wrote:

...[t]he European Court did not set aside the test of intention in determining whether a reservation is severable. Rather, it appears to highlight the difficulty in identifying such intention and expresses a disregard for such factors as formal declarations by the state.²⁸⁹

Only where it is established that the reserving State did not consider its reservation (which has been recognized as impermissible) to be an essential element of its consent to be bound by the treaty is the reservation separable from its treaty obligation.

170. Moreover, the European Court of Human Rights and the Inter-American Court of Human Rights do not limit their consideration to the will of the State that is the author of the impermissible reservation; both Courts take into account the specific nature of the instruments that they are mandated to enforce. In the *Loizidou* case, for example, the European Court noted:

In addressing this issue the Court must bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in Article 19 (art. 19), “to ensure the observance of the engagements undertaken by the High Contracting Parties”.²⁹⁰

The Inter-American Court, for its part, stressed in its judgement in the *Hilaire v. Trinidad and Tobago* case:

²⁸⁴ *Series A, No. 310* (footnote 240 above), para. 90.

²⁸⁵ *Ibid.*, para. 95.

²⁸⁶ *Simma* (footnote 163 above), p. 670.

²⁸⁷ See also footnote 281 above. According to Gaja, “Il regime della Convenzione di Vienna concernente le riserve inammissibili”, p. 358: “An alternative basis for subsequent determination of the will of the reserving State is that the State in question must have purported to be bound by the treaty even if the reservation was considered inadmissible, i.e., without the benefit of the reservation”, p. 358.

²⁸⁸ On this case and its impact, see Baratta, *Gli effetti delle riserve ai trattati*, pp. 160–163; Bourguignon, “The *Belilos* case: new light on reservations to multilateral treaties”, pp. 347–386; Cameron and Horn, “Reservations to the European Convention on Human Rights: the *Belilos* case”, pp. 69–116; Marks, “Reservations unhinged: the *Belilos* case before the European Court of Human Rights”, pp. 300–327; and Cohen-Jonathan, “Les réserves à la Convention européenne des droits de l’homme (à propos de l’arrêt *Belilos* du 29 avril 1988)”, pp. 272–314.

²⁸⁹ Schabas, “Invalid reservations to the International Covenant on Civil and Political Rights: is the United States still a party?” p. 322.

²⁹⁰ *Series A, No. 310* (footnote 240 above), para. 93.

²⁸¹ *Ibid.*, 14th meeting (A/C.6/60/SR.14), para. 23 (Sweden). See also the position of the United Kingdom (*ibid.*, para. 4): “On the related issue of the ‘super-maximum effect’ of an objection, consisting in the determination not only that the reservation objected to was not valid but also that, as a result, the treaty as a whole applied *ipso facto* in the relations between the two States, his delegation considered that that could occur only in the most exceptional circumstances, for example, if the State making the reservation could be said to have accepted or acquiesced in such an effect”.

²⁸² *Interhandel Case, Preliminary Objections, Judgment, I.C.J. Reports 1959*, dissenting opinion of Sir Hersch Lauterpacht, p. 117.

²⁸³ *Series A, No. 132* (footnote 239 above).

93. Moreover, accepting the said declaration in the manner proposed by the State would lead to a situation in which the Court would have the State's Constitution as its first point of reference, and the American Convention only as a subsidiary parameter, a situation which would cause a fragmentation of the international legal order for the protection of human rights, and which would render illusory the object and purpose of the Convention.

94. The American Convention and the other human rights treaties are inspired by a set of higher common values (centered around the protection of the human being), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties.²⁹¹

171. The position expressed by the Human Rights Committee in its general comment No. 24 is even more categorical.²⁹² In fact, the Committee makes no connection between the entry into force of the treaty, despite the nullity of the impermissible reservation, and the author's will in that regard. It simply states that the "normal consequence"²⁹³ is the entry into force of the treaty for the author of the reservation without benefit of the reservation. However, as noted above,²⁹⁴ this "normal" consequence, which the Committee apparently views as somewhat automatic, does not exclude (and, conversely, suggests) the possibility that the impermissible reservation may produce other "abnormal" consequences. But the Committee is silent on both the question of what these other consequences might be, and the question of how and by what the "normal" consequence and the potential "abnormal" consequence are triggered.

172. In any event, the position taken by the human rights bodies has been nuanced to a considerable extent in recent years. For example, at the fourth inter-committee meeting of the human rights treaty bodies and the 17th meeting of chairpersons of these bodies, it was noted that

[i]n a meeting with ILC on 31 July 2003, HRC confirmed that the Committee continued to endorse general comment No. 24, and several members of the Committee stressed that there was growing support for the severability approach, but that there was no automatic conclusion of severability for inadmissible reservations but only a presumption.²⁹⁵

173. In 2006, the working group on reservations noted that there were several potential consequences of a reservation that had been ruled impermissible. It ultimately proposed the following Recommendation No. 7:

The consequence that applies in a particular situation depends on the intention of the State at the time it enters its reservation^{*}. This intention must be identified during a serious examination of the available information, with the presumption, which may be refuted, that the State would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded.²⁹⁶

²⁹¹ *Series C, No. 80* (footnote 237 above), paras. 93–94.

²⁹² In her expanded working paper, Hampson states: "A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty. The result is the application of the treaty without the reservation, whether that is called 'severance' or disguised by the use of some other phrase, such as non-application" (see footnote 211 above, para. 59).

²⁹³ See footnote 266 above.

²⁹⁴ See paragraph 156 above.

²⁹⁵ Report on the practice of the treaty bodies with respect to reservations made to the core international human rights treaties (HRI/MC/2005/5), para. 37.

²⁹⁶ HRI/MC/2006/5, para. 16.

174. The working group's recommendations,²⁹⁷ which the sixth inter-committee meeting of the human rights treaty bodies endorsed²⁹⁸ in 2007, are recalled in the introduction to the fourteenth report.²⁹⁹ According to new Recommendation No. 7:

As to the consequences of invalidity, the Working Group agrees with the proposal of the Special Rapporteur of the International Law Commission according to which an invalid reservation is to be considered null and void. It follows that a State will not be able to rely on such a reservation and, *unless its contrary intention is incontrovertibly established*^{*}, will remain a party to the treaty without the benefit of the reservation.

175. Thus, it is clear that the deciding factor is still the intention of the State that is the author of the impermissible reservation. Entry into force is no longer simply an automatic consequence of the nullity of a reservation, but rather a presumption. In the Special Rapporteur's opinion, this position merits serious consideration in the Guide to Practice since it offers a reasonable compromise between the underlying principle of treaty law—consent—and the potential to consider that the author of the impermissible reservation is bound by the treaty without benefit of the reservation.

176. There might, however, be doubts as to the nature of the presumption; intellectually, it might be presumed either that the treaty would enter into force or, on the contrary, that the author of the reservation did not purport for it to enter into force.

177. A negative presumption—refusing to consider the author of the reservation to be a contracting State or contracting organization until an intention to the contrary has been established—may better reflect the principle of consent under which, in the words of ICJ, "in its treaty relations a State cannot be bound without its consent".³⁰⁰ From this point of view, a State or international organization that has formulated a reservation—even though it is impermissible—has, in fact, expressed its disagreement with the provision or provisions which the reservation purports to modify or the legal effect of which it purports to exclude. In its observations on general comment No. 24, the United Kingdom states that it is "hardly feasible to try to hold a State to obligations under the Covenant which it self-evidently has not 'expressly recognized' but rather has indicated its express unwillingness to accept".³⁰¹ From that point of view, no agreement to the contrary can be noted or presumed unless the State or organization in question consents, or at least acquiesces, to be bound by the provision or provisions without benefit of its reservation.

178. The reverse—positive—presumption has, however, several advantages which, regardless of any political consideration, argue strongly for it even though it is clear

²⁹⁷ See HRI/MC/2007/5, pp. 6–8.

²⁹⁸ Report of the sixth inter-committee meeting of human rights treaty bodies (A/62/224), annex, para. 48 (v).

²⁹⁹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, p. 14, para. 53.

³⁰⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 21.

³⁰¹ Report of the Human Rights Committee (A/50/40) (footnote 162 above), p. 138, para. 14.

that this rule is not established in the Vienna Conventions³⁰² or in international customary law.³⁰³ However, the decisions of the human rights courts, the positions taken by the human rights treaty bodies and the increasing body of State practice in this area must not be ignored.

179. First and foremost, it should be borne in mind that the author of the reservation, by definition, wished to become a contracting party to the treaty in question. The reservation is formulated when the State or international organization expresses its consent to be bound by the treaty, thereby conveying its intention to enter the privileged circle of parties and committing itself to implementation of the treaty. The reservation certainly plays a role in this process; for the purposes of establishing the presumption, however, its importance must not be overestimated. As Goodman has stated:

The package of reservation a State submits reflects the ideal relationship it wishes to have in relation to the treaty, not the essential one it requires so as to be bound.³⁰⁴

180. Furthermore, and perhaps most importantly, it is certainly wiser to presume that the author of the reservation is part of the circle of contracting States or contracting organizations in order to resolve the problems associated with the nullity of its reservation in the context of this privileged circle. In that regard, it must not be forgotten that, as the Commission has noted in its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties,³⁰⁵

in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State's either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty.³⁰⁶

To that end, as stressed at the fourth inter-committee meeting of the human rights treaty bodies and the seventeenth meeting of chairpersons of these bodies, “[h]uman rights treaty bodies”—or any other mechanism established by the treaty or the parties to the treaty as a whole—“should be encouraged to continue their current practice of entering a dialogue with reserving States, with a view to effecting such changes in the incompatible reservation as to make it compatible with the treaty”.³⁰⁷ This goal may more readily be achieved if the reserving State or reserving international organization is deemed to be a party to the treaty.

181. Moreover, presumption of the entry into force of the treaty provides legal certainty. This presumption (provided that it is not conclusive) can help fill the inevitable legal vacuum between the formulation of the reservation and the declaration of its nullity; during this entire period (which may last several years), the author of the reservation has conducted itself as a party and been deemed to be so by the other parties.

³⁰² As noted above, the Vienna Conventions do not address the issue of impermissible reservations; see paragraphs 96–112 above.

³⁰³ See, *inter alia*, Baratta, “Should invalid reservations to human rights treaties be disregarded?” pp. 419–420.

³⁰⁴ *Loc. cit.* (footnote 241 above), p. 537.

³⁰⁵ *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

³⁰⁶ *Ibid.*, p. 57 (para. 10 of the preliminary conclusions).

³⁰⁷ HRI/MC/2005/5, para. 42.

182. In the light of these considerations, the Special Rapporteur strongly recommends that the Commission should support the idea of a relative and rebuttable *presumption*, according to which the treaty would apply to a State or international organization that is the author of an impermissible reservation, notwithstanding that reservation, in the absence of a contrary intention on the part of the author. In other words, if this basic condition is met (absence of a contrary intention on the part of the author of the reservation), the treaty is presumed to have entered into force for the author—provided that the treaty has, in fact, entered into force in respect of the contracting States and contracting organizations—and the reservation has no legal effect on the content of the treaty,³⁰⁸ which applies in its entirety.

183. In practice, determining the intention of the author of an impermissible reservation is a challenging process. It is not easy to establish what led a State or an international organization to express its consent to be bound by the treaty, on the one hand, and to attach a reservation to that expression of consent, on the other, since “in international society at the present stage, the State alone could know the exact role of its reservation to its consent”.³⁰⁹ Since the basic presumption is rebuttable, it is, however, vital to establish whether the author of the reservation would knowingly have ratified the treaty without the reservation or whether, on the contrary, it would have refrained from doing so. Several factors come into play.

184. First, the text of the reservation itself may well contain elements that provide information about its author's intention in the event that the reservation is impermissible. At least, that is the case when reasons for the reservation are given as recommended in guideline 2.1.9 of the Guide to Practice:

2.1.9 Statement of reasons³¹⁰

A reservation should to the extent possible indicate the reasons why it is being made.

The reasons given for formulating a reservation, in addition to clarifying its meaning, may also make it possible to determine whether the reservation is deemed to be an essential condition for the author's consent to be bound by the treaty. Any declaration made by the author of the reservation upon signing, ratifying or acceding to a treaty or making a notification of its succession thereto may also provide an indication. Any declaration made subsequently, particularly declarations that the author of the reservation may be required to make in the context of judicial proceedings concerning the permissibility, and the effects of the impermissibility, of its reservation, should, however, be treated with caution.³¹¹

185. In addition to the actual text of the reservation and the reasons given for its formulation, the content

³⁰⁸ See paragraphs 130–144 above.

³⁰⁹ *Yearbook ... 1997*, vol. II (Part Two), p. 49, para. 83.

³¹⁰ For the commentary to this guideline, see *Yearbook ... 2008*, vol. II (Part Two), pp. 80–82, para. 124.

³¹¹ See *Loizidou v. Turkey, Series A, No. 310*, para. 95; see also paragraph 153 above.

and context of the provision or provisions of the treaty to which the reservation relates, on the one hand, and the object and purpose of the treaty, on the other, must also be taken into account. As mentioned above, both the European Court of Human Rights and the Inter-American Court of Human Rights have paid considerable attention to the “special character” of the treaty in question;³¹² there is no reason to limit these considerations to human rights treaties, which do not constitute a specific category of treaty—at least for the purposes of applying rules relating to reservations³¹³—and are not the only treaties to establish “higher common values”.

186. Furthermore, in line with the approach taken by the European Court of Human Rights in its judgement on the *Belilos* case,³¹⁴ it is also advisable to take into consideration the author’s subsequent attitude in respect of the treaty. The representatives of Switzerland, by their actions and their statements before the Court, left no doubt as to the fact that Switzerland would regard itself as bound by the European Convention on Human Rights, even in the event that its interpretative declaration was deemed impermissible. Moreover, as Schabas pointed out in relation to the reservations to the International Covenant on Civil and Political Rights made by the United States of America:

Certain aspects of the U.S. practice lend weight to the argument that its general intent is to be bound by the Covenant, whatever the outcome of litigation concerning the legality of the reservation. It is useful to recall that Washington fully participated in the drafting of the American Convention whose provisions are very similar to articles 6 and 7 of the Covenant and were in fact inspired by them. ... Although briefly questioning the juvenile death penalty and the exclusion of political crimes, [the U.S. representative] did not object in substance to the provisions dealing with the death penalty or torture. The United States signed the American Convention on June 1, 1977 without reservation.³¹⁵

Although, owing to the relative effect of any reservation, caution is certainly warranted when making comparisons between different treaties, it is possible to refer to the prior attitude of the reserving State with regard to provisions similar to those to which the reservation relates. If a State consistently and systematically excludes the legal effect of a particular obligation contained in several instruments, such practice could certainly constitute significant proof that the author of the reservation does not wish to be bound by that obligation under any circumstances.

187. Lastly, the reactions of other States and international organizations must also be taken into account. Although these reactions obviously cannot, in themselves, produce legal effects by neutralizing the nullity of the reservation, they can facilitate an assessment of the author’s intention or, more accurately, the risk that it may intentionally have run in formulating an impermissible reservation. This is particularly well illustrated by the European Court of Human Rights in the *Loizidou* case; the Court, citing case law established before Turkey

formulated its reservation, as well as the objections made by several States parties to the European Convention on Human Rights,³¹⁶ concluded that:

The subsequent reaction of various Contracting Parties to the Turkish declarations (...) lends convincing support to the above observation concerning Turkey’s awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46)—the latter subsequent to the statements by the Contracting Parties referred to above—indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves.³¹⁷

188. The combination of these criteria should serve as a guide for the authorities called upon to rule on the consequences of the nullity of an impermissible reservation, it being understood, however, that this list is in no way exhaustive and that all relevant factors for determining the intention of the author of the reservation must be taken into consideration.

189. That said, the establishment of such a presumption must not constitute approval of what are now generally called objections with “super-maximum” effect. Certainly, the result of the presumption may ultimately be the same as the intended result of such objections. But whereas an objection with “super-maximum” effect apparently purports to require that the author of the reservation should be bound by the treaty without benefit of its reservation simply because the reservation is impermissible, the presumption is based on the intention of the author of the reservation. Although this intention may be hypothetical if not expressly indicated by the author, it is understood that nothing prevents the author from making its true intention known to the other contracting parties. Thus, the requirement that the treaty must be implemented in its entirety would derive not from a subjective assessment by another contracting party, but solely from the nullity of the reservation and the intention of its author. An objection, whether simple or with “super-maximum” effect, cannot produce such an effect!³¹⁸ “No State can be bound by contractual obligations it does not consider suitable”,³¹⁹ neither the objecting State nor the reserving State, although such considerations clearly do not mean that the practice has no significance.³²⁰

190. In the light of this caveat, it would be advisable to include in the Guide to Practice a guideline 4.5.3 setting out the rebuttable presumption that a treaty is applicable in its entirety for the author of an impermissible reservation.

191. The first paragraph of guideline 4.5.3 as proposed by the Special Rapporteur sets forth the presumption that the treaty is applicable in its entirety, while the second contains an illustrative and non-exhaustive list of factors that should be taken into account in determining the intention of the author of the reservation. The guideline might read:

³¹² See paragraph 170 above.

³¹³ *Yearbook ... 1996*, vol. II (Part One), pp. 52–83, paras. 55–260; and the preliminary conclusions of the Commission on reservations to normative multilateral treaties including human rights treaties (*Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157).

³¹⁴ See paragraphs 167–169 above.

³¹⁵ Schabas (footnote 289 above), p. 322.

³¹⁶ *Series A, No. 310* (footnote 240 above), paras. 18–24.

³¹⁷ *Ibid.*, para. 95.

³¹⁸ See also paragraphs 76–77 above.

³¹⁹ Tomuschat, “Admissibility and legal effects of reservations to multilateral treaties”, p. 466; see also *Yearbook ... 1996*, vol. II (Part One), p. 57; and Müller, “Article 20”, pp. 809–811, paras. 20–24.

³²⁰ See paragraphs 211–223 below.

“4.5.3 [Application of the treaty in the case of an impermissible reservation] [Effects of the nullity of a reservation on consent to be bound by the treaty]”

“When an invalid reservation has been formulated in respect of one or more provisions of a treaty, or of certain specific aspects of the treaty as a whole, the treaty applies to the reserving State or to the reserving international organization, notwithstanding the reservation, unless a contrary intention of the said State or organization is established.

“The intention of the author of the reservation must be established by taking into consideration all the available information, including, *inter alia*:

“—The wording of the reservation;

“—The provision or provisions to which the reservation relates and the object and purpose of the treaty;

“—The declarations made by the author of the reservation when negotiating, signing or ratifying the treaty;

“—The reactions of other contracting States and contracting organizations; and

“—The subsequent attitude of the author of the reservation.”

192. Guideline 4.5.3 intentionally refrains from establishing the date on which the treaty enters into force in such a situation. In most cases, this is subject to specific conditions established in the treaty itself.³²¹ The specific effects, including the date on which the treaty enters into force for the author of the impermissible reservation, are therefore determined by the relevant provisions of the treaty or, failing any such provision, by treaty law.³²²

(c) Reactions to an impermissible reservation

193. It is clear from the above considerations that neither the nullity of the reservation—owing to its impermissibility—nor the effects of this nullity are dependent on the reactions of contracting States or contracting organizations other than the author of the reservation. The nullity of the reservation arises from its impermissibility. In turn, a reservation that is null and void has no effect on the treaty, not because of its acceptance or objection by the other contracting parties, but solely because of its nullity. In other words, in the light of the distinction made in the chapeau of article 21, paragraph 1, of the Vienna Conventions between the permissibility of a reservation, on the one hand, and the consent of the other contracting States and contracting organizations, on the other, an impermissible reservation does not meet the first

³²¹ Article 24, paragraph 1, of the 1969 Vienna Convention states: “A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.”

³²² See article 24, paragraphs 2 and 3, of the 1969 Vienna Convention. These paragraphs state:

“2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

“3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.”

criterion—permissibility—and it is therefore not necessary to apply the second criterion—acceptance.

194. Consequently, neither the acceptance of an impermissible reservation (except in the specific case of unanimous or express acceptance) nor an objection to an impermissible reservation has any particular consequences with regard to the legal effects that the reservation does or does not produce.

(i) Acceptance of an impermissible reservation

195. The question of the acceptance of a reservation that does not meet the criteria for permissibility has been discussed at length in the tenth report on reservations to treaties.³²³

196. In that report, the Special Rapporteur recalled that the unilateral acceptance of a reservation formulated in spite of article 19, subparagraphs (a) and (b), is undoubtedly excluded and, consequently, devoid of any effect. Sir Humphrey Waldock, in his capacity as Expert Consultant, clearly expressed his support for this solution at the United Nations Conference on Succession of States in Respect of Treaties, stating that:

a contracting State could not purport, under article 17 [current article 20], to accept a reservation prohibited under article 16 [19], paragraph (a) or paragraph (b), because, by prohibiting the reservation, the contracting States would expressly have excluded such acceptance.³²⁴

197. The logical consequence of the “impossibility” of accepting a reservation that is impermissible, either under paragraphs (a) or (b) of article 19, or under paragraph (c), of the same article—which follows exactly the same logic and which there is no reason to distinguish from the other two paragraphs of the article³²⁵—is that such an acceptance cannot produce any legal effect.³²⁶ It cannot “permit” the reservation, nor can it cause the reservation to produce any effect whatsoever—and certainly not the effect envisaged in article 21, paragraph 1, of the Vienna Conventions, which requires that the reservation must have been established. Furthermore, if the acceptance of an impermissible reservation constituted an agreement between the author of the impermissible reservation and the State or international organization that accepted it, it would result in a modification of the treaty in relations between the two parties; that would be incompatible with article 41, paragraph 1 (b) (ii), of the Vienna Conventions, which excludes any modification of the treaty if it relates “to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole”.³²⁷

³²³ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 141.

³²⁴ *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 25th meeting, para. 2, p. 133.

³²⁵ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, pp. 183–185, paras. 181–187.

³²⁶ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, pp. 25–26, para. 124.

³²⁷ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 187, para. 201. In that regard, see Greig (footnote 42 above), p. 57, and Sucharipa-Behrmann (footnote 34 above), pp. 78–79; see, however, the comments made by Eduardo Jiménez de Aréchaga and Gilberto Amado during the discussions on Sir Humphrey Waldock’s proposals in 1962 (*Yearbook ... 1962*, vol. I, 653rd meeting, paras. 44–45, p. 158, and para. 63, p. 160).

198. On the basis of these considerations, the Special Rapporteur, in his tenth report, proposed a guideline 3.3.3.³²⁸

3.3.3 *Effect of unilateral acceptance of an invalid reservation*

Acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation.

199. At its fifty-eighth session, in 2006, the Commission suggested, with the agreement of the Special Rapporteur,³²⁹ that consideration of this guideline should be deferred until such time as it could consider the question of the effects of reservations.³³⁰ Although this was a wise and cautious decision, it should be acknowledged that, despite the slightly misleading title of guideline 3.3.3, it is a question of identifying not the effect of acceptance of an impermissible reservation (which would fall under part IV of the Guide to Practice), but rather the effect of acceptance on the permissibility of the reservation itself (an issue which arises later in the process than the question of the effect of reservations—the subject of part IV of the Guide to Practice—but which falls under part III). Permissibility logically precedes acceptance³³¹ (the Vienna Conventions also follow this logic) and guideline 3.3.3 relates to the permissibility of the reservation—in other words, the fact that acceptance cannot change its impermissibility. As the tenth report on reservations to treaties explains:

The aim of this draft guideline is not to determine the effects of acceptance of a reservation by a State, but simply to establish that, if the reservation in question is invalid, it remains null [it might have been preferable to say “it remains impermissible”] even if it is accepted.³³²

200. Unilateral—even express—acceptance of an impermissible reservation has no effect as such on the effects produced by this nullity, which have been outlined in the preceding paragraphs of this report.³³³ The question of the consequences of acceptance for the effects of the reservation is not and should not be raised; the issue is not explored beyond the stage of permissibility, which is not and cannot be acquired as a result of the acceptance.

201. Guideline 3.4.1, which the Special Rapporteur proposed in 2009³³⁴ irrespective of the conclusions in the fourteenth report,³³⁵ reaffirmed this approach very clearly. This guideline is worded as follows:³³⁶

3.4.1 *Substantive validity of the acceptance of a reservation*

The explicit acceptance of a non-valid reservation is not valid either.

202. This guideline shows very clearly that the explicit acceptance of an impermissible reservation cannot have any effect, either; it, too, is impermissible.

³²⁸ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 188, para. 202.

³²⁹ *Yearbook ... 2006*, vol. II (Part Two), p. 138, para. 157.

³³⁰ *Ibid.*, p. 136, para. 139. See also *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, p. 7, para. 6.

³³¹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 188, para. 205.

³³² *Ibid.*, para. 203.

³³³ See paragraphs 113–191 above.

³³⁴ *Yearbook ... 2009*, vol. II (Part Two), p. 83, footnote 372.

³³⁵ See the conclusions regarding the permissibility of reactions to reservations in *ibid.*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 127.

³³⁶ Draft guideline 3.4.1 was referred to the Drafting Committee in 2009 (*ibid.*, vol. II (Part Two), para. 60), and was adopted that same year.

203. In the light of these comments, the Special Rapporteur suggests that the Commission should retain guideline 3.3.3 as it appears in the tenth report.

204. A major caveat should, however, be raised and, as a result, the categorical wording of guideline 3.3.3 should be nuanced. Although there is little doubt that an individual acceptance by a contracting State or contracting organization cannot have the effect of “permitting” an impermissible reservation or produce any other effect in relation to the reservation or the treaty, the situation is different where all the contracting States and contracting organizations expressly approve a reservation that—without this unanimous acceptance—would be impermissible. It can, in fact, be maintained—and Sir Humphrey Waldock expressly envisaged this possibility in his first report on the law of treaties³³⁷—that, in accordance with the principle of consensus, “the Parties always have a right to amend the treaty by general agreement *inter se* in accordance with article 39 of the Vienna Conventions and... nothing prevents them from adopting a unanimous agreement to that end on the subject of reservations”.³³⁸

205. In order to take this situation into account, in 2005³³⁹ the Special Rapporteur proposed a guideline 3.3.4:

“3.3.4 *Effect of collective acceptance of an invalid reservation*

“A reservation that is explicitly or implicitly prohibited by the treaty or which is incompatible with its object and purpose may be formulated by a State or an international organization if none of the other contracting States or contracting organizations³⁴⁰ objects to it after having been expressly consulted by the depositary.

“During such consultation, the depositary shall draw the attention of the signatory States and international organizations and of the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, to the nature of legal problems raised by the reservation.”

206. The idea underlying this guideline is, moreover, to some extent supported by practice. Although it is not,

³³⁷ See *Yearbook ... 1962*, vol. II, p. 65, para. (9) of the commentary to draft article 17. See also the explanations contained in *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 188, para. 205.

³³⁸ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 188, para. 205. This position is also maintained by Greig (footnote 42 above), pp. 56–57, and Sucharipa-Behrmann (footnote 34 above), p. 78. Bowett, who shares this position, considers, however, that this possibility does not fall under the law of reservations (“Reservations to non-restricted multilateral treaties” p. 84); see also Redgwell, “Universality or integrity? Some reflections on reservations to general multilateral treaties”, p. 269.

³³⁹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 189, para. 207.

³⁴⁰ The draft guideline initially proposed by the Special Rapporteur used the expression “contracting parties”, which is in common use and which, in his view, included contracting States and contracting organizations. Following various comments made within the Commission, the Special Rapporteur reconsidered this convenient term, which he acknowledged to be incompatible with the definitions of “contracting State” and “contracting organization”, on the one hand, and “party”, on the other, contained in article 2, paragraph 1 (f) (i) and (ii), and paragraph 1 (g), respectively, of the 1986 Vienna Convention.

strictly speaking, a case of unanimous acceptance by the parties to a treaty, the reservation of neutrality formulated by Switzerland upon acceding to the Covenant of the League of Nations is an example in which, despite the prohibition of reservations, the reserving State was admitted into the circle of States parties.³⁴¹

207. In the same vein, the Commission has already recognized, in guideline 2.3.1,³⁴² that the invalidity of a reservation owing to its late formulation may be remedied by unanimous acceptance—or at least absence of objection—by all the contracting States and contracting organizations.³⁴³

208. But even then, the issue is different from that of the effects of an impermissible reservation or that of the effects of reactions thereto; it is the separate issue of the permissibility of the reservation itself, which, unless it meets the conditions set out in article 19 of the Vienna Conventions, can become permissible only through unanimous acceptance by the contracting States or the contracting organizations. Only then can the Vienna regime continue to play its role: the now-permissible reservation must be accepted in accordance with the relevant provisions of article 20 of the Conventions, and that acceptance is indispensable for the reservation to produce any legal effect pursuant to article 21.

209. Thus, guideline 3.3.4, which remains relevant, should also be included in part III of the Guide to Practice on the “validity of reservations”. In any event, it would be illogical to place such a guideline in the part that deals with the effects of impermissible reservations. By definition, the reservation in question here has become *permissible* by reason of the unanimous acceptance or the absence of unanimous objection.

210. Guidelines 3.3.3 and 3.4.1 address the question of the acceptance of an impermissible reservation: it can have no effect on either the permissibility of the reservation—apart from the special case envisaged in guideline 3.3.4—or, *a fortiori*, on the legal consequences of the nullity of an impermissible reservation.

(ii) *Objection to an impermissible reservation*

211. In State practice, the vast majority of objections are based on the impermissibility of the reservation to which

the objection is made. But the authors of such objections draw very different conclusions from them: some simply note that the reservation is impermissible while others state that it is null and void and without legal effect. Sometimes (but very rarely), the author of the objection states that its objection precludes the entry into force of the treaty as between itself and the reserving State; sometimes, on the other hand, it states that the treaty enters into force in its entirety in these same bilateral relations.³⁴⁴

212. The jurisprudence of ICJ is not a model of consistency on this point.³⁴⁵ In its 1999 orders concerning the requests for provisional measures submitted by Yugoslavia against Spain and the United States, the Court simply noted that:

Whereas the Genocide Convention does not prohibit reservations; whereas Yugoslavia did not object to Spain’s reservation to Article IX; and whereas the said reservation had the effect of excluding that Article from the provisions of the Convention in force between the Parties.³⁴⁶

The Court’s reasoning did not include any review of the permissibility of the reservation, apart from the observation that the Convention did not prohibit it. The only determining factor seems to have been the absence of an objection by the State concerned; this reflects the position which the Court had taken in 1951 but which had subsequently been superseded by the Vienna Convention, with which it is incompatible:³⁴⁷

The object and purpose [of the treaty] (...) limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.³⁴⁸

213. Nonetheless, in its order concerning the request for provisional measures in the case of *Armed activities on the*

³⁴¹ See Mendelson, “Reservations to the constitutions of international organizations”, pp. 140–141.

³⁴² Guideline 2.3.1, adopted on first reading, reads:

“2.3.1 *Late formulation of a reservation*

“Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty *except if none of the other Contracting Parties objects to the late formulation of the reservation*.”

³⁴³ For a recent example of the formal “validation” of a late reservation, see the reservation to the United Nations Convention against Corruption formulated by Mozambique some seven months after ratifying the Convention (*Multilateral Treaties...* (footnote 35 above), chap. XVIII.14). In his depositary notification of 10 November 2009 (C.N.806.2009.TREATIES-34), the Secretary-General, in his capacity as depositary, wrote: “Within a period of one year from the date of the depositary notification transmitting the reservation (C.N.834.2008.TREATIES-32 of 5 November 2008), none of the Contracting Parties to the said Convention had notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged. Consequently, the reservation in question was accepted for deposit upon the above-stipulated one year period, that is on 4 November 2009.”

³⁴⁴ The reactions to the reservation formulated by Qatar upon accession to the Convention on the Elimination of All Forms of Discrimination against Women illustrate virtually the full range of objections imaginable: while the 18 objections (including late ones made by Mexico and Portugal) all note that the reservation is incompatible with the object and purpose of the Convention, one (that of Sweden) adds that it is “null and void”, and two others (those of Spain and the Netherlands) point out that the reservation does not produce any effect on the provisions of the Convention. Eight of these objections (those of Belgium, Finland, Hungary, Ireland, Italy, Mexico, Poland and Portugal) specify that the objections do not preclude the entry into force of the treaty, while ten (those of Austria, the Czech Republic, Estonia, Latvia, the Netherlands, Norway, Romania, Slovakia, Spain and Sweden) consider that the treaty enters into force for Qatar without the reserving State being able to rely on its impermissible reservation. See *Multilateral Treaties...* (footnote 35 above), chap. IV.8.

³⁴⁵ See the joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma annexed to the judgment of 3 February 2006, *Armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility*, I.C.J. Reports 2006, pp. 65–71.

³⁴⁶ Orders of 2 June 1999, *Legality of Use of Force (Yugoslavia v. Spain)*, *Provisional Measures*, I.C.J. Reports 1999, p. 772, para. 32; and *Legality of Use of Force (Yugoslavia v. United States of America)*, *Provisional Measures*, *ibid.*, p. 924, para. 24.

³⁴⁷ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, p. 21, paras. 98–100.

³⁴⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, I.C.J. Reports 1951, p. 24.

territory of the Congo (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*), ICJ modified its approach by considering *in limine* the permissibility of Rwanda's reservation: "[T]hat reservation does not bear on the substance of the law, but only on the Court's jurisdiction; (...) it therefore does not appear contrary to the object and purpose of the Convention".³⁴⁹

And in its judgment on the jurisdiction of the Court and the admissibility of the application, the Court confirmed that

Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.³⁵⁰

ICJ thus "added its own assessment as to the compatibility of Rwanda's reservation with the object and purpose of the Genocide Convention".³⁵¹ Even though an objection by the Democratic Republic of the Congo was not required in order to assess the permissibility of the reservation, the Court found it necessary to add: "As a matter of the law of treaties, when Rwanda acceded to the Genocide Convention and made the reservation in question, the DRC made no objection to it."³⁵²

214. This clarification is not superfluous. Indeed, although an objection to a reservation does not determine the permissibility of the reservation as such, it is an important element to be considered by all actors involved—the author of the reservation, the contracting States and contracting organizations, and anybody with competence to assess the permissibility of a reservation. Nonetheless, it should be borne in mind that, as ICJ indicated in its 1951 advisory opinion: "[e]ach State which is a party to the Convention is entitled to appraise the validity of the reservation and it exercises this right individually and from its own standpoint".³⁵³

215. The judgement of the European Court of Human Rights in the *Loizidou* case also attaches great importance to the reactions of States parties as an important element to be considered in assessing the permissibility of Turkey's reservation.³⁵⁴ The Human Rights Committee confirmed this approach in its general comment No. 24:

The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the

Covenant (...). However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.³⁵⁵

216. During consideration of the report of the Commission on the work of its fifty-seventh session, in 2005, Sweden, replying to the Commission's question regarding "minimum effect" objections based on the incompatibility of a reservation with the object and purpose of the treaty,³⁵⁶ expressly supported this position:

Theoretically, an objection was not necessary in order to establish that fact but was merely a way of calling attention to it. The objection therefore had no real legal effect of its own and did not even have to be seen as an objection... However, in the absence of a body that could authoritatively classify a reservation as invalid, such as the European Court of Human Rights, such "objections" still served an important purpose.³⁵⁷

217. As established above,³⁵⁸ the Vienna Conventions do not contain any rule concerning the effects of reservations that do not meet the conditions of permissibility set out in article 19, or—as a logical consequence thereof—concerning the potential reactions of States to such reservations. Under the Vienna regime, an objection is not an instrument by which contracting States or organizations assess the permissibility of a reservation; rather, it renders the reservation inapplicable as against the author of the objection.³⁵⁹ The acceptances and objections mentioned in article 20 concern only permissible reservations. The mere fact that these same instruments are used in State practice to react to impermissible reservations does not mean that these reactions produce the same effects or that they are subject to the same conditions as objections to permissible reservations.

218. In the opinion of the Special Rapporteur, however, contrary to what Sweden may have meant to say in the aforementioned statement,³⁶⁰ this is not a sufficient reason to refuse to consider these reactions as true objections. Such a reaction is fully consistent with the definition of the term "objection" adopted by the Commission in guideline 2.6.1 and constitutes

a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude (...) the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.³⁶¹

The mere fact that ultimately, it is not the objection that achieves the desired goal by depriving the reservation of effects, but rather the nullity of the reservation, does not change the goal sought by the objecting State or organization: to exclude all effects of the impermissible

³⁴⁹ Order of 10 July 2002, *Armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Provisional Measures*, I.C.J. Reports 2002, p. 246, para. 72.

³⁵⁰ I.C.J. Reports 2006, p. 32, para. 67.

³⁵¹ *Ibid.*, p. 70, para. 20.

³⁵² *Ibid.*, p. 33, para. 68.

³⁵³ I.C.J. Reports 1951, p. 26. See also the advisory opinion of the Inter-American Court of Human Rights on the effect of reservations on the entry into force of the American Convention on Human Rights, OC-2/82, 24 September 1982, *Series A*, No. 2, para. 38 ("The States Parties have a legitimate interest, of course, in barring reservations incompatible with the object and purpose of the Convention. They are free to assert that interest through the adjudicatory and advisory machinery established by the Convention.").

³⁵⁴ *Series A*, No. 310 (footnote 240 above), para. 95.

³⁵⁵ Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, para. 582.

³⁵⁶ See footnote 276 above.

³⁵⁷ Sweden, speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 14th meeting (A/C.6/60/SR.14), para. 22.

³⁵⁸ See paragraphs 96–112 above.

³⁵⁹ See paragraphs 2–5 above.

³⁶⁰ See paragraph 216 above.

³⁶¹ For the full text of guideline 2.6.1 (Definition of objections to reservations) and the commentary thereto, see *Yearbook ... 2005*, vol. II (Part Two), p. 77.

reservation. Thus, it seems neither appropriate nor useful to create a new term for these reactions to reservations, since the current term not only corresponds to the definition of “objection” adopted by the Commission, but is used extensively in State practice and, it would appear, is accepted and understood unanimously.

219. Moreover, although an objection to an impermissible reservation adds nothing to the nullity of the reservation, it is undoubtedly an important instrument both for initiating the reservations dialogue and for alerting treaty bodies and international and domestic courts when they must, where necessary, assess the permissibility of a reservation. Consequently, it would not be advisable—and would, in fact, be misleading—simply to note in the Guide to Practice that an objection to an impermissible reservation is without effect.

220. On the other hand, it is vitally important for States to continue to formulate objections to reservations which they consider impermissible even though such declarations may not seem to add anything to the effects that arise, *ipso jure* and without any other condition, from the impermissibility of the reservation. This is all the more important, as there are, in fact, only a few bodies that are competent to assess the permissibility of a contested reservation. As is usual in international law—in this area as in many others—the absence of an objective assessment mechanism remains the rule, and its existence the exception.³⁶² Hence, pending a very hypothetical intervention by an impartial third party, “each State establishes for itself its legal situation *vis-à-vis* other States”, including, of course, on the issue of reservations.³⁶³

221. States should not be discouraged from formulating objections to reservations that they consider impermissible. On the contrary, in order to maintain stable treaty relations, they should be encouraged to do so, provided that they provide reasons for their position.³⁶⁴ This is why, in guideline 4.5.4, which is proposed for inclusion in the Guide to Practice, it would not be sufficient simply to set out the (undoubtedly correct) principle that an objection to an impermissible reservation does not, as such, produce effects; it is also necessary to discourage any hasty inference, from the statement of that principle, that this is a futile exercise. Indeed, it is in every respect very important for States and international organizations to formulate an objection, when they deem it justified, in order to state publicly their position on the impermissibility of the reservation.

222. However, while it may be preferable, it is not indispensable³⁶⁵ for these objections to be formulated

within the time limit of 12 months, or within any other time limit set out in the treaty.³⁶⁶ Although they have, as such, no legal effect on the reservation, such objections still serve an important purpose not only for the author of the reservation, which would be alerted to the doubts surrounding its validity, but also for the other contracting States or contracting organizations and for any authority that may be called upon to assess the permissibility of the reservation. This was underscored clearly in the commentary to guideline 2.6.15 (Late objections):

This practice [of late objections] should certainly not be condemned. On the contrary, it allows States and international organizations to express—in the form of objections—their views as to the validity of a reservation, even when the reservation was formulated more than 12 months earlier, and this practice has its advantages, even if such late objections do not produce any immediate legal effect.³⁶⁷

The same applies *a fortiori* to objections to reservations that the objecting States or objecting organizations deem impermissible.

223. This comment is not, however, to be taken as an encouragement to formulate late objections on the grounds that, even without the objection, the reservation is null and void and produces no effect. It is in the interests of the author of the reservation, the other contracting States and contracting organizations and, more generally, of a stable, clear legal situation, for objections to impermissible reservations to be made and to be formulated as quickly as possible, so that the legal situation can be appraised rapidly by all the actors and the author of the reservation can potentially remedy the impermissibility within the framework of the reservations dialogue.

224. Given these considerations, the Commission might adopt a guideline 4.5.4 summarizing the rules to be applied to reactions to impermissible reservations and, more specifically, to objections to such reservations. The guideline might read:

“4.5.4 Reactions to an impermissible reservation

“The effects of the nullity of an impermissible reservation do not depend on the reaction of a contracting State or of a contracting international organization.

“A State or international organization which, having examined the permissibility of a reservation in accordance with the present Guide to Practice, considers that the reservation is impermissible, should nonetheless formulate a reasoned objection to that effect as soon as possible.”

³⁶² *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, para. 86: “In the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception.”

³⁶³ *Case of Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978, UNRIAA, vol. XVIII, p. 483, para. 81.

³⁶⁴ See guideline 2.6.10 (Statement of reasons), which recommends that the author of an objection to a reservation should indicate the reasons why it is being made (*Yearbook ... 2008*, vol. II (Part Two), para. 123).

³⁶⁵ Italy, in its late objection to the reservations of Botswana to the International Covenant on Civil and Political Rights, explained: “The Government of the Italian Republic considers these reservations to be incompatible with the object and the purpose of the Covenant according

to article 19 of the 1969 Vienna Convention on the Law of Treaties. These reservations do not fall within the rule of article 20, paragraph 5, and can be objected at any time” (*Multilateral Treaties...* (footnote 35 above), chap. IV.4). See also the objection of Italy to the reservation of Qatar to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, formulated by Qatar (*ibid.*, chap. IV. 9); and the position expressed by Sweden in paragraph 216 above.

³⁶⁶ For other recent examples, see the objections of Portugal and Mexico to the reservation formulated by Qatar upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women (*Multilateral Treaties...* (footnote 35 above), chap. IV.8). Both objections were made on 10 May 2010 (C.N.260.2010.TREATIES-15 and C.N.264.2010.TREATIES-16); Qatar’s instrument of accession was communicated by the Secretary-General on 8 May 2009.

³⁶⁷ *Yearbook ... 2008*, vol. II (Part Two), p. 95, para. (3) of the commentary.

3. ABSENCE OF EFFECT OF A RESERVATION ON TREATY
RELATIONS BETWEEN THE OTHER CONTRACTING PARTIES

225. Article 21, paragraph 2 of the Vienna Conventions provides that: “The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*”.

226. Pursuant to this provision, treaty relations between the other parties to the treaty are not affected by the reservation. This rule of the relativity of legal relations is designed to preserve the normative system applicable as between the other parties to the treaty. Although this normative system stands, in relation to the author of the reservation and to the reservation itself, as the general regime of the treaty (to which the author of the reservation is bound only partially by reason of its reservation), this is not necessarily the only regime, since the other parties may also make their consent subject to reservations which would then modify their mutual relations as envisaged in article 21, paragraphs 1 and 3.³⁶⁸ The purpose of paragraph 2 is not, however, to limit the number of normative systems that could be established within the same treaty, but only to limit the effects of the reservation to the bilateral relations between the reserving State, on the one hand, and each of the other contracting States, on the other.

227. The scope of paragraph 2 is not limited to “established” reservations—reservations that meet the requirements of articles 19, 20 and 23—but this is not a drafting inconsistency. Indeed, the principle of the relativity of reservations applies, irrespective of the permissibility or validity of the reservation. This is particularly obvious in the case of invalid reservations, which, owing to their nullity, are deprived of any effect, for the benefit of their authors and, of course, for the benefit or to the detriment of the other parties to the treaty.³⁶⁹

228. Furthermore, the acceptance of a reservation and the objections thereto also have no bearing on the effects of the reservation beyond the bilateral relations between the author of the reservation and each of the other contracting parties. They merely identify the parties for whom the reservation is considered to be established—those which have accepted the reservation³⁷⁰—in order to distinguish them from parties for whom the reservation does not produce any effect—those which have made an objection to the reservation. However, in relations between all the contracting States or contracting organizations except the author of the reservation, the reservation cannot modify or exclude the legal effects of one or more provisions of the treaty, or of the treaty as a whole, regardless of whether these States or organizations have accepted the reservation or objected to it.

229. Although paragraph 2 does not contain any limitation or exception, it might be wondered whether the rule of the “relativity of legal relations” is as absolute as the paragraph states.³⁷¹ Moreover, Sir Humphrey Waldock

made this point more cautiously in the appendix to his first report, entitled “Historical summary of the question of reservations to multilateral conventions”: “[*in principle*], a reservation only operates in the relations of States with the reserving State”.³⁷² This then raises the question of whether there are treaties to which the principle of relativity may not apply.

230. The specific treaties referred to in article 20, paragraphs 2 and 3, are definitely not an exception to the relativity rule. It is true that the relativity of legal relations is, to some extent, limited in the case of these treaties, but not with regard to the relations of the other States parties *inter se*, which also remain unchanged.

231. Although, in the case of treaties that must be applied in their entirety, the contracting States and contracting organizations must all give their consent in order for the reservation to produce its effects, this unanimous consent certainly does not, in itself, constitute a modification of the treaty itself as between the parties thereto. Here too, a distinction should therefore be made between two normative systems within the same treaty: the system governing relations between the author of the reservation and each of the other parties which have, by definition, all accepted the reservation, on the one hand, and the system governing relations between these other parties, on the other. The relations of the other parties *inter se* remain unchanged.

232. The same reasoning applies in the case of constituent instruments of international organizations. Although in this case the consent is not necessarily unanimous, it does not in any way modify the treaty relations between parties other than the author of the reservation. The majority system simply imposes on the minority members a position in respect of the author of the reservation, precisely to avoid the establishment of multiple normative systems within the constituent instrument. But in this case, it is the acceptance of the reservation by the organ of the organization which makes the reservation applicable universally, and probably exclusively, in the relations of the other parties with the reserving State or organization.

233. Even in the event of unanimous acceptance of a reservation which is *a priori* invalid,³⁷³ it is not the reservation which has been “validated” by the consent of the parties that modifies the “general” normative system applicable as between the other parties. Granted, this normative system is modified insofar as the prohibition of the reservation is lifted or the object and purpose of the treaty are modified in order to bring the treaty (and its reservation clauses) in line with the reservation. Nonetheless, this modification of the treaty, which has implications for all the parties, arises not from the reservation, but from the unanimous consent of the contracting States and contracting organizations that is the basis of an agreement purporting to modify the treaty in order to authorize the reservation within the meaning of article 39 of the Vienna Conventions.³⁷⁴

³⁶⁸ See Horn (footnote 7 above), p. 142.

³⁶⁹ See paragraphs 130–144 above.

³⁷⁰ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, paras. 199–236.

³⁷¹ Szafarz maintains that “[i]t is obvious, of course, that ‘the reservation does not modify the provisions of the treaty for the other parties

to the treaty *inter se*’” (“Reservations to multilateral treaties”, p. 311).

³⁷² *Yearbook ... 1962*, vol. II, p. 76, appendix, footnote e.

³⁷³ See paragraphs 204–209 above.

³⁷⁴ See paragraph 204 above.

234. It should be noted, however, that the parties are still free to modify their treaty relations if they deem it necessary.³⁷⁵ This possibility may be deduced *a contrario* from the Commission's commentary to draft article 19 of the 1966 draft articles on the law of treaties (which became article 21 of the 1969 Vienna Convention). In the commentary, the Commission stated that a reservation "does not modify the provisions of the treaty for the other parties, *inter se*, since they have not accepted it as a term of the treaty in their mutual relations".³⁷⁶

235. In the light of these comments, the Commission will certainly, following its usual practice, wish to include in the Guide to Practice a draft guideline 4.6, simply repeating the wording of article 21, paragraph 2, of the Vienna Conventions:

"4.6 Absence of effect of a reservation on relations between contracting States and contracting organizations other than its author

"A reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*."

236. Moreover, nothing prevents the parties from accepting the reservation as a real clause of the treaty, or from changing any other provision of the treaty, if they deem it necessary. However, such modification cannot be made *ipso facto* by acceptance of a reservation—as indicated in guideline 4.6—nor can it be presumed. In any event, the procedures set out for this purpose in the treaty or, in the absence thereof, the procedure established by in articles 39 *et seq.* of the Vienna Conventions, must be followed. In fact, it may become necessary, if not indispensable,³⁷⁷ to modify the treaty in its entirety. This depends, however, on the circumstances of each case and remains at the discretion of the parties. Consequently, it does not seem indispensable to provide for an exception to the principle established in article 21, paragraph 2, of the Vienna Conventions. Should the Commission take a different view, guideline 4.6 could still read:

"4.6 Absence of effect of a reservation on relations between contracting States and contracting organizations other than the author of the reservation

"[Without prejudice to any agreement between the parties as to its application,] a reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*."

³⁷⁵ Horn (footnote 7 above), pp. 142–143.

³⁷⁶ *Yearbook ... 1966*, vol. II, p. 209, para. (1) of the commentary.

³⁷⁷ Such a situation may occur, *inter alia*, in commodity treaties in which even the principle of reciprocity cannot "restore" the balance between the parties (Schermers, "The suitability of reservations to multilateral treaties" p. 356). Article 65, paragraph 2 (c) of the 1968 International Sugar Agreement seemed to provide for the possibility of adapting provisions the application of which had been compromised by the reservation: "In any other instance where reservations are made [namely in cases where the reservation concerns the economic operation of the Agreement], the Council shall examine them and decide, by special vote, whether they are to be accepted and, if so, under what conditions". Such reservations shall become effective only after the Council has taken a decision on the matter". See also Imbert (footnote 10 above), p. 250; and Horn (footnote 7 above), pp. 142–143.

B. Effects of interpretative declarations, approvals, oppositions, silence and reclassifications

237. Despite a long-standing and highly developed practice, neither the 1969 nor the 1986 Vienna Convention contains rules concerning interpretative declarations, much less the possible effects of such a declaration.³⁷⁸

238. The *travaux préparatoires* to the Conventions explain this absence. While the problem of interpretative declarations was completely overlooked by the first Special Rapporteurs,³⁷⁹ Sir Humphrey Waldock³⁸⁰ was aware both of the practical difficulties these declarations created, and of the utterly simple solution required. Indeed, several governments returned in their commentary to the draft articles adopted on first reading, not just to the absence of interpretative declarations and the distinction that should be drawn between such declarations and reservations,³⁸¹ but also to the elements to be taken into account when interpreting a treaty.³⁸² In 1965, the Special Rapporteur made an effort to reassure those States by affirming that the question of interpretative declarations had not escaped the notice of the Commission. As Sir Humphrey continued:

Interpretative declarations, however, remained a problem, and possible also statements of policy made in connexion with a treaty. The question was what the effect of such declarations and statement should be. Some rules which touch the subject were contained in article 69, particularly its paragraph 3 on the subject of agreement between the parties regarding the interpretation of the treaty and of the subsequent practice in its application. Article 70, which dealt with further means of interpretation, was also relevant.³⁸³

Contrary to the positions expressed by some members of the Commission,³⁸⁴ the effect of an interpretative declaration "was governed by the rules on interpretation".³⁸⁵

³⁷⁸ See *Yearbook ... 1999*, vol. II (Part Two), p. 97, para. (1) of the commentary on guideline 1.2.

³⁷⁹ Sir Gerald Fitzmaurice limited himself to specifying that the term "reservation" "does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty" (First report on the law of treaties, *Yearbook ... 1956*, vol. II, art. 13 (I), p. 110).

³⁸⁰ In his definition of the term "reservation", Sir Humphrey explained that "[a]n explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation". (First report on the law of treaties, *Yearbook ... 1962*, vol. II, art. 1 (I), pp. 31–32).

³⁸¹ See, in particular, the commentary of Japan summarized in the fourth report on the law of treaties by Sir Humphrey Waldock (*Yearbook ... 1965*, vol. II, p. 49) and the comment of the United Kingdom that "article 18 deals only with reservations and assumes that the related question of statements of interpretation will be taken up in a later report" (*ibid.*, p. 47).

³⁸² See the comments of the United States on draft articles 69 and 70 concerning interpretation, summarized in the sixth report on the law of treaties by Sir Humphrey Waldock (*Yearbook ... 1966*, vol. II, p. 93).

³⁸³ *Yearbook ... 1965*, vol. I, 799th meeting, p. 165, para. 13. See also Sir Humphrey Waldock, *ibid.*, vol. II, p. 49, para. 2.

³⁸⁴ See the comments of Mr. Verdross (*Yearbook ... 1965*, vol. I, 797th meeting, p. 151, para. 36 and 799th meeting, p. 166, para. 23) and Mr. Ago (*ibid.*, 798th meeting, p. 161, para. 68). See also Mr. Castren (*ibid.*, 799th meeting, p. 166, para. 30) and Mr. Bartos (*ibid.*, para. 28).

³⁸⁵ *Ibid.*, 799th meeting, p. 165, para. 14. See also *ibid.*, vol. II, p. 49, para. 2 ("Statements of interpretation were not dealt with by the Commission in the present section for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties³⁸⁷").

Although “[i]n interpretative statements are certainly important, ... it may be doubted whether they should be made the subject of specific provisions; for the legal significance of an interpretative statement must always depend on the particular circumstances in which it is made”.³⁸⁶

239. At the United Nations Conference on the Law of Treaties, the question of interpretative declarations was debated once again, in particular concerning an amendment by Hungary to the definition of the term “reservation”³⁸⁷ and to article 19 (which became article 21) concerning the effects of a reservation.³⁸⁸ The effect of this amendment was to liken interpretative declarations to reservations, without making any distinction between the two categories, in particular with regard to their respective effects. Several delegations were nevertheless clearly opposed to such a comparison.³⁸⁹ Sir Humphrey Waldock, in his capacity as expert consultant, had:

issued a warning against the dangers of the addition of interpretative declarations to the concept of reservations. In practice, a State making an interpretative declaration usually did so because it did not want to become enmeshed in the network of the law on reservations.³⁹⁰

Consequently, he appealed:

to the Drafting Committee to bear the delicacy of the question in mind and not to regard the assimilation of interpretative declarations to reservations as an easy matter.³⁹¹

240. In the end, the Drafting Committee had not retained the amendment of Hungary. Although Mr. Sepulveda Amor, on behalf of Mexico, had drawn attention to “the absence of a definition of the instrument envisaged in paragraph 2 (b) of article 27 [which became article 31]”, while “interpretative declarations of that type were common in practice”³⁹² and suggested that “it was essential to set forth clearly the legal effects of such declarations, as distinct from those of actual reservations”,³⁹³ as none of the provisions of the Vienna Convention had been devoted specifically to interpretative declarations. Sir Humphrey’s conclusions regarding the effects of these declarations³⁹⁴ were thus confirmed by the work of the Conference.

³⁸⁶ *Ibid.*, vol. II, p. 49, para. 2.

³⁸⁷ A/CONF.39/C.1/L.23, reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference (A/CONF.39/11/Add.2)*, p. 122, para. 35 (vi) (e). Hungary proposed the following text: “‘Reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a multilateral treaty, whereby it purports to exclude, to vary or to interpret the legal effect of certain provisions of the treaty in their application to that State.”

³⁸⁸ A/CONF.39/C.1/L.177, *ibid.*, p. 151, para. 199 (ii) (d) and (iii). See also the explanations provided at the Conference, *ibid.*, *First and Second Sessions, Vienna, 26 March–24 May 1968, Documents of the Conference (A/CONF.39/11)*, 25th meeting, pp. 148 and 149, paras. 52–53.

³⁸⁹ See, in particular, the position of Australia, (*ibid.*, 5th meeting, p. 33, para. 81), Sweden (*ibid.*, p. 34, para. 102), the United States (*ibid.*, p. 35, para. 116) and the United Kingdom (*ibid.*, 25th meeting, p. 149, para. 60).

³⁹⁰ *Ibid.*, p. 149, para. 56.

³⁹¹ *Ibid.*

³⁹² *Ibid.*, 21st meeting, p. 123, para. 62.

³⁹³ *Ibid.*

³⁹⁴ See footnote 386 above.

241. Neither the work of the Commission nor the 1986 Vienna Convention have further elucidated the question of the concrete effects of an interpretative declaration.

242. The absence of a specific provision in the Vienna Conventions concerning the legal effects an interpretative declaration is likely to produce does not mean, however, that they contain no indications on that subject, as the comments made during their elaboration will show.³⁹⁵

243. As their name clearly indicates, their aim and function consists in proposing an interpretation of the treaty.³⁹⁶ Consequently, in accordance with the definition arrived at by the Commission:

“Interpretative declaration” means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.³⁹⁷

Giving a precise definition of or clarifying the provisions of a treaty is indeed to interpret it and for this reason, the Commission used those terms to define interpretative declarations.³⁹⁸ Although, as the commentary on guideline 1.2 (Definition of interpretative declarations) makes clear, the definition accepted “in no way prejudices the validity or the effect of such declarations”,³⁹⁹ it seems quite evident that the effect of an interpretative declaration is essentially produced through the highly complex process of interpretation.

244. Before considering the role such a declaration may play in the interpretation process, it is important to specify the effect that it may definitely not produce. It is clear from the comparison between the definition of interpretative declarations and that of reservations that whereas the latter are intended to modify the treaty or exclude certain of its provisions, the former have no other aim than to specify or clarify its meaning. The author of an interpretative declaration does not seek to relieve itself of its international obligations under the treaty; it intends to give a particular meaning to those obligations. As Yasseen has clearly explained:

A State which formulated a reservation recognised that the treaty had, generally speaking, a certain force; but it wished to vary, restrict or extend one or several provisions of the treaty in so far as the reserving State itself was concerned.

A State making an interpretative declaration declared that, in its opinion, the treaty or one of its articles should be interpreted in a certain manner; it attached an objective and general value to that interpretation. In other words, it considered itself bound by the treaty and wished, as a matter of conscience, to express its opinion concerning the interpretation of the treaty.⁴⁰⁰

If the effect of an interpretative declaration consisted of modifying the treaty, it would actually constitute a

³⁹⁵ See paragraph 238 above.

³⁹⁶ *Yearbook ... 1999*, vol. II (Part Two), p. 100, para. (16) of the commentary on guideline 1.2.

³⁹⁷ Guideline 1.2 (Definition of interpretative declarations) and commentaries thereto, *ibid.*, pp. 97–103.

³⁹⁸ See the commentary on guideline 1.2 (Definition of interpretative declarations), *ibid.*, p. 100, para. (18).

³⁹⁹ *Ibid.*, p. 103, para. (33) of the commentary.

⁴⁰⁰ *Yearbook ... 1965*, vol. I, 799th meeting, p. 166, paras. 25–26.

reservation, not an interpretative declaration. The Commission's commentary on article 2, paragraph 1 (d), of its 1966 draft articles, describes this dialectic unequivocally:

States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.⁴⁰¹

245. ICJ has also maintained that the interpretation of a treaty may not lead to its modification. As it held in its advisory opinion concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*: "It is the duty of the Court to interpret the Treaties, not to revise them".⁴⁰²

246. It may be deduced from the foregoing that an interpretative declaration may in no way modify the treaty provisions. Whether or not the interpretation is correct, its author remains bound by the treaty. This is certainly the intended meaning of the *dictum* of the European Commission of Human Rights in the *Belilos* case, in which the Commission held that an interpretative declaration:

may be taken into account when an article of the Convention is being interpreted; but if the Commission or the Court reached a different interpretation, the State concerned would be bound by that interpretation.⁴⁰³

In other words, a State may not escape the risk of violating its international obligations by basing itself on an interpretation that it put forward unilaterally. In the case where the State's interpretation does not correspond to "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (article 31, para. 1, of the Vienna Conventions), its actions in the course of enforcing the treaty run a serious risk of violating its treaty obligations.⁴⁰⁴

247. If a State or international organization has made its interpretation a condition for its agreement to be bound by the treaty, in the form of a conditional interpretative declaration within the meaning of guideline 1.2.1 (Definition of conditional interpretative declarations),⁴⁰⁵ the situation is slightly different. Of course, if the interpretation proposed by the author of the declaration and the interpretation of the treaty given by an authorized

third body⁴⁰⁶ are in agreement, there is no problem; the interpretative declaration remains merely interpretative and may play the same role in the process of interpreting the treaty as that of any other interpretative declaration. If, however, the interpretation given by the author of the interpretative declaration does not correspond to the interpretation of the treaty objectively established (following the rules of the Vienna Conventions) by an impartial third body, a problem arises: the author of the declaration does not intend to be bound by the treaty as it has thus been interpreted, but only by the treaty text as interpreted and applied in the manner which it has proposed. It has therefore made its consent to be bound by the treaty dependent upon a particular "interpretation" which—it is assumed—does not fall within the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (article 31, para. 1, of the Vienna Conventions). In this case—but in this case only—the conditional interpretative declaration must be equated to a reservation and may produce only the effects of a reservation, if the corresponding conditions have been met. This eventuality, which is not merely hypothetical, explains why such an interpretative declaration, although not intended under its terms to modify the treaty, must nonetheless be subject to the same legal regime that applies to reservations. As McRae has pointed out:

Since the declaring State is maintaining its interpretation regardless of the true interpretation of the treaty, it is purporting to exclude or to modify the terms of the treaty. Thus, the consequences attaching to the making of reservations should apply to such a declaration.⁴⁰⁷

248. In view of the foregoing, guideline 4.7.4 concerns the specific case of conditional interpretative declarations that do not appear to be equatable, purely and simply, to reservations in respect of their definition, but which produce the same effects:

"4.7.4 Effects of a conditional interpretative declaration

"A conditional interpretative declaration produces the same effects as a reservation in conformity with guidelines 4.1 to 4.6."

249. In cases of a simple interpretative declaration, however, the mere fact of proposing an interpretation which is not in accordance with the provisions of the treaty in no way changes the declaring State's position with regard to the treaty. The State remains bound by it and must respect it. This position has also been confirmed by McRae:

[T]he State has simply indicated its view of the interpretation of the treaty, which may or may not be the one that will be accepted in any arbitral or judicial proceedings. In offering this interpretation the

⁴⁰¹ *Yearbook ... 1966*, vol. II, pp. 189–190, para. (11) of the commentary. See also Sir Humphrey Waldock's explanations, *Yearbook ... 1965*, vol. I, 799th meeting, p. 165, para. 14. ("The crucial point was that, if the interpretative declaration constituted a reservation, its effect would be determined by reference to the provisions of articles 18 to 22. In that event, consent would operate, but in the form of rejection or acceptance of the reservation by other interested States. If, however, the declaration did not purport to vary the legal effect of some of the treaty's provisions in its application to the State making it, then it was interpretative and was governed by the rules on interpretation").

⁴⁰² Second Phase, *I.C.J. Reports 1950*, p. 229. See also the judgments in *Case concerning Rights of Nationals of the United States of America in Morocco*, *I.C.J. Reports 1952*, p. 196, and *South West Africa cases*, Second Phase, *I.C.J. Reports 1966*, p. 48, para. 91.

⁴⁰³ *Belilos v. Switzerland*, Report of 7 May 1986, vol. 1, No. 32, para. 102.

⁴⁰⁴ See also McRae, "The legal effect of interpretative declarations", p. 161; Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen*, p. 126; or Horn (footnote 7 above), p. 326.

⁴⁰⁵ *Yearbook ... 1999*, vol. II (Part Two), pp. 103–106.

⁴⁰⁶ It is hardly likely that the "authentic" interpretation of the treaty (that is, the one agreed by the parties as a whole) will differ significantly from that given by the author of the interpretative declaration: by definition, an authentic interpretation arises from the parties themselves. See Salmon, ed. (footnote 176 above), p. 604: "An interpretation issued by the author or by all the authors of the provision being interpreted—in the case of a treaty, by all the parties—in due form so that its authority may not be questioned"; see also paras. 277–282 below.

⁴⁰⁷ McRae (footnote 404 above), p. 161. See also Heymann (footnote 404 above), pp. 147–148. Heymann shares the view that a conditional interpretative declaration should be treated as a reservation only in the case where the treaty creates a competent body to provide an authentic interpretation. In other cases, she considers that the conditional interpretative declaration may never modify the treaty provisions (*ibid.*, pp. 148–150).

State has not ruled out subsequent interpretative proceedings nor has it ruled out the possibility that its interpretation will be rejected. Provided, therefore, that the State making the reservation still contemplates an ultimate official interpretation that could be at variance with its own view, there is no reason for treating the interpretative declaration in the same way as an attempt to modify or to vary the treaty.⁴⁰⁸

250. Although an interpretative declaration does not affect the normative force and binding character of the obligations contained in the treaty, it may still produce legal effects or play a role in the interpretation of the treaty. It has already been noted during the consideration of the validity of interpretative declarations⁴⁰⁹ that “on the basis of its sovereignty, every State has the right to indicate its own understanding of the treaties to which it is party”.⁴¹⁰ This corresponds to a need: those to whom a legal rule is addressed must necessarily interpret it in order to apply it and meet their obligations.⁴¹¹

251. Interpretative declarations are above all an expression of the parties’ concept of their international obligations under the treaty. Accordingly, they are a means of determining the intention of the contracting States or organizations with regard to their treaty obligations. It is in this connection, as an element relating to the interpretation of the treaty, that case law⁴¹² and doctrine have affirmed the need to take into account interpretative declarations in the treaty process. McRae puts it this way:

In fact, it is here that the legal significance of an interpretative declaration lies, for it provides evidence of intention in the light of which the treaty is to be interpreted.⁴¹³

252. Heymann shares this view. She affirms, on the one hand, that an interpretation which is not accepted or is accepted only by certain parties cannot constitute an element of interpretation under article 31 of the Vienna Convention; on the other hand, she adds: “That does not exclude the possibility, however, that it may be used, under certain conditions, as an indication of the common intention of the parties.”⁴¹⁴

253. The French Constitutional Council shares this view and has clearly limited the object and role of an interpretative declaration by the French Government to the interpretation of the treaty alone: “Whereas, moreover, the French Government has accompanied its signature with an interpretative declaration in which it specifies the meaning and scope which it intends to give to the Charter or to some of its provisions with regard to the Constitution, such unilateral declaration shall have normative force only in that it constitutes an instrument in conformity with the treaty and may contribute, in the case of a dispute, to its interpretation”.⁴¹⁵

⁴⁰⁸ McRae (footnote 404 above), p. 160.

⁴⁰⁹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 142.

⁴¹⁰ Daillier, Forteau and Pellet, *Droit international public (Nguyen Quoc Dinh)*, p. 277.

⁴¹¹ Abi-Saab, “‘Interprétation’ et ‘auto-interprétation’: quelques réflexions sur leur rôle dans la formation et la résolution du différend international”, p. 14.

⁴¹² See footnote 403 above.

⁴¹³ McRae (footnote 404 above), p. 169.

⁴¹⁴ Heymann (footnote 404 above), p. 135.

⁴¹⁵ Constitutional Council, Decision No. 99-412 DC, 15 June 1999, *European Charter for Regional or Minority Languages, Official Gazette of the French Republic*, 18 June 1999, p. 8965, para. 4.

254. Guideline 4.7, which opens the section concerning the legal effects of an interpretative declaration, takes up these two ideas in order to clarify, on the one hand, that an interpretative declaration has no impact on the rights and obligations under the treaty and, on the other, that it produces its effects only in the process of interpretation. It could be worded as follows:

“4.7 Effects of an interpretative declaration

“An interpretative declaration may not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to some of its provisions and, accordingly, may constitute an element to be taken into account as an aid to interpreting the treaty.”

255. In addition, it should be recalled that an interpretative declaration is also a unilateral declaration expressing its author’s intention to accept a certain interpretation of the treaty or of its provisions. Accordingly, although the declaration in itself does not create rights and obligations for its author or for the other parties to the treaty, it may prevent its author from taking a position contrary to that expressed in its declaration. It does not matter whether or not this phenomenon is called estoppel;⁴¹⁶ in any case it is a corollary of the principle of good faith,⁴¹⁷ in the sense that, in its international relations, a State cannot “blow hot and cold”. It cannot declare that it interprets a given provision of the treaty in one way and then take the opposite position before a judge or international arbitrator.⁴¹⁸

⁴¹⁶ As Judge Alfaro had explained in the important separate opinion in the *Temple of Preah Vihear (Cambodia v. Thailand)* case, “[w]hatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consilium suum in alterius injuriam*). ... Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*)” (*I.C.J. Reports 1962*, p. 40). See also the Judgments of 12 July 1929, *Serbian loans*, P.C.I.J., Series A, No. 20, pp. 38–39; 20 February 1969 (*North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*), *I.C.J. Reports 1969*, p. 26, para. 30; 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, *I.C.J. Reports 1984*, p. 415, para. 51; or 13 September 1990, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application by Nicaragua for Permission to Intervene*, *I.C.J. Reports 1990*, p. 118, para. 63.

⁴¹⁷ See the judgment of 12 October 1984, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *I.C.J. Reports 1984*, p. 305, para. 130. The doctrine is in agreement on this point. Thus, as Bowett explained more than a half-century ago, the *raison d’être* of estoppel lies in the principle of good faith: “The basis of the rule is the general principle of good faith and as such finds a place in many systems of law” (“Estoppel before international tribunals and its relation to acquiescence”, p. 176 (footnotes omitted)). See also Crawford and Pellet, “Aspects des modes continentaux et anglo-saxons de plaidoiries devant la C.I.J.”, pp. 831–867.

⁴¹⁸ See the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted in 2006 by the Commission, principle 10: “A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to: “... (b) The extent to which those to

256. It cannot be deduced from the above that the author of an interpretative declaration is bound by the interpretation it puts forward—which might ultimately prove unfounded. The validity of the interpretation depends on other circumstances and can be assessed only under the rules governing the interpretation process. In this context, Bowett presents a sound analysis:

The estoppel rests on the representation of fact, whereas the conduct of the parties in construing their respective rights and duties does not appear as a representation of fact so much as a representation of law. The interpretation of rights and duties of parties to a treaty, however, should lie ultimately with an impartial international tribunal and it would be wrong to allow the conduct of the parties in interpreting these rights and duties to become a binding interpretation on them.⁴¹⁹

257. Nonetheless, the author of an interpretative declaration, by formulating an interpretation in a given sense, has created an expectation in the other contracting parties, who, acting in good faith, may take cognizance of and place confidence in it.⁴²⁰ The author of an interpretative declaration may not, therefore, change its position at will, as long as its declaration has not been withdrawn or modified. Indeed, under guidelines 2.4.9 (Modification of an interpretative declaration)⁴²¹ and 2.5.12 (Withdrawal of an interpretative declaration),⁴²² the author of an interpretative declaration is free to modify or withdraw it at any time.

258. Like the author of an interpretative declaration, any State or international organization that approves this declaration must also refrain from invoking, in respect of the author of the declaration, a different interpretation.

259. In view of the foregoing, it would be appropriate to insert a guideline 4.7.2 into the Guide to Practice in order to take into account this opposability of an interpretative declaration in respect of its author:

“4.7.2 Validity of an interpretative declaration in respect of its author

“The author of an interpretative declaration or a State or international organization having approved it may not invoke an interpretation contrary to that put forward in the declaration.”

260. Because of the very nature of the operation of interpretation—which is a process,⁴²³ an art rather than an exact science⁴²⁴—it is not possible in a general and abstract

whom the obligations are owed have relied on such obligations...” *Yearbook ... 2006*, vol. II (Part Two), p. 161.

⁴¹⁹ Bowett, “Estoppel before international tribunals and its relation to acquiescence”, p. 189. See also McRae (footnote 404 above), p. 168.

⁴²⁰ See Heymann (footnote 404 above), p. 142.

⁴²¹ This guideline reads as follows: “Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time” (*Yearbook ... 2004*, vol. II (Part Two), p. 108).

⁴²² This guideline reads as follows: “An interpretative declaration may be withdrawn at any time, following the same procedure applicable to its formulation, by the authorities competent for that purpose” (*ibid.*, p. 109).

⁴²³ A “logico-intellective” operation, according to Rosario Sapienza, “Les déclarations interprétatives unilatérales et l’interprétation des traités”, p. 623.

⁴²⁴ See *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, pp. 28–29, paras. 140 and 141.

manner to determine the value of an interpretation other than by referring to the “general rule of interpretation” which is set out in article 31 of the Vienna Conventions and which cannot be called into question or “revisited” in the context of the present exercise. Therefore, in the present study, any research must necessarily be limited to the question of the authority of a proposed interpretation in an interpretative declaration and the question of its probative value for any third party interpreter, that is, its place and role in the process of interpretation.

261. With regard to the first question—the authority of the interpretation proposed by the author of an interpretative declaration—it should be remembered that, according to the definition of interpretative declarations, they are unilateral statements.⁴²⁵ The interpretation which such a statement proposes, therefore, is itself only a unilateral interpretation which, as such, has no particular value and certainly cannot, as such, bind the other parties to the treaty. This common-sense principle was affirmed as far back as Vattel:

Neither the one nor the other of the parties interested in the contract has a right to interpret the deed or treaty according to his own fancy.⁴²⁶

During the discussion on draft article 70 (which became article 31) containing the general rule of interpretation, Mr. Rosenne expressed the view

that a situation might arise where, for instance, there might be a unilateral understanding on the meaning of a treaty by the United States Senate that was not always accepted by the other side. A purely unilateral interpretative statement of that kind made in connexion with the conclusion of a treaty could not bind the parties.⁴²⁷

262. The Appellate Body of the Dispute Settlement Body of the World Trade Organization has expressed the same idea:

The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined “expectations” of *one* of the parties to a treaty.⁴²⁸

263. Since the declaration expresses only the unilateral intention of the author—or, if it has been approved by certain parties to the treaty, at best a shared intention⁴²⁹—it certainly cannot be given an objective value that is applicable *erga omnes*, much less the value of an authentic interpretation accepted by all parties.⁴³⁰ Although it does

⁴²⁵ *Yearbook ... 1999*, vol. II (Part Two), p. 97.

⁴²⁶ *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, p. 462, para. 265.

⁴²⁷ *Yearbook ... 1964*, vol. I, 769th meeting, p. 313, para. 52.

⁴²⁸ Decision of 5 June 1998, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62-67-68/AB/R, para. 84 (also available on the World Trade Organization website: http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm, accessed 31 March 2015).

⁴²⁹ Heymann (footnote 404 above), p. 135, has explained in this regard: “If a mere interpretative declaration is accepted by only some of the contracting parties, the shared interpretation does not constitute an autonomous factor in interpretation within the meaning of the Vienna Convention on the Law of Treaties. This is because, when the treaty is interpreted, the intentions of the parties must be taken into account while the shared interpretation expresses only the will of a more or less large group of the contracting parties.”

⁴³⁰ On this case, see paragraphs 277–282 below.

not determine the meaning to be given to the terms of the treaty, it nonetheless affects the process of interpretation to some extent.

264. However, it is difficult to determine precisely on what basis an interpretative declaration would be considered a factor in interpretation under articles 31 and 32 of the Vienna Conventions. An element of doubt about the question was raised in a particularly careful manner as far back as Sir Humphrey:

Statements of interpretation were not dealt with by the Commission in the present action for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties. In short, they appear rather to fall under articles 69–71. These articles provide that the “context of the treaty, for the purposes of its interpretation”, is to be understood as comprising “any agreement or instrument related to the treaty and reached or drawn up in connexion with its conclusion” (article 69, paragraph 2); that “any agreement between the parties regarding the interpretation of the treaty” and “any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation” are to be taken into account “together with the context” of the treaty for the purposes of its interpretation (article 69, paragraph 3); that as “further means of interpretation” recourse may be had, *inter alia*, to the “preparatory work of the treaty and the circumstances of its conclusion” (article 70); and that a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning. Any of these provisions may come into play in appreciating the legal effect of an interpretative declaration in a given case. ... In the view of the Special Rapporteur the Commission was entirely correct in deciding that the matter belongs under articles 69–71 rather than under the present section.⁴³¹

265. Whether interpretative declarations are regarded as one of the elements to be taken into consideration for the interpretation of the treaty essentially depends on the context of the declaration and the assent of the other States parties. But it is particularly noteworthy that, in 1966, the Special Rapporteur very clearly refused to include unilateral declarations or agreements *inter partes* in this “context”, even though the United States had suggested doing so by means of an amendment. The Special Rapporteur explained that only a degree of assent by the other parties to the treaty would have made it possible to include declarations or agreements *inter partes* in the interpretative context:

As to the substance of paragraph 2, ... the suggestion of the United States Government that it should be made clear whether the “context” includes (1) a unilateral document and (2) a document on which several but not all of the parties to a multilateral instrument have agreed raises problems both of substance and of drafting which the Commission was aware of in 1964 but did not find it easy to solve at the sixteenth session. ... But it would seem clear on principle that a unilateral document cannot be regarded as part of the “context” for the purpose of interpreting a treaty, unless its relevance for the interpretation of the treaty or for determining the conditions of the particular State’s acceptance of the treaty is acquiesced in by the other parties. Similarly, in the case of a document emanating from a group of the parties to a multilateral treaty, principle would seem to indicate that the relevance of the document in connexion with the treaty must be acquiesced in by the other parties. Whether a “unilateral” or a “group” document forms part of the context depends on the particular circumstances of each case, and the Special Rapporteur does not think it advisable that the Commission should try to do more than state the essential point of the principle—the need for express or implied assent.⁴³²

266. Mr. Sapienza also concludes that interpretative declarations which have not been approved by the other

parties do not fall under article 31, paragraph 2 (b), of the Vienna Conventions:

First, it could be asked what meaning should be given to the phrase “accepted by the other parties as an instrument related to the treaty”. Does it mean that the assent of the other parties should be limited to the fact that the instrument in question could be considered to be related to the treaty or, rather, should it also cover the content of the interpretation? It seems that, in fact, the alternative should not be considered, since paragraph 2 states that the instruments in question will be taken into account “for the purpose of the interpretation”. Consequently, acceptance by the other parties of the instruments referred to in subparagraph (b) can only be consent to the use of the interpretation contained in the declaration for the reconstruction of the normative content of the treaty provisions in question, even with respect to other States.⁴³³

267. Nonetheless, although at first glance such interpretative declarations do not seem to fall under articles 31 and 32 of the Vienna Conventions, they still constitute the (unilateral) expression of the intention of one of the parties to the treaty and may, on that basis, play a role in the process of interpretation.

268. In its advisory opinion on the *International status of South-West Africa*, ICJ noted, on the subject of the declarations of the Union of South Africa regarding its international obligations under the Mandate:

These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court.⁴³⁴

269. The Court thus specified that declarations by States relating to their international obligations have “probative value” for the interpretation of the terms of the legal instruments to which they relate, but that they corroborate or “support” an interpretation that has already been determined by other methods. In this sense, an interpretative declaration may therefore confirm an interpretation that is based on the objective factors listed in articles 31 and 32 of the Vienna Conventions.

270. In *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*,⁴³⁵ the Court again had to make a determination as to the value of an interpretative declaration. In signing and ratifying the United Nations Convention on the Law of the Sea, Romania formulated the following interpretative declaration:

Romania states that according to the requirements of equity as it results from Articles 74 and 83 of the Convention on the Law of the Sea, the uninhabited islands without economic life can in no way affect the delimitation of the maritime spaces belonging to the mainland coasts of the coastal States.⁴³⁶

In its judgment, however, the Court paid little attention to the Romanian declaration, merely noting the following:

⁴³³ Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali*, pp. 239–240. See also Jennings and Watts, eds., *Oppenheim’s International Law*, p. 1268 (“An interpretation agreed between some only of the parties to a multilateral treaty may, however, not be conclusive, since the interests and intentions of the other parties may have to be taken into consideration”).

⁴³⁴ *I.C.J. Reports 1950*, pp. 135–136.

⁴³⁵ Judgment, *I.C.J. Reports 2009*, p. 61.

⁴³⁶ *Multilateral Treaties...* (footnote 35 above), chap. XXI.6.

⁴³¹ *Yearbook ... 1965*, vol. II, p. 49, para. 2 (observations of the Special Rapporteur on draft articles 18, 19 and 20).

⁴³² *Yearbook ... 1966*, vol. II, p. 98, para. 16.

Finally, regarding Romania's declaration..., the Court observes that under Article 310 of the United Nations Convention on the Law of the Sea, a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of the United Nations Convention on the Law of the Sea in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of United Nations Convention on the Law of the Sea as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania's declaration as such has no bearing on the Court's interpretation.⁴³⁷

271. The wording is radical and seems to call into question whether interpretative declarations are relevant at all. It seems to suggest that the declaration has "no bearing" on the interpretation of the provisions of the United Nations Convention on the Law of the Sea that the Court has been asked to give. Such a radical remark is qualified, however, by the use of the expression "as such": while the Court does not consider itself bound by the unilateral interpretation proposed by Romania, that does not preclude the unilateral interpretation from having an effect as a means of proof or a piece of information that might corroborate the Court's interpretation "in accordance with Article 31 of the Vienna Convention on the Law of Treaties".

272. The European Court of Human Rights took a similar approach. After the European Commission of Human Rights, which had already affirmed that an interpretative declaration "may be taken into account when an article of the Convention is being interpreted",⁴³⁸ the Court chose to take the same approach in the case of *Krombach v. France*: interpretative declarations may confirm an interpretation derived on the basis of sound practice. Thus, in order to respond to the question of knowing whether the higher court in a criminal case may be limited to a review of points of law, the Court first examined State practice, then its own jurisprudence, in the matter and ultimately cited a French interpretative declaration:

The Court reiterates that the Contracting States dispose in principle of a wide margin of appreciation to determine how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. Thus, the review by a higher court of a conviction or sentence may concern both points of fact and points of law or be confined solely to points of law. Furthermore, in certain countries, a defendant wishing to appeal may sometimes be required to seek permission to do so. However, any restrictions contained in domestic legislation on the right to a review mentioned in that provision must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right (see *Haser v. Switzerland* (dec.), No. 33050/96, 27 April 2000, unreported). This rule is in itself consistent with the exception authorised by paragraph 2 of Article 2 and is backed up by the French declaration regarding the interpretation of the Article, which reads: "... in accordance with the meaning of Article 2, paragraph 1, the review by a higher court may be limited to a control of the application of the law, such as an appeal to the Supreme Court".⁴³⁹

273. States also put forward their interpretative declarations on those grounds. Thus, the argument by the Agent for the United States in *Legality of Use of Force (Yugoslavia v. United States of America)* was tangentially based on the interpretative declaration made by the United States in order to demonstrate that the *mens rea specialis* is a *sine qua non* element of the qualification of genocide:

[T]he need for a demonstration in such circumstances of the specific intent required by the Convention was made abundantly clear by the United States Understanding at the time of the United States ratification of the Convention. That Understanding provided that "acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention". The Socialist Federal Republic of Yugoslavia did not object to this Understanding, and the Applicant made no attempt here to take issue with it.⁴⁴⁰

274. It is therefore clear from practice and doctrinal analyses that interpretative declarations come into play only as an auxiliary or complementary means of interpretation corroborating a meaning given by the terms of the treaty, considered in the light of its object and purpose. As such, they do not produce an autonomous effect: when they have an effect at all, interpretative declarations are associated with another instrument of interpretation, which they usually uphold.

275. The interpreter can thus rely on interpretative declarations to confirm his conclusions regarding the interpretation of a treaty or a provision of it. Interpretative declarations constitute the expression of a subjective element of interpretation—the intention of one of the States parties—and, as such, may confirm "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". In that same vein, the reactions that may have been expressed with regard to the interpretative declaration by the other parties—all of them potential interpreters of the treaty as well—should also be taken into consideration. An interpretative declaration that was approved by one or more States certainly has greater value as evidence of the intention of the parties than an interpretative declaration to which there has been an opposition.⁴⁴¹

276. This "confirming" effect of the interpretative declarations is the subject of guideline 4.7.1, which reads as follows:

4.7.1 Clarification of the terms of the treaty by an interpretative declaration

"An interpretative declaration may serve to elucidate the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose in accordance with the general rule of interpretation of treaties.

"In determining how much weight should be given to an interpretative declaration in the interpretation of the treaty, approval of and opposition to it by the other contracting States and contracting organization shall be duly taken into account."

277. Acquiescence to an interpretative declaration by the other parties to the treaty, however, radically alters the situation. Thus, Sir Humphrey recalled that the Commission:

agreed that the relevance of statements of the parties for purposes of interpretation depended on whether they constituted an indication of

⁴³⁷ *I.C.J. Reports 2009*, p. 78, para. 42.

⁴³⁸ See footnote 403 above.

⁴³⁹ Application No. 29731/9, judgement of 13 February 2001, para. 96.

⁴⁴⁰ *I.C.J. Pleadings, Legality of Use of Force (Yugoslavia v. United States of America)*, CR 99/35, 12 May 1999 (Mr. Andrews).

⁴⁴¹ McRae (footnote 404 above), pp. 169–170.

common agreement by the parties. Acquiescence by the other parties was essential.⁴⁴²

278. Unanimous agreement by all the parties constitutes a genuine interpretative agreement which represents the will of the “masters of the treaty” and thus an authentic interpretation.⁴⁴³ One example is the unanimous approval by the contracting States to the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) of the interpretative declaration of the United States of America concerning the right to self-defence.⁴⁴⁴

279. In this case, it is still just as difficult to determine whether the interpretative agreement is part of the internal context of the treaty (art. 31, para. 2 of the Vienna Conventions) or the external context (art. 31, para. 3) of the treaty. The fact is that everything depends on the circumstances in which the declaration was formulated and in which it was approved by the other parties. Indeed, in a case where a declaration is made before the signature of the treaty and approved when (or before) all the parties have expressed their consent to be bound by it, the declaration and its unanimous approval, combined, give the appearance of an interpretative agreement that could be construed as being an “agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty” within the meaning of article 31, paragraph 2 (a), or as “any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty” within the meaning of article 31, paragraph 2 (b), of that same article. If, however, the interpretative agreement is reached only once the treaty has been concluded, a question might arise as to whether it is merely a “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” within the meaning of article 31, paragraph 3 (b), or if, by virtue of their formal nature, the declaration and unanimous approval combined constitute a veritable “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”.⁴⁴⁵

⁴⁴² *Yearbook ... 1966*, vol. I (Part I), 829th meeting, p. 47, para. 53. See also Kolb, *Interpretation et création du droit international*, p. 609.

⁴⁴³ See footnote 406 above. See also Heymann (footnote 404 above), pp. 130–135; Voicu, *De l'interprétation authentique des traités internationaux*, p. 134 or Herdegen, “Interpretation in international law”, para. 34.

⁴⁴⁴ “Notes between the United States and other powers”, *AJIL, Supplement*, vol. 23, 1929, pp. 1–13.

⁴⁴⁵ In this regard, see, in particular, Heymann (footnote 404 above), p. 130.

280. Without really coming to a decision on the matter, the Commission wrote in its commentary to article 27 (which has become article 31), paragraph 3 (a), of its draft articles:

A question of fact may sometimes arise as to whether an understanding reached during the negotiations concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation. But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty. Thus, in the *Ambatielos* case the Court said: “... the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty ...”. Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.⁴⁴⁶

281. The fact remains, however, that an agreement between the parties as to the interpretation of the treaty must be taken into account together with the text.

282. Guideline 4.7.3 recognizes this practice of interpretative declarations approved by all the parties to the treaty:

“4.7.3 Effects of an interpretative declaration approved by all the contracting States and contracting organizations

“An interpretative declaration that has been approved by all the contracting States and contracting organizations constitutes an agreement regarding the interpretation of the treaty.”

283. Even in instances where unanimous agreement on an interpretative declaration is not certain, the interpretative declaration does not lose all significance. Since it might well constitute the basis for agreement on the interpretation of the treaty, it could also preclude such an agreement from being made.⁴⁴⁷ In this connection, Professor McRae noted:

The “mere interpretative declaration” serves notice of the position to be taken by the declaring State and may herald a potential dispute between that State and other contracting parties.⁴⁴⁸

⁴⁴⁶ *Yearbook ... 1966*, vol. II, p. 221, para. (14) of the commentary. For the *Ambatielos* case (Preliminary Objection), see *I.C.J. Reports 1952*, p. 44.

⁴⁴⁷ Heymann, (footnote 404 above), p. 129.

⁴⁴⁸ McRae, (footnote 404 above), p. 160–161.

RESERVATIONS TO TREATIES

[Agenda item 3]

Document A/CN.4/626 and Add.1

Sixteenth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur

[Original: French]
[19 March and 17 May 2010]

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Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	<i>Ibid.</i> , vol. 78, No. 1021, p. 277.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	<i>Ibid.</i> , vol. 75, No. 970–973, p. 31.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, No. 2545, p. 137.

Source

Protocol relating to the Status of Refugees (New York, 31 January 1967)	<i>Ibid.</i> , vol. 606, No. 8791, p. 267.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	<i>Ibid.</i> , vol. 360, No. 5158, p. 117.
Convention on the Continental Shelf (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 499, No. 7302, p. 311.
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Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 516, No. 7477, p. 205.
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Status of reservations, acceptances of and objections to reservations and interpretative declarations in the case of succession of States

Introduction

1. In accordance with the intention announced by the Special Rapporteur in his fourteenth report on reservations to treaties,¹ the present report addresses the issue of reservations to treaties and objections to reservations in relation to the succession of States. In line with the general plan of the study which the Special Rapporteur proposed in his second report² and has followed consistently ever since, the relevant guidelines should constitute the fifth and final chapter³ of the Guide to Practice.

2. The present report closely reflects the line of reasoning set forth in the Secretariat's very valuable memorandum of 2009 on reservations to treaties in the context of succession of States.⁴ It was impossible to refer systematically in footnotes to this Secretariat study, which in a manner of speaking is the original report on which the present text is based.

3. Taking into account the (few) rules on reservations contained in the Vienna Convention on Succession of States in respect of Treaties (hereinafter "the 1978 Vienna Convention"), the elements of practice identified in the aforementioned memorandum by the Secretariat⁵ and the considerations set forth therein, it seems appropriate to consider including in the Guide to Practice some guidelines concerning the problems posed by reservations, acceptances of reservations and objections to reservations in the context of succession of States.

4. The adoption of guidelines in this area is all the more important given that:

(a) The Vienna Convention on the Law of Treaties (hereinafter "the 1969 Vienna Convention") and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "the 1986 Vienna Convention") have no provisions on this subject except a safeguard clause, which, by definition, gives no indication as to the applicable rules;⁶

(b) The 1978 Vienna Convention contains only one provision on reservations (article 20), which is worded as follows:

Article 20. Reservations

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 17 or 18, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 17 or 18, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of article 19 of the Vienna Convention on the Law of Treaties.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20 to 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation.

(c) Also, as noted in the first report on reservations:⁷

132. Article 20 of the 1978 Vienna Convention scarcely deals with, much less solves, potential problems arising in connection with reservations in the case of succession of States.

133. First, it should be noted that the article is contained in Part III of the Convention, which deals with "newly independent States"; it therefore applies in the case of the decolonization or dissolution of States,^[8] whereas the question of the rules applicable in the case of the succession of a State in respect of part of a territory, the uniting of a State or the separation of a State is left aside completely...

134. Secondly, while article 20, paragraph 1, provides for the possible formulation of new reservations by the new State and while the effect of paragraph 3 is that third States may formulate objections in that event, it fails to stipulate whether the latter can object to a reservation being maintained...

135. Lastly, and this is a serious lacuna, article 20 of the 1978 Vienna Convention makes no reference whatever to succession in respect of objections to reservations—whereas the initial proposals of Sir Humphrey Waldock did deal with this point—and the reasons for this omission are not clear.¹⁷²

¹⁷² See Imbert, *Les réserves aux traités multilatéraux ...*, pp. 318–322.

5. In consequence, some of the guidelines proposed herein reflect the current state of positive international

⁷ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 147–148, paras. 132–135; see also pp. 136–137, paras. 62–71, and the second report, *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, p. 50, para. 46, as well as the memorandum by the Secretariat (see footnote 4 above), p. 3, paras. 1–2.

⁸ As the 1978 Vienna Convention—unlike the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, article 31—does not address the "dissolution of a State", and the present report does not explore particular forms of succession, it would probably be of little use to discuss whether States resulting from dissolution—which are "new States" but not "newly independent States" within the meaning of the 1978 Vienna Convention—may be likened to newly independent States.

¹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, p. 65, para. 65.

² *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, pp. 48–49, para. 37.

³ With the exception of two annexes concerning the reservations dialogue and the settlement of disputes, respectively.

⁴ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/616. The Special Rapporteur is grateful to the Secretariat staff who contributed to the preparation of this excellent study under the supervision of Mr. Václav Mikulka, Mr. George Korontzis and Mr. Gionata Buzzini.

⁵ *Ibid.*

⁶ Art. 73 of the 1969 Vienna Convention is worded thus: "The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States ...". A similar safeguard clause appears in art. 74, para. 1, of the 1986 Vienna Convention.

law on the subject, while others represent the progressive development of international law or are intended to offer logical solutions to problems to which neither the 1978 Vienna Convention nor the relevant practice seems to have provided clear answers thus far. In any event, as is generally the case, it is often difficult if not impossible to make a clear distinction between proposals that come under the heading of codification *stricto sensu*, on the one hand, and proposals aimed at progressive development, on the other.

6. At the same time, no attempt is made in the present report to call into question the rules and principles set out in the 1978 Vienna Convention. In particular, it relies on the definition of succession of States given in that instrument.⁹ More generally, the guidelines proposed herein use the same terminology as the 1978 Vienna Convention, attribute the same meaning to the terms and expressions used in that Convention and defined in its article 2 and are based, where applicable, on the distinctions made in that instrument among the various forms of succession of States:

(a) “Succession in respect of part of territory” (art. 15);

(b) “Newly independent States” (art. 2, para. 1 (f), and arts. 16 *et seq.*);

(c) “Newly independent States formed from two or more territories” (art. 30);

(d) “Uniting of States” (arts. 31–33); and

(e) “Separation of parts of a State” (arts. 34–37).

7. Furthermore, the Special Rapporteur has started from the initial premise that the question of the succession of a State to a treaty has been settled as a preliminary issue. This is the implication of the word “when”, which begins

⁹ Art. 2, para. 1 (b): “‘succession of States’ means the replacement of one State by another in the responsibility for the international relations of territory”; see also art. 2, para. 1 (a), of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, or art. 2 (a) of the articles on the nationality of natural persons in relation to the succession of States annexed to General Assembly resolution 55/153 of 12 December 2000.

several of the guidelines proposed herein and refers to concepts that are considered settled and need not be revisited by the Commission in the context of the present exercise. By this logic, then, the point of departure is that a successor State has the status of a contracting State or State party to a treaty as a consequence of the succession of States, not because it has expressed its consent to be bound by the treaty within the meaning of article 11 of the 1969 Vienna Convention,¹⁰ with no need to ascertain whether this situation has arisen by virtue of and in accordance with the rules laid down in the 1978 Vienna Convention or other rules of international law.

8. Lastly, like the 1978 Vienna Convention,¹¹ these guidelines concern only reservations formulated by a predecessor State that was a *contracting State* or *State party* to the treaty in question as of the date of the succession of States. They do not deal with reservations formulated by a predecessor State that had only signed the treaty subject to ratification, acceptance or approval, without having completed the relevant action prior to the date of the succession of States. Reservations of this second kind cannot be considered as being maintained by the successor State because they did not, at the date of the succession of States, produce any legal effects, not having been formally confirmed by the State in question when expressing its consent to be bound by the treaty, as required by article 23, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties.¹²

9. In the light of these general remarks, the following issues should be considered in turn:

(a) The status of reservations in the case of succession of States;

(b) The status of acceptances of and objections to reservations in the case of succession of States; and

(c) The status of interpretative declarations.

¹⁰ “The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”

¹¹ See art. 20.

¹² See guideline 2.2.1 and the commentary thereto in *Yearbook ... 2001*, vol. II (Part Two), pp. 180–183.

CHAPTER I

Status of reservations to treaties in the case of succession of States

10. As indicated above, article 20 of the 1978 Vienna Convention deals only with situations in which a newly independent State wishes to establish its status as a party or as a contracting State to a multilateral treaty. The term “newly independent State”, according to the definition set out in article 2, paragraph 1 (f), of the Convention, means “... a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible”. Thus, the rules on reservations provided for in the 1978 Vienna Convention

cover only cases of succession in which a State gains independence as a result of a decolonization process.¹³ This provision, which appears in part III of the Convention, entitled “Newly independent States”, not only leaves situations involving the uniting and separation of States (the subject of part IV) unaddressed, but also requires clarification as to the territorial and temporal scope of the reservations in question.

¹³ See paragraph 4 above or the memorandum by the Secretariat (footnote 4 above).

A. General principles

11. The origin of article 20 of the 1978 Vienna Convention¹⁴ dates back to a proposal put forward in the third report of Sir Humphrey Waldock on succession in respect of treaties.¹⁵ The report contained a draft article 9 on “Succession in respect of reservations to multilateral treaties”, its purpose being to determine the position of the successor State in regard to reservations, acceptances and objections. After referring to certain “logical principles” and noting that the still developing practice of depositaries was not wholly consistent with them, the Special Rapporteur concluded “that a flexible and pragmatic approach to the problem of succession in respect of reservations is to be preferred”.¹⁶ Accordingly, he proposed that rules should be adopted to reflect:

(a) A presumption in favour of succession to the reservations of the predecessor State unless the successor State has expressed a contrary intention or unless, by reason of its object and purpose, the reservation is appropriate only to the predecessor State (art. 9, para. 1);

(b) The possibility for the successor State to formulate new reservations, in which case (i) the successor State is considered to have withdrawn any different reservations made by the predecessor State; and (ii) the provisions of the treaty itself and of the 1969 Vienna Convention apply to the reservations of the successor State (para. 2);

(c) The application of these rules, *mutatis mutandis*, to objections to reservations (para. 3 (a)), although, “in cases falling under Article 20, paragraph 2, of the Vienna Convention no objection may be formulated by a successor State to a reservation which has been accepted by all the parties” (para. 3 (b)).¹⁷

12. The proposals were examined only in 1972 and did not give rise to very lively discussions.¹⁸ The Commission endorsed the pragmatic and flexible approach to the treatment of reservations and objections recommended by its Special Rapporteur. Apart from drafting changes, it made only one really substantive amendment to his draft: draft article 15 (which replaced draft article 9), paragraph 1 (a), stipulated that only a reservation “incompatible” with that of the predecessor State on the same subject (and no longer a “different” reservation) replaced it.¹⁹

13. However, in his first report in 1974, Sir Francis Vallat, who had been appointed Special Rapporteur, endorsed a proposal made by Zambia and the United Kingdom and returned it not to the letter at least to the spirit of Sir Humphrey Waldock’s proposal, though he described the change in question as minor, by removing the “incompatibility”

test and providing only that a reservation of the predecessor State is not maintained if the successor State formulates a reservation relating to the same subject matter.²⁰ Subject to a further drafting change, the Commission agreed with him on that point.²¹ However, the text emerged from its consideration in the Drafting Committee somewhat “pruned”.²² In particular, paragraph 3 (b) of draft article 9,²³ which, it was rightly said, dealt with the general law applicable to reservations and was not concerned with a problem specific to State succession, was deleted.

14. On the other hand, it is interesting to note that the Special Rapporteur did not take up two other sets of proposals put forward with some insistence by a few States, namely, proposals made, *inter alia*, by Australia, Belgium, Canada and Poland to reverse the presumption (of continuity) in paragraph 1, and the wish expressed by Poland for an express provision that the successor State would not automatically succeed to the objections of the predecessor State to reservations formulated by third States.²⁴ The Commission did not endorse those suggestions either.²⁵

15. This provision gave rise to little discussion at the United Nations Conference on Succession of States in Respect of Treaties, which met in Vienna from 4 April to 6 May 1977 and from 31 July to 23 August 1978. Even though some States again proposed that the presumption in draft article 19, paragraph 1, should be reversed under the “clean slate” principle,²⁶ the Committee of the Whole, and then the Conference itself, approved the article on reservations (which later became article 20) as proposed by the Commission, apart from some very minor drafting adjustments,²⁷ and the presumption in favour of the maintenance of reservations was reflected in the final text of article 20 as adopted at the Conference.

²⁰ *Yearbook... 1974*, vol. II (Part One) p. 54, para. 287.

²¹ *Ibid.*, pp. 222–227 (art. 19).

²² *Ibid.*, vol. I, 1272nd meeting, pp. 112–118, and 1293rd meeting, pp. 238–245.

²³ See para. 11 above.

²⁴ *Yearbook ... 1974*, vol. II (Part One), pp. 52–54, paras. 278–286 and 289.

²⁵ *Yearbook ... 1974*, vol. I, 1272nd meeting, p. 117, and *ibid.*, vol. II (Part One), p. 226.

²⁶ *Official Records of the United Nations Conference on Succession of States in Respect of Treaties, 1977 session and resumed session 1978, Vienna, 4 April–6 May 1977 and 31 July–23 August 1978*, vol. III, *Documents of the Conference* (A/CONF.80/16/Add.2, United Nations publication, Sales No. E.79.V.10), pp. 115–116. See also the analytical compilation of comments of Governments on the final draft articles on succession of States in respect of treaties, prepared by the Secretariat (A/CONF.80/5 and Corr.1, pp. 225–228). Thus, for example, at the United Nations Conference on Succession of States in Respect of Treaties, the United Republic of Tanzania proposed an amendment reversing the presumption in favour of the maintenance of reservations formulated by the predecessor State and providing that the successor State was considered to have withdrawn reservations formulated by the predecessor State unless it expressed a contrary intention. That amendment was rejected by 26 votes to 14, with 41 abstentions (*ibid.*, *First Session, Vienna, 4 April–6 May 1977*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.80/16, United Nations publication, Sales No. E.78.V.8), 28th meeting of the Committee of the Whole, p. 199, paras. 37 and 41.

²⁷ *Ibid.*, *resumed session, Vienna, 31 July–23 August 1978*, vol. II, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, A/CONF.80/16/Add.1 (United Nations publication, Sales No. E.79.V.9), 35th meeting, para. 23.

¹⁴ The discussion that follows is largely a synthesis of the considerations contained in the first report of the Special Rapporteur on reservations (*Yearbook ... 1995*, vol. II (Part One), pp. 136–137, paras. 62–71) and the above-mentioned Secretariat study (footnote 4 above), paras. 9–27.

¹⁵ *Yearbook... 1970*, vol. II, p. 25.

¹⁶ *Ibid.*, pp. 47 and 50, paras. (2) and (11) of the commentary.

¹⁷ *Ibid.*, p. 47.

¹⁸ See *Yearbook... 1972*, vol. I, 1166th, 1167th and 1187th meetings, pp. 86–99 and 211–217.

¹⁹ *Ibid.*, vol. II, p. 260.

16. The presumption in favour of the maintenance of reservations formulated by the predecessor State had been proposed by D. P. O'Connell, Rapporteur of the International Law Association on the subject of "the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors",²⁸ one year before Sir Humphrey Waldock endorsed the concept.²⁹ It is based on a concern for respecting the actual intention of the successor State by avoiding the creation of an irreversible situation:

[I]f a presumption in favour of maintaining reservations were not to be made, the actual intention of the successor State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the successor State's intention, the latter could always redress the matter by withdrawing the reservations.³⁰

17. This solution is not self-evident and has been criticized in the literature. For example, according to Imbert, "... there is no reason to think that the State would not study the text of the convention carefully enough to know exactly which reservations it wished to maintain, abandon or formulate".³¹ This author cast doubt in particular on the assumption that the predecessor State's reservations would be

necessarily advantageous to the newly independent State.... since reservations constitute derogations from or limitations on a State's commitments, they should not be a matter of presumption. On the contrary, it makes more sense to assume that, in the absence of a formal statement of its intention, a State is bound by the treaty as a whole.³²

18. The commentary to draft article 19 as finally adopted by the Commission nonetheless puts forward some convincing arguments supporting the presumption in favour of the maintenance of reservations formulated by the predecessor State:

First, the presumption of an intention to maintain the reservations was indicated by the very concept of succession to the predecessor's treaties. Secondly, a State is in general not to be understood as having undertaken more onerous obligations unless it has unmistakably indicated an intention to do so; and to treat a newly independent State, on the basis of its mere silence, as having dropped its predecessor's reservations would be to impose upon it a more onerous obligation. Thirdly, if presumption in favour of maintaining reservations were not to be made, the actual intention of the newly independent State might

²⁸ "Additional point" No. 10 proposed in the International Law Association, Buenos Aires Conference (1968), cited in *Yearbook... 1969*, vol. II, p. 49, para. 17: "A successor State can continue only the legal situation brought about as a result of its predecessor's signature or ratification. Since a reservation delimits that legal situation it follows that the treaty is succeeded to (if at all) with the reservation."

²⁹ See para. 11 above.

³⁰ *Yearbook ... 1970*, vol. II, p. 50, para. (12) of the commentary to art. 9; see also the elements of practice invoked in support of this solution, *ibid.*, pp. 47-49.

³¹ Imbert, *Les réserves aux traités multilatéraux*, p. 309.

³² *Ibid.*, p. 310. Imbert thus echoes the criticisms (see footnote 26 above) put forward at the United Nations Conference on Succession of States in Respect of Treaties by the United Republic of Tanzania, who expressed a preference for a "clean slate" in regard to reservations and pointed out that reservations formulated by the predecessor State were not necessarily in the interest of the successor State. *Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...*, vol. I (see footnote 26 above), 27th meeting of the Committee of the Whole, para. 79; see also 28th meeting of the Committee of the Whole, para. 37, and document A/CONF.80/14 (reproduced in vol. III; see footnote 26 above), para. 118 (c). A preference for the opposite presumption had also been expressed by other delegations; see vol. I, 28th meeting of the Committee of the Whole, para. 13 (Romania), para. 18 (India) and para. 33 (Kenya).

be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the newly independent State's intention, the latter could always redress the matter by withdrawing the reservations.³³

19. This seems to be the majority position in the literature, tending to support the presumption in favour of the maintenance of the predecessor State's reservations. Thus, explains D. P. O'Connell,

Since a State which makes a reservation to a multilateral convention commits itself only to the convention as so reserved, its successor State cannot, logically, succeed to the convention without reservations. Should the reservation be unacceptable to it the appropriate procedure would be to ask the depositary to remove it and notify all parties accordingly.³⁴

Similarly, Gaja takes the view that

The opinion that the predecessor State's reservations are maintained is also based on the reasonable assumption that when a newly independent State elects to become a party to a treaty by means of a notification of succession, in principle it wants the treaty to continue to be applied to its territory in the same way as it did before independence.³⁵

20. This presumption is inferred logically, since succession to a treaty by a newly independent State, though voluntary, is a true succession that must be distinguished from accession. Because it is a succession, it seems reasonable to presume that treaty obligations are transmitted to the successor State as modified by the reservation formulated by the predecessor State.

21. However, the presumption in favour of the maintenance of reservations formulated by the predecessor State is reversed, under article 20, paragraph 1, of the 1978 Vienna Convention, not only if a "contrary intention" is specifically expressed by the successor State when making the notification of succession, but also if that State formulates a reservation "which relates to the same subject matter" as the reservation formulated by the predecessor State. The exact wording of this second possibility was a subject of debate in the Commission when this provision was being drafted.

22. Sir Humphrey Waldock had proposed, in his third report on succession in respect of treaties, a different formulation that provided for the reversal of the presumption that the reservations of the predecessor State were maintained if the successor State formulated "reservations different from those applicable at the date of succession".³⁶ In its draft article 15 adopted on first reading in 1972, the Commission settled on a solution according to which the presumption that the reservations of the predecessor State were maintained was reversed if the successor State formulated a new reservation "which relates to the same subject matter and is incompatible with [the reservation formulated by the predecessor State]".³⁷

³³ *Yearbook ... 1974*, vol. II (Part One), p. 226, para. (17) of the commentary to art. 19.

³⁴ O'Connell, *State Succession in Municipal Law and International Law*, p. 229.

³⁵ Gaja, "Reservations to treaties and the newly independent States", p. 55. See also Ruda, "Reservations to treaties", p. 206; and Menon, "The newly independent States and succession in respect of treaties", p. 152.

³⁶ *Yearbook ... 1970*, vol. II, p. 47, art. 9, para. 1 (a).

³⁷ *Yearbook ... 1972*, vol. II, p. 260, art. 15, para. 1 (a).

23. The wording that was finally adopted by the Commission and reflected in the 1978 Vienna Convention has been criticized in the literature for omitting the test of “incompatibility” between a reservation formulated by the predecessor State and one formulated by the successor State.³⁸ Nonetheless, in accordance with Sir Francis Vallat’s proposal,³⁹ the Commission finally deleted this requirement from the final draft article for pragmatic reasons, which it explains in the commentary to the corresponding article adopted on second reading in 1974:

[T]he test of incompatibility for which the paragraph provided might be difficult to apply and ... if the newly independent State were to formulate a reservation relating to the same subject-matter as that of the reservation made by the predecessor State, it could reasonably be presumed to intend to withdraw that reservation.⁴⁰

24. While it may maintain—expressly or tacitly—reservations made by the predecessor State, a newly independent successor State is also empowered, under article 20, paragraph 2, of the 1978 Vienna Convention, to formulate reservations when making a notification of succession. This power is subject only to the general conditions laid down in article 19, subparagraphs (a), (b) and (c), of the 1969 Vienna Convention. Article 20, paragraph 3, of the 1978 Vienna Convention provides, further, that the rules set out in articles 20–23 of the 1969 Vienna Convention apply in respect of reservations formulated by a newly independent State when making a notification of succession.

25. In its commentary to draft article 19, the Commission noted that this power seemed to have been confirmed in practice.⁴¹ In support of this solution, Sir Humphrey Waldock, in his third report on succession in respect of treaties, based his views, *inter alia*, on the practice of the Secretary-General of the United Nations, who, on several occasions, had acknowledged that newly independent States have this power, without prompting any objections from States to this assumption.⁴² The second Special Rapporteur was also in favour, for “practical” reasons, of acknowledging the right of a newly independent State to make new reservations when notifying its succession.⁴³

26. The view of the two Special Rapporteurs prevailed in the Commission, which, as indicated in the commentary to draft article 19 as finally adopted, had a choice between two alternatives:

(a) to decline to regard any notification of succession made subject to new reservations as a true instrument of succession and to treat it in law as a case of accession, or (b) to accept it as having the character of a succession but at the same time apply to it the law governing reservations as if it were a wholly new expression of consent to be bound by the treaty.

Drawing upon the practice of the Secretary-General and wishing to take a “flexible” approach in this regard, the Commission opted for the second alternative, noting also that it might ease the access of a newly independent State

to a treaty that was not, “... for technical reasons, open to its participation by any other procedure than succession”.⁴⁴

27. At the United Nations Conference on Succession of States in Respect of Treaties, Austria challenged this solution—which, in purely logical terms, was somewhat incompatible with the preceding paragraph—and proposed the deletion of paragraphs 2 and 3 of the provision that would become article 20 of the 1978 Vienna Convention.⁴⁵ Austria contended that recognizing the capacity of a newly independent State to formulate new reservations when notifying its succession “seemed to be based on an erroneous concept of succession”⁴⁶ and that “[i]f a newly independent State wished to make reservations, it should use the ratification or accession procedure provided for becoming a party to a multilateral treaty”.⁴⁷ However, the amendment proposed by Austria was rejected by 39 votes to 4, with 36 abstentions.⁴⁸

28. Those States opposing the amendment of Austria at the United Nations Conference on Succession of States in Respect of Treaties put forth various arguments, including the desirability of ensuring that the newly independent State would “not be obliged to conform with more complicated ratification procedures than those provided for by the International Law Commission”,⁴⁹ the alleged incompatibility of the amendment of Austria with the principle of self-determination⁵⁰ or the principle of the “clean slate”,⁵¹ the need to be “realistic” rather than “puristic”,⁵² and the fact that a succession of States was not a “legal inheritance or a transmission of rights and obligations”.⁵³ Some authors have echoed these criticisms,⁵⁴ while others take the view that “the right to make reservations is not a right that is transmissible through inheritance, but a prerogative that is part of the set of supreme powers attributed by virtue of the protective principle to sovereign States” and that “the formal recognition of this capacity [on the part of a newly independent State] represents a

⁴⁴ *Ibid.*, p. 227, para. (20) of the commentary to draft article 19.

⁴⁵ *Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...*, vol. I (see footnote 26 above), A/CONF.80/16, 27th meeting of the Committee of the Whole, paras. 59–64.

⁴⁶ *Ibid.*, para. 60.

⁴⁷ *Ibid.* See also *ibid.*, 28th meeting of the Committee of the Whole, para. 30.

⁴⁸ *Ibid.*, para. 40.

⁴⁹ *Ibid.*, 27th meeting of the Committee of the Whole, para. 71 (Netherlands).

⁵⁰ *Ibid.*, para. 73 *in fine* (Algeria) and para. 89 (Guyana).

⁵¹ *Ibid.*, para. 85 (Madagascar).

⁵² *Ibid.*, para. 77 (Poland).

⁵³ *Ibid.*, 28th meeting of the Committee of the Whole, para. 7 (Israel). According to Israel, “[A] newly independent State [...] would simply have the right of option to establish itself as a separate party to the treaty in virtue of the legal nexus established by its predecessor. Its right was to notify its own consent to be considered as a separate party to the treaty; that was not a right to step into the predecessor’s shoes. The significance of article 19 was that a newly independent State should be ‘considered’ as maintaining its succession to the treaty. In other words, notification of succession was an independent act of the successor State’s own volition”.

⁵⁴ See Zemanek, “State succession after decolonization”, pp. 234–235; Gonçalves Pereira, *La succession d’États en matière de traité*, pp. 175–176, footnote 50; and Bokor-Szegö, *New States and International Law*, p. 100, cited by Gaja (footnote 35 above), p. 61, footnote 39.

³⁸ See Gaja (footnote 35 above), pp. 59–60.

³⁹ *Yearbook ... 1974*, vol. II (Part One), p. 54.

⁴⁰ *Ibid.*, p. 226, para. (18) of the commentary to art. 19.

⁴¹ *Ibid.*, pp. 224–225, paras. (7)–(12).

⁴² *Yearbook ... 1970*, vol. II, pp. 48–50.

⁴³ *Yearbook ... 1974*, vol. II (Part One), p. 54, paras. 291–294.

‘pragmatic’ solution that takes account of the ‘non-automatic’, i.e. voluntary, nature of succession to treaties on the part of newly independent States’.⁵⁵

29. In fact, the principles laid down in article 20 of the 1978 Vienna Convention are not overly rigid and are flexible enough to accommodate a wide variety of practices, as shown by a number of cases of succession to treaties deposited with the Secretary-General of the United Nations:

(a) In many cases, newly independent States have deposited a notification of succession to a particular treaty without making any mention of the question of reservations; in such cases, the Secretary-General has included the newly independent State in the list of States parties to the treaty concerned without passing judgement upon the status of reservations formulated by the predecessor State;⁵⁶

(b) Some newly independent States have expressly maintained the reservations formulated by the predecessor State;⁵⁷

(c) In other cases, the newly independent State has essentially reformulated the same reservations made by the predecessor State;⁵⁸

(d) There have been cases in which the newly independent State has maintained the reservations formulated by the predecessor State while adding new reservations;⁵⁹

(e) There have also been cases in which the newly independent State has “reworked” reservations made by the predecessor State;⁶⁰

(f) In a few cases, the newly independent State has withdrawn the reservations of the predecessor State while formulating new reservations.⁶¹

All these possibilities are acceptable under the terms of article 20, whose flexibility is unquestionably one of its greatest virtues.

30. Thus, notwithstanding the less-than-Cartesian logic of article 20 of the 1978 Vienna Convention, whose rules are based on considerations of principle that are hard to reconcile or in any case different (succession and/but

sovereignty), and despite the criticisms that may be levelled against the specific wording of this provision, there is no good reason not to include it—as a guideline—in the Guide to Practice. As far back as 1995, following the discussion of the first report on reservations, the Commission decided that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.⁶² Since then, it has been the consistent practice of the Commission to reflect systematically, to the extent possible, the wording of the relevant provisions of the 1969 and 1986 Vienna Conventions. The reasons for this practice have been sufficiently explained in the commentary to guideline 1.1, “Definition of reservations”.⁶³ There is no reason not to extend the practice to the relevant provision—the only one, apart from the definition of reservations—of the 1978 Vienna Convention, placing it at the beginning of the fifth part of the Guide to Practice. The Commission may therefore wish to include the text of article 20 of the 1978 Vienna Convention as guideline 5.1.

31. Although article 20 of that Convention applies only to reservations formulated in respect of treaties between States, guideline 5.1 will also, like the other guidelines in the Guide to Practice, cover reservations to treaties between States and international organizations. Further adaptations are also necessary.⁶⁴

32. As indicated in the first report on reservations,⁶⁵ this provision concerns only the status of reservations in cases where a newly independent State makes a notification of succession—in other words, it applies only to cases of decolonization. Accordingly, it is necessary, first, to mention this limitation in the title of the guideline and, second, to consider whether this solution should be extended to other modalities of State succession in other guidelines.

33. Further, article 20⁶⁶ expressly refers, in paragraphs 1 and 2, to articles 17 and 18 of the 1978 Vienna Convention itself and, in paragraphs 2 and 3, to all the provisions of the 1969 Vienna Convention that concern reservations.⁶⁷ Given that the Guide to Practice reproduces the text of the articles on reservations contained in the 1969 and 1986 Vienna Conventions, this second problem could easily be solved by the simple substitution of the guidelines corresponding to articles 19–23. This is perfectly feasible in relation to paragraph 2, which refers only to article 19 of the 1969 Vienna Convention, the text of

⁵⁵ Marcoff, *Accession à l'indépendance et succession d'États aux traités internationaux*, p. 346.

⁵⁶ See, for example, *Multilateral treaties deposited with the Secretary-General: Status as at 1 April 2009* (United Nations publication, sales No. E.09.V.3), ST/LEG/SER.E/26, chap. IV.2: the Solomon Islands succeeded to the International Convention on the Elimination of All Forms of Racial Discrimination without making any mention of the reservations made by the predecessor State (the United Kingdom), which are not reproduced in relation to the Solomon Islands. The same is true in the case of the succession of Senegal and Tunisia to the Convention relating to the Status of Refugees (*ibid.*, chap. V.2).

⁵⁷ Cyprus, Gambia and Tuvalu (*ibid.*, chap. V.2, Convention relating to the Status of Refugees).

⁵⁸ Fiji and Jamaica (*ibid.*).

⁵⁹ Botswana and Lesotho (*ibid.*, chap. V.3, Convention relating to the Status of Stateless Persons).

⁶⁰ Fiji (*ibid.*).

⁶¹ Zambia (*ibid.*); Zimbabwe (*ibid.*, chap. V.2).

⁶² *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487 (d).

⁶³ *Yearbook ... 1998*, vol. II (Part Two), p. 99, para. (1) (which expressly refers to the 1978 Vienna Convention) and para. (2) of the commentary.

⁶⁴ A matter of substance that is also open to criticism is the expression, in article 20, paragraph 1, “any reservation to that treaty which was applicable* at the date of the succession of States in respect of the territory* to which the succession of States relates”, as a reservation is not “applicable” but “established” in respect of a territory. In fact, a reservation is only applicable, and only produces effects, within the treaty relationship between the author of the reservation and the party in respect of which the reservation is established. Nonetheless, the Special Rapporteur, in line with his long-held position and the Commission’s consistent practice, is of the view that it would not be appropriate to “retouch” the text of one of the Vienna Conventions.

⁶⁵ *Yearbook ... 1995*, vol. II (Part One), p. 148, para. 133; see also footnote 4 above.

⁶⁶ See paragraph 4 above.

⁶⁷ Arts. 19–23.

which is reproduced in full in guideline 3.1 of the Guide to Practice. Conversely, it is not practical in relation to the reference in article 20, paragraph 3, to articles 20–23 of that Convention: while those articles are reflected in the Guide (often with formal modifications to adapt them to the structure and nature of the Guide), they are scattered in various parts of the text⁶⁸ and it would be very impractical to spell them all out in guideline 5.1. It seems sufficient to refer in general to the relevant rules of procedure set out in the second part (Procedure) of the Guide to Practice, and the guidelines concerned can always be specified in the commentary.

34. At first glance, the question of how to refer to articles 17 and 18 of the 1978 Vienna Convention seems more problematic: these long, detailed provisions⁶⁹ obviously

⁶⁸ The correspondences are as follows:

1969 Vienna Convention,

Article 20: para. 1—guidelines 2.8.0 and 2.8.1 (with drafting changes); para. 2—guideline 2.8.2 (*idem*); para. 3—guideline 2.8.7 (*idem*); para. 4 (a)—the Commission has not yet adopted a corresponding guideline; para. 4 (b)—guideline 2.6.8 (with drafting changes); para. 5—guideline 2.8.1 (with drafting changes).

Article 21: the Commission has not yet adopted a corresponding guideline.

Article 22: para. 1—guideline 2.5.1 (*idem*); para. 2—guideline 2.7.1 (*idem*); para. 3 (a)—guidelines 2.5.8 and 2.5.9 (with drafting changes); para. 3 (b)—guideline 2.7.5 (*idem*).

Article 23: para. 1—guidelines 2.1.1, 2.6.7 and 2.8.4 (with drafting changes); para. 2—guideline 2.2.1 (*idem*); para. 3—guideline 2.8.6 (with drafting changes); para. 4—guidelines 2.5.2 and 2.5.7 (with drafting changes).

⁶⁹ These provisions are worded as follows:

“Article 17. Participation in treaties in force at the date of the succession of States

“1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates.

“2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

“3. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties, the newly independent State may establish its status as a party to the treaty only with such consent.

“Article 18. Participation in treaties not in force at the date of the succession of States

“1. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a contracting State to a multilateral treaty which is not in force if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

“2. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

“3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

“4. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be

have no counterpart in the Guide to Practice. However, as noted above,⁷⁰ the basic principle—the *modus operandi*—of the present report consists of postulating that the relevant rules of the 1978 Vienna Convention apply; thus, it simply seems unnecessary to refer to (or to reproduce) specific provisions of that instrument in guideline 5.1.

35. In the light of these remarks, guideline 5.1 could read as follows:

“5.1 Newly independent States

“1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.

“2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty, a newly independent State may formulate a reservation unless the reservation is one the formulation of which is excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1 of the Guide to Practice.

“3. When a newly independent State formulates a reservation in conformity with paragraph 2, the relevant rules set out in the second part (Procedure) of the Guide to Practice apply in respect of that reservation.”

36. As the rules established by this guideline relate only to newly independent States, as defined in article 2, paragraph 1 (f), of the 1978 Vienna Convention,⁷¹ the question arises as to whether they can be transposed as is to other forms of State succession or whether adaptations are needed.

37. At the United Nations Conference on Succession of States in Respect of Treaties, it was suggested that, with respect to other cases of succession, a provision regulating the issue of reservations should be included. The delegation of India, for example, pointed out that there was a gap in the Convention in that respect and, accordingly, a need to add an article on reservations to the part of the Convention which dealt with the uniting and separation of States.⁷² Meanwhile, the delegation of the Federal

considered as requiring the consent of all the parties or of all the contracting States, the newly independent State may establish its status as a party or as a contracting State to the treaty only with such consent.

“5. When a treaty provides that a specified number of contracting States shall be necessary for its entry into force, a newly independent State which establishes its status as a contracting State to the treaty under paragraph 1 shall be counted as a contracting State for the purpose of that provision unless a different intention appears from the treaty, or is otherwise established.”

⁷⁰ See paragraph 7 above.

⁷¹ For the text of this definition see paragraph 10 above.

⁷² *Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...*, vol. I (footnote 26 above), A/CONF.80/16, 28th meeting of the Committee of the Whole, para. 17.

Republic of Germany proposed a new article 36 *bis*⁷³ that provided in particular for the transposition, to the cases of succession referred to in part IV of the Convention, of the rules on reservations applicable to newly independent States:

1. When under articles 30, 31, 33 and 35 a treaty continues in force for a successor State or a successor State participates otherwise in a treaty not yet in force for the predecessor State, the successor State shall be considered as maintaining:

(a) any reservation to that treaty made by the predecessor State in regard to the territory to which the succession of States relates; ...

2. Notwithstanding paragraph 1, the successor State may however:

(a) withdraw or modify, wholly or partly, the reservation (paragraph 1, subparagraph (a)) or formulate a new reservation, subject to the conditions laid down in the treaty and the rules set out in articles 19, 20, 21, 22 and 23 of the Vienna Convention on the Law of Treaties.⁷⁴

That delegation considered that "... the situation with respect to succession, as distinct from accession, was identical for the States to which Parts III [Newly independent States] and IV [Uniting and separation of States] of the draft referred".⁷⁵

38. The delegation of the Federal Republic of Germany nonetheless withdrew its proposed amendment after a number of delegations objected to it.⁷⁶ Those delegations considered that giving a successor State the right to formulate new reservations was inconsistent with the principle of *ipso jure* continuity of treaties set out by the Convention for cases involving the uniting or separation of States.⁷⁷ On the other hand, regarding the presumption in favour of the maintenance of reservations formulated by the predecessor State, various delegations believed that this presumption was obvious in cases involving the uniting or separation of States, bearing in mind this same principle of continuity, which had been reflected in the Convention in relation to these kinds of succession.⁷⁸

39. A distinction should thus be made between the presumption in favour of the maintenance of reservations (a principle established for newly independent States by article 20, paragraph 1, of the 1978 Vienna Convention) and the question of whether the power to formulate new reservations, recognized in paragraph 2 in the case of newly independent States, can be extended to cases involving the uniting or separation of States.

40. In fact, at least in principle, the extension of the presumption of continuity, which is explicitly provided for in article 20, paragraph 1, of the 1978 Vienna Convention for

newly independent States in the context of a notification of succession, and is reproduced in guideline 5.1 above, is indubitable. It seems to be even more justified in the case of successor States other than newly independent States. Under part IV of the 1978 Vienna Convention, the principle of continuity applies to treaties in force for the predecessor State at the date of a uniting or separation of States.⁷⁹ The practice in this regard, though relatively scarce and sometimes ambiguous, tends to confirm this solution.

41. The Secretary-General of the United Nations, in the exercise of his functions as depositary, generally avoids taking a position on the status of reservations formulated by the predecessor State. However, some elements of the practice of other depositaries show a clear tendency to extend the presumption set out in article 20, paragraph 1, of the 1978 Vienna Convention to cases of State succession other than those arising from decolonization. In practice, in cases involving the separation of States, in particular those of the States that emerged from the former Yugoslavia and Czechoslovakia,⁸⁰ the reservations of the predecessor State have been maintained. It should be noted, in this regard, that the Czech Republic,⁸¹ Slovakia,⁸² the Federal Republic of Yugoslavia⁸³ and, subsequently,

⁷⁹ See articles 31 and 34 of the Convention, which indicate that, apart from exceptions concerning the express or tacit agreement of the parties, when two or more States unite and so form one successor State or when a part or parts of the territory of an existing State separate to form one or more States, any treaty in force prior to the succession of States continues in force in respect of each successor State so formed.

⁸⁰ There appears to be virtually no relevant practice in relation to the successor States of the former Soviet Union.

⁸¹ *Multilateral treaties* ... (see footnote 56 above), chap. V.3. In a letter dated 16 February 1993, addressed to the Secretary-General and accompanied by a list of multilateral treaties deposited with the Secretary-General, the Czech Republic communicated the following: "In conformity with the valid principles of international law and to the extent defined by it, the Czech Republic, as a successor State to the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, i.e., the date of the dissolution of the Czech and Slovak Federal Republic, by multinational international treaties to which the Czech and Slovak Federal Republic was a party on that date, including reservations and declarations to their provisions made earlier by the Czech and Slovak Federal Republic. The Government of the Czech Republic has examined multilateral treaties the list of which is attached to this letter. [The Government of the Czech Republic] considers to be bound by these treaties as well as by all reservations and declarations to them by virtue of succession as of 1 January 1993. The Czech Republic, in accordance with the well-established principles of international law, recognizes signatures made by the Czech and Slovak Federal Republic in respect of all signed treaties as if they were made by itself".

⁸² *Ibid.* In a letter dated 19 May 1993 and also accompanied by a list of multilateral treaties deposited with the Secretary-General, the Slovak Republic communicated the following: "In accordance with the relevant principles and rules of international law and to the extent defined by it, the Slovak Republic, as a successor State, born from the dissolution of the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, i.e., the date on which the Slovak Republic assumed responsibility for its international relations, by multilateral treaties to which the Czech and Slovak Federal Republic was a party as of 31 December 1992, including reservations and declarations made earlier by Czechoslovakia, as well as objections by Czechoslovakia to reservations formulated by other treaty-parties".

⁸³ *Ibid.* By a notification dated 8 March 2001, the Federal Republic of Yugoslavia deposited an instrument, *inter alia*, communicating its intent to succeed to various multilateral treaties deposited with the Secretary-General and confirming certain actions relating to such treaties: "[T]he Government of the Federal Republic of Yugoslavia maintains the signatures, reservations, declarations and objections made by the Socialist Federal Republic of Yugoslavia to the treaties listed in the attached annex 1, prior to the date on which the Federal Republic of Yugoslavia assumed responsibility for its international relations."

⁷³ *Ibid.*, vol. II (footnote 27 above), A/CONF.80/16/Add.1, 43rd meeting of the Committee of the Whole, para. 11.

⁷⁴ *Ibid.*, vol. III (footnote 26 above), A/CONF.80/30, reproduced in A/CONF.80.16/Add.2, paras. 118 and 119.

⁷⁵ See footnote 73 above.

⁷⁶ See footnote 74 above, para. 119.

⁷⁷ *Official Records of the United Nations Conference on Succession of States in Respect of Treaties* ..., vol. II (footnote 27 above), A/CONF.80/16/Add.1, 43rd meeting of the Committee of the Whole, para. 14 (Poland), para. 15 (United States of America), para. 18 (Nigeria), para. 19 (Mali), para. 20 (Cyprus), para. 21 (Yugoslavia), para. 22 (Australia) and para. 24 (Swaziland, albeit in more nuanced terms).

⁷⁸ See, in this regard, the statements made by the delegations of Poland (*ibid.*, para. 13), France (*ibid.*, para. 16), Cyprus (*ibid.*, para. 20), Yugoslavia (*ibid.*, para. 21) and Australia (*ibid.*, para. 22).

Montenegro⁸⁴ formulated general declarations whereby these successor States reiterated the reservations of the predecessor State.⁸⁵ In addition, in some cases the reservations of the predecessor State have been expressly confirmed⁸⁶ or reformulated⁸⁷ by the successor State in relation to a particular treaty. In the case of the Republic of Yemen (united), there was also a repetition of reservations by the successor State. In a letter dated 19 May 1990 addressed to the Secretary-General, the Ministers for Foreign Affairs of the Yemen Arab Republic and the People's Democratic Republic of Yemen communicated the following:

As concerns the treaties concluded prior to their union by the Yemen Arab Republic or the People's Democratic Republic of Yemen, the Republic of Yemen (as now united) is accordingly to be considered as a party to those treaties as from the date when one of these States first became a party to those treaties. Accordingly the tables showing the status of treaties will now indicate under the designation "Yemen" the date of the formalities (signatures, ratifications, accessions, declarations and reservations, etc.) effected by the State which first became a party, those eventually effected by the other being described in a footnote.⁸⁸

42. The practice in relation to treaties deposited with depositaries other than the Secretary-General of the United Nations provides little guidance on the question of reservations in the context of succession of States. However, the few elements that can be identified do not tend to contradict the lessons that can be drawn from the practice in relation to treaties for which the United Nations Secretary-General serves as depositary; on the contrary, the practice of these various depositaries seems to confirm the general presumption in favour of the maintenance of the reservations of the predecessor State.

43. Accordingly, the Czech Republic and Slovakia transmitted to a number of depositaries notifications of succession similar to those transmitted to the United Nations Secretary-General and providing for the maintenance of reservations formulated by the predecessor State.⁸⁹ Neither the depositaries in question nor the other States parties to the treaties concerned raised any objections to this practice.

⁸⁴ *Ibid.* On 23 October 2006, the Secretary-General received a letter dated 10 October 2006 from Montenegro, accompanied by a list of multilateral treaties deposited with the Secretary-General, informing him that: "[The Government of] the Republic of Montenegro does maintain the reservations, declarations and objections made by Serbia and Montenegro, as indicated in the Annex to this instrument, prior to the date on which the Republic of Montenegro assumed responsibility for its international relations."

⁸⁵ See also the case of other successors to the former Yugoslavia (apart from the Federal Republic of Yugoslavia), which appear in the list of successor States for a number of treaties deposited with the Secretary-General with the indication, in footnotes, of reservations formulated by the former Yugoslavia (see, for example, Bosnia and Herzegovina, Croatia, Serbia and the former Yugoslav Republic of Macedonia in relation to the Convention on the Privileges and Immunities of the United Nations (*ibid.*, chap. III.1, note 2); the Protocol relating to the Status of Refugees (chap. V.5, note 5) and the Convention relating to the Status of Stateless Persons (chap. V.3, note 2).

⁸⁶ Convention on the Prevention and Punishment of the Crime of Genocide, reservation formulated by the Federal Republic of Yugoslavia (Montenegro) (*ibid.*, chap. IV).

⁸⁷ Convention on the Rights of the Child (*ibid.*, chap. IV.11, under "Slovenia").

⁸⁸ *Ibid.*, "Historical Information", under "Yemen".

⁸⁹ See Mikulka, "The dissolution of Czechoslovakia and succession in respect of treaties", pp. 111–112.

44. The Universal Postal Union's reply to the Special Rapporteur's questionnaire is also worthy of note.⁹⁰ That organization's practice is to consider that valid reservations applicable to a member State are automatically transferred to the successor State; the same is true in the case of States that have become independent by separating from a member State.

45. The Council of Europe applied the same presumption with respect to Montenegro. In a letter dated 28 June 2006 addressed to the Minister for Foreign Affairs of Montenegro, the Director General of Legal Affairs of the Council of Europe indicated that, in accordance with article 20 of the 1978 Vienna Convention, the Republic of Montenegro was considered "as maintaining these reservations and declarations because the Republic of Montenegro's declaration of succession does not express a contrary intention in that respect".⁹¹ That letter also included a list of reservations and declarations that had been revised in places to remove references to the Republic of Serbia. By a letter dated 13 October 2006, the Minister for Foreign Affairs of Montenegro communicated his agreement on the wording of those reservations and declarations, as adapted by the depositary.

46. The practice followed by Switzerland as depositary of a number of multilateral treaties likewise does not reveal any fundamental contradiction with that of the Secretary-General of the United Nations. It is true that Switzerland had initially applied to a successor State that had made no reference to the status of the predecessor State's reservations, the presumption that such reservations were not maintained. Today, however, Switzerland no longer applies any presumption, as its practice is to invite the successor State to communicate its intentions as to whether it is maintaining reservations formulated by the predecessor State.⁹²

47. The principle of the presumption in favour of the maintenance of the reservations of the predecessor State—a presumption which, in any event, may be reversed by the simple expression of a contrary intention on the part of the successor State—seems to be a common-sense approach that is sufficiently well established in practice to warrant inclusion in the text as guideline 5.2, paragraph 1, as proposed below. While this provision establishes a general presumption in favour of the maintenance of reservations, there are nonetheless exceptions to this presumption in

⁹⁰ Questionnaire prepared by the Special Rapporteur pursuant to a decision of the Commission reflected in its report on the work of its forty-seventh session (2 May–21 July 1995), *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 489. For the text of the questionnaire, see *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, p. 108.

⁹¹ JJ55/2006, PJD/EC. The Treaty Office of the Council of Europe regrets that it "is not in a position to provide... a copy of this letter which is part of the correspondence that [it] has with its member States", but confirms that the original letter was in English.

⁹² See the letter dated 3 May 1996 from the Directorate of Public International Law addressed to an individual, describing changes in the practice of Switzerland as depositary State for the Geneva Conventions for the protection of war victims, in relation to the succession of States to treaties; reproduced in Caflisch, "La pratique suisse en matière de droit international public 1996", pp. 683–685, in particular p. 684. This approach was confirmed in an opinion given on 6 February 2007 by the Directorate of Public International Law of the Federal Department of Foreign Affairs, entitled "Pratique de la Suisse en tant qu'État dépositaire. Réserves aux traités dans le contexte de la succession d'États", pp. 328–330.

certain cases involving the uniting of two or more States; these are dealt with in guideline 5.3, to which reference is made in guideline 5.2, paragraph 1.

48. As shown by the opposition to the amendment proposed by the Federal Republic of Germany at the United Nations Conference on Succession of States in Respect of Treaties,⁹³ there are serious doubts as to whether a successor State other than a newly independent State may formulate reservations. These doubts are echoed in the separate opinion annexed by Judge Tomka to the judgment of ICJ of 26 February 2007 in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*:

35. There can be no doubt that this decision to notify of the accession to the Genocide Convention, with a reservation to Article IX and not succession (*where no reservation is allowed**) was motivated by the considerations relating to the present case. ...

That single notification of accession, in my view, was totally inconsistent with the succession by the Federal Republic of Yugoslavia—notified the very same day to the United Nations Secretary-General as accession to the Genocide Convention—to the Vienna Convention on Succession of States in Respect of Treaties*, which in Article 34 provides that the treaties of the predecessor State continue in force in respect of each successor State. By the latter notification of succession, the Federal Republic of Yugoslavia became a contracting State of the Vienna Convention on Succession of States in Respect of Treaties as of April 1992. That Convention entered into force on 6 November 1996. Although not formally applicable to the process of the dissolution of the former Yugoslavia, which occurred in the 1991–1992 period, in light of the fact that the former Yugoslavia consented to be bound by the Vienna Convention already in 1980, and the Federal Republic of Yugoslavia has been a contracting State to that Convention since April 1992, one would not expect, by analogy to Article 18 of the Vienna Convention on the Law of Treaties, a State which, through notification of its accession, expresses its consent to be considered as bound by the Vienna Convention on Succession of States in Respect of Treaties to act in a singular case inconsistently with the rule contained in Article 34 of that Convention, while in a great number of other cases to acting in full conformity with that rule*. These considerations, taken together, lead me to the conclusion that the Court should not attach any legal effect to the notification of accession by the Federal Republic of Yugoslavia to the Genocide Convention, and should instead consider it bound by that Convention on the basis of the operation of the customary rule of *ipso jure* succession codified in Article 34 as applied to cases of the dissolution of a State.⁹⁴*

49. Indeed, if succession is considered to take place *ipso jure* in cases involving the uniting or separation of States, it is difficult to contend that a successor State may avoid or alleviate its obligations by formulating reservations.⁹⁵

⁹³ See paras. 37–38 above.

⁹⁴ *I.C.J. Reports 2007*, p. 8, judgment of 26 February 2007, separate opinion of Judge Tomka, pp. 330–331, para. 35 (italics added).

⁹⁵ Gaja, *loc. cit.* (footnote 35 above), pp. 64–65. According to this expert, the reasoning applicable to newly independent States can be extended to other cases of succession: even if a newly independent State were considered not to be entitled to make a reservation when notifying its succession, one should take the view that such a State may achieve practically the same result by making a partial withdrawal (if such a withdrawal is permitted) to the same extent that may be covered by a reservation; these considerations also apply to cases in which succession is considered not to depend on the acceptance of the treaty by the successor State. In terms of the outcome, this reasoning is probably correct; however, it underestimates the fact that a withdrawal (albeit partial) from a treaty and a reservation are two different institutions governed by different legal regimes and by conditions that are not necessarily the same. Partial withdrawal is not covered by the Guide to Practice (see guideline 1.4 on “Unilateral statements other than reservations and interpretative declarations”, in *Yearbook ... 1999*, vol. II (Part Two), p. 112).

50. Also worth mentioning in this regard, in addition to the arguments made against this possibility during the drafting of the 1978 Vienna Convention, is the position taken by the Council of Europe in its letter of 28 June 2006 to Montenegro,⁹⁶ to the effect that that State did “not have the possibility, at this stage, to make new reservations to the treaties already ratified” and to which it had notified its succession.⁹⁷ This position seems to be consistent with the rule of *ipso jure* succession to treaties, as set out in the 1978 Vienna Convention for cases involving the uniting or separation of States. In such situations, succession to a treaty does not depend on an expression of intention by the successor State, which may legitimately be considered to have inherited all of the predecessor State’s rights and obligations under the treaty, without the possibility of avoiding or alleviating those obligations by formulating reservations. This solution also seems to have been confirmed in practice, as successor States other than newly independent States do not seem to have formulated new reservations upon succeeding to treaties.

51. The situation thus differs from that of newly independent States, for which a *notification of succession* is provided, whereas in principle this is not the case in situations involving the uniting or separation of States. By its notification of succession, a newly independent State *establishes*, in exercise of its freedom to choose whether or not to maintain the treaties of the predecessor State, its status as a party or as a contracting State to the treaty in question.⁹⁸ In these circumstances, the notification of succession becomes a constitutive method of maintaining the treaties that were in force for the predecessor State at the date of the succession of States, along with other treaties to which that State was a contracting State. On the other hand, the 1978 Vienna Convention provides for a different regime for successor States other than newly independent States. Under part IV of the Convention, treaties in force at the date of the succession of States in respect of any of the predecessor States continue in force in respect of a State formed from the uniting of two or more States.⁹⁹ The same solution is provided for, in the case of a State formed from the separation of parts of a State, with respect to treaties in force at the date of the succession of States in respect of the entire territory of the predecessor State, and also treaties in force in respect only of that part of the territory of the predecessor State which has become a successor State.¹⁰⁰ Under the 1978 Vienna Convention, it is only in relation to treaties not in force for the predecessor State at the date of the succession of States, even though that State was a contracting State to the treaty, that a successor State (other than a newly independent State) may, if it so desires, establish by a *notification* its status as a party or as a contracting State to the treaty in question.¹⁰¹ In this regard, then, it is appropriate to treat successor States

⁹⁶ See footnote 91 above.

⁹⁷ Memorandum of the Secretary-General (see footnote 4 above), p. 23, para. 69.

⁹⁸ See articles 17 and 18 of the 1978 Vienna Convention, cited in footnote 69 above.

⁹⁹ See article 31 of the Convention.

¹⁰⁰ See article 34 of the Convention.

¹⁰¹ See articles 32 and 36 of the Convention.

other than newly independent States in the same way as newly independent States, given that, in both cases, succession to the treaty involves an expression of intention on the part of the State concerned.

52. But it is only in these circumstances that successor States formed from a uniting or separation of States should be deemed capable of making new reservations when notifying of their intention to become parties. In all other cases, it does not seem that the capacity to formulate new reservations should be recognized in respect of treaties that remain in force following a succession of States. Guideline 5.2, paragraph 2, as proposed below, establishes this principle (which contrasts with the one applicable to newly independent States)¹⁰² and this exception (i.e. acknowledgement of such capacity when the successor State establishes its status as a party or as a contracting State to a treaty by a notification). In other cases, the formulation of reservations by a successor State formed from a uniting or separation of States should be likened to the late formulation of a reservation, as proposed in guideline 5.9.¹⁰³

53. Thus, guideline 5.2, paragraph 2, is intended to fill a gap in the 1978 Vienna Convention. Given the general scope of this paragraph, which covers both cases involving the separation of parts of a State and cases involving the uniting of two or more States, the term “predecessor State” should be understood, in cases involving the uniting of States, to mean one or more of the predecessor States.

54. Guideline 5.2, which should be the “counterpart” of guideline 5.1 for cases involving the uniting or separation of States, could be worded as follows:

“5.2 *Uniting or separation of States*

“1. Subject to the provisions of guideline 5.3, a successor State formed from a uniting or separation of States shall be considered as maintaining any reservation to a treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless it expresses a contrary intention at the time of the succession or formulates a reservation which relates to the same subject matter as that reservation.

“2. A successor State may not formulate a new reservation at the time of a uniting or separation of States unless it makes a notification whereby it establishes its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State.

“3. When a successor State formulates a reservation in conformity with paragraph 2, the relevant rules set out in the second part (Procedure) of the Guide to Practice apply in respect of that reservation.”

¹⁰² See article 20, paragraph 2, of the Convention and guideline 5.1, paragraph 2 above.

¹⁰³ See paragraph 98 below.

55. Unlike the separation of parts of a State, where succession to a treaty results in the application of a single reservations regime to that treaty, a uniting of States entails a risk that two or more reservations regimes that may be different or even contradictory will apply to the same treaty. Such cases are not merely hypothetical. Nonetheless, the relevant practice does not seem to provide satisfactory answers to the many questions raised by this situation. For example, the aforementioned letter¹⁰⁴ of 19 May 1990 from the Ministers for Foreign Affairs of the Yemen Arab Republic and the People’s Democratic Republic of Yemen to the Secretary-General, in suggesting a solution to the technical problem of how the actions of the two predecessor States in relation to the same treaty should be recorded, referred to a time test whose legal scope appears uncertain in many respects and leaves unanswered the possible future question of the status of reservations formulated by the States concerned prior to the date of their union.

56. In the case of a treaty which, at the date of a uniting of States, was in force in respect of any of the uniting States and continues in force in respect of the State so formed,¹⁰⁵ guideline 5.2, paragraph 1, establishes the principle that any reservations to such a treaty that were formulated by any of the uniting States continue in force in respect of the unified State unless the latter expresses a contrary intention. The application of this presumption raises no difficulty, provided that the uniting States were either parties or contracting States to the treaty. However, the situation is more complicated if one of those States was a party to the treaty and the other was a contracting State in respect of which the treaty was not in force.

57. It is this situation that guideline 5.3 below, is intended to address: it provides for the exclusive maintenance of reservations formulated by the State that was a party to the treaty. This solution is based on the fact that a State—in this case, a State formed from a uniting of States—can have only one status in respect of a single treaty: in this instance, that of a State party to the treaty (principle of *ipso jure* continuity). Thus, for a treaty that continues in force in respect of a State formed from a uniting of States, it seems logical to consider that only those reservations formulated by the State or States in respect of which the treaty was in force at the date of the union may be maintained. Any reservations formulated by a contracting State in respect of which the treaty was not in force become invalid.

58. Such is the purpose of guideline 5.3:

“5.3 *Irrelevance of certain reservations in cases involving a uniting of States*

“When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the State so formed, such reservations as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.”

¹⁰⁴ See paragraph 41 above.

¹⁰⁵ See article 31 of the 1978 Vienna Convention.

59. Guideline 5.3¹⁰⁶ is worded so as to cover both the cases referred to in articles 31–33 of the 1978 Vienna Convention and other cases involving the uniting of States in which one of the uniting States retains its international legal personality (a situation not covered by these provisions of the 1978 Vienna Convention).

B. Territorial scope of reservations in the context of a succession of States

60. It seems self-evident that a reservation considered as being maintained following a succession of States retains the territorial scope that it had at the date of the succession of States. This is a logical consequence of the continuity inherent in the concept of succession to a treaty, whether it occurs *ipso jure* or by virtue of a notification of succession made by a newly independent State.

61. There are nevertheless exceptions to this principle in certain cases involving the uniting of two or more States. These exceptions, which raise rather complex issues, are dealt with in guideline 5.5 and are excluded from the scope of guideline 5.4 by the expression “subject to the provisions of guideline 5.5”.

62. In addition, there is a need to address separately the problems that arise in relation to reservations in cases of succession involving part of a territory. While these cases do not constitute an exception to the principle established in guideline 5.4, they nonetheless require more specific treatment, which guideline 5.6 is intended to afford.

63. In the light of these considerations, guideline 5.4 could be worded as follows:

“5.4 Maintenance of the territorial scope of reservations formulated by the predecessor State

“A reservation considered as being maintained in conformity with guideline 5.1, paragraph 1, or guideline 5.2, paragraph 1, shall retain the territorial scope that it had at the date of the succession of States, subject to the provisions of guideline 5.5.”

64. The principle set out in guideline 5.4, to the effect that the territorial scope of a reservation considered as being maintained following a succession of States remains unchanged, also applies to cases involving the uniting of two or more States, albeit with certain exceptions. As indicated earlier,¹⁰⁷ specific problems can arise with respect to the territorial scope of reservations considered as being maintained following a uniting of two or more States. Such exceptions can occur when, following a uniting of two or more States, a treaty becomes applicable to a part of the territory of the unified State to which it did not apply at the date of the succession of States.

65. Two possible situations should be distinguished in this connection:

(a) Where, following a uniting of two or more States, a treaty in force at the date of the succession of States in

respect of only one of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply previously; and

(b) Where a treaty in force at the date of the succession of States in respect of two or more of the uniting States—but not of the whole of what will become the territory of the successor State—becomes applicable to a part of the territory of the successor State to which it did not apply previously.

66. In the first of these cases, where a treaty in force, with reservations, at the date of the succession of States for *only one* of the States that unite to form the successor State becomes applicable to a part of the latter’s territory to which it did not apply at the date of the succession of States, the reservations in question may be extended to the whole of the territory of the unified State to which the treaty becomes applicable if that State so consents, either by a notification to that effect or by agreement with the other States parties.¹⁰⁸ In these circumstances, there is every reason to believe that this extension concerns the treaty relationship as modified by the reservations formulated by the State in respect of which the treaty was in force at the date of the union. But there is in principle nothing to prevent the State so formed from expressing a contrary intention in this regard and electing not to extend the territorial scope of those reservations. In any event, whatever the successor State may decide, the other contracting parties would not be adversely affected because the treaty was not previously applicable to the territory thus excluded from the scope of the reservation. Guideline 5.5, paragraph 1 (a), establishes this possibility.

67. On the other hand, the reservation’s nature or purpose may rule out its extension beyond the territory to which it was applicable at the date of the succession of States. This could be the case, in particular, of a reservation whose application was already limited to a part of the territory of the State that formulated it, or a reservation that specifically concerns certain institutions belonging only to that State. Guideline 5.5, paragraph 1 (b), refers to this circumstance.

68. The second case in which the territorial scope of a prior reservation can be extended beyond the limits it had had before the succession of States may seem similar, but is in fact different. Whereas, in the situation described above, only one of the uniting States was bound by the treaty, in this case the treaty was in force at the date of the succession of States, in respect of at least two of the uniting States, but was not at that time applicable to the whole of what would become the territory of the unified State. The question, then, is whether reservations made by any of those States also become applicable to the parts of the territory of the unified State to which the treaty was not applicable at the date of the succession of States. In the absence of specific information from the successor State, it may be unclear whether and to what extent that State, in extending the territorial scope of the treaty, meant to extend the territorial scope of the reservations formulated by any or all of the States in respect of which the treaty was in force at the date of the succession of States.

¹⁰⁶ The same is true of guidelines 5.5 and 5.11.

¹⁰⁷ See paragraph 61 above.

¹⁰⁸ See article 31, paragraph 2, of the 1978 Vienna Convention.

69. Unless there are indications to the contrary, there seems to be no reason not to accept the presumption that such a reservation does not extend to the part or parts of the territory of the unified State to which the treaty was not applicable at the date of the succession of States. Nor, however, is there any reason to regard this presumption as absolute. Different approaches should be taken in different cases:

(a) When an identical reservation has been formulated by each of the States concerned, it should on the contrary be presumed that the unified State intends to maintain a reservation that is common to all its predecessors, and the logic reflected in guideline 5.5, paragraph 1, should be followed;

(b) In addition, in some cases it may become apparent from the circumstances that a State formed from a uniting of States intends to maintain reservations formulated by one of the States in particular. This is the case, for example, when a unified State, upon extending the territorial scope of a treaty, refers specifically to actions carried out in respect of the treaty, prior to the date of the union, by one of the States concerned;

(c) This becomes still more apparent if a State formed from a uniting of States, when it agrees to extend the territorial scope of a treaty, expresses a contrary intention by specifying the reservations that will apply to the territory to which the treaty has been extended.

70. In this last circumstance, however, the decision of a unified State to extend the scope of various reservations to the territory concerned is not acceptable unless such reservations, formulated by two or more of the uniting States, are compatible with each other. They may, after all, be contradictory. In this situation, such a notification cannot be regarded as having any effect if it would give rise to the application of mutually incompatible reservations.

71. The rules proposed above concern situations in which the treaty to which the reservation or reservations of the predecessor States relate was in force in respect of at least one of them at the date of the succession of States. In the Special Rapporteur's view, they should apply *mutatis mutandis* to reservations considered as being maintained by a unified State that extends the territorial scope of a treaty to which, following the succession of States, it is a contracting State when the treaty was not in force, at the date of the succession of States, in respect of any of the predecessor States, even though one or more of them had the status of a contracting party.¹⁰⁹

72. In the same vein, this solution should apply to situations—undoubtedly rare, but provided for in article 32, paragraph 2, of the 1978 Vienna Convention—in which a treaty to which one or more of the uniting States were contracting States at the date of the succession of States enters into force after that date because the conditions provided for in the relevant clauses of the treaty have been met; in such a case, the successor State would become a State *party* to the treaty.

73. It should also be recalled that the issue of the territorial scope of reservations formulated by such a contracting State in respect of which the treaty was not in force at the date of the succession of States does not arise unless the treaty was not in force, on that date, for any of the uniting States; otherwise, the reservations formulated by that contracting State are not considered as being maintained.¹¹⁰

74. In the light of these observations, the Commission could adopt the following guideline 5.5:

“5.5 Territorial scope of reservations in cases involving a uniting of States

“1. When, as a result of the uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of the States forming the successor State becomes applicable to a part of the territory of that State to which it did not apply previously, any reservation considered as being maintained by the successor State shall apply to that territory unless:

“(a) the successor State expresses a contrary intention at the time of the extension of the territorial scope of the treaty; or

“(b) the nature or purpose of the reservation is such that the reservation cannot be extended beyond the territory to which it was applicable at the date of the succession of States.

“2. When, as a result of a uniting of two or more States, a treaty in force at the date of the succession of States in respect of two or more of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States, no reservation shall extend to that territory unless:

“(a) an identical reservation has been formulated by each of those States in respect of which the treaty was in force at the date of the succession of States;

“(b) the successor State expresses a different intention at the time of the extension of the territorial scope of the treaty; or

“(c) a contrary intention otherwise becomes apparent from the circumstances surrounding that State's succession to the treaty.”

3. A notification purporting to extend the territorial scope of reservations within the meaning of paragraph 2 (b) shall be without effect if such an extension would give rise to the application of contradictory reservations to the same territory.

4. The provisions of the foregoing paragraphs shall apply *mutatis mutandis* to reservations considered as being maintained by a successor State that is a contracting State, as a result of a uniting of States, to a treaty which was not in force for any of the uniting States at the date

¹⁰⁹ See article 32 of the 1978 Vienna Convention.

¹¹⁰ See guideline 5.3 above.

of the succession of States but to which one or more of those States were contracting States at that date, when the treaty becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States.

75. Article 15, “Succession in respect of part of territory”, of the 1978 Vienna Convention concerns cases involving the cession of territory or other territorial changes. It provides that, as from the date of the succession of States, treaties of the successor State are in force in respect of the territory to which the succession of States relates, while treaties of the predecessor State cease to be in force in respect of that territory. This provision represents an extension of the rule, established in article 29 of the 1969 Vienna Convention, concerning flexibility in the territorial scope of treaties. Accordingly, guidelines 5.1 and 5.2 would not apply to situations falling under article 15 of the Convention because, in these cases, there is in principle no *succession* to treaties as such. While the State in question is referred to as a “successor State” within the meaning of article 2, paragraph 1 (d), of the 1978 Vienna Convention, in a manner of speaking it “succeeds” itself, and its status as a party or as a contracting State to the treaty remains as it was when that State acquired it by expressing its own consent to be bound by the treaty in accordance with article 11 of the 1969 Vienna Convention.

76. When this situation arises as a result of a succession involving part of a territory, the treaty of the successor State is extended to the territory in question. In this case, it seems logical to consider that the treaty’s application to that territory is subject, in principle, to the reservations which the successor State itself had formulated to the treaty.

77. Here again, however, this principle should be qualified by two exceptions, also based on the principle of consent so prevalent in the law of treaties in general and of reservations in particular. Accordingly, a reservation should not extend to the territory to which the succession relates:

(a) When the successor State expresses a contrary intention, as this case can be likened to a partial withdrawal of the reservation, limited to the territory to which the succession of States relates;¹¹¹ or

(b) When it appears from the reservation itself that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a specific territory.

78. These considerations could lead to the adoption of a guideline 5.6 worded as follows:

“5.6 Territorial scope of reservations of the successor State in cases of succession involving part of a territory

“When, as a result of a succession of States involving part of a territory, a treaty to which the successor State is

a party or a contracting State becomes applicable to that territory, any reservations to the treaty formulated previously by that State shall also apply to that territory as from the date of the succession of States unless:

“(a) the successor State expresses a contrary intention; or

“(b) it appears from the reservation that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a specific territory.”

79. Guideline 5.6 is worded so as to cover not only treaties that are in force for the successor State at the time of the succession of States, but also treaties that are not in force for the successor State on that date but to which it is a contracting State, a situation not covered by article 15 of the 1978 Vienna Convention. The verb “apply” in relation to such a treaty should be understood as encompassing both situations, which need not be distinguished from one another in relation to the issue of reservations.

80. This guideline also covers situations in which the predecessor State and the successor State are parties or contracting States—or one is a party and the other is a contracting State—to the same treaty, albeit with different reservations.

81. However, guideline 5.6 does not apply to “territorial treaties” (concerning a border regime or other regime relating to the use of a specific territory). If a succession occurs in relation to such a treaty,¹¹² the solutions provided for in guideline 5.2 concerning the uniting or separation of States apply *mutatis mutandis* to reservations formulated in respect of that treaty.

C. Timing of the effects of a reservation in the context of a succession of States

82. Article 20 of the 1978 Vienna Convention does not directly address the effects *ratione temporis* of a declaration whereby a newly independent State announces, when notifying its succession to a treaty, that it is not maintaining a reservation formulated by the predecessor State; much less does it clarify the issue in the context of a succession of States resulting from a uniting or separation of States, as the 1978 Vienna Convention does not specify the status of the predecessor State’s reservations in this context. Neither practice nor the literature seems to provide a clear answer to this question, which could nonetheless be of some practical importance.

83. Whether resulting from the expression of a “contrary intention” or from the successor State’s formulation of a reservation that “relates to the same subject matter” as a reservation formulated by the predecessor State,¹¹³ it seems reasonable, in relation to its effects *ratione temporis*, to treat the non-maintenance of a reservation following a succession of States as a withdrawal of the reservation

¹¹¹ On the partial withdrawal of a reservation, see guidelines 2.5.10 and 2.5.11 and the commentary thereto (*Yearbook ... 2003*, vol. II (Part Two), pp. 70, 87–92).

¹¹² Regarding international practice, see, *inter alia*, the PCIJ order of 6 December 1930 in the case *Free zones of Upper Savoy and the District of Gex*, P.C.I.J., Series A, No. 24, p. 17, and the judgment of 7 June 1932 in the same case, *ibid.*, Series A/B, No. 46, p. 145.

¹¹³ See paragraph 1 of guidelines 5.1 and 5.2, respectively.

in question and to consider it subject, as such, to the ordinary rules of the law of treaties, codified in article 22 of the 1969 Vienna Convention. Under paragraph 3 (a) of that article, which is reproduced in guideline 2.5.8 of the Guide to Practice, “[u]nless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State”.

84. This solution, which is particularly fitting when succession to the treaty (and to the reservation) takes place *ipso jure*, seems to lend itself to all types of succession: not until they are aware of the successor State’s intention (by means of a written notification)¹¹⁴ can the other parties take the withdrawal into account.

85. The guideline below thus reproduces *mutatis mutandis* the rule set out in article 22, paragraph 3 (a), of the 1969 Vienna Convention and reflected in guideline 2.5.8 concerning the effects *ratione temporis* of the withdrawal of a reservation:

“5.7 Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State

“The non-maintenance[, in conformity with guideline 5.1 or 5.2,] by the successor State of a reservation formulated by the predecessor State becomes operative in relation to another contracting State or contracting international organization or another State or international organization party to the treaty when notice of it has been received by that State or international organization.”

86. The phrase in square brackets introduces a detail that is not strictly necessary. It would perhaps be sufficient to link paragraph 2 of guidelines 5.1 and 5.2, respectively, on the one hand, to guideline 5.7, on the other, in the commentary to the latter.

87. Just as it does not address the effects *ratione temporis* of the non-maintenance of a reservation of the predecessor State, the 1978 Vienna Convention makes no mention of the effects *ratione temporis* of a reservation formulated by a successor State at the time of the succession of States.

88. For reasons comparable to those put forward above in support of the rule set out in guideline 5.7 for the non-maintenance of a reservation to become operative, it seems reasonable to provide that a reservation formulated by a successor State does not become operative until the date on which the other States or international organizations parties or contracting States or contracting international organizations have received notice of it, i.e. the date of the notification whereby the successor State establishes its status as a party or as a contracting State to the treaty.

89. It is true that this solution could give rise, in retrospect, to the establishment of two different legal regimes. The first would cover the period between the date of the succession of States and the date of the notification whereby the successor State establishes its status as a party or as a contracting State to a treaty, during which

the successor State would be considered as bound by the treaty in the same way as the predecessor State, i.e. without the benefit of the new reservation. The second regime, in turn, would cover the period after the date of that notification, during which the successor State would have the benefit of the reservation.

90. It nonetheless seems preferable to abide by the principle to which the Commission itself referred in the commentary to its draft article 19 (which became article 20 of the 1978 Vienna Convention): while it decided not to refer explicitly to that point in the text of the draft itself, as had been proposed by Sir Francis Vallat,¹¹⁵ it nevertheless referred to “the general position that a reservation can only be effective at the earliest from the date when it is made”.¹¹⁶

91. This solution takes account of the legitimate interest of the other States in having a basic level of legal certainty and ensures that they will not be surprised by the formulation—possibly long after the date of the succession of States—of reservations to which the successor State intends to give retroactive effect. Conversely, there do not seem to be any grounds for delaying the effects of the reservation beyond the date of the notification whereby the successor State establishes its status as a party or as a contracting State to the treaty.¹¹⁷

92. Guideline 5.8, which is necessary in order to fill a gap in the 1978 Vienna Convention, could be worded as follows:

“5.8 Timing of the effects of a reservation formulated by a successor State

“A reservation formulated by a successor State[, in conformity with guideline 5.1 or 5.2,] when notifying its status as a party or as a contracting State to a treaty becomes operative as from the date of such notification.”

93. Here again,¹¹⁸ the phrase in square brackets would probably best be transposed to and explained in the commentary.

94. Even though the capacity of a newly independent State to formulate reservations to a treaty to which it intends to succeed is not in doubt,¹¹⁹ it ought not to be unlimited over time.

95. In this connection, it seems reasonable to consider that a newly independent State should exercise this capacity when notifying its succession. This is moreover clearly implied by the very definition of reservations contained in guideline 1.1 of the Guide to Practice, which, like article 2 (j) of the 1978 Vienna Convention—and unlike article 2 (d) of the 1969 Vienna Convention—mentions

¹¹⁵ The provision proposed by Vallat, which reflected a request to that effect by the United States of America (reproduced in Vallat’s first report, *Yearbook ... 1974*, vol. II (Part One), p. 1), was worded as follows: “A new reservation established under paragraphs 2 and 3 shall not have any effect before the date of the making of the notification of succession” (*ibid.*, p. 55, para. 298).

¹¹⁶ *Ibid.*, p. 227, para. (22) of the commentary to article 19.

¹¹⁷ See, in this regard, Gaja (footnote 35 above), p. 68.

¹¹⁸ See paragraph 86 above concerning a similar bracketed phrase in guideline 5.7.

¹¹⁹ See paragraphs 24–28 and 35 above.

¹¹⁴ See guideline 2.5.2 on the form of withdrawal of a reservation and the commentary thereto (*Yearbook ... 2003*, vol. II (Part Two), pp. 74–76).

among the temporal elements included in the definition of reservations the time “when [a State is] making a notification of succession to a treaty”.¹²⁰ It seems legitimate to conclude from this that reservations formulated by a newly independent State after that date should be subject to the legal regime for late reservations, as set out in guidelines 2.3.1, 2.3.2, 2.3.3 and 2.3.5 provisionally adopted by the Commission.¹²¹

96. For similar reasons, it seems that the regime for late reservations should apply to reservations formulated by a successor State other than a newly independent State after the date on which it has established, by a notification to that effect, its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State, in line with the conditions stipulated in guideline 5.2, paragraph 2. As in that provision, the term “predecessor State” should be understood, in cases involving a uniting of States, to mean one or more of the predecessor States.

97. In fact, the same solution should also apply to any reservation formulated by a successor State other than a newly independent State to a treaty which, following the succession of States, continues in force for that State.

¹²⁰ The full definition of reservations in guideline 1.1 reads as follows: “‘Reservation’ means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty*, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.” On the reasons for the inclusion of this reference to the succession of States in guideline 1.1, see *Yearbook ... 1998*, vol. II (Part Two), p. 100, paras. (5) and (6) of the commentary.

¹²¹ See *Yearbook ... 2008*, vol. II (Part Two), p. 73.

Granted, in such a case, guideline 5.2 does not acknowledge a capacity on the part of the successor State to formulate reservations that had not been formulated by the predecessor State. Nonetheless, should the successor State formulate a new reservation to the treaty in question, there are no grounds for denying that that State has the same capacity as any other State or for refusing it the benefit of the legal regime for late reservations.¹²² Guideline 2.3.1, it should be recalled, provides that the late formulation of a reservation is permitted only if *none* of the other contracting parties objects, thereby fully upholding the principle of consent.

98. Accordingly, guideline 5.9 could be formulated as follows:

“5.9 Reservations formulated by a successor State subject to the legal regime for late reservations

“A reservation shall be considered as late if it is formulated:

“(a) by a newly independent State after it has made a notification of succession to the treaty;

“(b) by a successor State other than a newly independent State after it has made a notification establishing its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State; or

“(c) by a successor State other than a newly independent State in respect of a treaty which, following the succession of States, continues in force for that State.”

¹²² See, in this regard, paragraph 50 above.

CHAPTER II

Status of acceptances of and objections to reservations in the case of succession of States

99. The 1978 Vienna Convention does not deal with the status of objections to or acceptances of reservations in the context of the succession of States. Apparently, no mention was made of acceptances in the *travaux préparatoires*.¹²³ Regarding objections, the Commission decided to leave the issue open, despite a partial proposal by Sir Humphrey Waldock.¹²⁴ Notwithstanding a request to that effect from the Netherlands¹²⁵ and the concerns expressed at the United Nations Conference on Succession of States in Respect of Treaties about this gap in the Convention,¹²⁶ the gap was allowed to remain.

¹²³ With the exception of some passing references in Sir Humphrey Waldock’s third report on succession in respect of treaties (*Yearbook ... 1970*, vol. II, p. 25); see paragraph 124 below.

¹²⁴ See paragraph 104 below.

¹²⁵ *Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...*, vol. I (see footnote 26 above), 27th meeting of the Committee of the Whole, para. 70; 28th meeting of the Committee of the Whole, para. 32; and 35th meeting of the Committee of the Whole, para. 19.

¹²⁶ See *ibid.*, 27th meeting of the Committee of the Whole, para. 85 (Madagascar).

100. That was a deliberate stance, as explained at the Conference by Mustafa Kamil Yasseen, Chairman of the Drafting Committee:

The Drafting Committee had paid particular attention to the question of objections to reservations and objections to such objections, which had been raised by the Netherlands representative. It had noted that, as was clear from the International Law Commission’s commentary to article 19, particularly paragraph (15) (A/CONF.80/4, p. 66),^[127] the article did not deal with that matter, which was left to be regulated by general international law.¹²⁸

101. In fact, the status of objections to reservations in relation to a succession of States raises four very different sets of questions:

(a) First, the question of what happens to objections made by the predecessor State to reservations formulated

¹²⁷ See paragraph 102 below.

¹²⁸ *Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...*, vol. I (see footnote 26 above), 35th meeting of the Committee of the Whole, para. 17.

by other States or international organizations that are parties or contracting States or contracting organizations;

(b) Second, questions related to objections made by such other States or international organizations to reservations of the predecessor State;

(c) Third, the question of whether the successor State itself can object to existing reservations at the time of the succession;

(d) Fourth, the question of whether and in what conditions the other States and international organizations can object to reservations formulated by a successor State at the time of the succession.

A. Status of objections formulated by the predecessor State

102. Draft article 19 (the forerunner of article 20 of the 1978 Vienna Convention), adopted by the Commission on second reading in 1974, also did not address the question of objections to reservations in the context of succession of States. Here again, this omission was deliberate; in the commentary to this provision, the Commission noted:

that it would be better, in accordance with its fundamental method of approach to the draft articles, to leave these matters to be regulated by the ordinary rules applicable to acceptances and objections on the assumption that, unless it was necessary to make some particular provision in the context of the succession of States, the newly independent State would “step into the shoes of the predecessor State”.¹²⁹

These last words could imply that the Commission considered that the transmission of objections should be the rule.¹³⁰

103. In order to justify its silence on the question of objections to reservations, the Commission invoked an argument based on their legal effects: it noted, on the one hand, that unless the objecting State has definitely indicated that by its objection it means to stop the entry into force of the treaty as between the reserving State and the objecting State, the legal position created by an objection to a reservation is “much the same as if no objection had been lodged”,¹³¹ and, on the other, that if such an indication is given, the treaty will not have been in force at all between the predecessor State and the reserving State at the date of the succession.¹³² This also implies that the Commission considered that the previous (maximum-effect) objections of the predecessor State continued to apply.

¹²⁹ *Yearbook ... 1974*, vol. II (Part One), p. 226, para. (15) of the commentary; see also p. 227, para. (23). This explanation was recalled at the United Nations Conference on Succession of States in Respect of Treaties by Sir Francis Vallat, acting as an expert consultant; see *Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...*, vol. I (see footnote 26 above), 27th meeting of the Committee of the Whole, para. 83.

¹³⁰ In this regard, see Imbert (footnote 31 above), p. 320, note 126.

¹³¹ This statement is a little reductive; see the Special Rapporteur's fifteenth report on reservations to treaties (document A/CN.4/624 and Add.1-2, reproduced in this volume) for a discussion of the effects of a minimum-effect objection on the treaty relationship.

¹³² *Yearbook ... 1974*, vol. II (Part One), p. 226, para. (14) of the commentary to article 19. This reasoning is supported by Ruda (footnote 35 above), pp. 207-208. See, however, the critical remarks of Klabbbers, “State succession and reservations to treaties”, pp. 109-110.

104. This was, moreover, the position of Sir Humphrey Waldock, who, while highlighting the scarcity of practice in this regard, had suggested, again along the lines of the proposals put forward by D. P. O'Connell to the International Law Association,¹³³ that the rules regarding reservations should apply *mutatis mutandis* to objections.¹³⁴ In particular, this meant that the same presumption that the Commission would later make with respect to reservations formulated by newly independent States, in its draft article 19, paragraph 1, which was reproduced in article 20, paragraph 1, of the 1978 Vienna Convention, would apply to objections.¹³⁵ The second Special Rapporteur on the subject, Sir Francis Vallat, also supported the presumption in favour of the maintenance of objections formulated by the predecessor State: “[O]n the whole, the reasoning which supports the retention of the presumption in favour of the maintenance of reservations also supports the presumption in favour of the maintenance of objections which is inherent in the present draft”, especially, he stressed, given that in any event it would “always be open to the successor State to withdraw the objection if it wishes to do so.” Nonetheless, Sir Francis considered that there seemed to be “no need to complicate the draft by making express provisions with respect to objections”.¹³⁶

105. Already noted 35 years ago by Gaja,¹³⁷ the dearth of practice in this area is still apparent. It should be noted, however, that certain elements of recent practice also seem to support the maintenance of objections.¹³⁸ Mention should be made, in particular, of a number of cases in which a newly independent State confirmed, in notifying its succession, the objections made by the predecessor State to reservations formulated by States parties to the treaty.¹³⁹ There have also been a few cases in which objections formulated by the predecessor State have been withdrawn and, at the same time, new objections have been formulated.¹⁴⁰ With respect to successor States other than newly independent States, it may be noted, for example, that Slovakia explicitly maintained the objections made by Czechoslovakia to reservations formulated by other States

¹³³ See *Yearbook ... 1969*, vol. II, p. 49, para. 17, “additional point” No. 13: “Since a new State takes over the legal situation of its predecessor, it takes over the consequences of its predecessor's objections to an incompatible reservation made to a multilateral convention by another party. Therefore the reservation would not be effective against the new State unless the latter formally waives the objection.”

¹³⁴ See draft article 9, paragraph 3 (a): “The rules laid down in paragraphs 1 and 2 regarding reservations apply also, *mutatis mutandis*, to objections to reservations”; *Yearbook ... 1970*, vol. II, p. 47.

¹³⁵ See paragraph 1 of guideline 5.1, above.

¹³⁶ *Yearbook ... 1974*, vol. II (Part One), p. 54, para. 289.

¹³⁷ Gaja (footnote 35 above), p. 56.

¹³⁸ See, on this subject, Szafarz, “Vienna Convention on Succession of States in respect of Treaties: a general analysis”, p. 96. Gaja, meanwhile, takes the view that practice does not contradict the presumption in favour of the maintenance of objections formulated by the predecessor State, but also does not suffice to support this presumption (*loc. cit.*, p. 57).

¹³⁹ *Multilateral treaties ...* (footnote 56 above), chap. III.3, Vienna Convention on Diplomatic Relations: Malta repeated, upon succession, some of the objections formulated by the United Kingdom, and Tonga indicated that it “adopted” the objections made by the United Kingdom respecting the reservations and statements made by Egypt; chap. XXI.1, Convention on the Territorial Sea and the Contiguous Zone, and chap. XXI.2, Convention on the High Seas (Fiji); chap. XXI.4, Convention on the Continental Shelf (Tonga).

¹⁴⁰ *Ibid.*, chap. XXI.2, Convention on the High Seas (Fiji).

parties to the treaties to which it succeeded.¹⁴¹ Similarly, the Federal Republic of Yugoslavia stated that it maintained the objections made by the former Yugoslavia,¹⁴² and Montenegro stated that it maintained the objections made by Serbia and Montenegro.¹⁴³

106. It is not immediately clear how this recent practice should be interpreted: it leans in the direction of continuity but could also reflect the absence of a set rule; otherwise, such statements would have been unnecessary.¹⁴⁴

107. It nevertheless seems wise and logical to revert to the solution proposed by Sir Humphrey Waldock, who suggested that the rules regarding reservations should apply *mutatis mutandis* to objections,¹⁴⁵ bearing in mind that, even though the Commission ultimately opted not to include in its draft articles a provision dealing specifically with objections to reservations, the solution proposed by the Special Rapporteur did not give rise to any substantive objections from the Commission.¹⁴⁶

108. Like the presumption in favour of the maintenance of reservations, established in article 20, paragraph 1, of the 1978 Vienna Convention, the presumption in favour of the maintenance of objections is warranted for both newly independent States and other successor States. However, there are exceptions to the presumption in favour of the maintenance of objections in certain cases involving the uniting of two or more States, which are referred to in guideline 5.11.

109. Echoing paragraph 1 of guidelines 5.1 and 5.2, respectively,¹⁴⁷ guideline 5.10 could be worded as follows:

“5.10 Maintenance by the successor State of objections formulated by the predecessor State

“Subject to the provisions of guideline 5.11, a successor State shall be considered as maintaining any objection formulated by the predecessor State to a reservation formulated by a contracting State or contracting international organization or by a State party or international organization party to a treaty unless it expresses a contrary intention at the time of the succession.”

110. Guideline 5.3, “Irrelevance of certain reservations in cases involving a uniting of States”, sets out the exceptions that must qualify the principle of the maintenance of the reservations of the predecessor State in certain situations that may arise in connection with the uniting of two or more States.¹⁴⁸ As the same causes produce the same effects, guideline 5.10, which sets out the principle that the successor State is presumed to maintain the objections of the predecessor State to reservations formulated

by other contracting States or contracting international organizations or parties to a treaty to which it has succeeded, should for the same reasons also be qualified by an exception when these situations arise.

111. Provision should also be made for another situation, one that is specific to objections, by establishing a second exception to the principle laid down in guideline 5.10. This exception, which is justified on logical grounds, relates to the fact that a successor State cannot maintain both a reservation formulated by one of the uniting States and, at the same time, objections made by another such State to an identical or equivalent reservation formulated by a party or contracting State to the treaty that is a third State in relation to the succession of States.

112. Guideline 5.11 sets out these two exceptions, which are specific to successions resulting from a uniting of two or more States.

“5.11 Irrelevance of certain objections in cases involving a uniting of States

“1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the State so formed, such objections to a reservation as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

“2. When, following a uniting of two or more States, the successor State is a party or a contracting State to a treaty to which it has maintained reservations [in conformity with guidelines 5.1 or 5.2], objections to a reservation made by another contracting State or contracting international organization or by a State or international organization party to the treaty shall not be maintained if the reservation is identical or equivalent to a reservation which the successor State itself has maintained.”

113. The phrase in square brackets introduces a detail that is not strictly necessary. It would perhaps be sufficient to link paragraph 2 of guideline 5.1 and paragraph 2 of guideline 5.2, on the one hand, to guideline 5.11, on the other, in the commentary to the latter.

B. Status of objections to reservations of the predecessor State

114. It would be difficult to explain why a party or a contracting State to a treaty should have to reiterate an objection it has already formulated with respect to a reservation of the predecessor State that applied to the territory to which the succession of States relates. Accordingly, the presumption in favour of the maintenance of objections formulated by a party or a contracting State to the treaty in relation to reservations of the predecessor State that are considered as being maintained by the successor State, in conformity with paragraph 1 of guideline 5.1 and paragraph 1 of guideline 5.2, seems to be called for.¹⁴⁹

¹⁴¹ See footnote 82 above.

¹⁴² See footnote 83 above.

¹⁴³ See footnote 84 above.

¹⁴⁴ The same could be said of a number of the clarifications proposed under the fifth part of the Guide to Practice, but the case at hand is especially striking, owing to the extreme scarcity of precedents.

¹⁴⁵ See paragraph 104 above.

¹⁴⁶ See the preceding footnote.

¹⁴⁷ See paragraphs 35 and 54 above.

¹⁴⁸ See paragraph 58 above.

¹⁴⁹ In this regard, see Gaja, *loc. cit.*, p. 67.

115. The presumption in favour of the maintenance of objections to reservations of the predecessor State that are maintained by the successor State also finds support in the views expressed by certain delegations at the United Nations Conference on Succession of States in Respect of Treaties.¹⁵⁰ For example, Japan indicated that it could go along with the Commission's text of draft article 19 on the understanding that "a State party which had objected to the original reservation which had been made by the predecessor State did not need to repeat the objection with regard to the successor State".¹⁵¹ A similar view was expressed by the Federal Republic of Germany, who said, with respect to both newly independent States and other successor States, "[t]he successor State was bound *ipso jure* by the individual treaty relationship created by the predecessor State, including the reservations and other declarations made by that State *and the objections thereto entered by its treaty partners*".¹⁵²

116. This perfectly reasonable presumption could be dealt with in guideline 5.12:

"5.12 Maintenance of objections formulated by another State or international organization to reservations of the predecessor State

"When a reservation formulated by the predecessor State is considered as being maintained by the successor State [in conformity with guideline 5.1 or 5.2], any objection to that reservation formulated by another contracting State or State party or by a contracting international organization or international organization party to the treaty shall be considered as being maintained in respect of the successor State."

117. Once again,¹⁵³ the bracketed phrase would probably best be transposed to and explained in the commentary.

C. Reservations of the predecessor State to which no objections have been made prior to the date of the succession of States

118. Another case that should be considered is that of a party or contracting State to a treaty that has not objected in time to a reservation formulated by a predecessor State and considered as being maintained by the successor State after the succession of States. In these circumstances, it would be difficult to explain why such a tacit acceptance of the reservation could be called into question merely because a succession of States has taken place. Accordingly, the capacity of a party or contracting State to a treaty to object, in respect of a successor State, to a reservation to which it had not objected in respect of the predecessor State, should in principle be ruled out.

¹⁵⁰ See the statements made by Japan (*Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...*, vol. I (see footnote 26 above), A/CONF.80/16, 28th meeting of the Committee of the Whole, paras. 15 and 16) and the Federal Republic of Germany (*ibid.*, vol. II (footnote 27 above), A/CONF.80/16/Add.1, 43rd meeting of the Committee of the Whole, para. 11).

¹⁵¹ *Ibid.*, vol. I (see footnote 26 above), A/CONF.80/16, 28th meeting of the Committee of the Whole, paras. 15 and 16.

¹⁵² *Ibid.*, vol. II (see footnote 27 above), 43rd meeting of the Committee of the Whole, para. 11.

¹⁵³ See paragraph 113 above on a similar bracketed phrase in guideline 5.11.

119. An exception should be made, however, for cases in which the succession of States takes place prior to the expiry of the period during which a party or contracting State to a treaty could have objected to a reservation formulated by the predecessor State.¹⁵⁴ In such a situation, the capacity of a contracting State or contracting international organization or of a State or international organization party to formulate an objection up until the expiry of that period should certainly be acknowledged.

120. The Commission could thus adopt the following guideline:

"5.13 Reservations of the predecessor State to which no objections have been made

"When a reservation formulated by the predecessor State is considered as being maintained by the successor State [in conformity with guideline 5.1 or 5.2], a contracting State or State party or a contracting international organization or international organization party to the treaty that had not objected to the reservation in respect of the predecessor State shall not have capacity to object to it in respect of the successor State unless the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period."

121. As in the case of the foregoing guidelines, the bracketed phrase would probably best be transposed to and explained in the commentary.

D. Capacity of the successor State to object to prior reservations

122. The problem is more complex if the focus is shifted from the status of objections made prior to the succession of States to the question of whether *the successor State* may formulate objections to reservations made in respect of a treaty to which it becomes a party as a result of the succession of States. In this regard, it is once again necessary to distinguish between two different situations that call for different solutions:

(a) On the one hand, cases where a successor State is free to decide whether to succeed to a treaty and establishes its status as a contracting State or, where applicable, as a State party to the treaty when notifying its succession; and

(b) On the other hand, cases of "automatic succession" in which the successor State "inherits" an existing treaty without being called upon to give its express consent.

123. The first situation, in turn, encompasses two different cases: that of a newly independent State that makes a notification of succession¹⁵⁵ and that of a successor State other than a newly independent State that establishes, "by making a notification" to that effect, its status as a party

¹⁵⁴ See guideline 2.6.13 (Time period for formulating an objection) and the commentary thereto, *Yearbook ... 2008*, vol. II (Part Two), pp. 92–94.

¹⁵⁵ See articles 17 and 18 of the 1978 Vienna Convention.

or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State.¹⁵⁶ What these two scenarios have in common, and what allows them to be considered together, is that the successor State has a choice as to whether or not to become a party to the treaty.

124. Sir Humphrey Waldock had briefly considered this issue in his third report on succession in respect of treaties and took the view that,

whenever a successor State becomes a party not by inheritance but by an independent act establishing its consent to be bound, logic would indicate that it should be wholly responsible for its own reservations, acceptances and objections, and that its relation to any reservations, acceptances and objections of its predecessor should be the same as that of any other new party to the treaty.¹⁵⁷

It does indeed seem logical to apply to objections the same reasoning that underlies guidelines 5.1, paragraph 2, or 5.2, paragraph 2, governing the formulation of reservations by a successor State: since, in the cases considered here, succession to a treaty takes place only by virtue of a deliberate act on the part of the successor State (a “notification of succession” or, in the case of successor States other than newly independent States, a “notification”), the successor State must be free to modify its treaty obligations, not only by formulating reservations, but also, if it so desires, by objecting to reservations formulated by other States even before the date of its succession to the treaty.¹⁵⁸

125. While the practice in this area is scarce, there have been cases in which newly independent States have formulated new objections when notifying their succession to a treaty. For example, Fiji withdrew objections made by the predecessor State and formulated new objections upon notifying its succession to the Convention on the High Seas.¹⁵⁹

126. There is thus no reason why a newly independent State or other successor State cannot formulate new objections in respect of a treaty that was not in force for the predecessor State or States¹⁶⁰ upon establishing, by a notification within the meaning of guideline 5.1, paragraph 2 or guideline 5.2, paragraph 2, its status as a party or as a contracting State to the treaty.

127. As proposed by Sir Humphrey Waldock in his third report on succession in respect of treaties, this capacity must nonetheless be limited; article 9, paragraph 3, which established the principle that the same rules should apply to both objections and reservations, included a subparagraph (b), worded as follows:

(b) However, in the case of a treaty falling under Article 20, paragraph 2, of the Vienna Convention, no objection may be formulated by

¹⁵⁶ See articles 32 and 36 of the 1978 Vienna Convention.

¹⁵⁷ *Yearbook ... 1970*, vol. II, p. 47, para. (2) of the commentary to draft article 9; see also paragraph 104 above.

¹⁵⁸ In this regard, in the case of newly independent States, see Gaja (footnote 35 above), p. 66.

¹⁵⁹ See footnote 140 above.

¹⁶⁰ As in the situations covered by guidelines 5.2, para. 2, and 5.8 (see paragraphs 53 and 96 above), the term “predecessor State” should be understood, in cases involving the uniting of two or more States, to mean one or more of the predecessor States.

a new State to a reservation which has been accepted by all the parties to the treaty.¹⁶¹

128. This exception is intended to ensure that a successor State cannot, by formulating an objection, compel the reserving State to withdraw from such a treaty. It is also consistent with guideline 2.8.2, “Unanimous acceptance of reservations”:

In the event of a reservation requiring unanimous acceptance by some or all States or international organizations which are parties or entitled to become parties to the treaty, such an acceptance once obtained is final.¹⁶²

129. This exception is set out in guideline 5.14, paragraph 3, for which the following wording is proposed:

“5.14 Capacity of a successor State to formulate objections to reservations

“1. When making a notification of succession establishing its status as a party or as a contracting State to a treaty, a newly independent State may, in the conditions laid down in the relevant guidelines of the Guide to Practice and subject to paragraph 3 of the present guideline, object to reservations formulated by a contracting State or State party or by a contracting international organization or international organization party to the treaty, even if the predecessor State made no such objection.

“2. A successor State other than a newly independent State shall also have the capacity provided for in paragraph 1 when making a notification establishing its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State.

“3. The capacity referred to in the foregoing paragraphs shall nonetheless not be recognized in the case of treaties falling under guidelines 2.8.2 and [4.X.X].”¹⁶³

130. The summary reference, in paragraph 1 of this guideline, to “the conditions laid down in the relevant guidelines of the Guide to Practice” is warranted by the fact that it would be difficult, if not impossible, to give an exhaustive list in the draft guideline itself of all the guidelines applicable to the formulation of objections; this could, however, be done in the commentary.

131. Guideline 5.14 does not apply to a successor State other than a newly independent State when, following a uniting or separation of States, a treaty continues in force in respect of that State in the context of a succession that can be termed “automatic”, i.e. when a treaty continues in force, following a succession of States, in respect of a successor State other than a newly independent State even though there has been no expression of consent by

¹⁶¹ *Yearbook ... 1970*, vol. II, p. 47; see also the explanation of the grounds for this proposal, *ibid.*, p. 52, para. (17) of the commentary to draft article 9.

¹⁶² *Yearbook ... 2009*, vol. II (Part Two), text and commentary, pp. 97–98.

¹⁶³ The number of the guideline in the Guide to Practice that reproduces article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions should be inserted in place of the brackets.

that State. Under part IV of the 1978 Vienna Convention, such a situation arises, in principle, in the case of a State formed from a uniting of two or more States in relation to treaties in force at the date of the succession of States in respect of any of the predecessor States.¹⁶⁴ The same is true of a State formed from the separation of parts of a State in relation to treaties in force at the date of the succession of States in respect of the entire territory of the predecessor State, as well as treaties in force in respect only of that part of the territory of the predecessor State that corresponds to the territory of the successor State.¹⁶⁵ In these circumstances, as succession to the treaty does not depend on an expression of volition on the part of the State formed from the uniting or separation of States, that State inherits all of the rights and obligations of the predecessor State under the treaty,¹⁶⁶ including objections (or the lack thereof) that the predecessor State had (or had not) formulated in respect of a reservation to the treaty. In any event, it does not seem that successor States other than newly independent States have laid claim to such a capacity.¹⁶⁷

132. As one author has written, “When ... succession is considered to be automatic, the admissibility of objections on the part of the successor State must be ruled out ... If the predecessor State had accepted the reservation, such consent cannot be subsequently revoked either by the same State or by its successor”.¹⁶⁸

133. As in the case of guideline 5.13, “Reservations of the predecessor State to which no objections have been made”, an exception should nonetheless be made for cases in which a succession of States takes place prior to the expiry of the time period during which the predecessor State could have objected to a reservation formulated by another party or contracting State to the treaty. In such a situation, acknowledging the capacity of the successor State to formulate an objection to such a reservation up until the expiry of that period seems warranted.¹⁶⁹

134. In view of the foregoing considerations, the Special Rapporteur proposes that the Commission adopt the following guideline 5.15:

“5.15 Objections by a successor State other than a newly independent State in respect of which a treaty continues in force

“A successor State other than a newly independent State in respect of which a treaty continues in force following a succession of States shall not have capacity to formulate an objection to a reservation to which the predecessor State had not objected unless the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period.”

¹⁶⁴ See article 31 of the Convention.

¹⁶⁵ See article 34 of the Convention.

¹⁶⁶ See paragraph 49 above.

¹⁶⁷ The memorandum by the Secretariat (footnote 4 above) does not mention any cases in which a successor State formed from a uniting or separation of States has formulated objections to reservations to which the predecessor State had not objected.

¹⁶⁸ *Gaja* (footnote 35 above), p. 67.

¹⁶⁹ See footnote 154 above.

E. Objections to reservations formulated by the successor State

135. While it is probably self-evident, it may also be desirable, in the interest of completeness, for the Commission to adopt a final guideline on objections to reservations in the context of a succession of States, in the light of the evidence showing that, when a successor State formulates a reservation at the time of the succession of States, contracting States and contracting international organizations may object to it in the conditions laid down in articles 20–23 of the 1969 and 1986 Vienna Conventions, which are reflected and elaborated upon in the Guide to Practice.¹⁷⁰

136. This guideline could be worded as follows:

“5.16 Objections to reservations of the successor State

“Any contracting State or contracting international organization may formulate objections to any reservation formulated by the successor State in the conditions laid down in the relevant guidelines of the Guide to Practice.”

137. It should be noted that the term “any contracting State” included in this guideline also includes, where applicable, the predecessor State if it continues to exist.

138. As in guideline 5.14, the summary reference to “the conditions laid down in the relevant guidelines of the Guide to Practice” is warranted by the fact that it would be difficult if not impossible to give an exhaustive list in the guideline itself of all the guidelines applicable to the formulation of objections; this could, however, be done in the commentary.

F. Acceptances of reservations

139. In the context of the succession of States, the acceptance of reservations is problematic only in so far as it relates to the status of express acceptances formulated by the predecessor State. On the one hand, there is no reason to question the capacity of the successor State to formulate an express acceptance of a reservation formulated, prior to the date of succession to a treaty,¹⁷¹ by a State or international organization that is a party or a contracting party: the successor State can, of course, exercise this capacity, pursuant to guideline 2.8.3,¹⁷² as any State is entitled to do at any time. In the Special Rapporteur’s view, this point may be clarified in the commentary without the need for a specific guideline on the matter. On the other hand, the status of tacit acceptance by a predecessor State which did not object to a reservation in a timely manner prior to the date of the succession of States is governed by guidelines 5.14¹⁷³ and 5.15,¹⁷⁴ proposed below.

¹⁷⁰ See footnote 168 above.

¹⁷¹ A successor State’s express acceptance of a reservation formulated after the date of succession to the treaty, however, falls under the general regime of acceptances and need not be dealt with in the context of the succession of States to treaties.

¹⁷² *Yearbook ... 2009*, vol. II (Part Two), text and commentary, pp. 98–99.

¹⁷³ See paragraph 129 above.

¹⁷⁴ See paragraph 134 above.

140. As with reservations and objections, the question of the status of express acceptances formulated by a predecessor State calls for an approach that varies, at least in part, according to whether succession to the treaty occurs through notification by the successor State or *ipso jure*.

141. As has been noted repeatedly in this sixteenth report, in the case of newly independent States, succession occurs through notification of succession.¹⁷⁵ In this context, article 20, paragraph 1, of the 1978 Vienna Convention, reproduced in the first paragraph of guideline 5.1, proposed above,¹⁷⁶ establishes the presumption in favour of maintenance by the newly independent State of the reservations of the predecessor State unless, when making the notification of succession, the newly independent State expresses a contrary intention or formulates a reservation which relates to the same subject matter as the reservation of the predecessor State. In the Special Rapporteur's view, while there appears to be no practice regarding express acceptances of reservations in connection with the succession of States, the presumption in favour of the maintenance of reservations should logically be transposed to express acceptances.

142. An analogy also seems appropriate in the case of the need to recognize the capacity of the newly independent State to express its intention not to maintain an express acceptance formulated by the predecessor State in respect of a reservation. That capacity does not constitute a derogation from the general rule regarding the final nature of acceptance of a reservation, set forth in guideline 2.8.12.¹⁷⁷ The voluntary nature of succession to the treaty by the newly independent State justifies this apparent derogation, just as it justifies the capacity of the newly independent State to formulate new reservations when making its notification of succession to the treaty,¹⁷⁸ recognized in article 20, paragraph 2, of the 1978 Vienna Convention, or the capacity of such a State to formulate objections to reservations that were formulated prior to the date of the notification of succession as recognized in guideline 5.14, proposed below.¹⁷⁹

143. However, the question of the time period within which the newly independent State may express its intention not to maintain an express acceptance by the predecessor State remains to be addressed. With respect to the non-maintenance of a reservation made by the predecessor State, article 20, paragraph 1, of the 1978 Vienna Convention requires that the newly independent State must express its intention to that effect when making its notification of succession to the treaty. Does the same requirement apply with respect to the non-maintenance of an express acceptance? In this case, logic suggests that, by analogy, the approach taken with regard to the formulation by a newly independent State of an objection to a reservation formulated prior to the date of the notification of succession¹⁸⁰ should be followed. In fact,

¹⁷⁵ See, *inter alia*, guidelines 5.1 and 5.2 and paragraphs 40 and 51 above.

¹⁷⁶ See paragraph 35 above.

¹⁷⁷ For the commentary on this guideline, see *Yearbook ... 2009*, vol. II (Part Two), p. 106.

¹⁷⁸ See also guideline 5.1, paragraph 2, proposed in the present report (para. 35 above).

¹⁷⁹ See paragraph 129 above.

¹⁸⁰ *Ibid.*

it appears that the potential effects of non-maintenance of an express acceptance can be likened, to a great extent, to the formulation of a new objection. In that regard, guideline 5.14¹⁸¹ on objections formulated by a successor State simply refers to "the conditions laid down in the relevant guidelines of the Guide to Practice", including the temporal requirement set forth in article 20, paragraph 5, of the 1969 Vienna Convention and reproduced in guideline 2.6.13.¹⁸² In the case of the objection by a newly independent State to a reservation formulated prior to the date of the notification of succession, application of the general rule suggests that the newly independent State has 12 months as from the date of the notification of succession to formulate such an objection. However, while we cannot simply refer to the general rules in addressing the issue of the maintenance or non-maintenance by the successor State of an express acceptance of a reservation made by the predecessor State (an issue that arises only in the context of the succession of States), there is no reason not to take, *mutatis mutandis*, the same approach. Consequently, the wording of guideline 5.16 *bis*, on the maintenance by the newly independent State of express acceptances formulated by the predecessor State, should be based on the rule applicable to the formulation by the successor State of an objection, and the 12-month time period within which the newly independent State may express its intention not to maintain an express acceptance formulated by the predecessor State should be retained.

144. The expression by a newly independent State of its intention on this matter may be conveyed either through its explicit withdrawal of the express acceptance formulated by the predecessor State, or through its formulation of an objection to the reservation which had been expressly accepted by the predecessor State and the content of which would be incompatible, in whole or in part, with this acceptance.

145. In the light of these considerations, a guideline 5.16 *bis*, worded as follows, might be included in the Guide to Practice:

"5.16 *bis* Maintenance by a newly independent State of express acceptances formulated by the predecessor State

"When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty, it shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or contracting international organization unless it expresses a contrary intention within 12 months of the date of the notification of succession."

146. In the case of successor States other than newly independent States, however, this question calls for different approaches depending on whether succession

¹⁸¹ *Ibid.*

¹⁸² See the text and commentary in *Yearbook ... 2008*, vol. II (Part Two), pp. 92–94. Guideline 2.6.13 reads: "Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later".

occurs *ipso jure* or through notification. As we have seen in this report, the first situation arises, in cases involving the uniting or separation of States, with respect to treaties which, on the date of the succession of States, were in force for the predecessor State and remain in force for the successor State.¹⁸³ Guideline 5.15, proposed above,¹⁸⁴ provides that, in such a situation, the successor State may not formulate an objection to a reservation to which the predecessor State did not object in a timely manner. *A fortiori*, such a successor State may not call into question an express acceptance formulated by the predecessor State.

147. The situation is, however, different where succession to a treaty by States emerging from a uniting or separation of States occurs only through a notification to that effect—as in the case of treaties which, on the date of the succession of States, were not in force for the predecessor State but to which it was a contracting State. In this situation—as has, moreover, been said of the formulation of new reservations¹⁸⁵ and new objections¹⁸⁶—these other successor States must be recognized as having the same capacity as newly independent States under guideline 5.16 *bis* above.

148. Guideline 5.17 might therefore read:

“5.17 Maintenance by a successor State other than a newly independent State of the express acceptances formulated by the predecessor State

“A successor State, other than a newly independent State, for which a treaty remains in force following a succession of States shall be considered as maintaining any express acceptance by the predecessor State of

¹⁸³ See paragraph 49 above.

¹⁸⁴ See paragraph 134 above.

¹⁸⁵ See article 20, paragraph 2, of the 1978 Vienna Convention and paragraph 2 of guideline 5.1, proposed in the present report (para. 35).

¹⁸⁶ See paragraph 1 of guideline 5.14, proposed in the present report (para. 129 above).

a reservation formulated by a contracting State or by a contracting international organization.

“When making a notification of succession establishing its status as a contracting State or as a party to a treaty which, on the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting party, a successor State other than a newly independent State shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting international organization unless it expresses a contrary intention within 12 months of the date of the notification of succession.”

149. A related issue concerns the effects *ratione temporis* of a successor State’s non-maintenance of an express acceptance of a reservation by the predecessor State. On this point, there is no reason not to follow the approach taken in guideline 5.7, proposed above,¹⁸⁷ concerning the timing of the effects of a successor State’s non-maintenance of a reservation formulated by the predecessor State.

150. It is therefore necessary to propose a guideline 5.18 with the following wording:

“5.18 Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State

“The non-maintenance [, in accordance with guidelines 5.16 and 5.17, paragraph 2,] by the successor State of the predecessor State’s express acceptance of a reservation formulated by a contracting State or by a contracting international organization shall take effect for a contracting State or for a contracting international organization when that State or that organization has received the notification thereof.”

¹⁸⁷ See paragraph 85 above.

CHAPTER III

Interpretative declarations

151. The succession of States to treaties may also raise questions with regard to interpretative declarations, on which the 1978 Vienna Convention is as silent as the 1969 and 1986 Vienna Conventions.

152. At the United Nations Conference on Succession of States in Respect of Treaties, the Federal Republic of Germany proposed an amendment that would have expanded the scope of article 20, the only provision of the 1978 Vienna Convention in which the status of reservations is mentioned.¹⁸⁸ The amendment would have preceded the rules concerning reservations, as proposed by the Commission, with a statement that “[...] any statement or instrument made in respect to the treaty in connection with its conclusion or signature by the predecessor State,

shall remain effective for the newly independent State”.¹⁸⁹ The Federal Republic of Germany later withdrew this proposed amendment, to which, for various reasons, several delegations had objected.¹⁹⁰

153. Although the text of the Convention is silent on this matter, two questions arise: the first concerns the status of

¹⁸⁹ *Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...*, vol. I (see footnote 26 above), A/CONF.80/16, 28th meeting, A/CONF.80/14, para. 118 (b) (reproduced in *ibid.*, A/CONF.80/16/Add.2).

¹⁹⁰ *Ibid.*, 27th meeting, para. 73 (Algeria, which considered that the proposed amendment seemed to affect the principle of self-determination); para. 78 (Poland, which believed that the proposed amendment was not sufficiently clear); para. 87 (Madagascar, which was of the view that the wording of the proposed amendment was “much too broad in scope”); para. 90 (Guyana); and para. 95 (Italy, which found the wording of the proposed amendment “very strong and inflexible”).

¹⁸⁸ See paragraph 4 above.

interpretative declarations formulated by the predecessor State, while the second is whether the successor State has the capacity to formulate its own interpretative declarations at the time of succeeding to the treaty, or thereafter. In either case, it must be borne in mind that, according to guideline 2.4.3, “[w]ithout prejudice to the provisions of guidelines 1.2.1, 2.4.6 and 2.4.7, an interpretative declaration may be formulated at any time”.¹⁹¹

154. Practice provides no answer to the question of the status of interpretative declarations in the context of the succession of States to a treaty. Furthermore, interpretative declarations are extremely diverse, both in their intrinsic nature and in their potential effects. It is, moreover, these factors which explain, at least in part, the lack of detail in the rules governing interpretative declarations in the Guide to Practice. Under these conditions, the Commission will doubtless opt for prudence and pragmatism.

155. In this spirit, the Commission might simply suggest that States should, to the extent possible, clarify their position on the status of any interpretative declarations formulated by the predecessor State. Furthermore, it should be recognized that there are situations in which, in the absence of an explicit position taken by the successor State, the latter’s conduct might answer the question of whether it subscribes to an interpretative declaration formulated by the predecessor State. In such cases, this conduct would suffice to establish the status of the predecessor State’s interpretative declarations.

156. A guideline on this issue, if formulated in general terms, might cover all types of succession. The Commission might therefore include in the Guide to Practice the following guideline 5.19:

¹⁹¹ Guidelines 1.2.1 and 2.4.7 concern conditional interpretative declarations, which appear to be subject to the legal regime applicable to reservations. Guideline 2.4.6 concerns the late formulation of an interpretative declaration where a treaty provides that an interpretative declaration may be made only at specified times, in which case this special rule takes precedence over the general rule.

“5.19 Clarification of the status of interpretative declarations formulated by the predecessor State

“A successor State should, to the extent possible, clarify its position concerning the status of interpretative declarations formulated by the predecessor State.

“The preceding paragraph is without prejudice to situations in which the successor State has demonstrated, by its conduct, its intention to maintain or to reject an interpretative declaration formulated by the predecessor State.”

157. Guideline 5.19 is formulated as a recommendation. On several occasions, the Commission has taken the view that such an approach was appropriate in the context of a Guide to Practice that was not intended to become a convention.¹⁹² This is all the more true in the case at hand since, in the absence of express treaty provisions, States have broad discretion as to whether and when to make such declarations.

158. The second question that arises with respect to interpretative declarations concerns the successor State’s capacity to formulate interpretative declarations, including declarations that the predecessor State did not formulate. There is little doubt that the existence of this capacity follows directly from guideline 2.4.3, which states that an interpretative declaration may, with some exceptions, be formulated at any time.¹⁹³ Thus, there appears to be no valid reason to deprive any successor State of a capacity that the predecessor State could have exercised at any time. The Special Rapporteur sees no need to devote a guideline to this question, which can be clarified in the commentary to guideline 5.19.

¹⁹² See, *inter alia*, guidelines 2.1.9, 2.4.0, 2.4.3 *bis*, 2.6.10 and 2.9.3.

¹⁹³ See also paragraph 153 above. For the commentary on guideline 2.4.3, see *Yearbook ... 2001*, vol. II, (Part Two), pp. 192–193.

SHARED NATURAL RESOURCES

[Agenda item 4]

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Shared natural resources: feasibility of future work on oil and gas, paper prepared by Mr. Shinya Murase

[Original: English]
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Introduction

1. The International Law Commission, at its fifty-fourth session, in 2002, decided to include the topic “Shared natural resources” in its programme of work and appointed Mr. Chusei Yamada as Special Rapporteur on the issue.¹ A Working Group was established to assist the Special Rapporteur in sketching out the general orientation of the topic in the light of the syllabus prepared in 2000.² The Special Rapporteur proposed to address transboundary groundwaters, oil and natural gas, taking a step-by-step approach, beginning with groundwaters.³ At its sixtieth session, in 2008, the Commission adopted, on the second reading, a preamble and a set of 19 draft articles on the law of transboundary aquifers, with the recommendation that the General Assembly, *inter alia*, consider the elaboration of a convention on the basis of the draft articles.⁴

2. At the fifty-ninth session, in 2007, the Working Group on Shared Natural Resources, chaired by Mr. Enrique Candioti, discussed the issue of oil and gas resources on the basis of the fourth report on shared

natural resources: transboundary groundwaters⁵ submitted by the Special Rapporteur, Mr. Chusei Yamada. In addition to determining that the law of transboundary aquifers should be addressed separately from issues concerning oil and gas resources, the Commission decided to request the Secretariat to circulate to Governments a questionnaire on the subject prepared by the Working Group.⁶ At the sixty-first session, in 2009, the Working Group discussed the feasibility of any future work by the Commission on the issue of oil and gas resources on the basis of a working paper on oil and gas,⁷ which had been prepared by Mr. Yamada before he resigned from the Commission. The Working Group decided to have the 2007 questionnaire recirculated and to entrust the author with the responsibility of preparing a study in which the feasibility of any future work by the Commission on oil and gas would be determined through the analysis of written replies from Governments and their comments and observations in the Sixth Committee of the General Assembly, as well as other relevant elements.⁸ The present working paper is submitted in compliance with that request.

¹ *Yearbook ... 2002*, vol. II (Part Two), p. 100, paras. 518–519.

² *Yearbook ... 2000*, vol. II (Part Two), annex, pp. 141–142.

³ *Yearbook ... 2003*, vol. II (Part Two), p. 93, para. 377.

⁴ See General Assembly resolution 63/124 of 11 December 2008, annex.

⁵ *Yearbook ... 2007*, vol. II (Part One), p. 1, document A/CN.4/580.

⁶ *Yearbook ... 2004*, vol. II (Part Two), pp. 55–61, paras. 161–183.

⁷ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/608.

⁸ *Ibid.*, vol. II (Part Two), paras. 187–193.

I. Replies and observations of Governments

3. The Commission received 39 replies from Governments, 19 of which addressed the question of the feasibility of future work by the Commission in the area of oil and gas.⁹ In addition, a number of Government representatives made statements on the subject in the Sixth Committee.¹⁰ From those written replies and oral statements, 46 in total, it is clear that the attitudes of Member States differ significantly on the issue of whether the Commission should undertake further work on oil and gas. While some States favour the Commission’s embarking on such work, a majority of States expressed the view that the Commission should not. Several other States took a middle-of-the-road view, advising a cautious approach.

4. The first group of States expected the Commission to take up the question of oil and gas.¹¹ It was stated that there were similarities between groundwaters and oil and gas, not only from a legal point of view, but also from a geological perspective, and that, even if a cautious

approach was advisable, the same general legal principles seemed to apply in both cases. It was also stated that, even if there were certain differences between groundwater and oil and gas, that did not necessarily warrant a separate approach with regard to gaseous substances and liquid substances other than groundwater. According to this view, the fact that different rules applied to oil and gas did not necessarily require the formulation of a different legal framework for oil and gas, special rules for aquifers could be included in a common legal framework for shared natural resources, and the simultaneous consideration of the rules of international law related to all such resources would enhance the legal quality of the emerging international legal framework. A few other States expected the Commission to develop general rules on transboundary natural resources, whether aquifers or oil and gas, while cautiously recalling that such rules should not be considered in isolation from the issue of maritime boundary delimitation, which would require in-depth study and careful treatment, and that the subject was usually covered by bilateral agreements. Nevertheless, the States that favoured embarking on the question of oil and gas constituted a minority of the States that addressed the issue.

5. The second group of States, which formed a clear majority, asserted that the topic of oil and gas should not be addressed by the Commission. The reasons cited by those States, while varying considerably, included the following points: (a) the question of oil and gas is essentially different from that of groundwater; (b) the issue is closely intertwined

⁹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/607 and Add.1. Replies were also received from three other Member States in January and February 2010.

¹⁰ For comments and observations by delegations, see *Official Records of the General Assembly, Sixty-second Session, Sixth Committee*, 22nd, 24th and 25th meetings (A/C.6/62/SR.22, 24 and 25); *ibid.*, *Sixty-third Session*, 16th–18th meetings (A/C.6/63/SR.16–18); and *ibid.*, *Sixty-fourth Session*, 17th, 18th and 20th–23rd meetings (A/C.6/64/SR.17, 18 and 20–23).

¹¹ References to comments are made in the present working paper to demonstrate a general trend in the views of Member States and are not intended to be exhaustive.

with the bilateral interests of the States involved; (c) it cannot be separated from boundary delimitation; (d) it is not suitable for codification; and (e) it involves political sensitivity and technical difficulty. Naturally, some of those reasons are closely interrelated, but they are referred to here for the sake of convenience, with a view to highlighting a general trend in the views of States.

A. Essential difference between aquifers and oil and gas

6. Several States expressed the view that groundwater should be addressed separately from oil and gas deposits, even if some geological factors might suggest the possibility of dealing with the two resources together. Such a limited, geological approach would ignore or underestimate social and economic implications, which differed significantly when it came to groundwater, on the one hand, and oil and gas, on the other. Similarly, the view was expressed that it was important to distinguish the physical or geological characteristics of oil and gas from the legal evaluation of those resources.

B. The question of bilateral nature

7. Many States considered that the question of oil and gas was one that involved the essential bilateral interests of the States concerned and that any attempt to codify general rules would not be appropriate or necessary. It was stated that the question was one to be resolved through negotiation between the States involved, as the topic was already adequately covered by principles of international law and dealt with by States on a bilateral basis. It was not deemed advisable to commence work on the subject of oil and gas, which were of great strategic, economic and developmental importance. Similarly, it was indicated that the specific and complex issues related to transboundary oil and gas reserves had been adequately addressed for a number of years through bilateral cooperation and mutually agreed arrangements, and thus did not seem to be giving rise to insurmountable problems in practice.

C. Boundary delimitation

8. Some States expressed the view that the Commission should not take up the subject of oil and gas because, in many cases, it would be linked to questions related to maritime delimitation. It was emphasized that the development, exploitation and management of transboundary oil and gas naturally presupposed the delimitation of territorial and/or maritime boundaries between two or more States and thus required a case-by-case approach. In particular, it was stressed that the Commission should refrain from considering matters relating to offshore boundary delimitation, as the United Nations Convention on the Law of the Sea¹² undoubtedly stipulated that maritime delimitation was a matter to be addressed by the States concerned: in areas where States had yet to permanently resolve maritime claims, the questions of if and how oil and gas resources were shared were inextricably linked to the resolution of such claims. Furthermore, the resulting delimitation agreements often contained provisions for

the joint exploitation of oil and gas deposits straddling the agreed boundary. Such existing bilateral mechanisms represented the best way forward for States in the management of shared oil and gas reserves.

D. Doubts about suitability for codification

9. Doubts were expressed by several States with regard to the suitability of the topic for the codification exercise. Many States shared the view that the issue of oil and gas did not fall within the scope of international customary law and should be addressed through cooperation and negotiation between the States concerned, and that codification would be neither timely nor realistic. According to other States, the subject was not ripe for codification or was not suitable for codification by the Commission. Some States were not persuaded that further codification work by the Commission on this topic would have any added value, since it might lead to additional complexity and confusion. They considered that it would not be helpful or wise for the Commission to study this area further or to attempt to deduce certain rules of customary international law from the very limited relevant practice. It was also argued that the Commission had no mandate to consider the environmental aspects of fossil and hydrocarbon fuels in the context of the topic. It was further stated that scientific and legal studies had shown that it would be impossible to elaborate universal standards in that area, which had no aspects that could benefit from further elaboration in the context of the Commission's work. As the available relevant practice was bilateral in nature and context-specific, it was more appropriate for application in bilateral negotiations between interested States than for the process of the progressive development and codification of international law.

E. Political sensitivity and technical difficulty

10. It was noted by a number of States that the subject of oil and gas was a complex one that had given rise to considerable difficulties of a political or technical nature. It was also stressed that the Commission should take into account the complexity and sensitivity of the issue. It was stated that it would be advisable for the Commission to exercise caution with regard to this matter. States and industries had immense economic and political stakes in the allocation and regulation of oil and gas resources, and any proposal by the Commission would likely be highly controversial. It was also emphasized that the issue of transboundary oil and gas naturally involved highly technical data and politically sensitive issues, as well as the issue of State sovereignty.

11. In sum, a large number of States believed that the oil and gas issue was essentially bilateral in nature as well as highly political or technical, involving diverse regional situations. They expressed doubts as to the need for the Commission to proceed with any codification process relating to this issue, including the development of universal rules. Moreover, it appeared that those countries would be concerned if the Commission were to broaden the topic to include matters relating to offshore boundary delimitation.

12. The third group of States comprised those that did not clearly indicate their positions. Many States in this group

¹² Signed in Montego Bay, 10 December 1982 (United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3).

stressed that the Commission must enjoy broad and widespread support among States if it wished to embark on the topic of oil and gas. Some States indicated that, while a codification exercise could not be considered appropriate or necessary, they would nonetheless welcome a study by the Commission on relevant State practice. For example, it was suggested that an analysis of various approaches

taken under existing arrangements might lead to a set of common principles and best practices. It was also stated that the Commission might wish to consider conducting a survey on practice related to both inter-State and private contracts in order to shed light on general trends in practice, both in public and private law, which might lead to the proposal of guidelines if necessary.

II. Recommendation

13. It may be recalled that the topic “Shared natural resources” was included in the programme of work of the Commission on the basis of a syllabus prepared by Robert Rosenstock during its fifty-second session, in 2000, which sketched out the general orientation of the topic. It was stated in the syllabus that the Commission should focus “exclusively on water, particularly confined groundwater, and such other single geological structures as oil and gas”.¹³ There was no specific syllabus concerning the issue of oil and gas resources. It is for this reason that, following the completion of the work on transboundary aquifers, consideration of the feasibility of work on the topic of oil and gas has been warranted.

14. It is generally considered that, in selecting a new topic or subtopic, the Commission should be guided by the following criteria, as elaborated by the Commission in 1997 and 1998: the topic should reflect the needs of States in respect of the progressive development and codification of international law; the topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and the topic should be concrete and feasible for progressive development and codification.¹⁴ Along the same lines, three feasibility tests were suggested for topic selection: the first was the practical consideration of whether there was any relevant pressing need in the international community as a whole; the second concerned the technical feasibility of the topic—whether it was sufficiently “ripe” in the light of relevant State practice and literature; and the third related to the political feasibility of the topic—whether addressing it might or might not meet with strong political resistance on the part of States.¹⁵

15. The views of the majority of Member States concerning the issue of oil and gas were largely negative, as summarized above. A majority believed that the question was not only essentially bilateral in nature, but also highly technical, involving diverse regional situations. It was particularly important to distinguish the physical or geological

characteristics of oil and gas from the legal evaluation of those resources, and also to note that, as far as oil and natural gas were concerned, each case had its own specific and distinct features and would need to be addressed separately. Doubts were thus expressed as to the need for the Commission to proceed with any codification process relating to this issue, including the development of universal rules. It was feared that an attempt at generalization might inadvertently lead to additional complexity and confusion in an area that had been adequately addressed through bilateral efforts to manage it. Given that oil and gas reserves were often located in continental shelves, maritime boundary delimitation, which, in political terms, was a very delicate and sensitive issue for the States concerned, was a prerequisite for the consideration of this topic, unless the parties had mutually agreed, as in a limited number of cases, to bypass the problem of delimitation.¹⁶

16. With regard to the middle course of action suggested by a few States—namely, collecting and analysing information about State practice concerning oil and gas or elaborating a model agreement on the subject¹⁷—that might not be a very fruitful exercise for the Commission, precisely because of the specificities of each case involving oil and gas. The delicate and sensitive nature of certain relevant cases could well be expected to hamper any attempt at sufficiently extensive and useful analysis of the issues involved.

17. Accordingly, the author of the present paper recommends that the Working Group decide, at the sixty-second session of the Commission, in 2010, that the topic of oil and gas not be pursued any further.¹⁸

¹⁶ See Charney, *et al.*, eds., *International Maritime Boundaries*, 4 vols.; Murase and Eto, eds., *International Law of Maritime Boundary Delimitation* (in Japanese).

¹⁷ A few attempts were made in the 1980s to elaborate model agreements. See Fox, *et al.*, *Joint Development of Offshore Oil and Gas: Model Agreement for States for Joint Development with Explanatory Commentary* (1989); Fox, ed., *Joint Development of Offshore Oil and Gas*, vol. 2, 1990; Szekely, *et al.*, “Transboundary hydrocarbon resources: the Puerto Vallarta draft treaty” (joint project between a United States university and a Mexican university). It may be noted that the International Committee on the Exclusive Economic Zone stopped short of coming up with a model agreement. See International Law Association, “Joint development of non-living resources in the Exclusive Economic Zone”.

¹⁸ Such a decision is not without precedent in the practice of the Commission. It may be recalled that the topic of the status, privileges and immunities of international organizations had been on the Commission’s agenda since 1976 and that two successive Special Rapporteurs had submitted a total of eight reports on that issue. Neither in the Commission nor in the Sixth Committee had the view been expressed that the topic should be more actively considered. Hence, the Commission decided, on the basis of a recommendation of the Planning Group, that the topic should not be pursued, and that decision was endorsed by the General Assembly in 1992.

¹³ *Yearbook ... 2000*, vol. II (Part Two), annex, p. 141. Differing views were expressed by Commission members as to whether a decision had been made by the Commission that oil and gas were included in the topic (see *Yearbook ... 2007*, vol. II (Part Two), paras. 169, 170 and 177).

¹⁴ See *Yearbook ... 1997*, vol. II (Part Two), pp. 71–71, para. 238; *Yearbook ... 1998*, vol. II (Part Two), p. 110, para. 553. It may be recalled that the Commission further agreed that it should not restrict itself to traditional topics, but could also consider those reflecting new developments in international law and pressing concerns of the international community as a whole.

¹⁵ Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law*, pp. 60–63; Murase, *International Lawmaking: Sources of International Law*, pp. 217–221.

SHARED NATURAL RESOURCES

[Agenda item 4]

DOCUMENT A/CN.4/633

Comments and observations received from Governments

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Protocol concerning regional co-operation in combating pollution by oil and other harmful substances in cases of emergency	<i>Ibid.</i>
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Ibid.</i> , vol. 1834, No. 31363, p. 396.
International Convention on oil pollution preparedness, response and cooperation, 1990 (London, 30 November 1990)	<i>Ibid.</i> , vol. 1891, No. 32194, p. 77.

Introduction

1. At its sixty-first session, in 2009, the International Law Commission requested that the Secretariat circulate once more to Governments the 2007 questionnaire, prepared by the Working Group on Shared Natural Resources, seeking information on State practice, in particular treaties or other existing arrangements, regarding

oil and gas.¹ The Commission also encouraged Governments to provide comments and information on any other matter concerning oil and gas, including, in particular, whether the Commission should address the subject. In

¹ See *Yearbook ... 2009*, vol. II (Part Two), p. 16, para. 30.

a circular note dated 9 November 2009, the Secretariat transmitted the questionnaire to Governments.

2. As at 31 March 2010, responses to the questionnaire had been received from the following 19 States: Bahrain, Bolivia (Plurinational State of), Bulgaria, Cyprus, Denmark, Ecuador, El Salvador, Guyana, Indonesia, Iraq, Lebanon,

Lithuania, Netherlands, New Zealand, Oman, Portugal, Romania, South Africa and Switzerland. The responses are contained in the present report and are organized, to the extent possible, on the basis of the questions contained in the questionnaire. Comments by Governments made previously on the subject are contained in *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/607 and Add.1.

Comments and observations on the questionnaire on oil and gas received from Governments

A. General comments

BULGARIA

1. Bulgaria shares the view that the complexity of the issue of the legal regulation of the exploration and the exploitation of transboundary oil and gas resources, covering different fields ranging from environmental aspects to commercial implications, predetermines the understanding that the work of the Commission would be more productive if, instead of codification efforts, the endeavour focused on drafting common principles, best practices and lessons learned through a study and review of the State practice, to be used by States negotiating agreements on the partition of oil and gas deposits. Therefore, it would be useful if the Commission could, on the basis of existing practice, elaborate on the application of common elements that go beyond the general principles of international law and legal principles in general.

2. This position is without prejudice to the understanding that, in a number of cases, considerations related to oil and gas resources are linked to questions of maritime delimitation, the latter being regulated by the provisions of the United Nations Convention on the Law of the Sea as a matter of principle for the States concerned. In this view, in some cases the application of regional regimes might be more effective than a universal approach.

GUYANA¹

Guyana does not produce oil or gas. Exploration has not yielded a petroleum discovery in the maritime area within Guyana's exclusive economic zone. There is, however, a petroleum discovery in the Takutu Basin, Rupununi, which borders Brazil. No commercial production has been derived from operations in the Takutu.

¹ For comments by Guyana made previously, see *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/607 and Add.1.

PORTUGAL¹

1. According to the step-by-step approach suggested by the Commission, the time has now come to decide on the future work on this topic. It should be recalled that the syllabus on shared natural resources, prepared by Mr. Robert Rosenstock and adopted by the Commission during its fifty-second session, in 2000, clearly stated that such work

¹ For comments by Portugal made previously, see *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/607 and Add.1.

should "focus exclusively on water, particularly confined groundwater, and such other single geological structures as oil and gas".² The document "Shared natural resources: Paper on oil and gas, prepared by Mr. Chusei Yamada, Special Rapporteur on shared natural resources", highlighted a lack of consensus among States on how to proceed.³

2. The question of the sharing of oil and gas is extremely relevant and particularly complex in the modern world. There is a potential for conflict inherent in shared oil and gas, as well as economic, political and environmental issues related to these natural resources. Portugal strongly supports the development of this work and believes that there are similarities between groundwater and oil and gas, not only from a legal point of view, but also from a geological point of view. In fact, even if a cautious approach is taken, the general legal principles at stake seem to apply in both cases.

² *Yearbook ... 2000*, vol. II (Part Two), p. 141.

³ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/608.

B. Question 1

Do you have any agreement(s), arrangement(s) or practice with your neighbouring State(s) regarding the exploration and exploitation of transboundary oil and gas resources or for any other cooperation for such oil or gas?

Such agreements or arrangements should include, as appropriate, maritime boundary delimitation agreements, as well as unitization and joint development agreements or other arrangements.

Please provide a copy of the agreement(s) or arrangement(s) or describe the practice.

BAHRAIN

1. There is an agreement with Saudi Arabia to exploit the oil output of one offshore oil field in the territorial waters. In accordance with the agreement signed in the 1950s, the two countries are sharing the production of the field on an equal basis.

2. In 2001, Bahrain and Qatar also signed a memorandum of understanding as a framework for a gas supply agreement that includes all necessary technical and financial aspects.

BOLIVIA (PLURINATIONAL STATE OF)

There is currently no form of cooperation, treaty or agreement with neighbouring States regarding the exploration and exploitation of transboundary oil and gas resources; consequently, there is no mechanism or association in place to conduct any of these activities.

BULGARIA

Bulgaria does not have any agreement, arrangement or practice with its neighbouring States regarding the exploration and exploitation of transboundary oil or gas resources. There are no such arrangements in the existing maritime boundary delimitation agreements.

CYPRUS

Cyprus submitted information similar to that provided in *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/607 and Add.1; however, the agreement between Cyprus and Lebanon on the Delimitation of the Exclusive Economic Zone has since been ratified by the House of Representatives.¹

¹ A copy of the agreement is available for consultation at the Codification Division of the Office of Legal Affairs.

DENMARK

Currently there are no known transboundary deposits within the realm of Denmark. Accordingly, Denmark has no agreements or other arrangements regarding shared natural resources that are relevant for the Commission's consideration.

ECUADOR

In the past, agreements have been signed with the State-owned companies of neighbouring countries; however, Petroecuador, a State institution, knows of no specific agreements containing commitments regarding joint and transboundary activities to explore for and extract oil or gas resources.

EL SALVADOR

El Salvador has not signed any specific agreements with regard to prospecting for or exploitation of transboundary oil or gas resources, nor has it agreed to any other type of cooperation with regard to such resources.

GUYANA

There are no arrangements or practice with neighbouring States regarding the exploration and exploitation of transboundary oil and gas resources. There are no cooperation arrangements, unitization or joint development agreements or other arrangements.

INDONESIA

No.

LEBANON¹

No. To date, Lebanon does not have an agreement or arrangement with any neighbouring State regarding the exploration and exploitation of transboundary oil and gas resources.

¹ For comments by Lebanon made previously, see *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/607 and Add.1.

LITHUANIA

No, there are no agreements or arrangements between Lithuania and neighbouring States or between the competent State institutions for the exploration or exploitation of transboundary oil or gas fields. There are geological prospects of finding such resources, but there has been no exploratory work done to date.

NETHERLANDS¹

There is an additional bilateral agreement concluded by the Netherlands with a third country, namely the Boundary Treaty between the Republic of Venezuela and the Kingdom of the Netherlands.²

¹ For comments by the Netherlands made previously, see *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/607 and Add.1.

² Signed at Willemstad, 31 March 1978 (United Nations, *Treaty Series*, vol. 1140, No. 17901, p. 311).

NEW ZEALAND

1. New Zealand has a maritime boundary delimitation agreement with Australia, the Treaty between the Government of Australia and the Government of New Zealand establishing certain exclusive economic zone boundaries and continental shelf boundaries.¹

2. Article 4 of that agreement provides for the possibility of the discovery of transboundary natural resources:

If any single accumulation of petroleum, whether in a gaseous, liquid or solid state, or if any other mineral deposit beneath the seabed, extends across the lines described in [the] Treaty, and the part of such accumulation or deposit that is situated on one side of the line is recoverable wholly or in part from the other side of the line, the two Parties will seek to reach agreement on the manner in which the accumulation or deposit shall be most effectively exploited and on the equitable sharing of the benefits arising from such exploitation.

3. New Zealand's continental shelf overlaps in the north with the continental shelves of Fiji and Tonga. New Zealand, Fiji and Tonga will therefore need to conclude maritime boundary delimitation agreements. New Zealand's continental shelf may also overlap with that of France (in respect of New Caledonia). If appropriate, the resulting delimitation agreements may include an article similar to article 4 of the agreement between Australia and New Zealand referred to above.

¹ Signed at Adelaide, 25 July 2004 (United Nations, *Treaty Series*, vol. 2441, No. 43985, p. 235).

OMAN¹

Oman signed on 25 July 1974 an agreement with the Islamic Republic of Iran for the boundary delimitation of the continental shelf in the Strait of Hormuz. In 2000, the Sultanate signed the Muscat Agreement on the delimitation of the maritime boundary between the Islamic Republic of Pakistan and the Sultanate of Oman,² and in 2003 the Sultanate signed the Agreement on the delimitation of the maritime boundary between the Sultanate of Oman and the Republic of Yemen.³

¹ For comments by Oman made previously, see *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/607 and Add.1.

² Signed in Muscat, 12 June 2000 (United Nations, *Treaty Series*, vol. 2183, No. 38455, p. 3).

³ Signed in Muscat, 14 December 2003 (*ibid.*, vol. 2309, No. 41170, p. 249).

PORTUGAL

No.

ROMANIA

Romania does not have any agreement, arrangement or practice with its neighbouring States regarding the exploration and exploitation of transboundary oil, gas or other mineral resources. In the absence of any such form of cooperation, the exploration and exploitation of oil and mineral resources is limited to the spaces under the sovereignty or sovereign rights of Romania, and these activities take place in accordance with Romanian laws and regulations.

SOUTH AFRICA

The answer is yes with regard to gas and no with regard to oil. South Africa does have an agreement with a neighbouring State, Mozambique, concerning natural gas trade, which was signed in 2001.¹ By its terms, the parties take such measures as they deem necessary to facilitate trade between them in natural gas. There is recognition that the development in South Africa of an open and competitive market for natural gas and a competitive environment for the exploration and development of natural gas reserves and the production and supply of natural gas contribute to the facilitation of trade.

¹ A copy of the agreement is available for consultation at the Codification Division of the Office of Legal Affairs.

SWITZERLAND

1. Switzerland currently has no agreement, arrangement, practice or any other form of cooperation with its neighbouring States regarding the exploration or exploitation of transboundary oil or gas resources.

2. In Switzerland, the cantons have sovereign rights over the exploration and exploitation of subsoil resources. It is the cantons that grant concessions and charge royalties to companies that wish to explore for oil. To date, the federal Government has had no reason to intervene.

In the event of a discovery, the cantons would collect the royalties. In order to harmonize their policies concerning concessions, the cantons concerned signed an agreement in 1955 concerning oil exploration and exploitation. Subsequently, natural gas was subsumed into that agreement.

3. In Switzerland, oil and gas exploration began in the late nineteenth century. To date, more than 40 wells have been drilled. Only one, in Finsterwald in the Canton of Lucerne, produced (at a loss) some 73 million cubic metres of gas between 1985 and 1994. Specialists continue to believe that the Swiss subsoil is likely to contain oil and gas fields, because the geology has some similarities to that of other regions of the world where hydrocarbons have been found. Moreover, natural gas fields are being exploited in the neighbouring countries, not far from the Swiss border.

4. In 1994, Swisspetrol, which had been a leading oil and gas exploration company for three decades, was liquidated. One of its subsidiaries, SEAG (Schweizerische Erdöl AG), resumed exploration activities in 1997 and hired non-Swiss companies to analyse the abundant geological data using the most up-to-date methods. Those analyses are ongoing.

5. There is another company that is currently very active in oil and gas exploration in Switzerland: Petrosvibri. Petrosvibri has been authorized by the Council of State of the Canton of Vaud to carry out exploratory drilling in the municipality of Noville. Petrosvibri hopes to discover gas under Lake Geneva, at a depth of approximately 3,000 metres. Drilling has begun, starting from the shore located in the Canton of Vaud, which is why only that canton was asked to approve the project. Should it prove successful, and depending on the location of the resources under their respective territories, the following would share the royalties: the Canton of Vaud, the Canton of Valais and France. In order for exploitation to proceed, terms and conditions would need to be agreed to, and the Swiss federal authorities would represent the two cantons in question during the negotiation of an agreement with France. The likelihood of discovering oil or gas at that location is considered to be less than 20 per cent.

C. Question 2

Are there any joint bodies, mechanisms or partnerships (public or private) involving exploration, exploitation or management of the transboundary oil or gas? Please provide information describing the nature and functioning of such arrangements, including governing principles.

BAHRAIN

There are no joint bodies, mechanisms or partnerships regarding the exploration, exploitation or management of the transboundary oil or gas.

BULGARIA

Bulgaria does not have joint bodies, mechanisms or partnerships (public or private) involving exploration, exploitation or management of the transboundary oil or gas.

CYPRUS

Cyprus submitted information similar to that provided in *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/607 and Add.1.

ECUADOR

The commitments and mechanisms for possible agreements or joint actions are established by the regional organizations of which Ecuador, or specifically Petroecuador, is a member. The constitutions or statutes of those specialized bodies refer in general terms to the possibility of joint actions. Those bodies are the Latin American Energy Organization (OLADE) and the Regional Association of Oil and Natural Gas Companies in Latin America and the Caribbean (ARPEL).

EL SALVADOR

1. At present, El Salvador has no joint body, mechanism or partnership with neighbouring States on prospecting for, or exploitation of, shared oil and/or gas resources. Nevertheless, the Act on Hydrocarbons¹ is designed to regulate the promotion, development and control of the exploration and exploitation of hydrocarbon deposits. Although there are no known deposits of that type on Salvadoran territory, a regulatory mechanism does exist should any be discovered.

2. The body responsible for carrying out exploration and exploitation of hydrocarbon deposits is the Executive Hydroelectrical Commission of Rio Lempa, which has been given the authority to carry out such activities on its own or through operating contracts with other entities.

3. The Act on Hydrocarbons specifies that all substances linked to hydrocarbons belong to the State and that management of such resources is the responsibility of the Commission. Furthermore, the Act states that activities linked with the Ministry of the Economy, which has the executive power, are the following: to approve operating contracts; to authorize the Commission to decide on how to transport hydrocarbons by pipeline; and to set prices for petroleum and gas products intended for domestic and industrial consumption.

¹ Published in the *Official Gazette* on 17 March 1981.

GUYANA

There are no joint bodies, mechanisms or partnerships (public or private) involving exploration, exploitation or management of transboundary oil or gas.

INDONESIA

No.

IRAQ¹

There are two cross-border oil committees:

(a) The Cross-Border Oil Fields Technical Committee with Kuwait. The Committee has held many meetings with the Kuwaiti side in order to exploit those fields using optimum unitization methods. The two parties (Iraq and Kuwait) shall nominate a third party to study those fields;

(b) The Cross-Border Oil Fields Technical Committee with the Islamic Republic of Iran. The two parties (Iraq and the Islamic Republic of Iran) agreed to study those fields without a third party, Kuwait.

¹ For comments by Iraq made previously, see *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/607 and Add.1.

LEBANON

There is a natural gas purchase agreement with Egypt, and a gas transportation agreement among Egypt, Jordan, the Syrian Arab Republic and Lebanon. These agreements were sent to the Parliament for final approval but are not yet finalized.

LITHUANIA

No.

NETHERLANDS

No.

NEW ZEALAND

New Zealand has no known transboundary oil or gas resources and, accordingly, does not have any joint bodies, mechanisms or partnerships.

PORTUGAL

No.

ROMANIA

Romania does not have joint bodies, mechanisms or partnerships related to the exploration, exploitation or management of transboundary oil or gas.

SOUTH AFRICA

Under the terms of the agreement between South Africa and Mozambique, the parties accept the principle that third parties should have access to the uncommitted capacity of transmission pipelines on non-discriminatory and commercially reasonable terms. In the application of this principle, due consideration is given to commercial viability. With regard to the transmission of natural gas from Mozambique to customers in South Africa, the provision of access to gas pipelines, the terms of such access and the tariff for transportation of natural gas by pipeline for cross-border sales are determined by agreement between transportation customers and pipeline owners. If they fail to reach an agreement within a time period fixed by the Government, then the determination of uncommitted capacity, the terms of access thereto and such tariff are referred to the relevant Government for resolution.

SWITZERLAND

To date, no body or partnership has been created for the exploration, exploitation or management of transboundary

oil and gas. With regard to the drilling project under Lake Geneva, Petrosvibri (see Switzerland's response to question 1 above) is acting alone and at its own risk, without financial support from the authorities.

D. Question 3

If the answer to question 1 is yes, please answer the following questions on the content of the agreements or arrangements and regarding the practice:

(a) Are there any specific principles, arrangements or understandings regarding allocation or appropriation of oil and gas, or other forms of cooperation? Please provide a description of the principles, provisions, arrangements or understandings;

(b) Are there any arrangements or understandings or is there any practice regarding prevention and control of pollution or regarding other environmental concerns, including mitigation of accidents? Please provide further description.

BAHRAIN

1. In relation to (a), in accordance with the usual practice in such cases, there are certain arrangements in this regard between Bahrain and Saudi Arabia.

2. With respect to (b), there are some arrangements between Bahrain and Saudi Arabia aimed at protecting the environment in accordance and in compliance with the international rules and regulations in this regard.

3. Bahrain is also a member of the Regional Organization for the Protection of the Marine Environment, which was established in Kuwait in 1978. Bahrain is also a founding member of the Marine Emergency Mutual Aid Centre, which is a regional international organization concerned with marine pollution issues. The Centre was established in Bahrain in 1982 within the framework of the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution, together with its Protocol concerning Regional Cooperation in Combating Pollution by Oil and Other Harmful Substances in Cases of Emergency.

BULGARIA

Not applicable.

CYPRUS

Cyprus submitted information similar to that provided in *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/607 and Add.1.

ECUADOR

The commitments and mechanisms referred to in Ecuador's response to question 2 above include a general reference to the subject. The understandings are contained in the proceedings of the expert meetings held by the bodies referred to in that response.

EL SALVADOR

This question does not apply.

GUYANA

Not applicable.

LEBANON

Not applicable.

NETHERLANDS

With respect to (a), articles 5 to 8 of the Boundary Treaty with the Republic of Venezuela¹. With respect to (b), article 9 of the same treaty.

¹ Signed at Willemstad, 31 March 1978 (United Nations, *Treaty Series*, vol. 1140, No. 17901, p. 311).

NEW ZEALAND

1. In New Zealand's only delimitation agreement (with Australia)¹, article 4 makes it clear that, for any trans-boundary petroleum resource found, the two parties are to seek to reach agreement on the manner in which the resource is to be most effectively exploited and on the equitable sharing of the benefits arising from such exploitation.

2. Maritime New Zealand is a Crown entity, and is responsible, under delegated authority from the Ministry of Transport, for maritime security, marine environment protection and maritime search and rescue in New Zealand. Maritime New Zealand has a complete preparedness and response system for marine oil spills based on the International Maritime Organization (IMO) International Convention on Oil Pollution Preparedness, Response and Cooperation. As a direct result of obligations under that Convention, there is a memorandum of understanding with Australia, specifically the Australian Maritime Safety Authority and the industry-funded Australian Marine Oil Spill Centre. Through this relationship, there is access to the global spill response network operated by the industry. An attempt has also been made to create a memorandum of understanding with New Caledonia for spill response. Maritime New Zealand is also a cooperative partner with the Pacific Regional Environment Programme, based in Apia, Samoa.

¹ Treaty between the Government of Australia and the Government of New Zealand establishing certain exclusive economic zone boundaries and continental shelf boundaries (with annexes), signed at Adelaide, 25 July 2004 (United Nations, *Treaty Series*, vol. 2441, No. 43985, p. 235).

OMAN

1. With respect to (b), oil and natural gas reserves are often located in the bed of the territorial sea, its subsoil and the continental shelf, and pollution may result from the exploration and exploitation thereof or from offshore mining activities or from other sources, such as pollution from land-based sources, ships (international and as a result of accidents), dumping and pollution from other human activities. Therefore, Oman attempts to review the international and regional conventions and agreements adhered to by Oman, and to deal with pollution control

from all sources, as these sources will definitely have an effect on the shared natural resources (living or non-living). The United Nations Convention on the Law of the Sea is the framework for marine environment protection and conservation. Oman is a party to the Convention, which it ratified by virtue of Royal decree No. 67/89.

2. In addition, Oman provided a list of IMO marine pollution-related conventions and other regional instruments and arrangements to which it was party.¹

¹ The list provided by Oman is available for consultation at the Codification Division of the Office of Legal Affairs.

PORTUGAL

Not applicable.

ROMANIA

Since the answer to the first question is in the negative, there is no information to be provided with respect to the present question.

SOUTH AFRICA

1. With respect to (a), the principles relating to metering and measurement are determined in the context of each gas trade project. There should be a technically and fiscally acceptable method of determining the quantity and quality of natural gas crossing the border.

2. As regards (b), in the agreement between South Africa and Mozambique, the parties cooperate with each other with respect to the gas trade projects in the areas of health, safety and protection of the environment. With regard to any gas trade project, the parties must ensure that the pipeline owners in their territories enter into an agreement that the responsibility for preventive and remedial actions in the case of an event, possible event or possible impact that has or will have an adverse health, safety or environmental effect, rests with the pipeline owner whose pipeline is the origin of such event or impact.

E. Question 4

Please provide any further comments or information, including legislation and judicial decisions, which you consider to be relevant or useful to the Commission in the consideration of issues regarding oil and gas.

BULGARIA

Not applicable.

CYPRUS

Cyprus submitted information similar to that provided in *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/607 and Add.1. In addition, the Hydrocarbons (Prospecting, Exploration and Exploitation) Regulations of 2009 (Regulatory Administrative Act 113/2009) had been promulgated.

ECUADOR

In the past, there had been no bilateral commitments with neighbouring State-owned oil or gas companies because transboundary oil and gas fields had been neither discovered nor technically established.

EL SALVADOR

1. The Act on Hydrocarbons aims to regulate the promotion, development and control of the exploitation of hydrocarbon deposits, as well as their transportation by pipeline. The Act stipulates that any hydrocarbons, whatever their physical state or form, discovered in the territory of the Republic, are the property of the State. Furthermore, their exploitation must be carried out in conformity with the social and economic policy of the State, with the aim of ensuring that any income they generate serves to benefit and promote the comprehensive development of the country.

2. El Salvador has additional relevant acts, namely the Act Regulating Deposits, Transportation and Distribution of Oil Products and the Act on Natural Gas.

GUYANA

New maritime boundary legislation is being prepared which should be consistent with obligations under the United Nations Convention on the Law of the Sea.

LEBANON

No comments.

LITHUANIA

Lithuania, like all EU member countries, implemented into national legislation Directive 94/22/EC of the European Parliament and the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons.¹

¹ *Official Journal of the European Communities*, No. L 164/3, 30 June 1994, p. 3.

NETHERLANDS

The Kingdom of the Netherlands does not have any further comments or information at this stage.

NEW ZEALAND

None applicable.

ROMANIA

1. The legislative framework relevant in respect of natural resources, including the transboundary oil and gas resources, includes the following: (a) law on oil resources; (b) law on mines; and (c) law establishing the National Authority of Mineral Resources.

2. In the case of adjoining perimeters involving different licensees, the relevant norms (see Law No. 238/2004 on oil resources) require the undertaking of common studies concerning the estimation of the quantity of the resources and reserves, as well as the production quotas attributable to each beneficiary and the establishment of common exploration and exploitation programmes. If the concerned parties are unable to agree, these elements are decided by independent experts. Romania believes that similar principles could be applied to transboundary deposits.

SOUTH AFRICA

Scarcity and the growing demand for oil and gas require that sufficient rules be established to avoid transboundary conflict. The question of sharing oil and gas is extremely complex in the modern world. The potential conflict inherent in shared oil and gas, its economic and political importance, as well as environmental issues associated with these natural resources, attest to that. While issues of oil and gas should be managed so as to ensure respect for international law and to avoid conflict, the promotion of sustainable development should also be at the core of attempts to regulate shared oil and gas resources.

F. Question 5

Are there any aspects in this area that may benefit from further elaboration in the context of the Commission's work? Please indicate those aspects.

CYPRUS

Cyprus submitted information similar to that provided in *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/607 and Add.1.

ECUADOR

Given the current interest, Petroecuador would be interested in sharing with the Commission a presentation of its strategic map and its projects for activities in all aspects of the industry.

EL SALVADOR

There are no additional observations.

GUYANA

There are no aspects in this area that may benefit from further elaboration in the context of the Commission's work.

INDONESIA

Harmonization of laws and regulations governing the exploration and production of resources, taxation issues, sharing liability in case of major accidents and profit-sharing mechanisms.

LEBANON

No comments.

NETHERLANDS

The Netherlands believes that the following aspects in particular would benefit from further elaboration in the context of the Commission's work on shared natural resources:

(a) The right to use transboundary oil and gas resources, taking into account the rights of other States and future generations;

(b) The prevention and abatement of significant harm as a result of the use of transboundary oil and gas reserves, including the management of risks involved in such use;

(c) The management of transboundary oil and gas resources;

(d) The planning of activities to use transboundary oil and gas resources;

(e) The response to emergency situations arising out of the use of transboundary oil and gas resources.

NEW ZEALAND

New Zealand looks forward to the study by Mr. Shinya Murase on shared natural resources: feasibility of future work on oil and gas, which will be submitted to the Working Group on Shared Natural Resources that may be established at the sixty-second session of the Commission, in 2010. While New Zealand wishes to reserve judgement until after consideration of that study, New Zealand supports the cautious approach that the Commission is taking, and tends towards the view that the topic is not one that is ripe for codification, and not a topic that is appropriate for the Commission to deal with.

SOUTH AFRICA

The sensitive nature and scarcity of oil and gas resources should encourage continued cooperation and support for the Commission's work. The issues of shared oil and gas resources ought not to be taken lightly.

EFFECTS OF ARMED CONFLICTS ON TREATIES

[Agenda item 5]

DOCUMENT A/CN.4/627 and Add.1

First report on the effects of armed conflicts on treaties, by Mr. Lucius Caflisch, Special Rapporteur

[Original: French]
[22 March and 21 April 2010]

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Source

Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, <i>Treaty Series</i> , vol. 75, Nos. 970–973, p. 31 <i>et seq.</i>
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	<i>Ibid.</i> , p. 31.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	<i>Ibid.</i> , p. 85.
Geneva Convention relative to the Treatment of Prisoners of War	<i>Ibid.</i> , p. 135.
Geneva Convention Relative to the Protection of Civilian Persons in Time of War	<i>Ibid.</i> , 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.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977)	<i>Ibid.</i> , vol. 1125, No. 17513, p. 609.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)	<i>Ibid.</i> , vol. 1946, No. 33356, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations, <i>Treaty Series</i> , vol. 2187, No. 38544, p. 3.

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BEAUCHAMP, Sylvain <i>Explosive Remnants of War and the Protection of Human Beings under Public International Law</i> . Geneva, Graduate Institute of International and Development Studies, 2008, thesis.	FITZMAURICE, G. G. “The juridical clauses of the peace treaties”, <i>Recueil des cours de l’Académie de droit international de La Haye, 1948–II</i> , vol. 73, Paris, Sirey, pp. 239–364.
BOTHE, Michael “Occupation, belligerent”, in Rudolf Bernhardt (ed.), <i>Encyclopedia of Public International Law</i> . Amsterdam, North-Holland, 1985, vol. 3, pp. 763–766.	INSTITUTE OF INTERNATIONAL LAW “The effects of armed conflicts on treaties”, <i>Yearbook</i> , Session of Helsinki (1985), vol. 61, Part. II, p. 278. Paris, Pedone, 1986.
	McNAIR, Lord <i>The Law of Treaties</i> . Oxford, Clarendon Press, 1961.

Introduction

1. The draft articles on effects of armed conflicts on treaties will be given a second reading at the sixty-second session of the Commission, in 2010. The Special Rapporteur wishes at the outset to pay tribute to the memory of his predecessor, Mr. Ian Brownlie, and to thank him for his four reports¹ and, in general, for the remarkable work which he carried out on the topic.

2. The draft articles adopted on first reading in 2008² and subsequently sent to the General Assembly were

commented on by 34 States during the Sixth Committee’s discussions in the same year. In addition, 13 Member States have submitted written comments on them.³ The present report considers these comments and proposes a number of changes to the initial set of draft articles.

3. While many questions were raised and suggestions made, the discussion seems to have focused on four themes: (a) the scope of the draft articles, in particular the question of including situations in which only one State party to a treaty is involved in an armed conflict, non-international armed conflicts, and agreements to which international organizations are parties (draft articles 1 and 2); (b) the “indicia” for identifying treaties that continue in operation (draft article 4); (c) the types of treaties whose subject matter implies their survival in

¹ First through fourth reports on the effects of armed conflicts on treaties, *Yearbook ... 2005*, vol. II (Part One), document A/CN.4.552, p. 209; *Yearbook ... 2006*, vol. II (Part One), document A/CN.4.570, p. 251; *Yearbook ... 2007*, vol. II (Part One), document A/CN.4.578, p. 55; and *Yearbook ... 2008*, vol. II (Part One), document A/CN.4.589, p. 81, respectively.

² The text of the draft articles and the corresponding commentaries approved by the Commission on first reading at its sixtieth session appear in *Yearbook ... 2008*, vol. II (Part Two), pp. 45–46, paras. 65–66.

³ See document A/CN.4/622 and Add.1, reproduced in the present volume.

whole or in part (draft article 5 and annex); and (d) the (different?) effects of international or civil war conditions involving a single State party or several States parties to treaties.

4. When considering the comments of States, the Special Rapporteur will take a pragmatic approach: he will not make drastic changes to the draft, since it is due for its second reading; he will not focus excessively on doctrinal considerations, so as to ensure that the draft retains practical value; and, within this framework, he will attempt to take into account the comments made by Member States. These comments will be considered article by article.

A. Scope (draft article 1)

5. As one State has commented,⁴ the issue of scope should be studied further. Despite, or perhaps because of, its conciseness, draft article 1 has triggered an avalanche of comments, from the suggestion that the scope of the draft articles should be very broad to the suggestion that it should be very limited, with supporting arguments.

6. A first group of Member States would like to restrict the scope of the draft articles to treaties between two or more States of which more than one is a party to the armed conflict. The reasoning behind this view is that situations involving only one State—mainly but not exclusively non-international conflicts—are already covered by articles 61 (Supervening impossibility of performance) and 62 (Fundamental change of circumstances) of the Vienna Convention on the Law of Treaties (hereinafter the “1969 Vienna Convention”).⁵ This is not really accurate: the approach thus advocated would mean that, in cases of conflicts between two or more States, a number of provisions relating to the effects of inter-State armed conflicts would be applicable in addition to articles 61 and 62, while, in situations involving only one State, only those articles would be applicable, to the exclusion, therefore, of the present draft articles. The response will be that the effects of armed conflicts in the two situations are so different that they cannot be governed by the same provisions. The Special Rapporteur remains sceptical of this argument, considering that, since the trigger in both cases is an armed conflict, the solution should be sought in the factors mentioned in draft articles 4 and 5. Another argument refers to article 73 of the 1969 Vienna Convention, which states that the provisions of the Convention shall not prejudice the question of the effects of war now under discussion and which forms the framework for the present draft articles. Article 73 refers to “the outbreak of hostilities between States”, which would exclude situations in which the question of the effects of armed conflicts on treaties involves only one State.⁶ The Special Rapporteur considers that the Commission’s mandate should be interpreted flexibly and that it is sufficiently broad to encompass the effects of armed conflicts involving only one State.

⁴ Slovenia, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 26.

⁵ Burundi and Portugal, document A/CN.4/622 and Add.1.

⁶ Czech Republic, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 82.

7. In the view of another Member State,⁷ the question of the effects of international armed conflicts involving only one State party to the treaty in question should be excluded from the scope of the draft articles, as should the question of the effects of non-international armed conflicts involving only one State party to the treaty. If these views were accepted, the draft articles would serve to determine the fate of treaties between States which are parties to them and of which more than one is also participating in an international armed conflict. Such a restriction would reduce the scope and usefulness of the draft articles too much. It would also mean that there were armed conflicts and armed conflicts: the effects of some would be determined by the draft articles, while the effects of others would not. This does not seem to be a desirable approach.

8. One question that remains open⁸ is whether the draft articles should cover the effects of armed conflicts on treaties to which international organizations are parties. Some States have said that they are in favour,⁹ but the majority seem to be opposed.¹⁰ Mainly for practical reasons, the Special Rapporteur is inclined to follow the latter view. Reviewing the draft articles in their entirety from that perspective would greatly delay the successful completion of the Commission’s work. In addition—although this is not a crucial factor—the matter relates not to article 73 of the 1969 Vienna Convention but to article 74, paragraph 1, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the “1986 Vienna Convention”).¹¹ Moreover, as the wording of the provision indicates, international organizations as such do not wage war; there will probably be few cases in which the obligations of States members of an organization have to be considered in the light of an armed conflict between them, and such cases could, where necessary, be resolved by adopting a new series of rules which would be based on article 74, paragraph 1, of the 1986 Vienna Convention.

9. Two Member States¹² have expressed the view that article 25 of the 1969 Vienna Convention should be mentioned in draft article 1; to be more precise, treaties that are applied provisionally on the basis of article 25 should continue to be applied provisionally to the same extent as treaties that were in force at the time of the outbreak of the armed conflict. This comment is perfectly justified: treaties applied provisionally pursuant to article 25 should

⁷ Portugal, *ibid.*, 19th meeting (A/C.6/63/SR.19), para. 26, and document A/CN.4/622 and Add.1; see also Poland, document A/CN.4/622 and Add.1.

⁸ *Yearbook ... 2008*, vol. II (Part Two), para. (4) of the commentary to draft article 1, p. 47.

⁹ China and Ghana, document A/CN.4/622 and Add.1.

¹⁰ Czech Republic, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 80; Poland, document A/CN.4/622 and Add.1; and Portugal, *ibid.* and *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 19th meeting (A/C.6/63/SR.19), para. 26.

¹¹ Article 74, paragraph 1, provides that the provisions of the Convention “shall not prejudice any question that may arise in regard to a treaty between one or more States and one or more international organizations ... from the outbreak of hostilities between States”.

¹² Burundi, document A/CN.4/622 and Add.1; and Romania, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 21st meeting (A/C.6/63/SR.21), para. 51.

continue to be applied provisionally as long as their provisional application is not terminated and they have not disappeared or been suspended pursuant to the provisions of the draft articles applicable to treaties in general. The Commission makes this point in paragraph (3) of the commentary to draft article 1, and it is not essential to refer to article 25 in draft article 1.

10. We will turn now to some other issues raised in the comments of Member States. One comment consisted of a suggestion to replace the words “apply to” with the words “deal with”.¹³ This drafting change seems acceptable.

11. Another comment¹⁴ was that it should be made clear that the draft articles cover both bilateral and multilateral treaties. This seems to be self-evident: draft article 1 refers to “treaties”, as does article 1 of the 1969 Vienna Convention; this means both categories. This point is also made in paragraph (2) of the commentary to draft article 2.

12. The phrase “where at least one of the States is a party to the armed conflict” may seem unclear. In the Special Rapporteur’s view, it means that at least one State party to the treaty must also be a party to the armed conflict; this idea would be expressed more clearly as follows: “where at least one of these States is a party to the armed conflict”.

13. Thus, draft article 1 could read as follows:

“Scope

“The present draft articles deal with the effects of armed conflict in respect of treaties between States where at least one of these States is a party to the armed conflict.”

B. Use of terms (draft article 2)

14. Draft article 2, subparagraph (a), defines the term “treaty” in accordance with article 2, paragraph 1, of the 1969 Vienna Convention. Here, the main question that arises is whether the scope of the draft articles should include treaties concluded between States and international organizations. This question has already been mentioned in paragraph 8 above. The Special Rapporteur considers that it would be preferable not to extend the draft articles to the effects of armed conflicts on treaties to which international organizations are parties. The present draft articles are intended to complement the 1969 Vienna Convention. The Commission is still at liberty to supplement the 1986 Vienna Convention with another draft text.

15. Having thus attempted to resolve the question of whether to include treaties to which one or more international organizations are parties, we must now consider the question of whether to include situations of non-international conflict. There can be no doubt that the current draft article 2, subparagraph (b), does not provide for any exclusions in this regard and, therefore,

should apply to all armed conflicts, even though the draft article itself and the commentary are silent on this point. Although this approach has been criticized by some,¹⁵ it is supported by a majority of States.¹⁶ It may therefore be retained.

16. The concept of armed conflict still needs to be defined. As stated in paragraph (3) of the commentary to draft article 2, its subparagraph (b) contains a definition adapted to the specific needs of the draft articles and is limited to armed conflicts which “by their nature or extent are likely to affect the application of treaties”. Under the current draft articles, the definition of “armed conflict” may thus vary, depending on the field to which it is intended to apply. Some¹⁷ are in favour of this approach but others¹⁸ are not. The Special Rapporteur considers that it would be detrimental to the unity of the law of nations to apply a given definition in the field of international humanitarian law and a completely different definition in the field of treaty law.

17. The Special Rapporteur takes note of the doubts expressed by one State¹⁹ regarding the appropriateness of defining “armed conflict”. Even if these doubts are shared by others, it must be acknowledged that a set of draft articles such as that proposed by the Commission is not viable without a minimum of definitions, particularly of concepts that determine the subject matter of the draft articles.

18. Which definition should be used? Insofar as the draft articles are to cover internal as well as international conflicts, article 1 of the resolution on the effects of armed conflicts on treaties adopted in 1985 by the Institute of International Law²⁰ is not appropriate because, despite the title of the resolution, it covers only international conflicts. Moreover, the definition in that article is an *ad hoc* definition adopted for a specific purpose; this type of approach has already been dismissed, in principle, in paragraph 16 above.

19. Another approach would consist in using the definitions contained in the Geneva Conventions for the protection of war victims; the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I); and the Protocol additional to the Geneva

¹⁵ Indonesia, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 49; Iran (Islamic Republic of), *ibid.*, para. 54; and Poland, 17th meeting (A/C.6/63/SR.17), para. 49, and document A/CN.4/622 and Add.1.

¹⁶ Burundi, document A/CN.4/622 and Add.1; Ghana, *ibid.* and *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 2; Greece, *ibid.*, para. 41; Hungary, 17th meeting (A/C.6/63/SR.17), para. 32; New Zealand, 18th meeting (A/C.6/63/SR.18), para. 18; Finland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), 16th meeting (A/C.6/63/SR.16), para. 31; and Switzerland, *ibid.*, para. 66, and document A/CN.4/622 and Add.1.

¹⁷ Burundi, document A/CN.4/622 and Add.1.

¹⁸ Ghana and Switzerland, *ibid.*; Japan, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 38; Slovenia, *ibid.*, para. 26.

¹⁹ United States, document A/CN.4/622 and Add.1.

²⁰ “The effects of armed conflicts on treaties”, resolution adopted in Helsinki on 28 August 1985.

¹³ United Kingdom, statement dated 27 October 2008, available from the Codification Division of the United Nations Office of Legal Affairs.

¹⁴ Burundi, document A/CN.4/622 and Add.1.

Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II):

The ... Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

Article 1, paragraph 1, of Additional Protocol II defines non-international armed conflicts as

armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [Protocol II].

20. The two articles could probably be combined with a view to defining the concept of armed conflict. This approach would have the advantage of specificity and of combining the concepts of “armed conflict” in the fields of international humanitarian law and treaty law. However, it would be cumbersome and the definition would be, to some extent, circular. Moreover, the former article has been somewhat overtaken by modern developments: it refers to “war”, “declared war” and “state of war”. Nonetheless, if there were a desire to take this approach without lengthening the draft article too much, that could be done simply by adding to draft article 2, subparagraph (b), a reference to common article 2 of the Geneva Conventions for the protection of war victims and article 1, paragraph 1, of Protocol II. In the Special Rapporteur’s view, this approach would not be ideal: references to other texts make the draft articles abstract and difficult to digest.

21. Another possibility is to opt for a more modern, simple and comprehensive wording, namely that used in 1995 by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadić* case:

An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.²¹

This wording, which could be considered for inclusion in draft article 2, subparagraph (b), appears to be sufficiently specific and comprehensive, particularly as it refers to “organized armed groups” without mentioning all the characteristics of such groups listed in article 1, paragraph 1, of Protocol II (responsible command; exercise of control over a part of State territory; capacity to carry out sustained and concerted military operations; capacity to implement Protocol II). If this wording is to be used, however, the last part (“or between such groups within a State”) should be deleted because, under draft article 3, subparagraphs (a) and (b), the draft articles apply only to situations involving at least one State party to the treaty that is a party to the armed conflict. That condition is not fulfilled when organized armed groups are fighting each

other within a State. With that reservation, the Commission could accept a solution based on the *Tadić* wording.

22. One Member State²² believes, however, that the draft articles should go further and deal with the legal effects of non-international conflicts and situations involving militias, armed factions, civilians who have become actors in a conflict, *ad hoc* soldiers or mercenaries recruited for a specific situation. The presence of such actors could certainly be included in the circumstances to be taken into account when deciding whether or not the treaty continues in operation (in the context of draft article 4, subparagraph (b)?).

23. If the draft articles are to cover both international and internal conflicts, an idea which was accepted in the draft articles as adopted on first reading, it will be necessary to consider whether the two categories of conflict have the same effects on treaties.²³

24. Let us now consider a number of issues related to those just addressed. Two Member States²⁴ would like it to be made clear that the draft articles are without prejudice to international humanitarian law, which constitutes the *lex specialis* governing armed conflict. This could be stated in the commentary to draft article 2. It could also be stated in the draft articles themselves by adding a new provision to the “without prejudice” provisions (draft articles 14, 16, 17 and 18).

25. One Member State²⁵ has quite rightly drawn attention to an inconsistency between the draft articles and the wording of article 73 of the 1969 Vienna Convention, which is the basis for the Commission’s work on this issue. The article in question specifies that the provisions of the Vienna Convention “shall not prejudice any question that may arise in regard to a treaty from... the outbreak of hostilities between States”. This article is mentioned in support of the view that non-international armed conflicts should be excluded from the scope of the draft articles, as the Commission’s mandate, on the basis of article 73, is limited to conflicts between States. However, article 73 cannot be seen as a categorical prohibition on examining issues which have not yet been considered. The same State admits that fact when arguing for the inclusion of international organizations on the basis of article 74, paragraph 1, of the 1986 Vienna Convention.

26. Another State²⁶ has requested that the definition of armed conflict should include the concept of “embargo”. It is difficult to agree to that suggestion because an embargo is a coercive measure that may be used, under certain

²² Burundi, document A/CN.4/622 and Add.1.

²³ China, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 53; Romania, 21st meeting, (A/C.6/63/SR.21), para. 52; and Switzerland, 16th meeting (A/C.6/63/SR.16), para. 66, and document A/CN.4/622 and Add.1.

²⁴ United Kingdom, statement dated 27 October 2008, available from the Codification Division of the United Nations Office of Legal Affairs; and United States, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 21.

²⁵ China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 53.

²⁶ Cuba, document A/CN.4/622 and Add.1.

²¹ International Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić a/k/a “Dule”*, Appeals Chamber, case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *Judicial Reports 1994–1995*, p. 429, para. 70.

conditions, in situations of peace as well as in situations of armed conflict. If such a measure is taken in time of peace, it has nothing to do with the topic currently under discussion. If it is adopted during an armed conflict, it is the conflict that has effects on treaties, not the embargo, which is merely an incidental element of the conflict.

27. One Member State²⁷ has suggested replacing the term “state of war”, used in draft article 2, subparagraph (b), with the expression “state of belligerency” on the grounds that article 73 of the 1969 Vienna Convention refers to the “outbreak of hostilities”. It is unclear how this change would improve the provision in question: the concepts “state of belligerency” and “outbreak of hostilities” are not identical to each other, nor are they identical to the concept of armed conflict. In any case, this issue would no longer arise if the suggestion, made in paragraph 21 above, of using the *Tadić* wording were accepted.

28. This also applies to the suggestion made by one Member State²⁸ that the word “operations”, which appears in draft article 2, subparagraph (b), and is generally reserved for the context of inter-State armed conflict, should be avoided. This issue would also not arise if the *Tadić* wording were used. However, the word “operations” is in any case used even for the activities of organized armed groups, as shown by article 1, paragraph 1, of Protocol II (see para. 19 above), which defines these groups in accordance with the criterion of their exercise of such control over a part of State territory “as to enable them to carry out sustained and concerted *military operations**”.

29. Lastly, there is the issue of occupation. When occupation occurs in the context of an armed conflict, is it part of the conflict to the extent that there is no need for specific mention of it? The Member State which raised the issue²⁹ believes that the two terms have distinct meanings. The Special Rapporteur does not consider this to be the case: occupation is an event that occurs during armed conflicts, as reflected in common article 2 of the Geneva Conventions for the protection of war victims, which states that the Conventions apply to cases of occupation. However, in order to maintain the greatest possible clarity, it is recommended that paragraph (6) of the commentary to draft article 2 be retained, as it states expressly that the draft articles apply to occupation even in the absence of armed actions between the parties.

30. Draft article 2 could therefore read as follows:

“Use of terms

“For the purposes of the present draft articles:

“(a) ‘Treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

²⁷ Hungary, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 32.

²⁸ Switzerland, document A/CN.4/622 and Add.1.

²⁹ United States, *ibid.* and *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 21.

“(b) ‘Armed conflict’ means a situation in which there has been a resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.”

C. Absence of a rule under which, in the event of an armed conflict, treaties are *ipso facto* terminated or suspended (draft article 3)

31. Draft article 3 provides that the outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as between the States parties to the conflict or between a State party to the conflict and a third State. This provision, entitled “Non-automatic termination or suspension”, is derived directly from article 2 of the resolution of the Institute of International Law, which reads as follows:

The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict.³⁰

32. However, there are two differences between these two provisions: (a) whereas the Institute of International Law’s resolution is concerned only with the fate of treaties in force between the parties to the armed conflict, the Commission’s draft is intended to cover the effect of armed conflicts either between parties to the treaty that are also parties to the armed conflict, or between a single State party to the conflict and a “third” State, that is, a State party to the treaty which is not a party to the conflict; (b) the Institute’s text uses the term “*ipso facto*”, whereas, in the Commission’s draft article 3, that term was replaced by “automatically” and, later, “necessarily”.

33. In general, draft article 3 has been well received. No State has objected to the basic idea that the outbreak of an armed conflict involving one or more States parties to a treaty does not, in itself, entail termination or suspension. In other words, there are agreements whose subject matter (draft article 5) or attendant circumstances (draft article 4) suggest or imply their continuity. This means that there are agreements which survive by reason of their subject matter or certain indicia. It may be, as noted by some States in their comments, that the words “necessarily” and “automatically” are ambiguous.³¹ The expression “*ipso facto*”, on the other hand, seems to reflect quite accurately what both the Institute of International Law and the Commission wanted to say. The Special Rapporteur, following the view of the majority of States which have commented,³² suggests that the Commission return to the expression “*ipso facto*”, despite the preference expressed by one State for the word “necessarily”.³³

³⁰ “The effects of armed conflicts on treaties”, p. 280.

³¹ Iran (Islamic Republic of), *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 55; and Poland, document A/CN.4/622 and Add.1. This could mean, for example, that there may be other criteria that justify the survival of the treaty in question, in addition to the indicia set out in draft article 4 and the indicative information relating to the subject matter of the treaty referred to in draft article 5 and in the annex to the draft articles.

³² Greece, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 42, and Ghana, Poland and Switzerland, document A/CN.4/622 and Add.1.

³³ Malaysia, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 10.

34. One Member State³⁴ would like to go further, and, without offering specific wording for draft article 3, has suggested that a positive formulation is needed. If the Special Rapporteur has understood correctly, the draft article should affirm that in principle treaties continue to operate in the event of armed conflict. It would be difficult to go so far, given the present state of international law, and also in view of the comments made on draft article 3. Moreover, a “positive” formulation of this provision might entail a complete rethinking of the draft articles.

35. The same State has requested that reference be made in draft article 3 to treaties establishing or modifying land and maritime boundaries.³⁵ Admittedly, that category of agreements is of great importance, as attested to by the fact that boundaries remain in place until the end of an armed conflict (occupation may occur, but not annexation)³⁶ and also by the fact that that type of agreement is given second place in the list contained in the annex to the draft articles, immediately following the category of treaties relating to the law of armed conflict, which become operative in the event of armed conflict. All of the foregoing serves to indicate that the stability of land or river boundaries, including maritime delimitation and territorial regimes, is a fundamental principle.³⁷ Removing this category from the list contained in the annex to the draft articles and incorporating it into draft article 3 would distort the essential elements of the draft articles, which state, firstly, that existing treaties do not cease, *ipso facto*, to have effects and, secondly, that, under draft article 5, the subject matter of certain treaties—including those on boundaries, delimitation and territorial regimes—is the reason for their continued operation. On this specific point, therefore, it should be maintained that, in accordance with generally accepted practice, this category of treaty is one of those whose continued operation is the best assured. There is no reason to modify draft article 3 in the manner requested. However, there is every reason to refer to this category of treaties in draft article 5; on this point, see paragraph 61 below.

36. According to another State which has commented,³⁸ draft article 3 concerns the operation of treaties: (a) between States parties to a treaty that are also parties to an armed conflict; and (b) between a State that is a party to the treaty and a party to the armed conflict, on the one hand, and a third State, on the other, that is, a State party to the treaty that is not a party to the conflict. The effects of the outbreak of a conflict could be different in the two cases, and that difference should be reflected in the draft.

37. Lastly, there is a terminology issue to resolve.³⁹ Under the current draft article 3, the “actors” in the

situations in question are: (a) States parties to a treaty; (b) a State party or States parties to an armed conflict; and (c) “third States”. It is important to specify, where there may be doubt, whether a State is a party to a treaty, an armed conflict, or both. As for “third States”, that term could refer to countries not parties to the armed conflict, countries not parties to the treaty, or countries not parties to either. An attempt could be made to clarify these issues in draft article 3; see paragraph 40 below.

38. Another criticism⁴⁰ is that the title of draft article 3 (Non-automatic termination or suspension) is unclear; a suggestion has been made to replace it with “Presumption of continuity”. The Special Rapporteur agrees with the diagnosis but not with the proposed treatment. Draft article 3 does not deal with a presumption that remains until it is contradicted; as indicated in draft articles 4 and 5, the fate of treaties involving one or more States that are parties to a conflict—whether or not it is an international conflict—will be determined by a number of factors: the *indicia* referred to in draft article 4 and the treaty’s subject matter, as referred to in draft article 5. An expression that is both neutral and clear should therefore be found. At present, the only wording that comes to mind is “Absence of *ipso facto* termination or suspension”. This formulation lacks elegance but reflects the content of the draft article.

39. The last issue to be considered in relation to this draft article is whether the Commission should also consider cases in which two States parties to a treaty are on the same side in an armed conflict.⁴¹ The answer seems to be yes; at least the current content of draft article 3 does not exclude such cases, which does not mean that the Commission could not exclude them if it so desired.

40. Taking account of the above considerations, draft article 3 could read as follows:

“Absence of *ipso facto* termination or suspension

“The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties as:

“(a) Between States parties to the treaty that are also parties to the conflict;

“(b) Between a State party to the treaty that is also a party to the conflict and a State that is a third State in relation to the conflict.”

D. Indicia of susceptibility to termination, withdrawal or suspension of treaties (draft article 4)

41. Draft article 4 provides that, in order to ascertain whether a treaty is terminated or suspended in the event of an armed conflict, resort shall be had to: (a) articles 31 and 32 of the 1969 Vienna Convention, which relate to the interpretation of treaties; and (b) the nature and extent of the armed conflict and its effect on the treaty, the subject matter of the treaty and the number of parties to the treaty.

³⁴ Iran (Islamic Republic of), *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 55; and document A/CN.4/622 and Add.1.

³⁵ Iran (Islamic Republic of), *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 53.

³⁶ See Bothe, “Occupation, belligerent”, p. 764.

³⁷ *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, decision of 31 July 1989, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 119.

³⁸ Italy, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16) para. 72.

³⁹ Poland, document A/CN.4/622 and Add.1.

⁴⁰ Switzerland, *ibid.*

⁴¹ Italy, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 72.

42. Before dealing with the substance of this provision and the controversy it has generated within the Commission and among Member States, the preliminary questions posed by one Member State⁴² should be answered, namely: what is the purpose of the provision and for whom is it intended? Does it seek to guide States in their conduct in such a situation, or does it seek to guide international courts in assessing whether, in acting on the basis of draft article 8 (Notification of termination, withdrawal or suspension), a State has followed the applicable rules of international law? The Special Rapporteur's response will be brief: the provision serves both purposes. Draft article 4 highlights the criteria used to ascertain, in a specific case, whether a treaty is susceptible to termination, withdrawal or suspension. If, during an armed conflict, a State concerned makes the notification provided for in draft article 8 without complying with the conditions set out in the draft article—should the interpretation of the treaty pursuant to articles 31 and 32 of the 1969 Vienna Convention show that the parties to the treaty had not expressed a common desire to allow for termination, withdrawal or suspension, and that there is no valid ground for such a request arising from the nature and extent of the conflict, the likely effect of the conflict on the treaty, the subject matter of the treaty or the number of parties to the treaty—the State that has so acted would, at the end of the armed conflict, be considered accountable for such non-compliance.

43. The criteria to be included in draft article 4 were contested in the Commission and are still being contested by States that are critical of the Commission's draft. One criticism is that criteria such as the “nature and extent of the armed conflict” and “the effect of the armed conflict on the treaty” amount to a “circular definition”.⁴³ It is not clear to the Special Rapporteur what constitutes an obstacle here. It is possible, for example, that a large-scale armed conflict concerning a territory over which, pursuant to the agreement at issue, a cooperation regime has been established, might terminate that agreement on account of either the extent or the duration of the conflict. Obviously, these criteria, the second of which can be established only with the passage of time, may create conditions that make performance of the treaty impossible and that undermine the trust of the parties to the conflict.

44. Some States that have commented on draft article 4⁴⁴ seem to think that the Commission has abandoned the criterion of the intention of the States at the time of conclusion of a treaty, while another State⁴⁵ seems to feel that this criterion will be of little practical use. Other States⁴⁶ and the Special Rapporteur think that the intention expressed by the States parties at the time of conclusion of a treaty or during a subsequent period—insofar as it reveals anything about the point under discussion here—is an important criterion derived from the application of

articles 31 and 32 of the 1969 Vienna Convention. Therefore, there is no need to add a reference to the intention of the States parties, as one Member State appears to wish.⁴⁷ Nonetheless, if there were a desire for even more explicit wording, draft article 4, subparagraph (a), could be reformulated as follows: “the intention of the parties as derived from the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties”. In any event, draft article 4, subparagraph (a), should be retained.

45. Another comment⁴⁸ was that the reference to “the nature and extent of the armed conflict” in draft article 4, subparagraph (b), should be deleted, either because it could contradict draft article 2, subparagraph (b),⁴⁹ or because it should be connected to the traditional grounds for terminating and suspending treaties in order to maintain the stability of treaty relations between States. The same should apply to criteria such as the nature and intensity of the armed conflict, the effects of the conflict on the treaty, the subject matter of the treaty, and the number of parties, all of which were said to be “abstract” concepts.⁵⁰ On the other hand, other Member States⁵¹ and the Special Rapporteur would like to maintain these criteria. First, it is not clear that there is a contradiction between the current draft article 2, subparagraph (b)—which requires some level of intensity for a conflict to qualify as an “armed conflict”—and the idea of increased intensity, which would be one of the indicia for ascertaining susceptibility to termination or suspension pursuant to draft article 4, subparagraph (b). Second, if the new text of draft article 4, subparagraph (b), proposed in paragraph 51, were accepted, the alleged contradiction would, in any event, disappear. With regard to other considerations put forward by one of the States that has expressed opposition to the inclusion of the criterion “nature and extent of the armed conflict”, it should be noted that the same State has requested that additional criteria such as the intensity and duration of the conflict should be taken into account.⁵²

46. Several ideas for additions to draft article 4 have been put forward. One suggestion was to add new “indicia” such as change of circumstances, impossibility of performance⁵³ and material breach of the treaty.⁵⁴ These additions are already covered by articles 60 to 62 of the 1969 Vienna Convention and draft article 17, and hence seem unnecessary.

47. According to another commenting State,⁵⁵ draft article 4 should include other important factors, such as the

⁴⁷ United Kingdom, statement dated 27 October 2008, available from the Codification Division of the United Nations Office of Legal Affairs.

⁴⁸ Austria, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 36; Belarus, *ibid.*, para. 40; and Iran (Islamic Republic of), 18th meeting (A/C.6/63/SR.18), para. 56.

⁴⁹ Iran (Islamic Republic of), *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 56).

⁵⁰ Belarus, *ibid.*, 16th meeting (A/C.6/63/SR.16), para. 40.

⁵¹ China, document A/CN.4/622 and Add.1.

⁵² Belarus, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 40.

⁵³ *Ibid.*

⁵⁴ Cyprus, *ibid.*, 19th meeting (A/C.6/63/SR.19), para. 8.

⁵⁵ China, document A/CN.4/622 and Add.1.

⁴² Poland, document A/CN.4/622 and Add.1.

⁴³ Austria, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 36.

⁴⁴ Burundi, document A/CN.4/622 and Add.1; Czech Republic, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 83; and New Zealand, 18th meeting, para. 18.

⁴⁵ Belarus, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 40.

⁴⁶ China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 54.

possible results of terminating, withdrawing from or suspending a treaty. This suggestion is covered in the proposed text of draft article 4 contained in paragraph 51 below.

48. The subject matter of the treaty is the key element in draft article 5. It is also mentioned, as one Member State has pointed out,⁵⁶ in draft article 4, subparagraph (b). Nonetheless, and in order to avoid any confusion, it would be appropriate to delete the reference to the subject matter of the treaty in draft article 4, subparagraph (b).

49. Some Member States⁵⁷ would like draft article 4, subparagraph (b), to indicate that the list of indicia contained therein is not exhaustive, but this information is already contained in paragraph 4 of the commentary to the current draft article 4. It is true that it could be moved to the draft article itself, but such a change would weaken the normative value of the text.

50. Lastly, it has been observed⁵⁸ that it is inappropriate to refer to “withdrawal” in draft article 4, since it would contradict draft article 3. The Special Rapporteur fails to see what would constitute the contradiction and hence proposes that the existing text be retained.

51. In the light of the foregoing considerations, draft article 4 could read as follows:

“Indicia of susceptibility to termination, withdrawal or suspension of treaties

“In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, resort shall be had to:

“(a) The intention of the parties to the treaty as derived from the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

“(b) The nature, extent, intensity and duration of the armed conflict, the effect of the armed conflict on the treaty and the number of parties to the treaty.”

E. Operation of treaties on the basis of implication from their subject matter (draft article 5 and annex)

52. The subject matter of a treaty may involve the implication that it continues in operation, in whole or in part, during armed conflict. Draft article 5 states that, in such cases, the incidence of an armed conflict will not as such affect the operation of the treaty. The draft articles are accompanied by an annex entitled “Indicative list of categories of treaties referred to in draft article 5”. The list contains the following categories: (a) treaties governing armed conflicts; (b) treaties establishing a boundary, delimitation or permanent regime; (c) treaties

of friendship, commerce and navigation and analogous agreements concerning private rights; (d) treaties for the international protection of human rights; (e) treaties relating to the protection of the environment; (f) treaties relating to watercourses; (g) treaties relating to aquifers; (h) multilateral law-making treaties; (i) treaties relating to the peaceful settlement of disputes between States; (j) treaties relating to commercial arbitration; (k) treaties relating to diplomatic relations; and (l) treaties relating to consular relations. These are all categories of agreements whose survival, in the opinion of the States concerned, is necessary—so necessary that the States in question have continued to apply them, in whole or in part, despite having experienced the catastrophic consequences of the incidence of an armed conflict.⁵⁹

53. Before examining the reactions to draft article 5 and the list contained in the annex, four preliminary comments may be made. First, in the types of situations envisaged, the incidence of an armed conflict will not as such affect the continued operation of the treaty, although such continued operation may be jeopardized by factors other than the incidence of the conflict. Second, continuity may apply to the treaty as a whole or to only a part thereof; in the Special Rapporteur’s view, the question should be resolved by referring to the indicia set out in draft article 4. Third, the list contained in the annex to the draft articles is described as “indicative” in paragraph 7 of the commentary to draft article 5. This seems to mean: (a) that other factors may be taken into consideration; and (b) that treaties do not continue in operation simply because they fall into one of the listed categories. In addition, treaties may fall into one category or another, or they may not fall into any of the categories yet contain provisions that do. Nonetheless, and considering the other variables included in the draft articles, the text offers approximations rather than hard and fast rules, which is hardly surprising, given the nature of the issue under discussion. Fourth, the list contained in the annex, the content of which has been questioned by a number of States that wish, for example, to supplement or update the list, to make it more abstract, or to spell out the criteria for the survival of treaties,⁶⁰ is, as another State has pointed out,⁶¹ indicative and does not suggest that the kinds of treaties mentioned would never be affected by the outbreak of an armed conflict.

54. The Special Rapporteur’s task now is to consider some specific comments made in relation to draft article 5. One comment⁶² was that the wording of the draft article should be made clearer. The Special Rapporteur is willing, but cannot propose changes without more specific comments. One group of States⁶³ seems to take the view that, in the context of draft article 5, the treaty or

⁵⁹ Detailed commentary on the categories listed here can be found in *Yearbook... 2008*, vol. II (Part Two).

⁶⁰ Chile, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 22nd meeting (A/C.6/63/SR.22), para. 12; Greece, 18th meeting (A/C.6/63/SR.18), para. 44; Israel, *ibid.*, para. 33; Japan, *ibid.*, para. 38; Italy, 16th meeting (A/C.6/63/SR.16), para. 73; Malaysia, 17th meeting (A/C.6/63/SR.17), para. 10; and Poland, *ibid.*, para. 49.

⁶¹ China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 54.

⁶² Republic of Korea, *ibid.*, 16th meeting (A/C.6/63/SR.16), para. 53.

⁶³ Finland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *ibid.*, para. 32.

⁵⁶ United Kingdom, statement dated 27 October 2008, available from the Codification Division of the United Nations Office of Legal Affairs.

⁵⁷ China, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 54; El Salvador, *ibid.*, para. 12; and Israel, 18th meeting (A/C.6/63/SR.18), para. 33.

⁵⁸ Iran (Islamic Republic of), *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 56.

clauses that survive do not necessarily have to be applied as they are, but that some basic treaty principles need to be taken into account during armed conflict. If this comment means that draft article 5 should be applied with some flexibility, it could well be endorsed, as flexibility is built into the current wording of the provision. Another Member State⁶⁴ has expressed concern about the survival, in whole or in part, of treaties whose subject matter seems to imply a degree of continuity. It may be assumed that, if the answer cannot be deduced from the subject matter of the treaty alone, the indicia contained in draft article 4 will come into play.

55. It has also been pointed out⁶⁵ that certain treaties are concluded with the specific purpose of being applied in times of armed conflict, particularly treaties on international humanitarian law, but also those relating to human rights, territorial boundaries, limits or regimes, and the establishment of intergovernmental organizations. It seems obvious that international humanitarian law should survive, since it applies largely to times of armed conflict,⁶⁶ whereas treaties constituting international organizations, for example, may remain partially suspended in time of conflict. The Special Rapporteur believes that it would be preferable, for reasons of clarity, to have an article containing a statement of principle followed by a separate list. For the same reasons—and in order to achieve some flexibility—it would be better, contrary to the suggestion made by one Member State,⁶⁷ not to incorporate the list into draft article 5.

56. One Member State⁶⁸ has expressed the wish to know the factors that make it possible to determine whether a treaty or some of its provisions should continue in operation (or be suspended or terminated) in the event of armed conflict. It seems to the Special Rapporteur that these factors can be determined by first consulting draft article 5, which relates to the subject matter of the treaty, then the indicative list in the annex to the draft articles and lastly, if necessary, the indicia contained in draft article 4 (see in this connection the position taken by China⁶⁹). Another State⁷⁰ has proposed that “relevant factors or general criteria” should be identified. In fact, the factors in question are a combination of general and specific criteria—the indicia mentioned in draft article 4 and the subject matter of the treaty mentioned in draft article 5. The latter criterion is based on international practice, which is the only factor of relatively reliable value in a field full of uncertainties. If its value were disregarded, the decisions to be taken in this regard would be even more arbitrary.

57. With regard to the survival, in whole or in part, of certain treaties referred to in draft article 5, one Member State⁷¹ feels rightly that partial survival is possible

only if the treaty provisions are separable. According to that State, a reference to draft article 10 (Separability of treaty provisions) should therefore be considered. Likewise, draft article 5 should contain an explicit reference to the list contained in the annex to the draft articles. Lastly, it has been suggested that other treaties should be considered for inclusion in the scope of draft article 5 on a case-by-case basis. The Special Rapporteur thinks that a reference to draft article 10 (also advocated by Switzerland) is neither necessary nor useful. All the draft provisions that allow for termination or partial suspension are subject to the conditions set out in draft article 10, and it would suffice to confirm this in the commentary to draft article 5. It is also superfluous to refer to the list in draft article 5 itself, since the list contains a reference to that draft article. In general, cross references within the draft articles should be limited, so as to prevent the absence of a reference in one case from being used in another case as evidence of a lack of connection between one article and another. As for the third comment—that other types of agreement should be considered for inclusion in the scope of draft article 5 on a case-by-case basis—this possibility already exists, since the list contained in the annex to the draft articles is indicative rather than exhaustive (see para. 53 above).

58. Contrary to the opinion expressed by one Member State,⁷² the Special Rapporteur is not of the view that draft article 5 is superfluous, given that termination and suspension are non-automatic. Since this principle is embodied in a general rule—draft article 3—the State in question argues, there is no need to enumerate the specific categories of agreements whose subject matter involves the implication that they continue in operation. The Special Rapporteur does not share this view. Draft article 3 does not in any way imply the automatic operation, in whole or in part, of a treaty in the event of armed conflict. It is clear from this and subsequent provisions that the question must be examined in the light of the criteria set forth in draft articles 4 and 5 and the list annexed to the draft articles in connection with draft article 5. Draft article 5 is thus a key provision.

59. As a further consideration,⁷³ the Commission has been invited to examine the relationship between draft article 5 and draft article 10. As explained above (para. 57), the Special Rapporteur takes the view that there is a link between these two provisions, as well as between draft articles 4 and 10. As stated, draft articles 4 and 5 establish the indicia, criteria and elements giving substance to draft article 3; their application leads to a determination of the survival in whole or in part of a treaty, or, on the contrary, to its disappearance. This conclusion must then be considered in the light of draft article 10, and also draft article 11. Where reference to draft articles 4 and 5 suggests survival of a treaty in part, reference to draft article 10 will indicate: (a) whether the provisions in question are separable from the rest of the treaty; (b) whether acceptance of the provisions in question constituted, for the other party or parties, an essential element in their consent to be bound

⁶⁴ Italy, *ibid.*, para. 73.

⁶⁵ Belarus, *ibid.*, para. 41.

⁶⁶ On this point, see draft article 7, which concerns treaties that contain express provisions on their operation in times of armed conflict.

⁶⁷ Hungary, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 33.

⁶⁸ India, *ibid.*, para. 47.

⁶⁹ *Ibid.*, para. 54.

⁷⁰ Israel, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 33.

⁷¹ Greece, *ibid.*, para. 43.

⁷² Poland, document A/CN.4/622 and Add.1.

⁷³ Finland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 32.

by the treaty as a whole; and (c) whether implementation of that part of the treaty that survives is unfair. That is to say, the conditions laid down in draft article 10 are in addition to those provided for in draft articles 4 and 5. Similar reasoning may, moreover, be applied to draft article 11 (Loss of the right to terminate, withdraw from or suspend the operation of a treaty) in that, even where a right to call for suspension or termination, in whole or in part, existed, that right may no longer be invoked once renounced by the State in question.

60. One Member State⁷⁴ has complained of the lack of clarity of draft article 5 and has encouraged the Commission to give examples of treaties or treaty provisions that might continue in operation. The Special Rapporteur acknowledges that the latter is an elusive goal but would point out that a degree of clarity is provided by the list contained in the annex to the draft articles, while the commentary, in fact, gives such examples.

61. Another State⁷⁵ has proposed the addition of a second paragraph to draft article 5, to read:

“2. Treaties relating to the protection of the human person, including treaties relating to international humanitarian law, to human rights and to international criminal law, as well as the Charter of the United Nations, remain or become operative in the event of armed conflict.”

This proposal is attractive. If a clear majority of the Commission is in favour, the Special Rapporteur would not be opposed, notwithstanding his view that the proposed amendments may well complicate rather than simplify matters. In particular, the question arises, given the contentious issue of determining to what extent human rights treaties continue to operate in time of armed conflict and to what extent international humanitarian law supplants them,⁷⁶ of whether it is possible to assume the continuity of treaties for the international protection of human rights. Consideration must also be given to the precise meaning of the term “international criminal law”, and to whether it might not be preferable to refer to treaties on international criminal justice. A third issue is whether it is useful and necessary to refer to the Charter of the United Nations. Be that as it may, such a change, which might well also encompass treaties on boundaries and limits (in this regard, see para. 35 above), would undoubtedly lead to the disappearance of several categories in the list contained in the annex to the draft articles.

62. If the idea of such an amendment were accepted, it would need to be drafted as precisely as possible. The following text might serve as a basis:

“Treaties relating to the law of armed conflict and to international humanitarian law, treaties for the protection of human rights, treaties relating to international criminal justice and treaties creating or regulating a regime, including those establishing or modifying land or maritime

boundaries, remain in or enter into operation in the event of armed conflict.”

63. We will now consider the list annexed to the draft articles, examining in turn the idea of having such a list, its nature and content, and its relationship to draft article 5.

64. Certain States⁷⁷ take the view that it is not desirable to have such a list; or it could be incorporated into the commentary to draft article 5, with determinations as to the survival of treaties being made case by case.⁷⁸ Other States would incorporate the list into draft article 5.⁷⁹ Still others endorse the Commission’s solution, namely a list annexed to the draft articles.⁸⁰ There is cause for hesitation, at least between annexing a list in connection with draft article 5 and incorporating it into the commentary (there being no prospect that a solution involving insertion of a list into the text of draft article 5 would find acceptance). The Special Rapporteur favours retention of the current text since it offers a greater degree of normativity than if the list were consigned to the commentary.

65. Following these preliminary observations, some general remarks are in order. The indicative nature of the list cannot be overemphasized.⁸¹ The title of the list reaffirms this element. Consequently, the subject matter of the treaty determines its inclusion in the “categories” of agreements that, in practice, survive in whole or in part. However, being indicative, the list cannot be considered complete; moreover, the indicia in draft article 4 may enter into consideration. All this is relevant to the question⁸² of what will become of the categories of treaties not on the list: since the list is merely indicative, they may still fall within the scope of draft article 5.

66. Another general remark was that the question has been inadequately examined and that further study of practice is required by seeking the views of Member States through questionnaires. In addition, it has been said that the practice referred to in the commentary is too focused on practice and doctrine in common law countries.⁸³ In response, it may be stated that: (a) the commentary is certainly not confined to the practice of common law authorities but it must be based on existing, accessible practice (and practice is perhaps more accessible in common law countries than in others); (b) while it may be that some precedents are not referred to, notwithstanding the meticulous research undertaken by the current Special Rapporteur’s late predecessor, that research was thoroughly conducted and there should

⁷⁷ Finland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 32.

⁷⁸ In this vein, see China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 54.

⁷⁹ Hungary, *ibid.*, para. 33.

⁸⁰ Cyprus, *ibid.*, 19th meeting (A/C.6/63/SR.19), para. 9; Indonesia, 18th meeting (A/C.6/63/SR.18), para. 49; and Republic of Korea, 16th meeting (A/C.6/63/SR.16), para. 53.

⁸¹ China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 54; Malaysia, *ibid.*, para. 10; Poland, *ibid.*, para. 49; Cyprus, 19th meeting (A/C.6/63/SR.19), para. 9; Japan, 18th meeting (A/C.6/63/SR.18), para. 38; and United States, document A/CN.4/622 and Add.1.

⁸² Chile, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 22nd meeting (A/C.6/63/SR.22), para. 12.

⁸³ Greece, *ibid.*, 18th meeting (A/C.6/63/SR.18), paras. 43 and 44.

⁷⁴ Colombia, document A/CN.4/622 and Add.1.

⁷⁵ Switzerland, *ibid.*

⁷⁶ On this issue, see, for example, Beauchamp, *Explosive Remnants of War and the Protection of Human Beings under Public International Law*, pp. 114–157.

be no major omissions; and (c) any further research based on questionnaires addressed to States would delay the conclusion of work on this topic indefinitely.

67. With regard to the content of the list, some would prefer more categories, others fewer. Certain States have argued for a more comprehensive list;⁸⁴ others have suggested the inclusion of additional categories: treaties embodying rules of *jus cogens*⁸⁵ and treaties relating to international criminal justice.⁸⁶ With regard to treaties embodying rules of *jus cogens*, such rules will survive in time of armed conflict, as will rules of *jus cogens* that are not embodied in treaty provisions; otherwise they would not be rules of *jus cogens*. Thus, the inclusion of this category of treaties does not seem essential. It is certainly the case, on the other hand, that the relatively recent rules of international criminal justice should form a new category and be included in the list, despite the absence or near absence of relevant practice; it may, moreover, be maintained that the aim of at least some of these rules is precisely to protect individuals in the event of armed conflict.

68. One State commenting on the list would like to go further.⁸⁷ To the types of agreement that it wishes to see included in the body of draft article 5 (treaties on international humanitarian law, human rights and international criminal law, Charter of the United Nations (see para. 61)), it has added a new category—treaties establishing an international organization. But it has also proposed the deletion of five categories: treaties of friendship, commerce and navigation and analogous agreements concerning private rights; treaties relating to the protection of the environment; treaties relating to international watercourses and related installations and facilities; treaties relating to aquifers and related installations and facilities; and treaties relating to commercial arbitration.

69. While the Special Rapporteur is agreeable to the inclusion of treaties establishing international organizations in the list, he sees no need to delete the five categories mentioned in the preceding paragraph. Their inclusion reflects practice, and the list is indicative in nature. In addition, it is evident from draft article 5 that it is the treaty either in whole or in part that continues in operation, which means that the survival of a treaty belonging to a category included in the list may be limited to only some of its provisions.

70. For the reasons elaborated on at length above, the text of draft article 5 and the attendant list might read:

“The operation of treaties on the basis of implication from their subject matter

“[1.] In the case of treaties the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict, the incidence of an armed conflict will not as such affect their operation.

⁸⁴ Japan, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 38; Malaysia, 17th meeting (A/C.6/63/SR.17), para. 10; and Poland, *ibid.*, para. 49.

⁸⁵ Hungary, *ibid.*, para. 33; and Portugal, document A/CN.4/622 and Add.1.

⁸⁶ Switzerland, document A/CN.4/622 and Add.1.

⁸⁷ *Ibid.*

“[2. Treaties relating to the law of armed conflict and to international humanitarian law, treaties for the protection of human rights, treaties relating to international criminal justice and treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land boundaries or maritime boundaries and limits, remain in or enter into operation in the event of armed conflict.]”⁸⁸

“Annex

“Indicative list of categories of treaties referred to in draft article 5

“[(a) Treaties relating to the law of armed conflict, including treaties relating to international humanitarian law;

“(b) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;]

“[(c) Treaties relating to international criminal justice;]

“(d) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

“[(e) Treaties for the protection of human rights;]

“(f) Treaties relating to the protection of the environment;

“(g) Treaties relating to international watercourses and related installations and facilities;

“(h) Treaties relating to aquifers and related installations and facilities;

“(i) Multilateral law-making treaties;

“(j) Treaties establishing an international organization;

“(k) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

“(l) Treaties relating to commercial arbitration;

“(m) Treaties relating to diplomatic and consular relations.”⁸⁹

F. Conclusion of treaties during armed conflict (draft article 6)

71. Draft article 6 enunciates two rules: (a) a State party to an armed conflict retains the capacity to conclude treaties; and (b) in time of armed conflict, States may

⁸⁸ The text between square brackets reflects the discussion in paragraphs 62–64 of the present report.

⁸⁹ The categories between square brackets are those that could be incorporated into a new draft article 5, paragraph 2.

conclude lawful agreements providing for the termination or suspension of treaties that would otherwise remain in operation.

72. One Member State⁹⁰ takes the view that this provision should be deleted since the Commission, in including it, has broached a non-existent problem. Capacity to conclude treaties derives from the independence of the State and its international personality. No peace treaty or armistice would ever have seen the light of day had the States parties to an armed conflict not retained this capacity. An express statement that the capacity to conclude treaties subsists sows doubt and confusion.

73. These criticisms concern paragraph 1 of draft article 6, which, as stated in paragraph (2) of the commentary to the draft article, enunciates the “basic proposition” that an armed conflict does not affect the capacity of States parties to the conflict to enter into treaties. This statement does not require any justification.⁹¹ That said, the proposal to delete draft article 6 takes no account of the fact that paragraph 1 serves as an introduction to paragraph 2; the latter must in no event disappear since it allows the States concerned to suspend or terminate treaties or parts of treaties which would otherwise remain in operation in time of armed conflict. This latter assertion appears less obvious than the rule in paragraph 1 of draft article 6.

74. Another Member State⁹² seeks clarification—if only in the commentary—that draft article 6, paragraph 2, is without prejudice to the rule embodied in draft article 9, which provides that the termination or suspension, in whole or in part, of a treaty as a consequence of an armed conflict does not exonerate the States concerned from the duty to comply with the rules of international law other than those in the treaty which is terminated or suspended. Thus, two belligerent States could not agree, with a stroke of the pen, to terminate, in relations between themselves, application of the Geneva Conventions for the protection of war victims, or of Protocols I and II. The Special Rapporteur considers it justifiable to retain draft article 6 and to specify, in the commentary, that the article is without prejudice to draft article 9.

75. The reference in draft article 6, paragraph 2, to “lawful agreements” has the same purpose: to prevent an agreement between certain States parties *inter se* (see the 1969 Vienna Convention, art. 41, para. 1 (b)) from undermining the object and purpose of treaty or customary provisions such as those of the Geneva Conventions for the protection of war victims, or of Protocols I and II. For this reason, the Special Rapporteur is reluctant to delete the adjective “lawful”, contrary to the suggestion made by certain States.⁹³ But there should, perhaps, be an explanation in the commentary of the importance of this adjective.

⁹⁰ Poland, document A/CN.4/622 and Add.1.

⁹¹ However, as noted in paragraph (4) of the commentary to draft article 6, eminent experts such as McNair (*The Law of Treaties*, p. 696) and Fitzmaurice (“The juridical clauses of the peace treaties”, p. 309) have deemed it appropriate to comment on the question.

⁹² Switzerland, document A/CN.4/622 and Add.1.

⁹³ Colombia, document A/CN.4/622 and Add.1; and United Kingdom, statement dated 27 October 2008, available from the Codification Division of the United Nations Office of Legal Affairs.

76. In view of the foregoing, draft article 6 could read:

“Conclusion of treaties during armed conflict

“1. The outbreak of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with the 1969 Vienna Convention on the Law of Treaties.

“2. During an armed conflict, States may conclude lawful agreements involving termination or suspension of a treaty or part of a treaty that is operative between them during situations of armed conflict.”

G. Express provisions on the operation of treaties (draft article 7)

77. Draft article 7 provides that “where a treaty expressly so provides, it shall continue to operate in situations of armed conflict”. To cover all eventualities, it would probably have been preferable to say “if insofar as”, in order to take into account the possibility of partial operation. However, if the new language proposed in paragraph 81 below is approved, this change would no longer be necessary.

78. Two Member States⁹⁴ have proposed that this draft article be deleted or modified.⁹⁵ The Special Rapporteur, like Colombia,⁹⁶ does not agree with the proposal to delete it, but considers that it is not in the right place and could be better drafted.

79. With regard to the proper place for this provision, one State⁹⁷ has suggested moving it close to draft article 5. Another State⁹⁸ thinks that draft article 7 should follow draft article 4 (Indicia of susceptibility to termination, withdrawal or suspension of treaties), since it is simply a case of the application of draft article 4. The Special Rapporteur shares the view that draft article 7 is not in the proper place. However, he would not place it after draft article 5 or 4, but rather after draft article 3. This solution would impart a logical order to the entire set of provisions applicable to the issues to be resolved: (a) general principle of the absence of a rule entailing *ipso facto* termination or suspension (draft article 3); (b) first possible solution: the provisions of the treaty itself provide the answer (draft article 7, which would become draft article 3 *bis*); (c) second option: review of a series of indicia in order to ascertain whether the treaty continues in operation, is suspended, in whole or in part, or is terminated (draft article 4); (d) third option (which may be combined with the second): on account of its subject matter, the treaty is one which, on the outbreak of armed conflict, continues in operation, in whole or in part, or, on the other hand, one which ceases to operate on the outbreak of armed conflict (draft article 5); and, lastly, (e) fourth

⁹⁴ Chile, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 22nd meeting (A/C.6/63/SR.22), para. 13; and Poland, document A/CN.4/622 and Add.1.

⁹⁵ Chile, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 22nd meeting (A/C.6/63/SR.22), para. 13.

⁹⁶ Document A/CN.4/622 and Add.1.

⁹⁷ Romania, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 21st meeting (A/C.6/63/SR.21), para. 53.

⁹⁸ Switzerland, document A/CN.4/622 and Add.1.

option: the States in question have concluded, during the armed conflict, agreements involving termination or suspension of the treaty which would otherwise continue in operation (draft article 6, para. 2). In other words, once the rule (or rather the absence of a rule) applicable to the central issue addressed in the draft articles has been stated in draft article 3, the possible solutions are presented in a logical order.

80. One Member State has requested that the Commission should indicate the factors for identifying treaties which, on account of their nature, are not affected by armed conflicts under any circumstances. It is difficult to give a definitive response to this request, but the Special Rapporteur believes that no treaty is untouchable. Obviously, the treaties referred to in draft article 7 continue to operate because they provide for their own survival, not because they are untouchable on account of their nature. The treaties referred to in draft article 5 and in the list annexed to the draft articles may also continue to operate because of their subject matter, but such continued operation does not necessarily apply to the treaty as a whole and, moreover, it may be subject to the application of the criteria set forth in draft article 4.

81. In the light of the foregoing remarks, draft article 7 should be retained, but it should follow draft article 3 and should be redrafted to read as follows:

“Express provisions on the operation of treaties

“Where a treaty itself contains [express] provisions on its operation in situations of armed conflict, these provisions shall apply.”

H. Notification of termination, withdrawal or suspension (draft article 8)

82. This provision has generated heated debate. Under the current text, the notifications referred to in draft article 8, paragraph 1, are unilateral acts through which a State, on the outbreak of armed conflict, informs the other contracting State or States or the depositary, if there is one, of its intention to terminate, withdraw from or suspend the operation of the treaty. Performance of this unilateral act is not required when the State in question does not wish to terminate, withdraw from or suspend the operation of the treaty. This is a consequence of the general rule set out in draft article 3, which provides that the outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties.

83. Draft article 8, paragraph 2, specifies that the notification takes effect upon receipt by the State or States in question. The same should apply when the notification is addressed to the depositary: the notification takes effect when the State for which it is intended receives it from the depositary.

84. In accordance with draft article 8, paragraph 3, nothing in paragraphs 1 and 2 shall affect the right of the notified party to object, in accordance with the terms of the treaty or other rules of international law, to termination, withdrawal from or suspension of the operation of the treaty.

85. Draft article 8, paragraph 3, therefore allows the notified State to object to the content of the notification if it considers it to be contrary to draft articles 3 to 7. This provision is aligned with article 65, paragraphs 3 to 5, of the 1969 Vienna Convention. However, the Commission decided not to include a draft provision corresponding to article 65, paragraph 4, of the Vienna Convention, which provides that nothing in the foregoing paragraphs shall affect the rights or obligations of the parties with regard to the peaceful settlement of disputes. In other words, following the notification and any objection to its content, the dispute settlement process would remain suspended until the end of the armed conflict. Consequently, in practice, the treaty will remain paralysed until the peaceful settlement of the dispute concerning the content of the notification. The Commission opted for this approach because it considered that

it was unrealistic to seek to impose a peaceful settlement of disputes regime for the termination, withdrawal from or suspension of treaties in the context of armed conflict.⁹⁹

In other words, a period during which one or more States are involved in an armed conflict would not be, in the Commission’s opinion, the ideal time for setting in motion the existing dispute settlement mechanisms: the State or States in question will consider that they have more urgent things to do and will have no inclination to address that issue at that particular time. While such an attitude may seem understandable, it does not help advance the cause of the peaceful settlement of disputes.

86. The Commission’s approach has been endorsed by some States¹⁰⁰ and criticized by another State,¹⁰¹ which considers that there is no reason to put on hold a State’s obligations with regard to the peaceful settlement of disputes in the context of the effects of armed conflicts on treaties.

87. The Special Rapporteur would not see any insurmountable difficulty in providing that settlement procedures shall remain accessible in times of armed conflict, or at least not precluding that possibility. It should also be noted that treaty obligations in this area are among those that may continue to operate pursuant to draft article 5 and item (i) of the corresponding list contained in the annex. Draft article 8 could therefore be supplemented with wording drawn from article 65, paragraph 4, of the 1969 Vienna Convention, as follows:

“Nothing in the preceding paragraphs shall affect the rights or obligations of the States parties with regard to the settlement of disputes insofar as, despite the incidence of an armed conflict, they have remained applicable pursuant to draft articles 4 to 7.”

This text would become paragraph 5 of draft article 8.

⁹⁹ *Yearbook ... 2008*, vol. II (Part Two), para. (1) of the commentary to draft article 8, p. 60.

¹⁰⁰ Hungary, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 33; and Malaysia, *ibid.*, para. 10.

¹⁰¹ Switzerland, document A/CN.4/622 and Add.1.

88. Another State¹⁰² would like to know the effects of notification on the rights and duties of States parties to the treaty. The response depends on the content of the notification: in the immediate term, the notification would lead to the total or partial paralysis of the treaty. If it is followed by an acknowledgement of receipt, a right to object to the content of the notification is triggered; otherwise, the State making the notification may carry out the measure which it has proposed.

89. Two Member States¹⁰³ have expressed the view that it may not always be practical to fulfil the notification requirement, a remark which also applies to acknowledgement of receipt, particularly if the other State or States or the depositary State are parties to the conflict. This difficulty cannot be denied. However, what would be the substitute for notification and acknowledgement of receipt? Without the duty to notify, the rules set out in the draft articles would become largely theoretical. The Special Rapporteur is of the view that, where difficulties emerge, the States concerned should be pragmatic in fulfilling their duties of notification and acknowledgement of receipt; what is certain is that these acts must be performed, to the extent possible, in a manner similar to that provided in article 65 of the 1969 Vienna Convention, and that an announcement “to the general public”, *urbi et orbi*, would probably not be sufficient.

90. One Member State¹⁰⁴ has questioned the substance of draft article 8, paragraph 3, which states that nothing shall prevent a State party from objecting, in accordance with the terms of the treaty or (other) rules of international law, to the termination, withdrawal or suspension of the operation of the treaty. This State has also requested information on the relationship between draft article 8, paragraph 3, and article 73 of the 1969 Vienna Convention. First, the Special Rapporteur believes that draft article 8, paragraph 3, is indispensable; if it disappeared, the issue of the effects of armed conflicts would be dominated by the State making the notification. As for the relationship between draft article 8, paragraph 3, and article 73 of the 1969 Vienna Convention, it should simply be noted that the latter article states that the Convention does not prejudge the question of the effects of the “outbreak of hostilities between States” on treaties, while the draft articles are designed to address that question, following the path set out in the Vienna Convention as far as possible.

91. Another issue is that no time limit has been set for objecting to a notification, contrary to article 65, paragraph 2, of the 1969 Vienna Convention, which sets a time limit of three months. The Commission took the view that it was difficult to provide for time limits in the context of armed conflicts. However, it may have to make such provision if the text proposed in paragraph 87 of the present report is accepted. Nonetheless, given that the context is one of armed conflict, the time limit should probably be longer than three months.

92. One interesting suggestion¹⁰⁵ was that the scope of draft article 8 should be extended to States that are not parties to the conflict but are parties to the treaty. Technically, this would be an easy matter: it would suffice to replace the current text of draft article 8, paragraph 1, with the following: “A State intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, whether or not it is a party to the conflict, shall notify... of that intention”. Since the State that made this suggestion has said that the Commission “should... consider” this possibility, the Special Rapporteur is submitting the observation in question to the members of the Commission for their consideration.

93. Another comment¹⁰⁶ was that the title of draft article 8 is imprecise: the notification that is the subject of the draft article is not of termination, withdrawal or suspension, but of the intention to terminate, withdraw from or suspend the operation of a treaty. According to the State that made this comment, it is clear that notification in itself cannot terminate or suspend the treaty obligations in question. It is the absence of objections within a given time limit (see para. 88 above) that will trigger this consequence. If an objection has been raised, the issue will remain frozen until a diplomatic or legal settlement is reached. In order to clarify the situation, a fourth paragraph could be inserted into draft article 8; it would be aligned with article 65, paragraph 3, of the 1969 Vienna Convention and would provide as follows:

“If an objection has been raised within the prescribed time limit, the States parties concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.”

This text would be preceded by the current paragraph 3 of draft article 8.

94. Draft article 8 has generated a great deal of interest and divided opinion among States, which have formulated other proposals in that regard. For example, one Member State¹⁰⁷ has requested that the right to make a notification within the meaning of draft article 8 should be limited to treaties other than those the subject matter of which, on the basis of draft article 5, involves the implication that they continue in operation. However, as has been noted during the consideration of draft article 5, neither it nor the corresponding list contained in the annex to the draft articles establishes the absolute certainty that would make draft article 8 as restrictive as desired.

95. In conclusion, it is worth noting the wish expressed by one Member State¹⁰⁸ to add, at the end of draft article 8, paragraph 2, wording along the lines of “unless the notice states otherwise” (unless it provides for a “subsequent” date).

¹⁰² Belarus, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 42.

¹⁰³ United Kingdom, *ibid.*, 16th meeting (A/C.6/63/SR.16), para. 59; and Greece, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 45.

¹⁰⁴ Greece, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 45.

¹⁰⁵ China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 55.

¹⁰⁶ Poland, document A/CN.4/622 and Add.1.

¹⁰⁷ Iran (Islamic Republic of), *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 57.

¹⁰⁸ United States, document A/CN.4/622 and Add.1.

96. The text of draft article 8 could therefore be improved and clarified to read as follows:

“Notification of intention to terminate, withdraw from or suspend the operation of a treaty

“1. A State engaged in armed conflict intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, shall notify the other State party or States parties to the treaty, or its depositary, of that intention.

“2. The notification takes effect upon receipt by the other State party or States parties, unless it provides for a subsequent date.

“3. Nothing in the preceding paragraphs shall affect the right of a party to object, in accordance with the terms of the treaty or applicable rules of international law, to termination, withdrawal from or suspension of the operation of the treaty. Unless the treaty provides otherwise, the time limit for raising an objection shall be... after receipt of the notification.

“4. If an objection has been raised within the prescribed time limit, the States parties concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

“5. Nothing in the preceding paragraphs shall affect the rights or obligations of States with regard to the settlement of disputes insofar as, despite the incidence of an armed conflict, they have remained applicable, pursuant to draft articles 4 to 7.”

I. Obligations imposed by international law independently of a treaty (draft article 9)

97. Draft article 9, which has its roots in article 43 of the 1969 Vienna Convention, provides that the termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty. This text has not given rise to any comments. Paragraph (2) of the commentary to this draft article describes the principle set out in the draft article as “trite”, which has led one Member State¹⁰⁹ to respond that, on the contrary, it is an important principle. The Special Rapporteur proposes to retain the draft article as it is and to replace the words “seems trite” in paragraph (2) of the commentary with the words “seems self-evident”.

J. Separability of treaty provisions (draft article 10)

98. Draft article 10, as adopted by the Commission on first reading, provides as follows:

Separability of treaty provisions

Termination, withdrawal from or suspension of the operation of the treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the parties otherwise agree, take effect with respect to the whole treaty except where:

(a) The treaty contains clauses that are separable from the remainder of the treaty with regard to their application;

(b) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) Continued performance of the remainder of the treaty would not be unjust.

99. It is stated in the commentary that this draft article reproduces verbatim article 44 of the 1969 Vienna Convention, except for paragraphs 4 and 5 of that article, which are of no relevance to the draft articles. Draft article 10 is of some importance in the present context because the partial survival or suspension of a treaty cannot be envisaged in the absence of separability.¹¹⁰ Since the draft article is clearly modelled on article 44 of the Vienna Convention, the Special Rapporteur sees no need to examine its structure further, contrary to the suggestion made by one group of States.¹¹¹

100. One Member State¹¹² has queried the meaning of the word “unjust”, used in draft article 10, subparagraph (c). An answer can be obtained by referring to the deliberations of the United Nations Conference on the Law of Treaties. It was not the Commission that originated article 44, paragraph 3 (c), of the 1969 Vienna Convention and hence draft article 10, subparagraph 3 (c). It was the United States that proposed this text at the Conference, fearing that a State might insist on the termination or invalidity of a treaty by giving an unduly narrow interpretation to the word “separable” in article 44, paragraph 3 (a), and the words “essential basis” in article 44, paragraph 3 (b). As Mr. Kearney, the United States representative, explained:

It was possible that a State claiming invalidity of part of a treaty might insist on termination of some of its provisions, even though continued performance of the remainder of the treaty in the absence of those provisions would be very unjust to the other parties.¹¹³

101. This explanation highlights the purpose of the United States proposal, which was to limit the separability of treaty provisions in order to protect the other contracting party or parties. However, the proposal is silent on the meaning of the word “unjust”. The Special Rapporteur believes, nonetheless, that article 44, paragraph 3 (c), of the 1969 Vienna Convention is a sort of general clause that may be invoked if the separation of treaty provisions—to satisfy the wishes of the requesting party—would create a significant imbalance to the detriment of the other party or parties. It thus complements paragraphs 3 (a) (separability with regard to application)

¹¹⁰ Greece, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 43.

¹¹¹ Finland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *ibid.*, 16th meeting (A/C.6/63/SR.16), para. 32.

¹¹² Colombia, document A/CN.4/622 and Add.1.

¹¹³ *Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11) (United Nations publication, Sales No. E.68.V.7), 41st meeting of the Committee of the Whole, para. 17. For the United States proposal, see A/CONF.39/C.1/L.260, in *ibid.*, *First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969* (A/CONF.39/11/Add.2) (United Nations publication, Sales No. E.70.V.5), para. 369.

¹⁰⁹ Switzerland, *ibid.*

and 3 (b) (which provides that acceptance of the clause or clauses whose termination or invalidity is requested was not an essential basis of the consent of the other party or parties to be bound by the treaty).

102. Under these circumstances, the Special Rapporteur sees no need to modify the text of draft article 10.

K. Loss of the right to terminate, withdraw from or suspend the operation of a treaty (draft article 11)

103. According to the Commission's commentary, draft article 11 is based on the equivalent provision in the 1969 Vienna Convention, namely article 45. It provides that a State may no longer terminate, withdraw from or suspend the operation of a treaty as a consequence of an armed conflict if it has "expressly agreed" that the treaty remains in force or continues in operation (subpara. (a)) or if it can "by reason of its conduct" be considered as having acquiesced in the maintenance in force of the treaty. The replication of this rule, which has been endorsed explicitly by some States,¹¹⁴ means essentially that a minimum of good faith must remain in times of armed conflict.

104. One Member State¹¹⁵ considers that this rule is "too rigid" and that a State cannot always anticipate the course of an armed conflict and its potential effects on the State's capacity to continue to fulfil its treaty obligations. In addition, the same State has stated its understanding that the circumstances resulting in a State's loss of the right to terminate, withdraw from or suspend the operation of a treaty arise after the armed conflict has produced its effect on the treaty.¹¹⁶ The arguments thus summarized may seem contradictory. The first argument seems to be that the course of armed conflicts is unpredictable and that the States concerned should be able to reconsider their position during the conflict; if this argument were generally accepted, then draft article 11 would become redundant. The second argument, by contrast, seems to be that article 45 of the 1969 Vienna Convention, as replicated in the Commission's draft article 11, means that the situation can be assessed only after the armed conflict has "produced its effect on the treaty" and that draft article 11 may be retained if this point is clarified.

105. In the Special Rapporteur's opinion, the commentary to draft article 11 could specify that the draft article covers positions adopted "after the armed conflict has produced its effect on the treaty", although it would be preferable to replace the words "its effect" with the word "effects", so as not to dilute the normative content of the provision in question too much. A simpler solution would be to suggest, in the commentary, that States refrain from the actions referred to in the draft article until the effects of the conflict on the treaty have become partially clear. The Special Rapporteur prefers the latter solution.

106. According to the same State,¹¹⁷ the Commission should examine the relationship between draft articles 11

and 17. Draft article 17 provides that the draft articles (and hence draft article 11) are without prejudice to termination, withdrawal or suspension on other grounds—agreement of the parties, material breach, impossibility of performance, or fundamental change of circumstances—although this list is not exhaustive. In the Special Rapporteur's opinion, this means that a State may very well decide to invoke—even if it has lost the right to termination, withdrawal or suspension under draft article 11—other grounds set out in the 1969 Vienna Convention. This conclusion is bolstered by the title of draft article 17, which uses the words "other cases", and by the explanation contained in paragraph (1) of the commentary to that draft article ("the reference to 'Other' in the title is intended to indicate that these grounds are additional to those in the present draft articles"). The question, however, seems largely theoretical, particularly in the scenario envisaged in draft article 11, subparagraph (b): it seems unlikely that it can be deduced from the mere "conduct" of the State concerned that its acquiescence in the maintenance of the treaty was based on the incidence of an armed conflict rather than on one of the items listed in draft article 17.

107. Using rather strong language—referring, for instance, to sloppy drafting—another State¹¹⁸ has claimed to have identified a fundamental contradiction: while the title of draft article 11 refers to the right to terminate, withdraw from or suspend the operation of a treaty, no such right is mentioned anywhere else. That, according to the State in question, is a fundamental flaw in the draft articles.

108. The Special Rapporteur believes that to be an overly formalistic point of view. The provisions preceding draft article 11 indicate what States have a right to do and under what conditions it is possible to maintain, terminate, withdraw from or suspend the operation of a treaty. Draft article 8 sets out what States must do and when they may do it. If these provisions do not amount to the definition of a right and the limits on that right, then the Special Rapporteur does not see how they can be characterized. However, if the Commission wished to take into account this criticism, it would suffice to replace, in the title of the draft article, the words "of the right" with "of the option".

109. Draft article 11, with a slight drafting change, would read as follows:

"Loss of the right [of the option] to terminate, withdraw from or suspend the operation of a treaty

"A State may no longer terminate, withdraw from or suspend the operation of a treaty as a consequence of an armed conflict if:

"(a) It has expressly agreed that the treaty remains in force or continues in operation; or

"(b) It can by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force."

¹¹⁴ Colombia, document A/CN.4/622 and Add.1.

¹¹⁵ China, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 56.

¹¹⁶ Document A/CN.4/622 and Add.1.

¹¹⁷ See footnote 115 above.

¹¹⁸ Poland, document A/CN.4/622 and Add.1.

L. Resumption of suspended treaties (draft article 12)

110. The resumption of the operation of a treaty suspended as a consequence of an armed conflict is determined in accordance with the indicia referred to in draft article 4: articles 31 and 32 of the 1969 Vienna Convention, the nature and extent of the armed conflict, the effect of the armed conflict on the treaty and the number of parties to the treaty (see para. (1) of the commentary). The question of when a treaty is resumed should be resolved on a case-by-case basis (para. (2) of the commentary). *Prima facie*, this provision seems obscure and requires clarification.

111. One important question¹¹⁹ is that of the relationship between draft articles 12 and 18. Draft article 18 provides that the draft articles are without prejudice to the right of States parties to a treaty and to an armed conflict to regulate, subsequent to the conflict, on the basis of a new agreement, the revival of treaties terminated or suspended as a result of the conflict. On this point, it should be noted that draft articles 12 and 18 are indeed closely linked and should be placed close to each other. For the sake of clarity, draft article 18 could first become draft article 12 because, in a sense, it contains the general rule: that, whether a treaty has been terminated or suspended in whole or in part, the States parties may, if they so agree, still conclude an agreement to revive or render operative even agreements or parts thereof that have ceased to exist. This is a consequence of the freedom to conclude treaties. It is also obvious that these are not unilateral decisions.

112. The scope of draft article 12 is narrower: it applies only to treaties that have been suspended in connection with the indicia referred to in draft article 4. Since the treaty in such a case has been suspended at the initiative of one State party—a party to the armed conflict—on the basis of the prescribed indicia, it would appear that, when the armed conflict is over, these indicia cease to apply. As a result, the treaty may or should become operative once again, unless other causes of termination, withdrawal or suspension have emerged in the meantime (see draft article 17), or unless the parties have agreed otherwise. Resumption may be called for by one or more States parties, because it is no longer a matter of an agreement between States, but an initiative that may be taken unilaterally and whose result will depend on compliance with the conditions for resumption set forth in draft article 4—an issue which will be resolved, if necessary, through the available dispute settlement procedures.

113. The foregoing is a brief analysis of the relationship between draft articles 12 and 18, the question of who may take the initiative to resume the operation of a treaty in accordance with draft article 12 and under what conditions,¹²⁰ and the question of how the scope of the two provisions should be defined.¹²¹ The analysis suggests that draft article 18 should be incorporated into draft

article 12¹²² and that the latter should no longer take the form of a “without prejudice” clause.

114. The new draft article 12 (into which draft article 18 would be subsumed) could read as follows:

*“Revival or resumption of treaty relations
subsequent to an armed conflict*

“1. Subsequent to an armed conflict, the States parties may regulate, on the basis of agreement, the revival of treaties terminated or suspended as a result of the armed conflict.

“2. The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the indicia referred to in draft article 4.”

M. Effect of the exercise of the right to individual or collective self-defence on a treaty (draft article 13)

115. Draft article 13 is based on article 7 of the above-mentioned resolution of the Institute of International Law,¹²³ which provides as follows:

A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor.

116. Draft article 13 and article 7 of the resolution of the Institute of International Law have elements in common. Both seek to prevent a situation in which an attacked State, on account of treaties by which it is bound, is deprived of its natural right of self-defence (Article 51 of the Charter of the United Nations). At the same time, the draft article aims to prevent impunity for the aggressor and any imbalance between the two sides, which would undoubtedly emerge if the aggressor, having disregarded the prohibition on the use of force set out in Article 2, paragraph 4, of the Charter, were able at the same time to require the strict application of the existing law and thus deprive the attacked State, in whole or in part, of its right to defend itself. In addition, both provisions seem to imply that suspension relates to agreements between the aggressor and the victim; neither excludes cases—perhaps less likely to occur—of treaties between the State that is the victim of the aggression and third States. On the other hand, the provisions do not cover internal conflicts, since they refer to self-defence within the meaning of Article 51 of the Charter. The third element which they have in common is that they refer only to suspension and not to termination. Lastly, neither provision identifies the treaties that may be suspended, except indirectly, by referring to treaties that are “incompatible” with the exercise of the right of self-defence.

117. The main difference between the two provisions is that article 7 of the resolution of the Institute of International Law states that, at a later stage, the Security Council may, in the exercise of its powers under Article 51 of

¹¹⁹ Raised by Colombia, Poland and Switzerland, *ibid.*

¹²⁰ United Kingdom, statement dated 27 October 2008, available from the Codification Division of the United Nations Office of Legal Affairs.

¹²¹ Colombia and Switzerland, document A/CN.4/622 and Add.1.

¹²² Colombia, *ibid.*

¹²³ “The effects of armed conflicts on treaties”, pp. 280 and 282.

the Charter of the United Nations, come to the conclusion that the attacked State is in fact the aggressor, and that the fate of the suspended instrument and questions of responsibility that may arise are subject to any consequences of such a determination. The Commission's draft article is silent on this point.

118. Nonetheless, it is clear that there is a close link between draft articles 13 and 14, the latter of which states that the draft articles are without prejudice to the legal effects of decisions of the Security Council in accordance with Chapter VII of the Charter of the United Nations. It is the Council that will ultimately determine the legality of a suspension announced pursuant to draft article 13; it is also the Council that may, in the context of an armed conflict, decide to take coercive measures with regard to the operation of treaties. Under Article 103 of the Charter, the Council's decisions prevail over the other obligations of the States concerned.¹²⁴

119. There is also a close link between draft articles 13 and 15: the former sets out what the attacked State may do, while the latter sets out what the aggressor State may not do; that is, terminate, withdraw from or suspend the operation of a treaty if the effect would be to the benefit of that State. Thus, the two provisions are complementary. This link should be highlighted in the commentaries to draft articles 13 and 15.

120. One Member State¹²⁵ has expressed the view that the draft articles should focus on the law of treaties and the fate of treaties rather than the use of force, self-defence and their consequences. Moreover, this State, citing a previous report of the Commission,¹²⁶ asserts that "the illegality of a use of force [does] not affect the question whether an armed conflict [has] an automatic or necessary outcome of suspension or termination". The Special Rapporteur does not share this point of view entirely. Although it is true, as the Commission states in the quoted passage, that the legality or illegality of the use of force does not automatically or necessarily determine the fate of treaties, this does not mean that it never does so. It is important, in this context, to preserve the right of self-defence in its entirety. Draft article 13 aims to do this by allowing a State that wishes to exercise this right to set aside temporarily, by means of suspension, possible obstacles arising from treaties. Given the relationship between this question and that of the effects of armed conflicts on treaties—a relationship confirmed by the wording of article 7 of the resolution adopted by the Institute of International Law—the Special Rapporteur recommends that draft article 13 be retained.

121. Before continuing consideration of the comments made on draft article 13, the Special Rapporteur wishes to point out that the provision does not cover every detail of the issue: it is silent on the questions of notification and opposition and does not mention time limits or peaceful settlement. This can probably be explained by the fact that the draft article in question does not occupy a key position

in the Commission's text—which, it should be remembered, relates to treaty law—and by the fact that self-defence is an exceptional measure in the context of public international law. The Commission risks exceeding its mandate if it attempts to resolve every aspect of the question. This response applies also to the suggestion¹²⁷ that the issue should be addressed in a more specific manner.

122. Unlike article 7 of the resolution adopted by the Institute of International Law, draft article 13 contains no reference to the Security Council. This is why it has been suggested¹²⁸ that the last phrase of article 7 of that resolution ("subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor") should be added to draft article 13. The Special Rapporteur is not in favour of this suggestion. The question is whether the inclusion of this wording would not contradict the opening phrase of the article, which refers to the exercise of the right of individual or collective self-defence "in accordance with the Charter of the United Nations". Moreover, it might be feared that the proposed addition would be interpreted as recognition of a right of pre-emptive self-defence.

123. That said, it must be admitted that a State that believes it is exercising the right of self-defence is not always actually exercising that right, and that the Security Council may come to the conclusion, at some point, that the State was not acting in self-defence, which will mean that any measures which the State has taken to suspend treaties are no longer legal. It is also possible that the State, although genuinely acting in self-defence, has taken steps to suspend a treaty that were not justified because the treaty in question did not in fact have the effect of restricting the exercise of the right of self-defence or because an unjustified suspension has caused harm to third States. In the Special Rapporteur's view, existing means of peaceful dispute settlement could come into play in such cases.

124. The Commission's attention has been drawn to a point that requires clarification: where suspension is possible because a treaty obligation is incompatible with the exercise of the right of self-defence, this possibility exists only subject to the provisions of draft article 5.¹²⁹ A consequence that would not even be tolerated in the context of armed conflict cannot be accepted in the context of self-defence. However, given that the list annexed to the draft articles in connection with draft article 5 is indicative in nature, and that draft article 5 itself is not applied in isolation,¹³⁰ the effect of a reference to draft article 5 remains uncertain.

125. Similarly, it has been noted that the current draft article 13 suggests that a State exercising the right of self-defence may suspend any treaty provision that may affect that right¹³¹ and that it should be made clear, at least in the commentary, that the right provided for does not prevail

¹²⁴ See paragraph 143 below.

¹²⁵ Portugal, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 19th meeting (A/C.6/63/SR.19), para. 27.

¹²⁶ *Yearbook ... 2007*, vol. II (Part Two), p. 75, para. 308.

¹²⁷ Republic of Korea, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 53.

¹²⁸ Japan, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 39.

¹²⁹ Switzerland, document A/CN.4/622 and Add.1.

¹³⁰ See paragraphs 54 and 59 above.

¹³¹ United States, document A/CN.4/622 and Add.1.

over treaty provisions that are designed to apply in armed conflict, in particular the provisions of treaties on international humanitarian law and the law of armed conflict, such as the Geneva Conventions for the protection of war victims. However, it will be recalled that the two categories of rules mentioned appear in the list contained in the annex to the draft articles, to which it is proposed that reference be made in draft article 13. If, for one reason or another, such a reference seems excessive, it may be moved to the commentary to the draft article.

126. The last point, which is a drafting issue, is that the reference to the right to “individual or collective” self-defence in the title of draft article 13 could be deleted, since this point is covered in the body of the draft article.

127. Bearing in mind the aforementioned considerations, draft article 13 could read as follows:

“Subject to the provisions of article 5, a State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a party and which is incompatible with the exercise of that right.”

N. Prohibition of benefit to an aggressor State (draft article 15)

128. The purpose of draft article 15 is to prevent an aggressor State from using an armed conflict that it has provoked—in spite of the prohibition of the use of force—as an opportunity to free itself from treaty obligations which it finds inconvenient. The provision is based on article 9 of the resolution adopted by the Institute of International Law.¹³² Draft article 15 differs, however, from that article in two respects: (a) it adds withdrawal from a treaty to the measures which the aggressor State is prohibited from taking; and (b) it states that the prohibition with respect to the aggressor State applies in the event of “an armed conflict”.

129. As stated in the previous paragraph, draft article 15 means that an aggressor State may not use an armed conflict which it has itself provoked as an opportunity to free itself from its treaty obligations. The characterization of a State as an aggressor will depend fundamentally on the definition given to the word “aggression” and, in terms of procedure, on the Security Council. If the Council determines that a State wishing to terminate, withdraw from or suspend the operation of treaties—which presupposes that the case has been referred to the Council—is an aggressor, that State may not take those measures or, in any case, may do so only insofar as it does not benefit from them; this latter point may be assessed either by the Council or by a judge or arbitrator. In the absence of such a determination, the State may act under draft articles 4 *et seq.*

130. *Ratione temporis* and *ratione materiae*, the first thing that happens is that aggression is committed. From that time, the State characterized as an aggressor by the attacked State may no longer, under draft article 8, claim the right to terminate, withdraw from or suspend the

operation of treaties, unless it derives no benefit from doing so. As a general rule, it will claim the right anyway, arguing that no aggression has been committed or that its adversary is the aggressor. The situation will therefore remain in limbo until the second stage, which is determination by the Security Council. That action determines what follows: if the State initially considered to be the aggressor turns out not to be, or if it does not benefit from the aggression, the notification that it may have made under draft article 8 will be assessed in accordance with the ordinary criteria established in the draft articles. If, on the other hand, the State is confirmed as the aggressor and has benefited from setting aside its treaty obligations, these criteria are no longer applicable when it comes to determining the legitimacy of termination, withdrawal or suspension.

131. Similarly, it has been commented¹³³ that the current draft article 15 provides that, under certain circumstances, the aggressor State loses the right to terminate a treaty; nonetheless, the consequences of the Security Council’s determining that that State is an aggressor should be specified. As explained in the previous paragraph, such a determination is made by the Council. As to the question of whether the aggressor State benefits from termination, withdrawal or suspension, existing means of peaceful dispute settlement would, where necessary, provide an answer.

132. The principle set out in draft article 15 has been endorsed by a number of Member States.¹³⁴ However, for different reasons, three States¹³⁵ would like to delete the reference to General Assembly resolution 3314 (XXIX), entitled “Definition of aggression”: the first two wish to avoid prejudging possible future developments, such as the outcome of the work of the Special Working Group of the Assembly of States Parties to the Rome Statute of the International Criminal Court on the Crime of Aggression; the third State¹³⁶ has observed that the current draft article 15 emphasizes the law applicable to determination of the aggressor rather than the process to be followed in making that determination. This is why that State has proposed that the beginning of draft article 15 should read as follows: “a State committing an act of aggression as determined in accordance with the Charter of the United Nations shall not terminate...” According to the State in question, this language would have the advantage of averting the risk of unilateral determinations.

133. The Special Rapporteur sees no reason to delete the reference to General Assembly resolution 3314 (XXIX). The resolution was adopted by consensus and the Institute of International Law, which refers to it in article 9 of its resolution, seems to regard it as a generally accepted text. The argument that the current draft article 15 does not take sufficient account of procedural questions is also

¹³³ Japan, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 39.

¹³⁴ China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 57; Hungary, *ibid.*, para. 33; Cyprus, 19th meeting (A/C.6/63/SR.19), para. 9; and Iran (Islamic Republic of), 18th meeting (A/C.6/63/SR.18), para. 58.

¹³⁵ El Salvador, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 13; Portugal, 19th meeting (A/C.6/63/SR.19), para. 27; and United States, document A/CN.4/622 and Add.1.

¹³⁶ United States, document A/CN.4/622 and Add.1.

¹³² “The effects of armed conflicts on treaties”, p. 282.

not persuasive, since the draft article refers to the Charter of the United Nations and, thus, to the Security Council. However, if the Commission so wished, the wording set out at the end of the preceding paragraph¹³⁷ could be inserted at the beginning of the draft article, without, however, deleting the reference to resolution 3314 (XXIX). As to the reservations expressed by the other two States,¹³⁸ which have advocated the deletion of the references both to the Charter and to the resolution, there is a risk that this double deletion would make draft article 15 too vague and unusable; moreover, the possibility of future development of the rules on aggression is not a reason to delete the references in question.

134. Another Member State¹³⁹ has commented that, if an aggressor State decides to terminate or suspend the operation of a treaty, a conflict may arise between the relevant provisions of the treaty and draft article 15. The Special Rapporteur considers that, when a State gives notification of termination, withdrawal from or suspension of the operation of a treaty and is then determined as an aggressor, it will be necessary to establish whether it benefits from the termination, withdrawal or suspension. If it does benefit, the notification has no effect unless the treaty in question sets out particular rules in that regard. Such an additional complication is possible but will rarely occur; it could be mentioned in the commentary to draft article 15, accompanied by the preceding explanation.¹⁴⁰

135. According to one Member State, the current draft article 15 contains a drafting error:¹⁴¹ it suggests that, once a State has been determined as an aggressor in a particular conflict, it would then be prevented from terminating, withdrawing from or suspending the operation of a treaty on the outbreak of any armed conflict. In other words, if State Y is determined as an aggressor with respect to State X, it will retain this determination even in the context of a subsequent, entirely different, conflict with the same State or even with a third State Z, which is clearly not the purpose of draft article 15. A similar concern seems to be behind the comment that it should be specified that the “armed conflict” mentioned in draft article 15 must be the result of the aggression referred to at the beginning of the draft article.¹⁴² This objective will be achieved by referring to a “consequence of an armed conflict that results from the act of aggression”.

136. The same Member State has argued that factors other than aggression may become important in prolonged conflicts, which would mean that the benefits that an aggressor State may derive from termination, withdrawal or suspension would not be the result of the

aggression alone. The Special Rapporteur is of the view that this would amount to approval of the aggressor State’s actions; if the principle set out in draft article 15 were immediately qualified, the draft article would lose much of its force.

137. Another State¹⁴³ has asked the Commission to establish a clear distinction between illegal use of force and self-defence. This comment relates to draft article 13 as well as draft article 15. The Special Rapporteur does not believe that the current set of draft articles is the ideal place to distinguish between, and therefore define, the concepts of aggression and self-defence. In addition, General Assembly resolution 3314 (XXIX), referred to in the draft article in question, contains a definition of aggression.

138. Another Member State¹⁴⁴ has expressed the view that the question of the effects of armed conflicts on treaties should be separated from the question of the causes of conflicts (such as aggression and self-defence). This view amounts to support for the deletion of draft articles 13 and 15—in other words, precisely the provisions that aim to introduce a moral dimension to the question of the survival of treaties in cases of armed conflict. The Special Rapporteur sees no need to return to this point.

139. Some States¹⁴⁵ have expressed concern about the question of whether the scope of draft article 15 should be limited to aggression—as it is currently—or whether it would be preferable to expand it to include the use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. Such an expansion is clearly possible, but the Special Rapporteur would prefer to retain the present text of the draft article, which is limited to acts that are punishable under instruments relating to international crimes¹⁴⁶ and that are more or less certain to be considered, and their nature determined, by the Security Council. However, if there were a desire to follow the suggestions made by these States, the first part of draft article 15 would have to be reformulated as follows: “a State using force in violation of Article 2, paragraph 4, of the Charter of the United Nations...”

140. Bearing in mind the above observations, draft article 15 could read as follows:

*“Prohibition of benefit to an aggressor State
[a State that uses force unlawfully]*

“A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations [A State using force in violation of Article 2, paragraph 4, of the Charter of the United Nations] shall not terminate, withdraw from or suspend the operation of a treaty as a consequence of an armed conflict that results from the act of aggression [from the unlawful use of force] if the effect would be to the benefit of that State.”

¹³⁷ United States proposal, *ibid.*

¹³⁸ El Salvador, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 13; and Portugal, 19th meeting (A/C.6/63/SR.19), para. 27.

¹³⁹ China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 57.

¹⁴⁰ In addition, the question arises of whether the rule embodied in draft article 15—consequences of the prohibition of the use of force, which is a rule of *jus cogens*—is not also a rule of *jus cogens*. If that were the case, the relevant special rules in the treaty would not apply and no conflict would arise.

¹⁴¹ Israel, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 34.

¹⁴² Colombia, document A/CN.4/622 and Add.1.

¹⁴³ Iran (Islamic Republic of), *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 58.

¹⁴⁴ Burundi, document A/CN.4/622 and Add.1.

¹⁴⁵ China and Switzerland, *ibid.*

¹⁴⁶ See article 5, paragraph (d), of the Rome Statute of the International Criminal Court, which mentions “the crime of aggression”.

O. The “without prejudice” clauses (draft articles 14, 16 and 17)

141. Draft articles 14, 16 and 17 deal with areas of international law that are on the margins of the rules set out in the draft articles as a whole. Draft article 14 states that the draft articles are without prejudice to decisions of the Security Council in accordance with Chapter VII of the Charter of the United Nations. Its function is similar to that of article 8 of the resolution of the Institute of International Law.¹⁴⁷ Draft article 16 provides that the draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality; the resolution does not contain a corresponding clause. Lastly, draft article 17 states that the draft articles are without prejudice to causes of termination, withdrawal or suspension of treaties other than those provided for in the draft articles: agreement of the States parties, material breach, impossibility of performance and fundamental change of circumstances. The Institute’s resolution is silent on this point also.

142. Before we discuss each of these draft articles, it will be noted that they are limited to referring to the existence of other rules that could be relevant in specific situations. There is therefore no need to examine the substance of the rules referred to.

143. Draft article 14 provides that the draft articles are “without prejudice” to the legal effects of decisions of the Security Council in accordance with Chapter VII of the Charter of the United Nations. This reference is thus limited to the obligations of States Members arising from Chapter VII; however, it could be extended to all obligations arising from decisions of the Council, since Article 103 of the Charter¹⁴⁸ establishes the primacy of all decisions of the Council, not only those taken under Chapter VII. In paragraph (2) of the commentary to draft article 14, the Commission explains that the reference to Chapter VII has been retained because the context of the draft articles is that of armed conflict.

144. Some States¹⁴⁹ think that Articles 25¹⁵⁰ and 103 of the Charter of the United Nations make draft article 14 superfluous. They are right in the sense that the substantive issue—the compulsory or optional nature of Security Council decisions—is effectively embodied in these two provisions and not in draft article 14. The latter is merely a reference to the provisions in question, in particular the

provision that establishes the primacy of the obligations arising from the Charter.

145. Should a distinction be drawn between decisions of the Security Council relating to self-defence (Article 51 of the Charter of the United Nations; draft article 13) and those relating to aggression (Chapter VII of the Charter)?¹⁵¹ Since Article 51 is part of Chapter VII of the Charter and draft article 14 functions merely as a reference, this does not seem to be essential.

146. To conclude our discussion of draft article 14, let us turn to the suggestion¹⁵² that further “without prejudice” clauses referring to the duty to respect international humanitarian law and human rights should be added to the draft articles. The Special Rapporteur has no strong position on this matter but takes the view that, in the current draft articles, the “without prejudice” clauses could remain limited to collective security, neutrality and the place accorded to the effects of armed conflicts in the context of treaties. He is concerned that the addition of other clauses could “water down” the substance of the draft articles.

147. Pursuant to draft article 16, the draft articles in no way affect the rights and duties of States arising from the laws of neutrality. While one Member State with the status of permanent neutrality¹⁵³ has endorsed the current content of the draft article, another¹⁵⁴ would like a clear distinction to be drawn between relations between belligerent States and those between belligerent States and other States. The Special Rapporteur is willing to draw such a distinction, but is not sure how to do it in the context of draft article 16. A third State¹⁵⁵ would like to know why the exception relating to the laws of neutrality is set out in draft article 16 as a “without prejudice” clause rather than in the indicative list contained in the annex to the draft articles. The response to this question is that, as a status derived from a treaty, neutrality becomes fully operational only on the outbreak of an armed conflict between third States; it is therefore clear that it survives the conflict, since it is precisely in periods of conflict that it is intended to apply. Moreover, the status of neutrality is not always derived from a treaty. Lastly, the question of the applicability of the laws of neutrality does not generally arise in terms of the survival of the status of neutrality but in relation to the specific rights and duties of a State that is neutral and remains neutral; pursuant to draft article 16, these rights and duties prevail over the rights and duties arising from the draft articles.

148. Draft article 17 reserves the right of States, in situations of armed conflict, to terminate, withdraw from or suspend the operation of treaties for reasons other than the outbreak of the armed conflict. Even if a State party cannot or will not terminate a treaty, temporarily or permanently, on account of the outbreak of such a conflict, it

¹⁴⁷ The article provides: “A State complying with a resolution by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the peace or acts of aggression shall either terminate or suspend the operation of a treaty which would be incompatible with such resolution” (“The effects of armed conflicts on treaties”, p. 282).

¹⁴⁸ This article reads as follows: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

¹⁴⁹ Czech Republic, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 83; and Iran (Islamic Republic of), 18th meeting (A/C.6/63/SR.18), para. 58.

¹⁵⁰ Article 25 establishes the following: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

¹⁵¹ Japan, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 39.

¹⁵² Ghana, document A/CN.4/622 and Add.1.

¹⁵³ Switzerland, *ibid.*

¹⁵⁴ Austria, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 36.

¹⁵⁵ Japan, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 39.

may still invoke other grounds, such as impossibility of performance or a fundamental change of circumstances. It could also be argued that, in the context of some treaties, the outbreak of an armed conflict could also be characterized as a fundamental change of circumstances entailing a temporary or permanent impossibility of performance. As a “without prejudice” clause, draft article 17 has a degree of importance: it states that other grounds for the termination or suspension of treaties remain applicable even when the outbreak of an armed conflict does not entail termination or suspension. From this perspective, draft article 17 may also be seen as a counterbalance to draft article 3, which establishes the principle of non-automatic termination or suspension in the event of armed conflict.

149. It has been suggested¹⁵⁶ that it would suffice to include in the draft articles a general clause referring to other causes of termination, withdrawal or suspension recognized under international law. This is perfectly true, but the current draft article 17, which mentions specific grounds that are particularly relevant in the context of the effects of armed conflicts, perhaps makes the purpose of the draft article clearer than a general and abstract reference would. Another State¹⁵⁷ has proposed that “the provisions of the treaty itself” should be included as another ground, since such an addition would be consonant with the 1969 Vienna Convention (art. 57, subpara. (a)). This proposal could be opposed on the grounds that the list set out in the current draft article 17 is in no way exhaustive and that, therefore, no addition is necessary; on the other hand, such an addition would have the advantage of rounding out subparagraph (a) (agreement of the parties). The Special Rapporteur would be willing to accept this suggestion, if the proposal to replace the current draft article with a general and abstract reference is not adopted. Lastly, a third State¹⁵⁸ has requested a definition of the expressions “material breach” and “fundamental change of circumstances” used in draft article 17, subparagraphs (b) and (d). Since the definitions requested are contained in articles 60 and 62 of the 1969 Vienna Convention, and paragraph (1) of the commentary to draft article 17 refers to those articles, the proposed addition does not seem to be necessary.

150. In the light of the foregoing, the “without prejudice” clauses in the draft articles could read as follows:

“Article 14. Decisions of the Security Council

“The present draft articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations.”

“Article 16. Rights and duties arising from the laws of neutrality

“The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality.”

“Article 17. Other cases of termination, withdrawal or suspension

“The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*:

- “(a) the provisions of the treaty;
- “(b) the agreement of the parties;
- “(c) a material breach;
- “(d) supervening impossibility of performance;
- “(e) a fundamental change of circumstances.”

[Or a general and abstract formulation:]

“The present draft articles are without prejudice to termination, withdrawal or suspension of operation on other grounds recognized under international law.”

P. Revival of treaty relations subsequent to an armed conflict (draft article 18)

151. This issue has been examined in paragraphs 110 to 114 above, in relation to draft article 12.

Q. Other points raised by Member States and general issues

152. A number of general comments have been made by Member States alongside their positions on specific points. These comments may be grouped into five categories: (a) the quality of the draft articles; (b) the scope of the draft articles; (c) the possible responsibility of States that have provoked a conflict and suspended treaties; (d) the fate of the “without prejudice” clauses; and (e) other questions. We will also come back to the question of whether the outbreak of an armed conflict could or should produce different effects depending on the nature of the conflict (see para. 23 above). In addition, it will be necessary to decide on the final form of the draft articles and the recommendations to be submitted to the General Assembly.

1. QUALITY OF THE DRAFT ARTICLES

153. This section contains fundamental criticisms of the draft articles, including, first of all, that of one State¹⁵⁹ which has questioned whether the topic is ripe for codification and progressive development, and has suggested that a questionnaire on the issue should be circulated to States. In the Special Rapporteur’s view, it is rather late for such a step, and its usefulness would be questionable. While it is true that the rules set out in the draft articles may seem very general, they nonetheless allow for substantial progress in a field which, to date, has proved particularly unamenable to regulation.

154. Another State¹⁶⁰ has requested, at this advanced stage of work, that all national practices, in particular the

¹⁵⁶ Colombia, document A/CN.4/622 and Add.1.

¹⁵⁷ Greece, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 46.

¹⁵⁸ Cuba, document A/CN.4/622 and Add.1.

¹⁵⁹ Poland, *ibid.*

¹⁶⁰ Argentina, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 22.

decisions of national courts, should be examined or re-examined, that such analysis should not be limited to only a few countries, and that each State should then be invited to endorse the results of the analysis. This proposal would undermine the Commission's mandate and independence. Another Member State¹⁶¹ has expressed the view that the Commission's commentaries focus on doctrine to the detriment of practice. The Special Rapporteur does not share this view, especially as most of the doctrine is concerned precisely with examining practice. The State in question has also requested that State practice should be re-examined and the results reflected in the commentary. The Special Rapporteur feels that it is a little late to start again from scratch, especially as such a step is unlikely to generate new, original conclusions that are fundamentally different from those on which the current draft articles are based.

2. SCOPE OF THE DRAFT ARTICLES

155. Notwithstanding a comment¹⁶² emphasizing, once again, the special status of treaties concerning boundary regimes, the *erga omnes* nature of these treaties and their permanence, as confirmed by the 1969 Vienna Convention (art. 62, para. 2 (a)) and the Vienna Convention on Succession of States in respect of Treaties (art. 11), we will here mention a suggestion¹⁶³ that, once the present draft articles have been completed, consideration should be given to the possibility of extending them to treaties to which international organizations are parties. The Special Rapporteur invites the Commission to take note of this suggestion.

156. Still on the subject of the scope of the draft articles, it will be recalled that one Member State¹⁶⁴ (see para. 120 above) has commented that the scope should be limited to the law of treaties and should not be extended to the law governing the use of force. However, there is no way of separating two subjects that are linked; therefore, the use of force cannot be completely disregarded here (see draft articles 13 to 15).

157. One Member State¹⁶⁵ has expressed concern about the fate of treaties dealing with international transport, such as air agreements. Certainly, many such instruments do not fall within the categories contained in the list annexed to the draft articles, which, as has been said before, is not exhaustive. Their survival may also particularly depend on the nature and extent of the conflict. It is certain, for example, that an interruption of the applicability of this type of agreement is justified for conflicts that cover the whole territory, airspace and territorial waters of a State party, whereas the opposite may be true for more localized conflicts; also, a conflict may escalate the longer it goes on. This is an area where it is particularly difficult to formulate general and abstract rules. It therefore seems preferable to limit the factors to be considered when deciding the fate of the treaties in question to those set out in draft articles 4 and 5.

¹⁶¹ Italy, *ibid.*, 16th meeting (A/C.6/63/SR.16), para. 74.

¹⁶² Iran (Islamic Republic of), *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 52.

¹⁶³ Belarus, *ibid.*, 16th meeting (A/C.6/63/SR.16), para. 44.

¹⁶⁴ Portugal, *ibid.*, 19th meeting (A/C.6/63/SR.19), para. 27.

¹⁶⁵ Ghana, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 2.

3. RESPONSIBILITY OF STATES

158. A question has been raised¹⁶⁶ about the responsibility of a State party to a treaty that has provoked an armed conflict, where the treaty ceases to operate on account of the conflict, and particularly where the other party or parties to the treaty had no desire to terminate or withdraw from it. The same State has also asked whether the extent and duration of the conflict and the existence of a formal declaration of war are factors that should be taken into account with regard to the effects of armed conflicts on treaties. The Special Rapporteur would prefer to retain the current content of draft articles 13 to 15 and not venture to address the question of the international responsibility incurred by the State that provoked the armed conflict. As to the implications of the extent and duration of the conflict when it comes to determining whether a treaty continues to operate, reference will be made to draft article 4. In order to determine what treaty obligations remain in force during and after the conflict,¹⁶⁷ draft articles 3 to 7, 11 and 12 should provide an answer in each case. With regard to the mechanism for the resumption of the operation of suspended treaties,¹⁶⁸ draft article 12, which has been the subject of extensive comments in the present report (see paras. 110–114 above), will be consulted. Lastly, the various aspects of the fate of treaties that put an end to conflicts, as well as the development of peacekeeping mandates and regional integration treaties,¹⁶⁹ seem to fall outside the scope of the topic.

4. "WITHOUT PREJUDICE" CLAUSES

159. As noted by one Member State,¹⁷⁰ if the draft articles do not ultimately take the form of binding rules, the need for the "without prejudice" clauses could be reconsidered. In the Special Rapporteur's opinion, it is premature to decide on this question, but, whatever decision is made, the clauses could remain anyway, since they merely clarify the limits on the application of the material rules set out in the draft articles.

5. OTHER QUESTIONS

160. One Member State¹⁷¹ has commented that the consequences of termination, withdrawal from or suspension of the operation of a treaty, which are covered by articles 70 and 72 of the 1969 Vienna Convention, are not examined anywhere in the draft articles. The Special Rapporteur sees no need to do so because it is so clear that these articles 70 and 72 are applicable by analogy, on the understanding that, if there is a notification followed by an objection (draft article 8), the question of justification of the termination or suspension, and of the objection, itself remains open. In the Special Rapporteur's view, it would suffice to mention the two articles of the Vienna Convention in the commentaries, perhaps in the commentary to draft article 8.

¹⁶⁶ Ghana, statement dated 28 October 2008, available from the Codification Division of the United Nations Office of Legal Affairs.

¹⁶⁷ Argentina, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 23.

¹⁶⁸ Cyprus, *ibid.*, 19th meeting (A/C.6/63/SR.19), para. 9.

¹⁶⁹ Ghana, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 2.

¹⁷⁰ United States, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 22.

¹⁷¹ Belarus, *ibid.*, 16th meeting (A/C.6/63/SR.16), para. 43.

161. To conclude, we must return to the fundamental question mentioned in paragraph 23 above, which was raised by one Member State¹⁷² in the context of draft article 2, subparagraph (b), namely whether the same rules apply, without distinction, to both internal and international armed conflicts. Also on the subject of draft article 2, subparagraph (b), the Member State in question has commented that, in principle and except in cases of impossibility of performance (where draft article 17 and article 61 of the 1969 Vienna Convention would apply), a State may not abandon its treaty obligations by reason of an ongoing internal armed conflict.

162. This question and the accompanying observation might suggest that a rule should be added, limiting the right of exemption from treaty obligations to the right to request the suspension of these obligations, since, usually in this type of conflict, the actual existence of the State that is bound by the obligations is not in question, even

¹⁷² China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 53, and document A/CN.4/622 and Add.1.

if the rebel side prevails. A rule to this effect could read as follows: “A State engaged in non-international armed conflict may request only the suspension of treaties to which it is a party”, and it could be incorporated into draft article 8. Of course, if the conflict resulted in permanent impossibility of performance or a fundamental change of circumstances (arts. 61 and 62 of the 1969 Vienna Convention), a State could, on those grounds, call for the total or partial termination of the treaty under draft article 17.

163. For the moment, the Special Rapporteur will refrain from making any specific proposal and invites the members of the Commission to give their opinions on the matter.

R. Form to be given to the draft articles

164. In due course, the Commission will have to consider the form to be given to the draft articles and the recommendations to be submitted to the General Assembly. The time has not yet come, as a number of important points are still outstanding.

EFFECTS OF ARMED CONFLICTS ON TREATIES

[Agenda item 5]

DOCUMENT A/CN.4/622 and Add.1

Comments and information received from Governments

[Original: Chinese, English, French and Spanish]
[15 March and 11 May 2010]

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Multilateral instruments cited in the present report

Source

Hague Convention of 1899 (II) respecting the Laws and Customs of War on Land (The Hague, 29 July 1899)	<i>The Hague Conventions and Declarations of 1899 and 1907</i> , J. B. Scott, ed., New York, Oxford University Press, 1918, p. 100.
Hague Convention 1907 (IV) respecting the Laws and Customs of War on Land (The Hague, 18 October 1907)	<i>Ibid.</i>
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, <i>Treaty Series</i> , vol. 75, Nos. 970–973, p. 31.
Geneva Convention relative to the Protection of Civilian Persons in Time of War	<i>Ibid.</i> , 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.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977)	<i>Ibid.</i> , vol. 1125, No. 17513, p. 609.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)	<i>Ibid.</i> , vol. 1946, No. 33356, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations, <i>Treaty Series</i> , vol. 2187, No. 38544, p. 3.
Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Lomé, 10 December 1999)	<i>Journal of Conflict and Security Law</i> , vol. 5, Issue 2 (June 2000), pp. 231–259.
Constitutive Act of the African Union (Lomé, 11 July 2000)	United Nations, <i>Treaty Series</i> , vol. 2158, No. 37733, p. 3.

Introduction

1. At its sixtieth session, in 2008, the International Law Commission adopted, on first reading, the draft articles on the effects of armed conflicts on treaties.¹ In paragraph 63 of its report, the Commission decided, in accordance with articles 16 to 21 of its Statute, to request the Secretary-General to transmit the draft articles to Governments for comments and observations, requesting also that such comments and observations be submitted to the Secretary-General by 1 January 2010. The Secretary-General circulated a note, dated 2 December 2008, transmitting the draft articles to Governments, as well as a reminder note, dated 15 September 2009. In paragraph 5 of its resolution 63/123 of 11 December 2008, the General Assembly

¹ *Yearbook ... 2008*, vol. II (Part Two), pp. 45 *et seq.*, para. 65. The text of the draft articles and related commentaries appear in *ibid.*, para. 66.

drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft articles.

2. As at 11 May 2010, written replies had been received from Austria (29 March 2010), Burundi (7 April 2009), China (30 December 2009), Colombia (9 February 2010), Cuba (29 January 2010), Ghana (4 January 2010), the Islamic Republic of Iran (2 March 2010), Lebanon (6 July 2009), Poland (31 December 2009), Portugal (6 January 2010), Slovakia (31 December 2009), Switzerland (14 January 2010) and the United States of America (1 February 2010). The comments and observations received from those Governments are reproduced below, organized thematically, starting with general comments and continuing with comments on specific draft articles.

Comments and information received from Governments

A. General comments

AUSTRIA

The draft articles are based on the general view that treaties could be suspended or terminated only insofar as they are affected by the armed conflict. This position could create problems with regard to multilateral treaties, as the effect could be different depending on whether the multilateral treaty is of a synallagmatic nature or an integral treaty under which the obligations are owed *erga omnes partes*. It would be useful if the Commission could also address this question and its consequences for the topic under discussion.

BURUNDI

1. From the legal standpoint, present-day conflicts have become unstructured conflicts that no longer always conform to the normal and classic rules of armed conflict that were always observed in the practice of war. This new kind of armed conflict involves a number of poorly identified actors, such as militias, members of armed factions who are generally recruited informally and who have no notion of respect for human rights, civilians who themselves become actors in the conflict, *ad hoc* soldiers, and even mercenaries recruited for a specific situation; and is a situation in which each armed group now makes its laws, to the detriment of the rules that are recognized and embodied in international law. There is reason to wonder whether international texts remain effective and relevant in the light of the change in the nature of conflicts.

2. Despite such difficulties, the Vienna Convention on the Law of Treaties remains appropriate in relation to the effects of armed conflicts on treaties. The inclusion of internal conflicts in the scope of the draft articles should be examined in the context of the Vienna Convention. The issue of effects of armed conflicts on treaties forms part of treaty law and must be kept distinct from the law on the use of force.

CHINA

The draft articles should strike an appropriate balance between maintaining the continuity and stability of treaty relations and the effect that dealing with armed conflicts has on those relations. The draft articles should be used only to supplement the Vienna Convention on the Law of Treaties and not to change the content of that Convention.

GHANA

1. A historical perspective on the desirability of paying attention to a study of the effects of armed conflicts on treaties would suggest that a contemporary study of this subject based on more contemporary practice is worthwhile, considering the number of armed or violent conflicts witnessed in all corners of the world in the post-cold-war era. While it has yet to be established that the many conflicts the world has witnessed have had a dramatic impact on the law of treaties, it seems useful, nonetheless, to address this topic, if only to anticipate, define and refine the rules on the possible effects of exceptional situations of armed conflicts on treaties, focusing on all conceivable aspects, and not just on suspension or termination of treaties by States or on depositary functions.

2. In the light of recent resolutions adopted by the Security Council and the General Assembly aimed at enhancing the protection of civilians in armed conflict, the Commission may also look at this dimension with appropriate “without prejudice” clauses, in respect of international humanitarian and human rights law, and also the relevant provisions of the Charter of the United Nations concerning the powers of the Security Council. Ghana subscribes to the Martens Clause, enunciated about a century ago, which postulates that populations and belligerents remain under the protection of the “principles of international law ... the laws of humanity and the requirements of the public conscience”.¹

¹ Hague Conventions of 1899 (II) and 1907 (IV) respecting the Laws and Customs of War on Land, para. 9 of the preamble.

3. Ghana shares a stated policy underlying the study of this topic, which is to ensure security, stability and predictability in treaty relations in order to minimize the negative effects of armed conflicts on treaty obligations. It should also be the aim of the study to ensure a proper balance between strong and weak nations in respect for the rule of law, and to strengthen the Charter of the United Nations in order to facilitate the attainment of some key purposes and objectives of the United Nations, namely development, peace and security, and respect for human rights.

IRAN (ISLAMIC REPUBLIC OF)

The stability, integrity and continuity of international treaties is a recognized principle in international law, and any act inconsistent with the purposes and principles of the Charter of the United Nations should not affect the application or operation of such treaties. The Islamic Republic of Iran reiterates its position that the mandate of the International Law Commission in considering the effects of armed conflicts on treaties is to supplement, and not to change, the existing international law of treaties, in particular the stipulations of the Vienna Convention on the Law of Treaties, which, to a large extent, reflects customary international law.

LEBANON

Lebanon agrees to the draft articles on the effects of armed conflicts on treaties, adopted by the International Law Commission at its sixtieth session in 2008.

POLAND

1. The task with which the Commission has been entrusted should be re-evaluated. It may well be that the efforts of the Commission have proved that the topic “the effects of armed conflicts on treaties” is, after all, not yet ready for codification and progressive development. There is not only a scarcity of information on the contemporary practice of States, but also a profound change in the realm of armed conflicts (as most present-day armed conflicts are not international), making the project even more elusive. Thus, it may well be that the only solution is to put the work on the back burner.

2. In the meantime, the Commission may consider drafting a questionnaire containing a list of well-thought-out and precise questions for States on the project. The questionnaire should be drafted with the view to finding out whether comprehensive and viable regulation of the subject matter is achievable at the present time.

PORTUGAL

1. The point of the topic is to know to what extent the reciprocal confidence between parties regarding the fulfilment of the obligations set out in the treaty would be jeopardized in case of an armed conflict. Thus, the key and only *ratio* of this subject is how to strike the balance between the confidence of the parties, as a prerequisite for compliance with treaties, and the need for legal certainty.

2. While satisfied to see progress being made on the topic, Portugal is of the opinion that there are some

important matters that still need to be settled in order to move towards a more mature work.

SWITZERLAND

The present draft articles are of interest to Switzerland, not only as a State party to the Geneva Conventions and their Additional Protocols, but also as their depositary. The long-standing position of the international community, generally, to consider armed conflict not as something apart from the law, but as a situation to be ruled by law, was overwhelmingly confirmed by the adoption of the Geneva Conventions in 1949. The preparation of the draft articles is the continuation of that principle.

UNITED STATES OF AMERICA

The United States has consistently supported the general approach taken in the draft articles, which preserves the reasonable continuity of treaty obligations during armed conflict and identifies several factors relevant to determining whether a treaty should remain in effect in the event of an armed conflict. Nonetheless, the United States continues to believe that the draft articles require further work and consideration.

B. Specific comments on the draft articles

1. DRAFT ARTICLE 1. SCOPE

AUSTRIA

The question arises whether the equal application to treaty relations among the States parties engaged in the conflict and those between a State party engaged in the conflict and a State party not engaged in the conflict (third State) is justified. It can be asked why the third State should have to renounce certain rights only because the other State party is engaged in an armed conflict, in particular given the general conviction that, in principle, the law of peace continues to govern relations between States engaged in a conflict and third States. It is, for instance, conceivable that a State engaged in an armed conflict suspends bilateral investment treaties with third States to avoid having to pay compensation in the case of damages caused by military operations. In such a situation, it could be asked why a third State should no longer enjoy the protection of its investments only because of the outbreak of an armed conflict. If the State engaged in the conflict suspends the operation of such a treaty, the third State would also no longer be obliged to protect investments of the other State—this would establish a situation of equality. But it seems that a right to suspend such treaties would create significant possibilities for misuse. Another legal solution would be to solve problems of injuries to foreign property through either the investment treaty itself, provided it contains regulations concerning this situation, or the law of State responsibility. The whole idea of the legal regime established by these draft articles is to conceive of the situation addressed by it as an exceptional one in which treaty relations should be maintained to the utmost extent. Preserving treaty relations with the third State would be in line with this conception. Moreover, the commentary on draft article 4 confirms that the effect of an armed conflict on a treaty between States engaged in the conflict is not identical to that on a treaty between a State

engaged in the conflict and a third State. Draft article 4, paragraph (b) attempts to cope with this problem by adopting a flexible approach, according to which the extent of affectedness determines the right of suspension or termination so that treaties with third States would to a large extent not be addressed. It is suggested that the Commission reconsider this problem, including the possibility of exempting the treaties between a State engaged in an armed conflict and a State not engaged in that conflict from the scope of applicability of these draft articles. However, should the view prevail that the draft articles should apply also to treaties between a State engaged in an armed conflict and a third State, it would be justified to also endow the third State with the right to suspend, for example, a treaty that is in conflict with its duties under the laws of neutrality.

BURUNDI

It would be desirable to examine the effects on bilateral treaties and on multilateral treaties and to make the distinction between belligerent States and third States in armed conflicts. For treaties concluded provisionally, the scope must be understood to cover the treaties envisaged in article 25 of the Vienna Convention on the Law of Treaties.

CHINA

Having taken note of paragraph (4) of the commentary on this article, China understands the Commission's reasons for limiting the scope of the draft article to treaties between States. At the same time, China is of the view that, with the steadily growing participation of international organizations in international activities, the variety of treaties they are concluding with States is also becoming richer, and such treaties are unavoidably affected by armed conflict (for example, host country agreements involving international organizations and States could give rise to such problems). For this reason, China recommends that, on the second reading, the Commission further consider whether to include the effects of armed conflict on treaties involving international organizations.

COLOMBIA

While the provisional application of treaties may be included, Colombia, when ratifying the Vienna Convention on the Law of Treaties, entered a reservation not recognizing the provisional application of treaties.¹

¹ United Nations, *Treaty Series*, vol. 1393, No. A-18232, p. 381.

GHANA

The study of this topic may go beyond a narrow focus on the effects of armed conflicts on treaties in the sense or meaning of the Vienna Convention on the Law of Treaties, relating to treaties between States *stricto sensu*, to include agreements between States and international organizations. The provisions of the African Union Constitutive Act and recent developments during the sixty-fourth session of the General Assembly argue in favour of the importance of a closer study of this topic by the International Law Commission.

POLAND

Poland proposes that draft article 1 read “[t]he present draft articles apply to effects of armed conflicts between States in respect of treaties”, so that the scope of the draft articles is clearly limited to international armed conflicts between States. The draft articles have their origin in article 73 of the Vienna Convention on the Law of Treaties, which refers to the outbreak of hostilities “between States”. The commentary to draft article 1 erroneously suggests that the descriptor “between States” refers to treaties, whereas it obviously refers to hostilities. (See also the comments on draft article 2 below.)

PORTUGAL

1. To enlarge the scope of the topic to situations in which only one party to a treaty participates in an armed conflict and to situations of internal conflict is not the best approach. Those situations are already adequately addressed in the provisions of the Vienna Convention on the Law of Treaties regarding “supervening impossibility of performance” (art. 61) and *rebus sic stantibus* (art. 62), which cover situations where only one State foresees difficulties complying with a treaty. In an ongoing conflict between parties to a treaty, the issue at stake is the level of trust and confidence necessary for the regular execution of the treaty.

2. The question of the inclusion of treaties concluded by international organizations raises both practical and theoretical issues that are too difficult to be dealt with in the framework of this topic and should be excluded from the scope of the topic.

3. As to the position of third States with regard to the armed conflict, Portugal fully supports the assessment that, as a matter of treaty law, an armed conflict would produce only the consequences generally provided for in the Vienna Convention on the Law of Treaties, for a State not involved in that conflict. Therefore, it has doubts as to the recommendation of the Working Group on the Effects of Armed Conflicts on Treaties that the draft articles should apply to all treaties between States where at least one of the States is a party to an armed conflict.¹

¹ *Yearbook ... 2007*, vol. II (Part Two), p. 78, para. 324 (1) (a) (i).

2. DRAFT ARTICLE 2. USE OF TERMS

AUSTRIA

1. The draft articles should relate only to international armed conflicts, despite the increased blurring of the distinction between international and non-international armed conflicts. Present international humanitarian law to a large extent is still based on such a distinction. The other State party to a treaty may possibly not be aware of the existence of a non-international armed conflict in a State, even if it amounts to a situation addressed by Protocol II to the Geneva Conventions of 1949. The inclusion of non-international armed conflicts would thus be detrimental to the stability and predictability of international relations, which are two main objectives of the international legal order. Since no other State is involved in a non-international

armed conflict, it is unclear to which other States parties the effects of the draft articles would then apply. Rather, these situations should be governed by the provisions of the Vienna Convention on the Law of Treaties. Articles 61 and 62 of the Convention seem to offer a legal device sufficient to cope with such situations. Since article 73 of that Convention excludes only questions arising from the outbreak of hostilities between States from the scope of its applicability, non-international armed conflicts are within its purview. To establish a special regime for such situations could prompt conflict with the Convention, as it would add an additional ground for unilateral suspension to the grounds established under the regime of the Convention, notwithstanding the exhaustive nature of the grounds for such suspension or termination in the Convention.

2. Although the present definition of armed conflicts does not explicitly mention a situation of occupation, Austria is nevertheless of the view that this situation is included in this definition.

3. A definition of third State could be included, since this term has different meanings in international law. The meaning in this context obviously refers to a State that is not engaged in the relevant armed conflict.

BURUNDI

It must be acknowledged that it is difficult to distinguish between international and non-international armed conflicts. Present-day armed conflicts have blurred such distinctions and the number of “civil wars” has increased. Many of these civil wars include “external elements”, such as varying degrees of support and participation of other States. Non-international armed conflicts can affect the operation of treaties as much as, if not more than, international armed conflicts and for that reason the proposed draft articles should also deal with the effects of such armed conflicts on treaties. There is a need to determine the legal effects on a treaty in situations involving non-State actors, such as militias, members of armed factions, civilians who themselves have become actors in a conflict, *ad hoc* soldiers or mercenaries recruited for a specific situation.

CHINA

China is of the view that the responsibilities towards other States borne by a State within which an armed conflict is ongoing and by a State caught up in an international armed conflict are not exactly alike. In principle, a State does not have the right to claim exemption from its international obligations by reason of an ongoing internal armed conflict, unless that internal armed conflict has deprived that State of the ability to fulfil its treaty obligations. In other words, invoking internal armed conflict does not have the same force as invoking international armed conflict as a reason for a State to terminate or suspend a treaty. Accordingly, China recommends that the Commission further study the issue.

COLOMBIA

1. The definition of armed conflict refers to situations that may affect the application of treaties. In other words, an effect or consequence of the conflict is part of the definition,

which may cause confusion. The international law of armed conflict does not expressly define “armed conflict”; it allows, however, for the identification of the characteristics of armed conflict and for a distinction between domestic and international armed conflicts. It may be inferred from the scope of the Geneva Conventions of 1949 that “international armed conflict” implies a declared war or any other armed conflict between two or more States, consistent with the definition proposed in paragraph (b), whether or not it is recognized by any of the parties.

2. It would suffice to include these characteristics in the definition contained in the article without mentioning any of the causes. It must be borne in mind that ICJ as well as the Nuremberg and Tokyo Tribunals have established that the law on armed conflict as a whole is part of *jus cogens*—customary international law—and is therefore binding on all members of the civilized international community, even on States that are not signatories to the various Geneva and Hague instruments.

CUBA

Cuba considers that the term “embargo” should be included within the definition of “armed conflict”, even if there are no armed operations between the parties. The article should also make reference to non-international as well as international conflicts, bearing in mind that both types of conflict can affect the execution of and compliance with treaties.

GHANA

1. The scope of the study of this topic should cover internal and international conflicts. Article 3 of the protocol of the Economic Community of West African States (ECOWAS) relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, to which Ghana is a State party, stipulates that one of the objectives of the mechanism is to “prevent, manage and resolve internal and inter-State conflicts”, thus making no distinction between international and non-international conflicts. In this context, the question of the extent to which an armed conflict affects the nature of the treaty obligations of a fragile or failed State whether or not a country’s status as a failed or fragile State was the consequence of either an internal conflict or an international conflict, merits further study. Ghana’s experience has been not to retaliate, but to encourage compliance by a conflict-torn neighbouring country that unilaterally decided to waive certain aspects of the provisions of an ECOWAS treaty on free movement of persons, citing financial difficulties and the need to raise revenue to facilitate its recovery.

2. Furthermore, like other agreements of a similar nature, the aforementioned ECOWAS treaty (protocol), which essentially becomes operable in the event of a conflict, would suggest that the Commission may wish to examine and elaborate any specific rules applicable to such categories of treaties in the course of its work.

3. An attempt by the Commission to consider further clarification of the definition of armed conflict will add value to an examination of the legal effects of armed conflicts on treaties. In an apparent attempt to address the

problem of definition, the ECOWAS Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security uses the term “Member State in crisis”, which “refers both to a Member State experiencing an armed conflict as well as a Member State facing serious and persisting problems or situations of extreme tension which, if left unchecked, could lead to serious humanitarian disaster or threaten peace and security in the subregion or in any Member State affected by the overthrow or attempted overthrow of a democratically elected government”. The question of whether or not a formal declaration of war exists and the duration of the conflict may be taken into account by the Commission in further elucidating the draft articles on the effects of armed conflicts on treaties.

POLAND

1. The definition of the term “armed conflict” should make clear that it refers exclusively to international armed conflicts by adding the word “international” before “conflict”. Expanding the scope of the draft articles to cover internal armed conflicts is incompatible with the Vienna Convention on the Law of Treaties, which already applies to internal armed conflicts: the State on whose territory the upheaval occurs may take advantage of a whole range of measures, provided for in the Convention, and attempt termination, withdrawal from or suspension of the operation of a treaty. The inclusion of internal armed conflicts in the draft articles would undermine such procedural safeguards adopted in the Convention. (See also the comments on draft article 1 above.)

2. Poland further suggests that there is a need to expand article 2 to cover other terms used in the present draft articles. The document should follow the pattern of the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. For example, the term “party” is not defined and is used to denote both a State party to the treaty and a State party to the conflict. As a result, the term “third State”, meaning not a party, is ambiguous, as it could denote either a third State with regard to the treaty (not a party to a treaty), or a third State with regard to the armed conflict (not a party to the conflict). The terms “State party” and “third State” have established meanings. Thus, using the terms with reference to the armed conflict may cause confusion. Some other terms should be used instead, for example: “a State or States in the conflict” or “a hostile State or States” to describe the State involved in an armed conflict; and “a State or States not involved in the conflict” to describe the State now appearing under the designation of a third State outside the conflict, but still a party to the treaty under consideration.

PORTUGAL

Portugal has doubts regarding the inclusion of internal conflicts. An internal conflict, by definition, does not involve more than one State party to a treaty and does not directly affect relations between that State and the other States parties, and accordingly would only activate the provisions of the Vienna Convention on the Law of Treaties concerning suspension or termination of treaties.

SLOVAKIA

The term “armed conflict” should include both international armed conflicts and non-international armed conflicts. The use of the term is consistent with common article 2 of the Geneva Conventions of 1949 and also with article I of Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts) and Protocol II (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts).

SWITZERLAND

1. The inclusion of internal armed conflicts must be supported. The experience of past decades has shown that internal armed conflicts can affect a State’s ability to fulfil its contractual obligations, at least to the same degree as international armed conflicts. The study by the Secretariat confirmed that view, citing several specific examples from State practice.¹ In addition, many States have expressed that view in the Sixth Committee, as have some members of the International Law Commission.

2. The objections of those States opposed to the inclusion of internal armed conflict in “armed conflict” may be dispelled by the fact that only armed conflicts “which by their nature or extent are likely to affect the application of treaties” (draft article 2 (b)) are relevant. In accordance with that provision, the definition of armed conflict should cover internal armed conflicts, on the understanding that States must only be able to invoke the existence of an internal armed conflict to suspend or terminate a treaty when the conflict in question is of a certain intensity.

3. Moreover, it is important not to set forth, in the draft articles, a narrower definition of armed conflict, excluding internal armed conflict, than the one established in other international legal instruments. It is clearly dangerous to suggest that the concept of “armed conflict”, established in the context of international humanitarian law, should be understood differently in the context of treaty law. That poses the risk of confusion if a subsequent document refers to or uses the term “armed conflict”. Switzerland therefore welcomes the commentary on draft article 2 (b), which notes that internal armed conflicts are included in the expression “armed conflict”, in line with practice in public international law in general.

4. Similarly, the expression “armed operations” could suggest a reference to regular inter-State conflicts, given that the word “operation” is normally used in the context of traditional military strategy and, therefore, in a context of inter-State conflict. Draft article 2 should perhaps be reformulated to avoid that interpretation.

5. The term “state of war” is also open to challenge. As this concept is used in traditional public international law, a state of war exists between States once a formal declaration of war has been made, regardless of actual armed actions. In modern public international law, the concept

¹ A/CN.4.550 and. Corr.1–2, para. 147 *et seq.*

is clearly outmoded. The use of such an expression is inappropriate in the context of the effects of armed conflicts on treaties.

6. Switzerland believes that “armed conflict” already includes occupations, and so it is not necessary to use “state of war” to cover such cases. It therefore suggests deleting the words “state of war”. In the commentary, explicit note could be made of the inclusion of occupations of territory, so as to avoid any misunderstanding.

UNITED STATES OF AMERICA

1. The United States reiterates its serious doubts regarding the appropriateness of including a definition of “armed conflict” in draft article 2. It is worth noting that even treaties directly relating to armed conflict, such as the Geneva Conventions, do not define this term. There is a wide variety of views on this question and such a definition would be more properly addressed in a treaty negotiated between States. If a definition of armed conflict is thought necessary, the one contained in article 2 seems doubtful, in that it is quite different from any contemporary treatment in modern treaties or judicial decisions. Furthermore, the terms “military occupation” and “armed conflict” have distinct meanings in the law of armed conflict and thus should be referred to separately, if at all.

2. A better approach in draft article 2 would be to make clear that armed conflict refers to the set of conflicts covered by common articles 2 and 3 of the Geneva Conventions (i.e., international and non-international armed conflicts).

3. DRAFT ARTICLE 3. NON-AUTOMATIC TERMINATION OR SUSPENSION

AUSTRIA

The formulation of draft article 3 depends on whether treaties concluded by a party to an armed conflict with a third State will be included.

BURUNDI

Burundi supports the position that the outbreak of an armed conflict does not necessarily terminate or suspend a treaty, although it may hinder its implementation. Therefore, a State exercising its right to self-defence must have the right to suspend the operation of a treaty that would conflict with its right to self-defence. In the area of fighting against impunity, this obligation has not yet been universally accepted by the international community, although it should be, just like obligations relating to other topical issues, such as terrorism, drug trafficking, etc. The question that arises is whether the examination of the matter of the fight against impunity should be addressed within the draft articles. In our opinion, this question should be dealt with, since its aim is to clarify the legal position and to promote the security of legal relations between States by stating, in draft article 3, that the outbreak of an armed conflict does not necessarily terminate or suspend the application of a treaty. That would be one way to compel States to feel bound to extradite or prosecute and try criminals and to eliminate impunity, so as to ensure justice worldwide by denying criminals refuge.

CHINA

The principle in draft article 3 is conducive to maintaining the stability of international relations, and China is of the view that it can be used as a basis for the draft.

COLOMBIA

This article is consistent with the general principles of international law and with the Vienna Convention on the Law of Treaties.

GHANA

The outbreak of armed conflicts should not *ipso facto* lead to the suspension or termination of treaties.

IRAN (ISLAMIC REPUBLIC OF)

1. The Islamic Republic of Iran fully supports the presumption of legal stability and continuity of treaty relations and deems it to be central to the topic in question. The use of two different terms, “non-automatic” and “necessarily”, respectively, in the title and in the chapeau of draft article 3, could compromise the aforementioned principle. To avoid any confusion as such, draft article 3 should be redrafted affirmatively.

2. The Islamic Republic of Iran would have preferred that a specific reference had been made in draft article 3 to the category of treaties establishing a boundary or a territorial regime. Such reference would have made it clear that treaties establishing boundaries and territorial regimes are exceptions. By doing so, the Commission would avoid the risk of sending a wrong message to any State which, for one reason or another, has ambitions to effect changes in the demarcation of its international borders. It is imperative to note the critical function of treaties establishing boundaries in the maintenance of international peace and security (see also the discussion under draft article 5).

POLAND

Poland applauds the general idea of the continuous existence and operation of treaties in times of armed conflict as consonant with the principle of *pacta sunt servanda* and the need for securing the stability of treaty relations. However, the provision requires clarification. Does it establish a presumption of the continuous existence and operation of treaties, similar to that expressed in article 42 of the Vienna Convention on the Law of Treaties, or does it simply provide that there is no presumption to the contrary? The word “necessarily”, which now substitutes the words *per se* used originally by the Special Rapporteur, introduces ambiguity. By adding the word “necessarily”, draft article 3 provides that treaties may or may not be automatically terminated or their operation suspended in case of an armed conflict. The question is whether the drafters intended to let treaties come to an end purely through the incidence of the outbreak of an armed conflict or whether express intent on the part of a State or both States involved in the armed conflict is required. If the former, then which categories of treaties may automatically terminate or become suspended?

PORTUGAL

1. Portugal welcomes the article, which contains a general rule of non-termination or suspension and well encapsulates the important principle of the stability of treaty relations. This may be a matter of policy rather than resulting from practice, as recognized by the Special Rapporteur himself in his concluding remarks in the 2008 report.¹ Nevertheless, this is a key idea for Portugal, one that justifies working on a matter that was intentionally excluded from the Vienna Convention on the Law of Treaties.

2. Portugal does not share, however, suggestions made in paragraph 290 of the 2007 report² to include additional clauses concerning justified armed conflict under international law, and the compatibility of such armed conflict with the object and purpose of the treaty or with the Charter of the United Nations. The stability of treaties, or their termination or suspension, should not be linked to the legality or illegality of the use of force.

¹ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/589, p. 123, paras. 43–48.

² *Yearbook ... 2007*, vol. II (Part Two), pp. 72–73, para. 290.

SWITZERLAND

1. Switzerland believes that neither “automatically” nor “necessarily” fully translates the sense of “*ipso facto*”. In its opinion, the clarity of this article would be enhanced by reverting to the expression chosen at the time by the Institute of International Law.

2. Furthermore, Switzerland believes that the presumption that treaties remain in effect during armed conflict should be emphasized more explicitly in the title of the article itself by replacing the existing title with “Presumption of continuity”.

4. DRAFT ARTICLE 4. INDICIA OF SUSCEPTIBILITY TO TERMINATION, WITHDRAWAL OR SUSPENSION OF TREATIES

AUSTRIA

According to the structure of the draft articles, a State engaged in a conflict will unilaterally decide whether these conditions have been met. However, since the vagueness of the conditions gives that State a wide discretion, such conditions would have to be elaborated.

BURUNDI

The intention of the States parties at the time of conclusion of a treaty should be examined when it is necessary to determine whether or not a treaty remains in force.

CHINA

China favours the comprehensive consideration of such factors as the intention of the parties to the treaty, the nature and extent of the armed conflict and the effect of the armed conflict on the treaty when armed conflict occurs, in order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension. China recommends that the Commission find an appropriate way to

prevent the current draft from being misconstrued by the reader as an exhaustive list of all factors requiring consideration. China also recommends that the Commission consider listing other important factors requiring consideration, such as the possible results of terminating, withdrawing from or suspending a treaty.

COLOMBIA

The wording is confusing, as “termination” refers to the treaty, while “withdrawal or suspension” refers to the State party. The wording of the first paragraph must be improved and the scope of the provision clarified.

IRAN (ISLAMIC REPUBLIC OF)

The inclusion of the indicium “the nature and extent of the armed conflict” may give the wrong impression that the more intensive and expanded an armed conflict becomes, the more probable it would be that treaty relations between the belligerent States may be terminated or suspended. Nor could “the effect of the armed conflict on the treaty” be a viable determining factor. These indicia are eventually left undefined, and the use of similar terms and phrases in draft article 2 (b), without providing clear definitions, has produced a circular ambiguity as to the exact meaning of the terms. Moreover, the Islamic Republic of Iran does not deem it appropriate to allow for “withdrawal” in this draft article, since it contradicts the content of draft article 3.

POLAND

1. In the view of Poland, it is not clear what situation the provision purports to regulate, nor is it clear who is supposed to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, or when such a determination is to be made. Does the provision seek to guide States in their unilateral actions attempting to put an end to the operation of a treaty, or is it intended to guide courts in assessing *ex post facto* the legality of such actions undertaken by States during the armed conflict?

2. Article 4 lacks a solid framework within which to operate: the draft articles do not make clear whether a State involved in an armed conflict has a right to unilaterally put an end to its treaty obligations. Draft articles 8 and 11 provide conflicting answers to that question. Until that issue is clarified, draft article 4 remains disconnected, having no clear object and serving no clear purpose.

PORTUGAL

Parties are supposed to conclude treaties in good faith and with the intention to comply with them (*pacta sunt servanda*). It is thus very difficult to guess the parties’ intention at the time of the conclusion of the treaty in the case of an outbreak of hostilities. Portugal thus supports the proposal of the Working Group on the Effects of Armed Conflicts on Treaties to leave aside “intention” as the predominant criterion for determining the susceptibility of treaties to termination or suspension.¹ The new criteria in the provision are more appropriate.

¹ *Yearbook ... 2007*, vol. II (Part Two), p. 78, para. 324 (2).

UNITED STATES OF AMERICA

The United States agrees that the determination as to whether a treaty is susceptible to termination or suspension in the event of an armed conflict is to be made based on the circumstances surrounding the particular treaty and armed conflict, and on articles 31 and 32 of the Vienna Convention on the Law of Treaties.

5. DRAFT ARTICLE 5 AND ANNEX. OPERATION OF TREATIES ON THE BASIS OF IMPLICATION FROM THEIR SUBJECT MATTER

CHINA

While China is of the view that the annex helps States to understand draft article 5 and is useful by virtue of its indicative nature, the treaties listed do not all conform to the conditions cited in draft article 5; moreover, the academic terms used in the list, such as “law-making treaties”, have different interpretations in practice. China recommends that the Commission omit the list as an annex to the draft articles but retain information about the listed treaties in the commentary.

COLOMBIA

While it is not feasible to envisage listing the treaties that may continue in operation or implementation, it may be possible, for the sake of greater clarity, to give a few examples of such treaties or of their subject matter.

GHANA

The Commission may also give some thought to the effects of armed conflicts on treaties aimed at bringing a conflict to an end, including the Charter of the United Nations, given its unique status as a post-conflict treaty of a universal nature. The Commission may also explore the effects of armed conflicts on treaties aimed at promoting regional integration.

IRAN (ISLAMIC REPUBLIC OF)

1. It would be very much desirable if the Commission would use this opportunity to highlight the extraordinary status of the category of treaties establishing a boundary or a territorial regime. It is true that “treaties establishing or modifying land and maritime boundaries”—to which should be added those treaties establishing or modifying river boundaries—figure prominently in the list of categories of treaties referred to in draft article 5. Nevertheless, a mere and simple reference to such treaties in the annex would hardly obligate the parties to an armed conflict, since it is an annexed indicative list whose legal status remains to be determined. The Islamic Republic of Iran would have preferred that a specific reference be made to this category of treaty in draft article 3.

2. A treaty which establishes an objective situation, such as a boundary or a territorial regime, belongs, by its nature, to the category of treaties creating permanent regime and status. Such treaties create *erga omnes* obligations to which not only the States parties to the treaty, but also the international community as a whole, including all States and even non-State actors, are bound. As

such, even a fundamental change of circumstances, such as armed conflict, cannot be invoked as a ground for terminating or withdrawing from these treaties.

3. Special treatment for treaties establishing a boundary or a territorial regime has been expressly admitted in the Vienna Convention on the Law of Treaties and the Vienna Convention on Succession of States in respect of Treaties, in which a clear distinction is made between treaties establishing boundaries and other treaties. For example, article 62 of the Vienna Convention on the Law of Treaties, relating to a fundamental change of circumstances, makes it clear that such a change would not affect this category of treaties and, thus, cannot be invoked as a ground for terminating such treaties. Similarly, article 11 of the Vienna Convention on Succession of States in respect of Treaties, entitled “Boundary regimes”, specifies that “[a] succession of States does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary”. In both instances, the permanence of boundaries and their inviolability constitute the main premise of those provisions.

4. Moreover, the principle of stability and permanence of territorial regimes established by treaty is critical for the provision of humanitarian assistance and protection of civilians during an armed conflict. Depending on the place of residence of the population, living in occupied territories or in a territory under the control of a party to the conflict other than occupied territory, international humanitarian law has created two distinct bodies of law in order to ensure the free passage of humanitarian consignments and supplies (see article 23 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, and articles 69 and 70 of the Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts). It is obvious that assuming any role for armed conflicts in modifying or suspending the operation of treaties establishing a border would seriously undermine the provision of humanitarian assistance and the protection of civilians.

5. International jurisprudence also firmly supports the principle of permanence of territorial rules and regimes established by treaty. For instance, ICJ recently admitted that “it is a principle of international law that a territorial regime established by treaty ‘achieves a permanence which the treaty itself does not necessarily enjoy’ and the continued existence of that regime is not dependent upon the continuing life of the treaty under which the regime is agreed”.¹ This principled observation was reiterated by ICJ in one of its most recently issued judgments, in which it held that “[t]he territorial rules laid down in treaties of this type are, by nature, particularly marked in their permanence ...”².

¹ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, I.C.J. Reports 2007, p. 861, para. 89.

² *Case concerning the Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, judgment of 13 July 2009, para. 68; see also *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, I.C.J. Reports 1994, p. 35, and p. 37, para. 73.

POLAND

In the view of Poland, article 5 is superfluous. Since there exists a general principle of survival of treaties, providing for specific categories of treaties that do not automatically cease their operation at the outbreak of an armed conflict is not needed. Retaining article 5 would be confusing: it may raise doubts as to the solidity of the principle of survival of treaties itself, in effect undermining the principle expressed in draft article 3.

PORTUGAL

Draft article 5 and the annex thereto have an important role in clarifying what kind of treaties cannot be terminated or suspended, thus helping the operativeness of draft article 4. In principle, Portugal supports the chosen method of categorization of treaties and the recommendation by the Working Group on the Effects of Armed Conflicts on Treaties in 2007 to replace “object and purpose” with “subject matter”.¹ However, the list should include an express reference to treaties codifying rules of *ius cogens*.

¹ *Yearbook ... 2007*, vol. II (Part Two), p. 78, para. 324 (1)(c)(i).

SWITZERLAND

1. Switzerland proposes that draft article 5 and its annex be restructured to consist of two paragraphs and one annex linked to paragraph 1, which would read as follows:

“1. In the case of treaties the subject matter of which implies that they continue to operate, in whole or in part, during armed conflict, the incidence of an armed conflict will not as such affect their operation. An indicative list of the categories of such treaties is annexed hereto.”

2. Paragraph 1 would cover the types of treaties enumerated therein. The current formulation would be retained, with an express reference to the annex, since the annex contains important information about the categories of treaties concerned.

3. In addition, the English formulation “treaties the subject matter of which involves the implication ...” is rather awkward and does not reflect the French formulation (“*traités dont le contenu implique ...*”). Such formulation should be replaced by “treaties the subject matter of which implies ...”. Switzerland also proposes replacing the English formulation “that they continue in operation” with the formulation “that they continue to operate”.

4. Switzerland proposes the addition of a paragraph 2 governing the applicability of a second type of treaty:

“2. Treaties relating to the protection of the human person, including treaties relating to international humanitarian law, to human rights and to international criminal law, as well as the Charter of the United Nations, remain or become operative in the event of armed conflict.”

5. The protection granted in draft article 5 against termination or suspension of treaties does not appear to be adequate for *all* types of treaties. Among those treaties

that imply that they continue to operate, there is one type which is indisputably operative during an armed conflict. The need for absolute protection of these treaties is based on their fundamental significance in view of the aforementioned goals of the international community, and is reflected by their content as well as by relevant doctrine and jurisprudence. However, the present formulation of draft article 5 does not create different levels of protection. The basic treaties of international humanitarian law and human rights (subparagraphs (a) and (d)) do not enjoy stronger protection against termination or suspension than, for example, treaties relating to international watercourses and related installations and facilities (subparagraph (f)). While Switzerland favours retaining an indicative list as an annex linked to paragraph 1, it is essential to stipulate, in paragraph 2 of draft article 5, that certain specific treaties can in no event be terminated, withdrawn or suspended in the event of an armed conflict.

6. As a model for such a paragraph, Switzerland proposes using the 1985 resolution of the Institute of International Law. Article 4 of the resolution stipulates that “[t]he existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty otherwise provides”.¹

7. In our proposal, treaties relating to the protection of the human person, including treaties relating to international humanitarian law, to human rights and to international criminal law, as well as the Charter of the United Nations, remain or become operative in the event of armed conflict.

8. Treaties relating to international humanitarian law (which, in our opinion, do not form a subset of “treaties relating to the law of armed conflict” as suggested in subparagraph (a) of the annex) play a central role in the protection of individuals from the harmful effects of armed conflicts. It is clear from the texts of international humanitarian law instruments that they apply specifically to situations of armed conflict and are intended to govern various aspects of hostilities. Any understanding to the contrary would render such treaties entirely meaningless. Consequently, armed conflicts cannot affect the operation of these specific treaties.

9. Human rights treaties must also enjoy absolute protection. In our view, the operation of human rights treaties in the event of armed conflict does not appear in principle to be called into question. On a number of occasions, ICJ has affirmed that the protection offered by the International Covenant on Civil and Political Rights does not cease in time of war, except by operation of article 4 of the Covenant, whereby, under certain conditions, States parties may derogate, in time of public emergency, from certain obligations the Covenant imposes. The fact that numerous human rights treaties provide for the possibility of derogating from certain provisions in time of public emergency, including armed conflict, confirms that in principle these treaties remain in operation in the event of armed conflict. The possibility of derogation does not affect the continuation of the operation of a human rights treaty as such, but provides for

¹ Institute of International Law, *Yearbook*, vol. 61, Part II (Session of Helsinki, 1985), p. 278.

a means of suspending certain provisions of the treaty in question.² The principle according to which human rights treaties remain in operation in the event of armed conflict has been confirmed by treaty bodies, the General Assembly of the United Nations and the Security Council. Moreover, this principle is supported by numerous commentators in the legal literature. International humanitarian law, particularly article 72 of Protocol I to the Geneva Conventions, as well as the second preambular paragraph of Protocol II, also rely on this principle.

10. At the same time, it must be recognized that such a provision is without prejudice in two regards: first, to the possibility of derogating from certain provisions, as provided for in the derogation clauses of human rights treaties, and second, to the relationship between international humanitarian law and human rights. Indeed, according to doctrine, both fields of law are deemed to be concurrently applicable.

11. In the case of treaties relating to *international criminal law*, the memorandum by the Secretariat cites, among other instruments, the Rome Statute of the International Criminal Court, under the heading of “other treaties dealing with aspects of armed conflict”.³ It is true that a certain number of crimes defined in treaties under international criminal law could also be considered to be governed by human rights law (forbidding torture, for example), as well as international humanitarian law (such as grave breaches of the Geneva Conventions). Such is not the case, however, for all crimes governed by international law. Considering that these instruments protect the fundamental values of the international community, it would be advisable to have a second paragraph that clearly and explicitly guarantees their operation in the event of armed conflict.

12. Finally, Switzerland proposes the inclusion of the Charter of the United Nations. While it is true that draft articles 13 and 14 implicitly recognize the primacy of the Charter and therefore its application, it would be advisable to mention the Charter explicitly in a paragraph defining those treaties that are operative under all circumstances. In addition to identifying the primary purposes of the international community, which were mentioned above, the Charter sets forth the essential rules of *jus ad bellum* within the context of armed conflict. The annex should be amended to read:

“Annex

“Indicative list of the categories of treaties referred to in draft article 5, paragraph 1

“(a) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;

“(b) Multilateral law-making treaties;

“(c) Treaties establishing an international organization;

“(d) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

“(e) Treaties relating to diplomatic and consular relations.”

13. As was stated above, an indicative list relating to paragraph 1 may in principle be useful. That said, the current formulation of the draft annex seems to be too wide-ranging and at the same time too specific to cover the cases that will no doubt arise in the future. It seems to us advisable to delete subparagraphs (a) and (b), which are covered by paragraph 2 of the proposed draft article 5. For the rest, Switzerland proposes the inclusion of the generic categories indicated above; they contain the current categories, which are in some cases too specific. For example, the treaties in present subparagraph (e) relating to the protection of the environment can be subsumed under new subparagraph (b). The fact that existing subparagraphs (f) and (g) form subunits of the new subparagraph (a) is confirmed in the Commission’s commentary.⁴ Present subparagraph (j) can be included in new subparagraph (d). Because of the relationship between them, diplomatic and consular treaties can be placed together. In addition, it would in our view be desirable to add to the list the category of treaties establishing an international organization, such as the Rome Statute of the International Criminal Court. As for treaties of friendship, commerce and navigation and analogous agreements concerning private rights, Switzerland does not regard them as necessarily forming part of the categories in draft article 5, paragraph 1.

⁴ *Yearbook ... 2008*, vol. II (Part Two), pp. 55 and 56, paras. (38) and (45) to the commentary on draft article 5, regarding subparas. (f) and (g), of the draft annex to article 5.

UNITED STATES OF AMERICA

While the United States has some concerns with the effort in the annex to categorize by subject matter treaties that generally would continue in operation during armed conflict, it supports the decision to characterize this list of categories as indicative and non-exhaustive. In particular, it supports the statement in the commentary to article 5 that it may well be that only the subject matter of particular provisions of a treaty in one of these categories may carry the necessary implication of their continuance. For example, treaties of friendship, commerce and navigation often contain provisions regarding bilateral commerce that might need to be suspended during armed conflict between the parties.

6. DRAFT ARTICLE 6. CONCLUSION OF TREATIES DURING ARMED CONFLICT

AUSTRIA

Austria concurs with the essence of this provision. Paragraph 1, however, raises the question of the purpose of the reference to the Vienna Convention on the Law of Treaties and whether a State that is not party to this convention would be covered by this provision. Similarly,

² See also *Yearbook ... 2008*, vol. II (Part Two), pp. 54–55, para. (33) to the commentary on draft article 5.

³ A/CN.4/550 and. Corr.1–2, para. 18.

the meaning of “lawful” in paragraph 2 could be queried. That term could be deleted, in particular in view of the possibility that such an agreement could be unlawful on grounds different from those stated here.

COLOMBIA

It is redundant to mention lawful agreements in paragraph 2. Clearly, States are subject to the norms and principles of international law and, as subjects of international law, their acts must be guided by them.

POLAND

Draft article 6 should be deleted. There can be no doubt that involvement in an armed conflict does not and cannot impair the capacity of a State to conclude treaties. The capacity to conclude treaties is a component of State sovereignty and international personality.

SWITZERLAND

Paragraph 2 must be understood as being without prejudice to article 9, given that States cannot legally agree to the termination of a treaty that is *jus cogens*, for example.

7. DRAFT ARTICLE 7. EXPRESS PROVISIONS
ON THE OPERATION OF TREATIES

COLOMBIA

This provision is logical and is consistent with the *pacta sunt servanda* principle.

POLAND

Article 7 should be deleted because it states the obvious, and it is not needed in view of the general principle as embodied in article 3.

SWITZERLAND

It would be more logical to place draft article 7 immediately after article 4, since it is simply a particularly clear case of the application of article 4.

8. DRAFT ARTICLE 8. NOTIFICATION
OF TERMINATION, WITHDRAWAL OR SUSPENSION

AUSTRIA

1. Austria emphasizes the necessity of establishing a procedure that avoids the lengthiness of that under the Vienna Convention on the Law of Treaties. Although draft article 8 addresses this issue, it remains silent on the consequences of an objection under paragraph 3. Does that mean that, in the case of an objection, the procedure under the Vienna Convention should apply, or does it mean that the usual dispute settlement procedures become applicable? The commentary does not address this question.

2. As mentioned under draft article 1, the third State should also have the right to suspend or terminate a treaty that is in conflict with its obligations under the laws of neutrality.

IRAN (ISLAMIC REPUBLIC OF)

Draft article 8 should distinguish between different categories of treaties. This seems to apply, unless stated otherwise, to all treaties, including treaties establishing boundaries. It can be (mis)interpreted as a kind of invitation to “[a] State engaged in armed conflict intending to terminate or withdraw from a treaty” to declare its intention to open hostilities. There is an inconsistency between this provision and the annexed indicative list. It would be more appropriate and legally sound if the initial right of the party to an armed conflict, namely notification, were limited to treaties other than those the subject matter of which involves the implication that they continue in operation during an armed conflict.

POLAND

1. The title of the article is misleading: the notification that is the subject of the article is not of termination, withdrawal or suspension but of the intent of a State to terminate, withdraw from or suspend the operation of a treaty. The difference is crucial. It reflects the idea that a State may not unilaterally terminate, withdraw from or suspend the operation of a treaty as a consequence of its engagement in an armed conflict. What it may do is to invoke the occurrence of an armed conflict as a ground for expressing its intent to terminate, withdraw from or suspend the operation of a treaty. If so, such a notification has no effects on the treaty until the other State so agrees. The only effect the notification has is to inform the other State or States of the relevant intent of the notifying State.

2. And yet, paragraph 3 spells out “the right” of a party to object, as if, without such an objection, the operation of the treaty could be put to an end unilaterally through a notification of intent to do so. The regulation is convoluted and does not provide guidance to States.

SWITZERLAND

1. Switzerland agrees with the Commission that draft article 8 is based on article 65 of the Vienna Convention on the Law of Treaties. The title of draft article 8 should be aligned with the title of article 65, so as to simply read “Procedure”, especially as draft article 8 deals with the entire procedure of termination, withdrawal or suspension, not solely with notification.

2. Switzerland commends the decision to include a duty of notification as an element supporting the principle of stability pursuant to draft article 3. It nevertheless would have been appropriate to retain in paragraph 2 the phrase indicating that it is “the termination, withdrawal or suspension” which takes effect, with a view to clarifying the constitutive effect of notification.

3. It would be possible, by analogy with article 65, paragraph 2, of the Vienna Convention, to add a provision fixing a time limit for entering an objection. In view of the urgency normally associated with a situation of armed conflict, such a time limit could in our view be shorter than three months. Alternatively, paragraph 2 should specify that termination, suspension and withdrawal shall take effect once the notification has been received, in the absence of a prompt objection by the other party to the treaty.

4. In addition, it is important to mention the duty of notification in draft article 3, which specifies the non-automatic nature of termination or suspension, so as to make it clear that notification is a prerequisite for termination or suspension.

5. Switzerland recalls that the Commission did not wish to include a formulation equivalent to that of article 65, paragraph (4), in draft article 8, considering that “it was unrealistic to seek to impose a peaceful settlement of disputes regime for the termination, withdrawal from or suspension of treaties in the context of armed conflict”.¹ Switzerland wonders what the basis for this assessment was, and whether its outcome is really in conformity with the provisions of the draft articles. The Commission’s assumption seems to be in contradiction with draft article 5 and the corresponding indicative list contained in the annex, given that, according to subparagraph (i), the incidence of an armed conflict as such will not affect the operation of treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and ICJ, because of the implication that they continue to operate.

6. In our view, rather, the question of whether it is possible in law to impose a peaceful settlement of disputes regime in relation to termination of a treaty, withdrawal of a party or suspension of the application of a treaty in the context of an armed conflict must be determined in the light of the criteria specified by the Commission elsewhere in the draft articles, in particular articles 4, 5 and 7. Draft article 8, paragraph 3, should be reviewed in the light of these considerations so that the draft articles do not affect the right of a party to have recourse to a peaceful settlement of disputes regime in a case where the continued operation of a treaty that makes provision for such a regime is involved pursuant to the above-mentioned draft articles.

¹ *Yearbook ... 2008*, vol. II (Part Two), p. 60, para. (1) of the commentary to art. 8.

UNITED STATES OF AMERICA

Paragraph 2 should be made subject to the proviso: “unless the notice states otherwise” in order to preserve the possibility, for a State wishing to do so, of providing notice in advance of the effective date of termination.

9. DRAFT ARTICLE 9. OBLIGATIONS IMPOSED BY INTERNATIONAL LAW INDEPENDENTLY OF A TREATY

GHANA

Where a treaty is rendered ineffective by the occurrence of an armed conflict, it should not necessarily derogate from a State’s treaty obligation assumed under pre-existing or prevailing customary rules of international law generally recognized to be binding on all States under international law.

SWITZERLAND

In the view of Switzerland, it is important to recall this principle in the context of the draft articles. In addition, it is appropriate to mention explicitly in the commentary on this draft article the category of rules of *jus cogens*.

10. DRAFT ARTICLE 10. SEPARABILITY OF TREATY PROVISIONS

AUSTRIA

The present formulation does not clarify whether termination, withdrawal or suspension should have effect only with regard to the clauses in subparagraphs (a) to (c). Although the effect of this draft article is to distinguish it from that of the corresponding article 44 of the Vienna Convention, a clarification is nevertheless necessary in the text of the draft article itself.

COLOMBIA

The meaning of the term “unjust” in paragraph (c) is not clear.

11. DRAFT ARTICLE 11. LOSS OF THE RIGHT TO TERMINATE, WITHDRAW FROM OR SUSPEND THE OPERATION OF A TREATY

CHINA

Draft article 11 could give rise to differing interpretations. China understands that the circumstances resulting in a State’s loss of its right to terminate, withdraw from or suspend the operation of a treaty as described in this article arise after the incidence of armed conflict; otherwise it would conflict with the Commission’s original intent in designing it along the lines of article 45 of the Vienna Convention on the Law of Treaties, as well as with the goals of the present draft. The Commission should amend the present text accordingly to clarify the relevant content.

COLOMBIA

Unilateral conduct is, by acquiescence, a source of international law, so paragraph (b) is acceptable.

POLAND

Draft article 11 is the only provision which expressly admits that a State engaged in an armed conflict may—as a consequence of the armed conflict—terminate, withdraw from or suspend the operation of a treaty. However, no such right exists under the draft articles. The transposition of article 45 of the Vienna Convention into draft article 11 was done without paying attention to the differences between the Vienna Convention and the draft articles. Article 45 of the Vienna Convention refers to the *right to invoke a ground for termination*, withdrawal from or suspension of a treaty. Article 45 does not refer to the *right to terminate*, withdraw from or suspend a treaty, because under the Vienna Convention no such right exists. The question about the right of a State to terminate, withdraw from or suspend the operation of a treaty must be answered as a matter of principle.

12. DRAFT ARTICLE 12. RESUMPTION OF SUSPENDED TREATIES

AUSTRIA

Austria fully concurs with the idea underlying this draft provision. However, the text does not indicate whether

the determination of resumption should be taken in agreement (as could be derived from paragraph 2 of the commentary) or could be determined unilaterally.

COLOMBIA

It does not seem appropriate to exclude, from the outset, the possibility that the parties may express their wish to resume the operation of a treaty and that they may agree on such resumption and on the conditions thereof, in exercise of the authority of sovereign States. It is important to read this article in conjunction with article 18 and to consider merging them into a single article.

POLAND

The relationship with article 18 is unclear.

SWITZERLAND

Given the relationship and substantive links between draft articles 12 and 18, Switzerland believes that it would be more logical if they were placed one after the other.

13. DRAFT ARTICLE 13. EFFECT OF THE EXERCISE OF THE RIGHT TO INDIVIDUAL OR COLLECTIVE SELF-DEFENCE ON A TREATY

AUSTRIA

1. Although there are no doubts that the victim of an armed attack, in the sense of article 51 of the Charter of the United Nations, should be entitled to suspend a treaty incompatible with the exercise of the right of self-defence, draft article 13 raises certain questions. It could be interpreted so as to allow the right of suspension in relation to any treaty, regardless of the restrictions set out in draft article 4. Since this is not envisaged, a clear indication of the applicability of draft article 4 (for example, "subject to article 4 ...") or of any other restriction would be helpful or even required.

2. Another question is whether the conditions concerning the separability of a treaty under draft article 10 are also applicable in the present context. It could also be asked why draft article 13 refers only to suspension and not to termination and withdrawal, as is foreseen in draft article 4. The commentary is silent in all these respects.

CHINA

China has taken note of a discrepancy in the texts of draft article 13 as contained in documents A/CN.4/L.727/Rev.1 and Add.1, and *Yearbook ... 2008*, vol. II (Part Two). China understands that the additional formulation about bearing in mind the consequences of aggression in the wording of the former could help reduce the risk that the draft article may be abused, but recommends that the Commission further consider the relationship of the article to draft articles 14 and 15.

PORTUGAL

Portugal considers that the draft articles should be developed on the basis of the law of treaties and not the

use of force. Accordingly, the question of self-defence should not be addressed. In an armed conflict, it is usually difficult to ascertain who is the aggressor and who is the victim. The illegality of a use of force does not affect the question whether an armed conflict has an automatic or necessary outcome of suspension or termination.

SWITZERLAND

It seems appropriate to clarify that even a State exercising its right to self-defence remains subject to the provisions of draft article 5, and Switzerland proposes that the draft article be amended accordingly.

UNITED STATES OF AMERICA

The United States has concerns that draft article 13 could be misread to suggest that a State acting in self-defence has a general right to suspend treaty provisions that may affect its exercise of self-defence. At a minimum, the commentary should clarify that, to the extent such a right exists, it would be a limited right that does not affect treaty provisions that are designed to apply in armed conflict, in particular the provisions of treaties on international humanitarian law and the regulation of armed conflict such as the Geneva Conventions of 1949.

14. DRAFT ARTICLE 14. DECISIONS OF THE SECURITY COUNCIL

IRAN (ISLAMIC REPUBLIC OF)

1. The Islamic Republic of Iran believes that the "without prejudice" clause contained in draft article 14 is not only superfluous, considering articles 25 and 103 of the Charter of the United Nations, but also relates to subject matter that falls outside the mandate of the International Law Commission and, therefore, should be deleted. In its practice *vis-à-vis* international armed conflicts, the Security Council has always emphasized its respect for treaty obligations and the territorial integrity of States involved in armed conflicts. The practice of other organs of the United Nations, including the General Assembly, also indicates that the parties to an armed conflict are required to fully respect their treaty obligations, in particular those treaties determining internationally recognized borders.

2. Moreover, the Islamic Republic of Iran does not agree with the interpretation of article 103 of the Charter of the United Nations as rendered in paragraph 3 of the commentary to draft article 14. Generally speaking, this article is merely intended to resolve conflicts between the provisions of the Charter itself on the one hand, and obligations arising from other international treaties on the other. However, the authority of the Security Council is subject to certain limitations; as the International Tribunal for the Former Yugoslavia held in the *Prosecutor v. Duško Tadić et al.* case: "In any case, neither the text nor the spirit of the Charter conceives the Security Council as *legibus solutus*"¹ (unbound by law). Member States have

¹ International Tribunal for the Former Yugoslavia, case No. IT-94-1-AR72, decision of 2 October 1995, *Judicial Reports 1994-1995*, vol. 1, p. 352.

undertaken to comply with the decisions of the Security Council only if they are in accordance with the Charter of the United Nations. As ICJ held in its 1971 advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*,¹ the Council is required to respect all international normative rules to which Member States are bound. The Security Council is entrusted with the primary responsibility for maintenance of international peace and security, but it cannot exceed its authority (*ultra vires*) or require breach of the principles and rules arising from treaty relations, in particular *pacta sunt servanda* and respect for international boundaries established and recognized by a treaty. The Security Council shall, therefore, act in accordance with the purposes and principles of the Charter of the United Nations, in particular respect for the obligations arising from treaties, while discharging its primary responsibility regarding the maintenance of international peace and security.

¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16.

15. DRAFT ARTICLE 15. PROHIBITION
OF BENEFIT TO AN AGGRESSOR STATE

BURUNDI

It is worth considering whether, under the Charter of the United Nations, it could be assumed that there is no difference in the legal effects on a treaty between an aggressor State and a State exercising self-defence.

CHINA

China acknowledges the policy considerations of draft article 15. However, if the aggressor State terminates or suspends a treaty in accordance with the provisions of that treaty itself, a conflict arises between the provisions of this article and those of the treaty in question. The draft articles give no indication as to how such a conflict is to be resolved. The Commission should further clarify this issue, as well as that of whether or not to create similar provisions with regard to unlawful use of force other than aggression.

COLOMBIA

It would be worthwhile to specify whether “armed conflict”, as referred to in this article, is the result of aggression.

IRAN (ISLAMIC REPUBLIC OF)

The Islamic Republic of Iran favours the inclusion of draft article 15, and submits that a clear distinction should be made between situations of unlawful use of force by a State and those of self-defence, in accordance with the Charter of the United Nations. It has always been Iran’s principled position that the State resorting

to unlawful use of force must not be allowed to benefit from such unlawful act in any manner. It is a general principle of international law that no State may benefit from its own wrongful act.

PORTUGAL

Although sharing the opinion that an aggressor State cannot be placed in the same position as the State exercising its right to self-defence for the purposes of asserting the lawfulness of a conduct, Portugal reiterates its firm belief that this topic must remain within the framework of the law of treaties and must avoid dealing with aspects related to the law on the use of force. Portugal is further concerned about the linking of the draft article to particular definitions of aggression.

SWITZERLAND

Switzerland appreciates the importance of this draft article. It wonders, nevertheless, whether it would not be appropriate to broaden the scope of the prohibition on benefiting from termination or suspension of a treaty to situations in which a State resorts to illegal threat or use of force within the meaning of article 2, paragraph 4, of the Charter of the United Nations, rather than covering only aggression.

UNITED STATES OF AMERICA

Draft article 15 is problematic to the extent that it incorporates the definition of aggression set forth in General Assembly resolution 3314 (XXIX), in which the Assembly recommended that the Security Council, as appropriate, take account of that definition as guidance in determining, in accordance with the Charter of the United Nations, the existence of an act of aggression. By directly incorporating that definition into draft article 15 and specifying the legal consequences that flow from actions falling within the definition, the United States believes that the provision fails to properly recognize the process described in the Charter of the United Nations for making an authoritative determination of aggression, and arguably leaves to the belligerent State the ability to decide whether it has committed aggression. In addition, this provision may be unnecessarily limited in scope as it does not address circumstances where a State has illicitly used force in a way that does not amount to aggression. The United States recommends that the reference to resolution 3314 (XXIX) be deleted and that the first clause of the article provide as follows: “[a] State committing an act of aggression as determined in accordance with the Charter of the United Nations shall not terminate ...”

16. DRAFT ARTICLE 16. RIGHTS AND DUTIES
ARISING FROM THE LAWS OF NEUTRALITY

SWITZERLAND

Draft article 16 is of particular importance to Switzerland, which agrees with both its formulation and form as a “without prejudice” clause.

17. DRAFT ARTICLE 17. OTHER CASES
OF TERMINATION, WITHDRAWAL OR SUSPENSION

COLOMBIA

It would suffice to mention in this article that the draft articles are to be understood as being without prejudice to the termination or suspension of, or withdrawal from, treaties that may occur for other reasons within the framework of international law.

CUBA

Cuba considers that definitions should be provided in draft article 17, paragraphs (b) and (d), as to what is understood by “material breach” and “fundamental change of circumstances”.

18. DRAFT ARTICLE 18. REVIVAL OF TREATY
RELATIONS SUBSEQUENT TO AN ARMED CONFLICT

COLOMBIA

See the comment on draft article 12.

POLAND

The relationship with article 12 is unclear.

SWITZERLAND

See the comment on draft article 12.

EXPULSION OF ALIENS

[Agenda item 6]

DOCUMENT A/CN.4/625 and Add.1–2

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

[Original: French]
[19 March, 28 May and 9 July 2010]

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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.
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Convention on International Civil Aviation (Chicago, 7 December 1944)	United Nations, <i>Treaty Series</i> , vol. 15, No. 102, p. 295.
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Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, No. 2545, p. 137.
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Convention on territorial asylum (Caracas, 28 March 1954)	<i>Ibid.</i> , vol. 1438, No. 24378, p. 127.
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Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	<i>Ibid.</i> , vol. 360, No. 5158, p. 117.
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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

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

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

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

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* (Quotidienmutations.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.

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 Stoléru 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

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 pre-arranged 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. III*, 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

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*.

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

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

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.

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/06Ausalet.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

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

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.

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.

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’État, 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’État, 30 September 1960, *Jauffret*, *Recueil Sirey*, Conseil d’État, 1960, p. 504 (for reasons of “decency”).

⁹⁷ See, *inter alia*, Conseil d’État, 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’État, 2 August 1924, *Leroux*, *Recueil Sirey*, 1924, p. 780; Conseil d’État, 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

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.

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

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

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.

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 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

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

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.

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

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 Familienpress*, *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, 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).

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 (*Utlanningslag*) 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 RGDIP (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

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

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

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

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).

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

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 Buergethal (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

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 Inter africaine 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

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,

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

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).

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;

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"

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).

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).

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 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 Etrangers’, *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 *ius 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 *ius 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 Faraud*, 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 makeshift 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 repainted 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 TFI 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

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.

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

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

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".

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

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 Ministers 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 abundantia, 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-Ciment 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

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.

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.

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

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.

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.”

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 of Human Rights, decision of 13 January 1993, *Voulofitch 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.

⁶⁸² These appeals have no suspensive effect.

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 *gendarmérie*. 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.

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

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.

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

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

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.

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,

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), (5*bis*)–(5*ter*), 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 Guerrive, “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, p. 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

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.

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

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

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.

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

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, *Transocean 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

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)).

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).

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.

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 Vinarao*, 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,

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.*

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

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

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.

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

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

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.

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.

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 cooperation 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, Grand, *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 Ducroquetz (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, UNRIIA, vol. IV, p. 60 (1926)).

⁹⁴⁰ *Ibid.*, p. 265.

⁹⁴¹ In the *Ceskovic* 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

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.

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):

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

“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.

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

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 Salon*, 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

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.

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.

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

¹⁰¹¹ Montero Pérez de Tudela, "L'expulsion judiciaire des étrangers en Suisse: La récidive et autres facteurs liés à ce phénomène".

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.

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

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.

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

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 Doehring (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

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,

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

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

¹¹²⁷ Reiner Pommerin, “Die Ausweisungen von ‘Ostjuden’ aus Bayern 1923”, *Vierteljahrshäfte 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.

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

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 Ilyumade (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.

¹¹⁶¹ *Ibid.*, para. 126.

¹¹⁶² *Ibid.*, para. 124.

¹¹⁶³ *Ibid.*

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.

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

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.

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:

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 HI. 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

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, UNRIAA, 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.

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

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 Zaire. 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 Zairean 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, UNRIAA, 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 Tillett*, the Government of the United Kingdom, claiming that Belgium had violated its own law by expelling Mr. Tillett, 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

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.*

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

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).

EXPULSION OF ALIENS

[Agenda item 6]

DOCUMENT A/CN.4/628 and Add.1

Comments and observations received from Governments

[Original: Arabic/Chinese/English/French/Russian/Spanish]
[26 April and 8 October 2010]

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Convention on International Civil Aviation (Chicago, 7 December 1944)	United Nations, <i>Treaty Series</i> , vol. 15, No. 102, pp. 295.
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 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. 11 to the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (Strasbourg, 11 May 1994)	<i>Ibid.</i> , vol. 2061, No. 2889, p. 7.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, No. 2545, p. 137.
Protocol relating to the Status of Refugees (New York, 31 January 1967)	<i>Ibid.</i> , vol. 606, No. 8791, p. 267.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	<i>Ibid.</i> , vol. 360, No. 5158, p. 117.
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 Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
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, 14 June 1985)	<i>Official Journal of the European Communities</i> , L 239, 22 September 2000, p. 13.
Agreement on the European Economic Area (Oporto, 2 May 1992)	<i>Ibid.</i> , L001, 3 January 1994, p. 3.

Introduction

1. At its fifty-seventh session, in 2005, the International Law Commission decided, in accordance with article 19, paragraph 2, of its statute, to request, through the Secretary-General, Governments to submit any information concerning the practice of States, including national legislation, relating to the topic “Expulsion of aliens”.¹

2. In paragraph 4 of its resolution 60/22, of 23 November 2005, the General Assembly invited Governments to provide information to the Commission, as requested in chapter III of the Commission’s report on its fifty-seventh session,² regarding, *inter alia*, the topic “Expulsion of aliens”.

3. At its fifty-ninth session, in 2007, and at its sixty-first session, in 2009, the Commission reiterated its request for information in relation to the topic “Expulsion of aliens”, also identifying a number of specific points on which comments and information from Governments would be of particular interest to the Commission.³

4. In paragraph 3 of its resolutions 62/66, of 6 December 2007, and 64/114, of 16 December 2009, the General Assembly drew the attention of Governments to the importance for the Commission of having their views on the various aspects of, *inter alia*, the topic “Expulsion of aliens”, in particular on all the specific issues identified in chapter III of the Commission’s report on the work

of, respectively, its fifty-ninth and sixty-first sessions. Furthermore, in paragraph 4 of the same resolutions, the Assembly invited Governments, within the context of paragraph 3, to provide information regarding practice on this topic.

5. Included here are the written replies that were received by 31 August 2010 from the following States: Andorra (4 May 2010); Armenia (23 April 2010); Bahrain (12 April 2010); Belarus (30 March 2010); Bosnia and Herzegovina (6 April 2010); Bulgaria (31 March 2010); Canada (25 May 2010); China (26 April 2010); Croatia (4 May 2010); Cuba (31 March 2010); the Czech Republic (18 February 2010); El Salvador (22 February 2010); Finland (31 March 2010); Germany (20 January 2010); Italy (19 May 2010); Kuwait (26 April 2010); Lithuania (16 April 2010); Malaysia (26 August 2009 and 5 April 2010); Malta (16 February 2010); Mexico (6 April 2010); New Zealand (13 April 2010); Norway (10 May 2010); Peru (24 February 2010); Portugal (11 May 2010); Qatar (25 May 2010); Republic of Korea (22 April 2010); Romania (20 January 2010); Serbia (29 March 2010); Singapore (October 2010); Slovakia (22 September 2010); South Africa (8 April 2010); Sweden (30 March 2010); Switzerland (6 April 2010); and the United States (26 March 2010). Previous comments and information provided by Governments on this topic are found in *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/604.

6. This document comprises three subsections. Subsections A and B contain, respectively, the comments and information on the specific issues (or aspects thereof) identified by the Commission in its 2007 and 2009 reports. Section C contains comments and information on other issues relating to the topic.

¹ *Yearbook ... 2005*, vol. II (Part Two), p. 13, para. 27.

² *Ibid.*

³ *Yearbook ... 2007*, vol. II (Part Two), pp. 13–14, para. 27; and *Yearbook ... 2009*, vol. II (Part Two), para. 29. The issues on which the Commission invited Governments to submit comments and information are listed below in sections A and B below.

Comments and information received from Governments

A. Comments and information on the specific issues identified by the Commission in its 2007 report

1. State practice with regard to the expulsion of nationals. Is it allowed under domestic legislation? Is it permissible under international law?

CHINA

Chinese law does not provide for the expulsion of Chinese citizens. Expulsion is applied only to aliens who do not possess Chinese nationality, and not to citizens of China.

MALAYSIA

Article 9 of the Federal Constitution makes provision for the prohibition of banishment and freedom of movement, where no citizen shall be banished or excluded from the Federation. The Federal Constitution does not provide against expulsion of non-citizens.

2. The manner in which persons having two or more nationalities are dealt with under expulsion legislation. Can such persons be considered aliens in the context of expulsion?

CHINA

1. Under the Nationality Law of the People’s Republic of China, China does not recognize dual nationality for any Chinese national.

2. Persons of known foreign nationality may be expelled. Under most circumstances, the nationality of a person having two or more nationalities will be determined on the basis of the foreign passport used at the time that person entered China.

MALAYSIA

1. Malaysian laws do not recognize dual citizenship. Article 24 (1) of the Federal Constitution provides that if the Federal Government is satisfied that any citizen has

acquired by registration, naturalization or other voluntary and formal act the citizenship of any country outside the Federation, the Federal Government may by order deprive that person of his citizenship.

2. Before an order for deprivation of citizenship can be made, the Federal Government is required, pursuant to article 27, to provide notice in writing to the person against whom the order is proposed to be made, informing him of the ground on which the order is proposed and of his right to have the case referred to a committee of inquiry.

3. The question of deprivation of nationality as a possible precondition for a person's expulsion. Is such a measure allowed under domestic legislation? Is it permissible under international law?

CHINA

Chinese law has no provisions in this regard.

MALAYSIA

1. First and foremost, it must be noted that article 9 of the Federal Constitution prohibits the banishment of a citizen. In addition, the Banishment Act 1959 (Act No. 79) relates to the banishment and expulsion from Malaysia of persons other than citizens.

2. Section 5 of Act No. 79 provides that, where the Minister is satisfied, after such inquiry or such written information, that the banishment from Malaysia of any person not being a citizen or an exempted person would be conducive to the good of Malaysia, the Minister may make an order that the person be banished from Malaysia either for the term of his natural life or for such other term as may be specified in the order. Furthermore, section 8 provides that the Minister may, if he thinks fit, in place of issuing a warrant of arrest and detention or in place of making a banishment order, make an order requiring any person who he is satisfied is not a citizen or an exempted person to leave Malaysia before the expiration of a period of 14 days from the date of service under subsection (4) of a copy of the order.

3. Since the law prohibits the banishment or expulsion of a citizen, the deprivation of nationality is a possible precondition for a person's expulsion. Malaysian laws allow for the deprivation of nationality under certain specific conditions, namely, articles 24 to 26A of the Federal Constitution. However, it is emphasized that only under these specific conditions may a citizen be deprived of his citizenship.

4. Article 24 (1) of the Federal Constitution provides that if the Federal Government is satisfied that any citizen has acquired by registration, naturalization or other voluntary and formal act the citizenship of any country outside the Federation, the Federal Government may by order deprive that person of his citizenship. Furthermore, article 24 (2) provides that if the Federal Government is satisfied that any citizen has voluntarily claimed and exercised in any country outside the Federation any rights available to him under the law of that

country, being rights accorded exclusively to its citizens, the Federal Government may by order deprive that person of his citizenship. In addition, as provided under article 24 (4), if the Federal Government is satisfied that any woman who is a citizen by registration under article 15, "Citizenship by registration (wives and children of citizens)", has acquired the citizenship of any country outside the Federation by virtue of her marriage to a person who is not a citizen, the Federal Government may by order deprive her of her citizenship.

5. Article 25 (1) of the Federal Constitution provides that the Federal Government may by order deprive of his citizenship any person who is a citizen by registration under article 16A, "Citizenship by registration (persons resident in the states of Sabah and Sarawak on Malaysia Day)", or a citizen by naturalization if satisfied:

(a) That he has shown himself by act or speech to be disloyal or disaffected towards the Federation;

(b) That he has, during any war in which the Federation is or was engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with any business which to his knowledge was carried on in such manner as to assist an enemy in that war; or

(c) That he has, within the period of five years beginning with the date of the registration or the grant of the certificate, been sentenced in any country to imprisonment for a term of not less than 12 months or to a fine of not less than 5,000 ringgit, or the equivalent in the currency of that country, and has not received a free pardon in respect of the offence for which he was so sentenced.

6. Article 25 (1A) of the Federal Constitution provides that the Federal Government may by order deprive of his citizenship any person who is a citizen by registration under article 16A or a citizen by naturalization if satisfied that without the Federal Government's approval, he has accepted, served in, or performed the duties of any office, post or employment under the Government of any country outside the Federation or any political subdivision thereof, or under any agency of such a Government, in any case where an oath, affirmation or declaration of allegiance is required in respect of the office, post or employment.

7. Provided that a person shall not be deprived of citizenship under this clause by reason of anything done before the beginning of October 1962, in relation to a foreign country, and before the beginning of January 1977, in relation to a Commonwealth country, notwithstanding that he was at the time a citizen.

8. Article 25 (2) of the Federal Constitution provides that the Federal Government may by order deprive of his citizenship any person who is a citizen by registration under article 16A or a citizen by naturalization if satisfied that he has been ordinarily resident in countries outside the Federation for a continuous period of five years and during that period has neither:

(a) Been at any time in the service of the Federation or of an international organization of which the Federal Government was a member; nor

(b) Registered annually at a consulate of the Federation his intention to retain his citizenship.

9. Provided that this clause shall not apply to any period of residence in any Commonwealth country before the beginning of January 1977.

10. Article 26 (1) provides that the Federal Government may by order deprive of his citizenship any citizen by registration or by naturalization if satisfied that the registration or certificate of naturalization was obtained by means of fraud, false representations or the concealment of any material fact, or was effected or granted by mistake. Article 26 (2) further provides that the Federal Government may by order deprive of her citizenship any woman who is a citizen by registration under article 15 if satisfied that the marriage by virtue of which she was registered has been dissolved, otherwise than by death, within the period of two years beginning with the date of the marriage.

11. Article 26A provides that where a person has renounced his citizenship or has been deprived thereof under article 24 (1) or article 26 (1) (a), the Federal Government may by order deprive of his citizenship any child of that person under the age of 21 who has been registered as a citizen or was so registered as being the child of that person or of that person's wife or husband.

4. The question of the collective expulsion of aliens who are nationals of a State involved in an armed conflict with the host State. In such a situation, should a distinction be drawn between aliens living peacefully in the host State and those involved in activities hostile to it?

CHINA

1. Chinese law has no specific provisions distinguishing the status of aliens living peacefully in the host State and of those involved in activities hostile to it, nor does it have any practices in this regard.

2. The Chinese Government has not expelled aliens temporarily or permanently residing in China because of international relations (whether in peacetime or in a state of war), domestic political exigency, politics, economics, ideology, religion or race. However, the Chinese Government will deal with aliens involved in hostile activities against it in accordance with international law and the provisions of domestic legislation.

MALAYSIA

1. Malaysia is studying and following conscientiously the discussion on this issue, and at this juncture would like to associate itself with the view that there is presently no universal rule prohibiting the collective expulsion of aliens.

2. Furthermore, the question of collective expulsion in cases of armed conflicts is not addressed by national legislation in Malaysia. It must also be noted that, legally, there is no distinction between the aliens living peacefully in Malaysia and those involved in activities hostile to it.

3. If an alien is involved in activities hostile to Malaysia, he or she may be prosecuted under the relevant criminal laws and may be convicted, if successful.

4. Besides that, an alien will also be subjected to sections 9 and 15 of the Immigration Act 1959/63 (Act No. 155). Section 9 provides that the Director-General may in his absolute discretion cancel any pass at any time by writing under his hand, or cancel any permit at any time by writing under his hand, if he is satisfied that the presence in Malaysia of the holder of any permit is, or would be, prejudicial to public order, public security, public health or morality in Malaysia. Besides that, section 15 provides that a person shall not remain in Malaysia after the cancellation of any permit or certificate, after the making of a declaration, after the expiration of the period of any pass relating to or issued to him, or after the notification to him, in such manner as may be prescribed, of the cancellation, under any regulations made under this Act, of any pass relating to or issued to him, unless he is otherwise authorized to remain in Malaysia under this Act.

5. The question of whether an alien who has had to leave the territory of a State under an expulsion order that is subsequently found by a competent authority to be unlawful has the right of return*

MALAYSIA

1. In Malaysia, the Banishment Act 1959 (Act No. 79) (revised 1972) relates to the banishment and expulsion from Malaysia of persons other than citizens. Section 8 of Act No. 79 provides that the Minister may, if he thinks fit, in place of issuing a warrant of arrest and detention or in place of making a banishment order, make an order requiring any person who he is satisfied is not a citizen or an exempted person to leave Malaysia before the expiration of a period of 14 days from the date of service of the order. Section 8 (4) of Act No. 79 also provides that a copy of the expulsion order shall be served on the person against whom it is made by a senior police officer, or by any other person authorized by the Minister to serve the order and shall be served personally on that person in the same manner as a summons is required to be served under the Criminal Procedure Code (Act No. 593), and the officer or person serving the copy shall notify the person against whom it is made that he may at any time within 14 days of the service apply to the High Court for an order that the expulsion order be set aside on the ground that he is a citizen or an exempted person.

2. Section 10 of Act No. 79 provides that any person in respect of whom an expulsion order has been made may, within 14 days of the service of a copy of the expulsion order under section 8 (4), apply to the High Court for an order that the expulsion order be set aside on the ground that he is a citizen or an exempted person; and if it be proved on that application that the person is a citizen or an exempted person, the High Court shall set aside the expulsion order, as the case may be, and direct that the applicant be set at liberty.

* See also section B.3 below.

3. It must be noted that the above situation applies when the person is actually still in Malaysia at the moment when he succeeds in setting aside the expulsion order and being eventually set at liberty.

4. 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.

5. It should be noted that "exempted person" means a person exempted from sections 5 and 8 by any order made under section 12. Section 12 provides that the Minister may by order direct that any particular person or persons of any specified class shall be exempt, either unconditionally or subject to such conditions as the Minister may impose, from sections 5 and 8.

6. Criteria that could be used to distinguish between the expulsion of an alien and the question of non-admission; more specifically, determining the point at which the removal of an illegal immigrant is governed by the expulsion procedure and not by the non-admission procedure

CHINA

1. The relevant Chinese laws have separate provisions regarding the expulsion of and denial of entry to aliens.

2. In practice, the point at which the removal of an illegal immigrant is governed by the expulsion procedure and not by the non-admission procedure depends on whether the illegal immigrant had already entered China at the time he or she was discovered. The non-admission procedure is applied when the illegal immigrant has not yet entered China.

MALAYSIA

1. A main criterion for drawing a distinction between these two procedures seems to be the territorial one, since it is not feasible to expel a person who is not present in the territory of the expelling State. Such a person can only be denied admission. Thus, non-admission means preventing a person who is actually outside the territory of a State from entering that State, while expulsion means forcing a person who is actually in the territory of a State to leave that territory.

2. With regard to the non-admission of an alien, it is governed under sections 6 and 9 of the Immigration Act 1959/63 (Act No. 155). Section 6 (1) provides that no person other than a citizen shall enter Malaysia unless he is in possession of valid entry permit or pass. In addition to that, section 9 provides that the Director-General may, where he deems it expedient to do so in the interests of public security or by reason of any economic, industrial, social, educational or other conditions in Malaysia, by order, prohibit the entry or re-entry into Malaysia of any person or class of persons.

3. On the other hand, in relation to the expulsion of an alien, as mentioned above, it will only be applicable to an alien who is actually in Malaysia. In this regard, section 31 of Act No. 155 makes provisions for the removal of prohibited immigrants from Malaysia where, if during the examination of any person arriving in Malaysia or after such enquiry as may be necessary the person is found to be a prohibited immigrant, the Director-General shall, subject to any regulations made under this Act, prohibit the person from disembarking or may in his discretion detain him at an immigration depot or other place designated by the Director-General until an opportunity arises to return him to his place of embarkation or to the country of his birth or citizenship.

4. Furthermore, section 32 provides for removal of illegal immigrants where any person who is convicted of an offence under sections 5, 6, 8 or 9 shall be liable to be removed from Malaysia by order of the Director-General, provided that no citizen convicted of an offence under section 5 shall be ordered to be removed from Malaysia under this subsection.

5. Last but not least, section 33 provides for the removal of persons unlawfully remaining in Malaysia by reason of sections 9, 15 or 60. The person shall, whether or not any proceedings are taken against him in respect of any offence against this Act, be removed from Malaysia by order of the Director-General.

7. The legal status of illegal immigrants located in the territorial sea or in internal waters, or in the frontier zone excluding port and airport areas. Specifically, apart from port and airport areas, is there an international zone within which an alien would be considered as not having yet entered the territory of the State? If so, how is the extent and breadth of such a zone determined?

CHINA

1. The Chinese Government is of the view that apart from port and airport zones, no international zones exist within which an alien could be considered as not yet having entered the territory of a State.

2. In China, illegal aliens who have entered border zones or territorial or domestic waters other than seaports or airports are considered to have entered Chinese territory, and expulsion procedures are applied to them. However, illegal aliens who have not completed legal entry procedures and are discovered in port areas open to the outside, such as seaports and airports, are not considered to have entered Chinese territory even though they have reached the seaport or airport zone. Expulsion procedures are not applied to such aliens; rather their cases are handled in accordance with the non-admission procedure.

MALAYSIA

1. Apart from port and airport areas, there is no international zone within Malaysia within which an alien would be considered as not having yet entered its territory.

2. It must be noted that section 6 of Act No. 155 provides that no person, unless he is a citizen, shall enter Malaysia unless he is in possession of a valid entry permit or pass. Besides that, section 15 of Act No. 155 elaborates on unlawful entry or presence in Malaysia. Therefore, any non-citizen who enters Malaysia without a valid entry permit or pass will be considered an “illegal immigrant”.

3. Reference as to the meaning of “entry” can be made to the Immigration Act 1959/63 (Act No. 155). Section 2 of Act No. 155 defines “entry” as:

(a) In the case of a person arriving by sea, disembarking in Malaysia from the vessel in which he arrives;

(b) In the case of a person arriving by air at an authorized airport, leaving the precincts of the airport;

(c) In the case of a person entering by land and proceeding to an immigration control post in accordance with section 26, leaving the precincts of the post for any purpose other than that of departing from Malaysia by an approved route; and

(d) In any other case, any entry into Malaysia by land, sea or air.

Provided that it shall not include in any case an entry made for the purpose of complying with this Act or an entry expressly or impliedly sanctioned by an immigration officer for the purpose of any enquiry or detention under this Act.

4. Nevertheless, an “illegal immigrant” who is within the territorial sea or in internal waters but has not disembarked onto the land would still be considered under domestic laws as being unlawfully present in the territory.

8. State practice in relation to grounds for expulsion, and the question of whether and, where appropriate, the extent to which such grounds are restricted by international law*

CHINA

Practice in relation to grounds for expulsion

1. In practice, expulsion is generally not applied to long-term or permanent foreign residents of China under the following circumstances: if they have resided, paid taxes or operated a business in China for a long period, or if their children are with them in China, or if expulsion would lead to the break-up of the family, its reduction to poverty, or deprivation of means of support for a lifetime. Expulsion is also generally not applied to stateless persons residing long-term or permanently in China. For substantive legal provisions, see section B.1 below.

Restrictions under international law

2. The expulsion of aliens must be carried out in accordance with the law; a State must not abuse its right of expulsion. The Chinese Government makes the decision as to whether to expel a person in strict accordance with the provisions of domestic legislation, international treaties and agreements, and commonly accepted international practice, taking into consideration the facts, nature and circumstances of that person’s actions. Such decisions are not to be prejudiced by such factors as the alien’s nationality, race, skin colour or religious faith.

* See also section B.1 below.

3. China is a party to the Convention relating to the Status of Refugees of 28 July 1951. Under the provisions of that Convention, aliens applying for refugee status after entering China may not be forcibly expelled while their refugee status is being determined or if they have been recognized as refugees (with the exception of those who have committed serious crimes).

4. China is also a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Under the provisions of that Convention, if there is sufficient cause to believe that any person risked being tortured in another country, China will not expel that person to that country.

MALAYSIA

1. Section 5 of the 1959 Banishment Act allows the Minister to make an order to banish a person if he is “satisfied after such inquiry or on such written information as he may deem necessary or sufficient that the banishment from Malaysia [of a non-citizen] would be conducive to the good of Malaysia”.

2. In addition, non-citizens who entered Malaysia not in compliance with the provisions of the Immigration Act 1959/63 (Act No. 155) are regarded as illegal immigrants and are punishable under the Act. Likewise, illegal immigrants are subject to deportation in accordance with the provisions of the Act.

B. Comments and information on the specific issues identified by the Commission in its 2009 report

1. Grounds for expulsion provided for in national legislation*

ANDORRA

1. The Immigration Act sets out the details with regard to the administrative expulsion of foreign citizens (arts. 106 *et seq.*). This standard establishes two main grounds for administrative expulsion. The first is that the entry into or the presence within Andorra of the person who is the subject of the measure represents a risk to the security of the State, persons, property or to public order. The second is that the foreign person has been notified of his/her irregular status but has not left the Principality of Andorra within the established deadline.

2. However, there are limitations to this administrative measure which provide important guarantees for the individual concerned. In this regard, the Constitution of the Principality of Andorra of 14 March 1993 establishes in article 22 that the expulsion of a person residing legally in Andorra can be granted only for the reasons and according to the terms provided by law, and as a result of a definitive judicial ruling in the case of a person exercising the right to a hearing. In addition, the Immigration Act establishes that foreign children, foreign adults born in Andorra who have lived there continuously since birth, and foreign adults residing legally in Andorra continuously for a period of 20 years, cannot be subject to expulsion.

* See also section A.8 above.

An exception to these cases can be made if there is an overriding need in the interest of the security of the State, persons, property or public order.

3. The Act establishes a maximum expulsion period of 10 years for persons presenting a risk to the security of the State, persons, property or to public order, and a maximum of 2 years for persons who, having been found to have irregular status, have not left the Principality of Andorra within the established deadline. Lastly, article 119.5 of the Immigration Act establishes that, prior to expelling a resident, the administration must issue an expulsion notice, unless the expulsion is the result of an enforcement measure or if the person is considered a serious risk to the security of the State.

ARMENIA

1. The status of aliens in Armenia is regulated by the Constitution, international treaties, the Law on Aliens of the Republic of Armenia and other legal documents. The issue regarding expulsion of aliens, in particular the definition of “expulsion”, legal grounds for expulsion, pursuing actions on expulsion, circumstances prohibiting expulsion, rights and obligations of aliens in the course of the case hearings, decision on expulsion, appeal and implementation of the decision and detention of an alien with the purpose of his/her expulsion are regulated by the Law on Aliens.

2. The Law on Aliens defines “expulsion” as the compulsory removal of an alien from Armenia when no legal grounds exist for his/her stay or residence in Armenia. An alien is obliged to leave the territory of Armenia in the following cases: (a) expiration of validity of entry visa or residency permit; (b) invalidation of entry visa as prescribed by the Law on Aliens; (c) dismissal of application for acquiring or extending the term of residency status; and (d) deprivation of residency status on the grounds prescribed by the Law on Aliens. Failure by the alien to voluntarily leave the territory of the Republic of Armenia as a result of any of the above-mentioned reasons may serve as legal grounds for expulsion.

BAHRAIN¹

Expulsion under the Alien Act of 1965 and amendments thereto

1. Deportation orders issued against foreign offenders are addressed in the Alien (Migration and Residence) Act of 1965 and the amendments thereto. In that Act, such an order is referred to as a deportation order. Article 25, paragraph 1, of the Act provides that the Chief of Police and Public Security may, with the authorization of the Head of State, in either of the circumstances specified in paragraph (2) of that article, issue an order (referred to as a “deportation order” in the Act) obliging the alien to leave Bahrain and to remain outside it thereafter.

2. With the authorization of the Head of State, a deportation order may be issued against an alien in the following circumstances:

(a) When a court attests to the Chief of Police and Public Security that an alien has been found guilty by that court or by a lower court against the judgement of which the alien has appealed of an offence punishable by imprisonment and that the court has recommended that a deportation order should be issued against that alien;

(b) When the Chief of Police and Public Security believes that it is in the public interest to issue a deportation order against an alien.

3. The General Directorate of Nationality, Passports and Residence is responsible for implementing the provisions of the Alien Act and takes the required measures against aliens who have been sentenced in criminal cases or who have committed an offence under the Alien Act, including violations of residency conditions. Offenders may be expelled either immediately upon issuance of the requisite order or after having served their sentence, depending on the judgement passed and the offence committed.

Expulsion in implementation of a court order

[...]

Expulsion of foreign workers under the Labour Market Regulation Act (No. 19 of 2006)

4. Following the promulgation of the Labour Market Regulation Act (No. 19 of 2006), the Labour Market Regulatory Authority assumed responsibility for expelling foreign workers whose work permit had become invalid for any of the reasons mentioned in the Act, obtaining a permit on the basis of false documents or information, expiration of permit validity, termination of project-related employment or violation of the conditions of the permit (art. 26).

BELARUS

1. In accordance with article 65 of the Act of 3 June 1993, “On the legal status of aliens and stateless persons in the Republic of Belarus”, as amended by the Act dated 19 July 2005 (hereinafter “the Aliens Act”), aliens and stateless persons (hereinafter “aliens”) may be expelled from Belarus in the interests of national security, public order, the protection of the morals and health of the population, and the rights and freedoms of Republic of Belarus citizens and other persons.

2. Decisions concerning expulsion are taken by internal affairs or State security bodies, either on their own initiative or at the request of the State bodies concerned.

3. It should be noted that on 21 July 2010, a new Act “On the legal status of aliens and stateless persons in the Republic of Belarus” (hereinafter “the new Aliens Act”), dated 4 January 2010, which contains similar provisions on the expulsion of aliens, will come into force.

4. Furthermore, the Code of Administrative Offences of 21 April 2003 and the Code of Administrative Procedure and Enforcement of 20 December 2006 have been in force in Belarus since 1 March 2007. International legal approaches to this issue were duly taken into account in their development.

¹ The text of relevant legislation has been provided to the Codification Division of the United Nations Office of Legal Affairs.

5. The Code of Administrative Offences established a new kind of administrative penalty: the deportation of aliens for the commission of an administrative offence.

6. Deportation may be applied to aliens as an additional administrative penalty for violations of the rules for residence in, and transit through, the territory of Belarus. This administrative penalty is determined in accordance with the nature and harmful consequences of the administrative offence committed, the circumstances in which it was committed and the identity of the alien who committed the administrative offence.

7. Administrative penalties for violations of the legal status of aliens and stateless persons in Belarus form a key part of the system of preventive measures, help to curb negative aspects related to illegal migration and fulfil a generally preventive function as a whole.

8. In accordance with article 66 of the Aliens Act, aliens are included in the list of persons whose entry into Belarus is prohibited or undesirable on the basis of a deportation or expulsion decision. The deported or expelled alien may be prohibited from entering Belarus for a period of 1 to 10 years. However, the new Aliens Act changed the period in which a deported alien is prohibited from entering Belarus and this may be from one year to five years.

9. The period of prohibition to enter Belarus is determined in the light of the circumstances that gave rise to the expulsion or deportation decision, and other information describing the identity and relating to the presence of the alien in Belarus.

10. If aliens subject to expulsion or deportation orders apply for refugee status, additional protection or asylum in Belarus in accordance with its legislation, their deportation or expulsion is suspended.

11. Expulsions or deportations are suspended until decisions are taken on applications for refugee status or additional protection in Belarus, until the expiry of the period established by law for appeals against decisions taken on applications for refugee status or additional protection in Belarus, until the entry into force of court decisions dismissing appeals or until decisions are taken on applications for asylum in Belarus.

12. Expulsions or deportations are halted when aliens subject to expulsion or deportation decisions are granted refugee status, additional protection or asylum in Belarus, and when aliens may not be returned or deported involuntarily to a country where their life or freedom would be threatened on the grounds of their race, religion, citizenship, nationality, membership of a particular social group or political opinions, or where they may be subjected to torture.

BOSNIA AND HERZEGOVINA

1. Pursuant to article 88 of the Law on Movement and Stay of Aliens and Asylum, a measure of expulsion from Bosnia and Herzegovina may be imposed against an alien for one of the following reasons:

(a) If he/she has entered or attempted to enter Bosnia and Herzegovina illegally, or stayed in Bosnia and Herzegovina after the visa expiry or expiry of non-visa stay, or he/she attempted to violate or violated the regulations pertaining to the State border crossing on exiting Bosnia and Herzegovina;

(b) If his/her visa has been annulled by a final decision and an alien has not left the territory of Bosnia and Herzegovina within the 15 days or the deadline for voluntary execution as prescribed by this Law;

(c) If his/her stay has been cancelled and he/she failed to leave Bosnia and Herzegovina voluntarily as prescribed by this Law;

(d) If he/she has remained in Bosnia and Herzegovina after the termination of his/her refugee status, subsidiary protection or temporary protection, or after the requirements are met as referred to under article 117 (Expulsion in case of rejection of request for international protection) of this Law, and he/she has not acquired the right to stay in accordance with this Law;

(e) The decision on withdrawal or release from Bosnia and Herzegovina citizenship has become legally binding, but he/she has not realized the right of residence in accordance with this Law;

(f) If there is a final and binding decision based upon which he/she has been found guilty for the crime of trading narcotics or weapons, or engaging in trafficking or smuggling of human beings, terrorism, money-laundering, or any other form of organized, cross-border and transnational crime;

(g) If he/she was legally convicted for committing a criminal offence for which a prison sentence of one year or longer prison sentence may be pronounced;

(h) If his/her presence constitutes a threat to public order, legal order or security of Bosnia and Herzegovina; or

(i) If he/she has been accepted based on an international agreement on cooperation for handing over and admitting persons whose stay is illegal, and he/she has not been granted a valid residence permit in Bosnia and Herzegovina.

2. Pursuant to article 90 of the Law on Movement and Stay of Aliens and Asylum special cases of expulsion are prescribed, as follows:

1. Exceptionally, based upon a substantiated proposal from the Ministry, Service, other organizational unit of the Ministry or the police, the Council of Ministers may, while resolving individual cases, take the decision on expulsion of an alien from Bosnia and Herzegovina, with a permanent prohibition of entry to Bosnia and Herzegovina, if they have assessed that his/her expulsion is necessary in the interest of public order or is based on reasons of national security in the sense of the provision of article 1, paragraph 2, of Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), as amended by Protocol 11.

2. The decision referred to in paragraph (1) of this article cannot be executed contrary to the requirements referred to in article 91 (Principle of *non-refoulement*) of this Law.

BULGARIA

1. The authorities of the Ministry of the Interior or of the State Agency for National Security have the authority to expel an alien who has been granted a long-term residence permit in another member State of the European Union (EU); who qualifies to be granted a long-term residence permit for Bulgaria, if the said person is a factory or office worker or a self-employed person in Bulgaria or for the purpose of study, including vocational training, if the said person or his or her family members represent a serious threat to national security or to public order, following consultations with the competent authorities of the other EU member State for which they hold a long-term residence permit. In case of expulsion, the length of the alien's residence within the territory of Bulgaria, the age, the health status, the marital status, the social integration, as well as the existence of a relationship with the State of residence or the lack of a relationship with the State of origin of the person are taken into consideration. The authorities of the Ministry of the Interior or of the State Agency for National Security are required to notify the competent authorities of the respective EU member State for the implementation of the expulsion decision.

2. According to article 42 (1) of the Aliens in the Republic of Bulgaria Act, expulsion of an alien is imposed where his or her presence in Bulgaria poses a serious threat to national security or to public order. According to article 42a of the same Act, expulsion is furthermore imposed on aliens residing within the territory of Bulgaria subject to an expulsion decision issued by the competent authorities of another EU member State. In such cases, the expulsion is effected provided that the expulsion decision has not been rescinded or suspended by the issuing State and that the alien poses a serious and present threat to national security or the expulsion decision is based on the alien's failure to comply with the requirements of the provisions regulating the entry into and residence of aliens in the issuing EU member State (art. 42b of the Aliens in the Republic of Bulgaria Act). Expulsion under article 42a of the Aliens in the Republic of Bulgaria Act takes effect only after confirmation that the expulsion decision has not been rescinded or suspended and upon receipt from the issuing EU member State of the documents confirming the alien's identity. Such expulsion does not take effect if a special law or an international treaty to which the Republic of Bulgaria is a party provides otherwise.

3. Whereby an alien poses a serious and present threat to public order or to national security because he or she has been convicted for a criminal offence for which a penal sanction of deprivation of liberty of at least one year has been imposed, or because of the existence of serious grounds to believe that he or she has committed a serious criminal offence or intends to commit such an offence within the territory of a member State of the European Union, the authorities of the Ministry of the Interior and of the State Agency for National Security are authorized to issue an expulsion order and request its enforcement by the competent authorities of the respective EU member State in respect of an alien present within its territory (art. 44g of the Aliens in the Republic of Bulgaria Act).

4. According to article 25 of the Act on Entry into, Residence in, and Exit from the Republic of Bulgaria by European Union Citizens and Family Members Thereof, expulsion is imposed on EU citizens or on their family members when their presence in the Republic of Bulgaria poses an imminent threat to national security or to public order. Expulsion is imposed on EU citizens who have resided in Bulgaria for the last 10 years only in exceptional cases related to national security, and on minors—when this is in their interest. Where an expulsion order has not been enforced for more than two years after its entry into force, the issuing authority must verify whether the factual grounds for its issuing still apply. If the factual grounds no longer apply, the order shall be considered rescinded. EU citizens or their family members on whom expulsion has been imposed may not be expelled to a State where their life and freedom will be jeopardized and where they will be exposed to a risk of persecution, torture, or inhuman or degrading treatment.

CHINA

Provisions of the Criminal Law

1. Article 35 of this law provides that deportation may be imposed independently or supplementarily on an alien who commits a crime.

Provisions of the Law on Entry and Exit of Aliens

2. Article 16 of this law provides that aliens who fail to abide by Chinese laws may have their period of stay in China curtailed or their status of residence in China annulled by the competent authorities of the Chinese Government.

3. Article 27 of this law provides that an alien who enters or resides in China illegally may be detained for examination or be subjected to residential surveillance or deportation by a public security organ at or above the county level.

4. Articles 29 and 30 of this law provide that if a person enters or leaves China illegally, establishes illegal residence or makes an illegal stopover in China, travels to places closed to aliens without a valid travel document, forges or alters an entry or exit certificate, uses another person's certificate as his own or transfers his certificate, and if the circumstances of the case are serious, [that person] may be ordered to leave the country within a certain time or may be expelled from the country.

5. Moreover, article 43 of the Rules for Implementation of the Law of the People's Republic of China on Entry and Exit of Aliens provides that aliens who fail to present for examination their residence permit as required, or to carry with them their passport or residence certificate, or refuse examination of their certificate by the police may, where the circumstances are serious, be ordered to leave the country within a specified time limit.

6. Article 44 of the Rules for Implementation provides that aliens who engage in employment in China without approval may, where the circumstances are serious, be ordered to leave the country within a specified time limit.

*Provisions of the Law on Public Security
Administration Punishments*

7. Article 10 of this law provides that any foreigner who violates public security administration may be ordered to leave the country within a certain time or may be expelled from the country.

CROATIA

1. The conditions and the procedure of expulsion of aliens from the Republic of Croatia have been laid down in:

(a) The Aliens Act (Republic of Croatia "Official Gazette" Nos. 79/07 and 36/09);

(b) Book of rules on travel documents, visas and on treatment of aliens (Republic of Croatia "Official Gazette" No. 79/07);

(c) Contravention Act (Republic of Croatia "Official Gazette" Nos. 88/02, 122/02, 187/03, 105/04, 127/04 and 107/07); and

(d) Penal Act (Republic of Croatia "Official Gazette" Nos. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 71/06 and 110/07).

2. The decision on expulsion shall be:

(a) Criminal court judgement pronouncing an expulsion security measure to an alien;

(b) Misdemeanour court decision pronouncing a protective measure of expulsion of aliens from the country;

(c) Decision on expulsion issued by the Ministry of the Interior, a police administration, or a police station.

3. An alien may be removed from Croatia if he/she represents a danger for the public order, national security or public health.

4. When making a decision on expulsion, account shall be taken of personal, family, economic and other circumstances.

5. The ruling on the expulsion of an alien (facultative expulsion) may be given particularly in the circumstances when:

(a) His/her stay has been found illegal;

(b) He/she has crossed or attempts to cross the State border illegally;

(c) He/she helps others to illegally enter, transit or stay in the country;

(d) He/she has concluded a marriage of convenience;

(e) He/she has violated the regulations on employment and work of aliens;

(f) He/she has violated the regulations on public order, weapons, abuse of narcotic drugs or customs levies and taxes;

(g) He/she has committed a predicate criminal offence;

(h) He/she has been sentenced with final force and effect in some other country for a violent crime punishable also under Croatian legislation;

(i) He/she repeats an offence.

6. Decision on the expulsion of an alien (obligatory expulsion) shall be pronounced in cases where:

(a) An alien has been sentenced to an unconditional prison sentence of more than one year for an aforethought criminal offence;

(b) For an aforethought criminal offence, an alien has, in the period of five years, been on a few occasions sentenced with final force and effect to a prison sentence of altogether three years;

(c) An alien has been sentenced to an unconditional prison sentence for a criminal offence against the values protected by international law;

(d) An alien represents a danger to national security.

7. The right of special protection against expulsion is exercised by the aliens who have been granted:

(a) Permanent stay in Croatia;

(b) Temporary stay in Croatia for an uninterrupted period of 10 years;

(c) Temporary stay and those aliens who are married to a Croatian national, or those with permanent stay.

8. They may be expelled only if there exists one of the reasons for obligatory expulsion.

9. The decision on expulsion provides for the ban of entry and stay for an alien in Croatia, which shall not be shorter than three months, or longer than five years.

10. A protective measure of the expulsion of an alien from the country may be imposed on a perpetrator of a contravention for whom there is a reason to believe that he/she would continue committing contraventions.

11. A protective measure of the expulsion on an alien from the country may neither be imposed for the period of less than three months, nor for the period of more than three years.

12. A safety measure of the expulsion of an alien from the country may be imposed on the perpetrator of a criminal offence, if there is a reason to believe that he/she is about to commit a certain criminal offence.

13. The safety measure of the expulsion of an alien from the country may not be shorter than 1 year, or longer than 10 years, counting from the day the sentence has become final, taking into account that the time of imprisonment shall not be included in the period of the duration of this measure.

14. A permanent expulsion security measure may be imposed on a perpetrator of a criminal offence for which a long-term prison sentence has been provided for in the law.

CUBA

Cuban criminal law provides for the expulsion of aliens as one of the additional sanctions applicable to natural persons in accordance with the provisions of article 28.3 (i) of Law No. 62 dated 30 April 1988, the Penal Code of the Republic of Cuba. Article 46.1 of the Code provides that the punishment of expulsion may be applied to an alien when a competent tribunal finds that the nature of the offence, the circumstances of its commission, or the personal character of the defendant indicate that his or her continued presence in the Republic would be harmful. It further provides that the expulsion of aliens may be imposed as an additional measure once the principal sanction has been completed and grants the Ministry of Justice the discretion of ordering the expulsion of the sanctioned alien prior to the completion of the primary sanction, in which case the criminal culpability of the guilty person is annulled.

CZECH REPUBLIC

1. An alien may be expelled from the Czech Republic either by an order issued by a court following criminal conviction (expulsion by court order), or by an administrative order issued by the police (administrative expulsion).

2. Expulsion following a criminal conviction is regulated by section 80 of the Criminal Code (Act No. 40/2009). The court may order the expulsion of an offender who is not a Czech citizen, either as the only penalty or in combination with another penalty, if necessary to protect the safety of persons or property or another general interest. Expulsion may be ordered as the only penalty if the nature and gravity of the crime and the offender's personal situation do not warrant additional penalties.

3. The offender may be barred from re-entry for a period of 1 to 10 years or for an indefinite period of time, depending on the nature and gravity of the crime, the offender's chances of rehabilitation and his or her personal situation, as well as the danger posed to the safety of persons, property or another general interest.

4. The court will not order expulsion:

- (a) If the offender's citizenship cannot be ascertained;
- (b) If the offender has been granted asylum or additional protection under other legislation;
- (c) If the offender holds a permanent residence permit, works and has an established home in the Czech Republic, and his or her expulsion would be inconsistent with the commitment to family reunification;

(d) If there is a danger that the offender might face persecution in the receiving State on the grounds of his or her race, ethnicity, nationality, association with a social group, political opinion or religion, or that as a result of the expulsion the offender might be exposed to torture or other inhuman or degrading treatment and/or punishment;

(e) If the offender is an EU citizen or a family member of an EU citizen, regardless of citizenship, who holds a permanent residence permit in the Czech Republic, or an alien who has been granted a long-term resident status in the Czech Republic in accordance with other legislation, unless the court finds that there are substantial grounds for believing that the offender might endanger national security or public order;

(f) If the offender is an EU citizen who has continuously resided in the Czech Republic for the past 10 years, unless the court finds that there are substantial grounds for believing that the offender might endanger national security; or

(g) If the offender is a child, who is an EU citizen, unless the expulsion would be in the child's best interests.

5. Administrative expulsion is regulated by chapter X of Act No. 326/1999 concerning the residence of aliens in the territory of the Czech Republic, as amended ("Aliens Residence Act").

6. On receiving an administrative expulsion order from the police, the alien must leave the Czech Republic within a certain deadline and will not be eligible for re-entry for a period stated in the administrative expulsion order. The grounds for administrative expulsion are enumerated in section 119 *et seq.* of the Aliens Residence Act, including the maximum periods for which the expellee may be barred from re-entry (within these maximum limits, the actual length of expulsion is determined by the police on a case-by-case basis, depending on the gravity of the breaches committed by the alien in the Czech Republic).

7. Once the administrative expulsion order becomes final, the police place the alien on the list of undesirable persons. An alien awaiting administrative expulsion is either left at liberty or detained in an aliens detention centre. The grounds for and maximum lengths of administrative expulsion differ according to the alien's residence status.

8. An alien holding a temporary residence permit may be administratively expelled and barred from re-entry:

(a) For up to 10 years:

(i) If there is a well-founded risk that, while in the Czech Republic, the alien might endanger national security by using force to achieve political ends, by engaging in activities that undermine the foundations of a democratic State or are intended to violate territorial integrity, or in other similar manner; or

(ii) If there is a well-founded risk that, while in the Czech Republic, the alien might seriously disrupt public order, or endanger public health in case he or she has a serious disease; or

(iii) If the alien has repeatedly and deliberately violated laws and regulations or obstructed the execution of judicial or administrative orders;

(b) For up to five years:

(i) If during a border check or an inland check on the residence status of aliens, the alien has presented a forged document and/or has presented another person's document as his or her own;

(ii) If during an inland check on the residence status of aliens or during a border check while leaving the Czech Republic, the alien has presented a travel document which is invalid, because the validity period indicated in it has expired, or because it is damaged so much that the entries are illegible, or because any of its parts has come loose, been torn or is missing, or because it contains incorrect data or unauthorized alterations;

(iii) If the alien is employed in the Czech Republic without an employment permit in cases where such permit is a necessary condition for employment, or if he or she has engaged in taxable gainful activities in the Czech Republic without the licence required by special laws and regulations, and/or if he or she has employed an alien without an employment permit or procured such employment for an alien;

(iv) If the alien has acted, or is supposed to have acted, on behalf of a legal entity which has employed an alien without an employment permit and/or procured such employment;

(v) If the alien does not undergo a border check when requested by the police;

(vi) If the alien has clandestinely crossed, or attempted to clandestinely cross, the State border;

(vii) If the alien has crossed the State border at a place other than a border crossing point; or

(viii) If the alien has not provided credible evidence that he or she has been staying in the territory of the States parties for the period of time for which he or she is allowed to stay there temporarily without a visa or on a short-stay visa; or

(c) For up to three years:

(i) If the alien has, without lawful authority, been staying in the Czech Republic without a travel document;

(ii) If the alien has, without lawful authority, been staying in the Czech Republic without a visa or without a valid residence permit; or

(iii) If, in the course of any proceedings under the Aliens Residence Act, the alien has made false statements with the intention to influence the decisions of an administrative authority.

9. An alien holding a permanent residence permit may be administratively expelled and barred from re-entry (depending on the gravity of the breaches):

(a) For up to 10 years:

(i) If there is a well-founded risk that, while in the Czech Republic, the alien might endanger national security by using force to achieve political ends, by engaging in activities that undermine the foundations of a democratic State or are intended to violate territorial integrity, or in other similar manner; or

(ii) If there is a well-founded risk that, while in the Czech Republic, the alien might seriously disrupt public order; or

(b) For up to three years, if an alien whose residence permit has been withdrawn does not leave the Czech Republic within the set deadline.

10. A collective administrative expulsion (i.e. expulsion of groups of aliens by a single expulsion order) is prohibited by the international treaties to which the Czech Republic is a party (art. 4 of 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) as well as by domestic legislation (section 118 of the Aliens Residence Act). Every case is examined individually, taking into account the specific situation of the person concerned.

EL SALVADOR

1. *False declaration.* Where an alien makes a false declaration either when entering the national territory or in its dealings with the Directorate-General for Migration and Alien Affairs. This offence is contemplated in article 16 of the Migration Act.

2. *Unlawful entry.* Where an alien enters Salvadorian territory unlawfully, i.e. via a point not set up to conduct migration control, irrespective of whether he or she is in possession of a travel document. This offence is established in article 6 of the Migration Act.

3. *Unlawful stay.* Where the duration of stay granted to an alien who entered the country lawfully expires, leaving him or her with irregular migratory status. This offence is contemplated in the third paragraph of article 60 of the Migration Act. See also article 66 of the Migration Act.

4. *Commission of a crime.* Where an alien commits a crime on Salvadorian territory, irrespective of whether he or she entered the country lawfully, and the competent authority orders his or her immediate expulsion from Salvadorian territory. This offence is established in article 61 of the Migration Act.

5. *National interests.* Article 63 of the Migration Act states that, where qualifying discretionary grounds exist, the Ministry of Justice and Public Security may order the expulsion from Salvadorian territory of an alien whose presence is contrary to national interests.

6. *Judicial order.* Article 60 of the Penal Code states the following: "The sentence of expulsion from the national territory for aliens shall include immediate enforced departure from the national territory, once the

main sentence has been served and a ban on returning to the national territory for a maximum of five years, at the judge's discretion".

7. *Procurement of specialized services.* The fourth paragraph of article 26 of the Migration Act states that when a contract for the provision of services ends, for whatever reason, the alien must abandon the national territory, failing which he or she will be expelled from the country.

8. *Entry as temporary residents.* Aliens who entered the country as temporary residents and aliens covered by article 23, paragraph (c), of the Migration Act must, within 48 hours of their registration, deposit with the Directorate-General for Migration and Alien Affairs the cost of an air ticket between the city of San Salvador and their country of origin. Failure to meet this requirement will be punished with expulsion from the national territory. This provision does not apply to persons who are Central American or Panamanian by birth.

9. It should be noted that the grounds described in points 7 and 8 above, though contained in the Migration Act in force since 1958, are not currently applied.

FINLAND

1. Section 149 of the Aliens Act (No. 301/2004) provides that an alien who has resided in Finland under a residence permit may be deported if:

1. He or she resides in Finland without the required residence permit;

2. He or she is found guilty of an offence carrying a maximum sentence of imprisonment for a year or more, or if he or she is found guilty of repeated offences;

3. He or she has, through his or her activities, shown that he or she is liable to endanger other people's safety; or

4. He or she has been engaged, or on the basis of his or her previous activities and for other reasons there are grounds to suspect that he or she may engage in activities that endanger Finland's national security or relations with a foreign State.

2. An alien who has been issued with a long-term resident's EC residence permit in Finland may be deported only if he or she poses an immediate and sufficiently serious threat to public order or security.

3. A refugee may be deported in the cases referred to in paragraphs 2 to 4 of Section 149 of the Aliens Act above. A refugee may not be deported to his or her home country or country of permanent residence against which he or she still needs international protection. A refugee may only be deported to a State which agrees to admit him or her.

4. When considering deportation, account must be taken of the facts on which the decision is based and the facts and circumstances otherwise affecting the matter as a whole. When considering the matter, particular attention must be paid to the best interest of the children and the protection of family life. Other facts to be considered must include the duration and purpose of the alien's residence in Finland, the nature of the residence permit issued to him or her, the alien's ties to Finland and the cultural and social ties to the home country of his or her family. Should

the deportation be on the basis of the criminal activity of the alien, account must be taken of the seriousness of the act and the detriment, damage or danger caused to public or private security.

GERMANY

1. As previously indicated by Germany,¹ the German Residence Act (*Aufenthaltsgesetz, AufenthG*) sets out various grounds for expulsion. These include grounds based on the commission of criminal offences or convictions, as well as those related to terrorist or extremist activities and regulatory offences.

2. The two-step process for ending residence in Germany must be taken into account when considering the question of restrictions imposed by international law. An alien's residence permit expires upon expulsion and his/her right of residence in Germany is thus terminated. He/she is therefore required to leave the country (section 50 of the Residence Act). Only once this requirement to leave the country has become enforceable, and it is not assured that the alien will leave voluntarily or reasons of public security and order make the supervision of the departure seem necessary, is the requirement to leave enforced by means of deportation (section 58 of the Residence Act). International obligations may militate against both expulsion and deportation. For example, the considerations mentioned in article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and article 6 of the German Basic Law (Constitution) have been incorporated into the Residence Act in section 56 (special protection from expulsion in the case of family ties in Germany). Sections 60 (2) and (5) of the Residence Act prohibit deportation (also because of the obligation under article 3 of the Convention) if there is a danger that the alien, once deported, would be subject to torture or inhumane or degrading treatment or punishment. These restrictions apply no matter what grounds for expulsion exist.

¹ See *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/604, section A.8.

ITALY

Provisions for the Expulsion of Foreigners from Italian Territory in the Consolidated Text on Immigration and the Condition of the Foreigner

1. The Italian legal code provides for two types of expulsion: administrative and jurisdictional.

2. Administrative expulsion can be ordered by the Minister of the Interior or by the Prefect for the following reasons:

(a) Reasons of public order or State security;

(b) Violations of the laws governing entry to and residence in Italian territory;

(c) The social danger posed by the subject, as determined by specific legal parameters (art. 13, paras. 1 and 2);

(d) The need to prevent domestic and international terrorism (Law No. 155/2005, art. 2).

3. In addition, there is a “deferred” return to the border of foreigners who, having entered the territory without undergoing border controls, are stopped at or immediately after entry, and foreigners who, not meeting the requirements for entry into Italy, are admitted temporarily into the territory for reasons of public rescue (art. 10, para. 2). The police chief executes the expulsion by escorting the subject coercively to the border. Only in the event that the subject’s visa has expired by more than 60 days and renewal has not been requested does the expulsion include notification that the territory must be left within 15 days (art. 13, paras. 4 and 5).

4. The police chief’s coercive escorting of the subject to the border must be approved by the judicial authorities and execution of it is suspended until authorization has been granted. The decision to authorize can be appealed to the Court of Appeals (art. 13, para. 5 *bis*).

5. When expulsion measures on the grounds of illegal entry or residence are adopted against a foreigner who has exercised his or her right to family reunification, or against the family member who has been reunified, consideration must also be given to the nature and effectiveness of family ties, the duration of the stay, and the existence of family, cultural or social ties to the country of origin (art. 13, para. 2 *bis*).

6. Jurisdictional Expulsion is ordered by the judge and falls within the following framework:

(a) As a substitute for monetary penalties for the crime of illegal entry and residence in the territory (art. 10 *bis* of the Consolidated Text and art. 62 *bis* of Legislative Decree No. 274/2000 as introduced by art. 1, paras. 16 and 17, *d*), provided for by Law No. 94/2009);

(b) As a substitute or alternative to detention (art. 16 of the Consolidated Text);

(c) As a security measure imposed by a guilty verdict and executed after fulfilment of the penalty, on the basis of the certification of the danger posed by the subject (art. 15 of the Consolidated Text, arts. 235 and 312 of the Criminal Code, art. 86 of the Consolidated Text, on narcotics).

7. In no case can expulsion or return be made to a State where the foreigner could be subject to persecution on the grounds of race, gender, language, citizenship, religion, political views, or personal or social condition, nor can the risk be taken of sending someone to another State that does not provide protection from persecution (art. 19, para. 1, of the Consolidated Text).

8. Expulsion is also prohibited, unless there are reasons of public policy and security, in the following cases:

(a) Foreign minors younger than 18 years of age, unless they are exercising their right to follow an expelled parent or guardian;

(b) Foreigners holding a residence card, except for cases of expulsion pursuant to laws regarding residence card holders;

(c) Foreigners living with second-degree relatives or a spouse of Italian nationality;

(d) Women who are pregnant or have given birth to a dependent child in the past six months (art. 19, para. 2, of the Consolidated Text) and the husbands with whom they live (order of the Constitutional Court No. 376/2000).

KUWAIT

1. The process of expelling foreigners or returning them to their own countries necessarily presupposes the existence of a penal text that includes authorization for expulsion as an additional penalty. The imposition and execution of an expulsion order are reasonable forms of national legal protection that are based on a well-established body of law. The guidelines for such orders may be found in the provisions of article 66 of the Kuwaiti Penal Code, Law No. 16 of 1960, which provides that the supplementary or additional penalties set forth in the Code include the expulsion from the country of a foreign national.

2. The Penal Code, article 79, also includes provisions that govern expulsion order procedures, namely, that in addition to any prison sentence imposed on a foreign national, a judge may order expulsion from Kuwait once the term of imprisonment has been served. That provision does not affect the right of the administrative authorities to expel aliens in accordance with the law.

3. When a foreign national has been sentenced to deprivation of liberty for a crime that was an offence against honour or an abuse of confidence, and the judge has ordered that person to be expelled from Kuwait once the sentence has been served, the Public Prosecutor must, as soon as the penalty has been completed, announce the judge’s decision to the administrative authorities that are interested in its execution.

4. It should be noted that the law specifies the ways in which foreign nationals are to be informed of the issuance of an expulsion judgement. The Code of Criminal Procedure and Judicial Proceedings (decree No. 60/17, article 179), provides that every accused and defendant shall be given an official copy of any judgement that is issued. No charge is to be made for that copy, which shall be delivered to the accused or defendant in person and officially announced.

5. An expulsion order is, without doubt, a supplementary or additional penalty and inevitably presupposes a main sentence: penal expulsion is only one means by which aliens may be expelled, particularly when the offence involved honour or an abuse of confidence, and in that case the alien will be expelled as soon as the main sentence has been served.

6. Penal expulsion is not the only means by which aliens may be expelled. In article 79 (decree No. 70/16), the law grants the relevant administrative authority the right

to expel aliens whenever the provisions of the law allow. Such expulsion is known as administrative expulsion. The law governing the residence of foreign nationals (decree No. 59/17, article 20), provides that a foreign national shall leave Kuwait at the order of the Chief of Police and Public Security if he has not obtained a residence permit or that permit has expired. He may return to Kuwait if he satisfies the conditions for entry that are set forth in the law.

7. In order to offer greater regulatory flexibility, one mechanism which the law governing the residence of foreign nationals (decree No. 59/17, article 24 *bis*), offers to foreign nationals that are in breach of the residence laws is a provision that allows for an accommodation to be reached with such persons once they have paid the requisite fine for the infraction.

LITHUANIA¹

1. The procedure of entry and exit, presence and stay of aliens, as well as the procedure for appealing against decisions concerning the legal status of aliens and other issues in connection with the legal status of aliens in Lithuania, are regulated by the Law of the Republic of Lithuania on the Legal Status of Aliens passed on 29 April 2004 (hereinafter referred to as the Law).

2. The Law stipulates the following:

Obligation to depart from Lithuania: a decision taken in the manner prescribed by legal acts obliging an alien to depart voluntarily within a specified time period from the territory of Lithuania;

Return to a foreign country: transfer of an alien to his country of origin or a foreign country to which he has the right to depart, according to a decision agreed with that country according to the procedure established by legal acts;

Expulsion from Lithuania: compulsory transportation or removal of an alien from the territory of Lithuania in accordance with the procedure established by legal acts.

An alien is expelled from Lithuania if:

(a) The alien has failed to comply with the requirement obliging him to depart from Lithuania within a set time period;

(b) The alien has entered or is staying in Lithuania unlawfully;

(c) The alien's stay in Lithuania constitutes a threat to public security or public policy;

(d) A decision has been taken to expel the alien from another State subject to the provisions of Council Directive No. 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals.²

3. The aforementioned provisions are not applicable to aliens who may be returned to the country of origin or a foreign country as well as to asylum applicants. An unaccompanied minor alien is returned only in the case where he will be properly cared for considering his needs, age and independence level in the foreign State to which he is returned. If an unaccompanied minor alien cannot be returned to the country of origin or another country, he must be granted the right to stay in Lithuania on the grounds provided for in the Law. When considering the issue of return of an alien, cooperation with foreign States and international organizations is undertaken pursuant to applicable international treaties.

4. The decision regarding expulsion of an alien from Lithuania in the cases where the alien has failed to comply with the requirement obliging him to depart from Lithuania within a set time period or where the alien has entered or is staying in Lithuania unlawfully, as well as the decision regarding the possibility of implementing, where the decision was taken to expel the alien from another State subject to the provisions of Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals, is taken by the Migration Department under the Ministry of the Interior of Lithuania.

5. The decision regarding expulsion of an alien from Lithuania in the case where the alien's stay in Lithuania constitutes a threat to public security or public policy is taken by Vilnius Regional Administrative Court.

6. Decisions regarding expulsion of an alien from Lithuania are enforced by the State Border Guard Service under the Ministry of the Interior of Lithuania or by the police.

7. When taking the decision to expel an alien from Lithuania, the following circumstances are taken into account:

(a) The period of his lawful stay in Lithuania;

(b) His family relationship with persons resident in Lithuania;

(c) His social, economic and other connections in Lithuania; and

(d) The type and extent of the seriousness of the committed violation of law.

8. The implementation of the decision regarding the expulsion of an alien from Lithuania is suspended if:

(a) The decision regarding expulsion of an alien from Lithuania is appealed against in court, except in cases when the alien must be expelled due to the threat which he constitutes to State security or public policy;

¹ The following information has been provided by the Ministry of the Interior of the Republic of Lithuania and is based on the current version of the Law of the Republic of Lithuania on the Legal Status of Aliens (*Official Gazette*, 2004, No. 73-2539). It is important to note that a new draft law amending the aforementioned law is currently being elaborated in order to implement the provisions of 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).

² *Official Journal of the European Union*, No. L 149 of 2 June 2001, p. 34.

(b) The foreign country to which the alien may be expelled refuses to accept him;

(c) The alien is in need of immediate medical aid, the necessity of which was confirmed by a consulting panel of a health-care institution;

(d) The alien cannot be expelled due to objective reasons (the alien is not in possession of a valid travel document; it is not possible to obtain travel tickets, etc.).

9. If the expulsion of an alien from the Republic of Lithuania is suspended due to the circumstances listed in items (b) to (d) in the previous paragraph and these circumstances do not cease to exist within one year of the suspension of the implementation of the decision to expel the alien from Lithuania, the alien is issued with a temporary stay permit.

10. It is prohibited to expel or return an alien to a country where his life or freedom is under threat or where he may be subjected to persecution on the grounds of race, religion, nationality, political opinion or membership of a social group or to a country from whence he may later be expelled to such a country (this provision is not applicable with respect to an alien who for serious reasons constitutes a threat to the security of Lithuania or has been convicted by an effective court judgement of a serious or particularly serious crime and constitutes a threat to the public).

11. An alien is not expelled from Lithuania or is not returned to a foreign country, if:

(a) There are serious grounds to believe that the alien will be tortured, subjected to cruel, inhuman or degrading treatment or punishment in that country;

(b) He, in accordance with the procedure set by the Government of Lithuania, was granted with a decision period during which he, as an actual or former victim of a crime associated with human trafficking, must take a decision regarding cooperation with pretrial investigation entities or courts.

MALAYSIA

1. In Malaysia, the Banishment Act 1959 [Act No. 79] (Revised 1972) is an Act relating to the banishment and expulsion from Malaysia of persons other than citizens. Section 5 of Act No. 79 provides that, where the Minister is satisfied after such inquiry or such written information, that the banishment from Malaysia of any person not being a citizen or an exempted person would be conducive to the good of Malaysia, the Minister may make an order that the person be banished from Malaysia either for the term of his natural life or for such other term as may be specified in the order. Furthermore, section 8 provides that the Minister may, if he thinks fit, in place of issuing a warrant of arrest and detention or in place of making a banishment order, make an order requiring any person who he is satisfied is not a citizen or an exempted person to leave Malaysia before the expiration of a period of 14 days from the date of service under subsection (4) of a copy of the order.

2. "Exempted person" means a person exempted from sections 5 and 8 by any order made under section 12. Section 12 provides that the Minister may direct, by order, that any particular person, or persons of any specified class, shall be exempt, either unconditionally or subject to such conditions as the Minister may impose, from sections 5 and 8.

3. A more common ground for expelling an alien from Malaysia is exercised under the Immigration Act No. 1959/63 (Act No. 155). An alien who is found to be in breach of Act No. 155 will be liable to be removed from Malaysia under part V of the Act, where the Director-General of Immigration may, in the case of a prohibited immigrant, prohibit that person's entry, and, in the case where an alien is an illegal immigrant or unlawfully residing in Malaysia, order for the removal of such person from Malaysia (sections 31–33 of Act No. 155). The definition of prohibited immigrant can be found under section 8 of Act No. 155.

4. Under section 31 of Act No. 155, if, during the examination of any person arriving in Malaysia or after such enquiry as may be necessary, the person is found to be a prohibited immigrant, the Director-General may, subject to any regulations made under this Act, prohibit the person from disembarking or may, at his discretion, order that person's detention at an immigration depot or other designated place until an opportunity arises to return that person to his place of embarkation or to the country of his birth or citizenship.

5. Section 32 of Act No. 155 further provides that those other than citizens convicted of an offence under section 5, 6, 8 or 9 shall be liable to be removed from Malaysia by order of the Director-General. Section 5 of Act No. 155 provides that the Minister may, by notification in the Gazette, prescribe approved routes and declare such immigration control posts, landing places, airports or points of entry, as he may consider to be necessary for the purposes of this Act, to be immigration control posts, authorized landing places, authorized airports or authorized points of entry, as the case may be, and no person shall, unless compelled by accident or other reasonable cause, enter or leave Malaysia except at an authorized landing place, airport or point of entry.

6. Under section 6 of Act No. 155, any person other than a citizen can only enter Malaysia if he is in possession of a valid entry permit lawfully issued to him under section 10; his name is endorsed upon a valid entry permit in accordance with section 12, and he is in the company of the holder of the permit; he is in possession of a valid pass lawfully issued to him to enter Malaysia; or he is exempted from this section by an order made under section 55 (Power to exempt by the Minister).

7. Section 9 provides that the Director-General may in his absolute discretion cancel any pass at any time by writing under his hand; or cancel any permit at any time by writing under his hand, if he is satisfied that the presence in Malaysia of the holder of any permit is, or would be, prejudicial to public order, public security, public health or morality in Malaysia.

8. Section 33 of Act No. 155 further allows for the removal, by order of the Director-General, of any person whose presence is unlawful by reason of section 9, 15 or 60 of the Act.

9. Besides that, section 15 provides that a person shall not remain in Malaysia after the cancellation of any permit or certificate; after the making of a declaration; after the expiration of the period of any pass relating to or issued; or after the notification to him, in such manner as may be prescribed, of the cancellation, under any regulations made under this Act, of any pass relating to or issued to him, unless he is otherwise authorized to remain in Malaysia under this Act. Section 60 is a savings provision for immigration laws which are repealed by Act No. 155.

MALTA¹

1. The immigration legislation of Malta does not mention “expulsion”, but rather “removal” and “deportation”. Both issues are distinct. The former is the result of a removal order issued by the Principal Immigration Officer, while the latter follows the issue of a deportation order by the Minister responsible for immigration.

2. Removal orders are issued to prohibited immigrants in line with articles 5 and 14 of chapter 217 of the Laws of Malta. Deportation orders are issued according to article 22 of the same Law.

¹ Relevant legislation was enclosed and is available at the Codification Division of the United Nations Office of Legal Affairs.

MEXICO

1. Article 33 of the Political Constitution of the United Mexican States provides that the executive branch shall have the exclusive power to expel from national territory, without the need for a prior court ruling, any alien whose continued presence it deems inexpedient.

2. The General Population Act, enacted in order to regulate factors affecting the size, structure, dynamics and distribution of the population within the national territory in order to ensure that its members share fairly and equitably in the benefits of economic and social development, regulates the process for the expulsion of aliens in accordance with the guidelines set forth in the Constitution. Article 125 of the Act provides that aliens shall be expelled if they engage in any of the following behaviours:

- (a) Aiding, harbouring or abetting an individual in the violation of the Act’s provisions;
- (b) Presenting immigration documents with a signature that is forged or different from the one normally used;
- (c) Failing to leave the national territory within the time period established owing to the cancellation of immigration status;
- (d) Re-entering the national territory after being expelled without having obtained authorization for re-entry;
- (e) Failing to disclose or concealing expulsion status in order to be granted and to obtain a new entry permit;
- (f) After legally obtaining authorization to enter the country, remaining illegally in non-compliance with or violation of the administrative or legal provisions established as conditions for the stay;

(g) Conducting activities not authorized under this Act or under the entry permit granted;

(h) Fraudulently using or claiming possession of an immigration status other than the one granted;

(i) Entering the country without the required documentation;

(j) Attempting to take or takes Mexican citizens or aliens to another country for the purposes of trafficking without the required documentation.

NEW ZEALAND

1. The Immigration Act 1987 (“the Act”) allows for the expulsion of aliens through deportation, revocation of residence permits upon which a person subsequently becomes unlawful, and the removal of persons unlawfully in New Zealand and who are subsequently served with a removal order. The grounds and relevant sections of the Act are set out below:

Deportation

(a) Deportation of persons threatening national security (through Order in Council) under sections 72 and 73 of the Act;

(b) Deportation of criminal offenders (deportation of holders of residence permits following conviction) under section 91 of the Act;

(c) Deportation of exempt person (exempt from the requirement to hold a permit under the Act) following conviction under section 92 of the Act.

Revocation

(d) Revocation of residence permit by immigration officer under section 19 of the Act;

(e) Revocation of residence permit by the Minister of Immigration under section 20 of the Act—on the following grounds only:

(i) Permit granted as a result of administration error (sect. 20 (1) (a));

(ii) Permit was procured by fraud, forgery, false or misleading information or concealment of misleading information (sect. 20 (1) (b));

(iii) Permit was granted to a person who held a visa or other permit which was procured by fraud, forgery, false or misleading information or concealment of misleading information (sect. 20 (1) (c));

(iv) Permit granted to a person who is no longer recognized as a refugee in New Zealand and that earlier recognition was procured by fraud, forgery, false or misleading information or concealment of misleading information (sect. 20 (1) (ca));

(v) Requirements imposed on a permit holder have not been met (sect. 20 (1) (d)).

Removal of persons in New Zealand unlawfully

(f) Persons in New Zealand unlawfully can be detained in custody pending removal from New Zealand (upon issuance of a Removal Order under section 53 of the Act);

(g) A person can be detained pending removal from New Zealand (under section 128) if he or she:

- (i) Has been refused a permit;
- (ii) Is not exempt from the requirement to have a permit under the Act;
- (iii) Fails to apply in the prescribed manner for permit;
- (iv) Is a stowaway;
- (v) Has had a pre-cleared permit revoked.

NORWAY

1. The legal framework applicable to expulsion of foreign nationals is the act of 15 May 2008 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm (Immigration Act) and the regulations of 15 October 2009 regarding the access of foreign nationals to the realm and their stay in the realm (Immigration Regulations).

2. A foreign national may only be expelled from Norwegian territory in pursuance of a decision made in accordance with the Immigration Act.¹ Pursuant to the Immigration Act, sections 66 to 68, a foreign national can be expelled if:

(a) He or she has committed a criminal act, in Norway or abroad (nationals holding a permanent residence permit can only be expelled for serious crimes);

(b) He or she has committed a terrorist act or has provided a safe haven for any person he or she knows has committed such an offence;

(c) Fundamental national interests make it necessary (threats against Norwegian and foreign interests in Norway or against Norwegian interests abroad).

3. Foreign nationals not holding a residence permit may also be expelled if:

(a) He or she has grossly or repeatedly violated the provisions of the Immigration Act, for example by staying in Norway illegally, working here illegally or providing incorrect information to the immigration authorities (for example, by stating an incorrect identity, withholding information that he has another identity in another country, etc.);

(b) He or she evades the implementation of a decision requiring him or her to leave Norway;

(c) He or she is expelled by another Schengen State.

¹ A translation of the law proposal was enclosed and is available at the Codification Division of the United Nations Office of Legal Affairs.

4. According to section 70, a foreign national may not be expelled if this would be a disproportionate measure with regard to the foreign national him/herself or his/her family, having regard for their connection to the country on the one hand and the gravity of the criminal offence on the other. In cases concerning children, the child's best interest shall be a fundamental consideration.

5. A foreign national who is born in Norway, and who subsequently has continuously had a fixed abode here, is, according to section 69, protected against expulsion. European Economic Area (EEA) nationals (citizens of a European Union/ European Free Trade Association country) have extended protection against expulsion in accordance with the relevant EU legislation (*cf.* the Immigration Act, sects. 122 and 123).

PERU

1. Aliens who violate the Aliens Act are subject to penalties, the most severe being expulsion from Peru.

2. Legislative Decree No. 703, which sets out the grounds for expulsion:

Article 64

Expulsion from the country shall occur in the following cases:

- 1. Clandestine or fraudulent entry into Peru;
- 2. A judicial warrant; and
- 3. Anyone who has been ordered to leave or whose stay or residency has been revoked and who has not left Peru.

3. Legislative Decree No. 635 of 3 April 1991, adopting the Penal Code of Peru:

Article 30

Sentences that restrict freedoms include: (1) expatriation (repealed); and (2) in the case of aliens, expulsion from the country.

Article 303

Aliens who have served their sentences shall be expelled from the country, and their return shall be prohibited.

PORTUGAL

1. The general regime on the expulsion of aliens is provided by Law No. 23/2007, of 4 July, and is further regulated by Regulatory Decree No. 84/2007, of 5 November. The former sets out the legal framework for the entry into, stay in, exit and removal of foreign nationals from the national territory.

2. It is important to be aware that Law No. 23/2007 does not apply to:

(a) Nationals of an EU member State, of a State that is Party to the European Economic Area or of a third State with which the EU has concluded an agreement on the free movement of persons;

(b) Nationals of a third State residing in the national territory under the refugee status, who are beneficiaries of subsidiary protection under the asylum provisions or of temporary protection;

(c) Nationals of a third State who are family members of a Portuguese or of a foreign citizen under the preceding subparagraphs.

3. Within this legal background, chapter VIII of Law No. 23/2007 specifically deals with expulsion matters.

4. Article 134 provides for information on the grounds of removal. Without prejudice to the arrangements of the international conventions to which Portugal is bound to, a foreign national shall be expelled when:

(a) Entering or staying illegally in the Portuguese territory;

(b) Endangering national security or offend against public order;

(c) His/her presence or activities in the country are a threat to the interests or dignity of the Portuguese State or of its nationals;

(d) Interfering abusively with the exercise of political rights reserved for national citizens;

(e) Having committed acts that if known to the Portuguese authorities would have prevented his/her entry into the country;

(f) In respect of him or her, there are serious reasons for believing that he/she has committed serious offences or intends to commit such acts, namely within the European Union territory.

5. Notwithstanding the above rules, the following exceptions may apply:

Pursuant to article 135, foreign citizens cannot be expelled from the country should:

(a) They have been born in the Portuguese territory and reside in this very territory;

(b) They be effectively responsible for the care of Portuguese children resident in Portugal;

(c) They have effective parental responsibility for children who are nationals of a third State resident in the Portuguese territory, and for whom they are responsible to provide maintenance, namely in respect of their education;

(d) They live in Portugal since the age of 10 or below and reside there.

6. Furthermore, article 136, paragraph 1, affords wider protection to foreign nationals with long-term resident status in Portugal by establishing that a decision on the judicial expulsion of a long-term resident can only be based on the fact that he/she constitutes a genuine and sufficiently serious threat to public order or public security and should not in any case be based on financial grounds.

7. In particular, where the judicial expulsion is applied as an additional penalty, one should consider that the

conditions for its application depend firstly on the fact that the foreign national is or is not habitually resident in Portugal as well as on the fact that he/she is or is not a permanent resident.

8. A foreign national who is not habitually resident in Portugal can be expelled, if he/she has been convicted for a malicious crime carrying a prison sentence of more than six months or a fine as an alternative to imprisonment for a term exceeding six months. It is essential to note that the grounds for imposing the accessory penalty have to be mandatory and the penalty must be justified and is not *ope legis*.

9. A foreign national who is habitually resident in Portugal can be expelled, if he/she has been convicted for a malicious crime carrying a prison sentence of more than one year. The judge must take into consideration the seriousness of the acts committed by the defendant, his/her character, the possibility of relapse into crime, the degree of social integration, the special prevention and the duration of residence in Portugal.

10. Foreign nationals with long-term resident status in Portugal enjoy enhanced protection under the conditions indicated previously. He/she can only be expelled from the country if there is evidence that he/she constitutes a genuine and sufficiently serious threat to public order or public security.

QATAR

1. The entry and exit, residence and sponsorship of visiting foreigners is regulated by Law No. 4 of 2009, article 1. The terms "deportation" and "order to leave" are clarified as follows:

(a) *Deportation*: any foreigner in respect of whom a deportation order is issued must leave the country;

(b) *Order to leave*: any foreigner who has not entered the country legally must leave.

2. The same law, in article 37, provides reasons for the deportation of foreigners, including the fact that their presence in the country poses a threat to its internal or external security or safety, or damages the national economy, public health or public decency. Without regard to the provisions of any other law, the Minister shall issue an order for the deportation of any foreigner of whom it is proved that his presence in the country poses a threat to its internal or external security or safety, or damages the national economy, public health or public decency.

3. Should any foreigner convicted of a crime or misdemeanour be sentenced to imprisonment, the court may issue a deportation order. The Penal Code, article 77, provides as follows:

Without prejudice to the right of the relevant administrative bodies to deport any foreigner in accordance with the law, the court may, in respect of a foreigner convicted of a crime or misdemeanour who is sentenced to imprisonment, issue a deportation order once the sentence has been served. If the offence for which the penalty is imposed in accordance with the previous paragraph was dishonourable or dishonest, the court must issue a deportation order once the sentence has been served or has lapsed.

4. On the basis of the Penal Code, article 78, the court may issue a deportation order instead of the penalty prescribed for the offence. That article provides as follows:

With respect to misdemeanours, the court may issue a deportation order instead of the penalty prescribed for the offence.

5. Deportation is provided for as a complementary and subordinate penalty as follows:

(a) The Penal Code, article 65, paragraph 7 (deportation), provides that deportation shall be a penalty complementary and subordinate to those provided for in articles 77 and 78, and may be ordered by a judge when the law provides that he may do so;

(b) Article 28, paragraph 4, of the Food Control Law, No. 8 of 1990, provides that if the offender is a foreigner, he may be deported from the country once all the other penalties passed on him have been served.

REPUBLIC OF KOREA¹

1. Expulsion measures are applicable to persons who are non-nationals of the Republic of Korea. The State's right of expulsion is subject to limitations of the expulsion of permanent residents ("F-5" status); protection of human rights; and due process of law. The head of the immigration office or a branch office or the head of a foreigner internment facility may deport non-nationals of the Republic of Korea (referred to in legislation of the Republic of Korea as "foreigners") under the Immigration Control Act (art. 46 of the Immigration Control Act).

2. Under the Act, "deportation" is defined as the expulsion from the Republic of Korea of foreigners who have violated the Immigration Control Act.

3. "Expulsion" in the Commission draft and "deportation" under the Immigration Control Act of the Republic of Korea may be regarded as identical in actual meaning in that both of them apply to foreigners who reside either legally or illegally in the country and that administrative measures are executed regardless of the will of the foreigners.

4. In addition to deportation, a foreigner may be subject to a "Recommendation for Departure" or a "Departure Order" under the Immigration Control Act:

(a) *Recommendation for Departure*: The head of the immigration office or a branch office may recommend that an alien who has committed a minor violation of the Immigration Control Act depart voluntarily from the Republic of Korea (art. 67 of the Immigration Control Act).

(b) *Departure Order*: The head of the immigration office or a branch office, or the head of a foreigner internment facility, may order any foreigner violating the Immigration Control Act to depart from the Republic of Korea specifying a certain period of time with which the foreigner is to voluntarily leave the country (art. 68 of the Immigration Control Act).

Expulsion measures are applicable to non-nationals of the Republic of Korea

5. Legislation regarding the expulsion is applicable to foreigners, non-nationals of the Republic of Korea (art. 2 of the Constitution; art. 46 of the Immigration Control Act; the Nationality Act).

(a) *Dual nationals*

6. Those who are regarded as nationals of the Republic of Korea are not subject to the expulsion. Nationals of the Republic of Korea who have nationalities of both of the Republic of Korea and a foreign country by birth or pursuant to the Nationality Act and who do not choose Korean nationality or do not give up their original nationality (not of the Republic of Korea) are not regarded as nationals of the Republic of Korea and are not exempt from expulsion (arts. 10 and 12 of the Nationality Act).

(b) *Stateless persons*

7. No provisions prescribe the legal status of stateless persons. Some provisions, however, infer that stateless persons are regarded as foreigners in the Republic of Korea and are not exempt from expulsion (art. 8 of the Enforcement Regulations of Immigration Control Act; art. 16 of the Enforcement Decree of the Passport Act).

8. As a contracting party to the Convention relating to the Status of Stateless Persons of 28 September 1954, the Republic of Korea shall not expel a stateless person who is lawfully in its territory, save on grounds of national security or public order (art. 31 of the Convention).

(c) *Refugees*

9. Refugees are persons to whom the Convention relating to the Status of Refugees of 28 July 1951 is applied under article 1 of the Refugee Agreement or article 1 of the Protocol relating to the Status of Refugees (art. 2 of the Immigration Control Act). As a contracting party to the Convention, the Republic of Korea shall not expel a refugee lawfully in their territory save on grounds of national security or public order, and the expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law (art. 32 of the Refugee Convention).

10. In addition, the Republic of Korea shall not expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (art. 33 of the Refugee Convention).

Limitations on the right of expulsion

Limitations on the expulsion of permanent residents ("F-5" status)

11. Foreigners who have a sojourn status that entitles them to permanent residency in the Republic of Korea ("F-5" status under the Immigration Control Act) shall not be deported from the Republic of Korea. However,

¹ The text of several provisions of national legislation relating to the expulsion of aliens was enclosed and is available at the Codification Division of the United Nations Office of Legal Affairs.

there are exceptions for those who have committed insurrection, foreign aggression or other violations of the relevant provisions of the Criminal Act (art. 46, para. 2, of the Immigration Control Act).

12. In 1972, the Supreme Court decided that the expulsion of an overseas Chinese in Korea, who was being expelled from the Republic of Korea having been accused of the violation of Anti-Communist Act in 1970s, was illegal beyond the discretion of the Government as he had been born in the Republic of Korea and had so far worked in the country.

ROMANIA

1. There are three different cases in which the removal of an alien from the territory may be ordered in accordance with Romanian legislation.

2. First, if an alien commits an offence (an act of a criminal nature) and the judge who finds him guilty and sentences him considers that the presence of that alien constitutes a threat to the values protected by criminal law, he may order the expulsion of the alien from the national territory.

3. Secondly, in the event of illegal entry into or illegal residence in the national territory (due to revocation or annulment of the residence permit, expiry of the permanent residence permit or rejection of the application for asylum), the alien in an irregular situation may be returned. This is an administrative measure applied in the absence of the right of residence in Romanian territory.

4. In exceptional cases, where national security is at stake, an alien, even one legally present in Romanian territory, may be declared undesirable by a national court (only one legal instance, the Court of Appeals of Bucharest, is competent to issue such a ruling), if the alien in question had engaged in, was engaging in at the moment the measure was taken, or had the intention (established on the basis of plausible reasons) of engaging in, activities of a nature that could endanger national security or public order.

SERBIA

1. The expulsion of an alien from the territory of Serbia is the criminal sanction of the security measure provided for in the Criminal Code. The Court may expel an alien who has committed a criminal offence for the period of 1 to 10 years.

2. The removal of an alien from the territory of Serbia is the infringement sanction of the protection measure provided for by the Law on Infringements. The Court may remove from the territory of Serbia an alien who has committed an infringement rendering his/her further stay in the country undesirable for a period of six months to three years.

3. In the execution of the protection measure of the removal of an alien from the territory of Serbia, the Ministry of Internal Affairs, as the competent authority, will deny, by a decision, further stay to an alien in Serbia and determine the period within which he/she must leave

Serbia, as well as the period within which he/she must not enter Serbia.

4. The Ministry of Internal Affairs will remove by force an alien who has been pronounced the protection measure of removal or the security measure of expulsion and an alien who is to be returned under an international treaty or an alien staying unlawfully in Serbia or who does not leave Serbia within the period determined for him/her.

SINGAPORE

1. The Immigration Act (chap. 133, 2008 rev. ed.) allows for the removal of certain categories of persons who have already entered Singapore, namely: (a) illegal immigrants; (b) persons whose presence in Singapore is unlawful because they do not possess the necessary permit or certificate; and (c) persons who are prohibited immigrants (who, in turn, are defined as members of the prohibited classes set out in section 8 (3) of the Act).

2. The Banishment Act (chap. 18, 1985 rev. ed.) empowers the Minister for Home Affairs to issue a banishment order or an expulsion order if the Minister is "satisfied after such inquiry or on such written information as he may consider necessary or sufficient that the banishment [or expulsion, as the case may be] ... would be conducive to the good of Singapore". A banishment order may be for the duration of the banished person's natural life or for a specific period of time (see section 5 (1)).

3. Under section 17 of the Mental Health (Care and Treatment) Act 2008 (Act 21 of 2008), the Minister of Health can direct by warrant that a person who is not a Singapore citizen or not domiciled in Singapore, and who is detained under the provisions of the Act in a designated psychiatric institution, be removed to the country of which he is a national or in which he is domiciled. This is conditioned on such removal likely being to the benefit of the person and where proper arrangements have been made for the removal and subsequent care and treatment of the person.

SLOVAKIA

1. The grounds for administrative expulsion of aliens from the territory of Slovakia are laid down in section 57, paragraphs 1 and 2, of Act No. 48/2002 Coll. on stay of aliens and on amending and supplementing other acts as amended (hereinafter referred to as to "the Act on Stay of Aliens"). The above provision of the Act on Stay of Aliens also lays down the duration of the prohibition of entry to the territory of Slovakia as follows:

(a) For a period of five years if the alien:

(i) Endangers the security of the State, public order, health, rights and freedoms of others and—in specifically defined areas—also the natural environment;

(ii) Was finally sentenced for committing an intentional criminal offence, except for receiving the sentence of expulsion;

(iii) Has violated legal provisions on narcotic and psychotropic agents;

(iv) Has submitted false or altered documents or documents of another person during the inspection conducted in compliance with this Act;

(v) Performs an activity that is different from the activity for which he/she was granted a temporary residence permit or a visa;

(vi) Has concluded marriage with the intention to acquire a residence permit;

(b) For a maximum of five years, but not less than one year, if:

(i) The alien unlawfully enters or unlawfully stays on the territory of the Slovak Republic;

(ii) The alien refuses to prove his/her identity in a credible manner;

(iii) The alien staying on the territory of Slovakia on the basis of an international agreement or by a decision of the Government of Slovakia performs activities that are contrary to the international agreement or to the decision of the Government of Slovakia;

(iv) The alien, in the course of proceedings conducted under this Act, knowingly provides untruthful, incomplete or misleading information or submits false or altered documents;

(v) It is established that the grounds based on which the alien was granted a temporary residence permit have ceased to exist without the alien notifying the police department of such fact;

(vi) The alien obstructs the execution of a decision of a State authority; or

(vii) The alien commits a serious violation of or repeatedly violates generally binding legal regulations.

2. If, in addition to the above, the police department finds that the alien's actions seriously endanger the security of the State, it may issue a decision on his/her administrative expulsion, including a prohibition of entry for a maximum of 10 years. The period of the prohibition of entry is determined on the basis of the principle that if the police department establishes the existence of several grounds for administrative expulsion of the alien, the entry prohibition period is determined according to the strictest provision.

SOUTH AFRICA

The grounds for expulsion provided for in the national legislation are illegal entry into the country; contraventions of permits; forged or fraudulently obtained permits; and forged or fraudulently obtained identity documents and passports. An alien is or becomes illegal when he has no residence permit or the residence permit has expired or is withdrawn or when the application for such a permit has been rejected or has been declared a "prohibited" or "undesired" person in terms of the Immigration Act No. 13 of 2002 as amended (the Act). An illegal alien who

has not left South Africa within the time limit prescribed by law may be expelled in the form of deportation.

SWEDEN

Refusal of entry and expulsion of aliens is regulated in chapter 8 of the Aliens Act (2005:716).

Refusal of entry

Section 1

An alien may be refused entry

1. If he or she has no passport when a passport is required to enter or stay in Sweden;

2. If he or she lacks a visa, residence permit or some other permit that is required to enter, stay or work in Sweden;

3. If it comes to light when the alien arrives in Sweden that he or she intends to visit some other Nordic country but lacks the permit required to enter that country;

4. If, on entry, he or she avoids providing requested information, knowingly supplies incorrect information that is of importance for the right to enter Sweden or knowingly suppresses any circumstance that is of importance for that right,

5. If he or she does not meet the requirements for entry laid down in article 5 of the Schengen Convention; or

6. If he or she has been refused entry to or expelled from a State belonging to the European Union or from Iceland, Norway or Switzerland either under the circumstances referred to in chapter 7, section 6, or if the refusal-of-entry or expulsion order has been based on the failure of the alien to follow applicable provisions concerning an alien's entry into or stay in that State.

A European Economic Area national¹ may not be refused entry under the first paragraph, point 1, if he or she can prove his or her identity by a means other than possession of a passport. The same shall apply to a family member of a European Economic Area national who is not a European Economic Area national himself or herself.

A European Economic Area national and a member of his or her family may not be refused entry solely on the grounds that he or she does not fulfil the provisions in article 5.1 (c) of the Schengen Convention concerning sufficient means of subsistence.

Section 2

An alien may be refused entry

1. If it can be assumed that he or she will lack adequate funds for the stay in Sweden or in some other Nordic country that he or she intends to visit or for the journey home;

2. If it can be assumed that during the stay in Sweden or in some other Nordic country he or she will not support himself or herself by honest means or will engage in activities that require a work permit, without having such a permit;

3. If it can be assumed, on the basis of previous imprisonment or some other particular circumstance, that he or she will commit a criminal offence in Sweden or in some other Nordic country;

4. If it can be assumed on the basis of previous activities or otherwise that he or she will engage in sabotage, espionage or unlawful intelligence activities in Sweden or in some other Nordic country; or

5. If, pursuant to the Act on Certain International Sanctions (1996:95), it has been prescribed that he or she may be refused entry.

¹ According to chapter 1, section 3b, of the Aliens Act, a "European Economic Area State" means a State that is covered by the European Economic Area agreement. A "European Economic Area national" means an alien who is a national of a European Economic Area State.

An alien may also be refused entry in other cases when this has been requested by the central aliens authority in another Nordic country and it can be assumed that he or she will otherwise proceed to that country. The first paragraph, point 1, does not apply to a European Economic Area national and the members of his or her family. However, persons other than workers or self-employed persons, persons seeking employment and their family members may be refused entry if any of them, after entering Sweden, proves to be a burden to the social assistance system under the Social Services Act (2001:453).

Section 3

An alien may not be refused entry if he or she on arrival in Sweden had or at some subsequent time has had a residence permit that has become invalid. Nor may entry be refused on the grounds that the alien lacks a residence permit, if during a period when such a permit is required to stay in Sweden he or she instead has had but no longer has a right of residence.

An alien who has a right of residence may not be refused entry.

Section 4

The Swedish Migration Board shall examine the question of refusing entry if

1. The alien is seeking asylum here;
2. The alien has a close family member who is seeking asylum here; or
3. The alien may be refused entry pursuant to section 1, first paragraph, point 6, or section 2, second paragraph.

In other cases both the Swedish Migration Board and the police authority may examine the issue of refusing entry.

If the police authority is in doubt as to whether an alien should be refused entry, the case shall be referred to the Swedish Migration Board.

Section 5

A first instance decision on refusal of entry may not be made later than three months after the first application for a residence permit has been made following arrival in Sweden.

Section 7

An alien who is not refused entry under section 1, point 1 or 2, may be expelled from Sweden if he or she is staying in this country but lacks a passport or the permits required to stay in the country. The Swedish Migration Board examines such expulsion cases.

Expulsion of European Economic Area nationals and their family members on the grounds of public order and security: Section 7a

An alien who has a right of residence may be expelled from Sweden out of consideration for public order and security. If the alien has a right of permanent residence at the time of the expulsion order, however, he or she may only be expelled if there are exceptional grounds for this.

A European Economic Area national who is a child or who has stayed in Sweden during the 10 immediately foregoing years may be expelled only if the decision is absolutely necessary out of consideration for public security.

Expulsion on account of criminal offences: Section 8

An alien may be expelled from Sweden if he or she is convicted of an offence that is punishable by imprisonment. An alien may also be expelled if a court sets aside a suspended sentence or probation that has been imposed on an alien and imposes another penalty.

An alien may, however, only be expelled if he or she is sentenced to a more severe penalty than a fine and

1. If, in view of the type of act involved and other circumstances, it can be assumed that he or she will be guilty of continued criminal activity in this country; or
2. If, in view of the resulting damage, danger or violation of private or public interests, the offence is so serious that he or she should not be allowed to stay.

Section 15

The Act concerning Special Controls in Respect of Aliens (1991:572) contains provisions on expulsion on grounds of national security and on account of anticipated criminal activity under the Act on Criminal Responsibility for Terrorist Offences (2003:148).

SWITZERLAND

See reply contained in *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/604, section A.8, p. 166.

UNITED STATES OF AMERICA

1. United States statutory law concerning the expulsion of non-citizens generally appears in the Immigration and Nationality Act (INA), which is codified as title 8 of the United States Code (USC). United States law does not use the term "expulsion". Instead, the process provided by INA is known as "removal", and the available grounds of removal for non-citizens depend upon whether they have been admitted to the United States. "Admission" is the lawful entry of the non-citizen into the United States after inspection and authorization by an immigration officer (see Immigration and Nationality Act § 101 (a) (13); 8 United States Code § 1101 (a) (13)). Non-citizens who arrive in the United States or who are present within the territory of the United States without having been admitted are inadmissible and may be removed. Non-citizens who have been admitted, including lawful permanent residents of the United States, may be removed if they fall within one or more grounds of "deportability".

2. There are 10 broad grounds of inadmissibility, each of which has a number of subcategories:

—Health-related grounds, such as communicable disease carriers (INA § 212 (a) (1); 8 USC § 1182 (a) (1));

—Criminal grounds, such as individuals who have been convicted of crimes involving moral turpitude or controlled substance offences (INA § 212 (a) (2); 8 USC § 1182 (a) (2));

—National security and related grounds, such as individuals believed to have engaged in espionage or terrorist activity or belonging to terrorist organizations and individuals who have participated in genocide, torture, or extrajudicial killings (INA § 212 (a) (3); 8 USC § 1182 (a) (3));

—Non-citizens a public charge (INA § 212 (a) (4); 8 USC § 1182 (a) (4));

—Non-citizens seeking employment in the United States without proper certifications (INA § 212 (a) (5); 8 USC § 1182 (a) (5));

—Non-citizens who have failed to comply with admission rules, such as those who have entered the United States without permission, procured or attempted to procure admission through fraud, or engaged in smuggling non-citizens into the United States (INA § 212 (a) (6); 8 USC § 1182 (a) (6));

—Non-citizens lacking valid immigration documents to enter or be present in the United States (INA § 212 (a) (7); 8 USC § 1182 (a) (7));

—Non-citizens who are permanently ineligible for United States citizenship (INA § 212 (a) (8); 8 USC § 1182 (a) (8));

—Non-citizens who have previously been removed from the United States or who have accrued significant periods of unauthorized presence (INA § 212 (a) (9); 8 USC § 1182 (a) (9));

—Non-citizens who have engaged in or intend to engage in certain other activities contrary to the public interest, such as polygamy, international child abduction, and renunciation of United States citizenship to avoid taxation (INA § 212 (a) (10); 8 USC § 1182 (a) (10));

3. There are six general grounds of deportability, which overlap to some degree with the grounds of inadmissibility. These include:

—Non-citizens who were admitted but were ineligible for admission at the time that they were admitted, such as those who procured admission because they concealed their inadmissibility. Non-citizens may also be deported where they become inadmissible because they fail to comply with the conditions of their admission, or engaged in certain types of illegal behaviour, such as smuggling of individuals into the United States or marriage fraud (INA § 237 (a) (1); 8 USC § 1227 (a) (1));

—Non-citizens who have been convicted of certain crimes following their admission, including crimes involving moral turpitude, certain controlled substance offences, certain particularly egregious crimes (these are defined as “aggravated felonies” in United States law at INA § 101 (a) (43); 8 USC § 1101 (a) (43)) and domestic violence offences (INA § 237 (a) (2); 8 USC § 1227 (a) (2));

—Non-citizens who failed to comply with registration requirements, falsified documents, or falsely claimed to be a United States citizen (INA § 237 (a) (3); 8 USC § 1227 (a) (3));

—Non-citizens who pose a threat to United States security or other interests, such as those who have engaged in espionage or terrorist activity, whose presence or activities are believed to have potentially adverse foreign policy consequences for the United States, or who participated in Nazi persecution, genocide, or acts of torture or extrajudicial killing (INA § 237 (a) (4); 8 USC § 1227 (a) (4));

—Certain non-citizens who have become public charges within five years of their entry into the United States (INA § 237 (a) (5); 8 USC § 1227 (a) (5));

—Non-citizens who have voted without authorization in any United States political election (INA § 237 (a) (6); 8 USC § 1227 (a) (6)).

4. Non-citizens determined to be “removable” from the United States (i.e. either inadmissible or deportable) may be able to qualify for certain waivers, immigration benefits and forms of humanitarian immigration protection to excuse their removability or withhold their removal. These forms of relief come in many varieties and may require a non-citizen to demonstrate a certain period of

physical presence in the United States, the existence of sponsoring employers or lawfully present family members, rehabilitation following criminal convictions, or a likelihood of persecution or torture if removed to a particular country.

2. Conditions and duration of custody/detention of persons who are being expelled in areas set up for that purpose

ANDORRA

With regard to the conditions and duration of detention for persons awaiting expulsion, it should be noted that anyone receiving an expulsion notice must leave the country immediately, failing which he or she will be held on grounds of failure to obey the administrative authority. The Andorran authorities then proceed as they would in the case of any other offence and the person is brought before a judge.

ARMENIA

According to the Law on Aliens in the Republic of Armenia, an alien may be detained and kept in a special premise, if there are enough grounds to suspect that he/she may escape until the case on expulsion is examined by the court and a decision on expulsion is implemented. Within 48 hours after detention and placement of the alien in a special premise, the authorized State body of the police must apply to the court for permission to detain the alien for up to 90 days.

BAHRAIN¹

Expulsion under the Alien Act of 1965 and amendments thereto

1. The General Directorate takes the following measures in respect of deportees placed in its custody:

(a) It ensures the receipt of wages due and signs a receipt to that effect;

(b) It verifies that there are no obstacles that might delay expulsion, such as criminal or civil orders prohibiting travel, or other judgements that have not been implemented.

2. The General Directorate provides for the needs of aliens against whom expulsion orders (deportation orders) have been issued until they are deported. It also provides them with means of communicating with their relatives and secures the assistance of foreign embassies.

3. Detainees, including foreign workers who have violated employment regulations and persons convicted of criminal offences, are transferred to the General Directorate by the police, the prosecution service and the competent courts. It should be noted that foreign workers fall under the authority of the Labour Market Regulatory Authority and that the General Directorate itself is authorized to detain persons.

¹ The text of relevant legislation has been provided to the Codification Division of the United Nations Office of Legal Affairs.

BELARUS

1. The Constitution of the Republic of Belarus provides that the restriction or deprivation of personal liberty is possible in the instances and in the procedure established by law.
2. The grounds for, and the duration of, administrative detention are laid down in articles 8.2 and 8.4 of the Code of Administrative Procedure and Enforcement.
3. With the approval of the prosecutor, administrative detention may be imposed for the period necessary to execute a deportation order in order to enforce an administrative penalty, namely deportation of the individual subject to this punitive measure.
4. The Code of Administrative Procedure and Enforcement details the rights of detainees, procedural formalities regarding detention and the duties of detention officials. The existence of such regulations in the Code provides significant additional guarantees that the rights and legitimate interests of individuals subject to the administrative procedure, including aliens, will be protected.
5. For example, detained aliens must be informed without delay, in a language that they understand, of the reasons for their detention and of the rights that they possess (part 4, article 8.2, of the Code of Administrative Procedure and Enforcement).
6. Detainees are notified that they are entitled to engage a defence lawyer and to have the services of an interpreter, if they are not proficient or insufficiently proficient in the language of the administrative procedure (articles 2.11 and 4.1 of the Code of Administrative Procedure and Enforcement). Notification of the location of individuals detained for a period of three hours for the commission of an administrative offence, at their request, is provided to adult members of their families, close relatives, their defence lawyer, the employer with whom detainees have employment relations and the administration of the establishment where they study (part 3, article 8.2, of the Code of Administrative Procedure and Enforcement).
7. For administrative detention over three hours, a record is drawn up which indicates: the date and location where it was drawn up; the position, surname, first name and patronymic of the person who drew up the record; and information on the identity of the detainee, the grounds for detention and the time and place of actual detention. The record is made known to the detainee and is signed by the official who drew up the record and also by the detainee (article 8.5 of the Code of Administrative Procedure and Enforcement).
8. The administrative detention of an alien for the execution of a deportation order may be carried out only by officials duly authorized by article 8.3 of the Code of Administrative Procedure and Enforcement, namely, officials of internal affairs bodies, border service agencies or State security bodies.
9. In accordance with article 63 of the Aliens Act, when a decision regarding forcible expulsion is made, the internal affairs or State security bodies, with the approval of the prosecutor, shall take steps to detain the alien for the period necessary for expulsion.
10. Furthermore, expulsion shall be enforced if there is reason to believe that the alien may fail to comply with the expulsion decision by means of voluntary departure, and if the alien has not left Belarus by the deadline stipulated in the expulsion decision by means of voluntary departure.
11. In accordance with the Regulation on procedures for the expulsion of aliens and stateless persons from the Republic of Belarus, approved by Decision No. 146 of the Council of Ministers dated 3 February 2006, the State body making a decision regarding forcible expulsion must notify aliens without delay, in a language that they understand, of the reasons for their detention and of their rights and duties. In addition, aliens detained for the purpose of enforcing their expulsion from Belarus are permitted, with the consent of the head of the competent body, or the person exercising those responsibilities, to meet and to have telephone calls with representatives of diplomatic missions or consular authorities of the State of their nationality or habitual residence. Following a review of the expulsion, an order is issued which indicates the time and place of issuance of the order; the surname, initials and position of the person from the State body that issued the order; information on the alien subject to the order; information on the interpreter (if the alien uses an interpreter's services); the grounds for the decision; the period of prohibition to enter Belarus; and the period and procedure for appeal. The order is signed by the official from the issuing State body and is approved by the head of that body. It is also signed by the alien and by the interpreter, where one is present.
12. In order to implement the Vienna Convention on Consular Relations, article 7 of the Aliens Act establishes that the body detaining an alien to execute a deportation order or to enforce an expulsion must report this detention within three days to the Ministry for Foreign Affairs so that the diplomatic mission or consular authorities of the State of the alien's nationality or habitual residence may be duly informed. Furthermore, in accordance with the new Aliens Act, information on the alien's detention, at his or her request, shall be sent to the Ministry for Foreign Affairs within 24 hours of his or her detention or arrest.
13. Detention measures, as a rule, are not applied to aliens who are under the age of 16 or over the age of 60, or to aliens who have clear signs of disability or are pregnant.
14. Analysis of the detention of aliens by internal affairs bodies for the purpose of executing a deportation order or enforcing an expulsion shows that a period of detention above 30 days is applied to aliens only when the documents for their travel abroad could not be obtained within this period. The late issuance of travel documents and transit visas by diplomatic missions and consular authorities is the main reason for delays in procurement. However, internal affairs bodies encounter situations where the diplomatic missions and consular authorities of some States are not interested in the return of their citizens.

15. Aliens detained for the purpose of executing a deportation order or enforcing an expulsion are held at special institutions of the competent body. Within the system of internal affairs bodies, such special institutions are temporary detention centres.

16. Procedures for detention at these centres were established by Decision No. 194 of the Ministry of Internal Affairs, dated 8 August 2007, "Establishing internal regulations for special institutions of internal affairs bodies discharging an administrative penalty in the form of administrative arrest".

17. Accordingly, persons detained at these centres are provided with individual sleeping places; a place for the storage of personal hygiene items, writing materials, documents and records, clothes and food; as well as bedding, dishes and cutlery. These items are provided free of charge for temporary use during the period of detention at the centres. Dishes and cutlery are handed out at the time of access to food.

18. In accordance with established rules and based on the number of detainees per cell, the following items are for general use in cells: domestic detergent; board games (draughts, chess and dominoes); products for cleaning cells; and sewing needles, scissors and knives used for cutting up food (which may be provided for short-term use under the supervision of staff at the centres). Women with children receive childcare products.

19. Cells are equipped with separate sanitary facilities, a place to access food, and radio and ventilation equipment. Where possible, cells have refrigerators and televisions.

20. Persons detained in these centres receive, free of charge, food of nutritional value adequate for health and strength. In addition, detainees can participate in religious practices, rituals and rites within their cells and, where possible, on premises equipped specifically for such purposes, in accordance with the traditions of their religious denominations, at the centres.

21. Detainees are permitted to receive packages, dispatches and parcels which contain articles of basic necessity as well as seasonal clothes and footwear. They can take daily walks and have access to a lawyer or to another person entitled to render legal assistance.

BOSNIA AND HERZEGOVINA

1. For the purpose of implementing the Law on Movement and Stay of Aliens and Asylum, pursuant to article 98 of this Law, an Immigration Centre, which is a specialized institution for the reception and accommodation of aliens against whom supervision measures have been imposed, was established.

2. Pursuant to article 99, paragraph (1), item (a) of the Law on Movement and Stay of Aliens and Asylum, an alien may be placed under supervision in order to secure the execution of a decision on expulsion. Based upon the decision of the Service for Foreigner's Affairs, an alien may be kept in detention as long as it is necessary to execute the purpose of supervision, or until the reasons for placing an alien in custody change, but not longer than 30 days.

3. Article 102 of the Law on Movement and Stay of Aliens and Asylum defines the execution of the decision placing an alien under supervision and the duration of supervision. The measure of placing an alien under supervision is carried out by accommodating the alien in an institution specialized for the reception of aliens (Immigration Centre). If a measure of expulsion from Bosnia and Herzegovina is imposed against an alien, he/she shall remain under supervision until the moment of his/her forcible removal from the country or as long as is necessary for execution of the purpose of the supervision. The Service for Foreigners' Affairs shall, as long as detention is in force, undertake all necessary measures in order to reduce the duration of the detention to as short a time as possible. The supervision may be extended for up to a further 30 days each time, at most if there exist conditions for imposing supervision. Hence, the total period of supervision imposed against an alien may not exceed 180 days. Decision extending supervision may be rendered not later than seven days prior to expiry of previous decision.

4. Exceptionally, in case that an alien fails to enable his/her removal from the country or it is impossible to remove an alien within 180 days for other reasons, the total duration of supervision may be prolonged for a period longer than 180 days.

BULGARIA

In accordance with article 44 of the Aliens in the Republic of Bulgaria Act, expulsion orders are subject to immediate enforcement (item 3 of para. 4). In cases where the alien on whom a coercive administrative measure has been imposed, has no established identity, obstructs the enforcement of the order, or there is a risk that the alien may abscond, an order on the coercive placement of the alien in a special area for temporary placement of aliens may be issued for the purpose of organizing the expulsion. Such special areas/centres are established within the Migration Directorate of the Ministry of the Interior for the temporary placement of aliens under order of forcible escort to the border of Bulgaria or under expulsion order. Placement continues for as long as the aforementioned circumstances exist or for six months, whichever of the two periods is longer. As an exception, when the person refuses to cooperate with the competent authorities, when receipt of the document necessary for expulsion is delayed, or when the person poses a threat to national security or to public order, the period of temporary placement may be extended additionally to a maximum of 12 months. The existing legislation does not provide for custody/detention of EU citizens and their family members in connection with the imposition of a coercive administrative measure of expulsion.

CANADA

Immigration detention within the Canadian context

(a) Legislative context

1. The framework for the detention programme is outlined in sections 55 to 61 of the Immigration and Refugee Protection Act, and in sections 244 to 250 of the Immigration and Refugee Protection Regulations. The

Act provides officers with the discretionary authority to detain foreign nationals¹ and permanent residents where the officer has reasonable grounds to believe the person is inadmissible to Canada, and:

—The person is considered to be a danger to the public; or

—The person is unlikely to appear (flight risk) for immigration processes, such as examination, hearing or removal.

2. Additionally, the officer may detain a foreign national where the person has not satisfied the officer as to his/her identity.

3. Finally, at a port of entry, a port of entry officer may detain a foreign national or a permanent resident where:

—It is necessary to complete the immigration examination; or

—The officer has reasonable grounds to suspect that the person is inadmissible on grounds of security or for violating human or international rights.

(b) *Legal rights*

4. The Canada Border Services Agency, as the detaining authority, is responsible for ensuring that those detained are informed of their legal rights under the Canadian Charter of Rights and Freedoms, including informing a detained person of the reasons for his or her detention and the right to retain and instruct counsel. In addition, a person detained is informed of his or her right under the Vienna Convention to have the nearest representative of the Government of his or her country of nationality informed of the arrest and detention.

(c) *Review process*

5. A Canada Border Services Agency officer's decision to detain a person under the Immigration and Refugee Protection Act is subject to an independent review by a Member of the Immigration Division of the Immigration and Refugee Board² on a regular basis, that is, after 48 hours, then within the next 7 days and every 30 days thereafter. The Canada Border Services Agency has the authority to release a detainee only prior to the 48 hour review. Thereafter, the authority to offer release rests with the Member of the Immigration Division.³

(d) *Refugee claimants and minors*

6. The Immigration and Refugee Protection Act does not preclude the detention of refugee claimants (asylum

seekers) or minors (children under the age of 18 years) under the aforementioned grounds for detention. In the case of minors, the Immigration and Refugee Protection Act stipulates that detention is to be used as a last resort and the best interests of the child must be considered by decision makers.

(e) *Selective use of detention*

7. The detention policy guidelines state that officers need to consider alternatives to detention, including the imposition of conditions, such as the requirement to report to the Canada Border Services Agency offices or the requirement for cash deposits or financial guarantees.

(f) *Detention facilities*

8. The Canada Border Services Agency operates four immigration holding centres: three for low-risk detainees located in Toronto, Ontario; Montreal, Quebec; and Vancouver, British Columbia; and one for security certificate cases in Kingston, Ontario. Generally, low-risk detainees are those who do not have criminal backgrounds and the reasons for their detention are linked to concerns regarding flight risk or identity. Minors detained as a measure of last resort are held in low-risk immigration holding centres with their parents or guardians.

9. The Canada Border Services Agency relies on provincial correctional facilities to house high-risk detainees, in particular, those with criminality backgrounds as well as those considered to be a danger to the public. Included in the former group are those that move from a criminal hold after serving a criminal sentence to an immigration hold prior to removal, and included in the latter group are security certificate cases.

10. In addition, the Canada Border Services Agency relies on provincial facilities for low-risk cases in areas not served by an immigration holding centre. Co-mingling of immigration detainees exists in all provincial facilities with the exception of one facility located near Lindsay, Ontario, where the Canada Border Services Agency was able to negotiate with its provincial partners a dedicated space for 90 immigration detainees.

(g) *Security certificates*

11. The Kingston Immigration Holding Centre is a Canada Border Services Agency immigration holding centre that is located on the Correctional Service of Canada Federal Reserve at Millhaven Institution. Currently, there is one individual who is a foreign national, being held at the Centre. Four other active security certificate cases have been released on conditions by the federal court and are subject to monitoring by the Canada Border Services Agency. These individuals are subject of a security certificate issued pursuant to section 77 (1) of the Immigration and Refugee Protection Act and have been detained pursuant to paragraph 82 (2) of that Act for a period in excess of two years.

(h) *Independent detention monitoring*

12. In 1999, the Canadian Red Cross began monitoring immigration detention conditions in provincial correctional

¹ "Foreign National" is defined under subsection 2 (1) of the Immigration and Refugee Protection Act as a "person, who is not a Canadian citizen or a permanent resident, and includes a stateless person".

² The Immigration and Refugee Board is an independent and quasi-judicial tribunal.

³ The detention regime for the security certificate process differs (Immigration and Refugee Protection Act, sects. 76–85). Detention is reviewed by a Federal Court Judge. Please see Note on Security Certificate Process.

facilities in British Columbia. With the signing of a Memorandum of Understanding in April 2002, all Canada Border Services Agency facilities are also subject to independent monitoring by the Red Cross. Recently the Red Cross started monitoring immigration detention in Quebec and Alberta provincial facilities. The Canada Border Services Agency is supportive of the Red Cross desire to expand its monitoring programme to all provincial facilities, particularly in Ontario, which historically has the greater volumes across the spectrum of immigration activity, including enforcement. The current Memorandum of Understanding between the Canadian Red Cross and the Canada Border Services Agency was signed on 3 November 2006.

CHINA

1. Aliens who are being expelled independently of or supplementarily to the commission of a crime are detained in custody under different conditions before being expelled. Prior to sentencing, they are subject to forcible deprivation of personal liberty in accordance with the law, and are held in detention facilities. Following sentencing, they are held in prisons administered by judiciary administrative departments. The duration of custody is determined by how long it takes to investigate, prosecute and conclude the case, or by the decision of a court to impose a specific term of detention.

2. Prior to expulsion, aliens who are subject to arrest and investigation under the law for having illegally entered or established residence in China are held in detention facilities operated by the public security organs. The period of detention and investigation is not to exceed one month. For serious or complex cases, this period may be extended by one month by permission of the public security organ at the next higher level. For persons whose nationality is unclear or who cannot be promptly deported, and whose safety cannot be guaranteed following release, the period of detention and investigation may be extended until nationality has been established and the person is deported.

3. China does not have any detention facilities specifically intended for holding aliens; aliens being detained prior to expulsion are subject to the same conditions of detention as Chinese citizens. During their detention, the religious beliefs and cultural customs of aliens are respected.

CROATIA

1. The movement of an alien may be restricted by his/her accommodation at the Aliens Detention Centre if he/she has been arrested, or detained because of the enforced removal which has not started in a period of 24 hours since the apprehension took place, or 48 hours if the case relates to the implementation of an international agreement on readmission.

2. Moreover, the movement of an alien may be also restricted by accommodating him/her at the Aliens Detention Centre in cases when his/her identity needs to be established.

3. Croatia has one reception centre for aliens which may accommodate 96 persons. This centre is an organizational unit of the Croatian Ministry of the Interior.

4. An alien who may not be accommodated at the Aliens Reception Centre because of his/her health conditions, or because of some other specific reasons, shall be accommodated in some other appropriate manner.

5. Aliens shall be accommodated at the Centre for a period of up to 180 days, upon the decision issued by a police administration or a police station.

6. This decision may be appealed at the Republic of Croatia Administrative Court, within 30 days, by filing a complaint.

7. The accommodation of an alien at the Centre may be prolonged for another 180 days in cases where:

(a) His/her identity has not been established;

(b) An alien has, pending the expulsion procedure, applied for asylum or subsidiary protection in order to prevent further deportation procedure;

(c) Preparations for his expulsion have to be completed;

(d) He/she prevented the deportation in some other way.

8. An alien who has applied for asylum or subsidiary protection after having been accommodated in the Aliens Reception Centre shall remain in the Centre until the expiration of his/her accommodation period at the Centre, or until his asylum or subsidiary protection status has been approved.

9. At the Aliens Reception Centre, women are accommodated separately from men, minors stay together with their legal representatives and the members of the same family are accommodated together in separate rooms.

CZECH REPUBLIC

1. The rules for the execution of expulsion orders issued by courts, the detention of offenders awaiting expulsion and the waiver of expulsion orders are contained in section 350*b et seq.* of the Code of Criminal Procedure (Act No. 141/1961, as amended).

2. If the sentenced offender remains at liberty and there is no danger that he or she might abscond or otherwise obstruct the execution of the expulsion order, the judge presiding over the case may allow the offender reasonable time (not more than one month) to arrange his or her personal affairs. At the offender's request and subject to the conditions stated in section 350*b*, paragraph 3, this time can be repeatedly extended, but not for more than 180 days from the date on which the sentence became final.

3. The execution of the expulsion order may be suspended if the offender has applied for international protection in terms of special legislation (Asylum Act, No. 325/1999) and the application is not manifestly unsubstantiated (section 350*b*, paragraph 4), or if the offender has been granted additional protection in terms of section 15*a* of the Aliens Residence Act.

4. If there are substantial grounds for believing that the offender might abscond or otherwise obstruct the execution of the expulsion order, the judge presiding over the case may order the offender's detention. Alternatively, the judge may decide that the offender will be allowed to remain at liberty on bail, recognizance or surety bond. Where necessary, the presiding judge may ask the police to seize the travel documents which are necessary for the execution of the expulsion order.

5. The rules concerning detention, bail, recognizance and surety are contained in chapter four, part one, of the Code of Criminal Procedure (sections 67–74a of the Code).

6. If the offender is in prison or in detention awaiting expulsion, his or her departure from the Czech Republic is organized by the police of the Czech Republic. The police will take over the offender at the prison following an agreement with the presiding judge.

7. The police may detain an alien over 15 years of age who has been served with a notice of commencement of administrative expulsion proceedings or whose administrative expulsion order has become final, if there is a risk that the alien might endanger national security, seriously disrupt public order or obstruct or impede the execution of an administrative expulsion order, or if the alien has already engaged in such actions. If it is necessary to detain an unaccompanied minor alien (between 15 and 18 years of age), the police must appoint a guardian to ensure the protection of the alien's rights and interests.

8. Once the detention order becomes final, the police place the alien in an aliens detention centre (the centres are established and operated by the Ministry of the Interior of the Czech Republic). The police must immediately inform the alien, in a language in which he or she is able to communicate, that he or she is entitled to apply for a judicial review of the detention. The alien must not be detained longer than strictly necessary. The maximum detention period (calculated from the moment of detention) is 180 days for aliens over 18 years of age and 90 days for aliens under 18 years of age.

9. Throughout the detention period, the procedures necessary for the alien's departure from the Czech Republic must be in progress. In addition, the police must examine on a regular basis whether the grounds for detention still apply. If the grounds cease to apply, or if the detention order is cancelled by court, the alien must be released. Detailed rules on the rights and duties of detained aliens and the conditions of their detention are contained in chapter XII of the Aliens Residence Act.

EL SALVADOR

1. The Republic of El Salvador does not use the terms custody, detention and/or restriction of liberty in its procedures relating to the expulsion of aliens. Rather, it has a Centre for Comprehensive Assistance to Migrants. The Centre, which opened its doors on 7 July 2008, was set up to provide shelter/accommodation to aliens with irregular status until such time as their status is resolved. It is extremely important to note that entry into the Centre is voluntary. Aliens who do choose to enter the Centre have all their basic needs met. The Centre has specially designed

dormitories divided into sectors—one for family groups, one for women and one for men. It has also adopted appropriate hygiene measures. Aliens are given food and medical and psychological assistance. There is also an area for physical recreation. Lastly, aliens are allowed to speak to their relatives outside the country by telephone.

2. The procedure for repatriating aliens is dignified, safe, orderly and fast. The Ministry of Foreign Affairs is involved in the process to ensure that the persons concerned have the correct documentation.

3. The amount of time spent at the Centre depends on the person's country of origin, the speed with which the embassy/consulate of the person's country of origin—which may or may not be located inside El Salvador—issues their identity documents and the speed with which arrangements are made for the purchase of a return ticket for travel by air or by land. Such arrangements are usually made by the alien's family. If the family cannot pay for the ticket, these arrangements are made by the Ministry of Justice and Public Security.

FINLAND

1. Section 121 of the Aliens Act lays down the requirements for holding an alien in detention. According to this section, an alien may be ordered to be held in detention if:

1. Taking account of the alien's personal and other circumstances, there are reasonable grounds to believe that the alien will prevent or considerably hinder the issue of a decision concerning him or her or the enforcement of a decision on removing him or her from the country by hiding or in some other way;

2. Holding the alien in detention is necessary for establishing his or her identity; or

3. Taking account of the alien's personal and other circumstances, there are reasonable grounds to believe that he or she will commit an offence in Finland.

2. Holding the alien in detention on grounds that his or her identity is unclear requires that the alien gave unreliable information when the matter was processed or refused to give the required information, or that it otherwise appears that his or her identity cannot be considered established.

3. Section 124 of the Aliens Act provides that the official responsible for the decision on holding the alien in detention shall, without delay and no later than the day after the alien was placed in detention, notify the relevant District Court of the matter.

4. The District Court shall hear the matter concerning the detention of the alien without delay and no later than four days from the date when the alien was placed in detention. The court shall order the detained alien to be released immediately if there are no grounds for holding him or her in detention. The District Court shall, on its own initiative, always rehear the matter no later than two weeks after the detention decision.

GERMANY

Under German aliens law, detention is not possible simply on the grounds of an expulsion. Deportation custody

(section 62 of the Residence Act) must only be applied for and authorized if deportation would be rendered more difficult or obstructed without custody (for example, because there is reason to suspect that the alien wants to avoid deportation). Otherwise, short-term deportation custody (for a period of two weeks) is possible if the deadline for leaving the country has passed and it is certain that the deportation can be performed. Custody to secure deportation may only be authorized for up to six months. An extension of 12 months (to a longest possible duration of 18 months) is possible if the alien is impeding his/her deportation and this is attributable to him/her (for example, lack of cooperation on procuring travel documents).

ITALY

Provisions for the Expulsion of Foreigners from Italian Territory in the Consolidated Text on Immigration and the Condition of the Foreigner

1. Should immediate expulsion not be possible, the foreigner is detained in special Centres for Identification and Expulsion. There are currently 13 of these Centres in Italy.

—The criteria for detaining a person are: rescue of a foreigner; further verification of his/her identity or nationality; the acquisition of travelling documents, unavailability of means of transportation (art. 14, para. 1);

—The comprehensive duration of detention cannot exceed 180 days. The initial detention is for 30 days, which can be extended by judge's order or police chief's request for a further 30 days. Should the citizen resist obtaining the necessary travelling documents or encounter delays, the police chief can request from the judge a further extension of 60 days, to which a further 60 days can be added should the conditions persist (art. 14, para. 5, amended art. 1, para. 22, letter I; Law No. 94/2009);

—It is the judge's responsibility to authorize the detention order within 48 hours;

—The authorization hearing takes place in chambers, at which legal counsel given timely notice must be present; the subject must also be informed in a timely manner and accompanied to the place where the judge will conduct the hearing;

2. General and applicable provisions are:

—The translation of the provision, even in summary form, into a language understood by the subject, or when not possible, into French, English or Spanish, depending on the subject's preference (art. 14, para. 2, of the Consolidated Text);

—The assistance of an attorney of trust;

—Legal aid;

—Assigned legal counsel; and

—Assistance, when necessary, of an interpreter (art. 14, para. 4, of the Consolidated Text).

3. During detention, the foreigner is guaranteed respect for her/his fundamental rights, the freedom to speak with visitors, legal counsel, clerics, and the freedom to communicate even via telephone. She/he is also guaranteed basic health care, socialization programmes and freedom of religion. She/he also has the right to receive visits from household family members, legal counsel, clerics, diplomatic and consular representatives, members of bodies and associations offering social assistance (Presidential Decree No. 394/1999, art. 21).

KUWAIT

It should be noted that responsibility for giving an opinion on these matters lies with the Ministry of the Interior, the body that is the prison administrator and regulator.

LITHUANIA

1. In the presence of grounds for detaining an alien pursuant to the Law, the Police or other law enforcement entity official is entitled to detain the alien for no longer than 48 hours.

2. An alien may be detained for longer than 48 hours by court decision. In this case, aliens are accommodated at the Foreigners' Registration Centre of the State Border Guard Service under the Ministry of the Interior.

3. An alien who is under 18 years of age may be detained in exceptional cases only and considering his best interests.

4. The Foreigners' Registration Centre provides temporary accommodation for aliens who entered Lithuania or are staying in Lithuania unlawfully, as well as for aliens who submitted asylum applications in Lithuania. The Foreigners' Registration Centre performs an investigation of aliens' identity and circumstances of their arrival in Lithuania, and implements the return and expulsion of aliens from Lithuania. The Centre can simultaneously house up to 500 aliens: 300 illegal migrants and 200 asylum-seekers. Persons who receive accommodation at the Foreigners' Registration Centre are entitled to receive legal support guaranteed by the State, free necessary medical aid, and social and other services. The average duration of detention at the Centre of persons to be expelled is approximately two months.

MALAYSIA

1. A banishment order issued pursuant to section 5 of Act No. 79 shall be served on the person by the officer-in-charge of the prison in which the person may be confined, or by a senior police officer.

2. Section 6 of Act No. 79 further provides on the method of execution of the banishment order. Subsection 6 (1) specifies that a banishment order may be carried into execution at any time after the expiration of 14 days from the date of service of that banishment order. This is done upon the issue of a warrant of execution issued and signed by the Minister.

3. No specific time period is stated in Act No. 79 for the duration of custody or detention of the person being expelled. However, subsection 6 (3) requires that the person should be conveyed into the custody of a senior police officer and placed on such means of transport as may be expedient for conveyance to the country of which he is a citizen or to such other place as may be stated in the warrant. Subsection 6 (4) further provides that any banished person in the custody of a senior police officer may be received into and detained in any prison or other suitable place in Malaysia until he is placed for conveyance in accordance with subsection 6 (3).

4. Under section 34 of Act No. 155, a person who is ordered to be removed from Malaysia may be detained in custody for such period as may be necessary for the purpose of making arrangements for that person's removal. Similar to Act No. 79, no specific time period is set. Any person detained in custody may be so detained in any prison, police station or immigration depot, or in any other place appointed for the purpose by the Director-General.

5. Section 34 of Act No. 155 further provides that any person detained under this subsection who appeals under subsection 33 (2) against the order of removal may, in the discretion of the Director-General, be released, pending the determination of his appeal, on such conditions as to furnishing security or otherwise as the Director-General may deem fit.

6. However, subject to the determination of any appeal for removal of persons unlawfully remaining in Malaysia under section 33, any person who is ordered to be removed from Malaysia may be placed on board a suitable vessel or aircraft by any police officer or immigration officer, and may be lawfully detained on board the vessel or aircraft, so long as the vessel or aircraft is within the limits of Malaysia.

MALTA

Persons against whom a removal order has been issued are kept in places of custody as designated by the Minister responsible for immigration. The maximum period of detention in Malta is 18 months according to Government policy.

MEXICO

1. Article 209 of the Regulations of the General Population Act states that when an alien is held at an immigration office because he has violated the General Population Act, the following procedure is followed:

1. A medical examination shall be conducted in order to ascertain the person's physical and psychological condition;

2. He shall be allowed to communicate with a person of his choosing by telephone or by any other means available;

3. His accredited consular representative in Mexico shall be notified immediately and if he does not have a passport, a request for issuance of a passport or travel and identification document shall be made;

4. An inventory of the personal effects he is carrying shall be drawn up and they shall be deposited in a place designated for that purpose;

5. His statement shall be taken during administrative proceedings in the presence of two witnesses and he shall be informed of the accusations against him and of his right to submit evidence and to make any legitimate defence, provided that the immigration authority did not so inform him at the time of his arrest. If necessary, an interpreter shall be provided for this purpose.

2. When the record of the proceedings is drawn up, the alien shall be informed of his right to appoint a representative or person of trust to assist him. The alien shall have access to the file on his case;

6. He shall be provided during his stay with proper accommodation, food, basic toiletries and, if needed, medical care;

7. During his stay, he shall be entitled to receive visits from family members and from his legal representative or person of trust;

8. When families are placed in detention, they shall be housed in the same facility and the authorities shall allow them to live together, in accordance with the applicable administrative provisions; and

9. When the alien is authorized to leave the immigration office, all the belongings taken from him upon admission shall be returned, except any forged documentation that he may have presented.

3. Article 210 of the Regulations provides that the Ministry of the Interior, as the agency of the executive branch responsible for formulating and implementing population policy and for the proceedings related to the implementation of article 33 of the Constitution, shall take a final decision regarding the status of persons subject to expulsion within 15 working days and shall inform the interested party in person, through his legal representative or by certified mail with recorded delivery.

NEW ZEALAND

Deportation

1. Criminal offenders facing deportation following conviction are liable for deportation upon release from imprisonment (including release on parole and home detention).

2. Order for deportation must be made before the expiry of a six-month period after release from imprisonment or date of conviction (if no imprisonment) (sect. 93).

3. The person can be arrested without warrant, placed in custody and can be detained for up to 48 hours (pending departure from New Zealand) under section 97.

4. If person is to be detained for longer than 48 hours then a warrant of commitment must be sought from a District Court judge for the detention of that person to continue (sect. 97).

5. A warrant of commitment allows the person to be detained for a period of 28 days pending that person's deportation from New Zealand. If the person cannot be removed during this period, a further warrant can be sought from a District Court judge for intervals of not more than seven days (sect. 100).

6. If no warrant is granted under section 99, the release shall be conditional upon the person residing at a specified address and complying with reporting conditions pending deportation from New Zealand (sect. 101).

7. Criminal offenders facing deportation following conviction, but not in custody, may be subject to reporting requirements and agreed place of residence pending deportation from New Zealand (sect. 98).

8. Criminal offenders facing deportation have the right of appeal to the Deportation Review Tribunal (sect. 104) for the order to be quashed if it held that it would be “unjust or unduly harsh” and that it would not be against public interest for the person to remain in New Zealand (sect. 105 (1)).

9. Criminal offenders facing deportation also have the right to appeal the legality of the Deportation Order at the High Court of New Zealand through judicial review (Judicature Amendment Act).

10. Persons whose deportation has been ordered on the basis of being a suspected terrorist (under section 73) may appeal to High Court against the Deportation Order (sect. 81).

Revocation

11. Persons who have had their residence permit revoked under sections 19–20 have an obligation to leave New Zealand immediately.

12. Such persons may appeal to the Deportation Review Tribunal to quash the Revocation Order (sect. 22) on humanitarian grounds and/or appeal to the High Court on grounds that decision was erroneous (sect. 21).

Removal of persons in New Zealand unlawfully

13. Such persons may appeal to the Removal Review Authority (under section 47) against their requirement to leave.

14. A person unlawfully in New Zealand and issued with a removal order (under section 53) may be arrested and detained for a period of up to 72 hours (pending departure from New Zealand).

15. If a person is to be detained for longer than 72 hours then a warrant of commitment must be sought from a District Court judge for the detention of that person to continue (sect. 60).

16. A warrant of commitment allows a person to be detained for a period of seven days pending that person’s deportation from New Zealand. If the person cannot be removed during this period a further warrant can be sought from a District Court judge for intervals of not more than seven days (sect. 60).

17. A person detained under section 128 can be detained for up to 48 hours (pending departure from New Zealand).

18. If a person is to be detained for longer than 48 hours, then a warrant of commitment must be sought from the Registrar of the District Court (or Deputy in the Registrar’s absence) for the detention of that person to continue (sect. 128 (7)).

19. A warrant of commitment allows the person to be detained for a period of 28 days pending that person’s deportation from New Zealand. If the person cannot be removed during this period an extension of the warrant can be sought from a District Court judge for intervals of not more than seven days or longer if the judge thinks necessary (sect. 128 (13B)).

20. Such persons may be released in certain cases (sect. 128AA), conditional upon the person residing at a specified address and subject to reporting conditions.

NORWAY

1. The conditions of custody/detention are stated in the Immigration Act, section 106:

A foreign national may be arrested and remanded in custody if

(a) the foreign national refuses to state his or her identity, or there are reasonable grounds for suspicion that the foreign national has given a false identity,

(b) it is most probable that the foreign national will evade the implementation of a decision requiring him or her to leave the realm,

(c) the foreign national fails to do what is necessary to comply with the obligation to obtain a valid travel document, and the intention is to present the foreign national at the foreign service mission of the country concerned in order to have a travel document issued.

2. Remand in custody pursuant to subparagraphs (b) and (c) may be decided for a maximum of four weeks at a time. The period of custody/detention may not exceed 12 weeks (cf. the Immigration Act, sect. 106, third para.). Exemptions can be made if there are particular reasons to exceed the 12-week limit. In all cases regarding arrest and custody a coercive measure may only be applied where there is sufficient reason to do so. A coercive measure may not be applied where doing so would constitute a disproportionate intervention in light of the nature of the case and other factors pursuant to the provisions of the Immigration Act, section 99. This means that arrest and custody should not be resorted to if imposing the seizure of a passport; an obligation of notification or a stay in a specific place pursuant to the provisions of sections 104 and 105, may be used instead.

PERU

1. In Peru, investigations related to violation of the Aliens Act are carried out by the Aliens Division of the Peruvian National Police Department of State Security, which respects human rights and, in this case, the rights of aliens prosecuted for violation of the Aliens Act. These individuals are not imprisoned; at the end of the administrative process they remain under summons. Peru has no detention centre for aliens who violate the Aliens Act.

2. Legal bases:

(a) The Political Constitution:

Article 2, paragraph 24 (a) and (b). Basic rights of the individual: everyone has the right to liberty and to security of the person; thus (a) no one is obligated to do what is not required by law or prevented from doing what is not prohibited by law; (b) no restrictions of personal liberty are permitted, except as provided by law.

(b) Legislative Decree No. 703:

Article 55. Aliens in the Republic have the same rights and obligations as Peruvians, with the exceptions established in the State Constitution, this Decree and other legal provisions of the Republic.

Article 73. The Department of Migration and Naturalization of the Internal Governance Authority (currently the Migration and Naturalization Authority) is responsible for enforcing the penalties established in this Decree and for monitoring the entry into, stay in and exit of aliens from the country, and the Aliens Division of the National Police is responsible for investigating migration violations in accordance with its Organization Act and other legislation.

PORTUGAL

1. A person who has been detained for illegal stay in the national territory has to be brought before a judge within 48 hours after being arrested, as established in the Portuguese Criminal Procedure Code. When brought before Court, the detained person is entitled to legal assistance and a translator if he/she cannot understand or speak the language. The person is entitled to be heard by the judge on the matter or to decline such right.

2. The detention in a temporary accommodation centre always results from a judicial decision and it may not exceed 60 days, as provided for in paragraph 3 of article 146 of Law 23/2007.

QATAR

1. A foreigner who is subject to a judicial deportation order or order to leave may be detained for a period of 30 days, which may be extended for the same period. That provision is made in the law which regulates the entry and exit, residence and sponsorship of visiting foreigners, article 38, which provides that the Minister may, as required, detain a foreigner who is subject to a judicial deportation order for a period of 30 days, which may be extended for the same period.

2. A foreigner who is subject to a judicial deportation order that is not executed may be obliged to reside in a particular place for a period of two weeks, which may be renewed. That provision is made in the law which regulates the entry and exit, residence and sponsorship of visiting foreigners, article 39, which provides that the Minister may order a foreigner who is subject to a judicial deportation order that is not executed to reside in a particular place for a period of two weeks, which may be renewed, rather than detain him. That foreigner must present himself to the security department responsible for that particular place at the times specified in the order issued in that regard until such time as he is deported.

3. Pursuant to the 2009 law that regulates penal and correctional institutions, article 76, special places have been designated for the detention of foreigners who are subject to deportation. That article provides that non-Qatari nationals who are to be deported must be kept temporarily in isolation within the institution until the order for their deportation is executed.

REPUBLIC OF KOREA

1. If it is impossible to immediately repatriate a person who is subject to a deportation order, the head of

the immigration office or a branch office, or the head of a foreigner internment facility may intern him in a foreigner internment room, foreigner internment facility or other place designated by the Minister of Justice until the repatriation is possible (art. 63 of the Immigration Control Act).

2. The Immigration Control Act, however, prescribes that the duration of "detention", that shall be 10 or fewer days (art. 52 of the Immigration Control Act).

ROMANIA

1. In the case of expulsion, as a general rule the order is either enforced when the alien has completed a sentence of imprisonment or, when the sentence is a fine, expulsion may be carried out immediately.

2. If enforcement is not immediate, the alien may be placed in the custody of the authorities and detained in an accommodation facility specially fitted out to meet the appropriate auditions for dealing with aliens. The maximum duration of such placement in an accommodation facility may not exceed two years.

3. In the case of a decision to return an alien, or of a declaration that an alien is an undesirable person, enforcement takes place under escort to the border of Romania (a border crossing point). In cases where enforcement is not possible, the person is assigned to the custody of the State and placed in an accommodation facility. Whereas the maximum duration of placement may not exceed six months in cases of return, in the case of undesirable persons the placement measure ceases when the alien is escorted to the border or to the State of origin.

4. Placement in an accommodation facility constitutes deprivation of liberty to the extent that such a facility is enclosed and specially fitted out and managed by the Romanian immigration authorities for the temporary housing of aliens assigned to the custody of the State.

5. Pursuant to the right to security in the case of deprivation of liberty, persons subject to an order of placement in an accommodation facility are immediately informed, in a language they speak or understand, of the reasons underlying the order and of their rights and obligations while they are housed in the facility. At the same time, that information is communicated to them in writing by the directors of the facility.

6. By law, accommodation facilities are equipped to offer suitable conditions of housing, food, medical care (free medication) and personal hygiene. Persons housed there are entitled to legal assistance, medical care and social services and to respect for their religion, beliefs and cultural values. Minors placed in an accommodation facility have the right to continue their education, with access at no cost to the forms of education compulsory in Romania.

7. Unimpeded communication with the diplomatic or consular personnel of the State of origin accredited in Romania is guaranteed at all times.

SERBIA

1. An alien who has been pronounced the protection measure of removal or the security measure of expulsion and an alien who is to be returned under an international treaty will be removed by force immediately. Exceptionally, if so required by reasons of ensuring removal by force, the alien may be held in custody/detention in the areas of the competent authority, but no longer than 24 hours.

2. The provisions of the Law on Police are applied to the custody/detention of an alien.

3. An alien whom it is not possible to remove by force immediately and an alien whose identity has not been established or who does not possess a travel document, as well as in other instances provided for by law, will have to stay, under increased police supervision, in the Detention Centre for Foreigners of the Ministry of Internal Affairs determined by a decision of the competent authority.

4. The stay in the Detention Centre will last until the removal of the alien by force, but no longer than 90 days. Upon the expiry of the period, an alien can have the stay extended, provided that: his/her identity has not been established; he/she impedes removal by force deliberately; he/she has submitted, during the removal proceedings, an asylum request in order to avoid removal by force.

5. The aggregate time of stay in the Detention Centre will last no longer than 180 days.

6. The time that an alien spent outside the Detention Centre, in prison or in custody/detention, is not included in the time of the stay in the Detention Centre.

SINGAPORE

Immigration Act

1. The legislative framework for the detention of a person being expelled from Singapore by the Controller of Immigration under the Immigration Act is provided for under section 34 of that Act. The main aspects of this framework are as follows:

(a) Such a person may be released at the Controller's discretion if he or she has appealed against the order for his or her removal, pending the determination of the appeal.

(b) Subject to the determination of an appeal against an order for removal, any person who is ordered to be removed from Singapore may be placed on board a suitable vessel, aircraft or train by a police officer or an immigration officer, and may be lawfully detained on board that vessel, aircraft or train, so long as the vessel, aircraft or train is within the limits of Singapore.

(c) Any person who is detained pursuant to an order for his or her removal may be so detained in any prison, police station or immigration depot, or in any other place appointed by the Controller of Immigration, as an interim measure, while the immigration authorities make travel arrangements for the person detained.

2. In addition, any person reasonably believed to be a person liable to removal from Singapore under the Immigration Act may be arrested and detained in any prison, police station or immigration depot for no more than 14 days pending a decision as to whether an order for his or her removal should be made (sect. 35).

3. Persons in custody or detention are accorded basic amenities and facilities, including provisions for personal hygiene, food, water and access to medical treatment. The authorities also ensure that the persons to be detained are medically fit for detention when they are received at the respective facility. Persons in detention or custody have access to legal and consular assistance as their request.

4. The duration of detention varies from case to case, and is influenced by factors including:

(a) The issuance of a travel document from the person's State of origin or citizenship;

(b) The availability of transportation to the State of origin, country of birth or citizenship or any place or port where the person is admissible.

5. As a Contracting Party to the Convention on International Civil Aviation, Singapore State practice on this issue is further guided by the Standards and Recommended Practices in the 12th edition of annex 9 (Facilitation) of the Convention which, regarding the custody of persons to be deported, states that state officers, during the period of custody, shall preserve the dignity of such persons and take no action likely to infringe such dignity.

Banishment Act

6. The legislative framework for the detention of a person being banished or expelled from Singapore under the Banishment Act is provided for under sections 5 to 8 of that Act:

(a) Such a person will be released from detention if he successfully applies to the High Court to set aside the order of banishment or expulsion, on the ground that he is a citizen of Singapore or an exempted person (sections 5 and 8; see also section 10).

(b) Otherwise, after 14 days from the service of the order, the person may be placed on board a ship or other means of transport as may be expedient for conveyance or, if necessary, be received into and detained in any prison or other suitable place in Singapore until he can be so conveyed (sect. 6).

(c) A person may also be released from detention if the Minister orders that the banishment or expulsion order be suspended, subject to certain conditions (sects. 7 and 8).

7. Section 9 of the Banishment Act also provides that, whenever a person detained under the Act appears to the Minister, on the certificate of a registered medical practitioner, to be mentally disordered, the Minister may direct the person's removal to any mental hospital or other fit place of safe custody within Singapore, to be kept and treated until the person is certified to have ceased to be mentally disordered.

Mental Health (Care and Treatment) Act 2008

8. Detention under the auspices of the Mental Health (Care and Treatment) Act 2008 must be in a designated psychiatric institution. Non-nationals so detained are accorded the same treatment as nationals detained under the Act, and are accorded their basic rights, including access to legal and consular assistance.

SLOVAKIA

1. According to section 62, paragraph 1 of the Act on Stay of Aliens, aliens may be detained only for such time as is necessary, but for not more than six months. The police department may decide to extend the detention period by a maximum of 12 months. The detention may be prolonged in case it is necessary to extend the expulsion procedure even if the steps have been taken to carry out administrative expulsion of the alien, either because of inadequate cooperation of the alien or because the alien has not been issued a substitute travel document within the six-month time limit by the diplomatic mission. The detention period may not be extended in case of families with children or vulnerable persons.

2. In the territory of Slovakia, aliens detained pursuant to section 62, paragraph 1 of the Act on Stay of Aliens are placed in one of the two Police Force establishments—Police Detention Centres for Aliens, at Medved'ov and Sečovce. The conditions of detention in Police Detention Centres for Aliens are laid down in sections 63a to 74 of the Act on Stay of Aliens. The details concerning the rights and obligations of aliens detained in the centres are laid down in internal rules of the Police Detention Centres for Aliens.

SOUTH AFRICA

Section 34 (1) of the Immigration Act 13 of 2002 as amended (the Act) provides:

Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director General of Home Affairs, provided that the foreigner concerned:

(a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of the Act;

(b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by a warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such a foreigner;

(c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;

(d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days; and

(e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.

SWEDEN

Detention of aliens is regulated in chapters 10 and 11 of the Aliens Act.

*Chapter 10. Detention and supervision of aliens**Detention**Section 1*

An alien who has attained the age of 18 may be detained if

1. The alien's identity is unclear on arrival in Sweden or when he or she subsequently applies for a residence permit and he or she cannot establish the probability that the identity he or she has stated is correct; and

2. The right of the alien to enter or stay in Sweden cannot be assessed anyway.

An alien who has attained the age of 18 may also be detained if

1. It is necessary to enable an investigation to be conducted on the right of the alien to remain in Sweden;

2. It is probable that the alien will be refused entry or expelled under chapter 8, section 1, 2 or 7; or

3. The purpose is to enforce a refusal-of-entry or expulsion order.

A detention order under the second paragraph, points 2 or 3, may only be issued if there is reason on account of the alien's personal situation or the other circumstances to assume that the alien may otherwise go into hiding or pursue criminal activities in Sweden.

Section 2

A child may be detained if

1. It is probable that the child will be refused entry with immediate enforcement under chapter 8, section 6, or the purpose is to enforce a refusal-of-entry order with immediate enforcement;

2. There is an obvious risk that the child will otherwise go into hiding and thereby jeopardize an enforcement that should not be delayed; and

3. It is not sufficient for the child to be placed under supervision under the provisions of section 7.

A child may also be detained if

1. The purpose is to enforce a refusal-of-entry order in other cases than those in the first paragraph or an expulsion order under chapter 8, section 7 or 8; and

2. On a previous attempt to enforce the order it has not proved sufficient to place the child under supervision under the provisions of section 7, second paragraph.

Section 3

A child may not be separated from both its custodians by detaining the child or its custodian. A child that does not have a custodian in Sweden may only be detained if there are exceptional grounds.

Section 4

An alien may not be detained for investigation pursuant to section 1, second paragraph, point 1, for more than 48 hours.

In other cases an alien who has attained the age of 18 may not be detained for more than two weeks, unless there are exceptional grounds for a longer period. If, however, a refusal-of-entry or expulsion order has been issued, the alien may be detained for at most two months unless there are exceptional grounds for a longer period.

Section 5

A child may not be detained for more than 72 hours or, if there are exceptional grounds, for a further 72 hours.

*Supervision**Section 6*

Subject to the conditions set out in section 1, an alien who has attained the age of 18 may be placed under supervision instead of being detained.

Section 7

Subject to the conditions set out in section 2, first paragraph, points 1 and 2, a child may be placed under supervision.

A child may also be placed under supervision when a refusal-of-entry order has been issued in cases other than those referred to in section 2, first paragraph, or when an expulsion order has been issued under chapter 8, section 7 or 8.

Section 8

Supervision means that the alien is obliged to report to the police authority in the locality or to the Swedish Migration Board at certain times. A supervision order may also require the alien to surrender his or her passport or other identity document.

*Re-examination of detention and supervision**Section 9*

A detention order under section 4, second paragraph, shall be re-examined within two weeks from the date on which enforcement of the order began. In cases where there is a refusal-of-entry or expulsion order, the detention order shall be re-examined within two months from the date on which enforcement of the order began.

A supervision order shall be re-examined within six months from the date of the order.

If the alien is retained in detention or is to remain under supervision, the order shall be re-examined regularly within the same intervals. A detention or supervision order shall be set aside immediately if there are no longer any grounds for the order.

Section 10

A detention or supervision order that is not re-examined within the prescribed period expires.

Section 11

Each re-examination of a detention order shall be preceded by an oral hearing. This also applies to a re-examination of a supervision order, unless it appears obvious in view of the nature of the investigation or other circumstances that an oral hearing is of no importance.

The provisions that apply to oral hearings at a Government authority are set out in chapter 13, sections 1 to 8. Provisions concerning oral hearings in a court are set out in chapter 16.

In cases concerning detention that are handled by the Government, the Government Minister responsible for cases under this Act or the official designated by the Minister may order an oral hearing and instruct a migration court to hold the hearing. The provisions of chapter 13 apply to the hearing, where relevant. A representative of the Government Offices shall attend the oral hearing. The Government Offices may order that other persons shall be heard at the hearing, in addition to the alien. In security cases, what applies is instead that the task of holding an oral hearing may be assigned to the Higher Migration Court.

*Decision-making authorities**Section 12*

Decisions on detention or supervision are taken by the authority or court handling the case.

If an alien who has been detained or placed under supervision is refused entry or expelled, the authority or court that takes this decision shall examine whether or not the alien shall be retained in detention or remain under supervision.

Section 13

The police authority is the case-handling authority

1. From the time when an alien requests to be allowed to enter the country until a case that is to be examined by the Swedish Migration Board is received by the Board or until the alien has left the country; and

2. From the time when the authority receives a refusal-of-entry or expulsion order for enforcement and until enforcement has been carried out, even if the case is subject to examination under chapter 12, sections 18 to 20, but not during the time when the order may not be enforced due to a stay of enforcement order.

Section 14

The Swedish Migration Board is the case-handling authority

1. From the time when the Board receives a case that the Board is required to examine until the Board takes a decision or the alien has left the country or the police authority has received the case or, if the case is appealed, until the case has been received by the migration court or the Migration Court of Appeal; and

2. From the time when the Board receives a refusal-of-entry or expulsion order for enforcement until the order has been enforced or the case has been turned over to the police authority.

The Swedish Migration Board is the case-handling authority for orders with immediate effect, even if the order has been appealed, until the court issues a stay of enforcement order.

Section 15

The Government is the case-handling authority when the case has been received by the ministry responsible for preparing the case.

Decisions in questions of detention and supervision are taken by the Government Minister responsible for the case. The Government may not take a decision to detain or retain anyone in detention or to place anyone under supervision. The Government may, however, set aside a detention or supervision order.

In a case where a stay of enforcement order can be issued pursuant to chapter 12, section 11, first paragraph, section 12 or section 20, the Government shall not be held to be the case-handling authority until a stay of enforcement order has been issued.

Section 16

In security cases the Migration Court of Appeal is the case-handling authority from the time when the Court receives a case until the ministry responsible for preparing the case receives it.

Section 17

A police authority may, even if it is not the case-handling authority, take a decision to detain an alien or place him or her under supervision, if there is no time to wait for an order from the case-handling authority. Such a decision shall be notified promptly to the case-handling authority and this authority shall then immediately examine whether the detention or supervision decision shall remain in force.

Under section 11 of the Police Act (1984:387), a police officer may take an alien into custody in certain cases pending the decision of the police authority on detention.

If an alien is being subjected to controls with the assistance of the Swedish Customs Service or the Swedish Coast Guard or with the assistance of a specially appointed passport control officer, the customs officer, the Swedish Coast Guard officer and the passport control officer have the same right to take the alien into custody as a police officer has under the second paragraph. The custody shall be reported as promptly as possible to a police officer for examination of whether the measure shall remain in force.

*General provisions on enforcement of detention orders**Section 18*

The Swedish Migration Board is responsible for the enforcement of detention orders.

Section 19

When so requested by the authority or court that has made a detention order the police authority shall provide the assistance needed to enforce the order.

If the Swedish Migration Board so requests, the police authority shall also provide the assistance needed to move an alien being held in detention.

Section 20

The Swedish Migration Board may order that an alien being held in detention shall be placed in a correctional institution, remand centre or police arrest facility if

1. The alien has been expelled under chapter 8, section 8, for a criminal offence;
2. The alien is being held in isolation under chapter 11, section 7, and cannot for security grounds be kept in special premises referred to in chapter 11, section 2, first paragraph; or
3. There are some other exceptional grounds.

Children who are being held in detention may not be placed in a correctional institution, remand centre or police arrest facility.

*Chapter 11. How an alien held in detention shall be treated**Section 1*

An alien who is being held in detention shall be treated humanely and his or her dignity shall be respected.

Activities that concern detention shall be organized in a way that results in the least possible infringement of the alien's integrity and rights.

Section 2

An alien who is being held in detention under this Act shall be kept in premises that have been specially arranged for this purpose. The Swedish Migration Board is responsible for such premises.

The Swedish Migration Board is responsible for the treatment and supervision of an alien who is being held in detention.

The relevant parts of the Act on the Treatment of Detained and Arrested Persons, etc. (1976:371), are applicable to the treatment of an alien who has been placed in a correctional institution, remand centre or police arrest facility under chapter 10, section 20, of this Act. In addition to what follows from the above Act, the alien shall be granted the facilities and privileges that can be permitted taking into consideration good order and security in the institution, remand centre or police arrest facility.

Section 3

An alien who is being held in detention shall be given the opportunity for activities, recreation, physical training and time outdoors.

Section 4

An alien who is being held in detention shall be given the opportunity to receive visits and have contact with persons outside the premises except if the visit or contact would hamper activities concerning the detention in a particular case.

If necessary for reasons of security, a visit may be monitored. A visit by a public counsel or a lawyer who is a member of the Swedish Bar may only be monitored if the counsel or the lawyer personally requests this.

Section 5

An alien who is being held in detention shall have access to the same level of health and medical care as a person who has applied for a residence permit under chapter 4, section 1 or 2, even if the alien has not applied for such a permit.

If an alien who is being held in detention needs hospital care during the period of detention, he or she shall be given the opportunity for such treatment.

The head of operations of the hospital where the alien is being treated shall ensure that the Swedish Migration Board or the person in charge of the premises where the alien shall be kept is notified immediately if the alien wishes to leave or has already left the hospital.

Section 6

An alien who is being held in detention may be prevented from leaving the premises where he or she is being held and may otherwise be subject to the restriction of his or her freedom of movement which is required to achieve the purpose for which the alien is being detained or is necessary for good order and security in the premises.

An alien's freedom of movement may also be restricted if he or she constitutes a serious danger to himself or herself or to others.

Section 7

An alien who is being held in detention and who has attained the age of 18 may be held in isolation from other persons being held in detention if this is necessary for good order and security in the premises or if he or she constitutes a serious danger to himself or herself or to others.

The decision to hold someone in isolation is taken by the Swedish Migration Board. The decision shall be reviewed as often as there is reason to do so, but at least every third day.

An alien who is being kept in isolation because he or she is a danger to himself or herself shall be examined by a doctor as soon as possible.

Section 8

An alien who is being held in detention may not without permission possess alcoholic beverages or other intoxicating substances or anything else that can harm anyone or be detrimental to good order in the premises.

Section 9

If there are reasonable grounds to suspect that an alien who is being held in detention is carrying something on his or her person that the alien is not permitted to possess under section 8 or under the Penal Law on Narcotics (1968:64), a personal search of the alien may be carried out to check this.

When a personal search is carried out, the provisions of chapter 9, section 2, third and fourth paragraphs, are applicable.

Section 10

An alien who is being held in detention may not receive mail without it being examined first, if there are reasonable grounds to suspect that it contains anything that the alien may not have in his or her possession under section 8 or under the Penal Law on Narcotics (1968:64).

If an alien does not permit the opening of the item of mail in his or her presence, the item of mail shall be held on behalf of the alien, but it may not be opened.

An examination may not concern the written content of letters or other documents. Mail from public counsel, lawyers who are members of the Swedish Bar, the United Nations High Commissioner for Refugees or other international bodies that are competent to examine complaints from individuals may never be examined.

Section 11

If property possession of which is forbidden under section 8 or under the Penal Law on Narcotics (1968:64) is found in premises where an alien is being held in detention or on the person of an alien, the property may be retained.

If it can be assumed that an alien has committed an offence by being in possession of or receiving such property or if there is no known owner, the property shall be turned over to the police promptly.

In other cases the property shall be held on behalf of the alien.

Section 12

Property that has been retained under section 10, second paragraph, or section 11, third paragraph, shall be returned to the alien when the order to hold the alien in detention has expired.

Section 13

An alien who is being held in detention is entitled to the daily allowance and the special allowance referred to in sections 17 and 18 of the Act on the Reception of Asylum Seekers, etc. (1994:137).

SWITZERLAND

1. In Switzerland, administrative detention related to the law of aliens falls into three areas: detention at the preparatory stage (Federal Act on Foreign Nationals of 16 December 2005, article 75, *Recueil systématique du droit fédéral* (RS 142.20), detention pending deportation (art. 76) and coercive detention (art. 78).

Detention at the preparatory stage

2. Detention at the preparatory stage ensures removal is enforced. During the preparation of a decision on the residence of a foreign national who has no short-stay, residence or permanent residence permit, detention at the preparatory stage may be ordered for up to six months, if the person concerned:

(a) Refuses during the asylum or removal procedure to disclose his or her identity, submits several applications for asylum using various identities, repeatedly fails to comply with a summons without sufficient reason, or ignores other instructions issued by the authorities in connection with the asylum procedure;

(b) Leaves a designated area or enters a prohibited area;

(c) Enters Swiss territory, despite a ban on entry, and cannot be immediately removed;

(d) Submits an application for asylum after being removed—after a legally binding revocation or non-renewal of a permit—for undermining or endangering public security and order or for constituting a threat to internal or external security;

(e) Submits an application for asylum after expulsion;

(f) Stays unlawfully in Switzerland and submits an application for asylum with the obvious intention of avoiding the imminent enforcement of a removal or expulsion order. Such an intention shall be presumed when the timing of an application for asylum, even when it would have been possible and reasonable earlier, is closely connected with detention, criminal proceedings, the enforcement of a penalty or the issuance of a removal order;

(g) Is criminally prosecuted for or found guilty of posing a serious threat to other persons or seriously endangering their life or physical integrity;

(h) Has been convicted of a crime.

Detention pending deportation

3. After notification of a removal or expulsion order by a court of first instance, the competent authority may

detain the person concerned to ensure enforcement of the order if that person has been previously detained at the preparatory stage. Notice of detention pending deportation may also be given if:

(a) The person leaves a designated area or enters a prohibited area;

(b) The person enters Swiss territory despite a ban on entry, and cannot be immediately removed;

(c) The person is criminally prosecuted for or found guilty of posing a serious threat to other persons or seriously endangering their life or physical integrity;

(d) The person has been convicted of a crime;

(e) The Federal Office for Migration has issued a non-entry decision related to asylum;

(f) Specific evidence or the behaviour of the person leads to the conclusion that he or she refuses to comply with the instructions of the authorities;

(g) The removal decision related to asylum is notified at a registration centre.

4. Detention pending deportation cannot last for more than three months under current legislation but may, if specific obstacles prevent enforcement of the removal or expulsion order, be extended for up to a maximum of 15 months for adults, subject to the agreement of the judicial authorities. It may be extended for up to a maximum of nine months for minors from 15 to 18 years of age. The decision to order detention pending deportation is taken by the cantonal authorities. The Confederation is only competent to order 20 days' detention in cases of asylum if the registration centre reaches a non-entry decision.

Coercive detention

5. If the foreign national has not obeyed the order to leave Switzerland by the established deadline and if the legally enforceable removal or expulsion order cannot be executed because of that person's behaviour, the person may be detained to ensure he or she will actually leave the country.

6. Coercive detention, by its very nature, is subsidiary to detention pending deportation and to other less coercive measures that would achieve the intended objective. It may be initially ordered for one month and extended for two months, subject to the agreement of the judicial authority, if the person is still not willing to change his or her behaviour and leave the country. The maximum length of coercive detention is 18 months for adults and 9 months for minors from 15 to 18 years of age.

7. In addition to the three types of administrative detention, the law provides for the possibility of custody for three days (notification of the order and establishment of identity or nationality), and detention pending deportation in cases of non-cooperation in obtaining travel documents for up to 60 days. In addition, a person may have a place

of residence designated and be prohibited from entering a given area if he or she disturbs or threatens public security and order or does not respect the deadline established for leaving the country.

8. In Switzerland, the cantons are responsible for enforcing removal orders. Coercive measures are therefore ordered by the authorities of the canton enforcing the removal or expulsion. The cantons ensure that a person in Switzerland designated by the detainee is notified. The detainee may meet and correspond with his or her legal representative.

9. Administrative detention must take place in appropriate facilities, care being taken not to place persons to be removed with persons in preventive detention or serving a sentence. Persons in detention must, to the extent possible, be able to engage in suitable activities. The legality and appropriateness of detention are reviewed within 96 hours by a legal authority after an oral hearing. During the review of the decision to issue, extend or revoke a detention order, the legal authority takes into account the detainee's family situation and conditions of enforcement of the detention. In no event may an order of detention prior to removal or expulsion be issued in cases involving children and young people under 15 years of age.

10. Detention at the preparatory stage, detention pending deportation and coercive detention may not last for more than 24 months in total. Detention of minors from 15 to 18 years of age may not last for more than 12 months in total. Furthermore, the competent authority must reach a decision without delay regarding the right of residence of a person placed in administrative detention (principle of expeditiousness).

UNITED STATES OF AMERICA

Conditions of custody

1. The United States is committed to safe, humane and appropriate detention of individuals who must be detained for reasons relating to their removal from the United States.

2. The former Immigration and Naturalization Service, the authorities of which were transferred to the Department of Homeland Security in March 2003, initially drafted and published 36 National Detention Standards in September 2000 to facilitate its provision of consistent conditions of detention, access to legal representation and safe and secure operations across its detention facilities nationwide. Simultaneously, those standards also served to establish a clear baseline for the agency's review of detention operations in the field, so that each detention facility housing aliens who are expelled from the United States after being found to be removable could be held accountable for any non-compliance with those standards.

3. Several years later, in 2008, after the dissolution of the legacy Immigration and Naturalization Service and the formation of United States Immigration and Customs Enforcement (ICE), ICE reviewed and redrafted those standards based on lessons learned during the implementation of the National Detention Standards. Evidencing progression since the drafting of the original 2000 National

Detention Standards, the revised detention standards, now known as the Performance-Based National Detention Standards, were drafted in consultation with different ICE components and the Department of Homeland Security's Office of Civil Rights and Civil Liberties. As part of the revision process, hundreds of concerns that were raised by non-governmental organizations, among other interest groups, were reviewed and addressed.

4. Although the Performance-Based National Detention Standards are again currently under review and revision, based on additional feedback that ICE received from non-governmental organizations and legal rights groups, among other stakeholders, the revision and prospective nationwide implementation of the Performance-Based National Detention Standards is evidence of the United States Government's ongoing commitment to ensuring that all detained non-citizens are humanely treated.

5. United States law also affords particular protections for unaccompanied non-citizen children who arrive in the United States but are not admissible. In those circumstances, the Department of Health and Human Services' Office of Refugee Resettlement is responsible for placing such non-citizen children in the appropriate and least restrictive setting during any detention prior to removal.

Duration of custody

6. Although the Department of Homeland Security generally may detain non-citizens to ensure their appearance during the pendency of their immigration proceedings, in many instances non-citizens need not be physically detained by the Department throughout those proceedings (see INA § 236 (a)).

7. For certain classes of non-citizens (such as those who pose a threat to the national security), United States law requires that they be detained pending issuance of an administrative order of removal (see INA § 236 (c)).

8. Non-citizens arriving in the United States without a valid entry document may be subject to expedited removal (see INA § 235 (b)). If, however, the non-citizen establishes a credible fear of persecution or torture, the non-citizen will be afforded a normal removal hearing and, if he or she adequately establishes his or her identity and poses neither a flight risk nor a danger to the community, will be released from custody, save in exceptional circumstances.

9. If a non-citizen, through the administrative process, is found to be in violation of United States immigration laws, in general they must be detained until they are removed (which generally must occur within 90 days of the final completion of the administrative process) (see INA § 241 (a) (1) (A), (2)).

10. Beyond these statutory parameters, United States Supreme Court precedent mandates that a non-citizen's detention (for purposes of removal) cannot be for an indefinite duration. More specifically, upon receipt of an administratively final order of removal, a non-citizen generally can only be detained so long as his or her removal is deemed significantly likely in the reasonably foreseeable future. Once it has been established that this

condition cannot be met, the Supreme Court held that a non-citizen generally may not be further detained (see *Zadvydas v. Davis*¹).

¹ *Kestutis Zadvydas v. Christine G. Davis*, 533 U.S. 678, at p. 699.

3. Whether a person who has been unlawfully expelled has a right to return to the expelling State*

ANDORRA

If, following administrative or judicial review, the expulsion order is found not to be in conformity with the law, the legal situation of the person concerned reverts to what it was immediately prior to the issuance of the expulsion measure and, as a result, the person can enter the Principality of Andorra.

ARMENIA

The fact of unlawful removal of an alien cannot serve as grounds for entry visa rejection. If an expulsion decision is appealed and the appellate court overturns the decision of the lower court, all the rights, which the alien had possessed prior to his/her initial expulsion decision, are restored.

BELARUS

1. The Constitution of the Republic of Belarus establishes the right of all persons concerned, in accordance with the established procedure, to seek redress in the courts to protect their violated or disputed rights or their interests protected by law.

2. In accordance with the Aliens Act, the decision of a State body regarding expulsion may be appealed against by aliens or their representatives before a higher State body and/or a court within 30 days of notification of the decision. However, it should be noted that under the new Aliens Act a judicial review of the decision of a State body regarding expulsion takes place only following the appeal against such a decision before a higher State body. An appeal against the expulsion decision must be brought before a higher State body within one month of notification of such a decision.

3. An expulsion order is annulled where there are circumstances indicating that the expulsion decision was unlawful or unjustified.

4. In accordance with the Code of Administrative Procedure and Enforcement, a deportation order may be appealed before a higher body, or before a court, by the person for whom it was issued, by his or her representative or defence lawyer, or by the prosecutor, within five days of receipt of a copy of the order and within one day of notification if the order was issued in the presence of the person to be deported. Furthermore, the appeal decision delivered by a higher body may be reviewed by a court upon appeal by the aforementioned persons or by the prosecutor and the appeal decision delivered by a court may be reviewed

by the president of a higher court within six months of the entry into force of a deportation order.

5. Deportation orders are annulled where it is established that there has been unilateralism, incompleteness or a biased investigation of the facts of an administrative violation; a substantive violation of the Code of Administrative Procedure and Enforcement; and misapplication of the rules establishing administrative responsibility. Furthermore, deportation orders may be annulled or amended if the administrative penalty imposed does not correspond to the gravity of the administrative violation committed.

6. The annulment of deportation or expulsion orders implies the revocation of restrictions related to the prohibition of entry to Belarus by aliens subject to these decisions. Accordingly, such aliens are removed from the list of persons whose entry into the Republic of Belarus is prohibited or undesirable. They are consequently entitled to return to Belarus.

BOSNIA AND HERZEGOVINA

1. In accordance with the Law on Movement and Stay of Aliens and Asylum, an appeal may be filed against the decision on expulsion of an alien from Bosnia and Herzegovina to the Seat of the Ministry of Security within eight days from the receipt of the decision. An appeal shall stay the execution of the decision. The Ministry of Security (in its Seat) shall render a decision on the appeal and shall serve the party without delay and within 15 days at the latest from the day of reception of the appeal.

2. Until the decision becomes enforceable, the alien shall not be removed from Bosnia and Herzegovina. He/she may be placed under supervision or his/her movement may be restricted to a certain area or location and he/she may be ordered to report in specified intervals to the organizational unit of the Service for Foreigner's Affairs in the territory of residence of an alien.

3. Only after enforceability of the decision on expulsion may an alien be removed from Bosnia and Herzegovina. Bringing a civil action has no suspensive effect and shall not stay the execution of the decision on expulsion. If a decision on expulsion is cancelled by the court having jurisdiction over civil action and if an expulsion measure is not pronounced in renewed procedure upon the court's instructions from judgement, there are no legal consequences for the alien regarding the prohibition of new entry or stay in Bosnia and Herzegovina for the period which has been defined as the period of prohibition of entry in the first degree decision.

CHINA

No cases of unlawful expulsion of aliens have occurred in China.

CROATIA

If the decision on removal has been abolished, an alien has the right to re-enter the Republic of Croatia and to stay in the country under the general conditions of entry and stay of aliens.

* See also section A.5 above.

CZECH REPUBLIC

1. In the case of court-ordered expulsions, the expellee's right to return depends on the result of his or her appeal (if any) from the judgement which included the expulsion order. The administrative expulsion order is subject to the general laws and regulations governing the administrative procedure. An alien who does not accept the first-instance decision may file an appeal with a higher administrative authority within the statutory deadline. Second-instance administrative decisions are reviewable by court. This procedure offers sufficient safeguards against wrongful administrative expulsions.

2. During the period for which the alien is barred from re-entry, the police may, at the alien's request, subject to conditions set by law:

(a) Grant the alien a single entry visa in case he or she is summoned to appear before a public authority in the Czech Republic, e.g., before a court (the Aliens Residence Act makes additional provisions for other serious situations, such as funerals of relatives in the Czech Republic); or

(b) Annul the administrative expulsion order.

3. The administrative expulsion order may be annulled at the alien's request if:

(a) The grounds for expulsion have ceased to apply, but not earlier than upon the expiry of one half of the period for which the alien is barred from re-entry; or

(b) The alien had been placed in alternative care, has reached the age of 18 years and the authority responsible for social and legal protection of children is satisfied that he or she is making an effort to integrate in the Czech Republic.

EL SALVADOR

1. Article 5 of the Constitution of the Republic states the following: "All persons shall have freedom to enter, to remain in and to leave the territory of the Republic, subject to any limitations that the law may establish".

2. These limitations include:

(a) *Participation in domestic politics*: The second paragraph of article 97 of the Constitution of the Republic states the following: "Aliens who directly or indirectly participate in the country's domestic politics shall lose the right to reside in the country".

(b) *Judicial order*: Article 60 of the Penal Code states the following: "The sentence of expulsion from the national territory for aliens shall include immediate enforced departure from the national territory once the main sentence has been served and a ban on returning to the national territory for a maximum of five years, at the judge's discretion".

(c) Article 2 of the Aliens Act states the following: "All persons shall have freedom to enter and to leave the territory of the Republic, subject to any limitations that this law may establish".

(d) Article 4 of the Migration Act states the following: "The Ministry of Justice and Public Security may close maritime, air and land entry points and prohibit the entry and exit of aliens when national needs so require".

FINLAND

A decision on removal from Finland may not be enforced until a final decision has been issued on the matter. Applying for leave to appeal from the Supreme Administrative Court does not prevent the enforcement of the removal decision unless otherwise ordered by the Supreme Administrative Court. The deported alien may return to Finland if the removal decision has been enforced and the Supreme Administrative Court, after the enforcement, has quashed it.

GERMANY

1. 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.

2. 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, para. 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).

3. 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.

ITALY

Provisions for the Expulsion of Foreigners from Italian Territory in the Consolidated Text on Immigration and the Condition of the Foreigner

1. Appeals of administrative expulsion measures can be brought before judicial (judge or court) or the regional administrative court authorities, depending on which authority ordered the measure (art. 13, paras. 5 *bis*, 8 and 11 of the Consolidated Text, art. 3, para. 4, of Law No. 155/2005 and Law No. 271/2004). The filing of an appeal does not automatically halt the expulsion process. It can be presented to an Italian diplomatic or consular authority. Should the judicial authority grant the appeal by final decision, the foreigner has the right to return to Italy.

2. Expulsion sentences issued as an alternative or substitute for detention can be appealed to a court of appeal and are subject to general legislation on criminal procedures.

KUWAIT

1. The general principle informing the Kuwaiti Constitution and national legislation is that all persons, whether nationals or foreigners, have the same right to bring lawsuits and appeal against judgements and decisions. Therefore, a foreigner who was unlawfully expelled may appeal against any expulsion order that is supplementary to a criminal judgement. However, a differentiation must be made between criminal and administrative expulsion, as follows:

Criminal expulsion

2. The Kuwaiti Constitution and national legislation certainly grant the same rights with regard to litigation to all persons in Kuwait. Those rights include the right to appeal against criminal judgements and any supplementary penalties, including expulsion. The Constitution, in article 166, guarantees those rights for all, stating that the necessary procedures are laid down in the law.

3. On the same issue, the Code of Criminal Procedure and Judicial Proceedings (decree No. 60/17), sets forth a number of ways in which an appeal may be brought against a criminal judgement, including one passed *in absentia*. Article 187 of that Code provides that an appeal may be brought against a sentence passed *in absentia* for a crime or misdemeanour. Such an appeal must be brought before the court which passed the sentence.

4. In article 199, the Code also gives a person on whom judgement has been passed the right to appeal against a preliminary ruling of culpability or innocence that is passed by the criminal courts or the misdemeanour courts, whether that ruling was passed in the defendant's presence or *in absentia*, when an appeal was lodged or when the term has elapsed with no appeal having been brought.

5. In all cases, if a criminal ruling is to be executed, it must, as provided in article 214 of the Code, have been determined to be enforceable, other than in exceptional cases where the judge believes that there is a need to execute the criminal judgement in the first instance.

6. With regard to the possible return of a foreigner whose criminal expulsion was not in accordance with the law, the final outcome depends on the judgement that is passed on the appeal that is brought against his expulsion by the deportee.

Administrative expulsion

7. It should be noted that in article 1, Law No. 20 of 1981, concerning the establishment of a department within the Full Court to consider administrative disputes, provides that requests presented by individuals with respect to the repeal of final administrative decisions passed on the residence and expulsion of non-Kuwaitis do not fall within the remit of the department of administrative disputes. It is therefore not possible for a deportee to lodge an appeal against expulsion directly with that department of the Full Court, notwithstanding the fact that the Constitution, in article 169, set forth a general principle with regard to administrative disputes and appeals. The article provided that, under the law, administrative disputes are to

be settled in a special room or court, using procedures that are set forth in the law. That room or court has authority to repeal or provide compensation for wrongful administrative decisions.

8. In view of the foregoing, it can be said that, with regard to administrative expulsion, the alien may return if the proper procedures were not observed, unless the administrative authorities decide otherwise.

LITHUANIA

1. The decision regarding expulsion from Lithuania may be appealed against to the Vilnius Regional Administrative Court within 14 days from the day of service of the decision. In this case, the implementation of the decision taken is suspended.

2. The decision regarding the expulsion of an alien or a decision regarding the possibility of implementing a decision taken by another State, which has not come into effect, may be implemented only in the case where the alien declares in writing that he agrees with the decision taken regarding his expulsion or with the decision regarding the possibility of implementing the decision taken by another State and agrees to be expelled prior to the expiry of the term set for appealing against the said decisions.

3. If the alien does not agree to being expelled prior to the expiry of the term set for appealing against a decision and appeals against the decision in court, the expulsion of the alien is possible only after the coming into effect of the relevant court ruling.

4. The situation where an alien is expelled unlawfully is not possible and no such instances have ever occurred.

5. An alien who was obliged to leave Lithuania, was expelled from it or returned to the country of origin or another foreign country, may be prohibited from entering Lithuania for a limited or unlimited time period. The prohibition from entering Lithuania may be disregarded in cases where the alien voluntarily agreed and was returned to the country of origin or another foreign country which he had the right to enter.

MALAYSIA

1. Section 8 of Act No. 79 provides that the Minister may, if he thinks fit, in place of issuing a warrant of arrest and detention or in place of making a banishment order, make an order requiring any person who he is satisfied is not a citizen or an exempted person to leave Malaysia before the expiration of a period of 14 days from the date of service of the order. Section 8 (4) of Act No. 79 further provides that a copy of the expulsion order shall be served on the person against whom it is made by a senior police officer, or by any other person authorized by the Minister to serve the order and shall be served personally on that person in the same manner as a summons is required to be served under the Criminal Procedure Code [Act No. 593], and the officer or person serving the copy shall notify the person against whom it is made that he may at any time within 14 days of the service apply to the High Court for an order that the expulsion order be set aside on the ground that he is a citizen or an exempted person.

2. Section 10 of Act No. 79 provides that any person in respect of whom an expulsion order has been made may within 14 days of the service of a copy of the expulsion order under section 8 (4), apply to the High Court for an order that the expulsion order be set aside on the ground that he is a citizen or an exempted person; and if it be proved on that application that the person is a citizen or an exempted person, the High Court shall set aside the expulsion order, as the case may be, and direct that the applicant be set at liberty.

3. It must be noted that the above situation applies when the person is actually still in Malaysia at the moment when he succeeds in setting aside the expulsion order and eventually is set at liberty.

4. 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 Act No. 155. In other words, he will only be allowed to enter Malaysia if he possesses a valid entry permit or pass.

5. Further, under section 36 of Act No. 155, any person who, having been lawfully removed or otherwise sent out of Malaysia, unlawfully enters Malaysia or unlawfully resides in Malaysia, shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding 10,000 ringgit or to imprisonment for a term not exceeding five years or to both and shall also be liable to whipping of not more than six strokes, and shall, in addition to any penalty for the offence, be removed or again removed, as the case may be, from Malaysia.

MALTA

1. Persons who are removed following the issue of a removal order have the right to appeal from this decision and they are not removed until the Immigration Appeals Board decides on their claim. This is considered to be a safeguard in order to avoid having cases of "unlawfully expelled" migrants.

2. Whoever is expelled may request re-entry to the Principal Immigration Officer.

MEXICO

1. Article 126 of the General Population Act empowers the National Immigration Institute, the federal agency responsible for immigration movements, to readmit an alien after expulsion.

2. The readmission process shall be conducted through a readmission agreement issued by the Ministry of the Interior or the respective department.

NEW ZEALAND

1. Persons expelled from New Zealand by means of a Deportation Order are exempt from returning to New Zealand indefinitely (sect. 7 (1) (d)).

2. Persons expelled from New Zealand by means of a Removal Order are exempt from returning to New Zealand for five years while the Removal Order is still in force (sect. 57).

NORWAY

An expelled person may lodge an administrative appeal to the Immigration Appeals Board, submit a complaint to the Parliamentary Ombudsman or bring the case before the courts. If the expulsion is found unlawful, the consequence as a main rule is that the prohibition on entry is lifted. The person may return to Norway if the general conditions to entry pursuant to the Immigration Act are fulfilled.

PERU

1. In order for a sentence to have legal effect, it must be the outcome of an administrative procedure conducted according to the principle of due process (established in Act No. 27444, the Administrative Procedure Act).

2. An alien faced with expulsion may enter an administrative appeal (Act No. 27444), on the grounds of fact or of law, through a Peruvian consulate abroad. The competent administrative authority shall decide whether to confirm the judgement or to annul the effect of the administrative sentence of expulsion so that the individual can re-enter Peru.

3. The Aliens Act does not establish the number of years that an alien must remain outside Peru, following expulsion, before being eligible to return to the country.

PORTUGAL

An unlawful expulsion cannot have the same legal effect as that of a lawful expulsion, meaning the prohibition to return to the State that expels a person for a certain period. When an unlawful expulsion of an alien with a valid stay visa in Portugal takes place, the alien has the right to return to Portugal and must be duly informed of such right.

QATAR

1. The law which regulates the entry and exit, residence and sponsorship of visiting foreigners, article 40, provides that any foreigner in respect of whom a judicial deportation order was issued or who was otherwise expelled may only return at the decree of the Minister.

2. Such a foreigner may also return if he fulfils the conditions necessary for entry that are provided for in the law which regulates the entry and exit, residence and sponsorship of visiting foreigners, article 41:

Any foreigner who does not obtain a residence permit, or whose permit has expired, shall leave the country and may return provided he fulfils the conditions necessary for entry that are provided for in this law.

REPUBLIC OF KOREA

1. There are no provisions under the Immigration Control Act for the right of an expelled person to return to the expelling State.

2. However, a person who has been unlawfully expelled may challenge the expulsion using local remedies such

as administrative appeals and administrative litigation (First periodic reports of States Parties under the International Covenant on Civil and Political Rights: Republic of Korea).

Administrative appeals

3. *Definition.* Administrative measures to relieve citizens from any infringement of rights or interests due to an illegal or unreasonable disposition or other exercise or non-exercise of public power by administrative agencies to achieve a proper operation of administration (art. 1 of Administrative Appeals Act).

4. *Conditions.* An appeal in writing for revocation may be filed by a person having legal interests to seek the revocation or alteration of a disposition, against the administrative agencies that have made the disposition, within 90 days from the date on which the appellant knows that a disposition has been made (arts. 13, 17, 27 and 28 of the Administrative Appeals Act).

5. *Binding force.* A ruling shall be binding to the administrative agency, which is an appellee, and other administrative agencies concerned (art. 49 of the Administrative Appeals Act).

Administrative litigation

6. *Definition.* Legal procedures to relieve citizens from the infringement of their rights or interests by the illegal dispositions of administrative agencies and the exercise or non-exercise of public power, and settle properly disputes over the rights involved in public law or the application of law (art. 1 of the Administrative Litigation Act).

7. *Conditions.* The revocation litigation may be instituted by a person having legal interests to seek the revocation of a disposition against the administrative agency that has made the disposition, within 90 days from the date a disposition is known, regardless of the institution of administrative appeals (arts. 12, 13, 18 and 20 of the Administrative Litigation Act).

8. *Binding force.* A final judgement revoking a disposition shall be binding on the parties, and other administrative agencies involved in the case. The judgement shall also have effect on a third person, as appropriate (arts. 29 and 30 of the Administrative Litigation Act).

ROMANIA

1. In the case of expulsion, the order may be contested in the national appeals courts, as may a guilty verdict. If the judges of a higher court decide to revoke the order, the final disposition will retain no reference to the order and the person will remain in Romanian territory, regardless of the decision reached as to guilt.

2. 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).¹

3. In the case of return, the decision may be contested and introduction of the appeal automatically suspends the enforcement of the order. In this case, no irreversible action may be taken.

4. An appeal against being declared as an undesirable alien does not automatically suspend enforcement of the order, but in the event of a well-founded claim by the alien, the court may decide to suspend its enforcement so as to prevent the causing of irreparable harm.

5. In the case of annulment or revocation of the order after its enforcement, annulment or revocation will expunge its effects, that is, the removal from the territory and the harm caused by the enforcement of such an order.

¹ ECHR, *Kordoghliazar v. Romania*, Application No. 8776/05, decision of 20 May 2008.

SERBIA

1. Upon the expiry of the protection measure of removal, security measure of expulsion and the ban of entry into Serbia, an alien may return.

2. If, following a complaint, a decision brought in the first-instance court proceedings (protection measure of removal or a security measure of expulsion) and in the administrative proceedings (denial of stay and a ban of entry) has been overturned or altered to the benefit of the complainant, he/she has a right to return.

SINGAPORE

Immigration Act

1. To avoid unlawful expulsions, Singapore law provides for the right of appeal and/or review by persons being expelled before actual removal/expulsion takes place, under section 33 (2) of the Immigration Act.

2. For persons already expelled, if it can be shown that the removal/expulsion was unlawful, legal mechanisms exist for the revocation of the order for removal.

3. However, revocation of the order does not give rise to any automatic right of return to Singapore, as eligibility to enter Singapore would still be subject to Singapore law governing immigration, specifically, the Immigration Act. In the case of refusal of permission to enter Singapore, the Immigration Act also provides recourse for a person to appeal. The appeal should be lodged within seven days of receiving notice of such a refusal, by making a petition in writing to the Minister for Home Affairs through the Controller of Immigration.

Banishment Act

4. As with the Immigration Act, to avoid unlawful expulsions, the Banishment Act provides that a person

subject of a banishment or expulsion order may, at any time within 14 days of being served with such order, apply to the High Court for the order to be set aside on the ground that he is a citizen of Singapore or an exempted person (sects. 5 and 8; also see section 10).

5. Assuming that the banishment order is not for the duration of the banished person's natural life, a person who has been banished or expelled from Singapore under the Act (as the case may be) is not prohibited from entering or residing in Singapore after the expiry of the term of the order, or if the order has been cancelled or revoked, or if the Minister has subsequently exempted that person from the prohibition on entry and residence in Singapore (sect. 14).

6. In any event, there is no automatic right of return to Singapore, as eligibility to enter Singapore would still be subject to Singapore law governing immigration, specifically, the Immigration Act. In the case of refusal to enter Singapore, the Immigration Act provides that an appeal against any refusal of permission to enter Singapore may be lodged within seven days of receiving notice of such a refusal.

Mental Health (Care and Treatment) Act

7. Under section 19 of the Mental Health (Care and Treatment) Act, persons who have been removed from Singapore under section 17 of the Act may only return to Singapore with the permission of the Minister of Health.

SLOVAKIA

1. The provision of section 61 of the Act on Stay of Aliens provides for the possibility of revoking the prohibition of entry to the territory of Slovakia for aliens subject to administrative expulsion who present a proof of having left Slovakia within the deadline fixed in the police department's decision or under the voluntary return regime.

2. Moreover, the above provision of the Act on Stay of Aliens lays down the possibility of entry to Slovakia based on individual entry permits for aliens subject to administrative expulsion or to the prohibition of entry. Aliens subject to administrative expulsion may enter the territory of Slovakia under the following exceptional circumstances:

(a) On humanitarian grounds, in particular death of a significant other or visiting a significant other who is seriously ill; or

(b) If the alien's stay is in the interest of Slovakia and the matter cannot be dealt with abroad.

3. In the above-mentioned cases, the decision on granting the permit to enter Slovakia is made by the Office of Border and Alien Police of the Ministry of Interior of Slovakia.

4. The citizens of the countries of the EEA or third-country nationals with preferred status may request that the decision on administrative expulsion be revoked on

the basis of evidence confirming that there has been a substantial change in the circumstances leading to their administrative expulsion and to the determination of the prohibition of entry. The Office of Border and Alien Police will decide on the application within a period of 180 days of its service.

5. If it is proven that expulsion of the alien from the territory of Slovakia was unlawful (reversal of the decision on administrative expulsion by the police department, court judgement reversing the decision on administrative expulsion in its entirety), the alien may enter the territory of Slovakia subject to the fulfilment of the conditions set out in the Act on Stay of Aliens.

SOUTH AFRICA

There is no specific legislation in South Africa regarding a right to return after an alien has been unlawfully expelled in the form of deportation.

SWEDEN

An expulsion order may not be enforced until it has become final.

SWITZERLAND

See reply contained in *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/604, section A.5.

UNITED STATES OF AMERICA

1. While the United States endeavours to ensure that removals always occur in strict accordance with the law, infrequent errors can occur. In such cases, an individual's ability to return to the United States will depend upon the facts and circumstances of the individual case. Where United States authorities determine that a non-citizen's removal did not occur in keeping with the law and the individual otherwise had a right to reside in the United States, they may undertake efforts to facilitate the individual's return to the United States. This could include the issuance of a travel permit. However, in cases where removal of a non-citizen without any underlying right to reside in the United States was not affected in accordance with the law, facilitation of the individual's return would be less likely. Additionally, non-citizens who illegally re-enter the United States after removal may have limited ability to challenge their prior removal.¹

2. In general, prior to removal from the United States, non-citizens have access to an administrative and judicial review process that takes into account the particular facts and circumstances surrounding their cases. Some non-citizens, including those encountered by authorities upon their arrival in the United States (or shortly thereafter), non-citizens who have been convicted of particularly egregious offences, or non-citizens who have been previously removed from the United States, may be subject to removal under streamlined processes.

¹ See also *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 498 (9th Cir. 2007) (*en banc*).

However, like the standard administrative and judicial review process, such streamlined processes are designed to comply with United States *non-refoulement* obligations by screening these groups of non-citizens for any potentially legitimate claims for humanitarian immigration protection consistent with United States obligations under the Protocol relating to the Status of Refugees and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see, e.g., INA § 235 (b) (1) (A) (ii); 8 USC § 1225 (b) (1) (A) (ii) (establishing a “credible fear” process for recently arrived non-citizens otherwise subject to expedited removal based upon fraud or a lack of valid immigration documents); 8 CFR §§ 208.31 and 1208.31 (establishing a “reasonable fear” process for non-citizens subject to expedited removal based on “aggravated felony” convictions and non-citizens who unlawfully re-entered the United States following a prior removal)).

3. For those individuals not subject to a streamlined process, the United States administrative and judicial processes to determine non-citizens’ removability and eligibility for relief from removal include administrative hearings and review by immigration judges, a Board of Immigration Appeals, United States Circuit Courts of Appeals and the United States Supreme Court. The statutory provisions detailing the scope of administrative proceedings and judicial review are INA §§ 240 and 242; 8 USC §§ 1229 (a) and 1252. Non-citizens may not be removed until administrative proceedings are complete. Non-citizens with administrative orders of removal who elect to pursue judicial review may do so from outside the United States or seek a judicial order staying their removal (see *Nken v. Holder*² (explaining the four-part test courts should apply in deciding whether to stay removal: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies)). Where it is available, non-citizens who successfully pursue judicial review from outside the United States generally may return to the United States.

4. A non-citizen whose administrative removal proceedings have concluded may seek to reopen those proceedings for a variety of reasons related to changes in the individual’s circumstances or other developments affecting his or her removability or eligibility for relief from removal. Regulations generally require that an individual pursue reopening before removal from the United States (see 8 CFR § 1003.2 (d)). However, in the limited circumstance where a non-citizen did not receive proper notice of the proceedings and was ordered removed *in absentia* on that basis, he or she may pursue reopening after removal (see *Matter of Bulnes*³). In the event that a motion to reopen the removal proceedings of a removed non-citizen is granted, United States authorities may take appropriate measures to facilitate the individual’s return to the United States.

4. The nature of the relations established between the expelling State and the transit State in cases where an expelled person must pass through a transit State

ARMENIA

Issues relating to the expulsion of an alien through a transit country are regulated by bilateral agreements with that country. Currently, Armenia has such agreements with Germany, Latvia, Sweden, Switzerland, Denmark and Estonia.

BELARUS

1. Where the person being expelled must pass through the territory of a transit State, the State body executing the alien’s deportation or expulsion order takes steps to organize his or her departure.

2. Where necessary, the State body executing the deportation or expulsion order requests the Ministry for Foreign Affairs of Belarus to provide assistance, through diplomatic channels, for the issuance of the necessary transit visas by the diplomatic missions or consular authorities of the relevant States.

3. When deporting or expelling an alien who is a citizen of a State with which Belarus has established a visa entry and exit regime, the relevant internal affairs body issues the alien being deported or expelled with an exit visa from Belarus, or with a travel document, for the period necessary to execute the deportation or expulsion order.

4. In consultation with the competent bodies of the State from which the alien is being deported, or in accordance with the international treaties to which Belarus has acceded, deported aliens may be transferred at crossing points on the State border (except for the section of the State border between Belarus and the Russian Federation). However, such transfers require the presence of representatives of Belarus border service agencies and representatives of the competent body of the State from which the alien is being deported or expelled, as well as the corresponding transfer document for the alien.

5. In the course of 2009, the internal affairs bodies deported 1,161 aliens from the territory of Belarus (including 435 aliens deported forcibly) and expelled 856 aliens (including 490 aliens expelled forcibly). The border service agencies deported 267 aliens from Belarus in 2009.

6. Furthermore, 70 migrants from 13 countries were repatriated in 2009 under IOM’s voluntary return programme, including citizens of Afghanistan, Georgia, Lebanon, Pakistan, Viet Nam and other countries.

BOSNIA AND HERZEGOVINA

1. During the execution of the decision on expulsion, a written notice shall be sent to the transit country. The notice indicates the manner, time and country in which the alien is to be sent, and all the data relating to the alien. If the alien is accompanied by a security officer, the notice shall also include his/her details. An effective removal of the alien may be carried out only upon receipt of the approval of the transit State.

² 556 U.S. 418, 129 S. Ct. 1749 (April 2009).

³ Department of Justice, 25 I&N Dec. 57 (BIA 2009).

2. If there is an Agreement on readmission between Bosnia and Herzegovina and the State through which transit is to be carried out, the provisions of that Agreement are to be applied.

BULGARIA

1. Relations between the expelling State and transit States are considered matters of international cooperation and in accordance with the existing practice are governed by the applicable provisions of bilateral agreements on readmission of nationals and third-country nationals residing without authorization within the territories of the States of the respective contracting parties.

2. Section I.A of chapter five of the Aliens in the Republic of Bulgaria Act deals with a request for assistance in cases of transit for removal by air of an alien from the territory of Bulgaria, issued by the authorities of the Ministry of the Interior or the other competent authorities of another EU member State, and section I.B of the same chapter deals with providing assistance to the competent authorities of another EU member State in cases of air transit of an alien through the territory of Bulgaria.

CHINA

1. When a person is being repatriated via a third country, the Chinese immigration and border inspection authorities will make sure that the person possesses valid international travel documents (with the exception of those who were discovered to be in possession of counterfeit documents at the time of entry and are being repatriated by the original [discovering] authorities) as well as valid tickets for travel to the country of repatriation via that third country.

2. China will provide the necessary facilitation and assistance for aliens who must transit China after having been lawfully expelled by other countries, in accordance with the request of the expelling country and on condition that so doing contravenes no relevant domestic legislation.

CROATIA

1. The Aliens Act lays down that the Ministry of the Interior of Croatia will, upon the accession of Croatia to the EU, render assistance in the course of transit for the purpose of forced removal by air, if so require competent authorities of an EEA member State.

2. Aside from the above-mentioned, the Ministry of the Interior of Croatia is currently rendering assistance in forced removal transiting across Croatian territory and is also using such assistance from other countries when forced removal involves transiting other countries.

CZECH REPUBLIC

1. In the case of court-ordered expulsion, the relations between the expelling State and the transit State are regulated by the readmission treaties. The departure of aliens who are not granted asylum or international protection is regulated by the Asylum Act.

2. The rules on the transit of expellees are contained in chapter XIII of the Aliens Residence Act. "Transit by land" means the expellee's entry and stay in and departure from the territory of the transit State. "Transit by air" means the expellee's entry and stay in and departure from the transit area of an international airport.

3. In cases of transit through the Czech Republic, the required assistance is provided by the police pursuant to an international treaty or at the request of the competent authority of an EU member State or of another State applying the procedure laid down in Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air.¹

4. The police may refuse the transit in cases provided for in international treaties, or in cases where:

(a) The alien is charged with a crime in the Czech Republic or is placed on the wanted list for the purpose of execution of a sentence;

(b) Transit through other States or admission by the country of destination is not feasible;

(c) The transit operation would involve a transfer to another airport in the Czech Republic;

(d) The requested assistance is not feasible at the given moment for practical reasons; or

(e) The alien would pose a threat to national security, public order, public health or other similar interests protected under a commitment arising from an international treaty.

5. In cases of expulsion from the Czech Republic, the police may request transit through the territory of another State on the basis of an international treaty. If the transit operation is effected by air and requires a stopover in the territory of another EU member State or another State applying the procedure laid down in Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, the police may ask the competent authority of such State for assistance during the stopover.

6. The above rules are general. Specific rules may be laid down in bilateral readmission treaties or in European Community readmission agreements.

¹ Official Journal of the European Union, L 321, 6 December 2003, p. 26.

EL SALVADOR

At the present time, there are no bilateral or multilateral agreements allowing transit States to participate in the expulsion process. In practice, however, they do participate in the process, in the form of direct *démarches* by the migration authority, with the support of the Ministry of Foreign Affairs.

FINLAND

Transit through a third State to the State of destination is subject to a permit issued by the transit State. Such a permit must be requested well in advance. If the permit is refused, no transit is possible, whether it necessitates only a change of plane at an airport in the transit State or *de facto* transit through this State.

GERMANY

For Germany, deportations from the country are primarily conducted by air. In 2008, for example, some 2,700 were performed by air via transit airports, most of which were within the EU. The procedures to be applied in such cases are laid down in the Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, which entered into force on 6 December.¹ The sovereign rights of the member States, especially the right to apply immediate force, are not affected by this, nor is the Convention on offences and certain other acts committed on board aircraft, particularly with regard to the authority on board of the pilot-in-command, or the briefing of the airlines on the carrying out of removals in line with annex 9 to the Convention on International Civil Aviation. Removals via transit States outside the EU are normally avoided. Should such removals be nevertheless necessary in individual cases, the German mission abroad in the country is informed to help resolve potential problems in the transit State.

¹ *Official Journal of the European Union*, L 321, 6 December 2003, p. 26.

ITALY

Provisions for the Expulsion of Foreigners from Italian Territory in the Consolidated Text on Immigration and the Condition of the Foreigner

In cases of foreigners transiting through third countries pursuant to an expulsion order, Italy abides by the international rules contained in the conventions it has ratified (Convention relating to the Status of Refugees), ratified by Law No. 722 of 24 July 1954, international conventions on human rights and fundamental freedoms, and international conventions on extradition). Italy also observes bilateral agreements with non-EU third countries as well as Italian law implementing EU regulations, valid within the borders of EU member States, without prejudice to obligations under international law (e.g. Legislative Decree No. 24 of 25 January 2007, entitled "Implementation of Directive 2003/110/EC, regarding assistance to persons in air transit under an expulsion order", published in the *Official Gazette*, issue 66, of 20 March 2007, which defines assistance provisions between competent authorities in cases of expulsion via air travel, with or without escort, to transit airports of member States, pursuant to Directive 2003/110/EC¹ of 25 November 2003).

¹ *Official Journal of the European Union*, L 321, 6 December 2003, p. 26.

KUWAIT

This issue is governed by the frameworks of the bilateral relations as well as by the agreement that exist between the expelling State to the transit State. The main principle in such matters is determined by the scope of the mechanisms of bilateral cooperation between the two concerned States. Therefore, it is fair to say that the administrative matter in this regard differs from one case to another, depending on the nature of the relation of cooperation between the concerned States.

LITHUANIA

1. An alien may be transferred from one foreign State through the territory of Lithuania to another foreign State pursuant to an international treaty ratified by Lithuania or pursuant to EU legislation, if proof is provided that he has the right to enter the foreign State and the data about the necessity of the transit through the territory of Lithuania is presented.

2. When implementing Council Directive 2003/110/EC¹ on assistance in cases of transit for the purposes of removal by air, the State Border Guard Service under the Ministry of the Interior of Lithuania acts as the central institution responsible for the provision of mutual assistance to EU member States in transit airports of Lithuania in connection with removal by air with or without accompanying persons and in connection with consideration of the related requests. The State Border Guard Service or the Police Department under the Ministry of the Interior of Lithuania are responsible for the presentation of requests to EU member States in connection with the organization and implementation of the transit of third-country nationals present in Lithuania.

3. When implementing Council Decision 2004/573/EC of 29 April 2004 on the organization of joint flights for removal, from the territory of two or more member States, of third-country nationals who are subjects of individual removal orders,² the Police Department, and the State Border Guard Service, act as the institutions responsible for the organization of and/or participation in the joint flights and for the provision of the related information to other member States. The Foreigners' Registration Centre is responsible for the implementation of this function within the State Border Guard Service. When organizing and implementing the expulsion of aliens from Lithuania, the Foreigners' Registration Centre is entitled, in accordance with the set procedure, to undertake direct (or following arrangement with the Foreign Ministry of the Republic of Lithuania) cooperation with foreign diplomatic representations or consular entities, and international and non-governmental organizations.

¹ *Official Journal of the European Union*, L 321, 6 December 2003, p. 26.

² *Ibid.*, L 261, 6 August 2004, p. 28.

MALAYSIA

1. There is no specific relation established between Malaysia and the transit State for purposes of expulsion of a person who has to travel through that transit State.

2. However, in the case of any person being expelled to the country of origin passing through a transit State, Malaysia ensures that such persons have onward tickets passing through such transit States.

Such instances are avoided in the majority of cases but, should the use of the services of a transit State be needed, Malta abides by Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air.¹

¹ *Official Journal of the European Union*, L 321, 6 December 2003, p. 26.

NEW ZEALAND

1. There is no specific relationship established between New Zealand and the transit State, however, New Zealand endeavours to meet all obligations that the transit State requires. Such obligations may include a request from the transit State that the expelled person is accompanied by escorts during his or her transit through their State. The transit State may also require the expelled person to hold a visa for that transit State.

2. With the possible exception of Australia, New Zealand has no formal relations with the authorities in transit States when a person is being turned around to retrace their journey back to their original point of embarkation via that transit State.

3. The documentation that accompanies an undocumented person being turned around, however, is addressed to the authorities at transit points and at the final destination. The documentation explains the full circumstances of the passenger and their travel and the reasons why that person was found inadmissible in the first place. The carrier is also provided with copies of this documentation.

4. In most instances, it is the carrier that fulfils the role of communicator between New Zealand and receiving/transit States.

5. In the majority of instances, persons being turned around will meet the immigration requirements of the transit State. However, when the person being turned around does not meet those requirements, chapter 5 of annex 9 to the Convention on International Civil Aviation obligates transit States to facilitate transit. However, as the Convention is non-binding this obligation is not always honoured.

NORWAY

There are established routines between Norway, as the expelling State, and transit States within the Schengen Area when an alien must pass through a transit State. The procedures are based on the 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). Norway sends an advanced notification to the transit State regarding the return. Some Schengen countries, e.g. Germany, must accept the transit stay beforehand. There exist no

procedures when an alien must pass through a transit State outside of the Schengen Area, nor is it necessary to notify the transit State beforehand. However, if the expelled alien has been imposed a penalty pursuant to the Norwegian Criminal Code, both the transit State(s) and the country of destination will be notified of the return through the INTERPOL system.

PERU

Advance coordination with the transit State concerning an expelled alien's travel to a third State is not necessary. Land border migration practice is that expelled aliens are accepted if the person in question is entering or exiting the transit country.

PORTUGAL

1. In accordance with Law No. 23/2007—which implements the Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air¹ into the Portuguese legal system—where a third State national is removed by air, the use of a direct flight to the country of destination should be considered.

2. If the use of a direct flight is not possible, a request may be submitted to the competent authorities of the other member State for the purpose of transit by air, as long as there is no need to change from one airport to another in the territory of the requested member State.

3. The request of transit by air, with or without an escort and related support measures, is made in writing and must be forwarded to the requested member State as soon as possible and in any case with no less than two days' notice. A transit operation cannot start without the authorization of the required member State. Where no reply is provided by the requested member State within the deadline it must comply with, the transit operations may be started by means of a notification by the requesting member State.

4. The third State national is immediately readmitted into Portuguese territory if:

(a) The transit by air authorization was refused or revoked;

(b) The third State national entered the requested member State without authorization during the transit;

(c) Removal of the third State national to another transit country or to the country of destination, or boarding of the connecting flight, was unsuccessful; or

(d) Transit by air is not possible for another reason.

5. The *Serviço de Estrangeiros e Fronteiras* (Aliens and Borders Service) is the central authority responsible for receiving requests for transit by air support. The Director General of the Service appoints, for all pertinent transit airports, focal points who can be contacted during all transit by air operations.

¹ *Official Journal of the European Union*, L 321, 6 December 2003, p. 26.

6. Portugal can also authorize, whenever necessary, transit by air in its territory following a request by the competent authorities of a member State removing a third State national.

7. Portugal may refuse transit by air if:

(a) The third State national, under national legislation, is charged with criminal offences or is wanted to serve a sentence;

(b) Transit through other States or admission by the country of destination is not feasible;

(c) The removal measure requires a change of airport on the national territory;

(d) The requested assistance is impossible at a particular moment for practical reasons; or

(e) The third State national will be a threat to public policy, security or health, or to international relations of the Portuguese Republic.

8. In the context of bilateral relations, Portugal has also concluded readmission agreements aiming at persons in an irregular situation that regulate this issue, amid others, with the following States: Estonia, France, Germany, Hungary, Lithuania, Romania and Spain.

QATAR

In such cases, the need to respect the rules in force in the transit country governs the relationship between the deporting country and the transit country.

REPUBLIC OF KOREA

1. There appears to be no general rule in international law governing the transit of expelled foreigners. However, some bilateral or multilateral treaties on civil aviation stipulate that the domestic law of the territorial State applies to the case.

2. In the cases where a foreign State requests the Minister of Justice of the Republic of Korea to approve the transit through the Republic of Korea of a person who is being extradited from another foreign State, if such request is deemed justified, the Minister of Justice (the transit State) has the discretion to approve it. However, if the person committed a crime that does not constitute any crime under the acts of the Republic of Korea or the person is a national of the Republic of Korea, the Minister of Justice shall not approve it (art. 45 of the Extradition Act).

ROMANIA

The relations established between Romania as an expelling State and the transit State are governed by international law, in the case of States non-members of the EU, namely the bilateral readmission agreements that provide the modalities for transit of persons expelled from the territory of contracting parties, or by international law in conjunction with community law, in cases where the transit State is another member of the EU. In the latter case, the issue is related to the assistance of transit States in enforcement of the removal measure.

SERBIA

The nature of the relations between the expelling State and the transit State is defined by the Transit Procedure set forth in article 14 of the Agreement between the Republic of Serbia and the European Union concerning the readmission of persons staying unlawfully.¹

¹ *Official Journal of the European Union*, L 334, 19 December 2007, p. 46.

SINGAPORE

1. As a Contracting Party to the Convention on International Civil Aviation, Singapore State practice on this issue is guided by the Standards and Recommended Practices in the 12th edition of annex 9 (Facilitation) of the Convention on International Civil Aviation.

2. For instance, recognizing the annex 9 obligations of Contracting States, Singapore State practice is on the basis that transit States (if Contracting Parties to the Convention on International Civil Aviation), will facilitate the transit of persons being removed from Singapore, and extend necessary cooperation to the aircraft operator(s) and escort(s) carrying out such removal. When presenting a deportee for removal, Singapore ensures that all official travel documentation required by any transit and/or destination State is provided to the aircraft operator. Also, Singapore ensures that the escort(s) accompanying the deportee remain with him or her to his final destination, unless suitable alternative arrangements are agreed, in advance of arrival, by the authorities and the aircraft operator involved at the transit location.

SLOVAKIA

1. The relations between the States in case of forced returns of aliens from the territory of Slovakia through the territories of the neighbouring countries or in case of their transit are provided for in international agreements, the so-called readmission agreements.

2. Readmission agreements provide, *inter alia*, for the rights and obligation of State parties in case of so-called forced return (transit) of aliens—third-country nationals—to their country of origin or a country ready to admit such aliens. The forced return procedure is laid down in readmission agreements, and forced return is always carried out in the form of escort, either by air or by police transport.

3. The requirements for police transport connected with forced returns under relevant readmission agreements are laid down in section 75, paragraphs 1 to 6 of the Act on Stay of Aliens. According to the above provision, the authority entitled to carry out police transports is the Police Detention Centres for Aliens and the transport is carried out exclusively on a request from a State party with the aim of transporting the alien to the State border between Slovakia and the State party. Moreover, the above provision lays down the rights and obligations of aliens and defines the responsibility of the police department in carrying out the police transport. The costs connected with police transports are borne by the requesting State.

4. The procedure of air transit connected with the expulsion of aliens is provided for in sections 75a and 75d of the Act on Stay of Aliens, based on the transposition of Council Directive 2003/110/EC of 25 November 2003 on the assistance in case of air transit with purposes of return.²

5. Air transit may be carried out exclusively on the basis of a written request from another EEA country or on the basis of a submission, written application filed by the Slovak Republic with another EEA country. Air transits to third countries are governed by international agreements (such as readmission agreements).

² *Official Journal of the European Union*, L 321, 6 December 2003, p. 26.

SOUTH AFRICA

If South Africa decides to deport an alien, ordinarily a direct flight or direct ground transport is found for that alien (from South Africa to his or her country of origin). This is done with a view to avoiding a situation where such an alien must pass through a transit State.

SWEDEN

1. In Sweden, two authorities are responsible for expulsions of aliens. The Swedish Migration Board is responsible for aliens who voluntarily return and the Swedish Police Authority is responsible for forced return.

2. Due to Sweden's geographical location, a person being expelled must often pass through transit States. If the transit State is a member State of the EU, the procedure is stipulated by Council Directive 2003/110/EC of 25 November 2003 on assistance in case of transit for the purpose of removal by air.¹

3. Concerning transit States outside the EU, Sweden has general understandings with these countries, when required. The understandings normally stipulate what measures Sweden has to take as an expelling State in order for the transit State to accept the transit. Certain transit States do not require any special measures and, in these cases, there is normally no contact between Sweden and the State in question.

¹ *Official Journal of the European Union*, L 321, 6 December 2003, p. 26.

SWITZERLAND

1. Switzerland's accession to the 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) was accompanied by the adoption of elements of European law, including Council Directive 2003/110/EC of 25 November 2003 on assistance in case of transit for the purpose of removal by air,¹ which calls for mutual assistance by member States

¹ *Official Journal of the European Union*, L 321, 6 December 2003, p. 26.

in the matter of expulsion to take their common objective into account, that being to end the illegal residence of the citizens of third countries obliged to leave the country.

2. In accordance with that directive, we request a form from the competent transit authorities for each citizen of a third country in transit in the Schengen area. The details of the transit form are given in the aforementioned Directive, but different States (Switzerland included) use their own forms.

UNITED STATES OF AMERICA

1. Prior to the removal of a non-citizen from the United States through a transit country, appropriate personnel at the United States Embassy in that transit country are electronically notified of the planned removal by United States immigration authorities. And, consistent with the cooperative principles underpinning the Convention on International Civil Aviation, United States Embassy personnel, in turn, generally provide notification to the transit country Government of the removal.

2. Beyond these general parameters, two unique scenarios bear mentioning. First, non-citizens arriving at a land border from a foreign country contiguous to the United States may be returned to that country, unless they have a credible fear of persecution or torture in that country, pending a determination by an immigration judge whether they were properly deemed inadmissible and whether they are eligible for a waiver or other immigration relief (INA § 235 (b) (2) (C); 8 USC § 1225 (b) (2) (C)). Secondly, under article 5 (b) of the Agreement between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, sometimes referred to as the United States-Canada "Safe Third-Country Agreement", a person being removed from the United States in transit through Canada who makes a refugee status claim in Canada will only be permitted onward movement to the country of removal by Canadian authorities if the person's refugee claim has already been rejected by the United States.

3. Where a non-citizen is expelled by a third country and will transit through the United States, the non-citizen must have valid documentation (such as a transit visa) for his or her travel through the United States. Depending on the facts and circumstances, the Department of Homeland Security may take appropriate measures to provide the necessary assistance and security to ensure that the non-citizen exits the United States in accordance with his or her travel documents.

C. Comments and information on other issues relating to the topic

ANDORRA

There are limitations to this administrative measure which provide important guarantees for the individual concerned. In this regard, the Constitution of the Principality of Andorra of 14 March 1993 establishes in article 22 that the expulsion of a person residing legally in Andorra can be granted only for the reasons and according to the terms

provided by law, and as a result of a definitive judicial ruling in the case of a person exercising the right to a hearing. In addition, the Immigration Act establishes that foreign children, foreign adults born in Andorra who have lived there continuously since birth, and foreign adults residing legally in Andorra continuously for a period of 20 years, cannot be subject to expulsion. An exception to these cases can be made if there is an overriding need in the interest of the security of the State, persons, property or public order.

BAHRAIN¹

Expulsion in implementation of a court order

1. Expulsion may take place only after verifying that copies of the following items have been made available:

- A definitive judgement or an expulsion order;
- Documents pertaining to the alien and his property;
- Reports and communications concerning it.

2. Official documents and travel tickets must also be verified.

3. Expulsion orders are executed in the same manner as other court judgements. Should any impediments arise, the matter is referred to the judge responsible for the execution of the order, who will decide on an appropriate course of action. The order is then transmitted to the Directorate for execution.

Expulsion of foreign workers under the Labour Market Regulation Act (No. 19 of 2006)

4. Under article 27 of the Act, employers are required to bear the costs of repatriation. Should the Authority bear the costs of repatriation in order to facilitate the expulsion and deportation of a foreign worker, it may reclaim them from the worker's last employer. The Minister of the Interior has issued Implementing Decree No. 122 (2007) concerning regulations and procedures for the deportation of foreign workers or the transportation of their corpses.

5. Foreign workers who are to be expelled are transferred to the General Directorate of Nationality, Passports and Residence, which will then take all the measures required for implementing the deportation order.

¹ The text of relevant legislation has been provided to the Codification Division of the United Nations Office of Legal Affairs.

BOSNIA AND HERZEGOVINA

1. The expulsion procedure of aliens in Bosnia and Herzegovina is prescribed by the Law on Movement and Stay of Aliens and Asylum, which was adopted by the Parliamentary Assembly on 16 April 2008. The Law on Movement and Stay of Aliens and Asylum was published in the *Official Gazette*, No. 36/08, and entered into force on 14 May 2008.

2. The aforementioned Law defines expulsion as a measure ordering an alien to leave Bosnia and Herzegovina

and prohibiting him/her to enter and stay in Bosnia and Herzegovina for a certain further period, which cannot be shorter than one year or longer than five years. The period of prohibition to enter shall commence from the day of leaving the territory of Bosnia and Herzegovina. The decision on expulsion of aliens from the territory of Bosnia and Herzegovina, along with the prohibition to enter and stay in Bosnia and Herzegovina in a certain period, shall be issued by the Service for Foreigner's Affairs (Organizational Unit within the Ministry of Security having operational independency in carrying out tasks and duties within the scope of its competence), at the proposal of the court or based on substantiated proposal of other organizational unit of the Ministry, law enforcement authority or other authority.

3. An appeal may be filed against the decision on expulsion of an alien from Bosnia and Herzegovina issued by the Service for Foreigner's Affairs to the Seat of the Ministry of Security, within eight days from the receipt of the decision. If the decision on expulsion was rendered on the basis of article 88 (Reasons for imposing the expulsion measures), under paragraph (1), item i) therein, the deadline for appeal shall be 24 hours as of the receipt of the decision. An appeal shall stay the execution of the decision. The seat of the Ministry of Security shall render a decision on the appeal and shall serve the party without delay and within 15 days the latest from the day of reception of the appeal. Until the decision becomes enforceable, the alien may be placed under supervision or his movement may be restricted to a certain area or location and he may be ordered to report in specified intervals to the organizational unit of the Service for Foreigner's Affairs in the territory of residence of an alien.

4. Until termination of the proceedings, all travel documents that may be used to cross the State border of Bosnia and Herzegovina shall be seized from an alien, who will receive the receipt on seizure, unless he voluntarily agrees to leave the territory of Bosnia and Herzegovina prior to the termination of the proceedings. In accordance with the Law on movement and stay of aliens and asylum, the collective expulsion of aliens is prohibited. The expulsion measure may be pronounced only to an individual.

5. The decision on expulsion may specify the deadline for voluntary execution of the decision, which may not exceed 15 days. In case the alien fails to leave Bosnia and Herzegovina voluntarily within the deadline set for execution of the decision, the final decision on expulsion shall be executed by the Service for Foreigner's Affairs through measures of forceful removal of an alien from the territory of Bosnia and Herzegovina. After the decision on expulsion becomes final, the Service shall make a conclusion on authorization of the enforcement without any delay, and at the latest within seven days from the date when the requirements for the forcible removal of an alien from Bosnia and Herzegovina were met. The conclusion on authorization establishes that the decision on expulsion became enforceable and shall specify the manner, time and place for enforcement of the decision. An appeal against the conclusion may be filed to the Seat of the Ministry of Security within eight days from the date of its delivery. The appeal does not stay the execution pending.

6. An alien against whom is imposed an expulsion measure shall register himself to the official authorized to control the crossing of the State border, while leaving Bosnia and Herzegovina. The Bosnia and Herzegovina Border Police shall enter in the alien's passport the fact that he/she left Bosnia and Herzegovina and shall also notify the Service of Foreigner's Affairs and the Ministry of Security. If the alien does not have a passport, an official note shall be made, and the concerned alien shall be issued a certificate that he/she has left Bosnia and Herzegovina. The Border Police shall immediately, and within the same day, notify the Service of Foreigner's Affairs and the Ministry of Security of any alien who left Bosnia and Herzegovina, and against whom has been imposed a measure of expulsion from Bosnia and Herzegovina.

BULGARIA

1. The basic legal framework regarding expulsion of aliens as a coercive administrative measure under the Bulgarian national legislation is contained in item 3 of article 39a of the Aliens in the Republic of Bulgaria Act and in item 2 of article 23 (1) of the Act on Entry into, Residence in, and Exit from the Republic of Bulgaria by European Union Citizens and Family Members Thereof. Due account should also be taken of the provisions of the Convention relating to the Status of Refugees (promulgated in the *State Gazette* No. 88 of 1993), Council Directive 2003/110/EC of 25 November 2003 on assistance in case of transit for the purpose of removal by air,¹ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents,² Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification,³ and Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals.⁴

2. The authorities of the Ministry of the Interior or of the State Agency for National Security have the authority to expel an alien who has been granted a long-term residence permit in another member State of the EU; who qualifies to be granted a long-term residence permit for Bulgaria, if the said person is a factory or office worker or a self-employed person in Bulgaria or for the purpose of study, including vocational training, if the said person or his or her family members represent a serious threat to national security or to public order, following consultations with the competent authorities of the other EU member State for which they hold a long-term residence permit. In case of expulsion, the length of the alien's residence within the territory of Bulgaria, the age, the health status, the marital status, the social integration, as well as the existence of a relationship with the State of residence or the lack of a relationship with the State of origin of the person are taken into consideration. The authorities of the Ministry of the Interior or of the State Agency for National Security are required to notify the competent authorities of the respective EU member State for the implementation of the expulsion decision.

¹ *Official Journal of the European Union*, L 321, 6 December 2003, p. 26.

² *Ibid.*, L 16, 23 January 2004, p. 44.

³ *Ibid.*, L 251, 3 October 2003, p. 12.

⁴ *Ibid.*, L 149, 2 June 2001, p. 34.

3. An alien on whom a coercive administrative measure of expulsion is imposed may not be expelled to a State where his or her life and freedom will be jeopardized and where he or she will be exposed to persecution, torture, inhuman or degrading treatment (art. 44a of the Aliens in the Republic of Bulgaria Act).

4. When immediate expulsion is impossible or the enforcement of the measures must be postponed for reasons of a legal or technical nature, the authority that issued the order imposing the coercive administrative measure could defer its enforcement until the impediments to its enforcement are eliminated. When the period of temporary protection under the Asylum and Refugees Act has elapsed, the expulsion is impossible or there is a need to postpone the enforcement of the measures for reasons of health or humanitarian nature, the authority which issued the order is entitled to defer its enforcement until the impediments to its enforcement are eliminated.

5. According to the Aliens in the Republic of Bulgaria Act, expulsion orders are subject to appeal before the Supreme Administrative Court, but an appellate review does not suspend their enforcement.

6. According to the provisions of the Aliens in the Republic of Bulgaria Act and the Act on Entry into, Residence in, and Exit from the Republic of Bulgaria by European Union Citizens and Family Members Thereof, upon imposition of a coercive administrative measure of expulsion, a coercive administrative measure of a mandatory ban on entry into Bulgaria is also imposed on the person for a period referred to in article 42h (3) of the Aliens in the Republic of Bulgaria Act:

A ban on entry into the Republic of Bulgaria shall be imposed for a period not exceeding five years. The ban on entry into the Republic of Bulgaria may be imposed for a period exceeding five years where the person concerned poses a serious threat to public order or to national security.

Also, according to article 26 (2) of the Act on Entry into, Residence in, and Exit from the Republic of Bulgaria by European Union Citizens and Family Members Thereof:

A ban on entry into the Republic of Bulgaria shall be imposed for a period not exceeding ten years.

CUBA

1. Cuba considers that the codification of the human rights of persons who have been or are being expelled would be useful, provided that such a codification is guided by the principle of comprehensive protection of the human rights of the person who has been or is being expelled, and does not infringe on the sovereignty of States.

2. As a general consideration regarding the aforementioned draft articles, Cuba believes it necessary to include an article of a general character, equivalent to a declaration of principles, requiring respect for domestic legislation, the maintenance of public security of each State, and respect for the principles of international law, as well as the non-use of expulsion as a xenophobic and discriminatory practice.

3. In this regard, Cuba also considers that account should be taken of the fact that the person expelled is exonerated of legal or criminal liability in the expelling State and that, in consequence, the person should not be tried again for the same reason in the receiving State, in line with the general legal principle that a person shall not be penalized twice for the same illegal act.

4. Moreover, Cuba notes that the articles do not mention an obligation to notify the receiving State prior to the implementation of an expulsion, and therefore proposes the inclusion of an article requiring States to inform the receiving State that a person is being expelled to it. In that regard, our country considers it appropriate to include in the draft articles a mention of the right of persons who have been expelled or are being expelled to communicate with representatives of the corresponding consulate.

5. Further, in connection with draft article 13, “Specific case of vulnerable persons”, the concepts of “child” and “older persons” need to be defined, as these terms are imprecise and ambiguous, given that in neither case is a range of ages provided which could serve as a basis for evaluating the vulnerability of such persons.

6. Cuba is of the view that the protection of pregnant women provided for under draft article 13 should be extended to all women and to girls. We propose the following wording for paragraph 1: “Boys and girls, women, older persons and persons with disabilities who have been or are being expelled shall be considered, treated and protected as such, irrespective of their status”. Paragraph 2 of draft article 13 should also include a mention of girls.

7. Cuba considers that the language of draft article 14 on the “Obligation to ensure respect for the right to life and personal liberty in the receiving State of persons who have been or are being expelled” should be made consistent with the draft as a whole. This draft article uses the term “returned” (*refoulé*) and establishes the possibility of “return” (*refoulement*) as a category distinct from expulsion, creating ambiguity and inconsistencies in the language of the text.

8. In our understanding, the concept of the stateless person as the target of expulsion arises in draft article 14 paragraph 3, without consideration of the very real possibility that this measure could be applied to a person whose country of origin is not recognized. This must be modified in the interest of obtaining greater clarity and coherence in the draft articles and avoiding ambiguities.

9. In the specific case of article 15.1, “Obligation to protect persons who have been or are being expelled from torture and inhuman or degrading treatment”, Cuba considers it necessary to include the obligation to demonstrate the so-called “real risk”, since what is currently stipulated is inadequate. The expression “where there is a real risk” is liable to subjective interpretation. Cuba further proposes that the following wording be appended to the paragraph: “... without first obtaining guarantees that his or her rights would not be violated thereby”.

10. Cuba has no objections or observations to advance with regard to the formulation of the remaining draft

articles, although it would like to reiterate its position that the human rights of persons who have been or are being expelled cannot constitute a limit on the exercise of the right of a State to carry out expulsions.

PERU

1. Legislative Decree No. 703, adopting the Aliens Act, lays down the legal provisions on aliens’ entry into, stay and residence in and exit from Peru. It also sets out the grounds, the punishments applicable to aliens who violate the relevant provisions and the competent authorities.

2. The administrative procedures for enforcing sentences of expulsion begin with information obtained by the Aliens Division of the Peruvian National Police Department of State Security (the information is consolidated in a certified statement or police report). This information is sent to the Migration and Naturalization Authority. The Authority’s Office of Legal Counsel issues the required opinion on the legality of the sentence, which will be executed by the Commission on Alien Affairs.

3. This Commission consists of the General Director for Consular Policy of the Ministry of Foreign Affairs, the General Director for Migration and Naturalization of the Ministry of the Interior, and the Chief of the Aliens Division of the Peruvian National Police, who, by means of an agreement supported by meeting minutes, order the expulsion of the alien. Depending on the grounds, this may be done by court order or as a result of an administrative violation of the Aliens Act.

4. The Migration and Naturalization Authority prepares a draft ministerial resolution to be signed by the Minister of the Interior.

5. The Aliens Division notifies the alien to appear at the police station, serves the official expulsion document and escorts the alien to the border, if that is the determined point of departure from the country, or to the international airport if travel will be by air.

6. The Migration and Naturalization Authority records the expulsion in its database so that the border authorities do not allow the offending alien to enter.

REPUBLIC OF KOREA

Limitations on the right of expulsion: Protection of human rights

(a) *Dignity, pursuit of happiness and equality*

1. All persons in the Republic of Korea shall be assured of human worth and dignity and have the right to pursue happiness. The right also applies to foreigners, and discrimination based on sex, religion or social status is prohibited (arts. 10 and 11 of the Constitution).

(b) *Principle of non-refoulement*

2. As a contracting party to the Convention relating to the Status of Refugees, the Republic of Korea shall not “expel or return (*refouler*)” a refugee in any manner

whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (art. 33 of the Convention).

3. As a contracting party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Republic of Korea shall not “expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture” (art. 3 of the Convention).

(c) *Due process of law*

(i) Decision on expulsion

4. *Investigation.* The immigration control official may investigate foreigners suspected of violating the Immigration Control Act (arts. 47–50 of the Immigration Control Act).

5. *Examination.* When the immigration control official has finished the investigation of a suspect, the head of the immigration office or a branch office, or the head of a foreigner internment facility shall examine and make a determination on the expulsion without delay (art. 58 of the Immigration Control Act).

6. *After examination.* If the suspect is found not to have violated the Immigration Control Act, the head of the immigration office or a branch office, or the head of a foreigner internment facility shall inform the suspect of the result without delay, and if the suspect is interned, the head shall immediately release the suspect from the internment (para. 1 of art. 59 of the Immigration Control Act).

7. If the head of the immigration office or a branch office, or the head of a foreigner internment facility determines after examination that the suspect has violated the Immigration Control Act, he may issue a deportation order. In the case where the head of the immigration office or a branch office or the head of a foreigner internment facility issues a deportation order, the head shall inform the suspect of the fact that the suspect may object to the Minister of Justice (paras. 2 and 3 of art. 59 of the Immigration Control Act).

(ii) Execution of deportation orders and repatriation

8. A deportation order shall be executed by an immigration control official. The head of the immigration office or a branch office or the head of a foreigner internment facility may entrust any judicial police official to execute a deportation order (art. 62 of the Immigration Control Act).

9. To execute a deportation order, the order shall be presented to the person who is subject to it, and he shall be

repatriated without delay to the country in which he has a nationality or citizenship (arts. 62 and 64 of the Immigration Control Act).

10. There are no provisions about the responsibility to inform the country of repatriation of the reason for expulsion. Except those who have committed a serious crime, most illegal foreigners, without informing their national embassies, will be given a sealed data stamp with relevant provisions on their passport after examination.

(iii) Internment of persons subject to deportation orders

11. If it is not possible to immediately repatriate a person who is subject to a deportation order, the head of the immigration office or a branch office or the head of a foreigner internment facility may intern him in a foreigner internment room, foreigner internment facility or other place designated by the Minister of Justice until the repatriation is possible (para. 1 of art. 63 of the Immigration Control Act).

(iv) Objection

12. If a person subject to a deportation order desires to object to the order, he shall file an objection with the Minister of Justice through the head of the immigration office or a branch office, or the head of a foreigner internment facility within seven days after the person receives the deportation order (art. 60 of the Immigration Control Act).

SOUTH AFRICA

1. South Africa’s right to expel foreign nationals is inherent in its sovereignty as a State. The immigration laws of South Africa prefer the term “deportation” to “expulsion”. South Africa’s right to expel in the form of deportation can only be found within the four corners of the Immigration Act No. 13 of 2002 as amended. South Africa’s right to expel aliens includes the right to control admission to its territory and to establish grounds for expulsion of aliens in terms of its immigration laws and regulations. The intention of the drafters of the Act was to put in place a system of immigration control which is compatible with the Constitution and the international obligations of South Africa.

2. In the event of being an expelling State, South Africa has a general obligation to respect the human rights of the person being expelled. It is bound to respect the limits deriving from international law, including international human rights law. The international human rights, whether in the provisions of the African Charter on Human and Peoples’ Rights or the International Covenant on Civil and Political Rights, are designed to ensure that individuals have recourse available to them when their rights are violated by Governments.

THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*)

[Agenda item 7]

DOCUMENT A/CN.4/630

Survey of multilateral instruments which may be of relevance for the work of the International Law Commission on the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”

Study by the Secretariat

[Original: English/French]
[18 June 2010]

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Multilateral instruments cited in the present document

	<i>Source</i>
Treaty on International Penal Law (Montevideo, 23 January 1889)	OAS, <i>Treaty Series</i> , No. 34, <i>Official Records</i> , OEA/Ser.X/7, p. 1.
Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Geneva, 6 July 1906)	ICRC, <i>Handbook of the International Red Cross</i> , 10th ed. (Geneva, 1953), p. 18.
Convention on Private International Law (Havana, 20 February 1928)	League of Nations, <i>Treaty Series</i> , vol. LXXXVI, No. 1950, p. 111.
International Convention for the Suppression of Counterfeiting Currency and Protocol (Geneva, 20 April 1929)	<i>Ibid.</i> , vol. CXII, No. 2623, p. 371.
Optional Protocol regarding the Suppression of Counterfeiting Currency (Geneva, 20 April 1929)	<i>Ibid.</i> , vol. CXII, No. 2624, p. 395.
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Geneva, 27 July 1929)	<i>Ibid.</i> , vol. CXVIII, No. 2733, p. 303.
Convention on Extradition (Montevideo, 26 December 1933)	<i>Ibid.</i> , vol. CLXV, No. 3803, p. 45.
Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs (Geneva, 26 June 1936)	<i>Ibid.</i> , vol. CXCVIII, No. 4648, p. 299.
Convention for the Creation of an International Criminal Court (Geneva, 16 November 1937)	League of Nations, <i>Official Journal</i> , 19th year (1938), document C.547.M.384.1937.V, p. 37.
Convention for the Prevention and Punishment of Terrorism (Geneva, 16 November 1937)	<i>Ibid.</i> , document C.546.M.383.1937.V, p. 23.
Treaty on International Penal Law (Montevideo, 19 March 1940)	OAS, <i>Treaty Series</i> , No. 34, <i>Official Records</i> , OEA/Ser.X/7, p. 71.
Convention on the prevention and punishment of the crime of genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, No. 1021, p. 277.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	<i>Ibid.</i> , vol. 75, Nos. 970–973, p. 31 <i>et seq.</i>
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	<i>Ibid.</i> , p. 31.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	<i>Ibid.</i> , p. 85.

Source

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- Geneva Convention Relative to the Protection of Civilian Persons in Time of War *Ibid.*, p. 287.
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- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950) *Ibid.*, vol. 213, No. 2889, p. 221.
- European Convention on Extradition (Paris, 13 December 1957) *Ibid.*, vol. 359, No. 5146, p. 273.
- Second Additional Protocol to the European Convention on Extradition (Strasbourg, 17 March 1978) *Ibid.*, vol. 1496, No. 5146, p. 328.
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- Convention on the Physical Protection of Nuclear Material (Vienna, 26 October 1979) *Ibid.*, vol. 1456, No. 24631, p. 101.
- International Convention against the Taking of Hostages (New York, 17 December 1979) *Ibid.*, vol. 1316, No. 21931, p. 205.
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Introduction

1. The International Law Commission identified the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” for inclusion in its long-term programme of work at its fifty-sixth session, in 2004.¹ A brief syllabus describing the possible overall approach to the topic was annexed to that year’s report of the Commission.² The General Assembly, in resolution 59/41 of 2 December 2004, took note of the Commission’s report concerning its long-term programme of work. At its fifty-seventh session (2005), the Commission decided to include the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” in its current programme of work and to appoint Mr. Zdzisław Galicki as Special Rapporteur for the topic.³ The General Assembly, in paragraph 5 of its resolution 60/22 of 23 November 2005, endorsed the decision of the Commission to include the topic in its programme of work.

2. From its fifty-eighth session (2006) to its sixty-first session (2009), the Commission received and considered three reports by the Special Rapporteur.⁴ It also received comments and information from Governments.⁵ At its sixtieth session (2008), the Commission decided to establish a working group on the topic under the chairmanship of Mr. Alain Pellet, the mandate and membership of which would be determined at the sixty-first session.⁶ Pursuant to that decision, at its sixty-first session, the Commission established an open-ended Working Group⁷ which held three meetings.⁸ The Working Group agreed that its mandate would be to draw up a general framework for consideration of the topic, with

the aim of specifying the issues to be addressed and establishing an order of priority. At the same session, the Commission took note of the oral report presented by the Chairman of the Working Group⁹ and reproduced the proposed general framework for the consideration of the topic, prepared by the Working Group, in its annual report.¹⁰

3. The present study, prepared by the Secretariat, aims at assisting the Commission by providing information on multilateral conventions which may be of relevance to its future work on the present topic. It should be recalled, in this respect, that the Working Group highlighted this issue in section (a) (ii) of the proposed general framework, which refers to “The obligation to extradite or prosecute in existing treaties”.¹¹

4. The Secretariat has conducted an extensive survey of multilateral conventions, both at the universal and regional levels, which has resulted in the identification of 61 multilateral instruments that contain provisions combining extradition and prosecution as alternative courses of action for the punishment of offenders. Chapter I of the present study proposes a description and typology of the relevant instruments in the light of these provisions, and examines the preparatory works of certain key conventions that have served as models in the field, as well as the reservations made to the relevant provisions. It also points out the differences and similarities between the reviewed provisions in different conventions and their evolution.

5. Chapter II proposes some overall conclusions, on the basis of the survey contained in chapter I, as regards (a) the relationship between extradition and prosecution in the relevant provisions; (b) the conditions applicable to extradition under the various conventions; and (c) the conditions applicable to prosecution under the various conventions.

6. The annex contains a chronological list of the conventions found by the Secretariat to contain provisions combining extradition and prosecution, as described in the present study, and reproduces the text of those provisions.

¹ See *Yearbook ... 2004*, vol. II (Part Two), p. 120, paras. 362–363.

² *Ibid.*, annex, p. 123.

³ At its 2865th meeting, on 4 August 2005 (*Yearbook ... 2005*, vol. II (Part Two), p. 92, para. 500).

⁴ Respectively, his preliminary report, in 2006 (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571); his second report, in 2007 (*Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585 and Corr.1); and his third report, in 2008 (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603).

⁵ See *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/579 and Add.1–4; *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/599; and *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/612.

⁶ At its 2988th meeting, on 31 July 2008 (*Yearbook ... 2008*, vol. II (Part Two), p. 142, para. 315).

⁷ At its 3011th meeting, on 27 May 2009 (*Yearbook ... 2009*, vol. II (Part Two), p. 142, para. 198).

⁸ The Working Group met on 28 May and on 29 and 30 July 2009 (*ibid.*, para. 200).

⁹ At its 3029th meeting, on 31 July 2009 (*ibid.*, para. 199).

¹⁰ *Ibid.*, para. 204.

¹¹ *Ibid.*

CHAPTER I

Typology and comparative analysis of multilateral conventions which may be of relevance for the Commission's work on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)"

7. The present chapter proposes a description and typology of provisions contained in multilateral instruments which may be of relevance for the Commission's work on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", with a view to providing a comparative overview of the content and evolution of such provisions in conventional practice. For this purpose, conventions including such provisions have been classified into the following four categories:

(a) The International Convention for the Suppression of Counterfeiting Currency and other conventions following the same model;

(b) The Geneva Conventions for the protection of war victims and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I);

(c) Regional conventions on extradition;

(d) The Convention for the Suppression of Unlawful Seizure of Aircraft and other conventions following the same model.

8. This classification combines chronological and substantive criteria. First of all, it roughly reflects an evolution in the drafting of provisions combining the options of extradition and prosecution, which is useful for understanding the influence that certain conventions (such as the 1929 International Convention for the Suppression of Counterfeiting Currency or the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft) have exercised over conventional practice and how such provisions have changed over time. Secondly, the classification highlights some fundamental similarities in the content of provisions pertaining to the same category, thus facilitating a better understanding of their precise scope and of the main issues that have been discussed in the field. However, it must be pointed out at the outset that this classification, while revealing some general tendencies in the field, should not be understood as reflecting a separation of the relevant provisions into rigid categories: conventions pertaining to the same category are often very different in their content, and drafting techniques adopted by certain conventions have sometimes been followed by conventions belonging to a different category.

9. Each subsection below identifies one or more key conventions that have served as models in the field and provides a description of the mechanism for the punishment of offenders provided therein, the relevant preparatory works and reservations affecting the legal effect of the provisions that combine the options of extradition and prosecution. Each subsection further lists other conventions that belong to the same category and describes how these conventions have followed, or have departed from, the original model, with information about the relevant aspects of preparatory works and reservations.

A. The International Convention for the Suppression of Counterfeiting Currency and other conventions following the same model

1. INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF COUNTERFEITING CURRENCY

(a) *Relevant provisions*

10. The International Convention for the Suppression of Counterfeiting Currency contains two provisions combining extradition and prosecution which have served as a prototype for a group of subsequently concluded treaties relating to the suppression of international offences.¹² The mechanism adopted in the International Convention for the Suppression of Counterfeiting Currency was considered to be an indispensable application of the underlying principle "that the counterfeiting of currency should nowhere go unpunished".¹³ The same notion is also reflected in the first article of the Convention, in which the parties recognize the rules laid down in part I of the Convention "as the most effective means in present circumstances for ensuring the prevention and punishment of the offence of counterfeiting currency". Under article 3, the parties undertake to make the offences concerned punishable as ordinary crimes.

11. The mechanism in the Convention makes a distinction between nationals and non-nationals of the State concerned. It further recognizes that States employ different practices with regard to the exercise of extraterritorial jurisdiction and therefore does not oblige States to assert jurisdiction in every case in which extradition is refused.¹⁴

12. Article 8 of the Convention deals with the issue of nationals who have committed an offence abroad:

In countries where the principle of the extradition of nationals is not recognized, nationals who have returned to the territory of their own country after the commission abroad of an offence referred to in Article 3 should be punishable in the same manner as if the offence had been committed in their own territory, even in a case where the offender has acquired his nationality after the commission of the offence.

This provision does not apply if, in a similar case, the extradition of a foreigner could not be granted.

It is understood that extradition would be applied in all cases by those States which allow their nationals to be extradited.¹⁵

¹² Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs; Convention for the Prevention and Punishment of Terrorism; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; Single Convention on Narcotic Drugs, 1961; and Convention on Psychotropic Substances.

¹³ League of Nations, *Proceedings of the International Conference for the Adoption of a Convention for the Suppression of Counterfeiting Currency, Geneva, April 9th to 20th, 1929* (C.328.M.114.1929.II), annex III, p. 234.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

13. Article 9 regulates the situation of foreigners who are in the territory of a third State:

Foreigners who have committed abroad any offence referred to in Article 3, and who are in the territory of a country whose internal legislation recognizes as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country.

The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence.

14. Article 10 provides for the extradition regime applicable to the offences referred to in article 3. A distinction is made between those States that make extradition conditional upon a treaty and those that do not.¹⁶ The first paragraph deals with the former category of States and stipulates that the relevant offences “shall be deemed to be included as extradition crimes in any extradition treaty which has been or may hereafter be concluded between any of the High Contracting Parties”. Pursuant to the second paragraph, those States that do not make extradition conditional on a treaty or reciprocity undertake to recognize the offences as cases of extradition between themselves. The third paragraph specifies that “[e]xtradition shall be granted in conformity with the law of the country to which application is made”.

15. The Convention also contains two provisions that safeguard the internal criminal legislation and administration of participating States in the context of its application. Article 17 provides that a State’s attitude on the general issue of criminal jurisdiction as a question of international law is not affected by its participation in the Convention. Article 18 specifies that, without allowing impunity, the Convention does not affect the principle that the offences should in each country be “defined, prosecuted and punished in conformity with the general rules of its domestic law”.¹⁷

(b) *Preparatory works*

16. The International Convention for the Suppression of Counterfeiting Currency was adopted at an international conference held in Geneva from 9 to 20 April 1929 under the auspices of the League of Nations. The Conference worked on the basis of a text of a draft convention¹⁸ prepared by a Mixed Committee that had been established by the Council of the League of Nations.¹⁹ The Conference

¹⁶ See comment by Great Britain during the plenary debate, *Proceedings* (footnote 13 above), p. 74.

¹⁷ A protocol to the International Convention for the Suppression of Counterfeiting Currency further clarifies this situation by stipulating that “the Convention does not affect the right of the High Contracting Parties freely to regulate, according to their domestic law, the principles on which a lighter sentence may be imposed, the prerogative of pardon or mercy and the right to amnesty”, sect. I, para. 2.

¹⁸ *Proceedings* (footnote 13 above), annex III.B.

¹⁹ The Committee, whose members were appointed by the Council, was established on the recommendation of the Financial Committee, which had initially been tasked to study the question of concluding a convention on the matter. The report of the Financial Committee (submitted in December 1926) already contained, *inter alia*, the recommendation that a State must punish its nationals who have committed counterfeiting abroad “as if the crime had been committed in the territory”, except when the State accepted to extradite them (*ibid.*, annex II, pp. 225–226).

also had before it observations on the report of the Mixed Committee by Governments.²⁰ The draft text proposed by the Mixed Committee was reviewed by a Legal Committee of the Conference,²¹ which presented an amended draft convention to the plenary.

17. In the explanatory part of its report,²² the Mixed Committee emphasized that, in preparing the draft convention, it had sought to propose the most effective rules for dealing with the offence of counterfeiting, while avoiding infringing on fundamental principles of the States’ internal legal systems. It had thus recognized the different practices among States with regard to the extradition of nationals and extraterritorial jurisdiction. The draft convention provided that those States that allowed their own nationals to be extradited would surrender the offenders in all cases, and that the obligation to prosecute would only apply to other States (and for these, the obligation would not be absolute, since prosecution would not be compulsory when the extradition request had been refused for reasons directly connected with the charge (e.g. period of limitation)).²³

18. In the same spirit, in the Mixed Committee’s draft text, the obligation of a third State to prosecute an offender would depend on whether that State’s criminal system was based on the principle of territoriality. If the State did not apply extraterritorial jurisdiction, it would extradite. This non-encroachment upon States’ criminal jurisdiction was further reinforced by a draft provision (which later became article 17) reserving the “principle of the territorial character of criminal law”.²⁴

19. Besides the jurisdictional aspect, the obligation of a third State to prosecute was made subject to the condition that extradition had not been made, or could not be granted, and to a complaint made, or notice given, by the injured party. This latter condition had been added in view of the fact that it was the injured State or the State *loci delicti* that were deemed to be in the best position to judge on the advisability to prosecute.²⁵

20. The Legal Committee maintained, with some amendments, the main thrust of the proposed text of the Mixed Committee, and in particular the underlying principle of not prejudicing States’ criminal legislation and administration.

21. Nevertheless, during the debate of the Legal Committee, an attempt was made to fill a lacuna in the Mixed Committee’s text through a proposed provision that would render the extradition of nationals obligatory for those countries that allowed it in principle, whether or not applicable extradition treaties contained a reservation to that effect.²⁶ While acknowledging the lacuna, countries to which this

²⁰ *Ibid.*, annex V.

²¹ In addition, the provisions concerning the option of extradition and prosecution were submitted to a subcommittee of the Legal Committee for further study.

²² *Proceedings* (footnote 13 above), annex III, p. 230.

²³ *Ibid.*, p. 234.

²⁴ *Ibid.*, p. 242.

²⁵ *Ibid.*

²⁶ *Ibid.*, pp. 154–155 (see proposal by Germany).

provision would have applied²⁷ strongly objected to the idea of making the extradition of their nationals an absolute obligation, and the proposed provision was eventually not included in the final text of the convention.

22. The issue of the scope of the obligation to prosecute was also raised in conjunction with the debate on the words “as a general rule” in article 9.²⁸ In response to a concern expressed by some delegations, the Rapporteur of the Legal Committee clarified that, under the said provision, only those States that applied the territoriality principle were exempted from the obligation to prosecute. He explained that the provision (which he qualified as “a first step towards admitting in the future, without reservations, the principle of universality of justice in the pursuit of criminals”) was to be applied by those countries that allowed proceedings for offences committed abroad, “such proceedings being justified either by the nature of the offence or the interest injured, or on account of the offender’s nationality, etc.”²⁹

23. Still in the context of article 9, the Legal Committee decided to subject the obligation to take proceedings against an alleged offender to the condition that extradition had been requested, but could not be granted for reasons not connected to the offence. It was considered that the country directly affected by the offence would be in a better position to institute proceedings and that the country of refuge would only prosecute when extradition could not be granted, to ensure that the underlying principle of the Convention was upheld, namely “that no counterfeiter should go unpunished”.³⁰ The Legal Committee, however, decided against making the obligation to take proceedings subject to a complaint or official notice by a foreign authority requesting such proceedings.³¹

24. The preparatory works also evidence a substantial debate with regard to the impact that the relevant provisions would have on certain principles of international penal law or on States’ internal criminal law systems. In that context, with regard to article 8, it was clarified that the wording “in the same manner as if the offence had been committed in their own territory” did not affect the application of certain principles, such as *non bis in idem* or *lex mitior*, and that prosecution and punishment would be carried out in accordance with the principles contained in the penal codes of each State.³² Similarly, referring to article 9, it was explained that the principle of discretionary powers of the prosecutor would not be

affected by the Convention, as long as it was executed in good faith.³³ Furthermore, in order to make it perfectly clear that “nothing was being done to prejudice the general criminal legislation and administration of each country within its domestic sphere”, the Legal Committee added the text of article 18.³⁴

25. The draft text of the Mixed Committee also proposed an extradition regime to the effect that the offences referred to in the Convention would be recognized as “extradition crimes” and that extradition would be granted in conformity with the internal law of the requested State.³⁵ While the Legal Committee maintained the underlying logic of this provision, it was observed that “the new Convention should not upset the whole system of extradition”: the provision (which then became article 10³⁶) was thus amended to submit the offences to the existing extradition procedures applicable among States, whether or not based on extradition treaties or reciprocity.³⁷

26. The text of the draft convention proposed by the Mixed Committee further contained an article which stipulated that the crime of counterfeiting was generally not to be considered a political offence.³⁸ While this issue was extensively discussed during the Conference,³⁹ it was finally decided to omit any language regarding political offences, leaving every country free to decide its own position in this respect.⁴⁰ The issue of political offence was also raised in the context of article 3 of the Convention and resulted in the inclusion therein of a reference to “ordinary crimes”, to avoid the establishment of any favourable treatment for the crime of counterfeiting.⁴¹ In addition, an Optional Protocol Regarding the Suppression of Counterfeiting Currency was prepared, whereby the High Contracting Parties undertook “in their mutual relations, to consider, as regards extradition, the acts referred to in Article 3 of the said Convention as ordinary offences”.⁴²

(c) Reservations

27. Upon becoming parties to the International Convention for the Suppression of Counterfeiting Currency,

³³ *Ibid.*, p. 153.

³⁴ *Ibid.*, pp. 158; see also pp. 159 and 163.

³⁵ Draft article 2 (final art. 10), *ibid.*, annex III, p. 234.

³⁶ See paragraph 14 above.

³⁷ *Proceedings* (footnote 13 above), p. 158.

³⁸ “The political motive of an offender is not enough to make an offence coming under the present Convention a political offence.” (draft art. 1, para. IX, *ibid.*, annex III, p. 240).

³⁹ For the debate in the Legal Committee, see *ibid.*, pp. 139–147. For the debate in Plenary, see *ibid.*, pp. 53–70 and 84–85. During the debate on this draft provision, several delegates specified that they could not accept a formula which would affect political asylum (see Great Britain (p. 58) and Germany (p. 144)) and that the question of defining a political offence would be too vast an undertaking for the Conference.

⁴⁰ It was, however, stressed that the implementation in good faith of the Convention implied that, save in exceptional circumstances, the counterfeiting of currency was not in principle to be regarded as a political offence (*ibid.*, pp. 84–85, comment by the delegate of Belgium (Mr. Servais), Chairman of the Legal Committee).

⁴¹ *Ibid.*, p. 158. See the statement by the delegate of Great Britain (Sir John Fischer Williams), Vice-Chairman of the Legal Committee.

⁴² Although not officially discussed during the Conference, the Optional Protocol was read to the delegates for information (*ibid.*, p. 97).

²⁷ *Ibid.* (see remarks by the United States and Great Britain).

²⁸ This issue was raised in both the Legal Committee and the plenary (*ibid.*, pp. 88 and 155–156). It should also be noted that the corresponding wording “as a general rule” in draft article 1, paragraph X (final art. 8) had been omitted “as useless” (*ibid.*, p. 162).

²⁹ *Ibid.*, p. 88. Delegate of Romania (Mr. Pella), Rapporteur of the Legal Committee.

³⁰ *Ibid.*, pp. 162–163.

³¹ Nevertheless, it was noted that Governments could include this condition in their own legislation, pursuant to article 18 (*ibid.*, p. 162, delegate of Belgium (Mr. Servais), Chairman of the Legal Committee).

³² *Ibid.*, p. 150. Nevertheless, it was suggested that where the law in the country where the crime was committed provided for lighter penalties than the country in which the offender was being prosecuted, the latter State would be prevented from applying such lighter sentences (*ibid.*, comment by the delegate of Romania (Mr. Pella), Rapporteur of the Legal Committee).

some States made reservations relating to the provisions concerning prosecution and extradition. Referring to their respective internal criminal law and legislation regarding extradition, Andorra and Norway made reservations with regard to the implementation of article 10.

2. OTHER CONVENTIONS

(a) *Relevant provisions*

28. The conventions listed below (in chronological order) contain a mechanism for the punishment of offenders for which the International Convention for the Suppression of Counterfeiting Currency seems to have served as a prototype:⁴³

(a) The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs;

(b) The Convention for the Prevention and Punishment of Terrorism;⁴⁴

(c) The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others;

(d) The Single Convention on Narcotic Drugs, 1961;

(e) The Convention on Psychotropic Substances.

29. The constitutive elements of the mechanism adopted in these conventions are the following: (a) the criminalization of the relevant offence, which the States parties undertake to make punishable under their domestic laws; (b) provisions on prosecution and extradition which take into account the divergent views of States with regard to the extradition of nationals and the exercise of extraterritorial jurisdiction, the latter being permissive rather than compulsory; (c) precedence for extradition over prosecution; (d) an extradition regime under which States undertake, under certain conditions, to consider the offence as an extraditable one; (e) a provision limiting the infringement of the convention upon

⁴³ The preparatory works of the three earlier conventions make explicit references to the International Convention for the Suppression of Counterfeiting Currency.

⁴⁴ This Convention never entered into force. It should be noted that explicit references are made to the principle *aut dedere aut judicare* or *aut dedere aut punire* during the debate of the Conference adopting the 1937 Convention for the Prevention and Punishment of Terrorism. See, for example, *Proceedings of the International Conference on the Repression of Terrorism, Geneva, November 1st to 16th, 1937* (C.94.M.47.1938.V.3), pp. 57, 67, 100 and 104 (comments by the delegates of Poland and Romania). During the debate, the Rapporteur of the Conference, Mr. Pella (Romania), noted that “[i]f it was at all possible in all cases to make a precise definition between a political offence and an act of terrorism, the principle of *aut dedere aut punire* should obviously be taken as the sole and unvarying basis of international co-operation in regard to extradition”. He further observed that “certain Governments were in favour of that principle [*aut dedere aut punire*] and that he personally regarded it as the only one which could in every case ensure the effective repression of acts of terrorism. Unfortunately, its adoption would involve such considerable changes in the criminal law and practice of various countries that, while affirming the desirability and moral value of such a principle, they would have to be satisfied for the present [...] with a more modest solution commanding more general acceptance” (*ibid.*, p. 67).

the States’ approach to the question of criminal jurisdiction as a question of international law; and (f) a non-prejudice clause with regard to the criminal legislation and administration of each State.

30. While some of these conventions follow the provisions of the International Convention for the Suppression of Counterfeiting Currency very closely, they all contain some terminological differences, some appearing to be more of an editorial nature and others modifying the substance of the obligations undertaken by States parties. The most significant aspects of their mechanisms are described hereinafter.

31. All of the above conventions oblige States parties to make the various offences punishable under their domestic legislation. Most of the conventions further contain explicit provisions concerning the requirement of States parties to ensure that their legislation and administration are in conformity with the obligations stipulated in the respective conventions or that such obligations can be carried out.⁴⁵

32. All of the conventions make the relevant provisions subject to the different practices of States with regard to the extradition of nationals and to the application of extraterritorial jurisdiction, with the result that the obligation to prosecute if extradition is not granted is not absolute. They are also based on the understanding that the obligation to institute proceedings against an offender occurs if extradition is not possible.

33. The three earlier conventions follow closely the model of the International Convention for the Suppression of Counterfeiting Currency in respect of the various provisions related to extradition or prosecution. Nevertheless, there are some differences. In particular, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others does not contain any provision for the prosecution of foreigners.⁴⁶

34. The provisions concerning nationals in these three conventions mirror article 8 of the International Convention for the Suppression of Counterfeiting Currency and

⁴⁵ See the International Convention for the Suppression of Counterfeiting Currency (art. 23); the Convention for the Prevention and Punishment of Terrorism (art. 24); the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (art. 27); and the Single Convention on Narcotic Drugs, 1961 (art. 4).

⁴⁶ The initial draft text of the Convention included a provision for offences committed by foreigners abroad (draft article 10). This draft article, and in particular its jurisdictional implications, was extensively discussed during the negotiations in the Third Committee of the General Assembly. Eventually, “taking into account the aims of article 10 and similar articles in other international conventions”, the Third Committee requested the Sixth Committee to consider the legal questions surrounding such a provision and to submit its recommendation thereon (Memorandum from the Chairman of the Third Committee to the Chairman of the Sixth Committee (A/C.3/526). See also *Official Records of the General Assembly, Fourth Session, Third Committee*, 242nd and 243rd meetings (A/C.3/SR.242 and 243). The Sixth Committee, after having considered the legal difficulties that arose with respect to extraterritorial jurisdiction, including practical difficulties of asserting such jurisdiction, recommended the deletion of draft article 10 (Memorandum from the Chairman of the Sixth Committee to the Chairman of the Third Committee on questions referred to the Sixth Committee (A/C.6/L.102), pp. 8 and 26).

only minor changes have been introduced.⁴⁷ It should be noted, however, that in respect of the Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs, yet another attempt was made to fill the lacuna that exists when a State, albeit recognizing the principle of extradition of nationals, does not extradite the individual and apply the territoriality principle in criminal law, thus being unable to institute proceedings against the alleged offender. As a compromise solution, the Conference recommended, in the Final Act, that countries recognizing the principle of extradition of nationals grant the extradition of their nationals who are guilty of committing an offence abroad, even if the applicable extradition treaty contains a reservation thereto.⁴⁸

35. Furthermore, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others contains an additional provision specifying that the article dealing with the prosecution and extradition of nationals is not applicable “when the person charged with the offence has been tried in a foreign State and, if convicted, has served his sentence or had it remitted or reduced in conformity with the laws of that foreign State” (art. 10).

36. Regarding the provisions on foreigners who have committed an offence in a third State, both the Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs and the Convention for the Prevention

⁴⁷ The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs (art. 7) and the Convention for the Prevention and Punishment of Terrorism (art. 9) use the more imperative language “shall prosecute and punish” instead of “should be punishable”. Upon a proposal to use the word “punishable” during the negotiations of the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, the President of the Conference observed that full discretion was left to national courts and, thus, such an amendment would be unnecessary. (*Records of the Conference for the Suppression of the Illicit Traffic in Dangerous Drugs, Geneva, June 8th to 26th, 1936. Text of the Debates*, Series of League of Nations Publications XI. Opium and Other Dangerous Drugs. 1936. XI.20, p. 159.) The article on nationals in the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (art. 9) contains further modifications that were introduced on the recommendation of the Sixth Committee of the General Assembly (see A/C.6/L.102). In particular, the wording “where the extradition of nationals is not permitted by law” is used instead of “where the principle of the extradition of nationals is not recognized”. This change was a result of a request by the Third Committee to the Sixth Committee to “inform it what would be the legal effects of deleting or retaining the clause ‘subject to the requirements of domestic law’ in all the articles of the [draft convention] in which this clause appears” (A/C.3/526). The Sixth Committee proposed its replacement in all instances by either “to the extent permitted by domestic law”, if it was desired to grant States discretion in carrying out the obligation, or “in accordance with the conditions laid down by domestic law”, if it was merely desired to grant States discretion as to the procedural and administrative means of implementation of the relevant obligation (A/C.6/L.102, pp. 6 and 7). Furthermore, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others replaced the wording “should be punishable in the same manner as if the offence had been committed in their own territory” with “shall be prosecuted in and punished by the courts of their own State” to accommodate different principles of deciding the applicable law. (*Official Records of the General Assembly, Fourth Session, Sixth Committee*, 199th meeting (A/C.6/SR.199), statements by Brazil (paras. 172–176), Egypt (para. 171) and Yugoslavia (para. 182).) The reference to the situation where the offender has acquired his nationality after the commission of the offence was also deleted due to, *inter alia*, the exceptional nature of the situation (*ibid.*, 199th and 200th meetings (A/C.6/SR.199 and 200)).

⁴⁸ Recommendation No. 2, *Records of the Conference ...* (footnote 47 above), annex VIII.

and Punishment of Terrorism have adopted very similar language to that found in article 9 of the International Convention for the Suppression of Counterfeiting Currency.⁴⁹ However, the Convention for the Prevention and Punishment of Terrorism has introduced yet another condition which significantly limits its application, namely an element of jurisdictional reciprocity.⁵⁰

37. Turning to the Single Convention on Narcotic Drugs, 1961 and the Convention on Psychotropic Substances, these two conventions set forth all provisions relating to extradition and prosecution in a sole article. In addition, these provisions conflate the treatment of nationals and foreigners into a single paragraph and limit the obligation to institute proceedings to serious offences. They specify that serious offences “shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found, if extradition is not acceptable in conformity with the law of the Party to which application is made”.⁵¹ However, both conventions adhere to the underlying principle established in the International Convention for the Suppression of Counterfeiting Currency regarding jurisdictional limitations, by subjecting the application of the article “to the constitutional limitations of a Party, its legal system and domestic law”,⁵² as well as to a State’s criminal law on questions of jurisdiction.⁵³

38. Furthermore, similarly to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,⁵⁴ both conventions specifically subject the institution of proceedings to the condition that the offender “has not already been prosecuted and judgement given”.⁵⁵

39. All of the five conventions mentioned above contain an extradition mechanism similar to the one set forth

⁴⁹ The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs (art. 7) and the Convention for the Prevention and Punishment of Terrorism (art. 9) use the more imperative language “shall prosecute and punish” instead of “should be punishable”. In addition, to provide clarity, the words “could not be granted” in relation to extradition requests are used instead of referring to the fact that the requested State “cannot hand over” the person accused (*Records of the Conference ...* (footnote 47 above, p. 96)).

⁵⁰ Under this provision, a State party is only obliged to institute proceedings against a foreigner when a request for extradition has been made but cannot be granted, if it recognizes extraterritorial jurisdiction and if “the foreigner is a national of a country which recognizes the jurisdiction of its own courts in respect of offences committed abroad by foreigners” (art. 10 (b)). During the Conference, it was explained that this provision had been inserted to accommodate the views of those States that considered that principles of international law did not permit the application of extraterritorial jurisdiction (*Proceedings of the International Conference on the Repression of Terrorism* (footnote 44 above), pp. 105–106). It should be noted that during the debate on the Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs, a proposal to introduce a similar condition was rejected (*Records of the Conference ...* (footnote 47 above), p. 99).

⁵¹ Art. 36, para. 2 (a) (iv), and art. 22, para. 2 (a) (iv), respectively.

⁵² Art. 36, para. 2 and art. 22, para. 2, respectively.

⁵³ Art. 36, para. 4 and art. 22, para. 3, respectively. The latter convention has substituted “criminal law” for “domestic law” to concord with other provisions of the article (*United Nations Conference for the Adoption of a Protocol on Psychotropic Substances*, Report of the Drafting Committee (see E/CONF.58/L.4/Add.2)).

⁵⁴ See paragraph 35 above.

⁵⁵ Art. 36, para. 2 (a) (iv) and art. 22, para. 2 (a) (iv), respectively.

in the International Convention for the Suppression of Counterfeiting Currency. The main differences can be summarized as follows:

(a) The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs, the Single Convention on Narcotic Drugs, 1961 and the Convention on Psychotropic Substances contain a provision allowing the requested party to refuse to effect the arrest of an offender or grant extradition in cases where the competent authorities consider that the offence is not sufficiently serious;⁵⁶

(b) Whereas all these conventions adopt the same approach as the International Convention for the Suppression of Counterfeiting Currency by specifying that extradition shall be granted in conformity with the law of the requested State, the Convention for the Prevention and Punishment of Terrorism, the Single Convention on Narcotic Drugs, 1961 and the Convention on Psychotropic Substances seem to widen the discretion of the requested States to refuse extradition. The Convention for the Prevention and Punishment of Terrorism subjects the obligation to grant extradition to “any conditions and limitations recognized by the law or practice of the country to which the application is made”.⁵⁷ The Single Convention on Narcotic Drugs, 1961 and the Convention on Psychotropic Substances subject the relevant provision to the “constitutional limitations of a Party, its legal system and domestic law”.⁵⁸ In addition, the two conventions last mentioned have adopted a more permissive approach to the extradition mechanism and provide that “[i]t is desirable that the offences [...] be included as extradition crimes ...”.⁵⁹ Nevertheless, the Single Convention on

Narcotic Drugs, 1961 was subsequently amended to substitute this permissive approach for the formula “shall be deemed to be included” used in the earlier conventions;⁶⁰

(c) The Convention for the Prevention and Punishment of Terrorism and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others have omitted a reference to States making extradition conditional on “reciprocity”, but refer to those States that condition extradition on the existence of a treaty;⁶¹

(d) The Convention for the Prevention and Punishment of Terrorism contains an additional paragraph extending the extradition regime to include any offence committed in the territory of the party against whom it is directed.⁶²

40. In conjunction with the adoption of the Convention for the Prevention and Punishment of Terrorism, it was envisaged that an international criminal court be established for the purpose of trying persons accused of offences under the Convention. Consequently, a Convention for the Creation of an International Criminal Court⁶³ was concluded together with the Convention for the Prevention and Punishment of Terrorism and thus provided States parties with a so-called “third option” in relation to its mechanism for the punishment of offenders. Pursuant to this third option, States parties had the alternative of committing a person (national or foreigner) accused of an offence under the Convention for the Prevention and Punishment of Terrorism for trial to the Court instead of prosecuting before its own courts. Similarly, in situations where a requested State was able to grant extradition, it was entitled to commit the accused for trial to the Court if the requesting State was also a party to the Convention. The Convention further specified that States parties to the Convention for the Prevention and Punishment of Terrorism that took advantage of this option were deemed to have discharged their obligations thereunder.⁶⁴

⁵⁶ Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs (art. 10, para. 4), Single Convention on Narcotic Drugs, 1961 (art. 36, para. 2 (b)) and Convention on Psychotropic Substances (art. 22, para. 2 (b)). During the debate on the Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs, it was argued that narcotic offences, as opposed to the crime of counterfeiting, were susceptible to greater variation concerning seriousness and that States therefore should be left with some discretion as to the extraditability of such offences (*Records of the Conference ...*, footnote 47 above). See, in particular, the observation by Austria on the First Consultation, reproduced in annex 2, p. 192, and the comments by the Netherlands at the 16th meeting.

⁵⁷ Art. 8, para. 4. The redrafting of the provision was due to the concern of several States not to encroach on the right of asylum, the discretion regarding political offences and the wide scope of the offences referred to in the article. (See, for example, *Proceedings of the International Conference on the Repression of Terrorism* (footnote 44 above), p. 102 (Belgium and the Netherlands) and annex 3 (Report of the Committee for the International Repression of Terrorism), p. 186; and *Draft Convention for the Prevention and Punishment of Terrorism, Observations by Governments, Series I, Geneva, September 7th, 1936* (A.24.1936.V), pp. 10–11 (Norway and the Netherlands)). Furthermore, it was explained that the addition of the word “conditions” did not affect the substance of the clause, but was done to indicate that not only limitations in the domestic law applied (*Proceedings of the International Conference on the Repression of Terrorism* (footnote 44 above), p. 152 (statement by the delegate of Romania (Mr. Pella), Rapporteur)). The wording “or by the practice” was inserted to accommodate States whose extradition law was regulated by case law and political practice in addition to written legislation (*ibid.*, pp. 102–103).

⁵⁸ Single Convention on Narcotic Drugs, 1961 (art. 36, para. 2), and Convention on Psychotropic Substances (art. 22, para. 2).

⁵⁹ Single Convention on Narcotic Drugs, 1961 (art. 36, para. 2 (b)) and Convention on Psychotropic Substances (art. 22, para. 2 (b)). The use of the formula “it is desirable” was motivated by the concern of certain States regarding their discretion to make certain offences extraditable and the reciprocal nature of extradition agreements (see,

in particular, statements by Canada, Pakistan, Poland and Yugoslavia, *Official Records of the United Nations Conference for the adoption of a Single Convention on Narcotic Drugs, New York, 24 January–25 March 1961*, vol. II (United Nations publication, Sales No. 1963.XI.5), 3rd meeting of the Ad Hoc Committee on Articles 44–46 of the Third Draft, pp. 242–244).

⁶⁰ Art. 36, para. 2 (b) (i) of the Protocol amending the Single Convention on Narcotic Drugs, 1961. In addition, the Protocol inserts a new art. 36, para. 2 (b) (ii) stating that “If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences” covered by the Convention, and that “[e]xtradition shall be subject to the other conditions provided by the law of the requested Party”. The provision regulating extraditable offences for Parties which do not make extradition conditional on the existence of a treaty was similarly amended, subjecting the obligation “to the conditions provided by the law of the requested Party” (art. 36, para. 2 (b) (iii)). The provision concerning the discretion of States with particular reference to the seriousness of the offence was also amended by the insertion of the qualification that the provision applies “notwithstanding subparagraphs (b) (i), (ii) and (iii) of this paragraph” (art. 36, para. 2 (b) (iv)).

⁶¹ Art. 8, para. 2 and art. 8, para. 2, respectively.

⁶² Art. 8, para. 3.

⁶³ The Convention never entered into force.

⁶⁴ Art. 2 of the Convention for the Creation of an International Criminal Court.

41. As mentioned above, during the debate on the International Convention for the Suppression of Counterfeiting Currency, the question of extraterritorial jurisdiction was subject to lengthy debates and resulted in the adoption of article 17 (which provides that participation in the Convention “shall not be interpreted as affecting that Party’s attitude on the general question of criminal jurisdiction as a question of international law”). The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs,⁶⁵ the Convention for the Prevention and Punishment of Terrorism⁶⁶ and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others⁶⁷ contain articles that closely follow the terms of this provision. The two later conventions, namely the Single Convention on Narcotic Drugs, 1954 and the Convention on Psychotropic Substances, 1971, contain provisions that, while using a somewhat different wording, are intended to have the same effect.⁶⁸

42. Another topic that was widely discussed during the negotiations of the International Convention for the Suppression of Counterfeiting Currency concerned the safeguarding of the internal criminal legislation and administration of participating States in the context of its implementation (art. 18).⁶⁹ All subsequent conventions⁷⁰ have adopted provisions similar to article 18 of the International Convention for the Suppression of Counterfeiting Currency, which provide that they do not prejudice the discretion of States to define, prosecute and punish the relevant offences in conformity with domestic law.⁷¹

(b) *Reservations*

43. Upon becoming party to the conventions mentioned above, some States made declarations and reservations

⁶⁵ Art. 14.

⁶⁶ Art. 18. The language in this article has been slightly modified to make it more specific. The words “the limits of” have been inserted between “the general question of” and “criminal jurisdiction”.

⁶⁷ Art. 11. This article has been modified in the same manner as the Convention for the Prevention and Punishment of Terrorism (see above).

⁶⁸ The relevant paragraphs state that the penal provisions of the Conventions shall be subject to the provisions of the domestic or criminal law of the party concerned on questions of jurisdiction (Single Convention on Narcotic Drugs, 1954 (art. 36, para. 3) and Convention on Psychotropic Substances (art. 22, para. 4)). See also *Commentary on the Single Convention on Narcotic Drugs, 1954*, issued in accordance with paragraph 1 of Economic and Social Council resolution 914 D (XXXIV) of 3 August 1962, para. 3 of the commentary to art. 36, para. 3.

⁶⁹ See paragraph 24 above.

⁷⁰ Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs (art. 15), Convention for the Prevention and Punishment of Terrorism (art. 19), Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (art. 12), Single Convention on Narcotic Drugs, 1954 (art. 36, para. 4), Convention on Psychotropic Substances (art. 22, para. 5). The phrase “without ever being allowed impunity” which is found in art. 18 of the International Convention for the Suppression of Counterfeiting Currency was considered superfluous and has been omitted in all the subsequent conventions (*Records of the Conference ...*, footnote 47 above, p. 205).

⁷¹ The Convention for the Prevention and Punishment of Terrorism contains a modified version of this provision (art. 19) which, in addition to the characterization of the offences, imposition of sentences and the methods of prosecution, also emphasizes that rules on mitigating circumstances, pardon and amnesty are determined by domestic law (*Proceedings of the International Conference on the Repression of Terrorism* (footnote 44 above), pp. 156–157).

relating to the provisions on the punishment of offenders.⁷² Most of these declarations and reservations concern the non-extradition of nationals⁷³ and the provisions regarding the extradition regime, in particular, the recognition of the various offences as extradition crimes.⁷⁴ In one instance, it has also been clarified that extradition is conditional on the existence of bilateral treaties.⁷⁵ In addition, a reservation has been made ensuring the State’s discretion as to whether or not its citizens will be prosecuted for crimes committed abroad.⁷⁶

B. The Geneva Conventions for the protection of war victims and the Additional Protocol I

1. THE GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS⁷⁷

(a) *Relevant provisions*

44. The four Geneva Conventions of 1949 contain in a common article an identical mechanism for the prosecution of persons accused of having committed grave breaches of the Conventions.⁷⁸ The underlying principle for this mechanism is the establishment of universal jurisdiction over grave breaches of the Conventions: thus, the obligation to undertake measures against an alleged offender is not conditioned by any jurisdictional considerations of States. Another feature is that the mechanism provides an obligation of prosecution, with the possibility to extradite an accused person as an alternative. The obligation to search for and prosecute an alleged offender seems to exist irrespective of any request for extradition by another party.⁷⁹

45. Pursuant to the first paragraph of the common article, the parties “undertake to enact any legislation

⁷² Some reservations were made in the light of jurisdictional restrictions that existed at the time. See, in particular, the reservation made by China to art. 9 of the Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs, containing the extradition regime (Protocol of Signature to the Convention, League of Nations, *Treaty Series*, vol. 198, No. 4648, p. 321).

⁷³ Declarations and reservations by Brazil and Panama (United Nations, *Treaty Series*, vol. 976, No. 14151, pp. 100 and 99, respectively) and Myanmar (*ibid.*, vol. 2223, No. A-14151, p. 212) with respect to article 14 of the 1972 Protocol amending the Single Convention on Narcotic Drugs, 1954.

⁷⁴ Reservations by India with respect to article 14, paragraph 2 (b), of the Protocol amending the Single Convention on Narcotic Drugs, 1954 (*ibid.*, vol. 1120, No. A-14151, p. 479, esp. footnote 2), and by Myanmar (*ibid.*, vol. 1887, No. 14956, p. 473) and Viet Nam (*ibid.*, vol. 1996, No. 14956, p. 427) with respect to article 22, paragraph 2, of the Convention on Psychotropic Substances.

⁷⁵ Declaration by Cuba with respect to article 14, paragraph 2 (b) (ii) of the Protocol amending the Single Convention on Narcotic Drugs, 1954 (*ibid.*, vol. 1551, No. 14151, p. 342).

⁷⁶ Reservation by Finland with respect to art. 9 of the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (*ibid.*, vol. 826, No. 1342, p. 289).

⁷⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention for the Amelioration of the Shipwrecked Members of Armed Forces at Sea, Geneva Convention Relative to the Treatment of Prisoners of War, and Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

⁷⁸ Articles 49, 50, 129 and 146, respectively, of the conventions listed in the preceding footnote.

⁷⁹ See Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, vol. IV, p. 593.

necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” of the Conventions.⁸⁰

46. In its second paragraph, the common article specifies that:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

47. While the obligation described above is limited to grave breaches, the common article further provides, in its third paragraph, that the High Contracting Parties shall take measures to suppress all acts contrary to the Conventions other than the grave breaches.

48. Finally, under its fourth paragraph, the common article stipulates that the accused “shall benefit by safeguards of proper trial and defence” in all circumstances, and that those safeguards “shall not be less favourable than those provided by Article 105 and those following” of the Geneva Convention relative to the Treatment of Prisoners of War.

(b) *Preparatory works*

49. The four Geneva Conventions were adopted at the Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims, held in Geneva from 21 April to 12 August 1949 and convened by the Swiss Federal Council.⁸¹ The Diplomatic Conference worked on the basis of draft texts adopted by

⁸⁰ Each Convention contains an article describing what acts constitute grave breaches that follows immediately after the extradite-or-prosecute provision. For the first and second Geneva Conventions, this article is identical (arts. 50 and 51, respectively): “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

Article 130 of the third Geneva Convention reads as follows: “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.”

Article 147 of the fourth Geneva Convention reads as follows: “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

⁸¹ *Final Record of the Diplomatic Conference of Geneva of 1949*, Federal Political Department, Bern, available at www.loc.gov/tr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html, accessed 22 November 2016.

the Seventeenth International Red Cross Conference, in Stockholm.⁸² To deal with the articles common to all four Conventions, the Conference established a Joint Committee, which assigned the task of preparing the texts to a Special Committee.⁸³

50. At the outset of the deliberations on the common article in the Joint Committee, discussions centred mainly on the text adopted by the Seventeenth International Red Cross Conference⁸⁴ and a text prepared by the International Committee of the Red Cross (ICRC).⁸⁵

51. The regime contained in the text of the International Red Cross Conference was quite modest compared to that prepared by ICRC. It provided that the parties to the Conventions should, in case existing laws were inadequate, propose to their legislatures the necessary measures to repress during wartime any act contrary to the provisions of the Conventions. This provision was based on the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field and the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Nevertheless, the proposed text also introduced some novel clauses aimed at strengthening the provisions concerning the repression of breaches, namely, an active obligation for the parties to search for alleged offenders of breaches of the Conventions, irrespective of their nationality, and to indict such persons or, if they preferred, to hand them over to another party for judgement.⁸⁶

52. The ICRC text set forth, in the first article, a firm obligation for States parties to incorporate the Conventions into national law and to enact provisions necessary for the repression and prosecution of any breaches of the Conventions. States parties further had to communicate to the Swiss Federal Council measures adopted to give effect to the article within a period of two years after ratification. A second article detailed the grave breaches of the Conventions and provided that they should be punished

⁸² Report of the Seventeenth International Red Cross Conference, Stockholm, August 1948, available at www.loc.gov/tr/frd/Military_Law/pdf/RC_XVIIth-RC-Conference.pdf, accessed 22 November 2016. For the text of the relevant draft article, see *Final Record ...* (footnote 81 above), vol. III, annex No. 50, p. 43.

⁸³ Report drawn up by the Joint Committee and presented to the Plenary Assembly, *Final Record ...* (footnote 81 above), vol. II-B, p. 128.

⁸⁴ *Ibid.*, vol. III, annex No. 50, p. 43.

⁸⁵ For the texts of these articles, see *Remarks and Proposals submitted by the International Committee of the Red Cross. Revised and New Draft Conventions for the Protection of War Victims. Document for the consideration of Governments invited by the Swiss Federal Council to attend the Diplomatic Conference at Geneva* (21 April 1949). The Seventeenth International Red Cross Conference had recommended to ICRC that it continue studying the question of repression of breaches of the Conventions and submit proposals on this topic to a conference (Report of the Seventeenth International Red Cross Conference (footnote 82 above), resolution XXIII). Accordingly, four new common articles on the repression of violations of the Conventions were presented to the Conference. In the light of the fact that several delegations objected to the late introduction of these new articles, the text adopted at the Stockholm Conference was re-established as the basis for discussion. Nevertheless, the delegate of the Netherlands adopted the ICRC draft articles and submitted them to the Conference as an amendment, to be formally considered (see summary record of the sixth meeting of the Joint Committee, *Final Record ...* (footnote 81 above), vol. II-B, pp. 23–25).

⁸⁶ See *Final Record ...* (footnote 81 above), vol. II-B, p. 85.

“as crimes against the law of nations”, either by the tribunals of any State party or by any international jurisdiction whose competence had been recognized, thus incorporating the principle of universal jurisdiction. The second paragraph provided an obligation for States parties to enact “suitable provisions for the extradition” of alleged offenders of grave breaches “whom the said [Party] does not bring before its own tribunals”.⁸⁷

53. During the deliberations in the Special Committee, it became clear that the ICRC text was considered to contain somewhat “far-reaching innovations, which impinged on the domain of international penal law”.⁸⁸ A more cautious approach was thus advocated.⁸⁹ A joint amendment was introduced with the aim of bridging the two texts,⁹⁰ which became the basis for the Committee’s negotiations. This amendment followed the structure of the ICRC text in that it devoted a special article to grave breaches, but omitted any reference to an international jurisdiction.⁹¹ Instead, the joint amendment imposed a firm obligation on the parties to enact legislation providing effective penalties, which was based on article V of the Convention on the Prevention and Punishment of the Crime of Genocide. The amendment further provided for criminal responsibility, not only of the offender, but also of whoever ordered the breach to be committed, thus addressing the question of command. In order to avoid resistance from legislators, the obligation to enact legislation was limited to grave breaches, which was intended to guarantee a certain amount of uniformity in national legislations. This was especially desirable since the tribunals were also supposed to hear charges against alleged offenders of other nationalities.⁹² Furthermore, the question of handing over the accused person to another party for trial was made subject to the establishment of a *prima facie* case by such party.⁹³ It was further explained that if the requested party decided not to hand over an alleged offender, it would be obliged to “bring him to trial before its own courts”.⁹⁴

54. During the discussions on the joint amendment, it was proposed to reintroduce the time limit of two years within which the parties to the Conventions were obliged

⁸⁷ The ICRC commentary describes this provision as enshrining the principle *aut dedere aut punire* (see Pictet (footnote 79 above), p. 585).

⁸⁸ Report of the Joint Committee to the Plenary Assembly, *Final Record of the Diplomatic Conference of Geneva of 1949* (footnote 81 above), vol. II-B, p. 132.

⁸⁹ It was recalled that “it is not the duty of this Conference to frame rules of international penal law” (*ibid.*).

⁹⁰ *Ibid.*, vol. III, annex No. 49, pp. 42–43. The joint amendment was submitted on behalf of Australia, Belgium, Brazil, France, Italy, Norway, the Netherlands, Switzerland, the United Kingdom and the United States. For other amendments and texts presented during the deliberations, see annexes Nos. 49 to 53 A.

⁹¹ Report of the Joint Committee to the Plenary Assembly. *Ibid.*, vol. II.

⁹² Fourth report drawn up by the Special Committee of the Joint Committee, *ibid.*, vol. II-B, p. 115.

⁹³ During the deliberations in the Special Committee, it was explained that the requirement of having established a *prima facie* case originated from the practice of the United Nations War Crime Commission and signified that “a finding of guilt to the charges against the accused was highly probable”. The requesting party was obliged to provide the requested State a satisfactory statement to this effect. *Ibid.*, p. 117.

⁹⁴ *Ibid.*, p. 115.

to enact the necessary penal legislation.⁹⁵ Referring to the different national legislative procedures, the proposal was rejected.⁹⁶ A proposal to limit the obligation to search for and bring to trial an accused person to the parties of the conflict was withdrawn after it was explained that the principle of universality applied and that such an obligation did not violate a State’s neutrality.⁹⁷ It was further suggested to use the term “extradition” instead of “handing over”. Nevertheless, the term “extradition” was considered less practicable in view of the wide range of extradition laws and treaties that existed. It was also observed that “‘handing over’ was a notion of customary international law in so far as it was extensively practised by States after the last war in connection with the activities of the United Nations War Crimes Commission”.⁹⁸ Furthermore, a proposal that the duty of handing over an accused person to another party be subject to States’ national legislation was accepted. Consequently, the phrase “in accordance with the provisions of its own legislation” was inserted after the words “if it prefers”.⁹⁹

55. Throughout the negotiations on these provisions, a proposal was made to replace the words “grave breaches” with “crimes”.¹⁰⁰ Nevertheless, the proposed amendment was consistently rejected with the rationale that it was the prerogative of each State to classify the breaches detailed in the Conventions and that it would be inappropriate to attempt to create new penal codes in the relevant provisions.¹⁰¹

56. During the debate of the Conference, the question of the establishment of jurisdiction was raised in the context of a proposed amendment to the second paragraph of the relevant provision. It was suggested to insert the words “in conformity with its own laws or with the Conventions prohibiting acts that may be defined as breaches” in connection with the obligation to bring an accused person to trial before its own courts.¹⁰² The aim was to specify

⁹⁵ *Ibid.*, p. 116. See also the summary records of the twenty-ninth meeting of the Special Committee and of the tenth meeting of the Joint Committee (statement by the Union of Soviet Socialist Republics), *ibid.*, pp. 86 and 31, respectively.

⁹⁶ *Ibid.*, summary record of the eleventh meeting of the Joint Committee, pp. 32–33 and Report of the Joint Committee to the Plenary Assembly, p. 132.

⁹⁷ *Ibid.*, Fourth report drawn up by the Special Committee of the Joint Committee, p. 116.

⁹⁸ *Ibid.*, p. 117 (statement by the delegate of the Netherlands, Rapporteur of the Joint Committee).

⁹⁹ *Ibid.*, p. 117. See also the summary records of the thirtieth and thirty-first meetings of the Special Committee (statement made by Italy), pp. 87–88.

¹⁰⁰ *Ibid.*, Fourth report drawn up by the Special Committee of the Joint Committee, pp. 116–117. See also the summary records of the twenty-ninth and thirtieth meetings of the Special Committee and of the tenth meeting of the Joint Committee (proposal made by the Union of Soviet Socialist Republics), pp. 85–87 and 31–32, as well as the summary records of the twenty-first and twenty-second plenary meetings, pp. 353–371.

¹⁰¹ *Ibid.*, p. 115. See also the summary records of the twenty-ninth and thirtieth meetings of the Special Committee and of the eleventh meeting of the Joint Committee, as well as the summary records of the twenty-first and twenty-second plenary meetings, pp. 85–87.

¹⁰² *Ibid.*, summary records of the tenth meeting of the Joint Committee (proposal made by the Union of Soviet Socialist Republics), p. 31, as well as the summary records of the twenty-first and twenty-second plenary meetings, pp. 353–371. The amendment was introduced with some variations, including “in obedience to its own legislation or to the Conventions repressing such acts as may be defined as breaches”. *Ibid.*, vol. III, annex No. 53, p. 44.

the obligation of parties to establish jurisdiction over the breaches enumerated in the Conventions.¹⁰³ The proposed amendment was rejected both in the Joint Committee and in plenary as being unnecessary, with the justification that jurisdiction would follow from the obligation to enact the necessary legislation to provide penal sanctions. It was explained that if a particular act was a penal offence under the law of a State—which it would be if that State had implemented its obligation specified in the first paragraph of the provision—it was clear that its courts would have jurisdiction to try a person committing the offence.¹⁰⁴

57. Whereas the joint amendment had omitted any language regarding judicial guarantees for accused persons,¹⁰⁵ the question was again raised during the deliberations on the amendment. Accordingly, a proposal was made to add a fourth paragraph on this subject, which provided for the safeguards of a proper trial and defence.¹⁰⁶ The proposed amendment was subsequently adopted without any modification.

(c) *Reservations*

58. No relevant reservations have been made with regard to this provision.

2. ADDITIONAL PROTOCOL I

59. The provision concerning the punishment of offenders contained in the common article to the Geneva Conventions for the protection of war victims seems to be unique and no other international instruments have been found containing a similar clause, with the exception 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). In this case, however, the common article has been made applicable to Protocol I by *renvoi*. Article 85, paragraph 1, of the Protocol specifies that “[t]he provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this section, shall apply to the repression of breaches and grave breaches of this Protocol”.

60. Article 85, paragraph 1, has been supplemented by other provisions relating to the repression of breaches which are not found in the Geneva Conventions. Paragraph 5 of article 85 explicitly provides that the grave breaches enumerated in the Conventions and the Additional Protocol shall be considered war crimes. Also of

interest in this context is article 88 on mutual assistance in criminal matters in connection with proceedings brought in respect of grave breaches. Paragraph 2 of article 88 specifies that the parties to Additional Protocol I shall, when the circumstances allow, cooperate in extradition matters. In this regard, due consideration shall be offered to the request of the State in whose territory the offence has occurred. Nevertheless, this duty is subject to the rights and obligations established in the Conventions and in article 85, paragraph 1, of the Additional Protocol. Yet another qualification is introduced in the third paragraph, which provides that the law of the requested party shall apply in all cases and that the paragraphs shall not “affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters”.

C. Regional conventions on extradition

61. Several regional conventions on extradition contain provisions that combine the options of extradition and prosecution. While conventions concluded in the American and European contexts appear to be the most influential, provisions of this kind may also be found in other regional conventions.

1. AMERICAN CONVENTIONS ON EXTRADITION

(a) *Relevant provisions*

62. Conventions relating to extradition concluded in the American context appear to be the first ones to have contained provisions combining the options of extradition and prosecution.¹⁰⁷ The Convention on Private International Law, also known as the “Bustamante Code”, under Book IV (International Law of Procedure), Title III (Extradition), contains two provisions which read as follows:

Article 344

In order to render effective the international judicial competence in penal matters, each of the contracting States shall accede to the request of any of the others for the delivery of persons convicted or accused of crime, if in conformity with the provisions of this title, subject to the dispositions of the international treaties and conventions containing a list of penal infractions which authorize the extradition.

Article 345

The contracting States are not obliged to hand over their own nationals. The nation which refuses to give up one of its citizens shall try him.

63. Similarly, under the 1933 Convention on Extradition adopted by the Seventh International Conference of American States, States parties undertook the obligation, under certain conditions, of surrendering to any of the States which may make the requisition the persons who may be in their territory and who are accused or under sentence (art. 1). Pursuant to article 2:

¹⁰⁷ It should be mentioned, however, that the Treaty on International Penal Law, signed at Montevideo on 23 January 1889, and the revised Treaty on International Penal Law, signed at Montevideo on 19 March 1940, contain an absolute obligation to extradite, subject to the conditions set forth in the respective treaties (see, respectively, art. 19 and art. 18), and therefore do not include a provision contemplating the alternative of prosecution. The former treaty explicitly provided that “[e]xtradition shall in no case be barred by the nationality of the offender” (art. 20).

¹⁰³ *Ibid.*, vol. II-B, summary records of the twenty-first and twenty-second plenary meetings (observations by the Union of Soviet Socialist Republics), pp. 353–371.

¹⁰⁴ *Ibid.*, summary records of the eleventh meeting of the Joint Committee and of the twenty-first and twenty-second plenary meetings, pp. 33–35 and 353–371.

¹⁰⁵ It should be recalled that ICRC had advocated the inclusion of a provision on this subject. See draft article 40 (b) of the ICRC text.

¹⁰⁶ *Final Record of the Diplomatic Conference of Geneva of 1949* (footnote 81 above), vol. II-B, summary records of the eleventh meeting of the Joint Committee (proposal by France), p. 33. It was explained that whereas the majority of cases were already covered by the Conventions, the amendment intended to “cover those persons who in virtue of armistice agreements or peace treaties might be handed over by a vanquished Power to its victors as presumed criminals”. For the text of the amendment, see *ibid.*, vol. III, annex No. 52, p. 44.

When the person whose extradition is sought is a citizen of the country to which the requisition is addressed, his delivery may or may not be made, as the legislation or circumstances of the case may, in the judgment of the surrendering State, determine. If the accused is not surrendered, the latter State is obliged to bring action against him for the crime with which he is accused, if such crime meets the conditions established in subarticle (b) of the previous article [i.e., if the act for which extradition was sought constitutes a crime and is punishable under the laws of the demanding and surrendering States with a minimum penalty of imprisonment for one year]. The sentence pronounced shall be communicated to the demanding State.

In this respect, it should be noted that States signing an “optional clause” accompanying the Convention, “notwithstanding Article 2 ..., agree[d] among themselves that in no case [would] the nationality of the criminal be permitted to impede his extradition”. The Convention further contained provisions relating to cases in which extradition will not be granted (including when the accused must appear before an extraordinary tribunal or court, or when the offence is of a political nature (art. 3)), requirements for the request for extradition (art. 5) and other substantive and procedural questions relating to extradition proceedings.

64. Similarly, the 1981 Inter-American Convention on Extradition imposes the obligation on States parties “to surrender to other States Parties that request their extradition persons who are judicially required for prosecution, are being tried, have been convicted or have been sentenced to a penalty involving deprivation of liberty” (art. 1). Article 2 indicates that, for extradition to be granted, the relevant offence must have been committed in the territory of the requesting State and that, when committed elsewhere, extradition shall be granted provided the requesting State has jurisdiction to try the offence. Paragraph 3 of that provision further specifies:

The requested State may deny extradition when it is competent, according to its own legislation, to prosecute the person whose extradition is sought for the offence on which the request is based. If it denies extradition for this reason, the requested State shall submit the case to its competent authorities and inform the requesting State of the result.

65. The subsequent articles contain provisions relating to extraditable offences (art. 3), grounds for denying extradition (art. 4, which refers, *inter alia*, to cases in which the person is to be tried before an extraordinary or *ad hoc* tribunal of the requesting State, when the relevant offence is a political offence or when it can be inferred that persecution for reasons of race, religion or nationality is involved or that the position of the person sought may be prejudiced for any of these reasons), and the preservation of the right of asylum (art. 6). Pursuant to article 7, paragraph 1, “[t]he nationality of the person sought may not be invoked as a ground for denying extradition, except when the law of the requested State otherwise provides”. Under the title “Prosecution by the Requested State”, article 8 reads as follows:

If, when extradition is applicable, a State does not deliver the person sought, the requested State shall, when its laws or other treaties so permit, be obligated to prosecute him for the offence with which he is charged, just as if it had been committed within its territory, and shall inform the requesting State of the judgment handed down.

66. Article 9 specifies that States parties shall not grant extradition when the offence in question is punishable in the requesting State by the death penalty, by life

imprisonment, or by degrading punishment, unless the requesting State gives sufficient assurances that these penalties will not be imposed. Further articles of the Convention relate to the substantive and procedural conditions relating to extradition proceedings.

(b) *Preparatory works*¹⁰⁸

67. The Bustamante Code was adopted at the 1928 Sixth International Conference of American States, from a draft prepared by the Rio de Janeiro International Commission of Jurists in 1927,¹⁰⁹ which itself relied on the preparatory work conducted by Antonio Sánchez de Bustamante y Sirven.¹¹⁰

68. Already in 1912, the International Commission of Jurists had adopted a draft convention on extradition, which aimed at making extradition binding for States parties, except in the case of individuals who were under trial or had already been prosecuted or convicted and in the case of political offences. The draft further provided that the nationality of the individual should not be a bar to extradition, but also that a State would not be under an obligation to surrender its nationals. If they decided not to grant extradition of one of their nationals, States parties would be obliged to prosecute and try the individual in their territory, in conformity with their own laws and with the evidence submitted by the requesting State.¹¹¹

69. The 1927 draft Code was based on the principle of territoriality in the exercise of criminal jurisdiction. Extradition was conceived as a means to ensure the effectiveness of criminal jurisdiction and the draft Code therefore imposed upon States parties a general duty to grant it. However, the drafters took note of the “duties of protection” that a State had with regard to its own nationals, and recognized that a State might hesitate to grant their extradition because of the possible irregularity of the proceedings undertaken against them in the requesting State or of the risk of the individuals being submitted to inhumane or cruel treatment abroad. For this reason, under the draft Code, States parties remained free to decide whether to grant extradition of their nationals, but, if they chose not to extradite, they were under an obligation to prosecute and try the individual in their territory, according to their laws and on the basis of the evidence submitted by the requesting State. Although this implied the exercise of extraterritorial jurisdiction,

¹⁰⁸ The preparatory works of the 1981 Inter-American Convention on Extradition could not be made available to the Secretariat and are therefore not described in this section.

¹⁰⁹ International Commission of Jurists, *Sessions held at Rio de Janeiro, Brazil, April 18–May 20, 1927, Private International Law, Project to be submitted for the consideration of the Sixth International Conference of American States*, Pan American Union, Washington, D.C., 1927.

¹¹⁰ The draft code prepared by Sánchez de Bustamante y Sirven was published for the first time at Havana in March 1925. It was accepted by the Pan American Union in Washington, D.C., on 3 February 1926. In 1927, the International Commission of Jurists held a four-week session to consider the draft, which was adopted on 20 May 1927 and submitted to the Sixth International Conference of American States for final approval the following year (see the preceding footnote).

¹¹¹ Sánchez de Bustamante y Sirven, *La Comisión de Jurisconsultos de Río de Janeiro y el Derecho internacional*, pp. 19–21. See also article 5 of the draft on extradition in International Commission of Jurists (1906), *Acts, resolutions and documents, first assembly in Rio de Janeiro, from June 26th to July 19th, 1912*, Rio de Janeiro, 1914, p. 76.

which the drafters considered as posing certain problems (notably with respect to the availability of evidence to conduct the trial), the provision was introduced to reflect the fact that some national constitutions forbade the surrender of nationals and could not be modified by an international treaty.¹¹² The draft Code further contained provisions relating, *inter alia*, to the order of priorities in case of multiple requests for extradition and the prohibition of extradition for political offences.¹¹³ These provisions of the draft Code were adopted without substantive amendment by the International Conference in 1928.

70. The 1933 Convention on Extradition was adopted at the Seventh International Conference of American States. The Conference worked on the basis of a draft convention prepared by the Fourth Sub-Commission of its Commission II. As explained in the report to the plenary, the extradition of nationals was considered as one of the most delicate issues regarding extradition and the Sub-Commission had decided not to attempt to resolve the matter.¹¹⁴ The draft convention therefore imposed upon States a general obligation to grant extradition, but contained a provision whereby the requested State could choose not to extradite one of its nationals, as provided for under its legislation, but would in that case have the obligation to try him and communicate the results of the prosecution to the requesting State.¹¹⁵ The draft convention further allowed States that had already accepted to surrender their nationals in their reciprocal relations under the 1889 Treaty of Montevideo to continue to do so, and left this option open for other States parties wishing to follow such practice.¹¹⁶ The relevant provision was accepted by the Conference and included in the final text of the Convention.

(c) *Reservations*

71. At the time of signing the 1933 Convention on Extradition, the delegation of the United States reserved, *inter alia*, article 2 (second sentence),¹¹⁷ declaring that the article “shall not be binding upon the United States of America, unless and until subsequently ratified in accordance with the Constitution and laws of the United States of America”.¹¹⁸ With respect to article 18 of the Convention (on transit through the territory of the State of extradited persons), El Salvador made a reservation to the effect that it could not cooperate in the surrender of its own nationals, prohibited by its Political Constitution, by permitting the transit through its territory of said nationals when one foreign State surrenders them to another.¹¹⁹

72. In a declaration made at the time of signature, Guatemala stated that it had signed the 1981 Inter-American Convention on Extradition:

¹¹² *Ibid.*, pp. 81 *et seq.*

¹¹³ *Ibid.*

¹¹⁴ “Informe del ponente, doctor L. A. Podestá Costa”, *Diario de la VII Conferencia Internacional Americana*, Montevideo, 17 December 1933.

¹¹⁵ “Tratado Interamericano de Extradición. Proyecto de la Cuarta Subcomisión de la Comisión II”, document C II, No. 2, *ibid.*

¹¹⁶ “Informe del ponente”, *ibid.*

¹¹⁷ League of Nations, *Treaty Series*, vol. CLXV, No. 3803, p. 45.

¹¹⁸ The Convention was subsequently proclaimed by the President of the United States on 25 January 1935.

¹¹⁹ See footnote 117 above.

with the understanding that the interpretation of articles 7 and 8 when applicable will be subject to the provisions of article 61 of our Constitution, particularly in that “no Guatemalan shall be handed over to a foreign government for trial or punishment except for crimes covered by international treaties in force in Guatemala”.¹²⁰

2. EUROPEAN CONVENTION ON EXTRADITION

73. The European Convention on Extradition, adopted in the context of the Council of Europe, contains a provision combining the options of extradition and prosecution which, as described below,¹²¹ partially served as a model for the corresponding provision included in the Convention for the Suppression of Unlawful Seizure of Aircraft.

(a) *Relevant provisions*

74. Under article 1 of the European Convention, entitled “Obligation to extradite”:

The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.

75. Under article 2, paragraph 1, “[e]xtradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty”. The subsequent provisions of the Convention spell out exceptions to these rules, as well as the conditions for extradition. These include the non-granting of extradition for political offences or when the request for extradition is made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or when the person’s position may be prejudiced for any of these reasons (art. 3), the possibility of refusing extradition when the offence was committed in whole or in part in the territory of the requested State (art. 7) or when the competent authorities of such State are proceeding against the person or a final judgment has been passed for the offence for which extradition is requested (arts. 8 and 9), the possibility to refuse extradition when the relevant offence is punishable by death under the law of the requesting party and the death penalty is not provided for in respect of such offence by the law of the requested party or is not normally carried out, unless the requesting party gives sufficient assurance that the death penalty will not be carried out (art. 11), etc.

76. Under article 6, paragraph 1 (a), a Contracting Party shall have the right to refuse extradition of its nationals. Subparagraph (b) specifies that each Contracting Party may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define as far as it is concerned the term “nationals” within the meaning of the Convention. Paragraph 2 of the same article reads as follows:

If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits

¹²⁰ League of Nations, *Treaty Series*, vol. 1752, No. 30597, p. 190.

¹²¹ See paragraph 99 below.

relating to the offence shall be transmitted without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request.¹²²

77. The Convention further contains provisions relating to other aspects of the extradition proceedings, including conditions for the request and supporting documents (art. 12), provisional arrest (art. 16), or the surrender of the person to be extradited (art. 18).

(b) *Preparatory works*

78. The European Convention on Extradition is the result of a draft prepared by a Committee of Governmental Experts on Extradition, convened by the Secretary-General of the Council of Europe on the instructions of the Committee of Ministers, following a recommendation by the Consultative Assembly.¹²³

79. During the proceedings of the Committee of Governmental Experts, delegations discussed at length whether they preferred a model bilateral convention or a multilateral European convention on extradition. As pointed out in the explanatory report on the European Convention, it then became apparent that “two different attitudes were being taken to certain principles which should govern extradition”, which “it proved impossible to reconcile”, namely one following the traditional view that the chief aim is to repress crime and that therefore extradition should be facilitated, and the other introducing humanitarian considerations and so tending to restrict the application of extradition laws.¹²⁴ An expert from the Scandinavian countries, in particular, explained that the current attitude of countries in his region, which resulted from the preparatory works on new extradition regulations among them, was that, “while they agree on certain general regulations governing extradition procedure, the requested State should retain the right in the last resort to decide, according to the circumstances, whether extradition should be granted or whether, on the other hand, the person claimed should be proceeded against in its own territory”. As a consequence, the orthodox extradition convention between these countries would be replaced by “a uniform law in each of them defining the conditions in which extradition would normally occur and giving special consideration to the need to protect the rights of

the individual”. His proposal that the Council of Europe introduce a similar system, however, did not receive the approval of the majority of experts and the Scandinavian experts thus expressed their willingness to consider the conclusion of extradition conventions of the traditional type (i.e. those entailing an obligation to extradite in specific cases) on condition that such conventions allow certain exceptional circumstances to be taken into consideration, so that in a given case extradition might be refused for imperative reasons of a humanitarian nature.¹²⁵

80. Article 1 of the European Convention on Extradition was inspired by the Bilateral Convention concluded between France and the Federal Republic of Germany on 23 November 1951.¹²⁶ The explanatory report of the European Convention on Extradition emphasizes that the term “competent authorities” in the English text corresponds to “*autorités judiciaires*” in the French text and covers the judiciary and the Office of the Public Prosecutor, but excludes the police authorities.¹²⁷

81. Article 2, paragraph 1, is described in the explanatory report as laying down the principle of compulsory extradition, since “[t]he requested Party has no discretionary power to grant or refuse extradition”, except in certain cases spelled out in subsequent provisions.¹²⁸ As regards article 3 on political offences, the report further explains that this provision allows the requested party to decide whether the offence is political or not: as the provision was not accepted by all the delegations, owing to its mandatory character, the Committee decided that reservations could be made to it.¹²⁹

82. With respect to article 6, it appears that the Committee of Experts found inspiration in the corresponding provisions of the 1933 Convention on Extradition. The majority of experts had considered it desirable, in view of the close links between the member States, to modify to some extent the established principle of non-extradition of nationals, on which legislation on extradition in many member States was still based. The Committee therefore recommended that the rule of non-extradition of nationals should in future be considered optional rather than compulsory and that the provision be drafted following the model of the Convention.¹³⁰

¹²² It should be noted that, on 23 October 1996, the member States of the European Union adopted a Convention, drawn up on the basis of art. K.3 of the Treaty on European Union, relating to extradition between them (*Official Journal of the European Communities*, No. C 313/12), which supplements the European Convention on Extradition and notably provides that “[e]xtradition may not be refused on the ground that the person claimed is a national of the requested member State” (art. 7).

¹²³ On 8 December 1951, the Consultative Assembly of the Council of Europe adopted recommendation 16 (1951), “on the preparatory measures to be taken to achieve the conclusion of a European Convention on Extradition”. After studying this recommendation and the Governments’ replies on the desirability of the convention, the Committee of Ministers instructed the Secretary-General, in its resolution (53) 4, of 19 March 1953, to convene the Committee of Governmental Experts, which held three sessions in Strasbourg (5–9 October 1953, 31 January–9 February 1955 and 15–25 February 1956), during which it based its work on a draft prepared by the Committee on Legal and Administrative Questions and approved by the Assembly (see recommendation 66 (1954)).

¹²⁴ Explanatory report on the European Convention on Extradition (available at <http://conventions.coe.int/treaty/en/Reports/Html/024.htm>), para. 9.

¹²⁵ *Ibid.*, para. 13.

¹²⁶ Bilateral Convention concluded between France and the Federal Republic of Germany, *Bundesgesetzblatt* 1953 II, S. 152. Article 1 of the Bilateral Convention reads as follows: “The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting State are proceeding or who are wanted by the said authorities for the carrying out of a sentence or detention order.”

¹²⁷ Explanatory report on the European Convention on Extradition, commentary to article 1.

¹²⁸ *Ibid.*, commentary to article 2.

¹²⁹ *Ibid.*, commentary to article 3.

¹³⁰ See Council of Europe, *Report of the Committee of Experts on Extradition to the Committee of Ministers*, Committee of Experts, 13th session, CM (53) 129 (Confidential), 10 October 1953, para. 21. The Committee also considered the possibility of supplementing this provision by an optional clause making extradition of nationals contingent upon a formal declaration of reciprocity, in order to avoid a situation where one State may surrender its nationals to another State but the

83. The explanatory report indicates that article 6, paragraph 1, allows the extradition of nationals if this is not contrary to the laws of the requested State, but that even in this case the requested country is not obliged to extradite its nationals, thus having the option of granting or refusing their extradition.¹³¹ As for paragraph 2, the report specifies that this provision imposes an obligation for the requested State, at the demand of the requesting party, to submit the matter to the competent authority, “in order that the person concerned may not go unpunished”. The report points out, however, that legal proceedings need not necessarily be taken, unless the competent authorities consider that they are appropriate.¹³² Taking into account the desirability in the interests of justice of proceeding against unextradited nationals, an expert had proposed an alternative drafting for this paragraph, which would have read as follows: “If the extradition of those persons is so refused, the requested Party shall proceed against them in accordance with the procedure which would be followed if the offence had been committed on its own territory.” This proposal was supported by two other experts, but was not adopted by the Committee.¹³³ It was also suggested in the Committee that the principle laid down in paragraph 2 should be extended to cover other cases in which extradition was not granted. The report states, however, that:

... several experts thought this unnecessary because if one State informs another State that a person on its territory has committed certain offences, the latter State will *ipso facto* make enquiries to discover whether there are grounds for proceeding against that person.¹³⁴

Finally, a proposal was made to include a provision that would allow the requested State to refuse extradition “if the arrest and surrender of the person claimed are likely to cause him consequences of an exceptional gravity and thereby cause concern on humanitarian grounds particularly by reason of his age or state of health”. This proposal was not adopted by the Committee, on the understanding that a reservation to article 1 of the Convention could be made on this subject.¹³⁵

84. In the preparatory works, the question was also raised whether extradition should be refused (a) if an

(Footnote 130 continued.)

latter declines to extradite its own nationals (*ibid.*, para. 22; see, in this respect, the optional clause contained in the 1933 Convention on Extradition described above). The United Kingdom expert had explained that the law and criminal procedure of his country very rarely permitted the prosecution of nationals for offences committed abroad, and he accordingly reserved his position as regards the relevant part of the proposed provision (*ibid.*, para. 24). It should also be noted that the draft prepared by the Committee on Legal and Administrative Questions, annexed to recommendation 66 (1954) of the Consultative Assembly, contained another variant of the relevant provision: “Where the person claimed is a national of a requested High Contracting Party, and for that reason cannot be extradited, the requested High Contracting Party shall, within one year of the notification to the requesting High Contracting Party of its refusal to extradite, prosecute the person concerned as if the act had been committed on its own territory”.

¹³¹ Explanatory report on the European Convention on Extradition, commentary to article 6.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.* For a more detailed description of the different positions in the Committee of Experts, see Council of Europe, Committee of Ministers, *Report of the Committee of Experts on Extradition to the Committee of Ministers*, CM (56) 83 (Confidential), 2 July 1956, pp. 73–76 (commentary to article 6).

amnesty had been declared in the requesting country; or (b) if an amnesty had been declared in the requested country for offences of the type of that for which extradition is requested. The experts were of the opinion that the first possibility did not need to be considered as it seemed very unlikely. With regard to the second possibility, the experts thought that an amnesty generally took local or national considerations into account and should not be extended to persons whom it was not originally intended to cover, and that extradition should therefore be granted.¹³⁶ It should be noted, however, that under article 4 of its Second Additional Protocol to the European Convention on Extradition, the Convention was supplemented by a provision (“Amnesty”) whereby:

Extradition shall not be granted for an offence in respect of which an amnesty has been declared in the requested State and which that State had competence to prosecute under its own criminal law.

(c) Reservations

85. Numerous declarations and reservations have been made in respect of the European Convention on Extradition, which specify the scope of the obligations accepted by each Contracting Party with regard to extradition. Thus, for example, reservations have been made to article 1 to the effect that extradition may be refused on humanitarian grounds (e.g. by reason of the person’s health, age or other personal circumstances, or if the person could be subjected to torture in the requesting State) or when the person will be tried in the requesting State by a special court or a tribunal that does not assure fundamental procedural guarantees.¹³⁷ Some States have also indicated that they would refuse extradition on the grounds of public morality, public order, State security or other essential interests.¹³⁸ States have also reserved their right to decide in each particular case whether acts for which extradition is requested are to be regarded as political offences¹³⁹ or to refuse extradition when the person could be subject to the death penalty in the requesting State, unless sufficient assurance is given that it will not be carried out.¹⁴⁰ Some States have also

¹³⁶ Explanatory report on the European Convention on Extradition, “Summary of questions which were not dealt with in the Multilateral European Convention but were discussed”.

¹³⁷ See declarations by Andorra, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Denmark, Finland, France, Georgia, Hungary, Iceland, Lithuania, Luxembourg, Republic of Moldova, the Netherlands, Norway, Portugal, the Russian Federation, San Marino, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Ukraine and the United Kingdom.

¹³⁸ See declarations by Georgia and the Russian Federation.

¹³⁹ See declarations by Armenia, Finland, Italy, Lithuania, the Russian Federation, Spain and Sweden.

¹⁴⁰ See declarations by Andorra, Austria, Hungary, Portugal and Spain. See also the declaration by Turkey. Portugal has further made a reservation to the effect that it would not grant extradition of persons who are being demanded in connection with an offence punishable by a lifelong sentence or detention order. Austria, Belgium, Germany, the Russian Federation and Switzerland have stated that such a reservation would be compatible with the object and purpose of the Convention only if refusal to grant extradition for offences punishable by a lifelong sentence or detention order is not absolute and that they took the reservation to mean that the only circumstance in which extradition would not be granted was where there is no possibility under the law of the requesting State for the person sentenced to life imprisonment having completed a certain proportion of the sentence or period of detention, to obtain a judicial review of his case with a view to having the remainder of the sentence commuted to probation.

reserved their right to refuse extradition of persons to whom they have granted political asylum.¹⁴¹

86. As regards article 6, various States have made a declaration defining how they interpret the term “nationals” within the meaning of the Convention, sometimes also clarifying that, under their domestic legislation, they will refuse extradition of nationals so defined.¹⁴² Some of these States have explicitly specified that domestic authorities would proceed to prosecution of their own nationals, even for crimes committed abroad.¹⁴³

3. OTHER REGIONAL CONVENTIONS ON EXTRADITION

87. The General Convention on Judicial Cooperation, signed in the context of the Afro-Malagasy Common Organization, provides that the States parties shall surrender to each other, following the rules and conditions under the Convention, individuals who are in their territory and are prosecuted or have been condemned by the judicial authorities of another party (art. 41). Article 42 reads as follows:

The High Contracting Parties shall not extradite their respective nationals; the status of national shall be determined at the time of the offence in respect of which extradition is requested.

Nevertheless, the requested State undertakes to initiate proceedings against its own nationals who have committed infractions in the territory of another State which are punishable as crimes or offences under its own legislation, insofar as it is competent to try such persons, if the other State transmits a request for prosecution along with files, documents, objects and information in its possession. The requesting State shall be kept informed of the action taken on its request.

88. Under the London Scheme for Extradition within the Commonwealth, extradition is granted among

¹⁴¹ See reservation by Armenia, as well as the declaration by Poland, whereby persons granted asylum in Poland will be treated as Polish nationals (whose extradition is excluded). Austria, Germany and Turkey have interpreted these declarations as meaning that persons having been granted asylum in those countries will be placed on an equal footing with their nationals only in the event of a request for extradition by the persecuting State and that, in such case, such persons will not be extradited.

¹⁴² See the declarations by Albania (specifying that it also applies to double nationals), Andorra, Armenia, Austria, Azerbaijan, Bulgaria, Croatia, Cyprus, Denmark (also including persons domiciled therein, as well as nationals of, and residents having their domicile in, Finland, Iceland, Norway or Sweden), Estonia (unless the national has consented to extradition), Finland (also including persons domiciled therein, as well as nationals of, and persons having their domicile in, Denmark, Iceland, Norway and Sweden, as well as aliens domiciled in these States), France, Georgia, Germany, Greece, Hungary (also reserving the right to refuse extradition of persons settled definitively in the country), Iceland (also including persons domiciled therein, as well as nationals of, and residents having their domicile in, Denmark, Finland, Norway or Sweden), Estonia (unless the national has consented to extradition), Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg (including in the definition foreigners integrated into the Luxembourg community insofar as they can be prosecuted in Luxembourg for the relevant crimes), the Republic of Moldova, Monaco, Montenegro, the Netherlands (including foreigners integrated into the Netherlands community insofar as they can be prosecuted in the Netherlands for the relevant crimes; extradition of nationals is allowed if the requesting State provides a guarantee that the person claimed may be returned to the Netherlands to serve his sentence there), Norway (including residents, as well as nationals and residents of Denmark, Finland, Iceland and Sweden), Poland, Portugal, Romania, the Russian Federation, San Marino, Serbia, South Africa, Spain, Sweden (also including aliens domiciled therein, as well as nationals of, and aliens domiciled in, Denmark, Finland, Iceland and Norway), the former Yugoslav Republic of Macedonia and Ukraine.

¹⁴³ See the declarations by Cyprus and Liechtenstein.

Commonwealth countries for extradition offences and subject to the dual criminality rule (sect. 2). The Scheme provides that extradition will be precluded by law if the competent authority is satisfied that the offence is of a political character (sect. 12) and foresees discretionary grounds of refusal (sect. 15). Under the title “Alternative Measures in the Case of Refusal”, section 16 further provides that “[f]or the purpose of ensuring that a Commonwealth country cannot be used as a haven from justice”, each country which reserves the right to refuse to extradite nationals or permanent residents “will take, subject to its constitution, such legislative action and other steps as may be necessary or expedient in the circumstances to facilitate the trial or punishment of a person whose extradition is refused on that ground” (para. 1), which may include the submission of the case to the competent authorities of the requested State for prosecution (para. 2 (a)).

89. Under the Economic Community of West African States (ECOWAS) Convention on Extradition, States parties undertake to surrender to each other, subject to the provisions and conditions laid down in the Convention, all persons within their territory who are wanted for prosecution for an offence or who are wanted by the legal authorities of the requesting State for the carrying out of a sentence (art. 2, para. 1). Pursuant to the Convention, extradition shall not be granted for political offences (art. 3), if the person may be submitted to torture or other inhuman or degrading treatment or punishment (art. 4), when extradition would be incompatible with humanitarian considerations in view of age or health (art. 5) or when an amnesty was granted (art. 16). It may also be refused if the person has been sentenced or would be tried by an extraordinary or *ad hoc* tribunal (art. 8), when the offence is regarded by the law of the requested State as having been committed in whole or in part in its territory or in a place treated as its territory (art. 11) or when the offence is punishable by the death penalty in the requesting State and is not provided for by the law of the requested State (art. 17). Under article 10, extradition of a national shall be a matter of discretion of the requested State; however, as stated in paragraph 2:

The Requested State which does not extradite its nationals shall at the request of the Requesting State submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits related to the offence shall be transmitted, without charge, through the diplomatic channel or by such other means as shall be agreed upon by the States concerned. The requesting State shall be informed of the result of its request.

D. The Convention for the Suppression of Unlawful Seizure of Aircraft and other conventions following the same model

90. The particular kind of provision known as the “Hague formula” appears to be the most common contemporary version of conventional provisions that combine the options of extradition and prosecution. This type of clause is present in conventions aimed at the suppression of specific offences, principally in the field of the fight against terrorism, but also in many other areas (including torture, mercenaries, safety of United Nations personnel, transnational crime, corruption, forced disappearance, etc.).

1. CONVENTION FOR THE SUPPRESSION OF
UNLAWFUL SEIZURE OF AIRCRAFT

91. The mechanism for the punishment of offenders provided for by the Convention for the Suppression of Unlawful Seizure of Aircraft is unanimously acknowledged as having served as a model for most of the contemporary conventions for the suppression of specific offences. Its relevant provisions and corresponding preparatory works will therefore be studied in some detail.

(a) *Relevant provisions*

92. The provision in the Convention that combines extradition and prosecution (art. 7) is part of an articulated mechanism for the punishment of offenders, the main elements of which are the following.

93. Article 1 defines the relevant offence under the Convention. Under article 2, each Contracting State further undertakes to make the offence punishable by severe penalties.

94. Article 4 specifies the obligations incumbent upon Contracting States with regard to the establishment of their jurisdiction over the offence.¹⁴⁴ Under paragraph 1, each Contracting State “shall take such measures as may be necessary to establish its jurisdiction” in three cases in which it has a special link with the offence.¹⁴⁵ Paragraph 2 provides that each Contracting State “shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1”. This provision therefore establishes a case of universal jurisdiction with regard to the relevant offences.¹⁴⁶ Paragraph 3 of this article indicates that the Convention “does not exclude any criminal jurisdiction exercised in accordance with national law”.

95. Article 6 imposes upon the Contracting State in whose territory the alleged offender is present, upon being satisfied that the circumstances so warrant, to take him into custody or take other measures to ensure his presence and to proceed immediately to a preliminary inquiry into the facts. It further details the conditions applicable to such custody and the obligations of notification to other interested States.

96. Under article 7:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception

¹⁴⁴ It should be noted that this provision “does not require any State to exercise jurisdiction, merely to establish it” (White, “The Hague Convention for the Suppression of Unlawful Seizure of Aircraft”, pp. 41–42). The question of prosecution is dealt with in the subsequent article 7.

¹⁴⁵ Namely, (a) when the offence is committed on board an aircraft registered in that State; (b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board; and (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

¹⁴⁶ See, for instance, Austria, Eighth meeting of the Commission of the Whole, para. 11, ICAO, *International Conference of Air Law, The Hague, December 1970, vol. I: Minutes* (Doc. 8979-LC/165-1), p. 74, and *ibid.*, vol. II: *Documents* (Doc. 8979-LC/165-2), p. 94.

whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

97. Article 8 spells out the regime of extradition of the relevant offence. Under paragraph 1, the offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States, and Contracting States undertake to include it as an extraditable offence in every extradition treaty to be concluded between them. Pursuant to paragraph 2, if a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider the Convention as the legal basis for extradition in respect of the offence, subject to the other conditions provided by its law. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State (para. 3). Under paragraph 4, the offence shall be treated, for the purpose of extradition, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 4, paragraph 1.

(b) *Preparatory works*

98. The Convention was adopted at the International Conference on Air Law, held in The Hague from 1 to 16 December 1970 under the auspices of ICAO.¹⁴⁷ The Conference worked on the basis of a draft convention submitted by the Legal Committee of ICAO, which was itself based on a draft prepared by a subcommittee on the subject matter.¹⁴⁸

99. In his description of the subcommittee’s draft during the proceedings of the Legal Committee, the Chairman of the subcommittee explained that the draft, which aimed at making it obligatory to prosecute acts of unlawful seizure of aircraft, was based on a system of multiple

¹⁴⁷ By resolution A16-37, adopted at its sixteenth session in September 1968, the Assembly of ICAO had urged States to become parties to the Convention on offences and certain other acts committed on board aircraft, and had requested the Council “to institute a study of other measures to cope with the problem of unlawful seizure”. While certain proposals had been made in the preparatory works of the Convention which combined the options of prosecution and extradition (see, for example, the proposal of Venezuela and the United States submitted to the Legal Committee of ICAO at its fourteenth session, held in Rome from 28 August to 15 September 1962 (Doc. 8302-LA/150-2), p. 102), the final text of the Convention only provided that the State of registration of the aircraft was competent to exercise jurisdiction over the relevant offences and that nothing in the Convention should be deemed to create an obligation to grant extradition (see, respectively, arts. 3 and 16, para. 2).

¹⁴⁸ In December 1968, the Council of ICAO decided to refer the legal aspects of the question to the Legal Committee, with a request to the Chairman of the Committee to establish a subcommittee on the subject. The subcommittee held two sessions (from 10 to 21 February 1969 and from 23 September to 3 October 1969) (Doc. 8838-LC/157), following which the Legal Committee, at its seventeenth session in February–March 1970, prepared a draft convention which it considered, by unanimous vote, ready for presentation to States as a final draft. In March 1970, the Council circulated this draft and decided to convene the conference at The Hague (see *International Conference of Air Law ...*, vol. I (footnote 146 above), Introduction, p. ix).

jurisdictions. Accordingly, the obligation to prosecute was placed on the State of registration of the aircraft and the State of landing if the alleged offender left the aircraft in the latter State.¹⁴⁹ The draft provided that the offence would be an extraditable one, but did not impose an obligation of extradition.¹⁵⁰ Moreover, the subcommittee had reckoned that it would not be possible to oblige the State of landing, which did not extradite the alleged offender, to prosecute him because, in many States, it was for the public prosecutor to decide whether to prosecute. It had thus adopted “a formula from the European Convention on Extradition whereby, if there was no extradition, the State which had arrested the alleged offender must submit the case to its competent authorities for their decision as to whether legal proceedings should be taken against the alleged offender”.¹⁵¹ The Chairman of the subcommittee therefore summed up the system of the draft convention as containing “the obligation of apprehension of the alleged offender, a possibility of extradition, the obligation of reference to the competent authority and the possibility of prosecution”.¹⁵²

100. The overall logic of this system was maintained, with minor amendments, by the Legal Committee, which explained in its report that “for the purpose of deterring acts of unlawful seizure of aircraft there is an urgent need

¹⁴⁹ The Chairman (Mr. Gilbert Guillaume, the delegate from France) indicated that the subcommittee had started its work with a proposal from the United States to establish priority jurisdiction for the State of registration of the aircraft in the case of unlawful seizure and to provide for extradition of the alleged offender to the State of registration of the aircraft even in exceptional cases, but that the majority of the States considered that, while this proposal presented the advantage of efficiency, it would probably not be accepted universally because of the traditional law of extradition (ICAO, Legal Committee, Thirtieth meeting (3 March 1970), para. 12, in *Seventeenth Session (Montreal, 9 February–11 March 1970, Minutes and Documents relating to the Subject of Unlawful Seizure of Aircraft* (Doc. 8877-LC/161)), pp. 16–17. As will be described below, a similar proposal was later put forward by the United States at the Conference.

¹⁵⁰ ICAO, Legal Committee, *ibid.*, paras. 12–14, pp. 16–17. At a later meeting, the Chairman of the subcommittee explained that the original version of the corresponding provision on extradition (draft art. 8) had been borrowed from the International Convention for the Suppression of Counterfeiting Currency (*ibid.*, Thirty-fourth meeting, para. 17).

¹⁵¹ *ibid.*, Thirtieth meeting (3 March 1970), para. 14. At a later meeting, the Chairman of the Subcommittee provided more details on this approach: “The idea on which [draft art. 7] was based was that the State must submit the case to competent authorities for their decision whether legal proceedings should be initiated against the offender. The subcommittee had already encountered difficulty in that, although one could imagine an automatic system whereby the State which did not grant extradition was obliged to prosecute, it was impossible for the subcommittee to express such a thought in absolute form since there was a great number of States in which there was a principle of opportunity of prosecution which left it to the public prosecutor to decide whether or not prosecution should be started and, consequently, it was not considered possible to trespass upon the jurisdiction of the authorities in this regard. Therefore, the Committee had taken this draft from the European Convention on Extradition, according to which if the States did not extradite the alleged offender they were bound at least to submit this question to the authorities for their decision as to whether prosecution should be undertaken” (*ibid.*, Thirty-sixth meeting (6 March 1970), para. 33). Mr. Guillaume later confirmed that the “Hague formula”, which he qualified as *aut dedere aut persequi*, was inspired by the European Convention on Extradition (Guillaume, “Terrorisme et droit international”, pp. 354 and 368).

¹⁵² ICAO, Legal Committee (footnote 149 above), Thirtieth meeting, para. 15. As for draft article 6 (on procedures for arrest, detention and preliminary enquiry), the Chairman also noted that it was, as draft article 9, borrowed from the Convention on offences and certain other acts committed on board aircraft (*ibid.*, p. 17, para. 16).

to make them punishable as an offence and to provide appropriate measures to facilitate prosecution and extradition of the offenders”.¹⁵³ With regard to extradition, it was agreed that, under the draft convention, the Contracting States would accept an obligation to include the offence of unlawful seizure of aircraft in their future extradition treaties.¹⁵⁴ However, it was also pointed out that the draft should safeguard the conditions imposed on extradition by domestic laws.¹⁵⁵

101. The draft submitted to the Conference by the Legal Committee thus contained the main elements of the mechanism that was later to be enshrined in the Convention, including a provision that imposed upon States parties, if they did not extradite, an obligation to submit the case to their competent authorities for prosecution.¹⁵⁶

102. In the general debate at the Conference, several delegations pointed out that the unlawful seizure of aircraft was a matter of international concern, and welcomed the negotiation of a convention that would avoid impunity of those responsible for such acts.¹⁵⁷ Some delegations called for a further strengthening of the mechanism to ensure that offenders be brought to justice.¹⁵⁸

103. As mentioned above, the Legal Committee’s draft, under article 4, imposed an obligation to establish jurisdiction over the offence only on the State of registration and the State of landing of the aircraft.¹⁵⁹ The insertion of paragraph 2 was the result of an amendment justified as follows:

¹⁵³ Report of the Legal Committee on the Subject of Unlawful Seizure of Aircraft, para. 5, reproduced in *ibid.*, p. 2.

¹⁵⁴ *ibid.*, Thirty-fourth meeting (5 March 1970), para. 16 (following a vote of the Committee).

¹⁵⁵ Several statements in this regard were made in reaction to a Polish proposal whereby Contracting States would have had the obligation to extradite offenders to the State of registration of the aircraft, without prejudice to the right of the State to grant territorial asylum and the principle of non-extradition of nationals: see the statements of Spain, France, Sweden, the United Kingdom, Italy and Belgium in *ibid.*, Thirty-fourth and thirty-fifth meetings (5 March 1970). The Polish proposal was rejected by the Committee (*ibid.*, p. 59).

¹⁵⁶ See “Draft Convention” (SA Doc. No. 4), *International Conference of Air Law ...*, vol. II (footnote 146 above), pp. 15–17. Draft article 7 read as follows: “The Contracting State which has taken measures pursuant to Article 6, paragraph 1 [to take the alleged offender into custody or ensure his presence] shall, if it does not extradite the alleged offender, be obliged to submit the case to its competent authorities for their decision whether to prosecute him. These authorities shall take their decision in the same manner as in the case of other offences.”

¹⁵⁷ See *ibid.*, vol. I, Second plenary meeting, United States (p. 9, para. 18); Greece (p. 10, para. 24: the hijacker “scorned the international community by undermining confidence in the safety of air travel”); Japan (p. 11, para. 27); Union of Soviet Socialist Republics (p. 11, para. 32: hijacking endangered world security); International Transport Worker’s Federation (p. 12, para. 36); Third plenary meeting, Malaysia (p. 15, para. 1: the unlawful seizure of aircraft should be recognized as an “international crime”); Costa Rica (p. 15, para. 7: “hijacking was a grave danger to peace”); Israel (p. 18, paras. 26 and 28); Thailand (p. 19, para. 32: “hijackers should be regarded as enemies of the human kind and consequently be punishable by all”); Tunisia (p. 19, para. 33).

¹⁵⁸ See *ibid.*, Second plenary meeting, United States (pp. 9–10, paras. 20–23); Greece (p. 10, para. 24); Japan (p. 10, para. 26); Bulgaria (p. 13, para. 43); Third plenary meeting, Poland (p. 15, para. 5); Canada (p. 17, para. 20); Israel (p. 18, para. 26); the United Kingdom (p. 18, para. 29); Cambodia (p. 18, para. 30); International Air Transport Association (p. 19, para. 37); Czechoslovakia (p. 19, para. 38).

¹⁵⁹ Subpara. 1 (c) was added following the adoption of a joint amendment submitted at the Conference (SA Doc. No. 46): see Ninth meeting of the Commission of the Whole, *ibid.*, pp. 82–87, paras. 12–49.

The reason behind [this] proposal was that Article 7, which obliged States that did not concede extradition to submit the case to their competent authorities for their decision whether to prosecute, would be a dead letter provision if the States did not have jurisdiction under Article 4, paragraphs 1 or 2. Since no mandatory extradition existed under the Convention, it was essential in its absence for the offender to be punished by the courts of the State in which he was held.¹⁶⁰

104. This proposal was criticized by some delegations, who considered that the original text was designed to provide for jurisdiction in those States most vitally connected with the offence and that the new paragraph would artificially bind together the establishment of jurisdiction and the machinery of extradition.¹⁶¹ Nevertheless, the amendment was supported by a majority of delegations, who were of the view that it filled a loophole in the convention,¹⁶² and was adopted by the Conference.¹⁶³

105. The text of article 7, as finally adopted, finds its origin in a joint amendment to the Legal Committee's draft that was also proposed at the Conference.¹⁶⁴ The original proposed amendment suggested, in particular, the inclusion of the phrase "whatever the motive for the offence and whether or not the offence was committed in its territory" and the provision by which the competent authorities should take their decision whether to prosecute "in the same manner as in the case of any other ordinary offence [in French: "*infraction de droit commun*"] of a serious nature under the law of that State".¹⁶⁵ While some delegations supported the proposal on the basis that it ensured that prosecution of hijackers would not be inhibited by any political aspects of their offence,¹⁶⁶

¹⁶⁰ Spain (*ibid.*, Eighth meeting of the Commission of the Whole, p. 75, para. 17), explaining its proposed amendment contained in SA Doc. No. 61 (*ibid.*, vol. II, p. 118). Other amendments similarly aimed at extending the establishment of jurisdiction under article 4 were proposed by the United Arab Republic (SA Doc. No. 11), Switzerland (SA Doc. No. 58), Austria (SA Doc. No. 42) and the United Kingdom (SA Doc. No. 62), but were either superseded by the proposal by Spain or withdrawn in the course of the debate. It should be noted that the amendment proposed by Switzerland provided for permissive (and not compulsory) extraterritorial jurisdiction when the State did not extradite the offender to another Contracting State.

¹⁶¹ See *ibid.*, vol. I, Eighth meeting of the Commission of the Whole, Jamaica (p. 76, para. 22) and France (p. 78, para. 37). Other delegations held similar views: Zambia (p. 76, para. 27, expressing its preference for jurisdiction of a permissive character); People's Republic of the Congo (p. 77, para. 28); Australia (p. 77, para. 31); Indonesia (p. 78, para. 40); India (p. 78, para. 42).

¹⁶² See *ibid.*, Costa Rica (p. 75, para. 20); Mexico (p. 75, para. 21); Venezuela (p. 76, para. 25); International Law Association (p. 76, para. 26); Austria (p. 77, para. 32); Norway (p. 77, para. 34); United States (p. 77, para. 35); Netherlands (pp. 77–78, para. 36); Panama (p. 78, para. 39); Italy (p. 78, para. 41); International Federation of Air Line Pilots' Associations (pp. 78–79, para. 43).

¹⁶³ The Commission of the Whole adopted the proposal by 34 votes to 17, with 17 abstentions (*ibid.*, p. 80, para. 53). The plenary later adopted article 4, paragraph 2, by 73 votes to none, with one abstention (Ninth plenary meeting, *ibid.*, 14 December 1970, p. 172, para. 54).

¹⁶⁴ See *ibid.*, vol. II, SA Doc. No. 72 Revised, proposed by 26 delegations, p. 131. The proposal read as follows: "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, whatever the motive for the offence and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. These authorities shall take their decision in the same manner as in the case of any other ordinary offence of a serious nature under the law of that State."

¹⁶⁵ *Ibid.*, vol. I, Fifteenth meeting of the Commission of the Whole, Italy (p. 130, para. 44).

¹⁶⁶ See *ibid.*; Argentina (p. 130, para. 49); the United Kingdom (p. 131, para. 50); Sixteenth meeting of the Commission of the

other delegations expressed their strong opposition to the revised text.¹⁶⁷ At the consideration of the final draft in plenary, a compromise text was submitted which replaced the phrase "whatever the motive for the offence" with "without exception whatsoever",¹⁶⁸ and this amendment was adopted by the Conference.¹⁶⁹

106. In the course of the debate on article 8, it was clarified that this provision obliged Contracting States to include the offence as an extraditable one in extradition treaties, but did not make extradition itself mandatory or automatic.¹⁷⁰ Paragraph 2 was added following a proposal whereby, *inter alia*, "the Contracting States which make extradition conditional on the existence of a treaty shall* recognize the present Convention as the legal basis for extradition".¹⁷¹ While this proposal was justified as filling a loophole in the Legal Committee's draft with respect to States which make extradition conditional on the existence of a treaty, and thus received some support,¹⁷² it was

Whole, Uganda (p. 134, para. 10); Yugoslavia (p. 134, para. 11); Canada (p. 135, paras. 13–15). See also the amended proposal by Spain (SA Doc. No. 61) (*ibid.*, vol. II, p. 117, fifth paragraph of the introduction: "It appears that the effect of a political motivation should be to create an exception only for the granting of extradition but not for prosecution by the State which holds the offender").

¹⁶⁷ See *ibid.*, Fifteenth meeting of the Commission of the Whole, Kenya (p. 130, para. 45); United Arab Republic (p. 130, para. 46 and p. 131, para. 53); United Republic of Tanzania (p. 130, para. 47); Zambia (p. 131, para. 51); Sixteenth meeting of the Commission of the Whole, People's Republic of the Congo (p. 133, para. 2); Malaysia (p. 133, para. 3, arguing that the Convention should not impose an obligation to prosecute, since the legal systems of States provided for varying degrees of discretion with regard to prosecution); Ceylon (p. 134, para. 7); Kuwait (p. 134, para. 8); United Arab Republic (p. 136, para. 26).

¹⁶⁸ The original proposal from Kenya suggested the phrase "without exception", but was modified to add the word "whatsoever", as proposed by the Union of Soviet Socialist Republics, to reflect the wording of General Assembly resolution 2645 (XXV) of 25 November 1970, by which the Assembly condemned, "without exception whatsoever, all acts of aerial hijacking or other interference with civil air travel, whether originally national or international, through the threat of use of force, and all acts of violence which may be directed against passengers". See *International Conference of Air Law ...*, vol. I (footnote 146 above), Tenth plenary meeting, pp. 177 and 178, paras. 8 and 21.

¹⁶⁹ For the debate, see *International Conference of Air Law ...*, vol. I (footnote 146 above), pp. 177–182, paras. 7–64.

¹⁷⁰ *Ibid.*, Twelfth meeting of the Commission of the Whole, International Air Transport Association (p. 106, para. 26); see also United States (p. 104, para. 16) and India (p. 105, para. 20). This point was also made in response to two amendments (SA Doc. No. 6 by Senegal and SA Doc. No. 64 by the United Republic of Tanzania (*ibid.*, vol. II, pp. 30 and 121, respectively)), aimed at modifying the text of the provision to ensure that the Convention did not replace national laws governing extradition, notably on the granting of asylum in cases of political hijackings (see Twelfth meeting of the Commission of the Whole, *ibid.*, vol. I, United Republic of Tanzania, p. 104, para. 11). While the amendments were supported by delegations who insisted on the need to respect the sovereignty of States (United Arab Republic (p. 104, para. 10); Tunisia (p. 105, paras. 17–18); Rwanda (p. 105, para. 19); Venezuela (p. 105, para. 22); Ceylon (pp. 105–106, paras. 23–24); Kuwait (p. 106, para. 25)), they were rejected by the Commission of the Whole (p. 106, paras. 30–31). Another proposal by the United Republic of Tanzania to avoid the implication that extradition should be resorted to automatically and to safeguard the validity of existing treaties was also rejected (see Thirteenth meeting of the Commission of the Whole, pp. 113–114, para. 39–42).

¹⁷¹ SA Doc. No. 26 Revised, proposed by Austria, Costa Rica, Italy, the Netherlands, Norway, Paraguay, Spain, Switzerland, the United Kingdom and the United States, *ibid.*, vol. II (footnote 146 above), p. 66.

¹⁷² See the Netherlands (*ibid.*, vol. I (footnote 146 above), Fifteenth meeting of the Commission of the Whole, p. 125, para. 3), pointing

opposed by several delegations who did not want the Convention to constitute the basis for extradition.¹⁷³ Such concerns were repeated in plenary in the final debate on the draft convention and, following a heated discussion, the proposal was amended to provide that the State concerned “*may at its option*” consider this Convention as the legal basis for extradition in respect of the offence.¹⁷⁴ Two further amendments, aimed at giving priority to a request for extradition submitted by the State of registration of the aircraft¹⁷⁵ and at making the offenders subject to extradition to the State of registration regardless of any specific agreement between the States concerned,¹⁷⁶ posed difficulties for several delegations and were set aside. While some delegations also proposed that the Convention contain a provision prohibiting the granting of political asylum to the offender or the refusal of extradition on the ground that the offence was a political act,¹⁷⁷ no corresponding amendment was adopted by the Conference.

(c) *Reservations*

107. No reservations have been made which affect the relevant provisions of the Convention for the Suppression of Unlawful Seizure of Aircraft.¹⁷⁸

2. OTHER CONVENTIONS

(a) *Relevant provisions*

108. The following conventions, listed in chronological order, contain a provision employing the so-called “Hague formula”: the Organization of American States (OAS) Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons

out that if the Convention went no further than providing for the situation of States which did not make extradition conditional on the existence of a treaty, the States which needed an extradition treaty could not extradite to countries with which they had no treaty even if they so wished; the Convention would as a consequence “become a kind of extradition treaty”); Canada (pp. 126–127, paras. 13–14); Romania (p. 127, para. 21); the United Kingdom (p. 128, para. 25); Greece (p. 129, para. 30).

¹⁷³ See *ibid.*, Uganda (p. 126, para. 7 and p. 129, para. 36); Kenya (p. 127, para. 15); Tunisia (p. 127, para. 18); Zambia (p. 127, para. 19); India (p. 128, para. 23); United Republic of Tanzania (p. 128, para. 28).

¹⁷⁴ See *ibid.*, vol. I, Eleventh plenary meeting, proposed by Zambia p. 188, para. 9. The compromise proposal, submitted by Zambia, was adopted by a roll-call vote of 63 votes to none, with 13 abstentions (p. 191, para. 37). See also Tenth plenary meeting (p. 177).

¹⁷⁵ *Ibid.*, vol. II, SA Doc. No. 28, proposed by the United States (p. 69). For the debate on this proposal, see *ibid.*, vol. I, Thirteenth meeting of the Commission of the Whole (pp. 112–113, paras. 29–38). The proposed amendment was withdrawn.

¹⁷⁶ SA Doc. No. 33 Rev. 2, proposed by Poland and the Union of Soviet Socialist Republics (*ibid.*, vol. II, p. 82). For the corresponding debate, in the course of which reference was notably made to the need to preserve other reasons for refusal of extradition, see *ibid.*, vol. I, Fifteenth meeting of the Commission of the Whole, pp. 126–129, paras. 10–34. The proposed amendment was rejected.

¹⁷⁷ The Polish and Soviet amendment referred to in the preceding footnote specified that none of the parties was obliged to extradite its nationals, but did not provide for any exception for granting political asylum (Poland indicated that, “in reply to the argument that the principle would encroach upon the right of States to grant political asylum, we said that anyone engaged in truly political activities would hardly commit the crime of hijacking” (Fifteenth meeting of the Commission of the Whole, *ibid.*, p. 126, para. 12)). See also Second plenary meeting, United States (pp. 9–10, paras. 20–23) and Greece (p. 10, paras. 24–25).

¹⁷⁸ See official website of ICAO, www.icao.int.

and Related Extortion that are of International Significance; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; the European Convention on the Suppression of Terrorism; the Convention on the Physical Protection of Nuclear Material; the International Convention against the Taking of Hostages; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Inter-American Convention to Prevent and Punish Torture; the South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the International Convention against the Recruitment, Use, Financing and Training of Mercenaries; the Inter-American Convention on the Forced Disappearance of Persons; the Convention on the Safety of United Nations and Associated Personnel; the Inter-American Convention against Corruption; the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials; the International Convention for the Suppression of Terrorist Bombings; the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the Convention on the Protection of the Environment through Criminal Law; the Criminal Law Convention on Corruption; the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict; the International Convention for the Suppression of the Financing of Terrorism; the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; the United Nations Convention against Transnational Organized Crime and its Protocols;¹⁷⁹ the Convention on Cybercrime; the African Union Convention on Preventing and Combating Corruption; the United Nations Convention against Corruption; the International Convention for the Suppression of Acts of Nuclear Terrorism; the Council of Europe Convention on the Prevention of Terrorism; the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel;¹⁸⁰ the International Convention for the Protection of All Persons from Enforced Disappearance; and the Association

¹⁷⁹ Namely, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.

¹⁸⁰ This Protocol extends the application of the Convention (art. II, para. 1) to “all other United Nations operations established by a competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control for the purposes of: (a) Delivering humanitarian, political or development assistance in peacebuilding, or (b) Delivering emergency humanitarian assistance”.

of Southeast Asian Nations (ASEAN) Convention on Counter-Terrorism.

109. Most of the conventions listed above also contain a mechanism for the punishment of offenders which appears to be based on that of the Convention for the Suppression of Unlawful Seizure of Aircraft, the constitutive elements of which are (a) the criminalization of the relevant offence, which the States parties undertake to make punishable under their domestic laws; (b) a provision by which States parties undertake to take such measures as may be necessary to establish their jurisdiction over the offence when they have a particular link with it, as well as when the alleged offender is present in their territory and they do not extradite him; (c) provisions regarding measures to take the offender into custody and to proceed to a preliminary inquiry into the facts; (d) a provision under which the State party in whose territory the alleged offender is found shall, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution; and (e) provisions under which States undertake, under certain conditions, to consider the offence as an extraditable one.

110. While in most of the cases it is apparent that the Convention for the Suppression of Unlawful Seizure of Aircraft has served as a model for the drafting of the relevant provisions, many of these conventions have modified the original terminology, thus sometimes affecting the substance of the obligations undertaken by States parties. In addition, some conventions have provided for a different, or sometimes more detailed, regime for the various elements of this mechanism. The most significant variations to the mechanism are described below.

111. All the conventions listed above contain provisions by which the relevant acts are qualified as criminal offences and States undertake to make them punishable under their domestic laws. Most of these conventions further establish that the relevant penalties should take into account the grave nature of the offence concerned.¹⁸¹

¹⁸¹ While some conventions (for example, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation) adopt the same formula as the Convention for the Suppression of Unlawful Seizure of Aircraft (“make the offence punishable by severe penalties”) (art. 2), most conventions have followed the model of the International Convention against the Taking of Hostages, by which the offence shall be made punishable by “appropriate penalties which take into account the grave nature of these offences” (for example, the Convention on the Physical Protection of Nuclear Material; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; the International Convention against the Recruitment, Use, Financing and Training of Mercenaries; the Convention on the Safety of United Nations and Associated Personnel; the International Convention for the Suppression of Terrorist Bombings; the International Convention for the Suppression of the Financing of Terrorism; and in similar terms, the Inter-American Convention on Forced Disappearance of Persons; the Convention on the Protection of the Environment through Criminal Law; the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; the United Nations Convention against Transnational Organized Crime; the United Nations Convention against Corruption). The International Convention for the Protection of All Persons from Enforced Disappearance refers to the “extreme seriousness” of the offence (sixth paragraph of the preamble), which it qualifies, when widespread or systematic, as a crime against humanity. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Criminal Law Convention on

Some conventions explicitly provide that the relevant offence should not be justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.¹⁸²

112. Nearly all of the above-mentioned conventions provide that States parties “shall take such measures as may be necessary to establish their jurisdiction” over the offence when they have a special link with that offence (e.g. when the offence was committed in their territory or against one of their nationals).¹⁸³ these obligatory bases of jurisdiction vary depending on the characteristics of the offence concerned. In addition, some conventions indicate that States parties “may also” establish their jurisdiction over the offence in other cases, thus providing for further voluntary bases of jurisdiction.¹⁸⁴

Corruption, the Council of Europe Convention on the Prevention of Terrorism and the Convention on Cybercrime refer to “effective, proportionate and dissuasive” penalties. Under the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, States parties are only bound to impose “appropriate penalties” for the offence (art. 15, para. 2).

¹⁸² See, for example, the International Convention for the Suppression of Terrorist Bombings (art. 5); the International Convention for the Suppression of the Financing of Terrorism (art. 6); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 6). The Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance states that the relevant crimes “shall be considered common crimes of international significance, regardless of motive” (art. 2).

¹⁸³ See the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (art. 5, para. 1); the International Convention against the Taking of Hostages (art. 5, para. 1); the Convention on the Physical Protection of Nuclear Material (art. 8, para. 1); the Inter-American Convention to Prevent and Punish Torture (art. 12, para. 1); the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (art. 9, para. 1); the Inter-American Convention on Forced Disappearance of Persons (art. IV, para. 1); the Convention on the Safety of United Nations and Associated Personnel (art. 10, para. 1); the Inter-American Convention against Corruption (art. V, para. 1); the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials (art. V, para. 1); the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 4, para. 1); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 1); the Convention on the Protection of the Environment through Criminal Law (art. 5, para. 1); the Criminal Law Convention on Corruption (art. 17, para. 1); the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (art. 16, para. 1); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 1); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 4, para. 1); the United Nations Convention against Transnational Organized Crime (art. 15, para. 1); the Convention on Preventing and Combating Corruption (art. 13); the United Nations Convention against Corruption (art. 42, para. 1); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 9, para. 1); the Council of Europe Convention on the Prevention of Terrorism (art. 14, para. 1); the ASEAN Convention on Counter-Terrorism (art. VII, para. 1). The International Convention for the Protection of All Persons from Enforced Disappearance uses a different expression which appears to have the same scope (“Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction* over the offence of enforced disappearance ...” (art. 9, para. 1). While also imposing such an obligation on States parties in certain cases, the Convention on Cybercrime provides that each party may reserve the right not to apply or to apply only in specific cases or conditions the relevant rules in all cases, except that of a crime committed on its territory (art. 22, paras. 1 and 2).

¹⁸⁴ See the Convention on the Physical Protection of Nuclear Material (art. 8, para. 4); the Convention on the Safety of United Nations and Associated Personnel (art. 10, para. 2); the Inter-American Convention

113. A widespread feature is the additional obligation, based on the Convention for the Suppression of Unlawful Seizure of Aircraft, by which States parties shall take such measures as may be necessary to establish their jurisdiction over the offence in the case where the alleged offender is in their territory and they do not extradite him.¹⁸⁵ There are several variants to the latter provision, which in some cases appear to be purely terminological¹⁸⁶ and in others seem to affect the content of

against Corruption (art. V, para. 2); the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials (art. V, para. 2); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 2); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 2); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 4, para. 2); the United Nations Convention against Transnational Organized Crime (art. 15, para. 2); the United Nations Convention against Corruption (art. 42, para. 2); the Council of Europe Convention on the Prevention of Terrorism (art. 14, para. 2); the ASEAN Convention on Counter-Terrorism (art. VII, para. 2).

¹⁸⁵ See the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (art. 5, para. 2) and its Supplementary Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (art. III); the European Convention on the Suppression of Terrorism (art. 6, para. 1); the International Convention against the Taking of Hostages (art. 5, para. 2); the Convention on the Physical Protection of Nuclear Material (art. 8, para. 2); the Inter-American Convention to Prevent and Punish Torture (art. 12, para. 2); the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (art. 9, para. 1); the Inter-American Convention on Forced Disappearance of Persons (art. IV, para. 2); the Convention on the Safety of United Nations and Associated Personnel (art. 10, para. 4); the Inter-American Convention against Corruption (art. V, para. 3); the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials (art. V, para. 3); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 4); the Convention on the Protection of the Environment through Criminal Law (art. 5, para. 2); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 4); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 4, para. 3); the United Nations Convention against Transnational Organized Crime (art. 15, para. 3); the Convention on Cybercrime (art. 22, para. 3); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 9, para. 4); the Council of Europe Convention on the Prevention of Terrorism (art. 14, para. 3); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9, para. 2); the ASEAN Convention on Counter-Terrorism (art. VII, para. 3). A notable exception is the SAARC Regional Convention on the Suppression of Terrorism, which does not establish an obligatory basis of jurisdiction when the alleged offender is present in the territory of a Contracting State and it does not extradite him or her, providing only that each Contracting State “may take such measures as it deems appropriate, consistent with its national laws, subject to reciprocity, to exercise its jurisdiction” for the relevant offences (art. V).

¹⁸⁶ Some conventions only omit the term “likewise” in the provision (for example, the Convention on the Safety of United Nations and Associated Personnel; the Inter-American Convention against Corruption; the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials; the Convention on Cybercrime) or replace it with “also” (the Inter-American Convention to Prevent and Punish Torture (art. 12, para. 2) and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 4, para. 3)). Although worded differently, the relevant provisions in the Inter-American Convention on Forced Disappearance of Persons (art. IV) and the Inter-American Convention to Prevent and Punish Torture (art. 12, para. 2) seem to imply the same obligation. Under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art. 5, para. 2) and the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9, para. 2), each State party is under this obligation when the alleged offender is present “in any territory under

the obligation.¹⁸⁷ In particular, some conventions impose such an obligation to establish jurisdiction only when extradition is denied on the ground that the offender is one of the nationals of the State concerned,¹⁸⁸ some conventions combine a regime of obligatory jurisdiction in some cases of refusal to extradite (particularly in the case of non-extradition of nationals) and of voluntary jurisdiction in others.¹⁸⁹ On one occasion, the “third alternative” is contemplated in this context, by it being provided that this basis of universal jurisdiction shall apply unless the State “extradites or surrenders [the alleged offender] to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized”.¹⁹⁰

its jurisdiction” (in the preparatory works of the Convention against Torture, it was explained that this wording would cover acts inflicted “aboard ships or aircrafts registered in the State concerned as well as occupied territories (report of the Working Group (E/CN.4/L.1470), para. 32). The Inter-American Convention to Prevent and Punish Torture uses the terms “within the area under its jurisdiction” (art. 12, para. 2). The European Convention on the Suppression of Terrorism, the Convention on the Protection of the Environment through Criminal Law, the Criminal Law Convention on Corruption (art. 17, para. 3) and the Convention on Cybercrime (art. 22, para. 3) specify that this basis of jurisdiction is triggered when the State Party does not extradite the alleged offender “after a request for extradition” (it appears that the corresponding provision in the Convention for the Suppression of Unlawful Seizure of Aircraft was also included on the assumption that such a request would have been made (see the original proposal by Spain for this provision in *International Conference of Air Law ...*, vol. II (footnote 146 above), p. 117).

¹⁸⁷ The Council of Europe Convention on the Prevention of Terrorism (art. 14, para. 3) and the European Convention on the Suppression of Terrorism (art. 6, para. 1) seem to limit the scope of the provision, in that they impose such an obligation only when the State Party in whose territory the alleged offender is present does not extradite him or her to a Party “whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested Party”. For certain offences, the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict imposes upon States parties an obligation to take the necessary legislative measures to establish their jurisdiction when the alleged offender is present in their territory (without any reference to a refusal to extradite) (art. 16, para. 1).

¹⁸⁸ See the Inter-American Convention against Corruption (art. V, para. 3); the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials (art. V, para. 3); the Criminal Law Convention on Corruption (art. 17, para. 3); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 4, para. 3); the Convention on Cybercrime (art. 22, para. 3).

¹⁸⁹ The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 4, para. 2 (b)) imposes an obligation to establish jurisdiction on the State that does not extradite the alleged offender on the grounds that the offence was committed in its territory or on board one of its vessels or aircrafts or that it was committed by one of its nationals, and provides that States “may also” establish jurisdiction in other cases of refusal. In the preparatory works, it was observed that the Convention did not intend to create universal jurisdiction for the relevant offences (see report of the open-ended intergovernmental expert group, *United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (Vienna, 25 November–20 December 1988), *Official Records*, vol. I, p. 38). The United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption contain split provisions for the case in which the State does not extradite the person on the ground that he or she is one of its nationals (for which there is an obligation to establish jurisdiction) and for the other cases of refusal to extradite (for which States parties only have the option to establish jurisdiction).

¹⁹⁰ See the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9, para. 2).

In addition, some conventions contain a provision calling on States parties to coordinate their actions whenever more than one of them claims jurisdiction over the relevant offences.¹⁹¹

114. Almost all the conventions concerned further clarify, in a manner similar to that of the Convention for the Suppression of Unlawful Seizure of Aircraft, that they do not exclude any criminal jurisdiction exercised in accordance with national law.¹⁹²

115. Most of the conventions listed above contain provisions relating to the taking into custody of the offender for the purposes of extradition or prosecution, preliminary inquiry into the facts and other mechanisms of cooperation in criminal matters.¹⁹³

116. While many conventions have followed the formulation of the provision contained in the Convention for the Suppression of Unlawful Seizure of Aircraft whereby the State shall, if it does not extradite the alleged offender, submit the case to its competent authorities for the purpose of prosecution,¹⁹⁴ several variants have appeared over time. In some cases, the alterations to the original model seem to be of a purely terminological nature.¹⁹⁵

¹⁹¹ See the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 4, para. 3); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 5); the United Nations Convention against Transnational Organized Crime (art. 15, para. 5); the Convention on Cybercrime (art. 22, para. 5); the United Nations Convention against Corruption (art. 42, para. 5); the Council of Europe Convention on the Prevention of Terrorism (art. 14, para. 5).

¹⁹² Some conventions also safeguard any applicable rule of international law which may affect the establishment of jurisdiction; see the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (art. 16, para. 2 (a)); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 6); the United Nations Convention against Transnational Organized Crime (art. 15, para. 6); the United Nations Convention against Corruption (art. 42, para. 6).

¹⁹³ These mechanisms will not be examined in detail in the present study.

¹⁹⁴ Only one convention appears to have adopted the same wording as article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft, namely the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (art. 7). On the other hand, conventions in the Inter-American context, while containing provisions which seem to follow substantively the same regime, appear to have been formulated without following the model of the Convention for the Suppression of Unlawful Seizure of Aircraft (see the Inter-American Convention to Prevent and Punish Torture (art. 14); the Inter-American Convention on Forced Disappearance of Persons (art. VI); the Inter-American Convention against Corruption (art. XIII); the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials (art. XIX, para. 6)). A peculiar case is that of the Convention on the Protection of the Environment through Criminal Law, which, while obliging States parties to establish their jurisdiction over the relevant offences in cases where an alleged offender is present in their territory and they do not extradite him to another party after a request for extradition (see above), does not contain a provision requiring States parties, if they do not extradite, to submit the case to their competent authorities for prosecution.

¹⁹⁵ Some conventions replace the word "found" with "present" (for example, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (art. 7); the Convention on the Physical Protection of Nuclear Material (art. 10); the International Convention for the Suppression of Terrorist Bombings (art. 8, para. 1); the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (art. 17, para. 1); the International

In other instances, they either affect the scope of the obligation or provide more details on the applicable regime. The main variants are the following:

(a) Preliminarily, it should be noted that not all the conventions place the said provision in the same position in the overall structure of the treaty¹⁹⁶ and that, when the relevant provisions include a title, this title varies;¹⁹⁷

(b) As regards the State subject to the obligation, some conventions provide that the provision shall apply to States "in the territory under whose jurisdiction" the alleged offender is found;¹⁹⁸

(c) With regard to the triggering of the obligation, all the relevant conventions refer to the hypothesis of a State that "does not extradite" the alleged offender. Some conventions specify that a prior request for extradition is needed;¹⁹⁹ other conventions provide that the obligation is only applicable when extradition is refused for specific

Convention for the Suppression of the Financing of Terrorism (art. 10, para. 1); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 11, para. 1); the ASEAN Convention on Counter-Terrorism (art. XIII, para. 1)). Some conventions simplify the expression "shall ... be obliged ... to submit" to "shall submit" (for example, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (art. 7); the Convention on the Physical Protection of Nuclear Material (art. 10); the Criminal Law Convention on Corruption (art. 27, para. 5); the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (art. 17, para. 1)).

¹⁹⁶ Most of the conventions follow the same structure as the Convention for the Suppression of Unlawful Seizure of Aircraft, placing the article imposing the obligation to prosecute failing extradition before that on extradition. Some conventions, however, adopt the inverse order (for example, the European Convention on the Suppression of Terrorism; the SAARC Regional Convention on the Suppression of Terrorism; the Inter-American Convention on Forced Disappearance of Persons). Some other conventions provide for the alternative of prosecution when extradition is not granted as a paragraph of the article on extradition (for example, the Inter-American Convention against Corruption (art. XIII, para. 6); the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials (art. XIX, para. 6); the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 10, para. 3); the Criminal Law Convention on Corruption (art. 27, para. 5); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 5, para. 5); the United Nations Convention against Transnational Organized Crime (art. 16, para. 10); the Convention on Cybercrime (art. 24, para. 6); the Convention on Preventing and Combating Corruption (art. 15, para. 6); the United Nations Convention against Corruption (art. 44, para. 11); the ASEAN Convention on Counter-Terrorism (art. XIII, para. 1)).

¹⁹⁷ Titles to this provision include: "Prosecution of alleged offenders" (Convention on the Safety of United Nations and Associated Personnel (art. 14)), "Prosecution" (Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (art. 17)), "Extradite or prosecute" (Council of Europe Convention on the Prevention of Terrorism (art. 18)). In addition, as mentioned in the previous note, the provision is sometimes a paragraph of the article entitled "extradition".

¹⁹⁸ See the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art. 7, para. 1) and the International Convention for the Protection of All Persons from Enforced Disappearance (art. 11, para. 1).

¹⁹⁹ See the European Convention on the Suppression of Terrorism (art. 7); the SAARC Regional Convention on the Suppression of Terrorism (art. IV); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 5, para. 5).

reasons (notably, the nationality of the offender);²⁰⁰ in one instance, explicit reference is additionally made to the refusal of the State to surrender the alleged offender to an international criminal tribunal (the so-called “third alternative”);²⁰¹

(d) With regard to the submission of the case to competent authorities, some conventions require that a request to this effect be made by the State seeking extradition.²⁰² While the condition that such a submission be made “without exception whatsoever and whether or not the offence was committed in its territory” has been included in some conventions,²⁰³ it has sometimes

²⁰⁰ See the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance (art. 5, which applies when extradition “is not in order because the person sought is a national of the requested State, or because of some other legal or constitutional impediment”); the Inter-American Convention against Corruption (art. XIII, para. 6, which applies when extradition “is refused solely on the basis of the nationality of the person sought, or because the Requested State deems that it has jurisdiction over the offence”); the submission to the competent authorities for prosecution is, however, subject to the agreement of the requesting State, who should also be informed of the final outcome of the proceedings); the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials (art. XIX, para. 6, which applies if extradition “is refused solely on the basis of the nationality of the person sought”); the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 10, para. 3—the provision applies to a “Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national”); the Criminal Law Convention on Corruption (art. 27, para. 5—the obligation is triggered either if extradition is refused “solely on the basis of the nationality of the person sought” or “because the requested Party deems that it has jurisdiction over the offence”); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 5, para. 5—provides that the obligation applies if the “requested State Party does not or will not extradite on the basis of the nationality of the offender”); the United Nations Convention against Transnational Organized Crime (art. 16, para. 10—“if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals”); the Convention on Cybercrime (art. 24, para. 6, which applies if extradition “is refused solely on the basis of the nationality of the person sought, or because the requested Party deems that it has jurisdiction over the offence”); the submission to the competent authorities for prosecution is made at the request of the requesting Party, who should be informed of the final outcome); the African Union Convention on Preventing and Combating Corruption (art. 15, para. 6—when the State Party “has refused to extradite that person on the basis that it has jurisdiction over offences”); the United Nations Convention against Corruption (art. 44, para. 11—“solely on the ground that [the alleged offender] is one of its nationals”). A particular case is that of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 6, para. 9), which establishes a different regime for the cases of refusal of extradition on the ground that the offence was committed in the State’s territory or on board one of its vessels or aircrafts, and on other grounds (see the applicable regime on the establishment of jurisdiction in this convention, as described in footnote 189 above).

²⁰¹ International Convention for the Protection of All Persons from Enforced Disappearance (art. 11, para. 1).

²⁰² See the United Nations Convention against Transnational Organized Crime (art. 16, para. 10); the Convention on Cybercrime (art. 24, para. 6); the United Nations Convention against Corruption (art. 44, para. 11).

²⁰³ See the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (art. 7); the International Convention against the Taking of Hostages (art. 8, para. 1); the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (art. 12). Interestingly, by employing the expression “without exception whatsoever”, these conventions include in their respective regimes a

been omitted, modified or supplemented with the further condition that the submission shall be made “without undue delay”;²⁰⁴

(e) Most conventions provide, as does the Convention for the Suppression of Unlawful Seizure of Aircraft, that the submission to the competent authorities shall be made “for the purpose of prosecution”.²⁰⁵ Some conventions also mention the conditions that such submission be made “through proceedings in accordance with the laws of”

condition that was originally adopted in the Convention for the Suppression of Unlawful Seizure of Aircraft with reference to a General Assembly resolution condemning the unlawful seizure of aircraft (see footnote 168 above).

²⁰⁴ In the preparatory works of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the omission of the phrase “without exception whatsoever and whether or not the offence was committed in its territory” was justified by its being superfluous in view of the previous provision in the same convention on extraterritorial jurisdiction (*Yearbook ... 1972*, vol. II, p. 318, para. (3) of the commentary to article 6). In the same convention, the insertion of the phrase “without undue delay” was based on an idea present in the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance, and aimed at ensuring that “the actual implementation of the obligation may not be frustrated by unjustifiably allowing the passing of time” and that “the alleged offender will not be kept in preventive custody beyond what is reasonable and fair” (*ibid.*).

The expression “without exception whatsoever and whether or not the offence was committed in its territory” is omitted, for example, from the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art. 7, para. 1); the Inter-American Convention on Forced Disappearance of Persons (art. VI); the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials (art. XIX, para. 6).

The expression is maintained, but supplemented with the condition that the submission shall be “without delay” or “without undue delay”, in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (art. 10, para. 1); the International Convention for the Suppression of Terrorist Bombings (art. 8, para. 1); the International Convention for the Suppression of the Financing of Terrorism (art. 10, para. 1); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 11, para. 1); the Council of Europe Convention on the Prevention of Terrorism (art. 18, para. 1); the ASEAN Convention on Counter-Terrorism (art. XIII, para. 1).

The phrase “whether or not the offence was committed in its territory” is replaced with “without undue delay” in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (art. 7); the European Convention on the Suppression of Terrorism (art. 7); the Convention on the Physical Protection of Nuclear Material (art. 10); the Convention on the Safety of United Nations and Associated Personnel (art. 14); the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (art. 17, para. 1).

The United Nations Convention against Transnational Organized Crime (art. 16, para. 10), the Convention on Preventing and Combating Corruption (art. 15, para. 6) and the United Nations Convention against Corruption (art. 44, para. 11) only impose the condition of “without undue delay”. The SAARC Regional Convention on the Suppression of Terrorism (art. IV) uses the expression “without exception and without delay”.

²⁰⁵ Some conventions are more specific: the Inter-American Convention to Prevent and Punish Torture (art. 14) and the Inter-American Convention on Forced Disappearance of Persons (art. VI) refer to submission “for the purposes of investigation and when appropriate, for criminal action, in accordance with its national law”; the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials (art. XIX, para. 6) refers to submission “for the purpose of prosecution under the criteria, laws, and procedures applied by the Requested State to those offenses when they are committed in its own territory”.

the State concerned²⁰⁶ and/or “as if the offense had been committed within its jurisdiction”;²⁰⁷

(f) With respect to the proceedings initiated against the alleged offender, almost all the conventions examined contain a provision, similar to the one in the Convention for the Suppression of Unlawful Seizure of Aircraft, by which the competent authorities shall take their decision on whether to prosecute as in the case of any ordinary offence of a grave nature under domestic law. Certain conventions spell out conditions that shall be respected during the proceedings, for instance as regards the standards of evidence required for prosecution,²⁰⁸ cooperation among States on evidentiary and procedural matters,²⁰⁹ or guarantees of fair treatment of the alleged offender at all stages of the proceedings.²¹⁰ Some conventions provide

²⁰⁶ The first convention that includes this phrase is the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (art. 7), which also omits the second sentence of the paragraph. This was indeed justified by the fact that the said phrase covered “all the desirable effect” of the second sentence, namely to provide a necessary degree of tolerance to the officials charged with taking the decision to prosecute or not to prosecute (*Yearbook ... 1972*, vol. II, pp. 318–319, para. (4) of the commentary to article 6). It should be noted, however, that with the exception of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (art. 17, para. 1 of which uses the slightly different wording “through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law”, but also omits the second sentence), all subsequent conventions containing this phrase also include the second sentence; the International Convention against the Taking of Hostages (art. 8, para. 1); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (art. 10, para. 1); the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (art. 12); the Convention on the Safety of United Nations and Associated Personnel (art. 14); the International Convention for the Suppression of Terrorist Bombings (art. 8, para. 1); the International Convention for the Suppression of the Financing of Terrorism (art. 10, para. 1); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 11, para. 1); the Council of Europe Convention on the Prevention of Terrorism (art. 18, para. 1); the ASEAN Convention on Counter-Terrorism (art. XIII, para. 1).

²⁰⁷ The Inter-American Convention to Prevent and Punish Torture (art. 14); the Inter-American Convention on Forced Disappearance of Persons (art. VI); the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials (art. XIX, para. 6).

²⁰⁸ See the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art. 7, para. 2) and the International Convention for the Protection of All Persons from Enforced Disappearance (art. 11, para. 2). This provision was included in the Convention against Torture to alleviate some of the concerns expressed by delegations with respect to the exercise of universal jurisdiction, in particular regarding the risk of discrepancies as to the standards of evidence (see report of the open-ended working group on a draft convention against torture and other cruel, inhuman or degrading treatment or punishment (A/CN.4/1982/L.40, 5 March 1982), para. 28).

²⁰⁹ The United Nations Convention against Transnational Organized Crime (art. 16, para. 10, included on a proposal by China at the fourth session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (A/AC.254/L.64, 8 July 1999)) and the United Nations Convention against Corruption (art. 44, para. 11) provide that “[t]he States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution”.

²¹⁰ See the International Convention against the Taking of Hostages (art. 8, para. 2: this provision was included on an original proposal by the Federal Republic of Germany (A/AC.188/L.3, 22 July 1977)); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 7, para. 3); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (art. 10, para. 2); the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (art. 11); the Convention

for general conditions for the prosecution of the relevant offences (e.g. non-applicability of, or conditions on, statutes of limitations, inadmissibility of the defence of superior orders, exclusion of trial by special jurisdictions), which would also apply in the case of prosecution under the provision which imposes the obligation to prosecute, unless extradition occurs;²¹¹

(g) Some conventions indicate that an extradition granted upon the condition that the person be returned to the State to serve the sentence is sufficient to discharge the obligations under the convention;²¹²

(h) Some conventions provide that prosecution under this provision is subject to the possibility for the State requesting extradition and the requested State to agree otherwise;²¹³

on the Safety of United Nations and Associated Personnel (art. 17); the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (art. 17, para. 2, which also contains a reference to the applicable guarantees under international law); the United Nations Convention against Transnational Organized Crime (art. 16, para. 13); the United Nations Convention against Corruption (art. 44, para. 14); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 12, also with a reference to the standards of the international law of human rights); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 11, para. 3). See also the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance (art. 4, then referred to in art. 5), under which “any person deprived of his freedom through the application of the convention shall enjoy the legal guarantees of due process”.

²¹¹ See the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 3, para. 8); the Inter-American Convention on Forced Disappearance of Persons (arts. VII–IX); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 8).

²¹² Under these conventions, whenever a State party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in the article. See the International Convention for the Suppression of Terrorist Bombings (art. 8, para. 2—the provision was included on a proposal by Canada and China (A/AC.252/1997/WP.29) and, while not intended to substitute for the general obligation to extradite or prosecute, was aimed at making it possible for States whose national laws prohibited extradition of their nationals to comply with the provisions of the convention (informal summary of the discussions in the plenary and in the working group, prepared by the Rapporteur, report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, *Official Records of the General Assembly, Fifty-second Session, Supplement No. 37 (A/52/37)*, annex IV, para. 78); the International Convention for the Suppression of the Financing of Terrorism (art. 10, para. 2); the United Nations Convention against Transnational Organized Crime (art. 16, para. 11); the United Nations Convention against Corruption (art. 44, para. 12); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 11, para. 2); the Council of Europe Convention on the Prevention of Terrorism (art. 18, para. 2).

²¹³ The Inter-American Convention against Corruption (art. XIII); the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials (art. XIX, para. 6); the Criminal Law Convention on Corruption (art. 27, para. 5); the Convention on Preventing and Combating Corruption (art. 15, para. 6). See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 6, para. 9), which conditions the submission to the competent authorities either to the agreement of the requesting State (in cases in which extradition was refused on the ground that the offence was

(i) Finally, some conventions impose upon the requested State the obligation to report the final outcome of the proceedings to the requesting State.²¹⁴

117. Most of the above-mentioned conventions contain a provision on extradition modelled on the Convention for the Suppression of Unlawful Seizure of Aircraft and include the same constitutive elements of the regime of extradition spelled out therein.²¹⁵ Some conventions, however, adopt a different approach, in which the various provisions on extradition are dispersed over in the text of the treaty.²¹⁶ The main variants of the regime of extradition are the following:²¹⁷

(a) Some conventions determine that their rules on extradition apply, provided that the relevant offence is punishable in both the requesting and the requested States;²¹⁸

(b) Most conventions specify, as does the Convention for the Suppression of Unlawful Seizure of Aircraft, that

committed on the territory of the requested State or on board one of its vessels or aircrafts) or to its contrary request to preserve its legitimate jurisdiction (in other cases).

²¹⁴ See the Inter-American Convention to Prevent and Punish Torture (art. 14); the Criminal Law Convention on Corruption (art. 27, para. 5); the Convention on Preventing and Combating Corruption (art. 15, para. 6).

²¹⁵ See the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (art. 8); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (art. 8); the International Convention against the Taking of Hostages (art. 10); the Convention on the Physical Protection of Nuclear Material (art. 11); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 8); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (art. 11); the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (art. 15); the Convention on the Safety of United Nations and Associated Personnel (art. 15); the Inter-American Convention against Corruption (art. XIII); the International Convention for the Suppression of Terrorist Bombings (art. 9); the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (art. 18); the International Convention for the Suppression of the Financing of Terrorism (art. 11); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 5, paras. 1–4); the United Nations Convention against Transnational Organized Crime (art. 16); the Convention on Cybercrime (art. 24); the United Nations Convention against Corruption (art. 44); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 13); the Council of Europe Convention on the Prevention of Terrorism (art. 19); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 13).

²¹⁶ See the European Convention on the Suppression of Terrorism and the SAARC Regional Convention on the Suppression of Terrorism (which adopts a structure similar to that of the European Convention). See also the other regional conventions against terrorism described later in this study.

²¹⁷ References in the footnotes hereinafter are limited to those conventions that contain substantive changes to the regime provided for under the Convention for the Suppression of Unlawful Seizure of Aircraft.

²¹⁸ See the United Nations Convention against Transnational Organized Crime (art. 16, para. 1); the Convention on Cybercrime (art. 24, para. 1); the United Nations Convention against Corruption (art. 44, para. 1; see, however, paragraph 2: a State may also grant extradition when the offence is not punishable under its domestic law). See, however, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 10, para. 4), according to which the condition of dual criminality “shall be deemed to be fulfilled” for the purpose of extradition for the relevant offence.

the relevant offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between States parties and that such States undertake to include the offence as an extraditable offence in every extradition treaty to be concluded among them;

(c) Similarly to the Convention for the Suppression of Unlawful Seizure of Aircraft, many conventions contain distinct provisions by which (i) States parties which make extradition conditional on the existence of a treaty, if they receive a request for extradition, may consider the convention as the legal basis for extradition in respect of the offence;²¹⁹ and (ii) States parties which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves.²²⁰ The relevant conventions further specify, as does the Convention for the Suppression of Unlawful Seizure of Aircraft, that these provisions remain subject to the conditions provided by the law of the requested State;²²¹

²¹⁹ The expression “at its option”, contained in the Convention for the Suppression of Unlawful Seizure of Aircraft, is sometimes omitted (for example, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (art. 8, para. 2); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 8, para. 2); the Inter-American Convention to Prevent and Punish Torture (art. 13, para. 2); the Inter-American Convention on Forced Disappearance of Persons (art. V); the Inter-American Convention against Corruption (art. XIII); the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials (art. XIX); the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 10, para. 2); the Criminal Law Convention on Corruption (art. 27, para. 2); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 5, para. 2); the United Nations Convention against Transnational Organized Crime (art. 16, para. 4)). Under the United Nations Convention against Transnational Organized Crime (art. 16, para. 5) and the United Nations Convention against Corruption (art. 44, para. 6), such States shall, at the time of deposit of their instrument of ratification, acceptance, approval of or accession to the convention, inform the Secretary-General of the United Nations whether they will take the convention as the legal basis for cooperation on extradition with other States parties to the convention, and, if they do not, seek, where appropriate, to conclude treaties on extradition with other States parties to the convention in order to implement the provision on extradition.

²²⁰ The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 10) and the ASEAN Convention on Counter-Terrorism (art. XIII) do not refer to this hypothesis.

²²¹ Reference is sometimes made in particular to the procedural provisions of the domestic law (for example, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents). In some conventions, the reference to domestic law is made in a separate paragraph (for example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 6, para. 5); the Inter-American Convention on Forced Disappearance of Persons (art. V); the United Nations Convention against Transnational Organized Crime (art. 16, para. 7); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 13, para. 6)). The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 6, para. 5), the Inter-American Convention against Corruption (art. XIII), the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials (art. XIX), the Criminal Law Convention on Corruption (art. 27, para. 4) and the Convention on Cybercrime (art. 24, para. 5) provide that extradition shall be subject to the conditions provided for by the law of the requested State or “by applicable extradition treaties, including the grounds on which the requested State may refuse extradition” (see also the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 10, para. 4)). The

(Continued on next page.)

(d) Most conventions also provide, as does the Convention for the Suppression of Unlawful Seizure of Aircraft, that the relevant offence shall be treated, for the purpose of extradition, as if it had been committed, not only in the place in which it occurred, but also in the territories of the States required to establish their jurisdiction over the offence in accordance with the relevant convention;²²²

(e) Some conventions provide that, for the purpose of extradition, the relevant offences shall not be regarded as political offences;²²³ some conventions further add that, accordingly, a request for extradition may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.²²⁴ Under certain conventions, States parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.²²⁵ Certain conventions specify that their provisions shall not be interpreted so as to impair the right of asylum;²²⁶

(f) Some conventions provide that a request for extradition shall not be granted in certain circumstances, which include: (i) if the requested State Party has substantial grounds for believing that the request is made for the purpose of prosecuting or punishing a person on discriminatory grounds and/or that the person's position may be prejudiced for that reason;²²⁷ (ii) where there are substantial

grounds for believing that the person would be in danger of being subjected to torture;²²⁸ (iii) if the requested Party has substantial grounds for believing that the person's position may be prejudiced because communication with the appropriate authorities of the State entitled to exercise rights of protection cannot be effected;²²⁹ or (iv) if it appears to the requested State that it is unjust or inexpedient to surrender or return the fugitive offender by reason of the trivial nature of the case, by reason of the request for the surrender or return of a fugitive offender not being made in good faith or in the interests of justice, or for any other reason.²³⁰ Some other conventions require the requested State, in considering a request for extradition, to pay due regard to whether the alleged offender's rights (including that of communication with representatives of his State of nationality) can be effected in the requesting State;²³¹

(g) Three conventions impose further obligations enhancing cooperation and effectiveness in extradition proceedings. Under these conventions: (i) the States parties, subject to their domestic law, shall endeavour to expedite the relevant extradition procedures and to simplify evidentiary requirements relating thereto;²³² (ii) before refusing extradition, the requested party shall, where appropriate, consult with the requesting State party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation;²³³ and/or (iii) States parties shall seek to conclude bilateral

(Footnote 221 continued.)

United Nations Convention against Transnational Organized Crime (art. 16, para. 7), the United Nations Convention against Corruption (art. 44, para. 8) and the International Convention for the Protection of All Persons from Enforced Disappearance (art. 13, para. 6) state that extradition shall be subject "to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition".

²²² This provision is not included in some conventions adopting the model of the Convention for the Suppression of Unlawful Seizure of Aircraft (for example, the Inter-American Convention against Corruption (art. XIII) and the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials (art. XIX)).

²²³ See the European Convention on the Suppression of Terrorism (arts. 1 and 2); the SAARC Regional Convention on the Suppression of Terrorism (arts. I and II); the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 3, para. 10); the Inter-American Convention on Forced Disappearance of Persons (art. V); the United Nations Convention against Corruption (art. 44, para. 4); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 13, para. 1).

²²⁴ See the International Convention for the Suppression of Terrorist Bombings (art. 11); the International Convention for the Suppression of the Financing of Terrorism (art. 14); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 15); the Council of Europe Convention on the Prevention of Terrorism (art. 20, para. 1).

²²⁵ See the United Nations Convention against Transnational Organized Crime (art. 16, para. 15); the United Nations Convention against Corruption (art. 44, para. 16); the ASEAN Convention on Counter-Terrorism (art. XIV). See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 3, para. 10).

²²⁶ See the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (art. 6); the International Convention on the Taking of Hostages (art. 15); the Inter-American Convention to Prevent and Punish Torture (art. 15).

²²⁷ See the European Convention on the Suppression of Terrorism (art. 5: this clause was justified by the need to comply with the requirements of the protection of human rights and fundamental freedoms as enshrined in the European Convention on Human Rights and

was modelled on article 3, paragraph 2, of the European Convention on Extradition (see explanatory report on the European Convention on the Suppression of Terrorism)); the International Convention against the Taking of Hostages (art. 9, para. 1 (a) and (b)); the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 6, para. 6); the International Convention for the Suppression of Terrorist Bombings (art. 12); the International Convention for the Suppression of the Financing of Terrorism (art. 15); the United Nations Convention against Transnational Organized Crime (art. 16, para. 14); the United Nations Convention against Corruption (art. 44, para. 15); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 16); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 13, para. 7). The possible grounds of discrimination are generally explicitly listed and vary depending on the convention.

²²⁸ See the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 3) and the Inter-American Convention to Prevent and Punish Torture (art. 13, para. 4, also referring to the case in which the person will be tried by special or *ad hoc* courts in the requesting State).

²²⁹ See the International Convention against the Taking of Hostages (art. 9, para. 1 (b)). This provision was included on a proposal by Jordan (A/AC.188/WG.II/CPR.9, submitted at the 1979 session of the Ad Hoc Committee on the Drafting of an International Convention against the Taking of Hostages) which aimed at incorporating into the Convention safeguards to prevent potential abuse in the context of extradition proceedings. It was felt that the exercise of legal and diplomatic protection would ensure a fair trial and avoid miscarriage of justice (see the statement by Mr. Al-Khasawneh (Jordan) in the debate in the Sixth Committee, *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 12th meeting (A/C.6/34/SR.12), paras. 19–24).

²³⁰ See the SAARC Regional Convention on the Suppression of Terrorism (art. VII).

²³¹ See the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (art. 11, para. 6).

²³² See the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 6, para. 7); the United Nations Convention against Transnational Organized Crime (art. 16, para. 8); the United Nations Convention against Corruption (art. 44, para. 9).

²³³ See the United Nations Convention against Transnational Organized Crime (art. 16, para. 16) and the United Nations Convention against Corruption (art. 44, para. 17).

and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition,²³⁴

(h) Some conventions specify that, with respect to the relevant offences, the provisions of all extradition treaties and arrangements applicable between States parties are modified as between States parties to the extent that they are incompatible with the convention.²³⁵

118. A separate mention should be made of certain regional conventions against crimes of international concern, particularly terrorism. In the African region, the Organization of African Unity (OAU) Convention for the elimination of mercenarism in Africa uses a wording similar to the Convention for the Suppression of Unlawful Seizure of Aircraft, whereby “[e]ach contracting State shall undertake such measures as may be necessary to punish ... any person who commits an offence ... and who is found on its territory if it does not extradite him to the State against which the offence has been committed” (art. 8); it then provides that “[a] request for extradition shall not be refused unless the requested State undertakes to exercise jurisdiction over the offender” in accordance with that article (art. 9, para. 2) and that “[w]here a national is involved in the request for extradition, the requested State shall take proceedings against him for the offence committed if extradition is refused” (art. 9, para. 2). The OAU Convention on the Prevention and Combating of Terrorism, while adopting a general mechanism for the punishment of offenders similar to that of the Convention for the Suppression of Unlawful Seizure of Aircraft,²³⁶ appears to impose an obligation on States parties to extradite any alleged offender whose extradition is requested by one of the States parties. This obligation, however, is subject to various conditions²³⁷ and is

²³⁴ See the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 6, para. 11); the United Nations Convention against Transnational Organized Crime (art. 16, para. 17); and the United Nations Convention against Corruption (art. 44, para. 18).

²³⁵ See the European Convention on the Suppression of Terrorism (art. 3, which had the purported effect of modifying article 3, paragraph 1, of the European Convention on Extradition (see explanatory report on the European Convention on the Suppression of Terrorism, footnote 227 above); the International Convention against the Taking of Hostages (art. 9, para. 2); the SAARC Regional Convention on the Suppression of Terrorism (art. III, para. 1); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (art. 11, para. 7); the International Convention for the Suppression of Terrorist Bombings (art. 9); the International Convention for the Suppression of the Financing of Terrorism (art. 11); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 13, para. 5); the Council of Europe Convention on the Prevention of Terrorism (art. 19, para. 5).

²³⁶ The Convention requires that States parties make the relevant offences “punishable by appropriate penalties that take into account the grave nature of such offences” (art. 2 (a)). It further provides that each State party “has jurisdiction” of the relevant offences when having certain special links with those offences, and that it may also establish its jurisdiction in other cases (art. 6, paras. 1 and 2). Similarly to the model established by the Convention for the Suppression of Unlawful Seizure of Aircraft, each State party “shall likewise take such measures as may be necessary to establish its jurisdiction” over the offences “in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 or 2” (art. 6, para. 4). Under art. 9, the relevant offences shall be included as extraditable offences in extradition treaties between the States parties.

²³⁷ Under article 8 of the Convention, the obligation to extradite is subject to the following conditions: (a) it applies “in conformity with

complemented by the provision that, if it does not extradite the person, the State is obliged to submit the case to its competent authorities.²³⁸

119. Conventions adopted in the Arab world and in the context of the Organization of the Islamic Conference appear to follow a very different model. Under their provisions, Contracting States “shall undertake to extradite” persons accused or convicted of terrorist offences in a Contracting State and whose extradition is sought by that State in accordance with the provisions of the convention. These conventions, however, establish a list of circumstances in which extradition “shall not be permissible”, including a provision whereby, if the legal system of the requested State does not allow it to extradite its nationals, the requested State shall prosecute any such persons who commit in any of the other Contracting States a terrorist offence that is punishable in both States by deprivation of liberty for a period of at least one year or more.²³⁹

(b) Reservations

120. Several States have made reservations or interpretative declarations in respect of the above-mentioned conventions, which sometimes affect the legal effect of the provisions for the punishment of offenders.

121. Some reservations or declarations specify, in general terms, the scope of the relevant provisions. Thus, for example, it has been declared that the provisions on the punishment of offenders under a certain convention should not be interpreted in such a way that the said offenders are neither tried nor prosecuted, and that mutual legal assistance and extradition are two different concepts and that the conditions for rejecting a request for extradition should not be valid for mutual legal assistance.²⁴⁰

the rules and conditions provided for in this Convention or under extradition agreements between the States Parties and within the limits of their national laws” (art. 8, para. 1); (b) at the time of the deposit of its instrument of ratification or accession, any State party may transmit to the Secretary-General of OAU the grounds on which extradition may not be granted, as well as the legal basis, in its national legislation or international conventions to which it is a party, which excludes such extradition (art. 8, para. 2); and (c) extradition shall not be granted if final judgement has been passed by a competent authority of the requested State upon the person in respect of the terrorist act or acts for which extradition is requested, and may also be refused if the competent authority of the requested State has decided either not to institute or terminate proceedings in respect of the same act or acts (art. 8, para. 3). In addition, the Convention contains various provisions detailing the necessary elements of a request for extradition (art. 11) and the procedures to be followed in those cases where such a request is made (arts. 12 and 13).

²³⁸ The provision is included as the final paragraph of the article on extradition (art. 8, para. 4) and establishes that “a State Party in whose territory an alleged offender is present shall be obliged, whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution if it does not extradite that person”.

²³⁹ See the Arab Convention on the Suppression of Terrorism, arts. 5 and 6; the Convention of the Organization of the Islamic Conference on Combating International Terrorism, arts. 5 and 6; the Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism, arts. 19 and 20.

²⁴⁰ *Multilateral Treaties Deposited with the Secretary-General: Status as at 1 April 2009* (United Nations publication, Sales No. E.09.V.3), document ST/LEG/SER.E/26, chapter XVIII.9, reservation by Turkey to the International Convention for the Suppression of Terrorist Bombings. See, in a similar vein, declarations by Montenegro, Serbia and Germany in respect of the International Convention against the Taking of Hostages (*ibid.*, chapter XVIII.5).

Similarly, in certain conventions, declarations have been made to the effect that, in the application of the provision requiring States, if they do not extradite, to submit the case for prosecution, any person committing the relevant offence shall be either prosecuted or extradited without any exception whatsoever.²⁴¹ Certain States have further pointed out that the wording “alleged offender”, used in some conventions, was in contradiction with the presumption of innocence, which was considered a fundamental principle under their domestic criminal law, and therefore stated that these terms should be interpreted as referring to the “accused”.²⁴² It has also been clarified that the condition “through proceedings in accordance with the laws of the State” shall be considered as referring to the provision on extradition and prosecution as a whole.²⁴³

122. Reservations have been made stating that the provisions imposing upon States parties, if they do not extradite, an obligation to submit the case to their competent authorities for the purpose of prosecution should be understood to include “the right of the competent authorities to decide not to submit any particular case for prosecution before the judicial authorities if the alleged offender is dealt with under national security and preventive detention laws”.²⁴⁴ Such reservations have been objected to as being “general and indefinite” and therefore contrary to the object and purpose of the relevant conventions, given that they made it impossible to identify in which way the reserving Government intended to change the obligations arising from those conventions.²⁴⁵ According to another reservation to provisions of this kind, some States have accepted the obligation to prosecute subject to the condition that they have received and rejected a request for extradition from another State party to the relevant convention.²⁴⁶ Yet another reservation contains the understanding that the relevant clause includes the right of the competent judicial authorities to decide not to prosecute a person if, in their opinion,

²⁴¹ Declaration by Israel in respect of the International Convention against the Taking of Hostages (also referring to the relevant provisions of the Geneva Conventions for the protection of war victims and their Additional Protocols) (*ibid.*, chapter XVIII.5).

²⁴² Reservations by Colombia and declaration of Malaysia in respect of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (*ibid.*, chapter XVIII.7).

²⁴³ Reservation by Italy in respect of the Convention on the Physical Protection of Nuclear Material (United Nations, *Treaty Series*, vol. 1456, No. 24631, p. 101).

²⁴⁴ Declarations by Malaysia (para. 3) and Singapore in respect of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents (*Multilateral Treaties...* (footnote 240 above), chapter XVIII.7) and the International Convention for the Suppression of Terrorist Bombings (*ibid.*, chapter XVIII.9).

²⁴⁵ Objections by Germany and the Netherlands to the declaration by Malaysia (para. 3) to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (*ibid.*, chapter XVIII.7) and the International Convention for the Suppression of Terrorist Bombings (*ibid.*, chapter XVIII.9).

²⁴⁶ Declaration by the Netherlands to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (*ibid.*, chapter XVIII.7); and reservations of the Netherlands to the International Convention against the Taking of Hostages (*ibid.*, chapter XVIII.5) and the Convention on the Physical Protection of Nuclear Material (United Nations, *Treaty Series*, vol. 1653, No. A-24631, p. 502).

grave considerations of procedural law indicate that effective prosecution would be impossible.²⁴⁷

123. Several reservations or declarations concern the limitations to granting extradition under the domestic legislation of the State. Some of these reservations clarify, in general terms, that the relevant conventions shall be applied, in matters relating to extradition, subject to the modalities and procedures laid down under the national laws of the requested State.²⁴⁸ On many occasions, however, reservations are more precise. Some States have indicated that they would refuse the extradition of their nationals;²⁴⁹ on some occasions, these reservations further clarify that nationals would be tried and sentenced under national laws.²⁵⁰ Under some other reservations, requests for extradition would be refused for persons to whom political asylum has been granted,²⁵¹ or for persons accused

²⁴⁷ Declarations by the Netherlands to the Convention on the Safety of United Nations and Associated Personnel (*Multilateral Treaties...* (footnote 240 above), chapter XVIII.8), the International Convention for the Suppression of Terrorist Bombings (*ibid.*, chapter XVIII.9) and the International Convention for the Suppression of the Financing of Terrorism (*ibid.*, chapter XVIII.11).

²⁴⁸ Reservation by Mexico to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (United Nations, *Treaty Series*, vol. 1823, No. A-29004, p. 389); reservation by Pakistan to the International Convention for the Suppression of the Financing of Terrorism (*Multilateral Treaties...* (footnote 240 above), chapter XVIII.11); and declaration by El Salvador to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (United Nations, *Treaty Series*, vol. 2260, No. A-27531, p. 161).

²⁴⁹ See reservation by Colombia to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (withdrawn on 1 March 2002) (*Multilateral Treaties...* (footnote 240 above), chapter XVIII.7, especially footnote 14); the declaration by France to the International Convention against the Taking of Hostages (*ibid.*, chapter XVIII.5); the reservation by Mozambique to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the International Convention for the Suppression of Terrorist Bombings (*ibid.*, chapter XVIII.9); the reservation by Belgium and the declaration and reservation of the Republic of Moldova to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (*ibid.*, chapter XVIII.6); and the reservation by Myanmar to the International Convention for the Suppression of the Financing of Terrorism (*ibid.*, chapter XVIII.11). A different declaration concerning nationals was made by Portugal to the International Convention for the Suppression of Terrorist Bombings, whereby it declared that the extradition of its nationals would only be authorized “(a) in case of terrorism and organized criminality; and (b) for purposes of criminal proceedings and, being so, subject to a guarantee given by the State seeking the extradition that the concerned person will be surrendered to Portugal to serve the sentence or measure imposed on him or her, unless such person does not consent thereto by means of expressed declaration” (*ibid.*, chapter XVIII.9).

²⁵⁰ See reservation by Colombia to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (withdrawn on 1 March 2002) (*ibid.*, chapter XVIII.7, especially footnote 14); the reservation by Mozambique to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the declaration on the International Convention for the Suppression of Terrorist Bombings (*ibid.*, chapter XVIII.9); and the declaration by the Bolivarian Republic of Venezuela regarding the United Nations Convention against Corruption (*ibid.*, chapter XVIII.14).

²⁵¹ Reservation and declaration by the Republic of Moldova to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (*ibid.*, chapter XVIII.6) and the United Nations Convention against Transnational Organized Crime (*ibid.*, chapter XVIII.12). See also the reservation by France to the European Convention on the Suppression of Terrorism (United Nations, *Treaty Series*, vol. 1497, No. A-17828, p. 424).

of political crimes or for their opinions.²⁵² In the same vein, some reservations aim at excluding the application of those provisions in a convention that state that a request for extradition could not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives;²⁵³ these reservations have been objected to on the ground that they would be incompatible with the object and purpose of the relevant convention, since they are intended to exclude the application of fundamental provisions of the convention.²⁵⁴ Some States have further declared that the provisions under which conventions shall not be interpreted as imposing an obligation to extradite (if the requested State Party has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on discriminatory accounts or that compliance with the request would cause prejudice to that person's position for any of these reasons) must be applied in such a way as to ensure the inevitability of responsibility for the relevant crimes.²⁵⁵ In yet other cases, the reservation excludes the handing over of the suspect in the event that the crime ascribed entails the death sentence in the requesting State.²⁵⁶ Furthermore, some reservations are made to the effect that extradition is restricted to offences that, under the domestic

law of the requested State, are punishable with a penalty more severe than a stated minimum, or that it is subject to the fulfilment of other conditions under domestic law.²⁵⁷ Under a different reservation, the handing over of a person could only be based on "strong suspicions" that he committed the crimes he is accused of, and would depend on a court decision.²⁵⁸

124. A reservation made by Belgium to some of the above-mentioned conventions, whereby "in exceptional circumstances" it reserved "the right to refuse extradition or mutual legal assistance in respect of any [relevant] offence ... which it considers to be a political offence or as an offence connected with a political offence or as an offence inspired by political motives",²⁵⁹ has proven particularly contentious. Objections were made to the reservation, stating that it seeks to limit the scope of application of a critical provision that should be applied in all circumstances and, by referring to subjective criteria, introduces uncertainty into conventional relations, and that it was therefore incompatible with the object and purpose of the relevant conventions.²⁶⁰ In the light of these criticisms, Belgium has withdrawn its reservation with respect to these conventions.²⁶¹

²⁵² See reservation by Colombia to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (withdrawn on 1 March 2002) (*Multilateral Treaties...* (footnote 240 above), chapter XVIII.7, especially footnote 14).

²⁵³ Reservation by the Democratic People's Republic of Korea to the International Convention for the Suppression of the Financing of Terrorism (*ibid.*, chapter XVIII.11); reservation and declaration by Denmark to the Council of Europe Convention on the Prevention of Terrorism (United Nations, *Treaty Series*, vol. 2494, No. A-44655, p. 276).

²⁵⁴ Objections by Argentina, Germany and the Republic of Moldova to the reservation by the Democratic People's Republic of Korea to the International Convention for the Suppression of the Financing of Terrorism (*Multilateral Treaties...* (footnote 240 above), chapter XVIII.11, especially footnote 16).

²⁵⁵ Reservations and declarations by Belarus and Ukraine, and declaration by Bulgaria in respect of the International Convention against the Taking of Hostages (*ibid.*, chapter XVIII.5); declarations by the Republic of Moldova and the Russian Federation in respect of the International Convention for the Suppression of Terrorist Bombings (*ibid.*, chapter XVIII.9); declarations by the Russian Federation in respect of the International Convention for the Suppression of the Financing of Terrorism (*ibid.*, chapter XVIII.11); declarations by the Russian Federation and Uzbekistan in respect of the International Convention for the Suppression of Acts of Nuclear Terrorism (*ibid.*, chapter XVIII.15); declaration by the Russian Federation in respect of the United Nations Convention against Transnational Organized Crime (*ibid.*, chapter XVIII.12).

²⁵⁶ Declaration by France to the International Convention against the Taking of Hostages (with respect to aliens, extradition will not be granted "if the offence is punishable by the death penalty under the laws of the requesting State, unless that State gives what are deemed to be adequate assurances that the death penalty will not be imposed or, if a death sentence is passed, that it will not be carried out") (*ibid.*, chapter XVIII.5); reservation by Portugal to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (United Nations, *Treaty Series*, vol. 1931, No. A-29004, p. 456). See also the reservation by Portugal to the European Convention on the Suppression of Terrorism (*ibid.*, vol. 1338, No. A-17828, p. 355) (which states that "Portugal shall not grant extradition for offences punishable in the requesting State with either the death penalty, life imprisonment or a detention order involving deprivation of liberty for life") and the objections made thereto by Belgium and Germany.

²⁵⁷ Reservations by Finland and Thailand to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (*Multilateral Treaties...* (footnote 240 above), chapter XVIII.7). See also the declaration by Panama in respect of the United Nations Convention against Transnational Organized Crime (*ibid.*, chapter XVIII.12) (by which Panama shall not be obliged to carry out extraditions where the event giving rise to the request are not offences under the criminal legislation of Panama).

²⁵⁸ Reservation by Portugal to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (United Nations, *Treaty Series*, vol. 2494, No. 44655, p. 456).

²⁵⁹ Reservations by Belgium to the International Convention for the Suppression of Terrorist Bombings (*Multilateral Treaties...* (footnote 240 above), chapter XVIII.9, especially footnote 1) and the International Convention for the Suppression of the Financing of Terrorism (*ibid.*, chapter XVIII.11, especially footnote 1). These reservations further clarify that, in the cases where the reservation applies, Belgium remains bound by the general legal principle to prosecute or extradite, pursuant to the rules governing the competence of its organs. It should be recalled that these conventions provide that extradition may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives (see footnote 224 above). See also the similar reservation by Belgium to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (*ibid.*, chapter XVIII.6) (whereby no provision under the relevant convention "should be interpreted as implying an obligation of extradition if the requested State party has reason to believe that the request for extradition based on the offences set forth in the Convention has been submitted for the purposes of prosecuting or punishing a certain person on the grounds of ethnic origin, religion, nationality or political views, or if acceding to the request would prejudice the situation of that person on any of those grounds"), which did not give rise to any objection.

²⁶⁰ Objections by Germany, Spain, the United Kingdom and the United States to the reservation by Belgium to the International Convention for the Suppression of Terrorist Bombings (*ibid.*, chapter XVIII.9); objections by the Russian Federation, Argentina, the Netherlands, Germany, the United Kingdom and the United States to the reservation by Belgium to the International Convention for the Suppression of the Financing of Terrorism (*ibid.*, chapter XVIII.11).

²⁶¹ See withdrawal of the reservation by Belgium to the International Convention for the Suppression of Terrorist Bombings (*ibid.*, chapter XVIII.9, footnote 1) and the International Convention for the Suppression of the Financing of Terrorism (28 January 2008) (*ibid.*, chapter XVIII.11, footnote 1).

CHAPTER II

Conclusions

125. The present section aims at recapitulating the main variations of clauses which may be of relevance to the study of the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”, as found in the various instruments examined in the present study, following three thematic issues: (a) the relationship between extradition and prosecution resulting from the clause (which reveals the overall structure and logic of that clause); (b) the conditions applicable to extradition; and (c) the conditions applicable to prosecution. It then proposes some general conclusions arising from the examination of the previous work of the Commission on related topics and the conventional practice with respect to the obligation to extradite or prosecute.

A. Relationship between extradition and prosecution in the relevant clauses

126. The fundamental common feature of the above-mentioned clauses resides in the fact that they impose upon States an obligation to ensure the prosecution of the offender either by extraditing the individual to a State that will exercise criminal jurisdiction or by enabling their own judicial authorities to prosecute. The relationship between these two alternative courses of action (to extradite or to prosecute), however, is not identical in all the examined clauses. Under this aspect, the relevant provisions contained in multilateral conventions may be classified into two main categories: (a) those clauses that impose an obligation to prosecute *ipso facto* when the alleged offender is present in the territory of the State, which the latter may be liberated from by granting extradition; and (b) those clauses for which the obligation to prosecute is only triggered by the refusal to surrender the alleged offender following a request for extradition.

1. CLAUSES IMPOSING AN OBLIGATION TO PROSECUTE *IPSO FACTO*, WITH THE POSSIBLE ALTERNATIVE OF EXTRADITION

127. The first category includes all those clauses that impose an obligation upon States parties to prosecute any person present in their territory who is alleged to have committed a certain crime. This obligation to prosecute may be said to exist *ipso facto* in that it arises as soon as the presence of the alleged offender in the territory of the State concerned is ascertained,²⁶² regardless of any

²⁶² On the need for the accused to be present in the territory of the State concerned as a precondition of the assertion of universal jurisdiction, see the separate opinion by Judges Higgins, Kooijmans and Buergethal appended to the judgment of ICJ in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case: “The great treaties on aerial offences, hijacking, narcotics and torture are built around the concept of *aut dedere aut prosequi*. Definitionally, this envisages presence on the territory. There cannot be an obligation to extradite someone you choose not to try unless that person is within your reach. National legislation, enacted to give effect to these treaties, quite naturally also make mention of the necessity of the presence of the accused. These sensible realities are critical for the obligatory exercise of *aut dedere aut prosequi* jurisdiction ...” (*I.C.J. Reports 2002*, p. 80, para. 57; see also President Guillaume’s separate opinion, *ibid.*, pp. 39–40, para. 9). See also

request for extradition. It is only when such a request is made that an alternative course of action becomes available to the State, namely the surrender of the alleged offender to another State for prosecution. In other words, in the absence of a request for extradition, the obligation to prosecute is absolute, but, once such a request is made, the State concerned has the discretion to choose between extradition and prosecution.

128. The clearest example of this first category of clauses is to be found in the relevant common article of the Geneva Conventions for the protection of war victims, which provides that each State party “shall bring” persons alleged to have committed, or to have ordered to be committed, grave breaches to those Conventions, regardless of their nationality, before its own courts,²⁶³ but “may also, if it prefers”, hand such persons over for trial to another State party concerned. While this provision appears to give a certain priority to prosecution by the custodial State, it does also recognize that this State has the discretion to opt for extradition,²⁶⁴ provided that the requesting State has made out a *prima facie* case.²⁶⁵

129. Article 9 of the draft Code of Offences against the Peace and Security of Mankind, adopted by the Commission in 1996, appears to respond to the same logic. Under that article, the State party in whose territory an individual alleged to have committed certain crimes under the draft Code is found “shall extradite or prosecute that individual”. While the wording of the article seems to place the two alternative courses of action on the same level, it is clear from the commentary that the obligation to prosecute

Guillaume (footnote 151 above), pp. 368–369. For a view according to which the presence of the alleged offender in the territory of the State is not required for prosecution under the relevant provision of the Geneva Conventions for the protection of war victims, see Henzlin, *Le principe de l’universalité en droit pénal international: Droit et obligation pour les Etats de poursuivre et de juger selon le principe de l’universalité*, p. 354.

²⁶³ Although the text of the provision is not unequivocal in this regard, the commentary to the Geneva Conventions explains that the obligation to search for the alleged offender (which, as shall be described hereinafter, constitutes a preamble to prosecution) arises “[a]s soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach” (Pictet (footnote 79 above), p. 593).

²⁶⁴ See, for example, Costello, “International terrorism and the development of the principle *aut dedere aut judicare*”, p. 486; Bassiouni and Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, p. 15; Maierhöfer, “*Aut dedere—aut iudicare*”, pp. 349–350; Mitchell, *Aut Dedere Aut Judicare: The Extradite or Prosecute Clause in International Law*, pp. 75–76. For authors who emphasize the priority attributed to prosecution in the Geneva Conventions for the protection of war victims, see Condorelli, “Il sistema della repressione dei crimini di guerra nelle Convenzioni di Ginevra del 1949 e nel primo protocollo addizionale del 1977”, pp. 35–36; Henzlin (footnote 264 above), p. 353 (who qualifies the model of the Geneva Conventions as *primo prosequi secundo dedere*).

²⁶⁵ It should be noted that article 88, paragraph 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) calls on States parties to “give due consideration to the request of the State in whose territory the alleged offence has occurred”, thus hinting at the idea that prosecution by the latter State would be preferable.

arises independently from any request for extradition. The commentary specifies that the custodial State has an obligation “to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition”.²⁶⁶ According to the commentary, article 9 “does not give priority to either alternative course of action”²⁶⁷ and the requested State is not required to grant a request for extradition if it prefers to entrust its own authorities with the prosecution of the case.²⁶⁸

130. The terms of the relevant provision contained in the Convention for the Suppression of Unlawful Seizure of Aircraft appear to be ambiguous in this respect: as described above, they provide that “[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged [...] to submit the case to its competent authorities for the purpose of prosecution”.²⁶⁹ Even when read in its context and taking into account the preparatory works of the Convention,²⁷⁰ the text of this provision does not unequivocally resolve the question of whether the obligation to prosecute arises *ipso facto* or only once a request for extradition is submitted and not granted. Moreover, the views expressed in the legal literature on provisions of this kind do not give a definitive answer to this question.²⁷¹ However,

²⁶⁶ *Yearbook ... 1996*, vol. II (Part Two), p. 31, para. (3) of the commentary to art. 9. Reference should also be made to the commentary to article 8 (whereby each State party “shall take such measures as may be necessary to establish its jurisdiction” over the crimes set out in the draft code “irrespective of where or by whom those crimes were committed”): the Commission observes therein that, failing the establishment of jurisdiction, “the custodial State would be forced to accept any request received for extradition which would be contrary to the alternative nature of the obligation to extradite or prosecute under which the custodial State does not have an absolute obligation to grant a request for extradition”, and “the alleged offender would elude prosecution in such a situation if the custodial State did not receive any request for extradition” (para. (6) of the commentary to art. 8, *ibid.*, p. 29).

²⁶⁷ See paragraph (6) of the commentary to article 9 of the draft code of offences against the peace and security of mankind, *ibid.*, pp. 31–32.

²⁶⁸ *Ibid.* The commentary also recalls that it had been proposed in the Commission to give priority to the request of the territorial State, but that the Drafting Committee considered that this question was not ripe for codification, consistent with article 16 of the Model Treaty on Extradition (resolution 45/116 of the General Assembly, 14 December 1990, annex).

²⁶⁹ Art. 7.

²⁷⁰ Art. 4, para. 2 (under which each Contracting State is under an obligation to take such measures as may be necessary to establish their jurisdiction over the offence “in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 8”) seems to make the establishment of jurisdiction in that case conditional to a refusal to extradite. As described in paragraphs 16–26 above, in the preparatory works, the Legal Committee had placed the obligation to prosecute on the State of registration of the aircraft and the State of landing; while not obliged to extradite, other States were expected to grant extradition to those States or, in the alternative, to prosecute the alleged offender. Article 4, paragraph 2, was the result of an amendment aiming only at ensuring the effectiveness of the mechanism in the absence of extradition (see footnote 160 above). On the other hand, the preparatory works make it clear that the overall purpose of the Convention was to design a mechanism that would avoid impunity of those who had committed the relevant offence.

²⁷¹ Authors are either split or ambiguous about the scope of this obligation; see, for example, Dinstein, “Criminal Jurisdiction over Aircraft Hijacking”, p. 196 (noting that the obligation to prosecute arises in case of “failure of extradition”); White (footnote 144 above);

the interpretation according to which provisions of this kind²⁷² impose an obligation to prosecute independently from any request for extradition may today find support in the case law of the Committee against Torture. In a decision relating to a similar provision contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 7, para. 1),²⁷³ the Committee found that:

... the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition. The alternative available to the State party under article 7 of the Convention exists only when a request for extradition has been made and puts the State party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial authorities for the institution of criminal proceedings, the

Feller, “Comment on ‘Criminal jurisdiction over aircraft hijacking’”, p. 207; Wood, “The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents”, pp. 808–809 (according to whom extradition should be the “normal procedure” and extraterritorial jurisdiction, “which goes beyond what is normally permitted by customary international law”, was acceptable in negotiations “only as a secondary jurisdiction, where for any reason extradition did not take place”); Bigay, “Extrader ou punir”, p. 118 (noting the ambiguity of the terminology and pointing out that the French delegation at the International Conference on Air Law (1970 Hague Conference) had argued that the refusal of a prior request for extradition was required); Wise, “The obligation to extradite or prosecute”, p. 272 (according to whom the obligation under the Hague formula “is not contingent on a request for extradition, nor on an offer of extradition being refused”); Bassiouni and Wise (footnote 264 above), p. 18 (noting that, while in certain regional conventions on terrorism the obligation to prosecute comes into play only when a request for extradition has been refused, in the Convention for the Suppression of Unlawful Seizure of Aircraft “it makes no difference that extradition has not been requested by the state where the offence took place”); Enache-Brown and Fried, “Universal crime, jurisdiction and duty: the obligation of *aut dedere aut judicare* in international law”, p. 626; Henzelin (footnote 262 above), pp. 301, 303–304 and 370 (who considers that the State where the alleged offender is present has the obligation to arrest the individual, initiate investigations and inform other interested States (pursuant to art. 6 of the Convention for the Suppression of Unlawful Seizure of Aircraft); if no extradition is filed, the State would have the obligation to submit the case to its competent authorities for prosecution); Plachta, “Contemporary problems of extradition: human rights, grounds for refusal and the principle *aut dedere aut judicare*”, pp. 75–76 (arguing that the principle does not subordinate *judicare* to *dedere*); Kolb, “The exercise of criminal jurisdiction over international terrorists”, pp. 250–254; Maierhöfer (footnote 264 above), pp. 338–341; Mitchell (footnote 264 above), pp. 75–76; Amnesty International, “International Law Commission: the obligation to extradite or prosecute (*aut dedere aut judicare*)”, pp. 8–9. On this issue, see the intervention of the representative of the Netherlands at the General Assembly, during the preparatory works of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, commenting on the rejection of an amendment proposed by his delegation making an express reference to a previous request for extradition: “It is now clear that a State party, where an alleged offender is found, will be bound to submit the case to prosecution even if the States which have primary jurisdiction under the terms of article 3 all shirk requesting extradition. I wish to make it clear that we regard the listing of States with primary jurisdiction as the expression of those States’ duty to bear, as a rule, the heaviest burden of the Convention. In other words, the primarily interested States have at least a moral duty to request extradition when the alleged offender is found in a State which, under normal jurisdictional rules, would have no involvement with the crime at all” (*Official Records of the General Assembly, Twenty-eighth Session, 2202nd plenary meeting (A/PV.2202)*, para. 308).

²⁷² As described in chapter I, section D, above.

²⁷³ Under this provision, “[t]he State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution”.

objective of the provision being to prevent any act of torture from going unpunished.²⁷⁴

131. The question arises whether other clauses formulated in similar terms should also be interpreted in the same way. In the light of the decision of the Committee against Torture, it may be argued that the formula by which the State in whose territory the alleged offender is found shall, if it does not extradite him, submit (or be obliged to submit) the case to its competent authorities for the purpose of prosecution, indicates that the obligation to prosecute exists *ipso facto*. However, this interpretation is to be set aside at least in those cases where the clause expressly specifies that the obligation to prosecute is subject to the existence of a prior request for extradition²⁷⁵ or to a further request made by the State seeking extradition for the requested State to prosecute the individual:²⁷⁶ these variants of the formula belong to the second category described hereinafter. Other specificities of the provision may also have a bearing on how the clause should be interpreted in this respect. Thus, for example, as described above, some conventions place the said provision in a paragraph of the article concerning extradition;²⁷⁷ some conventions provide that the obligation is only applicable when extradition is refused for specific reasons (notably, the nationality of the offender);²⁷⁸ some conventions only contain an obligation for States parties to establish their jurisdiction over the relevant offences (in cases where an alleged offender is present in their territory and they do not extradite him to another party), but do not contain a clause that imposes upon States parties, if they do not extradite, the subsequent obligation to submit the case to their competent authorities for prosecution.²⁷⁹ A definitive answer to this question cannot therefore be given in general terms and should rather be based on a case-by-case examination of the exact formulation of the provision, its context and preparatory works.

2. CLAUSES IMPOSING AN OBLIGATION TO PROSECUTE ONLY WHEN EXTRADITION HAS BEEN REQUESTED AND NOT GRANTED

132. The second category encompasses those provisions for which the obligation to prosecute is triggered by the refusal of a request for extradition. Under the conventions belonging to this category, States parties (at least those who do not have a special link with the offence) do not have a general obligation *ipso facto* to prosecute alleged offenders present in their territory. When a State receives a request for extradition, these conventions recognize the possibility for the State to refuse the surrender of the individual, either on grounds based on its own national

legislation or for reasons explicitly contemplated in the conventions themselves. If it decides not to grant extradition, however, the State has the obligation to prosecute the individual. In other words, these conventions appear to give some priority to the option of extradition (*rectius* to prosecution by certain States, most notably those where the crime was committed, to which the alleged offender should normally be surrendered) and provide the alternative of prosecution as a safeguard against impunity. These conventions thus appear to follow the very same lines as originally foreseen by Hugo Grotius when he referred to the principle *aut dedere aut punire*.²⁸⁰

133. The International Convention for the Suppression of Counterfeiting Currency and subsequent conventions inspired from it belong to this second category. The International Convention for the Suppression of Counterfeiting Currency expressly provides that, in the case of foreigners who have committed a relevant offence abroad, “[t]he obligation to take proceedings is subject to the condition that extradition has been requested and the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence” (art. 9, para. 2).²⁸¹ The overall structure of the mechanism for the punishment of offenders in these conventions is indeed based on the idea that the State in whose territory the crime was committed will request the extradition of the offender who has fled to another country and that extradition should, in principle, be granted; these conventions, however, recognize that States may be unable to extradite in some cases (most notably, when the individual is their national or when they have granted asylum to him) and provide, as an alternative, for the obligation to prosecute.²⁸²

134. Multilateral conventions on extradition are also to be placed in this second category. By their very nature, the application of the rules of judicial cooperation provided in them is triggered by the submission of a request for extradition. These conventions are based on the general undertaking by States parties to surrender to each other all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted for the carrying out of a sentence or detention order. This obligation to extradite, however, is subject to a number of exceptions, particularly in the case in which the individual whose extradition is sought is a national of the requested State. These conventions provide for an alternative obligation to prosecute the offender whenever his extradition is refused, particularly on the grounds that he is a national of the requested State, as a mechanism to avoid impunity.²⁸³

²⁷⁴ Report of the Committee against Torture, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44 (A/61/44)*, para. 9.7. The complainants, all Chadian nationals purportedly tortured by agents of the Chadian State answerable directly to Hissène Habré, claimed, *inter alia*, that Senegal, by neither prosecuting nor extraditing Mr. Habré, was in breach of its obligations under the principle *aut dedere aut judicare* enshrined in article 7 of the Convention (*ibid.*, paras. 3.8–3.10). The complainants refuted in particular Senegal’s argument that there would be an obligation to prosecute under article 7 only after an extradition request had been made and refused (para. 8.12).

²⁷⁵ See footnote 199 above.

²⁷⁶ See footnote 202 above.

²⁷⁷ See footnote 196 above.

²⁷⁸ See footnote 200 above.

²⁷⁹ See footnote 194 above.

²⁸⁰ *De Jure Belli ac Pacis*, Book II, chap. XXI, sect. IV (English translation by Francis W. Kelsey, Oxford/London, Clarendon Press/Humphrey Milford, 1925, pp. 527–529).

²⁸¹ Art. 9, para. 2. It should be noted that an earlier preparatory draft for this convention had proposed that proceedings be taken if extradition had not been requested (Société des Nations, Comité mixte pour la repression du faux monnayage, *Mémoire et projet de convention préparé par M. Pella* (doc. F.M.4, 23 June 1927), Part IV, p. 7). As seen in chapter I, section A.1 (b) above, this proposal was modified in subsequent negotiations of the 1929 Convention.

²⁸² See Henzelin (footnote 262 above), p. 286 (who qualifies the system as *primo dedere secundo prosequi*).

²⁸³ See chapter I, section C, above. See also Bassiouni and Wise (footnote 264 above), pp. 11–12; Maierhöfer (footnote 264 above), pp. 346–347.

135. As observed above, some of the conventions described in section D of chapter I above should also be included in this category, whenever the relevant clause is to be interpreted as subjecting the obligation to prosecute to the refusal of a request for extradition.²⁸⁴

136. It should be noted, however, that conventions belonging to this category adopt very different mechanisms for the punishment of offenders, which may affect the interaction between extradition and prosecution. For example, those conventions that aim at the suppression of specific international offences generally contain detailed provisions concerning the prosecution of such offences, while multilateral conventions on extradition rather regulate the extradition process and do not include provisions on the conduct of prosecution. In the former category, while older conventions (such as the International Convention for the Suppression of Counterfeiting Currency) contain very limited obligations concerning the punishment of offenders (which remain without prejudice to national limitations to the exercise of extraterritorial jurisdiction), more recent conventions (notably those described in section D of chapter I above) provide for more elaborate regimes, which may include obligations for certain States to establish extraterritorial jurisdiction. These issues will be further examined below.

B. Conditions applicable to extradition

137. Three aspects of the regulation of the conditions applicable to extradition in the relevant conventions deserve particular consideration: the provision of a legal basis for extradition; the subjection of extradition to the national legislation of the requested State; and the inclusion of other norms relating to extradition proceedings.

138. The conventions reviewed differ in the mechanisms they establish to provide a legal basis for extradition of the relevant offences. Multilateral conventions on extradition,²⁸⁵ as well as a few conventions regarding specific international offences,²⁸⁶ directly impose upon States parties a general obligation to extradite, subject to certain conditions. The Geneva Conventions for the protection of war victims do not address the issue of the legal basis for extradition, and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) only calls on States parties to cooperate in the matter of extradition and safeguards the obligations arising from other treaties on the subject of mutual assistance in criminal matters (art. 88). The majority of the conventions reviewed, however, establish a system by which the relevant offence shall be deemed to be included as an extraditable offence in any existing extradition treaty between States parties and such States undertake to include the offence as an extraditable offence in every future extradition treaty to be concluded among them, which is usually combined with provisions whereby States parties which make extradition conditional on the existence of a treaty may consider the relevant convention as the legal

basis of extradition and States parties which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves.²⁸⁷ In other words, these conventions do not contain an obligation to extradite,²⁸⁸ they operate a *renvoi* to extradition treaties, which would provide the legal basis for extradition, but may also provide by themselves, in certain circumstances, such legal basis.

139. Besides the multilateral conventions on extradition (which usually spell out the conditions applicable to the extradition process, including possible grounds of denial), nearly all the conventions reviewed specify that extradition is subject to the conditions provided by the law of the requested State.²⁸⁹ This implies that the requested State has the right to refuse extradition of an individual on the basis of the provisions of its domestic legislation. Such grounds of refusal may be connected to the offence (e.g. the statute of limitations has expired, the offence is not criminalized in the requested State or the crime is subject to death penalty in the requesting State) or not (e.g. the individual was granted political asylum or there exist humanitarian reasons to deny extradition).

140. The need to safeguard the conditions provided by national laws was often a major point of discussion in the preparatory works of the conventions reviewed. In particular, it was emphasized in negotiations that the mechanism for the punishment of offenders to be established should take into account the fact that many States have constitutions which expressly prohibit the extradition of their own nationals and that States sometimes grant political asylum to individuals later sought for extradition. It was then considered that such conventions could not impose upon States parties an absolute obligation to extradite and should allow for the possibility for the requested State to refuse extradition based on its national law. As illustrated by the preparatory works of the Bustamante Code and the International Convention for the Suppression of Counterfeiting Currency, this discussion is what originally led to the elaboration of a mechanism that would combine the possibility of extradition with that of prosecution.²⁹⁰ This

²⁸⁷ Such provisions are found in the Convention for the Suppression of Unlawful Seizure of Aircraft and in most of the conventions following the "Hague formula", as well as in the International Convention for the Suppression of Counterfeiting Currency and other conventions following the same model. However, as described in chapter I, sections A and D, above, the precise formulation of the provisions varies and, in some cases, some provisions are missing (for example, the International Convention for the Suppression of Counterfeiting Currency does not provide for the possibility for States parties which make extradition conditional on the existence of a treaty to consider the convention as the legal basis for extradition).

²⁸⁸ See paragraph 99 above. See also White (footnote 144 above), pp. 43–44; Costello (footnote 264 above), p. 487; Guillaume (footnote 151 above), pp. 356–357; Benavides, "The universal jurisdiction principle: nature and scope", p. 33.

²⁸⁹ See White (footnote 144 above), p. 43, according to whom the corresponding provision in the Convention for the Suppression of Unlawful Seizure of Aircraft "... in no way affects any restriction there may be in national law on the extradition of an offender. Thus, for example, the law of many States prohibits the extradition of political offenders or of nationals of the State requested to extradite. The Convention does not require such rules to be waived: it merely provides that hijacking is an extraditable offence and leaves it to national law to determine whether in any given case the hijacker should be extradited."

²⁹⁰ See sections A.1 (b) and C.1 (b) of chapter I above. See also, with respect to the "Hague formula", Wise (footnote 271 above), p. 271.

²⁸⁴ Maierhöfer (footnote 264 above), p. 344.

²⁸⁵ See chapter I, section C, above.

²⁸⁶ See the OAU Convention on the Prevention and Combating of Terrorism, referred to in paragraph 118 above.

discussion is then reflected in those conventions (such as the International Convention for the Suppression of Counterfeiting Currency and other conventions following its model) that contain separate provisions on extradition and prosecution applicable to foreigners and nationals, in conventions in which the obligation to prosecute is triggered by a refusal to extradite on the specific ground of the nationality of the alleged offender,²⁹¹ or in certain conventions which expressly safeguard the right of asylum.²⁹²

141. Finally, it should be noted that some conventions have included more elaborate provisions relating to the extradition process, which affect the operation of the clauses on prosecution and extradition. Thus, for example, the Geneva Conventions for the protection of war victims specify, in the clause itself, that the option of extradition to another State is subject to the condition that such State “has made out a *prima facie* case”. Many of the conventions described in section D of chapter I above specify that each of the crimes concerned shall be treated, for the purpose of extradition between States parties, “as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction” in accordance with such conventions, thus eliminating a possible bar to extradition. Some conventions contain other provisions according to which a request for extradition may not be refused on certain grounds (particularly by reason of the political character of the offence or for the fact that it involves fiscal matters²⁹³) or, on the contrary, such a request shall be denied in certain circumstances (for example, when prosecution in the requesting State will be conducted on discriminatory grounds or would otherwise prejudice the person’s position for that reason, or when the request for extradition is based on trivial grounds²⁹⁴). Additionally, some conventions impose further obligations aimed at enhancing cooperation and effectiveness in extradition proceedings.²⁹⁵

142. In conclusion, it appears that, beyond certain common features included in all conventions, the degree of specificity of the rules concerning the conditions applicable to extradition have varied depending on several factors. Among these, one may note that the inclusion of more detailed provisions has sometimes taken into account the specific concerns voiced in the course of negotiations (e.g. when the issue of the non-extradition of nationals has been raised, it has often led to the express recognition of this exception in the relevant convention), the particular nature of the offence (for instance, the risk of refusal of extradition based on the political character of the offence appears to be more acute with respect to certain crimes) and a certain evolution in the drafting of the relevant provisions to take

into account problems that may have been overlooked in the past (for instance, the possible triviality of the request for extradition or the protection of the rights of the alleged offender). Once again, the reasons for the adoption of a certain type of regulation appear to depend on the particularities of each convention and its negotiating history, and should be assessed on the basis of a detailed examination of the relevant preparatory works.

C. Conditions applicable to prosecution

143. Three aspects of the regulation of the conditions applicable to prosecution are of particular relevance for our purposes, namely the measures that States parties are obliged to take in order to be able to prosecute when the situation arises; the precise scope of the obligation to prosecute, including the issue of prosecutorial discretion; and the conditions applicable to subsequent judicial proceedings.

144. The conventions concerning specific international offences usually contain detailed provisions imposing upon States parties the obligation to adopt such measures as may be necessary to establish the relevant acts as criminal offences under their domestic law and to make them punishable by appropriate penalties; to establish their jurisdiction with regard to such offences; and to investigate relevant facts and ensure the alleged offender’s presence for the purpose of prosecution or extradition. These preliminary steps are essential to allow the proper operation of the mechanism for the punishment of offenders in the relevant convention. In earlier conventions, the failure to impose obligations of this kind implied that there were loopholes in the mechanism. For example, as is apparent from the preparatory works,²⁹⁶ the drafters of the International Convention for the Suppression of Counterfeiting Currency were careful not to impose upon States parties any duty to establish extraterritorial jurisdiction. As a consequence, article 9 limits the obligation to take proceedings against foreigners having committed an offence abroad to the case in which they are in a country “whose internal legislation recognises as a general rule the principle of the prosecution of offences committed abroad”: foreigners in other countries would therefore escape punishment.²⁹⁷ One of the major innovations of the Convention for the Suppression of Unlawful Seizure of Aircraft was to address this loophole by establishing a double-layered system of jurisdiction, under which the obligation incumbent upon States having a connection with the crime to establish their jurisdiction was complemented by the further obligation of each State to “take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present

²⁹¹ See, for example, the multilateral extradition conventions described in chapter I, section C above, as well as the conventions cited in footnote 200 above.

²⁹² See footnote 226 above.

²⁹³ See, respectively, footnotes 224 and 225 above. It has been argued that, in the absence of such explicit provisions, the conventions following the model of the Convention for the Suppression of Unlawful Seizure of Aircraft should be interpreted as allowing the possibility of refusing extradition on these grounds; see, for example, Bigay (footnote 271 above), p. 120.

²⁹⁴ See footnotes 227 and 230 above.

²⁹⁵ See footnotes 232 and 235 above.

²⁹⁶ See chapter I, section A.1 (b) above.

²⁹⁷ As noted by Wise (footnote 271 above), pp. 273–274, the 1929 Convention “does not require the parties to be prepared to assert jurisdiction in every case in which an offender is not extradited. It allows for the fact that states may have different views about the propriety of exercising jurisdiction over offences taking place abroad, even in cases in which extradition is refused. The obligation to prosecute in lieu of extradition is therefore conditioned on a state’s general posture with respect to the propriety of exercising extraterritorial jurisdiction”. See also Bassiouni and Wise (footnote 264 above), p. 13; President Guillaume’s separate opinion appended to the judgment of ICJ in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case, *I.C.J. Reports 2002*, p. 38, para. 6.

in its territory and it does not extradite him” to any of the above-mentioned States.²⁹⁸ In other words, the Convention for the Suppression of Unlawful Seizure of Aircraft established a link between the operation of the provision on extradition and prosecution, on the one hand, and what appears to be a subsidiary exercise of universal jurisdiction, on the other hand. If one recalls, however, that the formula used in that convention has been interpreted as imposing an obligation to prosecute *ipso facto*, it may be considered that there is a general obligation to exercise universal jurisdiction, unless the State proceeds to extradition. As seen above,²⁹⁹ this mechanism has later been followed in many (albeit not all) other conventions concerning specific international crimes.

145. The determination of the scope of the obligation to prosecute is complicated by the fact that the formulation used in the various conventions to describe this obligation varies: the Bustamante Code uses the verb “to try” (e.g. art. 345); the International Convention for the Suppression of Counterfeiting Currency provides that individuals “should be punishable” and refers to an “obligation to take proceedings” (art. 9); the Geneva Conventions for the protection of war victims impose upon States parties the obligation to “bring before their own courts” the alleged offenders (e.g. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, para. 2); the European Convention on Extradition refers to the obligation of the State to “submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate” (art. 6, para. 2); the Convention for the Suppression of Unlawful Seizure of Aircraft and other later conventions employ the expression “to submit the case to its competent authorities for the purpose of prosecution” (art. 7).

146. The question arises whether the submission of the case to competent national authorities would necessarily result in the prosecution and punishment of the offender.³⁰⁰ As described above, the question was already raised in the context of the negotiations of the International Convention for the Suppression of Counterfeiting Currency and led to the adoption of an express provision on the matter.³⁰¹ The same issue was considered in detail during the preparatory works of the European Convention on Extradition, in the course of which it was pointed out that the requested State had the obligation to submit the case to its competent authorities, but that “legal proceedings need not necessarily be taken, unless the competent authorities consider they are appropriate”.³⁰² The Subcommittee that prepared the first draft for the Convention for the Suppression of Unlawful Seizure of Aircraft took inspiration from this formula, specifying that “the State

which had arrested the alleged offender must submit the case to its competent authorities for their decision as to whether legal proceedings should be taken against the alleged offender”.³⁰³ In other words, this obligation does not necessarily imply that proceedings will be taken, let alone that the alleged offender will be punished. For this reason, it has been authoritatively argued that the formula used in the Convention for the Suppression of Unlawful Seizure of Aircraft should, strictly speaking, be described as *aut dedere aut persequi*.³⁰⁴

147. This raises the issue of whether the authorities to whom the case is referred enjoy any “prosecutorial discretion” in their decision whether to go forward with the proceedings. In this regard, following debates in the negotiations, the International Convention for the Suppression of Counterfeiting Currency expressly provides that it does not affect the principle that the relevant offences “should in each country, without ever being allowed impunity, be defined, prosecuted and punished in conformity with the general rules of its domestic law” (art. 18). Many of the most recent conventions described in section D of chapter I above contain an explicit limitation whereby “[t]hose authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State” (art. 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft), thus excluding that, for the purpose of prosecution, the offence be considered of a political nature. Some other conventions of the same group alternatively specify that the submission to competent authorities is to be made “through proceedings in accordance with the laws of” the State concerned and/or “as if the offense had been committed within its jurisdiction”,³⁰⁵ in some cases, it is established that “the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply” in other similar cases (art. 7, para. 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). It follows from these provisions that competent authorities do retain some prosecutorial discretion and that there may be cases in which a State would abide by its obligations under these conventions, while the alleged offender would neither have been extradited nor actually prosecuted.³⁰⁶ However, in the context of the preparation of the International Law

³⁰³ See paragraph 99 above.

³⁰⁴ Guillaume (footnote 151 above), pp. 354 and 368 (Mr. Guillaume was the President of the subcommittee that prepared the first draft of the Convention for the Suppression of Unlawful Seizure of Aircraft). See also Henzelin (footnote 262 above), pp. 302 and 304–306.

³⁰⁵ See footnotes 206 and 207 above.

³⁰⁶ In this regard, it has been noted, with regard to the Convention for the Suppression of Unlawful Seizure of Aircraft, that “some States would have liked a somewhat stronger Convention which would have bound each contracting State in every case either to prosecute a hijacker found in its territory or to extradite him (whether he had committed the offence of hijacking for political reasons or not) to a State which would prosecute him. However, it was apparent that many States could not accept such provisions and the purpose of the Convention would be frustrated if it were not widely adopted” (White (footnote 144 above), p. 44). For authors interpreting the “Hague formula” as allowing for prosecutorial discretion, see Wood (footnote 271 above), p. 792, with respect to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents; Costello (footnote 264 above), p. 487; Bigay (footnote 271 above), pp. 118–119; Bassiouni and Wise (footnote 264 above), p. 4; Dugard and Van den Wyngaert, “Reconciling Extradition with Human Rights”, p. 209; Henzelin (footnote 262 above), pp. 304–306; Mitchell (footnote 264 above), pp. 67–69.

²⁹⁸ Art. 4, para. 2. See President Guillaume’s separate opinion (footnote 297 above), pp. 38–39, paras. 7–8; Plachta (footnote 271 above), p. 81.

²⁹⁹ See footnote 185 above.

³⁰⁰ In this regard, it should be noted that the very strict terms used in various conventions adopting the “Hague formula” (for example, “without exception whatsoever and whether or not the offence was committed in its territory” or “without undue delay”) refer to the obligation to submit the case to the competent authorities, but not to the subsequent proceedings undertaken by these authorities following the submission (see paragraph 105 above, as well as footnotes 203 and 204 above).

³⁰¹ See paragraph 24 above.

³⁰² See paragraph 83 above.

Commission's draft Code of Offences against the Peace and Security of Mankind, the argument was made that the ordinary sort of prosecutorial discretion would be inappropriate for the crimes dealt with in the Code.³⁰⁷ It was noted, in particular, that the regime of the Geneva Conventions for the protection of war victims was to be interpreted as not providing for prosecutorial discretion for grave breaches.³⁰⁸ The terminology used in article 9 of the draft Code ("to prosecute") was therefore intended to impose an obligation to prosecute whenever there was sufficient evidence for doing so as a matter of national law, without there being any possibility of granting immunity in exchange for giving evidence or assisting with the prosecution in other cases.³⁰⁹ In sum, the precise degree of prosecutorial discretion available to competent authorities would seem to need to be determined on a case-by-case basis, in the light of the text of the relevant provision and the preparatory works, taking into account the nature of the crime concerned.

148. Finally, some conventions spell out conditions that shall be respected in the conduct of the judicial proceedings, such as the standards of evidence, cooperation among States on evidentiary and procedural matters, guarantees of fair treatment of the alleged offender at all stages of the proceedings, etc.³¹⁰ Variations in the content of these provisions appear to depend on different factors, including issues expressly raised in the negotiations, the risk of breach of such standards in the case of prosecution for certain crimes or the progressive evolution of such clauses.³¹¹ In any event, it would appear reasonable to argue that the general conditions applicable to the conduct of judicial proceedings established by international standards binding upon the State would also apply in the case of prosecution in the context of the clauses envisaging prosecution or extradition.

D. Final remarks

149. On the basis of the examination of conventional practice, the following conclusive observations are proposed.

³⁰⁷ See the explanation of the Chairman of the Drafting Committee, *Yearbook ... 1996*, vol. I, 2439th meeting, p. 50, para. 36.

³⁰⁸ *Ibid.*, p. 51, para. 48 (Mr. Yamada).

³⁰⁹ See *ibid.*, vol. II (Part Two), p. 31, para. (4) of the commentary to art. 9.

³¹⁰ See, for example, the fourth paragraph of the common article to the Geneva Conventions for the protection of war victims, which provides that "[i]n all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War", as well as the conventions referred to in footnotes 208 and 211 above.

³¹¹ In its resolution on "New Problems of Extradition" (Session of Cambridge, 1983), the *Institut de droit international* called for a strengthening and amplification of the rule *aut dedere aut judicare*, emphasizing some aspects relating to the conduct of proceedings: "When a State undertakes to prosecute the person concerned, other interested States, in particular the State on the territory of which the offence was committed, should be entitled to send observers to the trial unless serious grounds related to the preservation of State security in fact justify the non-admittance of such observers" (art. VI, para. 2); "In cases of such prosecution, if the tribunal concerned finds the accused guilty, an appropriate penalty should be imposed similar to that which would normally be applied under the law of that State in a similar case" (art. VI, para. 3). See also Costello (footnote 264 above), pp. 491-494.

150. Firstly, clauses usually qualified as containing an obligation to extradite or prosecute share two fundamental characteristics, namely: (a) their objective to ensure the punishment of certain offences at the international level; and (b) their use, for that purpose, of a mechanism combining the possibility of prosecution by the custodial State and the possibility of extradition to another State. Beyond these basic common features, however, such provisions, as found in multilateral conventions, greatly vary in their formulation, content and scope, particularly with regard to the conditions they impose upon States with respect to extradition and prosecution, and the relationship they establish between these two possible courses of action.

151. Secondly, in order to make an accurate assessment of the scope of the obligations incumbent upon States under the clauses that combine the options of extradition and prosecution, the relevant provisions should not be read in isolation. As shown above, these provisions are but one element of an overall mechanism for the punishment of offenders provided for under the relevant international instruments, which usually also includes rules relating to the criminalization of certain offences, the establishment of jurisdiction, the search for and arrest of alleged offenders, rules on cooperation in criminal matters and the regime of extradition. A study of the topic of "The obligation to extradite or prosecute (*aut dedere aut judicare*)" in conventional practice therefore requires that due consideration be given to the other elements of the mechanisms for the punishment of offenders in which these provisions are found.

152. Thirdly, multilateral conventions containing provisions that combine the options of extradition and prosecution may be classified according to different criteria, none of which, however, fully succeeds in reflecting the complexity of conventional practice in this regard. The present study has proposed a categorization of multilateral conventions which combines chronological and substantive criteria. This approach was considered to be the most effective to expose the main sources of inspiration of each convention, the overall historical trends in the evolution of such provisions, as well as the most important common features shared by certain groups of conventions. Nevertheless, other classifications could have been proposed. One could observe, for example, that a fundamental distinction exists between, on the one hand, multilateral conventions on extradition (which aim at regulating international judicial cooperation on criminal matters regardless of the nature of the offence concerned) and, on the other hand, conventions concerning specific offences of international concern (which aim at the criminalization of such offences and the establishment of an effective international system for this purpose). While the former emphasize the obligation to extradite (which is regulated in detail) and only contemplate prosecution as an exceptional alternative to avoid impunity, the latter focus on the conditions to ensure prosecution, mainly regulating extradition as a mechanism to ensure that the alleged offender is brought to trial. In any event, whatever the classification adopted, it should be noted that there has always been a transversal process of cross-fertilization, under which conventions belonging to seemingly different groups have served as inspiration to each other for the purpose of the elaboration of new mechanisms for the punishment of offenders.

153. Fourthly, in the light of the study undertaken and beyond the observations made above in the present section, it appears to be difficult to draw general conclusions as to the precise scope of the conventional obligations incumbent upon States under the clauses that combine the options of extradition and prosecution, including on issues such as the exact meaning of the obligation to prosecute and conditions applicable thereto (including prosecutorial discretion), the legal basis and conditions applicable to extradition (including handling of multiple requests, standard of proof and circumstances that may exclude its operation), the relationship between the two courses of action provided for under the obligation, the relationship with other principles (including universal jurisdiction), the implementation of the obligation, or the availability of a “third alternative”. The examination of conventional practice in this field shows that the degree of specificity of the various conventions in regulating these issues varies considerably, and that there exist very few conventions that adopt identical mechanisms for the punishment of offenders (including with respect to the relationship between

extradition and prosecution). The variations in the provisions relating to prosecution and extradition appear to be determined by several factors, including the geographical, institutional and thematic framework in which each convention is negotiated, notably the pre-existence of other conventions in the same region or substantive field that may have had an influence on the preparatory works; the specific concerns voiced by delegations in the course of the negotiations; the particular issues arising from the nature of the offence that the convention aims at combating; a certain general evolution in the drafting of such clauses to take into account new issues that have arisen in practice; and the development of related areas of international law, such as human rights and international criminal justice. It follows that, while it is possible to identify some general trends and common features in the relevant provisions, conclusive findings regarding the precise scope of each provision need to be made on a case-by-case basis, taking into account the formulation of the provision, the general economy of the treaty in which it is contained and the relevant preparatory works.

ANNEX

MULTILATERAL CONVENTIONS INCLUDED IN THE SURVEY, IN CHRONOLOGICAL ORDER, WITH THE TEXT OF THE RELEVANT PROVISIONS

CONVENTION ON PRIVATE INTERNATIONAL LAW (BUSTAMANTE CODE) (PAN AMERICAN UNION)

Article 345

The contracting States are not obliged to hand over their own nationals. The nation which refuses to give up one of its citizens shall try him.

INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF COUNTERFEITING CURRENCY

Article 8

In countries where the principle of the extradition of nationals is not recognized, nationals who have returned to the territory of their own country after the commission abroad of an offence referred to in Article 3 should be punishable in the same manner as if the offence had been committed in their own territory, even in a case where the offender has acquired his nationality after the commission of the offence.

This provision does not apply if, in a similar case, the extradition of a foreigner could not be granted.

Article 9

Foreigners who have committed abroad any offence referred to in Article 3, and who are in the territory of a country whose internal legislation recognizes as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country.

The obligation to take proceedings is subject to the condition that extradition has been requested and that the

country to which application is made cannot hand over the person accused for some reason which has no connection with the offence.

CONVENTION ON EXTRADITION (PAN AMERICAN UNION)

Article 2

When the person whose extradition is sought is a citizen of the country to which the requisition is addressed, his delivery may or may not be made, as the legislation or circumstances of the case may, in the judgement of the surrendering State, determine. If the accused is not surrendered, the latter State is obliged to bring action against him for the crime with which he is accused, if such crime meets the conditions established in subarticle (b) of the previous article. The sentence pronounced shall be communicated to the demanding State.

CONVENTION OF 1936 FOR THE SUPPRESSION OF THE ILLICIT TRAFFIC IN DANGEROUS DRUGS

Article 7

1. In countries where the principle of the extradition of nationals is not recognized, nationals who have returned to the territory of their own country, after the commission abroad of any of the offences referred to in Article 2, shall be prosecuted and punished in the same manner as if the offence had been committed in the said territory, even in a case where the offender has acquired his nationality after the commission of the offence.

2. This provision does not apply if, in a similar case, the extradition of a foreigner cannot be granted.

Article 8

Foreigners who are in the territory of a High Contracting Party and who have committed abroad any of the offences set out in Article 2 shall be prosecuted and punished as though the offence had been committed in that territory if the following conditions are realized—namely, that:

(a) Extradition has been requested and could not be granted for a reason independent of the offence itself;

(b) The law of the country of refuge considers prosecution for offences committed abroad by foreigners admissible as a general rule.

CONVENTION FOR THE PREVENTION AND PUNISHMENT
OF TERRORISM

Article 9

1. When the principle of the extradition of nationals is not recognized by a High Contracting Party, nationals who have returned to the territory of their own country after the commission abroad of an offence mentioned in Articles 2 or 3 shall be prosecuted and punished in the same manner as if the offence had been committed on that territory, even in a case where the offender has acquired his nationality after the commission of the offence.

2. The provisions of the present article shall not apply if, in similar circumstances, the extradition of a foreigner cannot be granted.

Article 10

Foreigners who are on the territory of a High Contracting Party and who have committed abroad any of the offences set out in Articles 2 and 3 shall be prosecuted and punished as though the offence had been committed in the territory of that High Contracting Party, if the following conditions are fulfilled—namely, that:

(a) Extradition has been demanded and could not be granted for a reason not connected with the offence itself;

(b) The law of the country of refuge recognizes the jurisdiction of its own courts in respect of offences committed abroad by foreigners;

(c) The foreigner is a national of a country which recognizes the jurisdiction of its own courts in respect of offences committed abroad by foreigners.

GENEVA CONVENTION FOR THE AMELIORATION OF THE
CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES
IN THE FIELD

GENEVA CONVENTION FOR THE AMELIORATION OF THE
CONDITION OF WOUNDED, SICK AND SHIPWRECKED
MEMBERS OF ARMED FORCES AT SEA

GENEVA CONVENTION RELATIVE TO THE TREATMENT OF
PRISONERS OF WAR

GENEVA CONVENTION RELATIVE TO THE PROTECTION OF
CIVILIAN PERSONS IN TIME OF WAR

Paragraph 2 of articles 49/50/129/146

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS
OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF
VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I)

Article 85. Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this section, shall apply to the repression of breaches and grave breaches of this Protocol.

CONVENTION FOR THE SUPPRESSION OF THE TRAFFIC IN PERSONS
AND OF THE EXPLOITATION OF THE PROSTITUTION OF OTHERS

Article 9

In States where the extradition of nationals is not permitted by law, nationals who have returned to their own State after the commission abroad of any of the offences referred to in articles 1 and 2 of the present Convention shall be prosecuted in and punished by the courts of their own State.

This provision shall not apply if, in a similar case between the Parties to the present Convention, the extradition of an alien cannot be granted.

EUROPEAN CONVENTION ON EXTRADITION
(COUNCIL OF EUROPE)

Article 6. Extradition of nationals

...

2. If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request.

SINGLE CONVENTION ON NARCOTIC DRUGS, 1961

[See also the Protocol amending the Single Convention on Narcotic Drugs, 1961]

Article 36. Penal Provisions

...

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(a) ...

- (iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgment given.

GENERAL CONVENTION ON JUDICIAL COOPERATION
(AFRO-MALAGASY COMMON ORGANIZATION)

Article 42

The High Contracting Parties shall not extradite their respective nationals; the status of national shall be determined at the time of the offence in respect of which extradition is requested.

Nevertheless, the requested State undertakes to initiate proceedings against its own nationals who have committed infractions in the territory of another State which are punishable as crimes or offences under its own legislation, insofar as it is competent to try such persons, if the other State transmits a request for prosecution along with files, documents, objects and information in its possession. The requesting State shall be kept informed of the action taken on its request.

CONVENTION FOR THE SUPPRESSION
OF UNLAWFUL SEIZURE OF AIRCRAFT

Article 7

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

CONVENTION TO PREVENT AND PUNISH THE ACTS OF
TERRORISM TAKING THE FORM OF CRIMES AGAINST PERSONS
AND RELATED EXTORTION THAT ARE OF INTERNATIONAL
SIGNIFICANCE (OAS)

Article 5

When extradition requested for one of the crimes specified in Article 2 is not in order because the person sought is a national of the requested state, or because of some other legal or constitutional impediment, that state is obliged to submit the case to its competent authorities for prosecution, as if the act had been committed in its territory. The decision of these authorities shall be communicated to the state that requested extradition. In such proceedings, the obligation established in Article 4 shall be respected.

CONVENTION ON PSYCHOTROPIC SUBSTANCES

Article 22

...

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

- (a) ...

- (iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgment given.

CONVENTION FOR THE SUPPRESSION
OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION

[See also the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation]

Article 7

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

CONVENTION ON THE PREVENTION AND PUNISHMENT OF
CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS,
INCLUDING DIPLOMATIC AGENTS

Article 7

The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

EUROPEAN CONVENTION ON THE SUPPRESSION
OF TERRORISM (COUNCIL OF EUROPE)

Article 7

A Contracting State in whose territory a person suspected to have committed an offence mentioned in Article 1 is found and which has received a request for extradition under the conditions mentioned in Article 6, paragraph 1, shall, if it does not extradite that person, submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State.

ORGANIZATION OF AFRICAN UNITY CONVENTION FOR THE
ELIMINATION OF MERCENARISM IN AFRICA

Article 9. Extradition

...

3. Where a national is involved in the request for extradition, the requested State shall take proceedings against him for the offence committed if extradition is refused.

CONVENTION ON THE PHYSICAL PROTECTION OF NUCLEAR
MATERIAL

Article 10

The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

INTERNATIONAL CONVENTION AGAINST THE TAKING OF
HOSTAGES

Article 8

1. The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.

INTER-AMERICAN CONVENTION ON EXTRADITION (OAS)

Article 2. Jurisdiction

...

3. The requested State may deny extradition when it is competent, according to its own legislation, to prosecute the person whose extradition is sought for the offence on which the request is based. If it denies extradition for this reason, the requested State shall submit the case to its competent authorities and inform the requesting State of the result.

Article 8. Prosecution by the Requested State

If, when extradition is applicable, a State does not deliver the person sought, the requested State shall, when its laws or other treaties so permit, be obligated to prosecute him for the offence with which he is charged, just as if it had been committed within its territory, and shall inform the requesting State of the judgment handed down.

CONVENTION AGAINST TORTURE AND OTHER CRUEL,
INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH
TORTURE (OAS)

Article 14

When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if

the crime had been committed within its jurisdiction, for the purposes of investigation, and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State that has requested the extradition.

SOUTH ASIAN ASSOCIATION FOR REGIONAL COOPERATION
(SAARC) REGIONAL CONVENTION ON SUPPRESSION OF
TERRORISM

Article IV

A Contracting State in whose territory a person is suspected of having committed an offence referred to in Article I or agreed to in terms of Article II is found and which has received a request for extradition from another Contracting State, shall, if it does not extradite that person, submit the case without exception and without delay, to its competent authorities who shall take their decisions in the same manner as in the case of any offence of a serious nature under the law of the State.

CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS
AGAINST THE SAFETY OF MARITIME NAVIGATION

Article 10

1. The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN
NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

Article 6. Extradition

...

9. Without prejudice to the exercise of any criminal jurisdiction established in accordance with its domestic law, a Party in whose territory an alleged offender is found shall:

(a) If it does not extradite him in respect of an offence established in accordance with article 3, paragraph 1, on the grounds set forth in article 4, paragraph 2, subparagraph (a), submit the case to its competent authorities for the purpose of prosecution, unless otherwise agreed with the requesting Party;

(b) If it does not extradite him in respect of such an offence and has established its jurisdiction in relation to that offence in accordance with article 4, paragraph 2, subparagraph (b), submit the case to its competent authorities for the purpose of prosecution, unless otherwise requested by the requesting Party for the purposes of preserving its legitimate jurisdiction.

INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT,
USE, FINANCING AND TRAINING OF MERCENARIES*Article 12*

The State Party in whose territory the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCE
OF PERSONS (OAS)*Article VI*

When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the offence had been committed within its jurisdiction, for the purposes of investigation and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the state that has requested the extradition.

ECONOMIC COMMUNITY OF WEST AFRICAN STATES
(ECOWAS) CONVENTION ON EXTRADITION*Article 10*

...

2. The requested State which does not extradite its nationals, shall at the request of the requesting State submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted, without charge, through the diplomatic channel or by such other means as shall be agreed upon by the States concerned. The requesting State shall be informed of the result of its request.

CONVENTION ON THE SAFETY OF UNITED NATIONS AND
ASSOCIATED PERSONNEL

[See also the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel]

Article 14

The State Party in whose territory the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a grave nature under the law of that State.

INTER-AMERICAN CONVENTION AGAINST CORRUPTION (OAS)

Article XIII. Extradition

...

6. If extradition for an offence to which this article applies is refused solely on the basis of the nationality of the person sought, or because the requested State deems that it has jurisdiction over the offence, the requested State shall submit the case to its competent authorities for the purpose of prosecution unless otherwise agreed with the requesting State, and shall report the final outcome to the requesting State in due course.

INTER-AMERICAN CONVENTION AGAINST THE ILLICIT
MANUFACTURING OF AND TRAFFICKING IN FIREARMS,
AMMUNITION, EXPLOSIVES AND OTHER RELATED MATERIALS*Article XIX. Extradition*

...

6. If extradition for an offence to which this article applies is refused solely on the basis of the nationality of the person sought, the requested State Party shall submit the case to its competent authorities for the purpose of prosecution under the criteria, laws, and procedures applied by the requested State to those offences when they are committed in its own territory. The requested and requesting States parties may, in accordance with their domestic laws, agree otherwise in relation to any prosecution referred to in this paragraph.

INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF
TERRORIST BOMBINGS*Article 8*

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC
OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS*Article 10*

...

3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

ARAB CONVENTION ON THE SUPPRESSION OF TERRORISM

Article 6

Extradition shall not be permissible in any of the following circumstances:

...

(h) If the legal system of the requested State does not allow it to extradite its nationals. In this case, the requested State shall prosecute any such persons who commit in any of the other Contracting States a terrorist offence that is punishable in both States by deprivation of liberty for a period of at least one year or more. The nationality of the person whose extradition is sought shall be determined as at the date on which the offence in question was committed, and use shall be made in this regard of the investigation conducted by the requesting State.

CONVENTION ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW (COUNCIL OF EUROPE)

[See footnote 194 above.]

CRIMINAL LAW CONVENTION ON CORRUPTION (COUNCIL OF EUROPE)

Article 27

...

5. If extradition for a criminal offence established in accordance with this Convention is refused solely on the basis of the nationality of the person sought, or because the requested Party deems that it has jurisdiction over the offence, the requested Party shall submit the case to its competent authorities for the purpose of prosecution unless otherwise agreed with the requesting Party, and shall report the final outcome to the requesting Party in due course.

SECOND PROTOCOL TO THE HAGUE CONVENTION OF 1954 FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

Article 17

1. The Party in whose territory the alleged offender of an offence set forth in Article 15 subparagraphs 1 (a) to (c) is found to be present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law.

CONVENTION OF THE ORGANIZATION OF THE ISLAMIC CONFERENCE ON COMBATING INTERNATIONAL TERRORISM

Article 6

...

8. If the legal system of the requested State does not permit extradition of its national, then it shall be obliged to prosecute whosoever commits a terrorist crime if the

act is punishable in both States by a freedom restraining sentence for a minimum period of one year or more. The nationality of the person requested for extradition shall be determined according to the date of the crime taking into account the investigation undertaken in this respect by the requesting State.

OAU CONVENTION ON THE PREVENTION AND COMBATING OF TERRORISM

Article 8

...

4. A State Party in whose territory an alleged offender is present shall be obliged, whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution if it does not extradite that person.

INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

Article 10

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY

Article 5

...

5. If an extradition request is made with respect to an offence described in article 3, paragraph 1, and the requested State Party does not or will not extradite on the basis of the nationality of the offender, that State shall take suitable measures to submit the case to its competent authorities for the purpose of prosecution.

UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

[See also the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime; the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime.]

Article 16

...

10. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

CONVENTION ON CYBERCRIME (COUNCIL OF EUROPE)

Article 24

...

6. If extradition for a criminal offence referred to in paragraph 1 of this article is refused solely on the basis of the nationality of the person sought, or because the requested Party deems that it has jurisdiction over the offence, the requested Party shall submit the case at the request of the requesting Party to its competent authorities for the purpose of prosecution and shall report the final outcome to the requesting Party in due course. Those authorities shall take their decision and conduct their investigations and proceedings in the same manner as for any other offence of a comparable nature under the law of that Party.

LONDON SCHEME FOR EXTRADITION WITHIN THE COMMONWEALTH, INCORPORATING THE AMENDMENTS AGREED AT KINGSTOWN IN NOVEMBER 2002^a

16. (1) For the purpose of ensuring that a Commonwealth country cannot be used as a haven from justice, each country which reserves the right to refuse to extradite nationals or permanent residents in accordance with clause 15 paragraph (3), will take, subject to its constitution, such legislative action and other steps as may be necessary or expedient in the circumstances to facilitate the trial or punishment of a person whose extradition is refused on that ground.

(2) The legislative action necessary to give effect to paragraph (1) may include—

- (a) providing that the case be submitted to the competent authorities of the requested country for prosecution;
- (b) permitting:
 - (i) the temporary extradition of the person to stand trial in the requesting country on condition that, following trial and sentence, the person is returned to the requested country to serve his or her sentence; and
 - (ii) the transfer of convicted offenders; or

^a The Scheme is not a binding international instrument.

(c) enabling a request to be made to the relevant authorities in the requesting country for the provision to the requested country of such evidence and other information as would enable the authorities of the requested country to prosecute the person for the offence.

...

AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION

Article 15

...

6. Where a State Party in whose territory any person charged with or convicted of offences is present and has refused to extradite that person on the basis that it has jurisdiction over offences, the requested State Party shall be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution, unless otherwise agreed with the requesting State Party, and shall report the final outcome to the requesting State Party.

UNITED NATIONS CONVENTION AGAINST CORRUPTION

Article 44

...

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

CONVENTION OF THE COOPERATION COUNCIL FOR THE ARAB STATES OF THE GULF ON COMBATING TERRORISM

Article 20

Extradition shall not be possible in the following cases:

...

(h) If the law of the requested State prohibits it from extraditing its nationals. In this case, the requested State shall undertake to convict a national who has committed a terrorist offence in any other Contracting State if the offence is punishable by deprivation of liberty of at least one year in both States. The nationality of the person whose extradition is sought shall be deemed to be the nationality as at the date of the commission of the offence for which extradition is sought, on the basis of investigations conducted by the requesting State.

INTERNATIONAL CONVENTION FOR THE SUPPRESSION
OF ACTS OF NUCLEAR TERRORISM

Article 11

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 9 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

COUNCIL OF EUROPE CONVENTION
ON THE PREVENTION OF TERRORISM

Article 18

1. The Party in the territory of which the alleged offender is present shall, when it has jurisdiction in accordance with Article 14, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that Party. Those authorities shall take their decision in the same manner as in the case of any other offence of a serious nature under the law of that Party.

INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL
PERSONS FROM ENFORCED DISAPPEARANCE

Article 11

1. The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN)
CONVENTION ON COUNTER-TERRORISM

Article XIII. Extradition

1. The Party in the territory of which the alleged offender is present shall, in cases to which Article VII of this Convention applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the domestic laws of that Party. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the domestic laws of that Party.

THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*)

[Agenda item 7]

DOCUMENT A/CN.4/L.774

Bases for discussion in the Working Group on the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”, paper prepared by Mr. Zdzislaw Galicki, Special Rapporteur

[Original: English]
[24 June 2010]

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Multilateral instruments cited in the present document

	<i>Source</i>
International Convention for the Suppression of Counterfeiting Currency (Geneva, 20 April 1929)	League of Nations, <i>Treaty Series</i> , vol. CXII, No. 2623, p. 371.
Convention for the Prevention and Punishment of Terrorism (Geneva, 16 November 1937)	League of Nations, <i>Official Journal</i> , document C.546.M.383.1937.V.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, <i>Treaty Series</i> , vol. 75, Nos. 970–973, p. 31 <i>et seq.</i>
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 suppression of unlawful seizure of aircraft (The Hague, 16 December 1970)	<i>Ibid.</i> , vol. 860, No. 12325, p. 105.
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.
International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006)	A/RES/61/177.

Introduction

1. During the sixty-first session of the Commission, in 2009, the Working Group on the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” proposed a general framework for the Commission’s consideration of the topic, consisting of an outline setting out, as comprehensively as possible, the questions to be considered, without assigning any order of priority.¹ As explained in the Commission’s report, “the general framework should not be considered as providing a definitive answer as to how general the Commission’s approach should be in its consideration of the topic”,² and it would be for the Special Rapporteur to determine the exact order of the questions to be considered, as well as the structure of, and linkage between, his planned draft articles on the various aspects of the topic.³

2. At the sixty-second session, in 2010, the Secretariat submitted to the Commission a Study containing an extensive survey of multilateral conventions which may be of relevance for the Commission’s work on the topic

¹ See *Yearbook ... 2009*, vol. II (Part Two), paras. 202 and 204.

² *Ibid.*, para. 202.

³ *Ibid.*, para. 203.

“The obligation to extradite or prosecute (*aut dedere aut judicare*)”.⁴ The Study by the Secretariat has identified more than 60 multilateral instruments that contain provisions combining extradition and prosecution as alternative courses of action for the punishment of offenders. It proposes a description and typology of the relevant instruments in the light of these provisions, and examines the preparatory works of certain key conventions that have served as models in the field, as well as the reservations made to the relevant provisions. It also points out the differences and similarities between the reviewed provisions and their evolution.

3. The Study by the Secretariat may constitute a suitable basis for the consideration of the topic by the Working Group at the present session. In the light of the conventional practice in the field, as it stems from the description contained in the Study, the Working Group could continue its debate on the issues to be addressed in this context, provide some tentative answers to some of the questions raised, and determine the way forward for the consideration of the topic by the Commission.

⁴ Document A/CN.4/630, reproduced in the present volume.

Issues to be addressed by the Working Group

4. The present document contains some observations and suggestions as to the issues that the Working Group may wish to address at the current session, based on the general framework proposed in 2009.

A. The legal bases of the obligation to extradite or prosecute

5. The examination of multilateral instruments in the field reveals that, as pointed out by the Working Group at the previous session,⁵ those clauses that may be considered as containing obligations in relation to extradition and prosecution are linked to the objective of imposing a duty to cooperate in the fight against impunity for certain crimes.⁶ The Study by the Secretariat evidences, however, that there is a great diversity in the formulation, content and scope of these obligations in conventional practice. This may affect how the Commission should consider the issues of whether and to what extent the obligation to extradite or prosecute has a basis in customary international law and whether it is inextricably linked with certain particular “customary crimes”.⁷

⁵ See paragraph (a) (i) of the proposed general framework for the Commission’s consideration of the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”, prepared by the Working Group, *Yearbook ... 2009*, vol. II (Part Two), para. 204.

⁶ See Study by the Secretariat (footnote 4 above), para. 150.

⁷ Paragraph (a) (iii) and (iv) of the general framework (footnote 5 above).

6. The Study by the Secretariat proposes a typology of relevant treaty provisions by classifying the conventions reviewed into the following four categories⁸:

(a) International Convention for the Suppression of Counterfeiting Currency and other conventions which have followed the same model;

(b) Geneva Conventions for the protection of war victims and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I);

(c) Regional conventions on extradition; and

(d) The Convention for the suppression of unlawful seizure of aircraft and other conventions which have followed the same model.

7. This classification, which combines chronological and substantive criteria, is successful in highlighting the differences and similarities between those provisions, as well as their evolution, as contemplated by the Working Group. As pointed out in the Study by the Secretariat, however, other classifications could be considered (for instance, one that would distinguish multilateral conventions on extradition and conventions concerning specific offences of international concern), which the Commission may also want to envisage in order to address certain aspects of the present topic.

⁸ Study by the Secretariat (footnote 4 above), para. 7.

8. It is suggested that the Working Group determine, in the light of the survey of multilateral conventions contained in the Study by the Secretariat, whether it is advisable for the Commission to adopt a general approach to the topic or whether it should focus its attention on certain specific categories of obligations (e.g. those found in conventions on terrorism). In this regard, the Working Group should consider which typology of treaty provisions better serves the objectives pursued by the Commission in its consideration of the present topic.

B. The material scope of the obligation to extradite or prosecute

9. The Study by the Secretariat confirms that clauses of the kind considered by the Commission under the present topic are included in multilateral instruments dealing with a wide range of crimes, such as counterfeiting, terrorism, traffic in illicit drugs and psychotropic substances, traffic in persons, war crimes, torture, mercenaries, crimes against the safety of United Nations personnel, transnational crime, corruption, forced disappearance, etc. The Study also reveals, however, that in conventional practice the formulation and content of the obligation may vary from one category of crimes to the other and, in some cases at least, from one instrument to the other dealing with the same category of crimes. As a consequence, the Commission could identify preliminarily which categories of crimes are relevant for the purpose of addressing the issues relating to the material scope of the obligation highlighted in the general framework.⁹

10. It is suggested that the Working Group determine, in the light of the conventional practice described in the Study by the Secretariat, whether it is advisable to examine the material scope of the obligation to extradite or prosecute on the basis of a classification of the crimes concerned. The Working Group could consider, in particular, whether the Commission should focus its attention on certain categories of crimes (for instance, whether the obligation to extradite or prosecute applicable to grave breaches under the Geneva Conventions for the protection of war victims extends to other crimes under international law—such as other war crimes, crimes against humanity or genocide—or whether the obligation included in many instruments on terrorism extends to other offences of terrorism not covered in those instruments or to other crimes of international concern).

C. The content of the obligation to extradite or prosecute

11. The survey of multilateral conventions in the field provides valuable elements for the Commission to assess, at least in conventional practice, the meaning and scope of each of the two elements of the obligation to extradite or prosecute, as well as the relationship between these two elements, including those issues that were highlighted in the general framework.¹⁰

12. As regards, in particular, the question of whether one of the elements has priority over the other, and the power of free appreciation of the requested State in choosing whether to extradite or prosecute, the Study by the Secretariat reveals that, while some treaty provisions appear to impose an obligation to prosecute as soon as the offender is known to be present in the territory of the State, which the latter may be liberated from by granting extradition, in some other provisions the obligation to prosecute is only triggered by the refusal to surrender the alleged offender following a request for extradition.¹¹ The interpretation of the relevant provisions under this aspect raises however some difficulties, as illustrated by the question of whether the clause contained in the Convention for the suppression of unlawful seizure of aircraft (and similar provisions included in other instruments) should be read as triggering the obligation as soon as it is ascertained that the alleged offender is present in the territory of the State, independently of a request for extradition.¹² The question also arises as to what are the factors that determine the content of the obligation to extradite or prosecute, such as the nature of the instrument, the degree of cooperation in judicial matters, the seriousness of the crime concerned, etc.

13. It is suggested that the Working Group, taking into account the conventional practice as described in the Study by the Secretariat, consider the issue of the relationship between the two elements of the obligation to extradite or prosecute. The Working Group could determine, for example, whether, in the light of the case law of the Committee against Torture,¹³ the various provisions contained in contemporary instruments should be interpreted as imposing an obligation to prosecute as soon as the presence of the alleged offender in the territory of the State is ascertained, and whether a similar obligation exists in customary international law for one or more categories of crimes.

D. Relationship between the obligation to extradite or prosecute and other principles

14. The Study by the Secretariat contains some elements that may contribute to a further discussion on the relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction.¹⁴ It is apparent from the preparatory works reviewed that earlier instruments had been cautious not to infringe on fundamental principles of the States' internal legal systems, in particular with respect to their attitude on the general issue of criminal jurisdiction as a question of international law and the exercise of extraterritorial jurisdiction. As a result, the mechanism for the prosecution of offenders in such instruments appeared to have various loopholes which limited the scope of the obligation to extradite or prosecute.¹⁵ This issue was addressed in the Convention

⁹ See paragraph (b) of the general framework (footnote 5 above).

¹⁰ See paragraph (c) of the general framework (footnote 5 above).

¹¹ Study by the Secretariat (footnote 4 above), para. 126.

¹² See *ibid.*, paras. 130 and 131.

¹³ *Ibid.*, para. 130.

¹⁴ See paragraph (d) (i) of the general framework (footnote 5 above).

¹⁵ See Study by the Secretariat (footnote 4 above), paras. 17, 18, 22, 24, 41, 42 and 144.

for the suppression of unlawful seizure of aircraft, and other subsequent instruments, which establish a double-layered system of jurisdiction, under which the obligation incumbent upon States having a connection with the crime to establish their jurisdiction is complemented with the further obligation of each State to “take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him” (art. 4, para. 2) to any of the above-mentioned States.¹⁶ In other words, these instruments—the Geneva Conventions for the protection of war victims and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)—envisage an obligation to exercise universal jurisdiction at least in some circumstances.

15. The preparatory works of the various conventions reviewed in the Study by the Secretariat also demonstrate that the principle of non-extradition of nationals, enshrined in various legislations and constitutions, played a central role in leading governments to devise a mechanism for the prosecution of offenders that would combine the options of prosecution by the State where the individual is found or extradition to another State claiming a special connection with the crime.

16. The Study by the Secretariat further shows that the question of the relationship of the present topic with general principles of criminal law (*nullum crimen sine lege, nulla poena sine lege, non bis in idem*) and the possible problem arising from conflicting principles or constitutional limitations were very present in international negotiations in the field and have had an effect on the formulation of the relevant provisions.

17. It is suggested that the Working Group examine further the extent to which the obligation to extradite or prosecute is linked to the principle of universal jurisdiction, at least for certain categories of crimes, and in particular whether the duty of the State to establish its jurisdiction over a certain crime when the alleged offender is present in its territory is a necessary element to ensure the proper implementation of the obligation to extradite or prosecute. The Working Group may also wish to consider to what extent the relationship of the present topic with other principles, in particular general principles of criminal law, needs to be addressed by the Commission.

E. Conditions for the triggering of the obligation to extradite or prosecute

18. As already noted above, the issue of the conditions for the triggering of the obligation to extradite or prosecute is very present in the negotiations of the conventions reviewed in the Study by the Secretariat, and is closely linked to the question of the relationship between the two elements of the obligation. In particular, it appears that, while some instruments (for example, the International Convention for the Suppression of Counterfeiting Currency and, for obvious reasons, conventions on

extradition) explicitly subject the obligation to prosecute to the refusal of a request for extradition,¹⁷ some other instruments impose such an obligation as soon as the presence of the alleged offender in the territory of the State is ascertained.¹⁸ In this regard, due note should be taken of the case law of the Committee against Torture, according to which the relevant obligation under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to prosecute an individual “does not depend on the prior existence of a request for his extradition”.¹⁹ As also reported in the Study, issues such as the standard of proof that should be satisfied by the request for extradition and the existence of circumstances that might exclude the operation of the obligation have also been addressed in conventional practice.²⁰

19. It is suggested that the Working Group should consider the issue whether the obligation to extradite or prosecute is triggered by the presence of the alleged offender in the territory of the State or by a previous request for extradition being refused in connection with the question of the relationship between the two elements of the obligation (see paragraph 13 above). The Working Group could also explore, in the light of the conventional practice in the field, to what extent other issues relating to the request for extradition (standard of proof, political nature of the offence, immunities, etc.) have an impact on the operation of the obligation.

F. The implementation of the obligation to extradite or prosecute

20. The survey of conventional practice undertaken in the Study by the Secretariat evidences that most treaties contain, to a greater or lesser extent, specific provisions regarding the implementation of the obligation. In particular, it appears that the scope of the obligation of the State, if it does not extradite, to take action for the prosecution of the offender, has been a recurrent feature in negotiations of such instruments and has determined the formulation of the relevant provisions. The main issue in this respect seems to be whether the submission by the executive of the case to competent judicial authorities would necessarily result in the prosecution and punishment of the offender, i.e. whether these authorities enjoy any prosecutorial discretion in this regard.²¹ The conventions reviewed sometimes also contain detailed regulations of specific aspects of extradition and judicial proceedings (e.g. how to deal with multiple requests

¹⁷ *Ibid.*, paras. 133–135.

¹⁸ *Ibid.*, paras. 127–131.

¹⁹ Decisions of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Communication No. 181/2001, Report of the Committee against Torture, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44 (A/61/44)*, communication No. 181/2001, *Suleymane Guengueng et al. v. Senegal*, para. 9.7, reproduced in Study by the Secretariat (footnote 4 above), para. 130.

²⁰ See, for example, Study by the Secretariat (footnote 4 above), paras. 141 and 148.

²¹ *Ibid.*, paras. 145–147.

¹⁶ *Ibid.*, paras. 103, 104, 113 and 144.

for extradition, procedural guarantees for the individual, etc.).²² With respect to the control of the implementation of the obligation, it is noteworthy that some instruments impose upon the requested State a duty to report the final outcome of the proceedings to the requesting State.²³

21. It is suggested that the Working Group examine, in particular, in the light of conventional practice, the scope of the obligation of the requested State to take proceedings against the alleged offender, including the question of prosecutorial discretion enjoyed by national judicial authorities in this respect.

G. The relationship between the obligation to extradite or prosecute and the surrender of the alleged offender to a competent international criminal tribunal (the “third” alternative)

22. The Study by the Secretariat reveals that the possibility for a State to discharge its obligation under an *aut dedere aut judicare* provision by surrendering an alleged offender to a competent international criminal tribunal (the so-called “third alternative”) has been contemplated

²² *Ibid.*, paras 142–148.

²³ *Ibid.*, para. 116 (i).

in certain international instruments. The most far-reaching example of such a mechanism would be the aborted Convention for the Prevention and Punishment of Terrorism, in which case an international criminal court were to be established with jurisdiction over the crimes defined in the Convention.²⁴ Nevertheless, the Study also discloses that the idea of handing over an alleged offender to an international criminal court is found in at least one more recent treaty, namely the International Convention for the Protection of All Persons from Enforced Disappearance.²⁵ While conventional practice in this area is scarce, one may argue, based on the language of the provisions of these two examples, that States taking advantage of such a mechanism for the punishment of offenders are deemed to have fulfilled their obligations thereunder.

23. It is suggested that the Working Group determine, in the light of the scarce conventional practice, whether it would be desirable to examine, if, and to what extent, a State that surrenders an alleged offender to a competent international criminal tribunal has fulfilled its obligation to extradite or prosecute.

²⁴ *Ibid.*, para. 40.

²⁵ *Ibid.*, paras. 113 and 116 (c).

PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

[Agenda item 8]

DOCUMENT A/CN.4/629

Third report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur

[Original: English]
[31 March 2010]

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Geneva Convention of 22 August 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field (Geneva, 22 August 1864)	<i>International Red Cross Handbook</i> , 12th ed. (1983), p. 19.
Declaration of St. Petersburg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime (St. Petersburg, 11 December 1868)	<i>Handbook of the International Red Cross and Red Crescent Movement</i> , 14th ed. (Geneva, 2008), p. 331.
Hague Conventions respecting the Laws and Customs of War on Land: Convention II (The Hague, 29 July 1899)	James Brown Scott, ed., <i>The Hague Conventions and Declarations of 1899 and 1907</i> , New York, Oxford University Press, 1915, p. 100.
Hague Conventions respecting the Laws and Customs of War on Land: Convention IV (The Hague, 18 October 1907)	<i>Ibid.</i>

Source

Hague Convention Relative to the Laying of Automatic Submarine Contact Mines: Convention VIII (The Hague, 18 October 1907)	<i>Ibid.</i>
Convention and Statute Establishing an International Relief Union (Geneva, 12 July 1927)	League of Nations, <i>Treaty Series</i> , vol. 135, No. 3115, p. 247.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, No. 1021, p. 277.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	<i>Ibid.</i> , vol. 75, Nos. 970–973, p. 31 <i>et seq.</i>
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	<i>Ibid.</i> , p. 31.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	<i>Ibid.</i> , p. 85.
Geneva Convention relative to the Treatment of Prisoners of War	<i>Ibid.</i> , p. 135.
Geneva Convention Relative to the Protection of Civilian Persons in Time of War	<i>Ibid.</i> , 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.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977)	<i>Ibid.</i> , No. 17513, p. 609.
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 No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (Vilnius, 3 May 2002)	<i>Ibid.</i> , vol. 2246, No. 2889, p. 110.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965). Opened for signature at New York on 7 March 1966.	<i>Ibid.</i> , vol. 660, No. 9464, p. 195.
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African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	<i>Ibid.</i> , vol. 1520, No. 26363, p. 217.
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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	United Nations, <i>Treaty Series</i> , vol. 1465, No. 24841, p. 85.
Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Vienna, 26 September 1986)	<i>Ibid.</i> , vol. 1457, No. 24643, p. 133.
Agreement on cooperation across state frontiers to prevent or limit damage to persons or property or to the environment in the case of accidents (Stockholm, 20 January 1989)	<i>Ibid.</i> , vol. 1777, No. 31001, p. 223.
Convention on the Rights of the Child (New York, 20 November 1989)	<i>Ibid.</i> , vol. 1577, No. 27531, p. 3.
Agreement establishing the Caribbean Disaster Emergency Response Agency (Port of Spain, 26 February 1991)	<i>Ibid.</i> , vol. 2256, No. 40212, p. 53.
Inter-American Convention to Facilitate Disaster Assistance (Santiago, 7 June 1991)	OAS, <i>Official Documents</i> , OEA/Ser.A/49 (SEPF).
Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)	United Nations, <i>Treaty Series</i> , vol. 2105, No. 36605, p. 457.

Source

Inter-American Convention on Forced Disappearance of Persons (Belém do Pará, 9 June 1994)	OAS, <i>Official Documents</i> , OEA/Ser.A/55 (SEPF).
Convention on the law of the non-navigational uses of international watercourses (New York, 21 May 1997)	<i>Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49)</i> , vol. III, resolution 51/229, annex.
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Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (Tampere, 18 June 1998)	United Nations, <i>Treaty Series</i> , vol. 2296, No. 40906, p. 5.
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Introduction*

1. At its sixty-first session, in 2009, the International Law Commission had before it the second report on the protection of persons in the event of disasters.¹ That report contained proposals for three draft articles setting the scope and purpose of the Commission’s draft, defining “disaster” and its relationship to armed conflict, and articulating the principle of cooperation, which is central to the undertaking.

2. The second report was considered by the Commission at its 3015th to 3019th meetings,² and all three draft articles were referred to the Drafting Committee. The Drafting Committee expanded the number of articles to five, reflecting the belief among members that the three articles submitted by the Special Rapporteur embodied five distinct concepts which merited separate treatment: the scope of the undertaking; its purpose; the definition of “disaster”; the relationship of the project with international humanitarian law; and the duty of cooperation. The Drafting Committee stipulated that it had adopted the fifth article, on the duty to cooperate, on the understanding that the Special Rapporteur would propose an article on the primary responsibility of the affected State, to be included in the set of draft articles in the future. These five articles were provisionally adopted by the Drafting Committee and submitted to the plenary in a comprehensive report presented by the Committee’s Chair on 30 July 2009. After further discussion, and owing to the lack of time for the preparation and adoption of the corresponding commentaries, the Commission took note of draft articles 1 to 5 at its 3029th meeting.³

Following the Commission’s standard practice, the text of the five draft articles was not reproduced in the annual report of the Commission to the General Assembly. Nevertheless, they were made available in a separate official document.⁴

3. In addition to endorsing the specific draft articles, the Commission also reached general agreement on certain aspects concerning the scope and substance of the topic. Members supported the conclusion of the Special Rapporteur that the concept of the “responsibility to protect” would not play a role in the Commission’s work on the topic.⁵ Additionally, it was understood that the Special Rapporteur could usefully continue his work by focusing primarily on States, without prejudice to specific provisions regarding non-State actors.⁶

4. In October and November 2009, at the sixty-fourth session of the General Assembly, the Sixth Committee considered the Special Rapporteur’s second report and the debate thereon held in the Commission, with particular attention being given to the first draft articles on the protection of persons in the event of disasters. Some States addressed directly the five articles as provisionally adopted by the Drafting Committee but, since their text had not been reproduced in the annual report, other States confined their comments largely to the three articles as originally proposed by the Special Rapporteur. States welcomed the progress made by the Commission in a short time and all who spoke continued to emphasize the importance and timeliness of the topic.

5. States expressed satisfaction with the dual-axis approach, by which the Commission would focus first on the rights and obligations of States *vis-à-vis* each other, and then on the rights and obligations of States *vis-à-vis*

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¹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615.

² *Ibid.*, vol. I.

³ *Ibid.*, vol. II (Part Two), para. 152.

⁴ A/CN.4/L.758, mimeographed.

⁵ *Yearbook ... 2009*, vol. II (Part Two), para. 164.

⁶ *Ibid.*, para. 167.

individuals.⁷ It was further emphasized that State-to-State relations remained an important feature of disaster relief.⁸

6. Most States expressed support for the Special Rapporteur's approach to the topic, which focused on the rights and needs of affected individuals.⁹ It was urged that the Commission refrain from attempting to enumerate the specific rights or groups of rights relevant to disaster relief,¹⁰ and some States invited the Commission to give due consideration to economic and social rights, which were the most likely to be affected in times of disaster.¹¹ Other States, however, expressed their preference for an approach based on needs, and the hope that the practical needs of affected persons would play a central role in the Commission's future work.¹² It was also noted that a "rights-based approach" implied that individuals were in a position to appeal for international relief, a concept that was in tension with the principles of sovereignty and non-intervention.¹³

7. Regarding the general scope of the topic, many States agreed with the view that the Commission should focus first on immediate response and long-term rehabilitation, leaving discussions of disaster preparedness and prevention to a later stage.¹⁴ However, some delegations emphasized the importance of disaster prevention, and suggested that this phase was quite relevant and should also be considered.¹⁵ With regard to the scope *rationae personae*, States agreed that the Commission could usefully focus on States, while not losing sight of other actors,¹⁶ though the view was expressed that the Commission should concentrate exclusively on the rights and obligations of States.¹⁷ Most States agreed that the responsibility to protect was not applicable to the present undertaking.¹⁸

8. Because State delegations made helpful remarks regarding the drafting and orientation of the five draft articles, it will be useful to discuss State comments on each article in turn.¹⁹ With respect to draft article 1, States agreed that the project's scope should be defined simply as "the protection of persons in the event of disasters",²⁰ and that the project's purpose should be articulated in a separate draft article.²¹ Some delegations, however, felt that "assistance", or "assistance and relief", might be more appropriate than "protection" in the context of disasters,²² a suggestion that implies changing the Commission's perspective on and, therefore, the title of the topic.

9. Many States saw the need for a separate article, such as draft article 2, addressing the purpose of the project.²³ The article's fusion of the rights- and needs-based approaches to disaster relief was endorsed by many States,²⁴ with a delegation noting that it "represents an elegant compromise" between those who would prefer an approach focused exclusively on needs, and those who argue that rights should be the central concern of disaster relief.²⁵ It was suggested that the article refer to a "timely and effective" response, instead of "adequate and effective".²⁶

10. The definition of "disaster" agreed upon in draft article 3 was well received by States.²⁷ Some States agreed with the determination that the definition should refer to an "event",²⁸ though the view was also expressed that a disaster should be understood in terms of its effects, rather than in terms of the factors provoking it.²⁹ States also noted that the definition should address damage to property and to the environment.³⁰ While some States argued that the

⁷ For example, Russian Federation, *Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee*, 20th meeting (A/C.6/64/SR.20), para. 45.

⁸ Austria, *ibid.*, para. 11.

⁹ Chile, *ibid.*, para. 28; Czech Republic, *ibid.*, para. 42; Russian Federation, *ibid.*, para. 45; Spain, *ibid.*, para. 49; Portugal, 21st meeting (A/C.6/64/SR.21), para. 82; Thailand, *ibid.*, para. 14; Ireland, 22nd meeting (A/C.6/64/SR.22), para. 15; and New Zealand, *ibid.*, para. 71. IFRC stated, "We would like to express our appreciation for the Commission's acknowledgment of the Red Cross and Red Crescent's traditional adherence to an approach to disaster response that is based on needs but informed by rights" (*ibid.*, para. 30).

¹⁰ Ireland, *ibid.*, 22nd meeting (A/C.6/64/SR.22), para. 15; and Russian Federation, 20th meeting (A/C.6/64/SR.20), para. 45.

¹¹ Chile, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 28; and Thailand, 21st meeting (A/C.6/64/SR.21), para. 14. But see the Netherlands, *ibid.*, para. 90, stating that the Commission, if it takes this approach, should be more specific about the rights involved.

¹² Myanmar, *ibid.*, 21st meeting (A/C.6/64/SR.21), para. 2; Netherlands, *ibid.*, para. 90; United States, *ibid.*, para. 101; United Kingdom, 20th meeting (A/C.6/64/SR.20), para. 38.

¹³ China, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 21.

¹⁴ China, *ibid.*, para. 22; Spain, *ibid.*, para. 48; Ireland, 22nd meeting (A/C.6/64/SR.22), para. 14; and Portugal, 21st meeting (A/C.6/64/SR.21), para. 83 (excluding the stage of prevention). See also France, *ibid.*, para. 20 (focus on the immediate response).

¹⁵ Chile, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 28; Russian Federation, *ibid.*, para. 46; Ghana, 22nd meeting (A/C.6/64/SR.22), para. 11; and Poland, 21st meeting (A/C.6/64/SR.21), para. 75.

¹⁶ Russian Federation, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 46; and Portugal, 21st meeting (A/C.6/64/SR.21), para. 82 (emphasizing non-State actors).

¹⁷ China, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 22.

¹⁸ China, *ibid.*; Czech Republic, *ibid.*, para. 43; Russian Federation, *ibid.*, para. 46; Ghana, 22nd meeting (A/C.6/64/SR.22), para. 12;

Islamic Republic of Iran, *ibid.*, para. 82; Ireland, *ibid.*, para. 14; Sri Lanka, 21st meeting (A/C.6/64/SR.21), para. 54; and Thailand, *ibid.*, para. 16; but see Poland, *ibid.*, para. 76 (arguing that the responsibility to protect should apply to disasters).

¹⁹ The articles referred to in the following discussion are those provisionally adopted by the Drafting Committee and contained in document A/CN.4/L.758, mimeographed.

²⁰ *Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee*, Chile, 20th meeting (A/C.6/64/SR.20), para. 28; and Finland (on behalf of the Nordic States), *ibid.*, para. 7.

²¹ Austria, *ibid.*, para. 12; Chile, *ibid.*, para. 28; and Hungary, 18th meeting (A/C.6/64/SR.18), para. 60.

²² Islamic Republic of Iran, *ibid.*, 22nd meeting (A/C.6/64/SR.22), para. 80; and United Kingdom, 20th meeting (A/C.6/64/SR.20), para. 39.

²³ Chile, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 28; Russian Federation, *ibid.*, para. 45; United Kingdom, *ibid.*, para. 39; and Ireland, 22nd meeting (A/C.6/64/SR.22), para. 14.

²⁴ Czech Republic, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 42; see also Finland (on behalf of the Nordic States), *ibid.*, para. 8 (noting that the Nordic States supported the rights-based approach to assistance, but could support the wording of draft article 2, which also emphasized needs).

²⁵ See Russian Federation, *ibid.*, para. 45.

²⁶ United Kingdom, *ibid.*, para. 39.

²⁷ See, for example, Chile, *ibid.*, para. 29; Finland (on behalf of the Nordic States), *ibid.*, para. 7; Russian Federation, *ibid.*, para. 47; and the Netherlands, 21st meeting (A/C.6/64/SR.21), para. 91.

²⁸ See Austria, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 15 (citing the International Charter on Space and Major Disasters); compare with China, *ibid.*, para. 23 (stating that the Commission should focus on disasters that "strike without warning and cause serious" damage).

²⁹ Russian Federation, *ibid.*, para. 47.

³⁰ Austria, *ibid.*, para. 16; Malaysia, 21st meeting (A/C.6/64/SR.21), para. 38; and Poland, *ibid.*, para. 73.

topic should focus primarily on natural disasters,³¹ most States agreed that the distinction between man-made and natural disasters was not a useful one.³² It was also suggested that the definition be limited to events that exceed the local response capacity.³³

11. It was widely agreed that armed conflicts should not be covered by the Commission's draft,³⁴ but States offered varying suggestions as to how to address that issue. Some States welcomed the Commission's approach in draft article 4,³⁵ but others suggested that a "without prejudice" clause would be more appropriate.³⁶ Some delegations also noted that other situations should also be excluded, such as riots and internal disturbances, as well as the law of consular assistance.³⁷ It was also suggested that the existence of an armed conflict should not in itself preclude the application of the draft articles.³⁸

12. Draft article 5 on the duty to cooperate received ample support in the Sixth Committee, with States noting that cooperation was a central principle of international law.³⁹ The list of relevant cooperative actors—including the United Nations, the International Red Cross and Red Crescent Movement and other international and non-governmental organizations—met with approval,⁴⁰ though

³¹ Islamic Republic of Iran, *ibid.*, 22nd meeting (A/C.6/64/SR.22), para. 80; Malaysia, 21st meeting (A/C.6/64/SR.21), para. 38; and Sri Lanka, *ibid.*, para. 54.

³² Chile, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 29; China, *ibid.*, para. 23; Finland (on behalf of the Nordic States), *ibid.*, para. 7; Ghana, 22nd meeting (A/C.6/64/SR.22), para. 11; Ireland, *ibid.*, para. 17; Poland, 21st meeting (A/C.6/64/SR.21), para. 73; and Thailand, *ibid.*, para. 15.

³³ China, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 23; and the Bolivarian Republic of Venezuela, 21st meeting (A/C.6/64/SR.21), para. 41.

³⁴ Austria, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 13; Russian Federation, *ibid.*, para. 47; and Spain, *ibid.*, para. 48.

³⁵ Finland (on behalf of the Nordic States), *ibid.*, para. 8; and Russian Federation, *ibid.*, para. 47.

³⁶ Chile, *ibid.*, para. 29; Greece, 21st meeting (A/C.6/64/SR.21), para. 46; Netherlands, *ibid.*, para. 91; Slovenia, *ibid.*, para. 70; Ghana, 22nd meeting (A/C.6/64/SR.22), para. 12; and Ireland, *ibid.*, para. 18.

³⁷ United Kingdom, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 39 (referring to consular assistance).

³⁸ France, *ibid.*, 21st meeting (A/C.6/64/SR.21), para. 23.

³⁹ Chile, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 30; Finland (on behalf of the Nordic States), *ibid.*, paras. 9 and 10; and France, 21st meeting (A/C.6/64/SR.21), para. 24; see also New Zealand, 22nd meeting (A/C.6/64/SR.22), para. 71 (the central principle underpinning disaster relief is cooperation); and Poland, 21st meeting (A/C.6/64/SR.21), para. 77). (While the duty to cooperate refers to a "formal framework of the protection of persons, solidarity refers to its substance". They complement each other in an indispensable way.) But see China, 20th meeting (cooperation as a moral value only) (A/C.6/64/SR.20), para. 24.

⁴⁰ See Chile, *ibid.*, para. 30; Finland (on behalf of the Nordic States), *ibid.*, para. 10; and Ireland, 22nd meeting (A/C.6/64/SR.22), para. 19.

some delegations noted that the duty to cooperate with the United Nations was different from the duty owed to other actors.⁴¹ Several States expressed hesitation, stating that the duty to cooperate as expressed in the draft article was currently too general, and required further clarification.⁴² Some delegations suggested that the duty to cooperate should be re-examined after other rules and principles had been articulated.⁴³ Finally, it was noted that draft article 5 referred only to obligations to cooperate that already existed under international law.⁴⁴

13. A number of delegations focused on the relationship between the duty to cooperate and an obligation to accept disaster relief. Some States urged that the principle of cooperation should not be understood as requiring a State to accept international assistance,⁴⁵ though others suggested that an affected State must cooperate with international actors if it is unwilling or unable to assist its own population.⁴⁶ In this connection, several States suggested that the Special Rapporteur articulate the primary responsibility of the affected State to protect persons on its territory.⁴⁷ It was also recommended that the Special Rapporteur address other principles relevant to disaster relief, such as humanity, neutrality, impartiality, sovereignty and non-intervention.⁴⁸

⁴¹ Czech Republic, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 42; France, 21st meeting (A/C.6/64/SR.21), para. 24; and Islamic Republic of Iran, 22nd meeting (A/C.6/64/SR.22), para. 82.

⁴² Austria, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 17; Islamic Republic of Iran, 22nd meeting (A/C.6/64/SR.22), para. 82; Japan, 23rd meeting (A/C.6/64/SR.23), para. 28; and the Netherlands, 21st meeting (A/C.6/64/SR.21), para. 91; see also Myanmar, *ibid.*, para. 3.

⁴³ Austria, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 17; and Russian Federation, *ibid.*, para. 47.

⁴⁴ France, *ibid.*, 21st meeting (A/C.6/64/SR.21), para. 24; and Ireland, 22nd meeting (A/C.6/64/SR.22), para. 19.

⁴⁵ China, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 24; United Kingdom, *ibid.*, para. 38; Islamic Republic of Iran, 22nd meeting (A/C.6/64/SR.22), para. 82; Myanmar, 21st meeting (A/C.6/64/SR.21), para. 3; see also Cuba, *ibid.*, para. 10 (noting that respect for the sovereignty and self-determination of States "must prevail") and the Bolivarian Republic of Venezuela, *ibid.*, para. 42. ("While the principles of sovereignty and non-intervention could not justify denial of the victims' access to assistance, such assistance should not be provided without the prior consent of the State.")

⁴⁶ Finland (on behalf of the Nordic States), *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 10; Greece, 21st meeting (A/C.6/64/SR.21), para. 48; and Poland, *ibid.*, para. 76.

⁴⁷ Czech Republic, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 42; and Sri Lanka, *ibid.*, 21st meeting (A/C.6/64/SR.21), para. 54; see also Romania, *ibid.*, 22nd meeting (A/C.6/64/SR.22), para. 25 (noting that it will be important to strike a balance between cooperation and the responsibility of affected States).

⁴⁸ China, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 24; Finland (on behalf of the Nordic States), *ibid.*, para. 10; United States, 21st meeting (A/C.6/64/SR.21), para. 101; and New Zealand, 22nd meeting (A/C.6/64/SR.22), para. 71.

CHAPTER I

The principles of humanity, neutrality and impartiality

14. Taking into account the concordant views expressed in the Commission and the Sixth Committee when considering the Special Rapporteur's second report, the Rapporteur will now proceed to identify in the present report, as already announced in his previous one, "the principles

that inspire the protection of persons in the event of disaster, in its aspect related to persons in need of protection".⁴⁹

⁴⁹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615 and Corr.1, para. 71.

15. Response to disasters, in particular humanitarian assistance, must comply with certain requirements to balance the interests of the affected State and the assisting actors. The requirements for specific activities undertaken as part of the response to disasters may be found in the humanitarian principles of humanity, neutrality and impartiality.

16. Keeping in mind that the purpose of a response to disasters, as stated in draft article 2 provisionally adopted by the Drafting Committee, is to meet the essential needs of the persons concerned, with full respect for their rights, the term “humanitarian response” is used here to indicate that its scope extends beyond what is generally understood by humanitarian assistance, which constitutes only the “minimum package of relief commodities”.⁵⁰

17. The principles of humanity, neutrality and impartiality are leading principles that come into play when it is a question of humanitarian response in disaster situations.⁵¹ Recent debates surrounding the reaffirmation, respect and implementation of the principles applicable to humanitarian response highlight the importance attached to including them in any work on the topic.⁵² As is pointed out in the 2009 report of the Secretary-General entitled “Strengthening of the coordination of emergency humanitarian assistance of the United Nations”, submitted to the General Assembly and the Economic and Social Council:

Respect for and adherence to the humanitarian principles of humanity, neutrality, impartiality and independence are therefore critical to ensuring the distinction of humanitarian action from other activities, thereby preserving the space and integrity needed to deliver humanitarian assistance effectively to all people in need (see General Assembly resolution 46/182).⁵³

18. Originally found in international humanitarian law⁵⁴ and in the fundamental principles of the Red Cross,⁵⁵ these humanitarian principles are widely used and accepted in a number of international instruments in the context of

⁵⁰ Slim, “Relief agencies and moral standing in war: principles of humanity, neutrality, impartiality and solidarity”, p. 346; see also Rey Marcos and de Curra-Lugo, *El debate humanitario*, p. 53.

⁵¹ Memorandum by the Secretariat, A/CN.4/590 and Add.1–3, para. 11, including references to relevant instruments, available on the website of the Commission.

⁵² See, for example, the discussions that took place in the substantive session of the Economic and Social Council, 20–22 July 2009 (press releases are available at www.un.org/en/ecosoc/julyhls/2009newsroom.shtml, accessed 7 December 2015). Also illustrative is the heading of a United Nations press release on the substantive session of the Council in July 2008 (ECOSOC/6362) which, in the French version, reads: “ECOSOC: Plusieurs États insistent sur le respect des principes d’humanité, de neutralité, d’impartialité et d’indépendance qui sous-tendent l’aide humanitaire”, available from www.un.org/News/fr-press/docs/2008/ECOSOC6362.doc.htm, accessed 7 December 2015.

⁵³ A/64/84-E/2009/87, para. 23.

⁵⁴ For instance, article 70, paragraph 1, of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) refers to “relief actions which are humanitarian and impartial in character and conducted without any adverse distinction”: and article 18, paragraph 2, of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) refers to “relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction”.

⁵⁵ Resolution VIII of the twentieth International Conference of the Red Cross (*Resolutions*, Vienna, 1965).

response to disasters.⁵⁶ Most notably, the instruments identified by the Secretariat in its preparatory study on the topic at hand illustrate their significance in disaster situations.⁵⁷ A more recent instrument, the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), states, in part:

Article 5, paragraph 7

States Parties shall take necessary steps to effectively organize relief action that is humanitarian and impartial in character.

Article 5, paragraph 8

States Parties shall uphold and ensure respect for the humanitarian principles of humanity, neutrality, impartiality and independence of humanitarian actors.

Article 6, paragraph 3

International organizations and humanitarian agencies shall be bound by the principles of humanity, neutrality, impartiality and independence of humanitarian actors, and ensure respect for relevant international standards and codes of conduct.⁵⁸

19. The Secretariat study has identified these principles in the context of “international rules relating to disaster relief”. For instance, it recalls expressly General Assembly resolutions 43/131, of 8 December 1988; 45/100, of 14 December 1990; and 46/182, of 19 December 1991.⁵⁹ In particular the reference to resolution 46/182, annex, should be emphasized. Its paragraph 2 contains the following phrase: “Humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality”. The General Assembly has thus developed a practice of listing these three principles together when referring to humanitarian assistance, including in situations of natural disasters.⁶⁰

20. With reference to General Assembly resolution 46/182, these principles also appear as “core principles” in the documents entitled *Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies*⁶¹ of 2003 and the *Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (Oslo Guidelines)* of 2006.⁶²

⁵⁶ For reference made to “the principles of international humanitarian law” applicable to assistance in all cases of disaster, see article 72, paragraph 2, of the Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its member States, of the other part. The Food Aid Convention, 1999, art. VIII (d), refers to the “humanitarian principles” applicable to the provision of food in emergency situations.

⁵⁷ *Yearbook ... 2008*, vol. II (Part One), Addendum 1, document A/CN.4/590 and Add.1–3, paras. 10–16.

⁵⁸ See also article 3, paragraph 1 (c) and (d) of the Convention.

⁵⁹ A/CN.4/590 and Add.1–3 (footnote 51 above), para. 11; see also paras. 10, 12 and 15, and footnote 36.

⁶⁰ For recent General Assembly resolutions, consider resolutions 63/139 and 63/141 of 11 December 2008; and 64/74 and 64/76, of 7 December 2009.

⁶¹ OCHA, *Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies*, paras. 22–24; see also paragraphs 2, 27, 28, 32 and 33.

⁶² OCHA, *Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (Oslo Guidelines)*, revised on 1 November 2007, paras. 1, 20, 22, 79, 80, 93 and 95.

21. Those Guidelines provide further references to instruments that include the same set of principles in this context, such as the statutes of the International Red Cross and Red Crescent Movement.⁶³ Another widely recognized instrument in the field of disaster response is the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief.⁶⁴ This Code of Conduct contains 10 principles—including those of humanity, impartiality and non-discrimination—that should guide the actions of the signatory organizations. At the time of writing, it had attracted 481 signatories.⁶⁵

22. Significantly, the international disaster response law guidelines of IFRC contain references to the three humanitarian principles.⁶⁶ However, it is worth noting that IFRC has inserted particular elements flowing from these principles which can be found in various instruments.⁶⁷ The relevant guideline 4, paragraph 2, of the Guidelines reads in full:

Assisting actors should ensure that their disaster relief and initial recovery assistance is provided in accordance with the principles of humanity, neutrality and impartiality, and in particular that:

(a) Aid priorities are calculated on the basis of need alone;

(b) It is provided without any adverse distinction (such as in regards to nationality, race, ethnicity, religious beliefs, class, gender, disability, age and political opinions) to disaster-affected persons;

(c) It is provided without seeking to further a particular political or religious standpoint, intervene in the internal affairs of the affected State, or obtain commercial gain from charitable assistance;

(d) It is not used as a means to gather sensitive information of a political, economic or military nature that is irrelevant to disaster relief or initial recovery assistance.

23. In the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ referred to “the purposes hallowed in the practice of the Red Cross” in the context of humanitarian assistance in order to “escape condemnation as an intervention in the internal affairs” of the affected State. The Court specified that these purposes included “to prevent and alleviate human suffering” and “to protect life and health and to ensure respect for the human being”. Moreover, humanitarian assistance must be “given without discrimination to all in need”.⁶⁸

24. In his commentary on the principles of the Red Cross, Pictet has made a distinction between what he

calls substantive principles and derived principles.⁶⁹ The substantive principles, as identified by Pictet, are humanity and impartiality, and neutrality was recognized as a derived principle “to translate the substantive principles into factual reality”.⁷⁰

25. Thus, response to disasters in all stages is conditioned on these humanitarian principles so as to preserve the legitimacy and effectiveness of that response. To achieve a better understanding of these principles, especially in the context of the protection of persons in the event of disasters, they will be touched upon below. With a view to ensuring greater coherence in the presentation of this report as a whole, they will be dealt with not necessarily in the order usually followed when reference is made to the three principles together.

A. Neutrality

26. “The Red Cross may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature” is the phrase used by ICRC to describe the principle of neutrality.⁷¹ It demonstrates not only its relevance to armed conflict situations but also to other disaster situations. It makes clear that neutrality implies abstention. Neutrality between belligerents may well come into play when considering that persons affected amidst armed conflict may fall victim to another disaster. The provisionally adopted draft article 3 does not exclude such a situation.⁷² In such a case, assisting actors are to remain neutral.

27. Furthermore, neutrality neither confers nor takes away legitimacy from any authority. Nor should humanitarian response be used to intervene in the domestic affairs of a State. As explained by an author:

However, the effect of [humanitarian relief activities] is the safeguarding of human life, and the protection of victims of natural disasters, of victims who cannot protect themselves or of victims in need of special protection. It is obvious that the principle of neutrality may not be interpreted as an action that fails to take account of respect for other fundamental human rights principles. This principle is clearly subordinate to the principle of respect for the sovereignty of States.⁷³

28. Hence, actions taken in response to disasters are neither partisan or political acts nor substitutes for them.⁷⁴ Rather, adherence to the principle of neutrality should facilitate an adequate and effective response. It is a means to an end: access to those whose essential needs are to be met providing at the same time a condition for the safety

⁶³ Together with the principles of independence, voluntary service, unity and universality, humanity, neutrality and impartiality constitute the seven fundamental principles codified in the statutes of the International Red Cross and Red Crescent Movement.

⁶⁴ Approved at the 26th International Conference of the International Red Cross and Red Crescent Movement, held in Geneva, 3–7 December 1995 (*International Review of the Red Cross*, vol. 36, No. 310 (1996), annex VI).

⁶⁵ www.ifrc.org/Global/Publications/disasters/code-of-conduct/codeconduct_signatories.pdf, accessed 7 December 2015.

⁶⁶ *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*.

⁶⁷ IFRC, *Annotations to the Draft Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, version of 26 October 2007, available at www.ifrc.org/docs/idrl/I1020EN.pdf, accessed 7 December 2015.

⁶⁸ *Merits, Judgment, I.C.J. Reports 1986*, p. 125, para. 243.

⁶⁹ Pictet, *The Fundamental Principles of the Red Cross Proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1965: Commentary*, pp. 12 and 13.

⁷⁰ *Ibid.*

⁷¹ Resolution VIII of the Twentieth International Conference of the Red Cross (*Resolutions*, Vienna, 1965).

⁷² See footnote 4 above.

⁷³ Patrnogic, “Protection de la personne humaine au cours des catastrophes naturelles”, p. 19.

⁷⁴ See, for example, International Institute of Humanitarian Law, “Guiding principles on the right to humanitarian assistance”. Preamble paragraph 5 states: “Stressing that humanitarian assistance, both as regards those granting and those receiving it, should always be provided in conformity with the principles inherent in all humanitarian activities; the principles of humanity, neutrality and impartiality, so that political considerations should not prevail over these principles” (*ibid.*, p. 521).

of those who bring relief. Equally, it obliges assisting actors to do everything feasible to ensure that their activities are not being used for purposes other than responding to the disaster in accordance with the humanitarian principles. As put by a commentator:

Returning to the essence of neutrality and allowing it a scope which encompasses its possible implications in peacetime, neutrality may therefore be understood as a duty to abstain from any act which, in a conflict situation, might be interpreted as furthering the interests of one party to the conflict or jeopardizing those of the other.⁷⁵

29. In disaster situations other than armed conflict,⁷⁶ the conclusion may be drawn that those responding to disasters should abstain from any act which might be interpreted as interference with the interests of the State. Conversely, the affected State must respect the humanitarian nature of the response activities and “refrain from subjecting it to conditions that divest it of its material and ideological neutrality”.⁷⁷ The interest of persons adversely affected by disasters, defined by needs and rights, are the primary concern of both the affected State and any assisting actor.

30. Neutrality neither lacks a moral standing nor is it impracticable. As such, the principle of neutrality provides the operational mechanism to implement the ideal of humanity. The principle of neutrality has, therefore, been recognized as a critical humanitarian principle by a number of actors, including donor States.⁷⁸ The Regulation of the European Union concerning humanitarian aid⁷⁹ provides a good example. It spells out the humanitarian aim and refers to the principles of non-discrimination and impartiality. Furthermore, the Regulation explicitly states that humanitarian aid “must not be guided by, or subject to, political considerations”.⁸⁰ The principle has also been reflected in various General Assembly resolutions.⁸¹ In line with the purpose of this topic as defined provisionally by the Drafting Committee,⁸² neutrality is, therefore, a key operational principle to ensure access to those adversely affected by disasters in an impartial manner.

B. Impartiality

31. Any response to disasters should be guided by meeting needs and fully respecting rights of those affected, giving priority to the most urgent cases of distress. The principle of impartiality is commonly understood as encompassing three distinct principles: non-discrimination,

proportionality and impartiality proper. These three distinct components will be briefly outlined below.

32. The modern origins of the principle of non-discrimination may be found in the development of international humanitarian law as well. Motivated by the need to provide relief for the wounded and sick in a non-discriminatory manner, the first Geneva Convention (the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field) of 1864 came into existence. It recognized the principle that, regardless of their nationality, all wounded and sick must be cared for. From then on, the principle of non-discrimination was further developed in international humanitarian law and later in human rights law as well. It reflects the equality of all human beings and that no adverse distinction may be made between them. Moreover, the prohibited grounds for discrimination were expanded and made non-exhaustive.⁸³ These grounds include non-discrimination as to ethnic origin, sex, nationality, political opinions, race or religion.⁸⁴ This is not to say that, in certain circumstances and depending on the special needs of certain groups of victims, preferential treatment may, and indeed must, be granted to them. Numerous examples may be given with reference to international humanitarian law and human rights law but illustrative is the special protection afforded to children.⁸⁵ All human rights instruments and indeed individual human rights provisions take into account the principle of non-discrimination either explicitly or implicitly. The principle has thus acquired the status of a fundamental rule of international human rights law.⁸⁶

33. The principle of non-discrimination also finds expression in the Charter of the United Nations. Article 1, paragraph 3, states as one of the purposes of the Organization:

To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all *without distinction as to race, sex, language, or religion*.*.

Similar wording is used in Article 55 (c) of the Charter.

34. In the context of disasters, some conventions have spelled out the principle of non-discrimination as a

⁷⁵ Plattner, “ICRC neutrality and neutrality in humanitarian assistance”, p. 165, cited in H. Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Paris, 1970, p. 392.

⁷⁶ As evidenced by the draft articles provisionally adopted by the Drafting Committee, draft article 4 excludes situations of armed conflict from its scope.

⁷⁷ Stoffels, “Legal regulation of humanitarian assistance in armed conflict: achievements and gaps”, p. 544.

⁷⁸ Walker and Maxwell, *Shaping the Humanitarian World*, p. 139.

⁷⁹ Council Regulation (EC) No. 1257/96, of 20 June 1996, concerning humanitarian aid, *Official Journal of the European Communities*, vol. 39, No. L 163, 2 July 1996.

⁸⁰ *Ibid.*, preambular para. 10.

⁸¹ In particular, resolution 46/182 and subsequent resolutions adopted under the item, “Strengthening of the coordination of emergency humanitarian assistance of the United Nations” (see footnote 60 above).

⁸² See footnote 4 above.

⁸³ Exemplary is the Charter of Fundamental Rights of the European Union, whose article 21 reads: “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.

⁸⁴ See, *inter alia*, article 3 common to the Geneva Conventions for the protection of war victims; article 2 of the Universal Declaration of Human Rights; article 2, paragraph 1, of the International Covenant on Civil and Political Rights; and article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights.

⁸⁵ See, for example, article 77 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); article 4, paragraph 3, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II); and the Convention on the Rights of the Child.

⁸⁶ World Conference on Human Rights, Vienna Declaration and Programme of Action (A/CONF.157/24 (Part I), chap. III), para. 15.

general principle of the provision of disaster relief.⁸⁷ In the same vein, the Convention and Statute Establishing an International Relief Union makes it clear that it operates “for the benefit of all stricken people, whatever their nationality or their race, and irrespective of any social, political or religious distinction”.⁸⁸

35. The second component of the principle of impartiality is the principle of proportionality. The principle of proportionality recognizes that the response must be proportionate to the degree of suffering and urgency.⁸⁹ In other words, the response activities must be proportionate to the needs in scope and in duration.⁹⁰ While humanity and non-discrimination claim instant and full relief for everyone, the principle of proportionality acts as an essential distributive mechanism to put these principles into action when time and resources may not be readily available. This is, unfortunately, rather the rule than the exception in a disaster. Thus, a distinction may be made based upon the degree of need. The principle at hand finds expression, for instance, in a resolution adopted by the Institute of International Law in Bruges (Belgium) in 2003. Its article II, paragraph 3, reads:

Humanitarian assistance shall be offered and, if accepted, distributed without any discrimination on prohibited grounds, while taking into account the needs of the most vulnerable groups.⁹¹

36. The last of the three elements making up the principle of impartiality refers to the obligation not to make a subjective distinction (as opposed to the objective distinctions addressed by the principle of non-discrimination) between individuals based on criteria other than need. This is impartiality in a narrow sense. The Secretariat study has further elaborated on this point.⁹²

C. Humanity

37. Humanity is a long-standing principle in international law. According to Grotius, it has been present as a general principle for millennia.⁹³ In its contemporary sense, humanity is the cornerstone of the protection of persons in international law, as it serves as the point of articulation between international humanitarian law and the law of human rights. It is, in that sense, a necessary inspiration in the development of mechanisms for the protection of persons in the event of disasters.

38. The principle of humanity gained its central status in the international legal regime with the development of international humanitarian law. The principle was expressed in the Declaration of St. Petersburg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime,⁹⁴ and in the preamble to Hague Conventions respecting the Laws and Customs of War on Land: Convention II, adopted by the First Hague Peace Conference in 1899, from which the Martens Clause was derived.⁹⁵ Humanity is also one of the founding principles of both ICRC and IFRC.⁹⁶

39. The principle of humanity finds its most clear expression in the requirement to treat humanely civilians and persons *hors de combat* established by international humanitarian law. The obligation of humane treatment was present in the Lieber Code (art. 76),⁹⁷ and is set forth in subparagraph (1) (c) of common article 3 of the Geneva Conventions for the protection of war victims. Similarly, the obligation is present in article 12, second paragraph, of the First Geneva Convention (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field); article 12, second paragraph, of the Second Geneva Convention (Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea); article 13 of the Third Geneva Convention (Geneva Convention relative to the Treatment of Prisoners of War); and article 5 and the first paragraph of article 27 of the Fourth Geneva Convention (Geneva Convention Relative to the Protection of Civilian Persons in Time of War). Moreover, it is recognized by article 75, paragraph 1, of Protocol I (Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts); and article 4, paragraph 1, of Protocol II (Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts).

40. The principle of humane treatment, as established by international humanitarian law in common article 3 of the Geneva Conventions for the protection of war victims, is an expression of general values that guide the international legal system as a whole. The International Tribunal for the Former Yugoslavia underscored this link, when it held in the *Aleksovski* case that:

A reading of paragraph (1) of common Article 3 reveals that its purpose is to uphold and protect the inherent human dignity of the individual. It prescribes humane treatment without discrimination based on “race, colour, religion or faith, sex, birth, or wealth, or any other similar criteria”. Instead of defining the humane treatment which is guaranteed, the States parties chose to proscribe particularly odious forms of

⁸⁷ Framework Convention on civil defence assistance, art. 3 (c); and Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters, art. 3, para. 4. See also draft convention on expediting the delivery of emergency assistance (A/39/267/Add.2-E/1984/96/Add.2), art. 5, para. 1 (c). See further the Agreement between the Republic of China and the United States of America Concerning the United States Relief Assistance to the Chinese People (Nanking, 27 October 1947, United Nations, *Treaty Series*, vol. 12, No. 178, p. 11), art. II (d), referring to the principle of non-discrimination and in the same line noting that supplies may not be used for purposes other than relief for such time as need be.

⁸⁸ Art. 3, para. 1; here we can also identify the principle of neutrality as the only objective of relief is the “stricken people”.

⁸⁹ Pictet (footnote 69 above), p. 41.

⁹⁰ Stoffels (footnote 77 above), p. 540.

⁹¹ *Yearbook*, p. 269.

⁹² A/CN.4/590 and Add.1–3 (footnote 51 above), paras. 14 and 15.

⁹³ Grotius, *De Jure Belli ac Pacis*, book 3, chap. 11, paras. 9 and 10.

⁹⁴ “Having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity” (first paragraph).

⁹⁵ “The High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.” See also the preamble of the Hague Conventions respecting the Laws and Customs of War on Land: Convention IV, 1907.

⁹⁶ See Pictet (footnote 69 above).

⁹⁷ Instructions for the Government of Armies of the United States in the Field (1863), in Schindler and Toman (eds.), *The Laws of Armed Conflicts: a Collection of Conventions, Resolutions and Other Documents*, p. 13.

mistreatment that are without question incompatible with humane treatment. The Commentary to Geneva Convention IV explains that the delegations to the Diplomatic Conference of 1949 sought to adopt wording that allowed for flexibility, but, at the same time, was sufficiently precise without going into too much detail. For “the more specific and complete a list tries to be, the more restrictive it becomes”. Hence, while there are four sub-paragraphs which specify the absolutely prohibited forms of inhuman treatment from which there can be no derogation, the general guarantee of humane treatment is not elaborated, except for the guiding principle underlying the Convention, that its object is the humanitarian one of protecting the individual *qua* human being and, therefore, it must safeguard the entitlements which flow therefrom.⁹⁸

41. Humanity as a legal principle is not limited to the obligation of humane treatment in armed conflict, but rather guides the international legal system both in war and in peace. The general applicability of humanity was made clear early on by ICJ, which held in the *Corfu Channel* case (merits) that:

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war.⁹⁹

42. The same premise was confirmed by ICJ in subsequent decisions. In the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court noted that common article 3 is a reflection of more general values, as such an article, in the Court’s words,

defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called “elementary considerations of humanity”.¹⁰⁰

43. Such elementary considerations of humanity provide the common ground shared by international humanitarian law and the law of human rights. For ICJ, this common ground implies that human rights are also applicable in the context of armed conflict. In its 1996 advisory opinion in the case of *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that

the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.¹⁰¹

⁹⁸ International Tribunal for the Former Yugoslavia, *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement of 25 June 1999, para. 49.

⁹⁹ *Corfu Channel case, Judgment, I.C.J. Reports 1949*, p. 22.

¹⁰⁰ *Merits, Judgment, I.C.J. Reports 1986*, p. 113, para. 218.

¹⁰¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *I.C.J. Reports 1996*, p. 240, para. 25.

44. This view has since then become a central tenet of ICJ’s approach to the protection of persons under international law. In its 2004 advisory opinion in the case of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court confirmed that the protection of the humanity of individuals provides guidance to the international legal regime. Indeed, for the Court,

the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.¹⁰²

45. This approach is not restricted to advisory opinions. ICJ applied the same reasoning in its judgment on merits in 2005 in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. In that judgment, the Court applied the standard established in its 2004 advisory opinion in the case of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, thus:

The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

...

It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”, particularly in occupied territories.¹⁰³

46. Focus on humanity as the ultimate ground for both human rights and international humanitarian law has been also accepted by the Inter-American Court of Human Rights. In the *Bámaca-Velásquez v. Guatemala* case, the Inter-American Court held that

there is a similarity between the content of Article 3, common to the 1949 Geneva Conventions, and the provisions of the American Convention and other international instruments regarding non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman or degrading treatment).¹⁰⁴

Following such precedent, in the *Mapiripán Massacre* case, the Inter-American Court of Human Rights found State responsibility on the basis of a standard of diligence that specifically invoked common article 3 of the Geneva Conventions for the protection of war victims and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims

¹⁰² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *I.C.J. Reports 2004*, p. 178, para. 106.

¹⁰³ *Armed activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 242, para. 216.

¹⁰⁴ Inter-American Court of Human Rights, case of *Bámaca-Velásquez v. Guatemala*, Judgment of 25 November 2000, *Series C, No. 70*, para. 209.

of non-international armed conflicts (Protocol II).¹⁰⁵ Similarly, in the matter of the *Matter of the Peace Community of San José de Apartadó regarding Colombia*, the Inter-American Court also ordered provisional measures on the basis of both human rights law and international humanitarian law, after finding the existence of an armed conflict in the State.¹⁰⁶

47. Considering the aforementioned precedents, the Special Rapporteur concludes that the approach suggested by ICJ and other international tribunals is also applicable to the protection of persons in the event of disasters. Humanity is an established principle of international law, applicable to both armed conflicts and peace, and could helpfully guide the present effort. It is pivotal to international humanitarian law, and explains the application of human rights law in armed conflict. However, the Special Rapporteur also notes that, as regards the protection of persons in the event of disasters, the Commission has provided clear guidance in the sense that armed conflict is to be excluded from the subject matter to be covered in its current work.¹⁰⁷ Therefore, having noted that humanity may serve as a guiding principle, and following the Commission's direction, it becomes of importance to emphasize the role of such principle in a context other than armed conflict, serving thus indeed as the cornerstone of the protection of persons under international law.

48. The starting point for the protection of persons in the event of disasters has been encapsulated in the provisionally adopted draft article 3 ("Definition of disaster").¹⁰⁸ It is the widespread loss of life, great human suffering and distress, or large-scale material or environmental damage (in relation to the persons concerned) that justifies the Commission's inclusion of this topic in its programme of work.¹⁰⁹ A number of instruments relevant to the particular context of humanitarian response share the notion that:

human suffering must be addressed wherever it is found, with particular attention to the most vulnerable in the population, such as children, women and the elderly. The dignity and rights of all victims must be respected and protected.¹¹⁰

49. The International Red Cross and Red Crescent Movement has defined humanity as an endeavour "to prevent and alleviate human suffering wherever it may be found ... to protect life and health and to ensure respect for the human being".¹¹¹ That this principle seems already to take

into account needs and rights may also be implicit in Pictet's commentary that the principle extends to a person's "life, liberty and happiness—in other words everything which constitutes his [...] existence".¹¹² The principle of humanity thus not only sees to a material or physical quest but extends to rights, too.¹¹³ In accordance with the purpose as spelled out in the provisionally adopted draft article 2,¹¹⁴ response to the three stages of a disaster focuses on the "essential needs" of the persons adversely affected by disasters with "full respect for their rights". Both aspects can be found in a number of documents.¹¹⁵ Pictet has attributed three elements to the principle of humanity: to prevent and alleviate suffering, to protect life and health, and to assure respect for the individual.¹¹⁶ Protection thus serves to uphold the human dignity.¹¹⁷ In a sense, the embodiment of the principle of humanity in one of the draft articles to be adopted for the present topic validates the fundamental ideal of the Martens Clause.¹¹⁸ The notion of humanity, or rather its recognition as an objective and a principle of international law, can be found in numerous conventions,¹¹⁹ General Assembly resolutions,¹²⁰ and in the practice of courts and tribunals.¹²¹ The principle of humanity thus serves as a constant reminder of the purpose of the topic under consideration.

50. In the light of the foregoing, the Special Rapporteur proposes the following draft article 6 on the humanitarian principles in disaster response.

**"Draft article 6. Humanitarian principles
in disaster response**

"Response to disasters shall take place in accordance with the principles of Humanity, Neutrality and Impartiality."

¹¹² Pictet (footnote 69 above), p. 26.

¹¹³ This has led one scholar to conclude that "without recognizing humanitarianism's concern for all types of rights, humanitarian reductionists actually minimize the rights of those they seek to help" (Slim (footnote 50 above), p. 345).

¹¹⁴ See footnote 4 above.

¹¹⁵ For instance, Human Rights Council resolution S-11/1 (A/HRC/S-11/2), where, in preambular para. 13, it is stated in relevant part that, "after the conclusion of hostilities, the priority *in terms of human rights** remains the provision of assistance to ensure the relief and rehabilitation of persons affected by the conflict" and in its preambular paragraph 14 examples of humanitarian assistance are enumerated (safe drinking water, sanitation, food and medical and health-care services) in response to the needs of internally displaced persons. Interestingly, the Human Rights Council qualified these types of assistance only as "*basic** humanitarian assistance". See also the Mohonk Criteria (footnote 110 above).

¹¹⁶ Pictet (footnote 69 above), pp. 21–27.

¹¹⁷ Thürer characterizes humanity as follows: "The principle of humanity is rooted in the idea of human dignity, linking it with the constitutional law of modern States, based on the rule of law, and with international human rights law" (Thürer, "Dunant's pyramid: thoughts on the 'humanitarian space'", p. 56; see chapter II below).

¹¹⁸ See footnote 95 above.

¹¹⁹ In particular, human rights and humanitarian law treaties.

¹²⁰ In particular, General Assembly resolution 46/182 and subsequent resolutions adopted under the item "Strengthening of the coordination of emergency humanitarian assistance of the United Nations"; see A/CN.4/590 and Add.1–3 (footnote 51 above), paras. 10–15, and footnotes 53 and 60 above.

¹²¹ See, for instance, the *Corfu Channel case (United Kingdom v. Albania)*, Merits, *I.C.J. Reports 1949*, p. 11, in which the Court noted the "elementary considerations of humanity"; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, *I.C.J. Reports 1986*, p. 13, para. 218; and the *Aleksovski case* (see footnote 98 above), para. 49.

¹⁰⁵ Inter-American Court of Human Rights, case of the *Mapiripán Massacre v. Colombia*, Judgement of 15 September 2005, *Series C, No. 134*, para. 114.

¹⁰⁶ Inter-American Court of Human Rights, Order of the Inter-American Court of Human Rights in the *Matter of the Peace Community of San José de Apartadó regarding Colombia*, Provisional Measures, 2 February 2006, para. 6.

¹⁰⁷ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615 and Corr.1, para. 6.

¹⁰⁸ See footnote 4 above.

¹⁰⁹ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598, chapters I and II.

¹¹⁰ Ebersole, "The Mohonk criteria for humanitarian assistance in complex emergencies: task force on ethical and legal issues in humanitarian assistance", p. 196. The Mohonk Criteria were established as part of the World Conference on Religion and Peace. The Criteria were distributed among humanitarian actors and States, and were generally well received. See also footnote 186 below and the references in A/CN.4/590 and Add.1–3 (footnote 51 above), para. 12.

¹¹¹ See footnote 71 above.

CHAPTER II

Human dignity

51. The principle of humanity in international humanitarian law is intimately linked to the notion of dignity. The humanitarian principle of humanity is often phrased in terms of dignity; thus, common article 3, paragraph 1 (c), of the Geneva Conventions for the protection of war victims prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment”; article 75 of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”; article 85 of Protocol I prohibits “practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination”; and article 4 of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”.

52. Dignity has been interpreted as providing the ultimate foundation of human rights law,¹²² ever since the preamble of the Charter of the United Nations, which declares:

We the people of the United Nations, determined:

...

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

The preamble to the 1948 Universal Declaration of Human Rights¹²³ in turn declares:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

...

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedoms.

53. From those early origins, dignity has been present as an inspiration of all major universal human rights instruments. Thus, articles 1, 22 and 23, paragraph 3, of the same 1948 Universal Declaration of Human Rights refer to dignity. Similarly, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial

Discrimination, all refer in their preambles to dignity as a source and inspiration of the rights provided therein. The same can be said about the preambles of the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child.

54. Dignity is also present beyond the preamble of universal human rights instruments. Thus, the notion is included in articles 28, 37 and 40 of the Convention on the Rights of the Child, and in article 19 of the International Convention for the Protection of All Persons from Enforced Disappearance, among many others. It operates as a founding notion and general principle in the Convention on the Rights of Persons with Disabilities,¹²⁴ as well as informing the operational aspects of the Convention.¹²⁵

55. Dignity is included in the preambles of most regional human rights instruments, including the American Convention on Human Rights; the Inter-American Convention on Forced Disappearance of Persons; the 2004 revised Arab Charter on Human Rights; the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances; and the Charter of Fundamental Rights of the European Union.

56. Human dignity has also inspired the opinions of many members of ICJ. Writing separately in the 1971 *South West Africa* case, Vice-President Ammoun noted that:

It is not by mere chance that in Article 1 of the Universal Declaration of the Rights of Man there stands, so worded, this primordial principle or axiom: “All human beings are born free and equal in dignity and rights”. From this first principle flow most rights and freedoms.

...

As is plain from the texts of its many resolutions, what decided the United Nations to penalize South Africa's conduct was much less the non-compliance over reports and petitions than the flagrant violation of the most essential principles of humanity, principles protected by the sanction of international law: equality, of which apartheid is the negation; freedom, which finds expression in the right of peoples to self-determination; and the dignity of the human person, which has been profoundly injured by the measures applied to non-White human beings.¹²⁶

¹²² See, for example, Henkin, “International human rights as ‘Rights’”, p. 269.

¹²³ General Assembly resolution 217 (III), of 10 December 1948.

¹²⁴ General Assembly resolution 61/106, annex I, art. 3 (establishing as a general principle the “inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons”) and art. 1 (purpose is to promote full and equal enjoyment of fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity).

¹²⁵ Arts. 16, 24 and 25.

¹²⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, advisory opinion, I.C.J. Reports 1971, p. 16.

Dissenting in the 1966 *South West Africa* judgment, Judge Tanaka also invoked the principle of human dignity.¹²⁷ Likewise, in addressing in the judgment on preliminary objections in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the question of succession to the Convention on the Prevention and Punishment of the Crime of Genocide, Judge Weeramantry stressed that individual dignity represents “one of the principal concerns of the contemporary international legal system”¹²⁸ and argued that “human rights and humanitarian treaties involve no loss of sovereignty or autonomy of the new State, but are merely in line with general principles of protection that flow from the inherent dignity of every human being which is the very foundation of the United Nations Charter”.¹²⁹ The dignity of the human person is also stressed as a central concern in separate and dissenting opinions in several other cases before the Court.¹³⁰

57. The notion of dignity has also been applied widely by the European Court of Human Rights. Thus, in the *Tyrer* case, a certain form of corporal punishment was deemed contrary to human dignity¹³¹ and, since then, several other decisions have referred expressly to the same idea.¹³² Even when pondering the right to life, the European Court of Human Rights held:

The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental

decrepitude which conflict with strongly held ideas of self and personal identity.¹³³

58. Human dignity also plays a fundamental role in the constitutions of many nations.¹³⁴ For example, the Constitution of Germany holds, “The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority”;¹³⁵ and the constitution of South Africa notes that the nation is founded on human dignity and “affirms the democratic values of human dignity, equality, and freedom”.¹³⁶ Many constitutions express similar principles.¹³⁷ Even where the value of dignity is not expressed in a nation’s fundamental rights documents, the concept is often invoked in that State’s constitutional jurisprudence.¹³⁸

59. The concept of human dignity also stands at the centre of many instruments developed by the international community to guide humanitarian relief operations. The Mohonk Criteria holds that: “Everyone has the right to request and receive humanitarian aid necessary to sustain life and dignity”.¹³⁹ In its resolution on humanitarian assistance adopted in Bruges, Belgium, in 2003, the International Law Institute noted: “Leaving the victims of disaster without humanitarian assistance constitutes a threat to human life and an offence to human dignity and therefore a violation of fundamental human rights”.¹⁴⁰ Furthermore, in the Guiding Principles on Internal Displacement, the concept of dignity guides provisions relating to displacement, fundamental rights and return and resettlement.¹⁴¹ The Guidelines recently adopted by IFRC likewise oblige assisting actors to “respect the human dignity of disaster-affected persons at all times”.¹⁴²

¹²⁷ *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 308 and 312. (“[A]ll human beings are equal before the law and have equal opportunities without regard to religion, race, language, sex, social groups, etc. As persons they have the dignity to be treated as such. This is the principle of equality which constitutes one of the fundamental human rights and freedoms which are universal to all mankind... The Respondent probably being aware of the unreasonableness in such hard cases, tries to explain it as a necessary sacrifice which should be paid by individuals for the maintenance of social security. But it is unjust to require a sacrifice for the sake of social security when this sacrifice is of such importance as humiliation of the dignity of the personality.”)

¹²⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595 (separate opinion by Judge Weeramantry).

¹²⁹ *Ibid.*, p. 645.

¹³⁰ See, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 255 (separate opinion of Judge Elaraby); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 433 (dissenting opinion of Judge Weeramantry, arguing that the use of nuclear weapons is illegal in any circumstances because it “contradicts the fundamental principle of the dignity and worth of the human person”); compare with *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 32 (recounting Mexico’s contention that its nationals had been “subjected to criminal proceedings without the fairness and dignity to which each person is entitled”); see generally McCrudden, “Human dignity and judicial interpretation of human rights”, pp. 682 and 683.

¹³¹ ECHR, *Tyrer v. United Kingdom, Series A, No. 26*.

¹³² See, *inter alia*, ECHR, *Bock v. Germany* (1990), *Series A, No. 150*; *S.W. v. United Kingdom, Series A, No. 335-B*; *C.R. v. United Kingdom* (1995), *Series A, No. 335-C*; *Ribitsch v. Austria* (1995), *Series A, No. 336*; and *Goodwin v. United Kingdom* (2002), 2002–VI.

¹³³ ECHR, *Pretty v. United Kingdom* (2002), 2002-III, para. 65.

¹³⁴ See generally Chaskalson, “Human dignity as a constitutional value”.

¹³⁵ Art. 1 (1).

¹³⁶ Art. 7, para. 1; see also arts. 1 and 10.

¹³⁷ See, for example, Basic Laws of Israel, Human Dignity and Liberty, art. 1 (“The purpose of this Basic Law is to protect human dignity and liberty.”); Constitution of Brazil, art. 1 (III); Constitution of Hungary, art. 54, para. 1 (“In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights.”); Constitution of Nigeria, arts. 17 and 34; Constitution of China, art. 38 (“The personal dignity of citizens of the People’s Republic of China is inviolable.”); Constitution of Colombia, art. 1 (declaring that the State is founded in the respect for human dignity); Constitution of Thailand, chap. 1, art. 4. See also Constitutional Proclamation of Egypt (“having realized that man’s humanity and dignity are the torches that guide and direct the course of the enormous development of mankind towards its supreme ideals”); Constitution of India, preamble (“assuring the dignity of the individual”).

¹³⁸ This is the case, for example, in the United States; see, for example, *Roper, Superintendent, Potosi Correctional Center v. Simmons* (*United States Reports*, vol. 543, p. 551, 2005, rejecting *Miranda v. Arizona*, 384 U.S. 436 (1966), noting the connection between human dignity and the principle against self-incrimination). Similarly, in Canada, justices often invoke the principle to deal with serious deprivations of rights; see, for example, *Kindler v. Canada* (1992), *Canada Supreme Court Reports*, part 1, 1991, vol. 2, p. 793 (Judge Cory, dissenting).

¹³⁹ Ebersole (footnote 110 above), p. 196. See also Hardcastle and Chua, “Humanitarian assistance: towards a right of access to victims of natural disasters” (offering similar language); Guiding Principles on the Right to Humanitarian Assistance, principle 3 (a), adopted by the Council of the International Institute of Humanitarian Law (1993).

¹⁴⁰ *Yearbook*, p. 268.

¹⁴¹ E/CN.4/1998/53/Add.2, annex.

¹⁴² Guideline 4.1, *Guidelines* (footnote 66 above), p. 12.

60. In his fifth report on the expulsion of aliens, in 2009, submitted to the Commission at its last session, the Special Rapporteur, Kamto, discussed the concept of dignity and proposed a draft article, later revised, on the obligation to respect the dignity of persons being expelled.¹⁴³ The Commission is yet to take a position on that proposal.

61. The Special Rapporteur concludes that dignity embodies the evolution beyond a mere contractual understanding of the protection of persons under international

¹⁴³ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611 and Corr.1, Fifth report on the expulsion of aliens, draft article 10, p. 143; and document A/CN.4/617, p. 170, 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, draft article 9.

law, and points to a true international community, based on the respect of human beings in their dignity.¹⁴⁴ Such a notion naturally inspires also the protection of persons in the event of disasters, and should guide the efforts of the Commission in the present undertaking.

62. In the light of the foregoing, the Special Rapporteur proposes the following draft article on human dignity:

“Draft article 7. Human dignity

“For the purposes of the present draft articles, States, competent international organizations and other relevant actors shall respect and protect Human Dignity.”

¹⁴⁴ See Simma, “From bilateralism to community interest in international law”.

CHAPTER III

The responsibility of the affected State

63. The Commission, having established that the individual, as a bearer of rights and as a person with essential needs, stands at the centre of its work on the topic (see draft article 2), the Special Rapporteur will now consider the role and responsibility of the affected State towards the persons found within its territory. The inquiry will highlight the fact that the territorial State (i.e. the affected State), and not a third State or organization, has the primary responsibility to protect disaster victims on its territory. In doing so, the Special Rapporteur will address a central concern previously expressed by several members of the Commission.¹⁴⁵

A. Sovereignty and non-intervention

64. In determining the role and responsibility of the affected State, mention must be made of the principles of State sovereignty and non-intervention. Although both principles are well established in international law, their restatement is convenient for the purposes of the present report.

65. The principle of State sovereignty is rooted in the fundamental notion of sovereign equality, a concept that de Vattel illustrated by noting that nations are “free, independent, and equal,”¹⁴⁶ and that “a dwarf is as much a man as a giant is; a small republic is no less a sovereign State than the most powerful kingdom”.¹⁴⁷ This understanding implies the more specific notions of independence and territorial sovereignty, whereby, within its own territory, a State can exercise its functions to the exclusion of all others.¹⁴⁸ Thus understood, sovereignty is regarded as a

fundamental principle in the international order,¹⁴⁹ and its existence and validity have been recognized by States in numerous international instruments.

66. Suffice it to mention the Charter of the United Nations, which enshrines the principle of the sovereign equality of States in the following terms:

Article 2

The Organization and its Members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

67. Subsequently, members of the United Nations have reiterated the importance of this principle. In the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, Member States reaffirmed “the basic importance of sovereign equality and [stressed] that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations”. Furthermore, the operative language of this declaration proclaimed that, “All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community”.¹⁵⁰

68. International tribunals have widely recognized State sovereignty as a fundamental principle of international law. In 1928, in the *Island of Palmas* case, Max Huber noted that “[i]nternational law has established this principle of the exclusive competence of the State in regard to its own territory as the point of departure in settling most questions that concern international relations”.¹⁵¹ ICJ

¹⁴⁵ See, for example, *Yearbook ... 2009*, vol. II (Part Two), paras. 162 and 167.

¹⁴⁶ De Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, vol. III, p. 7, para. 21.

¹⁴⁷ *Ibid.*, para. 18.

¹⁴⁸ Permanent Court of Arbitration, *Island of Palmas* (Netherlands/United States of America), award of 4 April 1928 (UNRIAA, vol. II (Sales No. 1949.V.1), p. 829.

¹⁴⁹ *Corfu Channel* case (see footnote 99 above), p. 4.

¹⁵⁰ General Assembly resolution 2625 (XXV) of 24 October 1970, annex, 12th preambular paragraph, the principle of sovereign equality of States, first paragraph.

¹⁵¹ *Island of Palmas* case (see footnote 148 above).

stated in 1949, in the *Corfu Channel* case, that “between independent States respect for territorial sovereignty is an essential foundation of international relations”.¹⁵² These statements tend to characterize sovereignty as a general principle of law. Subsequently, ICJ made clear that State sovereignty is also part of customary international law.¹⁵³

69. The concepts of sovereign equality and territorial sovereignty are widely invoked in the context of disaster response. In the guiding principles annexed to General Assembly resolution 46/182 of 19 December 1991, the most significant on the subject, the Assembly held:

The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.¹⁵⁴

Previous efforts to draft multilateral treaties on the subject of disaster response have invoked sovereignty as a central principle.¹⁵⁵ Likewise, the Framework Convention on civil defence assistance provides: “All offers of assistance shall respect the sovereignty, independence and territorial integrity of the Beneficiary State ...”.¹⁵⁶ The agreement recently concluded by ASEAN likewise contains such a statement.¹⁵⁷

70. It is also worth noting that the Commission, in its work on the non-navigational uses of international watercourses, has stated in a general way the relationship between sovereignty and the duty of cooperation among States. The Commission considered that the sovereign equality of States informs the manner in which they must cooperate for common ends, noting that “Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit ...”.¹⁵⁸ This provision points in the direction to be followed when considering the relationship between sovereignty and draft article 5 as provisionally adopted by the Drafting Committee.¹⁵⁹

¹⁵² *I.C.J. Reports 1949*, p. 35.

¹⁵³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 111, para. 212 (noting that the concept of sovereignty “extends to the internal waters and territorial sea of every State and to the air space above its territory”).

¹⁵⁴ Guiding principle 3.

¹⁵⁵ Draft convention on expediting the delivery of emergency assistance (A/39/267/Add.2-E/1984/96/Add.2) (“Respect for the sovereignty of the Receiving State and non-interference in its internal affairs”); see also the Convention establishing an International Relief Union, art. 4 (“Action ... in any country is subject to the consent of the Government thereof”).

¹⁵⁶ Art. 3 (b). It is notable, however, that direct references to sovereignty are lacking in several major treaties, including the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency.

¹⁵⁷ ASEAN Agreement on Disaster Management and Emergency Response (“The sovereignty, territorial integrity and national unity of the Parties shall be respected, in accordance with the Charter of the United Nations and the Treaty of Amity and Cooperation in Southeast Asia, in the implementation of this Agreement”) (art. 3, para. 1).

¹⁵⁸ Draft article 8 on the law of the non-navigational uses of international watercourses (*Yearbook ... 1994*, vol. II (Part Two), p. 111); see also Convention on the law of the non-navigational uses of international watercourses, art. 8.

¹⁵⁹ See footnote 4 above.

71. In connection with the principle of State sovereignty, the principle of non-intervention serves to ensure that the sovereign equality of States is preserved.¹⁶⁰ In this sense, the Charter of the United Nations declares in its Article 2, paragraph 7 that:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

72. In direct reference to intervention by States in the internal affairs of other States, the General Assembly has emphasized:

The strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security.¹⁶¹

In addition, as was stated by the Assembly, non-intervention implies: “No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”¹⁶²

73. This principle has likewise been recognized as a rule of customary international law by ICJ, which stated in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, that “though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law”.¹⁶³ The Court, in the *Corfu Channel* case of 1949, had foreshadowed this conclusion.¹⁶⁴

74. From the firmly established principles of international law mentioned above, it is clear that a State affected by a disaster has the freedom to adopt whatever measures it sees fit to ensure the protection of the persons found within its territory. In addition, as a consequence, no other State may legally intervene in the process of response to a disaster in a unilateral manner: third parties must instead seek to cooperate with the affected State in accordance with article 5, as provisionally adopted by the Drafting Committee.¹⁶⁵

75. The correlating principles of sovereignty and non-intervention presuppose a given domestic sphere, or a *domaine réservé*, over which a State may exercise its

¹⁶⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 106, para. 202.

¹⁶¹ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, preamble (General Assembly resolution 2625 (XXV) of 24 October 1970, annex, eighth preambular paragraph).

¹⁶² Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, General Assembly resolution 2131 (XX) of 21 December 1965, para. 1.

¹⁶³ *Merits, Judgment, I.C.J. Reports 1986*, p. 106, para. 202.

¹⁶⁴ *I.C.J. Reports 1949*, p. 35.

¹⁶⁵ See footnote 4 above.

exclusive authority. This sovereign authority remains central to the concept of statehood, but it is by no means absolute. When it comes to the life, health and bodily integrity of the individual person, areas of law such as international minimum standards, humanitarian law and human rights law demonstrate that principles such as sovereignty and non-intervention constitute a starting point for the analysis, not a conclusion. Moreover, as some jurists have argued, the concept of sovereignty itself places obligations on States. Already in 1949, Judge Álvarez, in his separate opinion in the *Corfu Channel* case, explained:

By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory to the exclusion of all other States, and also in its relations with other States. Sovereignty confers rights upon States and imposes obligations on them.¹⁶⁶

B. Primary responsibility of the affected State

76. International law has long recognized that the Government of a State is best positioned to gauge the gravity of emergency situations, and to implement responsive policies. One example may be seen in the “margin of appreciation” given by the European Court of Human Rights to domestic authorities in determining the existence of a “public emergency”. Most recently, the Court held in 2009 that “the national authorities are in principle better placed than the international judge to decide” on the presence of such an emergency.¹⁶⁷ The law of internal armed conflicts provides another example that is perhaps more directly relevant to the present undertaking. Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), governing situations of non-international armed conflict, reflects “the principle that States are primarily responsible for organizing relief”, and that “relief societies, such as the Red Cross and Red Crescent play an auxiliary role”.¹⁶⁸ This understanding provides a useful starting point in the context of the present topic. As far as disasters are concerned, the principles of sovereignty and non-intervention find their expression in the acknowledgement that the State affected by the disaster has the primary responsibility for the protection of persons on its territory.¹⁶⁹

77. The General Assembly has, numerous times, reaffirmed the primacy of the affected State in disaster response.¹⁷⁰ In the above-mentioned guiding principles annexed to General Assembly resolution 46/182, the Assembly held that:

¹⁶⁶ *I.C.J. Reports 1949*, p. 43.

¹⁶⁷ *A. and Others v. the United Kingdom*, No. 3455/05, ECHR 2009, para. 173.

¹⁶⁸ Sandoz, “Protocol II”, in *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para. 4871. This section of the commentary refers to article 18 (1) of Additional Protocol II, which holds that relief societies may offer their services to the national Government, implying that the Government has a right to refuse. The Protocol does, however, contemplate that, in some situations, relief actions must take place (see *ibid.*, para. 4885).

¹⁶⁹ This has also been understood as the principle of “subsidiary function”. See the comments of the delegation of France to the General Assembly concerning resolution 46/182 (A/46/PV.39, p. 72).

¹⁷⁰ See, for example, General Assembly resolutions 38/202, of 20 December 1983, para. 4; 43/131, of 8 December 1988, para. 2; and 45/100, of 14 December 1990, para. 2 (affirming “the sovereignty of affected States and their primary role in the initiation, organization, coordination and implementation of humanitarian assistance within their respective territories”).

Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory.¹⁷¹

More recently, the General Assembly reaffirmed this principle in its resolution 63/141, of 11 December 2008, on international cooperation on humanitarian assistance,¹⁷² and in resolution 64/251, of 22 January 2010, following the earthquake in Haiti.

78. Two general consequences flow from the primacy of the affected State in disaster response. First is the recognition that the affected State bears the ultimate responsibility for protecting disaster victims on its territory and that it has the primary role in facilitating, coordinating and overseeing relief operations on its territory. The other general conclusion is that international relief operations require the consent of the affected State.¹⁷³ The remainder of this section shall consider each element in some detail.

1. DIRECTION, CONTROL, COORDINATION AND SUPERVISION

79. A prototypical articulation of the primary role of the affected State may be found in the draft Convention on Expediting the Delivery of Emergency Assistance¹⁷⁴. The draft Convention holds that:

The receiving State shall have, within its territory, responsibility for facilitating the coordination of operations to meet the situation created by the disaster.¹⁷⁵

The draft Convention, then, highlights the facilitative role of the State receiving emergency aid. The provision does not emphasize that this role is primary, nor does it clearly state that the affected nation has the foremost obligation to deliver humanitarian assistance and to protect persons on its territory. Moreover, it does not directly address the State’s role in initiating, supervising, organizing and controlling operations, although the draft treaty, read as a whole, may make it clear that these aspects of disaster response are primarily within the prerogative of the affected State.

80. Subsequent multilateral instruments modify the formula articulated by the draft Convention on Expediting the Delivery of Emergency Assistance, focusing on the supervisory role of the affected State. For example, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency¹⁷⁶ states:

¹⁷¹ Guiding principle 4.

¹⁷² Fourth preambular paragraph (“Emphasizing that the affected State has the primary responsibility in the initiation, organization, coordination and implementation of humanitarian assistance within its territory and in the facilitation of the work of humanitarian organizations in mitigating the consequences of natural disasters”).

¹⁷³ This is also stated by the General Assembly in guiding principle 3 annexed to resolution 46/182 (“humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country”).

¹⁷⁴ A/39/267/Add.2-E/1984/96/Add.2.

¹⁷⁵ Art. 3, para. 2. Note that the draft convention emphasizes “respect for the sovereignty of the receiving State and non-interference in its internal affairs” (art. 3, para. 1 (a)). Also, the convention’s scope of application may be read to indicate that the treaty would have applied only when assistance operations had begun, and not to the initiation phase (art. 4).

¹⁷⁶ Art. 3 (a).

The overall direction, control, coordination and supervision of the assistance shall be the responsibility within its territory of the requesting State.

Similar formulations were employed by the Agreement establishing the Caribbean Disaster Emergency Response Agency,¹⁷⁷ by the Inter-American Convention to Facilitate Disaster Assistance,¹⁷⁸ and by the Convention on the Transboundary Effects of Industrial Accidents.¹⁷⁹ The provisions in these instruments clarify the State's unique and sovereign role in controlling disaster assistance on its territory. The State is not only a conduit for international cooperation and coordination; it also exercises final control over the manner in which relief operations are carried out.

81. A plethora of bilateral agreements, concluded in the same time period as the above conventions, similarly describe the role of the State affected by a natural or man-made disaster. Because of the bilateral nature of these treaties, they focus almost exclusively on the operational aspects of disaster relief, giving little mention to the broader principles of sovereignty and non-intervention. One typical treaty provision states:

The coordinating body of the requesting State shall be responsible for directing the operations. It shall establish guidelines for and possible limits of the operations assigned to the emergency teams of the other State without, however, intervening in operational arrangements.¹⁸⁰

A similar treaty concluded among the Nordic States held, in relevant part, "The authorities of the State seeking assistance shall have full responsibility for directing operations at the site of the accident".¹⁸¹ Bilateral treaties on disaster response continue to stress that the responsibility for operational coordination and direction lies with the State requesting assistance.¹⁸²

82. The Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, covering the provision of telecommunications assistance, adopts language similar to that in the Convention on Assistance in the Case of a Nuclear

¹⁷⁷ Art. 16, para. 1 ("the overall direction, control, coordination and supervision of assistance despatched to a requesting State shall be the responsibility within its territory of the requesting State").

¹⁷⁸ Art. IV (a), available from www.oas.org/juridico/english/treaties/a-54.html (accessed 7 December 2015).

¹⁷⁹ Annex X.

¹⁸⁰ Spain and Argentina: Agreement on cooperation on disaster preparedness and prevention, and mutual assistance in the event of disasters (Madrid, 3 June 1988), art. XI (United Nations, *Treaty Series*, vol. 1689, No. 29123).

¹⁸¹ Art. 3, para. 2, Agreement on cooperation across state frontiers to prevent or limit damage to persons or property or to the environment in the case of accidents, concluded among Denmark, Finland, Norway and Sweden.

¹⁸² See, for example, France and Italy: Convention on the prediction and prevention of major hazards and on mutual assistance in the event of natural or man-made disasters (Paris, 16 September 1992), art. 7 (United Nations, *Treaty Series*, vol. 1962, No. 33532, p. 369); Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Belarus on cooperation in the field of prevention and elimination of consequences of catastrophes, natural disasters and serious accidents (Vilnius, 16 December 2003), art. 5 (*ibid.*, vol. 2339, No. 41934, p. 203); Treaty between the Federal Republic of Germany and the Czech Republic concerning mutual assistance in the event of disasters or serious accidents (Berlin, 19 September 2000), art. 8 (*ibid.*, vol. 2292, No. 40860, p. 291).

Accident or Radiological Emergency and its contemporaries, but it does so in the form of a without-prejudice clause. The treaty states:

Nothing in this Convention shall interfere with the right of a State Party, under its national law, to direct, control, coordinate and supervise telecommunication assistance provided under this Convention within its territory.¹⁸³

This phrasing is significant, because it indicates that the right of an affected State to oversee disaster response on its territory is a pre-existing one, inherent either in the general principles of sovereignty and non-intervention or in customary international law, and that the treaty need not grant this right explicitly to the States parties. The second innovation of the Tampere Convention provision is the reference to national law, indicating that an affected State properly exercises control over relief operations when it does so in accordance with its own laws.

83. The ASEAN Agreement on Disaster Management and Emergency Response offers a unique articulation of the primary role of the affected State. The Agreement invokes the principles of sovereignty and non-intervention, the Charter of the United Nations and the Treaty of Amity and Cooperation in Southeast Asia, and notes that "each affected Party shall have the primary responsibility to respond to disasters occurring within its territory. But the treaty also contains a provision similar to the Tampere Convention and the Convention on Nuclear Accidents, holding that "The Requesting or Receiving Party shall exercise the overall direction, control, coordination and supervision of the assistance within its territory" (art. 3, para. 2).

84. The primary responsibility of the affected State also plays a founding role in many draft principles and guidelines developed by humanitarian actors and independent experts. Some instruments prepared by the International Red Cross and Red Crescent Movement discuss the principle of primary responsibility in much the same way as the above-mentioned treaties. The Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief states that "overall planning and coordination of relief efforts is ultimately the responsibility of the host government".¹⁸⁴ More recently, the *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* of IFRC stated in article 3, paragraph 1: "Affected States have the primary responsibility to ensure disaster risk reduction, relief and recovery assistance in their territory". The Guidelines further elaborate on this principle in article 3, paragraph 3, in terms similar to the ASEAN Agreement and others:

Affected States have the sovereign right to coordinate, regulate and monitor, disaster relief and recovery assistance provided by assisting actors on their territory, consistent with international law.

These provisions offer strong evidence that the primary responsibility of the affected State is a principle endorsed both by States and by humanitarian actors.

85. A range of international instruments also stress that the State has the primary responsibility for providing aid

¹⁸³ Art. 4, para. 8.

¹⁸⁴ Code of conduct (footnote 64 above), annex VI p. 125.

and protection. For example, IFRC notes in its Principles and Rules for disaster relief:¹⁸⁵

Prevention of disasters, assistance to victims and reconstruction are first and foremost the responsibility of the public authorities. The International Federation of Red Cross and Red Crescent Societies... will actively offer assistance to disaster victims through the agency of the National Society in a spirit of cooperation with the public authorities.

This provision clearly focuses on the humanitarian elements of the State's responsibility, as opposed to the operational concerns considered above. However, provisions such as this one also clearly establish that the affected State, not a third party, is generally expected to initiate and sustain relief operations after a disaster, and that any assistance from non-governmental or international actors should be considered auxiliary to the State's efforts.

86. Other instruments take an approach similar to the Principles of the Red Cross and Red Crescent. The Mohonk Criteria on Complex Emergencies, for example, hold that:

Primary responsibility for the protection and well-being of civilian populations rests with the government of the state or the authorities in control of the territory in which the endangered persons are located.¹⁸⁶

The Criteria also note that insurgent groups and militias should be held to the same obligations as governments in this regard. Like the Red Cross Principles, the Criteria emphasize the State's function in providing humanitarian aid, but, where the Red Cross focuses on preventing and responding to a disaster, the Criteria emphasize the protection and dignity of affected individuals.

87. The above approach is also reflected in the Guiding Principles on the Right to Humanitarian Assistance of 1993 of the International Institute of Humanitarian Law, which emphasize that the "primary responsibility to protect and assist the victims of emergencies" rests with the territorial State. Likewise, the Guiding Principles on Internal Displacement emphasize the provision of assistance:

National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.¹⁸⁷

88. Recent instruments regarding disaster response tend to meld the operational approach of the treaty instruments with the humanitarian focus of the Mohonk Criteria and similar documents. The Humanitarian Charter of the Sphere Project,¹⁸⁸ first published in 2000, accomplishes this by implying that the primacy of the affected State

arises not only from classically Westphalian principles of sovereignty and non-intervention, but also from the right of all peoples to dignity and self-determination:

We recognize that it is firstly through their own efforts that the basic needs of people affected by calamity or armed conflict are met, and we acknowledge the primary role and responsibility of the state to provide assistance when people's capacity to cope has been exceeded.¹⁸⁹

The approach of the Sphere Project reminds the reader that local initiation and oversight of disaster assistance is closely associated with the autonomy and dignity of the affected population.

89. The resolution on humanitarian assistance adopted by the Institute of International Law in Bruges, Belgium, in 2003 offers a more explicit combination of the humanitarian and operational aspects of this principle. The Institute stated:

The affected State has the duty to take care of the victims of disaster in its territory and has therefore the primary responsibility in the organization, provision and distribution of humanitarian assistance. As a result, it has the duty to take the necessary measures to prevent the misappropriation of humanitarian assistance and other abuses.¹⁹⁰

The Institute provision thus links the primary responsibility of the affected State to the right of all peoples to humanitarian assistance in the event of a disaster. Other instruments have instead focused on the principle of international cooperation.¹⁹¹ The Bruges resolution is useful in that it focuses both on the State's role as an organizer and facilitator, and on the State's responsibilities in the actual provision of assistance. Such an approach may provide a useful point of departure for the Commission's work.

2. CONSENT

90. In formulating a draft article on the primary responsibility of the affected State, the Special Rapporteur also finds it necessary to deal with the requirement that humanitarian aid be provided only with the consent of the affected State. The foregoing discussion focused on what may be termed the "internal" aspects of the State's responsibilities, highlighting the State's role in managing, organizing and providing relief within its territory. On the other hand, the consent requirement is of a primarily "external" character, governing the affected State's relationships with other international actors in the wake of a disaster.

"The cornerstone of the handbook is the Humanitarian Charter, which is based on the principles and provisions of international humanitarian law, international human rights law, refugee law and the *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief*. The Charter describes the core principles that govern humanitarian action and reasserts the right of populations affected by disaster, whether natural or man-made (including armed conflict), to protection and assistance. It also reasserts the right of disaster-affected populations to life with dignity." (p. 5)

¹⁸⁹ *Ibid.*, p. 20, para. 2.1.

¹⁹⁰ *Yearbook*, p. 268.

¹⁹¹ See Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters (A/CONF.206/6 and Corr.1, chap. I, resolution 2) ("Taking into account the importance of international cooperation and partnerships, each State has the primary responsibility for its own sustainable development and for taking effective measures to reduce disaster risk, including for the protection of people on its territory, infrastructure and other national assets from the impact of disasters" (para. 13 (b))).

¹⁸⁵ Principle 3.1, 26th International Conference of the International Red Cross and Red Crescent Movement, held in Geneva, 3–7 December 1995, *International Review of the Red Cross*, No. 310 (January–February 1996), annex IV, p. 103.

¹⁸⁶ Ebersole (footnote 110 above), p. 197. The term "complex emergency" is understood to refer to "a humanitarian crisis which may involve armed conflict and which may be exacerbated by natural disasters" (*ibid.*, p. 194, footnote 7). See also footnote 110 above.

¹⁸⁷ E/CN.4/1998/53/Add.2, annex, principle 3, para. 1. See also principle 25, para. 1 ("The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities").

¹⁸⁸ The Sphere Project, *Humanitarian Charter and Minimum Standards in Disaster Response* (2d ed., Geneva, 2004). The project explains its basis in existing law as follows:

91. The requirement of consent played a central role in the first major treaty on disaster relief. The Convention and Statute Establishing an International Relief Union held:

Action by the International Relief Union in any country is subject to the consent of the Government thereof.¹⁹²

This provision, though no longer in force, provides a useful starting point for the investigation. The phrase “subject to” implies that State consent continues to be required for the duration of the relief operation. In other words, the approval of the affected State is required for the initiation of international assistance, and, should the affected State at any time withdraw its consent, relief operations must cease. While this provision was limited to actions taken by the International Relief Union, subsequent instruments would make clear that consent is required for all international relief efforts.

92. The consent requirement also appears in analogous treaty provisions in the law of armed conflict. In the context of international armed conflicts, Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), for example, holds that relief actions “shall be undertaken, subject to the agreement of the Parties concerned” when the civilian population is inadequately supplied.¹⁹³ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), governing non-international conflicts, states that, if the civilian population is suffering “undue hardship”, relief actions “shall be undertaken subject to the consent of the High Contracting Party concerned”.¹⁹⁴

93. The consent requirement is present in several multilateral treaties governing disaster relief. For example, the Tampere Convention (art. 4, para. 5) states:

No telecommunication assistance shall be provided pursuant to this Convention without the consent of the requesting State Party. The requesting State Party shall retain the authority to reject all or part of any telecommunication assistance offered pursuant to this Convention in accordance with the requesting State Party’s existing national law and policy.

As with the Convention and Statute Establishing an International Relief Union, the Tampere Convention does not establish that consent is always required for disaster relief, but only that assistance may not be provided in accordance with that Convention without the receiving State’s approval. The second sentence, concerning the State’s right to reject assistance, is a helpful one, but it is language that may be more usefully considered in a subsequent report by the Special Rapporteur dealing directly with offers and acceptance of relief.

94. The Framework Convention on civil defence assistance offers a more restrictive version of the consent requirement than that articulated in the Tampere Convention. Article 3 (a) of the Framework Convention provides:

Only assistance requested by the Beneficiary State or proposed by the Supporting State and accepted by the Beneficiary State may take place.

¹⁹² Art. 4.

¹⁹³ Art. 70, para. 1.

¹⁹⁴ Art. 18, para. 2.

This provision purports to govern all actions by a disaster response or prevention unit belonging to one State, taken for the benefit of another (see art. 1 (d)). Thus, the provision indicates that, among States party to that Convention, no international assistance may take place without the consent of the territorial State. The ASEAN Agreement on Disaster Management and Emergency Response includes a similar provision (in art. 3, para. 1), stating that “external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party”.

95. Other multilateral conventions do not contain an explicit reference to the consent rule, because they purport to govern only the provision of assistance that is expressly accepted by the receiving State. This is the case with the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, which contemplates (in art. 2) a detailed request for assistance, which is considered in good faith by other States parties. The Inter-American Convention to Facilitate Disaster Assistance explicitly limits its scope only to situations in which “a state party furnishes assistance in response to a request from another state party, except as they otherwise agree” (art. 1).

96. Given the foregoing, the Special Rapporteur is of the opinion that the primary responsibility of the affected State, as expressed through its operational control of disaster relief and through the consent requirement, constitutes a general rule governing humanitarian assistance. Therefore, it is possible to propose the following draft article:

“Draft article 8. Primary responsibility of the affected State

“1. The affected State has the primary responsibility for the protection of persons and provision of humanitarian assistance on its territory. The State retains the right, under its national law, to direct, control, coordinate and supervise such assistance within its territory.

“2. External assistance may be provided only with the consent of the affected State.”

97. The first sentence of this article describes the primary responsibility of the State in a manner that references the overarching theme of the Commission’s undertaking, which is the protection of the individual person. It echoes statements in the Bruges resolution of the Institute of International Law and in General Assembly resolution 46/182, that the affected State has the primary responsibility to “take care” of victims on its territory, but it chooses the term “protection”, in reference to draft article 1 as provisionally adopted by the Drafting Committee. Protection is also highlighted in the Guiding Principles on the Right to Humanitarian Assistance of 1993. The reference to provision of humanitarian assistance recalls the Principles and Rules for Red Cross and Red Crescent Disaster Relief, the Bruges resolution and other instruments discussed above, and it serves to emphasize that this article will focus primarily on the initiation and governance of relief operations.

98. The second sentence of paragraph 1 stresses the operational aspects of the State's authority over aid operations. The terms "direct, control, coordinate and supervise" are found in a host of international instruments,¹⁹⁵ and together they constitute a well-settled understanding of the State's primary role in disaster relief. The Special Rapporteur is of the opinion that these four verbs are suitably general in scope, and that they imply the more specific terms used by other instruments, such as "facilitate", "monitor" and "regulate".¹⁹⁶ General Assembly resolution 46/182 notes that the affected State also has the primary role in the initiation of assistance; this aspect of the State's responsibility is considered in paragraph 2 of the draft article. In addition, the draft article incorporates the phrase "under its national law" from the Tampere Convention. This wording serves to emphasize that the appropriate way for the affected State to exercise its operational control is through its own legal system.

99. Taken together, paragraph 1 reflects the "internal" aspect of sovereignty and the primary responsibility of the affected State. The provision highlights the State's roles as a provider of humanitarian assistance and as a manager of relief operations. The Special Rapporteur is of the opinion that these two roles belong in the same provision, for they are mutually reinforcing. As

¹⁹⁵ For example, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (art. 3 (a)); the Agreement establishing the Caribbean Disaster Emergency Response Agency (art. 16); the Inter-American Convention to Facilitate Disaster Assistance (art. IV); the Tampere Convention (art. 4, para. 8); and the ASEAN Agreement on Disaster Management and Emergency Response (art. 3, para. 2).

¹⁹⁶ For example, the Bruges resolution of the Institute of International Law (art. III, para. 1) ("organization, provision and distribution") (*Yearbook*, p. 268); and the Guidelines of IFRC, guideline 3, para. 3 ("coordinate, regulate and monitor").

the guideline from the Sphere Project's Humanitarian Charter implies, local and domestic control over disaster management and rehabilitation programmes constitutes an important element of the collective right to self-determination, as well as the individual dignity on which this undertaking is founded.

100. Paragraph 2 refers to the "external" aspect of the State's primary responsibility, namely the requirement of consent. This provision takes its basic structure from General Assembly resolution 46/182, but, where the Assembly said that assistance "should" take place with the State's consent, this provision establishes a clear requirement. The phrase "external assistance" is taken from the ASEAN Agreement on Disaster Management and Emergency Response, and reflects the fact that this provision does not purport to govern the State's relationship with humanitarian actors established within its own borders.

101. As with the other general provisions submitted by the Special Rapporteur, much of the subsequent work on this topic will involve drafting specific provisions that define or qualify the primary role of the affected State. For example, many bilateral treaties require that a host State provide detailed guidelines to foreign actors, setting out the tasks it is willing to assign to these parties.¹⁹⁷ Others provide specific guidance involving the relationship between the supervising body of the affected State and foreign assisting personnel.¹⁹⁸ These and other related questions will be the subject of future reports.

¹⁹⁷ See, for example, the Agreement between the Government of the Republic of Latvia and the Government of the Republic of Lithuania on the mutual support in the event of natural disasters and other large-scale accidents (United Nations, *Treaty Series*, vol. 2267, No. 40379, p. 135).

¹⁹⁸ See, for example, the Agreement establishing the Caribbean Disaster Emergency Response Agency.

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

[Agenda item 9]

DOCUMENT A/CN.4/631

Second report on immunity of State officials from foreign criminal jurisdiction, by Mr. Roman Anatolevich Kolodkin, Special Rapporteur

[Original: Russian]
[10 June 2010]

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Convention on Special Missions (New York, 8 December 1969)	<i>Ibid.</i> , vol. 1400, No. 23431, p. 231.
European Convention on State Immunity (Basel, 16 May 1972)	<i>Ibid.</i> , vol. 1495, No. 25699, p. 181.
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Source

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Introduction

1. The topic “Immunity of State officials from foreign criminal jurisdiction” was included in the long-term programme of work of the International Law Commission at its fifty-eighth session, in 2006, on the basis of a proposal prepared by the Special Rapporteur.¹ At its fifty-ninth session, in 2007, the Commission decided to include the topic in its current programme of work. At that same session,

Mr. Roman Kolodkin was appointed Special Rapporteur on this topic,² and a request was made to the Secretariat to prepare a background study on it.³

2. At the sixtieth session of the Commission, in 2008, a preliminary report (or to be more precise, its first part and

¹ *Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 257 (b).

² *Yearbook ... 2007*, vol. II (Part Two), p. 98, para. 376.

³ *Ibid.*, p. 101, para. 386.

the start of its second part)⁴ and a memorandum by the Secretariat on the topic⁵ were presented.

3. The preliminary report briefly described the history of the consideration of the issue of immunity of State officials from foreign jurisdiction by the Commission and by the Institute of International Law⁶ and outlined the range of issues proposed for consideration by the Commission in the preliminary phase of work on the topic. These included the issue of the sources of immunity of State officials from foreign criminal jurisdiction, the issue of the substance of the concepts of “immunity” and “jurisdiction”, “criminal jurisdiction” and “immunity from criminal jurisdiction” and the relationship between immunity and jurisdiction, the issue of the typology of the immunity of State officials (immunity *ratione personae* and immunity *ratione materiae*), and the issue of the rationale for the immunity of State officials and of the relationship between the immunity of officials and the immunity of the State, diplomatic and consular immunity and the immunity of members of special missions.⁷

4. In parallel with this, the report identified issues which the Special Rapporteur deemed it necessary to consider in order to determine the scope of this topic.⁸ Such issues included, in particular, the issue of which State officials—all or only some of them (for example, only Heads of State, Heads of Government and Ministers for Foreign Affairs)—should be covered by any future draft guiding principles or draft articles which may be prepared by the Commission as a result of its consideration of the topic, the issue of the definition of the concept “State official”, the issue of recognition in the context of this topic and the issue of the immunity of members of the families of State officials.

5. In addition, issues which the Special Rapporteur deemed it necessary to consider in order to determine the scope of this topic included the issue of the scope of immunity enjoyed by serving and former officials to be covered by any future draft guiding principles or articles and the issue of waiver of immunity (and possibly other procedural aspects of immunity).⁹

6. The conclusions reached by the Special Rapporteur as a result of the analysis made in the part of the preliminary report which was presented are contained in paragraphs 102 and 130 thereof.¹⁰

⁴ Yearbook ... 2008, vol. II (Part One), document A/CN.4/601.

⁵ Memorandum by the Secretariat, A/CN.4/596, available on the website of the Commission.

⁶ Preliminary report (footnote 4 above), paras. 6–26.

⁷ *Ibid.*, paras. 27–102.

⁸ *Ibid.*, paras. 103–130.

⁹ *Ibid.*, para. 4.

¹⁰ Paragraph 102 states:

“(a) The basic source of the immunity of State officials from foreign criminal jurisdiction is international law, and particularly customary international law;

“(b) Jurisdiction and immunity are related but different. In the context of the topic under discussion, the consideration of immunity should be limited and should not consider the substance of the question of jurisdiction as such;

“(c) The criminal jurisdiction of a State, like the entire jurisdiction of the State, is exercised in the form of legislative, executive and

7. For the most part, these conclusions met with support in the Commission. In his closing remarks, the Special Rapporteur was able to note broad agreement, in particular, that:

(a) The principal source of the immunity of State officials from foreign criminal jurisdiction is customary international law;

(b) The concept of “immunity” presupposes legal relations and a correlation between corresponding rights and duties;

judicial jurisdiction (or in the form of legislative and executive jurisdiction, if the latter is understood to include both executive and judicial jurisdiction);

“(d) Executive (or executive and judicial) criminal jurisdiction has features in common with civil jurisdiction but differs from it because many criminal procedure measures are adopted in the pre-trial phase of the juridical process. Thus the question of immunity of State officials from foreign criminal jurisdiction is more important in the pre-trial phase;

“(e) Immunity of officials from foreign jurisdiction is a rule of international law and the corresponding juridical relations, in which the juridical right of the person enjoying immunity not to be subject to foreign jurisdiction reflects the juridical obligation of the foreign State not to exercise jurisdiction over the person concerned;

“(f) Immunity from criminal jurisdiction means immunity only from executive and judicial jurisdiction (or only from executive jurisdiction, if this is understood to include both executive and judicial jurisdiction). It is thus immunity from criminal process or from criminal procedure measures and not from the substantive law of the foreign State;

“(g) Immunity of State officials from foreign criminal jurisdiction is procedural and not substantive in nature. It is an obstacle to criminal liability but does not in principle preclude it;

“(h) Actions performed by an official in an official capacity are attributed to the State. The official is therefore protected from the criminal jurisdiction of a foreign State by immunity *ratione materiae*. However, this does not preclude attribution of these actions also to the person who performed them;

“(i) Ultimately the State, which alone is entitled to waive an official’s immunity, stands behind the immunity of an official, whether this is immunity *ratione personae* or immunity *ratione materiae*, and behind those who enjoy immunity;

“(j) Immunity of an official from foreign criminal jurisdiction has some complementary and interrelated rationales: functional and representative rationale; principles of international law concerning sovereign equality of States and non-interference in internal affairs; and the need to ensure the stability of international relations and the independent performance of their activities by States.”

Para. 130 states:

“(a) This topic covers only immunity of officials of one State from national (and not international) criminal (and not civil) jurisdiction of another State (and not of the State served by the official);

“(b) It is suggested that the topic should cover all officials;

“(c) An attempt may be made to define the concept ‘State official’ for this topic or to define which officials are covered by this concept for the purposes of this topic;

“(d) The high-ranking officials who enjoy personal immunity by virtue of their post include primarily Heads of State, Heads of Government and Ministers for Foreign Affairs;

“(e) An attempt may be made to determine which other high-ranking officials, in addition to the threesome mentioned, enjoy immunity *ratione personae*. It will be possible to single out such officials from among all high-ranking officials, if the criterion or criteria justifying special status for this category of high-ranking officials can be defined;

“(f) It is doubtful whether it will be advisable to give further consideration within the framework of this topic to the question of recognition and the question of immunity of members of the family of high-ranking officials.”

- (c) Immunity is procedural in nature;
- (d) Immunity of State officials from foreign criminal jurisdiction means immunity from executive and judicial jurisdiction, but not from legislative jurisdiction;
- (e) The question of such immunity arises even in the pre-trial phase of the criminal process;
- (f) Differentiation between immunity *ratione materiae* and immunity *ratione personae* is useful for analytical purposes;
- (g) The topic does not cover questions of international criminal jurisdiction;
- (h) As regards which persons are covered by the topic, the status of all State officials should be considered;
- (i) The term “State official” is the term which should be used and it should be given a definition;
- (j) Immunity *ratione personae* is enjoyed by, at least, Heads of State and Government, and also by Ministers for Foreign Affairs.

8. During the discussion of the report of the Commission on its sixtieth session in the Sixth Committee of the General Assembly, in 2008, many delegations made statements on the topic under consideration.¹¹

9. During discussion of the Commission’s report on its sixty-first session in the Sixth Committee of the General Assembly in 2009, statements by a number of delegations referred to the importance of continuing work on the topic, despite the fact that no continuation of the preliminary report had been presented by the Special Rapporteur and consequently the Commission had not considered the topic at its sixty-first session.¹² South Africa, in particular, stressed the importance of this topic in the light of the ongoing discussion on the exercise of national universal jurisdiction and highlighted questions which it felt the Commission should answer.¹³

¹¹ See *Yearbook ... 2008*, vol. II (Part Two), paras. 265–311. See also the Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-third session, prepared by the Secretariat (A/CN.4/606), paras. 89–110.

¹² See, in particular, statements by the delegations of Austria, *Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee*, 15th meeting (A/C.6/64/SR.15), para. 30; South Africa, *ibid.*, paras. 69–70; Hungary, 16th meeting, (A/C.6/64/SR.16), para. 35; Portugal, *ibid.*, para. 41; Ghana, 17th meeting (A/C.6/64/SR.17), para. 6; and Libyan Arab Jamahiriya, *ibid.*, para. 16.

¹³ Among the questions facing the Commission, South Africa highlighted, in particular, the following: do Ministers for Foreign Affairs and other senior State officials possess full immunity under customary international law; is such immunity applicable in the case of genocide, war crimes and crimes against humanity; do temporal limits on such immunity exist and, if so, are they the same for all officials, what importance for immunity will the fact have that the aforementioned crimes may potentially fall within the category of crimes under the norms of *ius cogens*? South Africa also showed interest in the question of the relationship between immunity and the powers of national authorities to take measures for the purposes of arresting senior officials on the basis of requests by international tribunals (*ibid.*, 15th meeting (A/C.6/64/SR.15), paras. 69–70).

10. In the discussions between the African Union and the European Union on universal criminal jurisdiction, the outcome of which was the preparation of an expert report, the issue of immunity also occupied a position of no small importance.¹⁴ The same is true of the discussion held in the Sixth Committee in 2009 on the issue of universal criminal jurisdiction.¹⁵

11. During the period which has elapsed since consideration of the preliminary report, ICJ has begun considering cases relating in one way or another to this topic: the *Case concerning questions relating to obligation to prosecute or extradite (Belgium v. Senegal)*¹⁶ and the *Case concerning jurisdictional immunities of the State (Germany v. Italy)*.¹⁷ The *Case concerning certain criminal proceedings in France (Republic of the Congo v. France)*,¹⁸ which also touches upon issues of the immunity of senior and high-ranking State officials from foreign criminal jurisdiction, is still under consideration by the Court.

12. In the period following consideration of the preliminary report, these issues have been the subject of consideration within the scope of national jurisdictions on several occasions.¹⁹

¹⁴ See the AU-EU Expert Report on the Principle of Universal Jurisdiction, Council of the European Union document 8672/1/09 Rev.1, 16 April 2009.

¹⁵ See statements from Austria, China, Costa Rica, Ethiopia, Finland, Indonesia, Iran (Islamic Republic of), Liechtenstein, Peru, Russian Federation, Rwanda, Senegal, South Africa, Sudan, Swaziland and Tunisia, *Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee*, 12th–13th meetings (A/C.6/64/SR.12–13). Individual delegations particularly emphasized the link between the idea of universal jurisdiction and the norms of international law on immunity of the State and its officials, pointing to the need for a considered approach to resolving the problem of the liability of persons for committing crimes under international law.

¹⁶ *Case concerning questions relating to obligation to prosecute or extradite (Belgium v. Senegal)*, 19 February 2009 (available at www.icj-cij.org).

¹⁷ *Case concerning jurisdictional immunities of the State (Germany v. Italy)*, 23 December 2008 (available at www.icj-cij.org).

¹⁸ *Case concerning certain criminal proceedings in France (Republic of the Congo v. France)*, 11 April 2003 (available at: www.icj-cij.org).

¹⁹ In November 2008, in Frankfurt (Germany), Rose Kabuye, Chief of Protocol for the President of Rwanda, was arrested on the basis of an arrest warrant issued by a French judge and charged in connection with the murder of the former President of Rwanda in 1994, which marked the start of the bloodshed in that country. In March 2009, she was released from arrest (*BBC News*, 23 December 2008, <http://news.bbc.co.uk/go/pr/ft/-/2/hi/africa/7797024.stm>, accessed 20 March 2016). According to press reports, the case has been abandoned (*The New Times* (Kigali), 26 September 2009). In December 2009, Westminster Magistrates’ Court (United Kingdom) issued a warrant for the arrest of the leader of the Israeli opposition, Tzipi Livni, on charges of having committed war crimes in Gaza. Tzipi Livni held the post of Minister for Foreign Affairs of Israel during the period in which the events for which she is charged took place. The warrant was withdrawn shortly afterward, according to media reports, because it was established Tzipi Livni was not in United Kingdom territory (*The Guardian*, 15 December 2009, www.guardian.co.uk/world/2009/dec/15/tzipi-livni-arrest-warrant-israeli). Attempts had earlier been made in the United Kingdom to secure the arrest of Ehud Barak, Israeli Defence Minister, but he was acknowledged as having diplomatic immunity (*The Guardian*, 29 September 2009, www.guardian.co.uk/world/2009/sep/29/ehud-barak-war-crimes-israel). In Spain, in the period 2008–2009, investigations were launched in connection with charges of crimes against humanity and genocide in Tibet brought against high-ranking officials and politicians in China (the former President of China Jiang Zemin,

13. In connection with the aforementioned discussion on universal jurisdiction and in connection with consideration of the issues of immunity of foreign officials in national jurisdictions, within the scope of cases in ICJ and in other cases concerning immunity from foreign jurisdiction, governments have stated their position on more than one occasion recently.²⁰ Changes have also been made to the legislation of several States.²¹

14. Following the issuance of the memorandum by the Secretariat and the preliminary report, a resolution was adopted by the Institute of International Law in 2009 on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes.²² In addition, new works have been published on the topic under consideration.²³

15. The factual aspect is important to the consideration of the topic by the Commission. To obtain realistic results in the work of the Special Rapporteur, we have to take reality as our starting point and not portray what is desirable as being the actual state of affairs. As described in the work of Lutz and Reiger, which contains very interesting factual information with

(Footnote 19 continued.)

Defence Minister Liang Guanglie and others). In view of changes in Spain's legislation which restricted the scope of "universal jurisdiction", the cases were abandoned (*El País*, 27 February 2010, www.elpais.com/articulo/espana/Pedraz/archiva/investigacion/genocidio/Tibet/elpepuesp/20100227/lpepinac_7/Tes, accessed 29 July 2016). In December 2009, a warrant was also issued in Argentina for the arrest of Jiang Zemin and the head of the security service Luo Gan on charges of crimes against humanity which had manifested themselves in persecution of the Falun Gong movement ("Argentina judge asks China arrests over Falun Gong", Reuters, 22 February 2010).

²⁰ *Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee*, 13th meeting (A/C.6/64/SR.13), statements of the United Kingdom and Israel, paras. 6–7 and 18–21, respectively. See also the materials of hearings in ICJ on the issue of temporary measures in the *Case concerning questions relating to obligation to prosecute or extradite (Belgium v. Senegal)*, Oral proceedings, 6–8 April 2009 (available at www.icj-cij.org).

²¹ Thus, amendments have been introduced into Spain's legislation regulating the application of universal jurisdiction. A requirement for the existence of "a link" between the case under consideration and the State of Spain has been established ("Spanish Congress Enacts Bill Restricting Spain's Universal Jurisdiction", *The New York Times*, 21 May 2009).

²² Institute of International Law, "Resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", Naples session, 2009.

²³ For example, O'Donnell, "Certain criminal proceedings in France (*Republic of Congo v. France*) and Head of State immunity: how impenetrable should the immunity veil remain?"; Penrose, "The emperor's clothes: evaluating Head of State immunity under international law"; Lutz and Reiger, *Prosecuting Heads of State*; Buzzini, "Lights and shadows of immunities and inviolability of State officials in international law: some comments on the *Djibouti v. France* case"; Rensmann, "Impact on the immunity of States and their officials"; Colangelo, "Universal jurisdiction as an international 'false conflict' of laws"; Roht-Arriaza, "Making the State do justice: transnational prosecutions and international support for criminal investigations in post-armoured conflict Guatemala"; Summers, "Diplomatic immunity *ratione personae*: did the International Court of Justice create a new customary law rule in *Congo v. Belgium*?" ; Ambos, "Prosecuting Guantanamo in Europe: can and shall the masterminds of the 'torture memos' be held criminally responsible on the basis of universal jurisdiction?"; Kaleck, "From Pinochet to Rumsfeld: universal jurisdiction in Europe 1998–2008"; Alderton, "Immunity for Heads of State acting in their private capacity—*Thor Shipping A/S v. The Ship 'Al Duhal'*"; Gallagher, "Efforts to hold Donald Rumsfeld and other high-level United States officials accountable for torture".

respect to the topic under consideration, in the period from 1990 to June 2008, attempts at criminal prosecution were undertaken against at least 67 Heads of State and Government in various jurisdictions, and in approximately 65 of these cases, the jurisdictions concerned were national jurisdictions. Around 10 out of these 65 cases were attempts at criminal prosecution of former Heads of State and Government in foreign States. The cases concerned were attempts at criminal prosecution of former Heads of State and Government of Argentina in Spain (5 cases) and in Italy and Germany (1 case); of Chile in Spain (1 case); of Chad in Senegal and Belgium (1 case) and of Suriname in the Netherlands (1 case).²⁴ This factual list is scarcely exhaustive. To it can be added at least statements of charges submitted against China's former leader in Spain and Argentina,²⁵ as well as cases referred to in the preliminary report.²⁶ Meanwhile, in the overwhelming majority of cases, these attempts to call former Heads of State and Government and lower-ranking former officials²⁷ to account for their crimes have been unsuccessful. These facts are in themselves revealing.

16. While on the one hand, attempts at the criminal prosecution of senior foreign officials continue to be made, on the other, this is happening in a very small number of States, in practice only in respect of former such officials, and these attempts come to fruition only when the State, the criminal prosecution of whose officials is at issue, consents to such prosecution. Meanwhile, such consent is extremely seldom forthcoming. In recent times, one may perhaps recall only the consent of Chad to the criminal prosecution of the former President of that country, Hisssein Habré, in Senegal²⁸ and of Argentina in respect of its former military official Adolfo Scilingo (convicted of

²⁴ *Op. cit.*

²⁵ See footnote 19 above.

²⁶ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601, footnote 219.

²⁷ They were launched unsuccessfully, for example, in France and Germany against United States Defense Secretary Donald Rumsfeld ("French Prosecutors throw out Rumsfeld torture case", Reuters, 23 November 2007; K. Gallagher (footnote 23 above), pp. 1109–1112). Also notable is the so-called "Bush Six" case (six high-ranking officials in the Bush administration, including the former Attorney General and Undersecretary of Defense) in Spain (*ibid.*, pp. 1112–1114). Despite the recommendation of the Spanish Attorney General, in January 2010 the Central Court for Preliminary Criminal Proceedings number five, National Court (Madrid) confirmed the existence of Spanish jurisdiction over this case and sanctioned the continuation of investigations into the complaints against the United States officials. (This case is founded on a private prosecution on behalf of a number of non-governmental human rights organizations in Spain, representing the interests of persons who were victims of torture and other types of cruel and degrading treatment by United States armed services personnel. Spain's jurisdiction in this case has been confirmed despite restrictions introduced in 2009 on the application of "universal jurisdiction" in that country, since the Court considered the fact that one of the victims holds Spanish citizenship sufficient.)

²⁸ It is noteworthy, firstly that even when Chad waived the immunity of Hisssein Habré, the Senegalese court referred to the immunity of the former Head of State, and secondly that Senegal, in exercising its criminal jurisdiction in this case, relied on the corresponding decision by the African Union (see Decision on the *Hisssein Habré* case and the African Union, Doc. Assembly/AU/3 (VII)). See also *Case concerning questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, Provisional Measures, Order, 28 May 2009 (available at www.icj-cij.org).

crimes against humanity during the “Dirty War” 1976–1983) in Spain.²⁹ It is noted that until now attempts to exercise universal jurisdiction that have been successful have just taken place in cases where the State concerned consented.³⁰ In other cases, States usually react negatively to attempts to exercise foreign criminal jurisdiction even over their former Heads of State and Government, as they also do, however, in respect of other high-ranking officials. In the absence of cooperation with the State whose official a case concerns, the proper and legally correct criminal prosecution of such a person is practically impossible. On the whole,

²⁹ “Argentina recognizes Spain’s jurisdiction to try rights abuser”, Inter Press Service, 18 April 2005.

³⁰ “The ‘Pinochet precedent’: a mixed legacy for human rights”, Jurist, www.jurist.org.

therefore, such attempts end up merely complicating relations between States.³¹

³¹ As a result of the threat of arrest of Tzipi Livni, a series of visits of high-ranking Israeli representatives to the United Kingdom was cancelled, and the complication of bilateral relations became the subject of a series of publications and statements by officials (“Israel fury at UK’s Livni warrant”, BBC News, 15 December 2009). China lodged protests against decisions infringing upon the country’s leadership in Spain and Argentina (“China warns Spain over Tibet lawsuit”, *The New York Times*, 6 June 2006; “China criticizes Argentina for arrest request of Jiang Zemin, Falung Gong support”, *Voice of America*, 24 December 2009). The attempt to secure the arrest of the Minister for Foreign Affairs of the Democratic Republic of Congo in Belgium led to an inter-State dispute, which was referred to ICJ for consideration (*Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, at: www.icj-cij.org). The warrants for the arrest of a number of high-ranking Rwandan military officers issued in France led to Rwanda severing diplomatic relations with France in 2006 (*The New York Times*, 24 November 2006).

The scope of immunity of a State official from foreign criminal jurisdiction

A. Preliminary considerations

17. As a starting point for the consideration of issues relating to the scope of immunity, it is necessary to recall certain provisions stated in the preliminary report. In particular, based on the analysis contained in paragraphs 56–59, 64–70 and 84–96, the conclusions contained in subparagraphs (e)–(j) of paragraph 102 were drawn up. For the purposes of considering issues relating to the scope of immunity, the following are important:

(e) Immunity of officials from foreign criminal jurisdiction is a rule of international law and the corresponding juridical relations, in which the juridical right of the person... not to be subject to foreign jurisdiction reflects the juridical obligation of the foreign state not to exercise jurisdiction over the person.³²

(f) Immunity from criminal jurisdiction... is immunity from criminal process or from criminal procedure measures [and not from the substantive law of the foreign State];

(g) Immunity... is an obstacle to criminal liability but does not in principle preclude it;

(h) Actions performed by an official in an official capacity are attributed to the State. The official is therefore protected from the

criminal jurisdiction of a foreign State by immunity *ratione materiae*. However, this does not preclude attribution of these acts also to the person who performed them;

(i) Ultimately the State... stands behind the immunity of an official, whether this is immunity *ratione personae* or immunity *ratione materiae*, and behind those who enjoy immunity;

(j) Rationale for the immunity has some interrelated components, including principles of international law concerning sovereign equality of States and non-interference in internal affairs, need to ensure the stability of international relations and the independent performance of States’ activities.³³

18. Despite the existence in the doctrine of a different point of view,³⁴ it is fairly widely recognized that immunity from foreign jurisdiction is the norm, i.e. the general rule, the normal state of affairs, and its absence in particular cases is the exception to this rule. What is important in this context is not whether a State has to or does not have to invoke the immunity of its official in order for the issue of immunity to be considered or taken into account by the State exercising jurisdiction (the subject of such invocation will be considered further in the section on procedure). What is important is that if a case concerns senior officials, other serving officials or the acts of former officials performed when they were in office, in an official capacity, then the existence of an exemption from or an exception to this norm, i.e. the absence of immunity, has to be proven, and not the existence of this norm and consequently the existence of immunity. Since immunity is based on general international law, its absence (when, of course, immunity is not waived in the specific case) may be evidenced either by the existence of a special rule or the existence of practice and *opinio juris*, indicating that exceptions to the general rule

³² Evidently, it is more accurate to talk of the rights of a State in whose service a person stood or stands than of the rights of a person. The right to refer to immunity is enjoyed principally by a State and not a person. A dispute about a violation of rights and obligations deriving from immunity arises between a State claiming immunity and a State exercising jurisdiction. See, for example, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, p. 17, para. 40: “Despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the Arrest Warrant issued... against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant”. In the case *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, the Congo based its request for the indication of provisional measures on its right to “respect by France for the immunities conferred by international law on... the Congolese Head of State”, *Provisional Measures, Order of 17 June 2003, I.C.J. Reports 2003*, p. 108, para. 28. See also the comments of Lord Phillips of Worth Matravers: “It is common ground that the basis of the immunity claimed is an obligation owed to Chile, not to Senator Pinochet. The immunity asserted is Chile’s” in the case *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3) [2000] 1 AC 147*, pp. 79–80.

³³ Preliminary report (footnote 4 above), para. 102.

³⁴ Moving in the same direction, the memorandum by the Secretariat (footnote 5 above) mentions the need, in particular, to consider the question of whether international law recognizes any exceptions from or limitations to immunity (para. 88). It is also characteristic that the European Convention on State Immunity and the Convention on Jurisdictional Immunities of States and Their Property reflect the general principle of State immunity, and then formulate provisions on exceptions from this principle. On the view that immunity does not exist as a general rule, see, for example, the first footnote of paragraph 215 of the memorandum by the Secretariat.

have emerged or are emerging. It is precisely on this that the logic of the judgment of ICJ in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* appears to have been based.³⁵ It is therefore impossible to agree with the criticism of this judgment that the Court, instead of proving the existence of immunity, began to examine the practice of States, court rulings, international treaties etc. for the existence of evidence of the absence of immunity.³⁶ There was no need for the Court to look for evidence of the immunity of a Minister for Foreign Affairs since, according to prevailing opinion, it is the existing norm. It looked for evidence of the existence of a norm on exemptions from the rule governing immunity and did not find any.

19. One further preliminary consideration deriving from the conclusions cited above is that the immunity of an official, whether a serving or former official, belongs not to the official but to the State. For instance, an official of a State which has ceased to exist can hardly be said to have immunity.³⁷

20. And finally, the last preliminary consideration is the following. The Special Rapporteur does not yet see the need to consider immunity from pretrial measures of protection and immunity from execution separately from immunity from criminal jurisdiction as a whole.³⁸ From

³⁵ *I.C.J. Reports 2002*, p. 24, para. 58.

³⁶ Such criticism is expressed in a separate opinion by Judge Van den Wyngaert, who dissented from the majority in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Judgment, Dissenting opinion of Judge Van den Wyngaert, para. 11, at p. 143). Frulli ("The ICJ judgment on the *Belgium v. Congo* case (14 February 2002): a cautious stand on immunity from prosecution for international crimes", para. 3) puts forward a corresponding analysis in her article. In her view, the existence of absolute immunity from foreign jurisdiction for the Minister for Foreign Affairs is an issue that is still under dispute, whereas ICJ "did not adequately build its conclusions on the existence of rules of customary law granting such absolute immunities to foreign ministers... it did not substantiate its findings through State practice nor evidence of *opinio juris*, as it has accurately done in previous cases". Koller ("Immunities of foreign ministers: paragraph 61 of the *Yerodia* judgment as it pertains to the Security Council and the International Criminal Court", p. 15) also challenges the existence of grounds for recognizing the "absolute" immunity of a Minister for Foreign Affairs, noting that ICJ does not produce evidence of the existence of a corresponding rule in international law. ("The Court's decision lacks any clarity as to why the functions of foreign ministers necessitate such absolute immunity, particularly with regard to private visits to foreign countries. Head of State immunity before foreign courts is derived from the dignity of the state, not the function of the position. The Court needs to determine a functional basis for the extension of such immunity to foreign ministers; it is unclear, however, that such a basis exists".)

³⁷ See, for example, judgements of the Federal Constitutional Court in the case of the former leader of the German Democratic Republic Honecker in 1992 and in the case of members of the Government of the former German Democratic Republic found guilty of murders in 1996, and also the judgement of the Federal Supreme Court of Germany in the *Border Guards* case in 1992 (memorandum by the Secretariat (footnote 5 above), first footnote of para. 179).

³⁸ In the 2001 resolution of the Institute of International Law on immunities from jurisdiction and execution of Heads of State and of Government in international law, a separate provision was devoted to immunity from execution ("Immunities from jurisdiction and execution of Heads of State and of Government in international law", (para. 1)). However, the subject matter of the resolution is immunity not only from criminal jurisdiction but also from other types of jurisdiction. The memorandum by the Secretariat (footnote 5 above) also points out that such a separation is made when other types of jurisdiction are involved, although the view is expressed there that the separation of immunity from execution from immunity from jurisdiction raises certain specific

the very outset, criminal jurisdiction has been interpreted in this study as referring to the entirety of the criminal procedural measures at the disposal of the authorities in respect of foreign officials.

B. Immunity *ratione materiae*³⁹

21. The issue of the immunity *ratione materiae* of State officials other than the so-called threesome was considered by ICJ in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.⁴⁰ This case concerned the immunity of the *Procureur de la République* and the Head of the National Security Service of Djibouti. The Court did not number these officials among those high-ranking persons enjoying immunity *ratione personae*. The Court noted:

There are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case.⁴¹

Establishing in this manner that the persons indicated lacked personal immunity in this case both under general and under special international law, the Court at the same time did not indicate directly that they held functional immunity. At the same time, it would appear to follow from the logic of paragraphs 195 to 196 of the Court judgment that if Djibouti had informed France in good time that the acts of these persons, which are the subject of consideration by the French authorities, were acts carried out in an official capacity, i.e. acts of the State of Djibouti itself, and correspondingly, that these persons enjoyed immunity from French criminal jurisdiction in respect of these acts, then it may have been a question of France ensuring that obligations stemming from the immunity were observed. The court even formulated a general provision in this respect, identifying the officials of a State with its organs.⁴² The memorandum by the Secretariat cites a series of court judgments recognizing the immunity of officials with respect to official acts.⁴³ There is to all appearances also agreement in the doctrine on the question of the category of persons enjoying immunity *ratione materiae*: all State officials are meant, irrespective of their position within the structure of the organs of State power.⁴⁴

22. If it is assumed that State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction, then a number of questions concerning the scope of this

issues and makes the division of immunity from execution into immunity from execution at the stage before the adoption of a substantial ruling by the court and immunity from execution at the stage after the adoption of a substantial ruling by the court worth exploring (para. 234).

³⁹ See memorandum by the Secretariat (footnote 5 above), paras. 154–212.

⁴⁰ *Judgment, I.C.J. Reports 2008*, p. 177.

⁴¹ *Ibid.*, pp. 70–71, para. 194.

⁴² "The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State." (*ibid.*, p. 244, para. 196)

⁴³ See memorandum by the Secretariat, (footnote 5 above), para. 169.

⁴⁴ See *ibid.*, paragraph 166 and the second footnote of that paragraph.

immunity need to be answered. It has to be determined which acts can be considered acts performed in an official capacity as distinct from acts which are private in character, whether this immunity is State immunity and whether it is identical in scope with State immunity (in particular, whether officials enjoy immunity in respect of official acts *jure gestionis*). It has to be clarified whether acts *ultra vires* and illegal acts may be considered official and consequently covered by immunity *ratione materiae*. The question has to be answered whether officials enjoy immunity *ratione materiae* in respect of acts performed before holding office and, after leaving office, in respect of acts performed while holding office. It needs to be understood whether immunity *ratione materiae* depends on the nature of the stay abroad of the person who is enjoying such immunity at the time when a decision is taken on exercising foreign criminal jurisdiction over this person. It should be stressed that we are talking here of officials who do not enjoy immunity *ratione personae*. In other words, these officials do not enjoy immunity from foreign jurisdiction in respect of acts performed in a personal capacity. At the same time, answers to these questions also apply to those high-ranking officials who enjoy immunity *ratione personae*. Furthermore, we will be concerned here with the state of affairs as a general rule. The issue of possible exceptions will be considered further.

23. In discussing the issue of the immunity of officials, the parties in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* were in agreement that on the whole State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction, i.e. immunity in respect of acts performed in an official capacity, since these acts are acts of the State itself which they serve.⁴⁵ This immunity was, in essence, identified by the parties with State immunity.⁴⁶ It would appear that the Court itself proceeds on this assumption in its judgment in this case, stating that “such a claim [Djibouti’s reformulated claim of functional immunity in respect of the *Procureur de la République* and the Head of National Security] is, in essence, a claim of immunity for the Djiboutian State, from which the *Procureur de la République* and the Head of National Security would be said to benefit”.⁴⁷ Buzzini points this out in his detailed analysis of this judgment.⁴⁸ The Commission, commenting nearly 50 years ago on a draft article on the immunity of consular officials, spoke of the same thing:

The rule that, in respect of acts performed by them in the exercise of their functions (official acts) members of the consulate are not amenable to the jurisdiction of the... receiving State, is part of customary international law. This exemption represents an immunity which the sending State is recognized as possessing in respect of acts which are those of a sovereign State. By their very nature such acts are outside the jurisdiction of the receiving State, whether civil, criminal or administrative.

⁴⁵ See preliminary report (footnote 4 above), footnote 163.

⁴⁶ “What Djibouti requests of the Court is to acknowledge that a State cannot regard a person enjoying the status of an organ of another State as individually criminally liable for acts carried out in that official capacity, that it to say in the performance of his duties”, ICJ, CR 2008/3, 22 January 2008, para. 24. The legal counsel for France also spoke of this (see preliminary report (footnote 4 above), footnote 163).

⁴⁷ *I.C.J. Reports 2008*, p. 242, para. 188.

⁴⁸ Buzzini (footnote 23 above), pp. 462–463.

Since official acts are outside the jurisdiction of the receiving State, no criminal proceedings may be instituted in respect of them.⁴⁹

24. The Special Rapporteur considers it right to use the criterion of the attribution to the State of the conduct of an official in order to determine whether the official has immunity *ratione materiae* and the scope of such immunity.⁵⁰ At the same time, the Special Rapporteur does not see objective grounds for drawing a distinction between the attribution of conduct for the purposes of responsibility on the one hand and for the purposes of immunity on the other. There can scarcely be grounds for asserting that one and the same act of an official is, for the purposes of State responsibility, attributed to the State and considered to be its act, while, for the purposes of immunity from jurisdiction, it is not attributed as such and is considered to be only the act of an official.

⁴⁹ *Yearbook ... 1961*, vol. II, p. 117, para. (2) of the commentary to article 43. This viewpoint is also widespread in the doctrine. For example, David (*Éléments de Droit Pénal International et Européen*, p. 58) states “The immunity of State agents is just one application of the principle of State immunity”. According to Simbeye (*Immunity and International Criminal Law*, pp. 109–110) “Conduct that is directly attributable to state action is considered an act of state. As the person in question does not commit such acts for his own personal benefit, foreign domestic courts have to grant such acts immunity. Although the person in question commits the act, he is considered to be immune from prosecution for such conduct because it is his state that has acted. The act itself is non-justiciable in a foreign court for an indefinite period.” Van Alebeek (*The Immunity of States and their Officials in International Criminal Law and International Human Rights Law*, 2008, p. 103) notes that “the functional immunity of (former) foreign state officials is often approached as a corollary of the rule of state immunity”. She refers at the same time to the well-known pronouncement of the United Kingdom Court of Appeal in *Propend Finance v. Sing*, “The protection afforded by the [State Immunity Act] to States would be undermined if employees, officers or... ‘functionaries’ could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity. [The relevant provisions of the SIA] must be read as affording individual employees or officials of a foreign State protection under the same cloak as protects the State itself” (United Kingdom Court of Appeal, *Propend Finance Ltd. v. Sing* (1997), 111 ILR 611, at p. 669). However, this author considers that “[t]he application of the rule of state immunity to foreign state officials can be explained in different terms. As a rule, foreign state officials do not incur personal responsibility for acts committed under the authority of their home state... The non-personal responsibility of state official for acts committed on behalf of the state may be seen to be an autonomous principle that precedes in its operation the application of the rule of state immunity to the facts of the case” (*op. cit.*, pp. 106–107). The Special Rapporteur is not sure of the correctness of such a juxtaposition of approaches, all the more so in that they lead to the same result. A little further on in her book, van Alebeek writes: “In sum, foreign state officials enjoy immunity in regard to official acts. Acts committed as a mere arm or mouthpiece of a foreign state are acts of that state rather than acts of the officials personally. Accordingly state officials cannot be called to account for them in their personal capacity” (*op. cit.*, p. 112.). In addition, one can talk of the “non-responsibility of foreign officials” (all the more so as a principle) only with a degree of conditionality. In law, as has already been noted in the preliminary report, immunity and responsibility are quite different things. The official conduct of an official is, of course, attributed to the State, but this does not mean that it cannot simultaneously be attributed to that person. For example, the State which the person serves has only to waive immunity, and the foreign State is given the possibility of exercising criminal jurisdiction over that person. However, see van Alebeek (footnote 49 above). She states that it is not possible to revoke immunity in some cases. Firstly, it is possible not to claim immunity. Secondly, what is to be done about the implementation of liability on the basis of international law under international criminal jurisdiction for the same act? Does this change the attribution of the conduct or classification of the conduct as official?

⁵⁰ See paragraph 89 of the preliminary report (footnote 4 above), and also the conclusion contained in paragraph 102 (*h*). In this regard, the Special Rapporteur shares the approach of the Secretariat to the meaning of attribution set out in paragraph 156 of the memorandum by the Secretariat (footnote 5 above).

25. The issue of determining whether the conduct of an official is official or personal in nature, and correspondingly of attributing or not attributing this conduct to the State, must logically be considered before the issue of the immunity of the official in connection with this conduct is considered. Commenting on the issue of functional immunity in paragraph 2 of article 39 of the Vienna Convention on Diplomatic Relations, Denza notes that “the correct test to be applied... is one of imputability. If the conduct in question is imputable or attributable to the sending State—even if it did not expressly order or sanction it—then continuing immunity *ratione materiae* should apply”.⁵¹

26. That the act of an official acting in this capacity is attributed to the State is generally recognized.⁵² As noted by ICJ in the *Difference Relating to the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* case, “According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule... is of a customary character.”⁵³ The question, consequently, is that of what conduct of an official can (must) be considered to have been exercised in an official capacity and correspondingly be attributable to the State, i.e. considered as State conduct, and what cannot be considered as such and can (must) be considered as conduct exercised in a personal capacity. It is thus a question of the criterion on the basis of which it can be established that a State official is acting in a capacity as such and not in a personal capacity.

27. This question has also already been considered by the Commission. As noted in the commentary to article 4 of the draft articles on responsibility of States for internationally wrongful acts:

It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question are attributable to the State.⁵⁴

⁵¹ Denza, “*Ex parte Pinochet: lacuna or leap?*”, p. 951. See also Denza, *Diplomatic Law, A commentary on the Vienna Convention on Diplomatic Relations*.

⁵² See the Commission’s commentary to article 4 of the draft articles on the responsibility of States for internationally wrongful acts. *Yearbook ... 2001*, vol. II (Part Two), pp. 40–42.

⁵³ Advisory Opinion, *I.C.J. Reports 1999*, p. 87, para. 62.

⁵⁴ *Yearbook ... 2001*, vol. II (Part Two), p. 42, commentary to article 4, para. (13). See examples of drawing a distinction between “unauthorized conduct of a State organ and purely private conduct” in international arbitral awards. A somewhat different criterion was applied by Japanese courts when considering criminal cases against American soldiers serving in that country’s territory in order to determine whether the acts under consideration were acts performed in an official or a personal capacity. They analysed whether these acts were performed in the interests of service. Thus in the case *Japan v. William S. Girard* concerning the charge against an American serviceman of having inflicted grievous injury leading to death, the Court stated that “[a]lthough the Court is able to recognize that this case took place while the accused was on official duty and that it occurred at the place of duty, the case has no direct connection whatever with the execution of the duty of guarding a light machine gun, etc. as ordered by a senior officer... [T]he act was not committed in the process of carrying out one’s official duty” and further: “the act can only be regarded as excessive mischief... an action simply carried out for the sole purpose of satisfying the momentary caprice of the accused himself” (*Japan v. William S. Girard*, Maebashi District Court, 19 November 1957, reproduced in *The Japanese Annual of International Law*, No. 2 (1958) 128, pp. 132–133). In considering an appeal against a judgement by Osaka High Court in the case of another United States serviceman (he was charged with having caused grievous injury during an attempted rape) the Supreme Court

Thus, it is the view of the Commission that, in order for the acts of an official to be deemed to have been performed in this capacity, i.e. official acts, they must clearly have been performed in this capacity or “under the colour of authority”.⁵⁵ Consequently, classification of the conduct of an official as official conduct does not depend on the motives of the person or the substance of the conduct. The determining factor is that the official is acting in a capacity as such. It is necessary to judge whether the actions of an official are official or private depending on the circumstances of each concrete situation.⁵⁶

28. One of the questions which arises in this connection is whether the distinction between acts *jure imperii* and acts *jure gestionis*, important in the context of State immunity, is applicable to situations involving the immunity of State officials. Noting that there are differing viewpoints on this issue in the doctrine, the Secretariat draws the conclusion in its memorandum that

there would seem to be reasonable grounds for considering that a State organ performing an act *jure gestionis* which is attributable to the State is indeed acting in his or her official capacity and would therefore enjoy immunity *ratione materiae* in respect of that act.⁵⁷

It would appear difficult not to agree with this. As the Commission has already noted, for the purposes of attributing conduct to the State “[i]t is irrelevant... that the conduct of a State organ may be classified as ‘commercial’ or as *acta jure gestionis*”.⁵⁸ In such a case, the scope of immunity of the State and the scope of immunity of its official are not

of Japan upheld that “the Court in the first instance is proper that the provision ‘in the performance of official duty’ in Paragraph 3 (a) (ii) of Article XVII of the Administrative Agreement (this article of the Agreement between Japan and the United States establishes the priority of United States jurisdiction in the event of a crime being committed by an American serviceman as a result of actions performed during the execution of their official duties) should be interpreted to mean ‘in the course of the performance of official duty’, rather than ‘during the hours of official duty’; and as applied to the instant case, the accused, even though performed during the hours of his official duty, was of a private nature independent of his official duty, and it therefore did not constitute an offense ‘arising out of any act or omission done in the performance of official duty’” (*Japan v. Dennis Cheney*, Supreme Court of Japan, 3 March 1955, *ibid.*, p. 137).

This criterion has its followers in the doctrine. Simbeye (footnote 49 above, p. 128), for example, notes that “[i]n order to act as state organs in their official function, heads of state and government must act in line with their state’s position in a given subject matter, or act within that state’s given boundaries for action. Then and only then can their acts be deemed official.”

⁵⁵ See preceding footnote. As van Alebeek (footnote 49 above, p. 113) notes: “In general it can be said that ostensible authority is accepted as actual authority”. See also Watts, “The legal position in international law of Heads of State, Heads of Government and Foreign Ministers”, pp. 56–57.

⁵⁶ “In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances”. *Yearbook ... 2001*, vol. II (Part Two), p. 42, commentary to article 4, para. (13). At the same time, account must be taken of the fact that as before there is no unanimity in doctrine in this regard. The viewpoint that the substance of conduct at least must be taken into account in order to determine the official nature of such conduct and in order to resolve the question of its attribution to the State is fairly broadly accepted. In this connection, see the discussion on actions which are crimes under international law as facts precluding the immunity of officials. See paragraphs 57 *et seq.* of the present report.

⁵⁷ Memorandum by the Secretariat (footnote 5 above), para. 161.

⁵⁸ *Yearbook ... 2001*, vol. II (Part Two), p. 40, commentary to article 4, para. (6), of the draft articles on the responsibility of States for internationally wrongful acts.

identical despite the fact that in essence⁵⁹ the immunity is one and the same. An official performing an act of a commercial nature, if this act is attributed to the State, enjoys immunity from foreign jurisdiction, but the State itself, in respect of such an act, does not (whereas civil and criminal jurisdiction apply in relation to the official, in relation to the State only civil jurisdiction applies).⁶⁰

29. Another question is whether *ultra vires* conduct and illegal conduct can be attributed to the State and, correspondingly, covered by immunity. The concept of an “act of an official as such”, i.e. an “official act”, must be differentiated from the concept of an “act falling within official functions”. The former includes the latter, but is broader. As long ago as 1961, the Commission, commenting on the draft articles concerning the immunity of consular officials, according to which “[m]embers of the consulate shall not be amenable to the jurisdiction of the... receiving State in respect of acts performed in the exercise of consular functions”,⁶¹ noted:

In the opinion of some members of the Commission, the article should have provided that only official acts within the limits of the consular functions enjoy immunity of jurisdiction. The Commission was unable to accept this view.⁶²

Acts outside the limits of the functions of an official, but performed by him in this capacity do not become private. They are not acts within the limits of his functions and acquire, for example, *ultra vires* character, but nonetheless remain official acts and, therefore, are attributed to the State. Article 7 of the draft articles on the responsibility of States for internationally wrongful acts is devoted to this.⁶³ As the Commission notes in the commentary to article 5 of these draft articles:

The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra vires* or in breach of the rules governing the operation. In the latter case, the organ is nevertheless acting in the name of the State.⁶⁴

Consequently, in respect of such acts immunity *ratione materiae* from foreign criminal jurisdiction extends to the officials who have performed them. As Buzzini notes:

⁵⁹ It is characteristic that, in the passage from the judgment in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* cited in paragraph 23 of this report, ICJ uses the qualification “in essence”. See also footnote 47 above.

⁶⁰ It is worth recalling here that, as noted in the preliminary report (footnote 4 above), this does not mean that this act cannot simultaneously be attributed to the official.

⁶¹ *Yearbook ... 1961*, vol. II, p. 117, art. 43 (Immunity from jurisdiction).

⁶² *Ibid.*, p. 117, commentary to article 43, para. (3). The Commission further pointed out here that “It is in fact often very difficult to draw an exact line between what is still the consular official’s act performed within the scope of the consular functions and what amounts to a private act or communication exceeding those functions” (*ibid.*). The latter merely underlines the need for the circumstances of each specific situation to be evaluated.

⁶³ *Yearbook ... 2001*, vol. II (Part Two), p. 26:

“Article 7. Excess of authority or contravention of instructions

“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”

⁶⁴ *Ibid.*, p. 42, commentary to article 4, para. (13). See also *ibid.*, p. 46, commentary to article 7, paras. (7) and (8).

Excluding in general terms *ultra vires* acts from the scope of immunity *ratione materiae* from foreign criminal jurisdiction would be problematic, since this might lead to defeating the whole purpose of such immunity; in most cases, official conduct giving rise to a criminal offense should probably also be regarded as *ultra vires*.⁶⁵

30. It is also difficult to agree with the viewpoint according to which conduct of an official beyond the limits of that which falls within the functions of the State may be considered as conduct of the State but, since it falls outside the limits of the functions of the State, does not have immunity extended to it.⁶⁶ This point of view is justified by claiming that immunity of the State and its officials has as its aim protection of the sovereign functions of the State, and that that which does not fall within the functions of the State cannot be covered by immunity.⁶⁷ However, immunity protects not the sovereign function as such—this would be simply an abstraction with no link to reality—but, as noted above, sovereignty itself and its bearer, the State, from foreign interference.⁶⁸

⁶⁵ Buzzini (footnote 23 above), p. 466. At the same time, account must be taken of the existence of national judicial practice based on the opposite approach to *ultra vires* acts. An example is the judgement of the Supreme Court of the Philippines concerning the case *United States of America, et al. v. Luis R. Reyes, et al.* (G.R. No. 79253, 1 March 1993). In this case, the refusal to satisfy the petition of the United States concerning dismissal of a civil claim against the respondent was challenged before the court (United States citizen serving in a subdivision of the Joint United States Military Assistance Group, JUSMAG). The petition was motivated by the United States having jurisdictional immunity in relation to this claim, as well as by the respondent having immunity from a claim in connection with acts performed by her in the discharge of official functions. At the same time, the plaintiff insisted that the acts performed by the respondent (search of her person and search of the car in the presence of external witnesses and on a discriminatory basis), exceeded the limits of her official functions, were *ultra vires* acts and must be considered acts in a personal capacity. The United States submitted as an argument that “...even if the latter’s [respondent’s] act were *ultra vires* she would still be immune from suit for the rule that public officers or employees may be sued in their personal capacity for *ultra vires* and tortious acts is ‘domestic law’ and not applicable in International law. It is claimed that the application of the immunity doctrine does not turn upon the lawlessness of the act or omission attributable to the foreign national for if this were the case, the concept of immunity would be meaningless as inquiry into the lawlessness or illegality of the act or omission would first have to be made before considering the question of immunity; in other words, immunity will lie only if such act or omission is found to be lawful”. The Court, however, did not find the arguments of the United States persuasive and rejected the appeal, stating that “[t]he cloak of protection afforded the officers and agents of the government is removed the moment they are sued in their individual capacity. This situation usually arises where the public official acts without authority or in excess of the powers vested in him. It is a well-settled principle of law that a public official may be liable in his personal private capacity for whatever damage he may have caused by his act done with malice and in bad faith, or beyond the scope of his authority or jurisdiction” (*Philippine Laws and Jurisprudence Databank*).

⁶⁶ See memorandum by the Secretariat (footnote 5 above), para. 206, last footnote.

⁶⁷ Stern, for example, writes: “[T]he immunities or other doctrines protecting the state and its representatives were developed to protect the sovereign function, and nothing else; therefore, all that is outside of this sovereign function should be excluded from this benefit” (“Vers une limitation de l’ ‘irresponsabilité souveraine’ des États et chefs d’État en cas de crime de droit international?”, p. 516).

⁶⁸ The question of who plays the decisive role in determining whether acts have been performed in an official or a private capacity is important. Is it sufficient for the State which an official serves to inform the State exercising jurisdiction that the acts were performed in an official capacity? Is it necessary to prove this in court and, correspondingly, does the decisive role in this case belong to the court? Is there a general answer to these questions for all cases, or does the answer depend on the specific circumstances of each case? These questions will be considered in more detail in the part of the preliminary report concerning procedural issues of immunity.

31. Immunity *ratione materiae* also extends to the acts of an official, performed by him in that capacity, which are illegal. It would seem that the logic here is the same as that applied to *ultra vires* acts of an official. The illegal acts of an official, performed by him in that capacity, are official acts, i.e. acts of the State. In Canada, as the Court of Appeal of the Province of Ontario noted in its judgement in the case of *Jaffe*, in which the acts of United States officials were in question, “[t]he illegal and malicious nature of the acts alleged do not themselves move the actions outside the scope of the official duties of the responding defendants”.⁶⁹ As Watts wrote in relation to the issue of the immunity of former Heads of State:

A Head of State clearly can commit a crime in his personal capacity; but it seems equally clear that he can, in the course of his public functions as Head of State, engage in conduct which may be tainted by criminality or other forms of wrongdoing. The critical test would seem to be whether the conduct was engaged in under the colour of or in ostensible exercise of the Head of State’s public authority. If it was, it must be treated as official conduct, and so not a matter subject to the jurisdiction of other States *whether or not* it was wrongful or illegal under the law of his own State.⁷⁰

The assertion that immunity does not extend to such acts renders the very idea of immunity meaningless. The question of exercising criminal jurisdiction over any person, including a foreign official, arises only when there are suspicions that his conduct is illegal and, what is more, criminally punishable. Accordingly, it is precisely in this case that immunity from foreign criminal jurisdiction is necessary. As noted in the memorandum by the Secretariat:

If unlawful or criminal acts were considered, as a matter of principle, to be “non-official” for the purposes of immunity *ratione materiae*, the very notion of “immunity” would be deprived of much of its content.⁷¹

⁶⁹ Canada, Ontario Court of Appeal, *Jaffe v. Miller and Others* (1993), 95 ILR 446, at p. 460.

⁷⁰ Watts (footnote 55 above), pp. 56–57. The views of Watts cited also apply in full to other State officials.

⁷¹ Memorandum by the Secretariat (footnote 5 above), para. 160 (including the footnote). See also the position of the United States in the case *United States of America, et al. v. Luis R. Reyes, et al.* (see footnote 65 above). It should, however, be pointed out that the majority of observers advocating an absence of immunity for officials in connection with the performance of illegal acts limit the category of such acts to crimes under international law, i.e. the gravest forms of illegal act. See, for example, Simbeye (footnote 49 above), p. 127: “State officials, including heads of state or government, can commit crimes whilst in office. However, it is arguable that the commission of certain acts should exclude an individual from being classified as a state organ for international law purposes. If an individual commits an international crime he cannot be seen to be acting as a state organ under either domestic or international law”. Simbeye continues: “When dealing with international criminal law, states as abstract entities cannot order or sanction conduct punishable under criminal jurisdiction, nor indeed can a state carry out such acts itself... [I]n a situation where customary norms prohibit certain acts or there exists a treaty that the state in question has ratified, imputability is impossible” (*ibid.* p. 129). Stern also considers that “immunities should not be permitted to protect a state or its representatives either in criminal cases or in civil cases when an international crime is committed, since such an act should be considered as dramatically outside the functions of a state” (“Can a State or a Head of State claim the benefit of immunities in case an international crime has been committed?” pp. 448–449.) She explains, however, that “[i]f one considers the official acts that enjoy immunity, it must be conceded that it is not because an act is illegal that it is ipso facto disqualified from being an official act: if this were true, the institution of immunity would make no sense, as it is precisely to protect the head of state from prosecution that it was instituted” (“Immunities for Heads of State: Where Do We Stand?” p. 99). Nonetheless, it would appear that, even in the cases referred to, such acts performed by a person in an official capacity will be attributed to the State with all the

32. Since immunity *ratione materiae* protects an official only in respect of acts performed in this (official) capacity, this immunity does not extend to acts which were performed by that person prior to his taking office, in a private capacity. Those acts were not State acts and did not take on the character of such acts upon entry of that person into government service.

33. Conversely, a former official is protected by immunity *ratione materiae* in respect of acts performed by him during the period when the official was acting in this capacity. These acts do not cease to be acts of the State because the official ceased to be such and they therefore continue as before to be covered by immunity, this being, in essence, State immunity.⁷²

34. From this logic, it also follows that immunity *ratione materiae* can scarcely be affected by the nature of an official’s or a former official’s stay abroad, including in the territory of the State exercising jurisdiction. Apparently, irrespective of whether this person is abroad on an official visit or staying there in a private capacity, he enjoys immunity from foreign criminal jurisdiction in respect of acts performed in his capacity as an official.⁷³

C. Immunity *ratione personae*⁷⁴

35. This part of the report is concerned solely with the scope of this immunity and does not examine the question of the category of persons possessing immunity *ratione personae*. The Special Rapporteur is proceeding on the assumption that it is enjoyed by the so-called threesome (Head of State, Head of Government and Minister for Foreign Affairs), as well as by certain other high-ranking State officials.

consequences which that entails. See in this regard Dominice: “Some judges have declared (in the *Pinchet* case) that it is not the function of a Head of State to order acts of torture, clearly contrary to international law... That would mean that international law brings a necessary corrective to the constitutional powers of a Head of State. And according to what criteria? Whether or not the act is contrary to international law? This construction is not satisfactory. An act of function remains an act of function, even if it is contrary to international law. In this case, it leads to international responsibility of the State, without prejudice to that of the individual organ.” (“Quelques observations sur l’immunité de juridiction pénale de l’ancien chef d’Etat”, pp. 304–305).

⁷² According to Cassese, “[immunity] does not cease at the end of the discharge of official functions by the State agent (the reason being that the act is legally attributed to the State, hence any legal liability for it may only be incurred by the State)”, (“When may senior State officials be tried for international crimes? Some comments on the *Congo v. Belgium* Case”, p. 863). According to O’Donnell (footnote 23 above, pp. 384–385), “Once the [diplomatic] agent leaves office, the immunity ceases with respect to private acts under immunity *ratione personae*, or personal immunity, but continues for official acts. The limited shield of immunity *ratione materiae*, or functional immunity, afforded to official acts derives from the belief that the ‘ambassador’s actions are attributed to his government, rather than to personal choice’” (citing Michael A. Tunks, “Diplomats or Defendants? Defining the Future of Head-of-State Immunity”, *Duke Law Journal* 52 (2002), p. 651).

⁷³ In addition to immunity *ratione materiae*, officials on official visits abroad may of course enjoy immunity founded in other rules of international law, such as those regulating, for example, the status of members of special missions or delegations in the organs of international organizations. Obviously, with regard to a former official, the question of the nature of his visit to a foreign State does not arise as such a visit cannot be official. This, in turn, does not affect immunity *ratione materiae*.

⁷⁴ See memorandum by the Secretariat (footnote 5 above), paras. 94–153.

36. As noted in the preliminary report:

Immunity *ratione personae* extends to acts performed by a State official in both an official and a private capacity, both before and while occupying his post.⁷⁵

The existence of this immunity is explained by the importance of the relevant post to the State, the exercise of its sovereignty and its representation in international relations.⁷⁶ In the modern world, the importance of the posts of Head of Government, Minister for Foreign Affairs and possibly certain other officials is, from this point of view, entirely commensurate with the importance of the Head of State. Therefore, it would appear, at least at the present stage of work on this topic, that it makes no sense to consider the scope of immunity *ratione personae* of a Head of State, Head of Government, Minister for Foreign Affairs or other possible holders of such immunity⁷⁷ separately.

37. As noted in the memorandum by the Secretariat, the material scope of this immunity is well-settled both in judicial decisions and the legal literature, which often express this idea by qualifying immunity *ratione personae* as “complete”, “full”, “integral” or “absolute”.⁷⁸ In terms of scope, this is the same immunity from foreign criminal jurisdiction as the immunity of heads of diplomatic missions or other diplomatic agents from the criminal jurisdiction of the receiving State under the Vienna Convention on Diplomatic Relations⁷⁹ and customary international law, or of representatives of the sending State and members of the diplomatic personnel of special missions under the Convention on Special Missions. It can be considered as supplementing immunity *ratione materiae* or as including immunity *ratione materiae*, since, while a person occupies a high-level post, it covers, in addition to acts performed in an official capacity, acts performed by him in a private capacity both while holding office and prior to taking up office. Since it is linked to a particular high-level post, personal immunity is temporary in character and ceases when the post is departed.⁸⁰ Therefore, immunity *ratione personae* would appear not to be affected either by the fact that acts, in connection with which jurisdiction is being exercised, were performed outside the limits of the functions of the official or by the nature of his stay abroad, including in the territory of the State exercising jurisdiction.⁸¹

⁷⁵ Preliminary report (footnote 4 above), para. 79; see also memorandum by the Secretariat (footnote 5 above), para. 137.

⁷⁶ Preliminary report (footnote 4 above), para. 93.

⁷⁷ Referring to how ICJ describes the scope of the immunity *ratione personae* as it applies to a Minister for Foreign Affairs in the *Case Concerning the Arrest Warrant of 11 April 2000*, the Secretariat notes in paragraph 138 of its memorandum (see footnote 5 above) that this description “could be used *mutatis mutandis* to describe and explain the position of the head of State, head of government or any other official enjoying the same immunity”.

⁷⁸ *Ibid.*, para. 137.

⁷⁹ *Ibid.*, para. 139. In *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, ICJ recalled that “the rule of customary international law reflected in Article 29 of the Vienna Convention on Diplomatic Relations, while addressed to diplomatic agents, is necessarily applicable to Heads of State” (*I.C.J. Reports 2008*, p. 238, para. 174).

⁸⁰ See preliminary report (footnote 4 above), paras. 79–83.

⁸¹ Other opinions on this matter have also been advanced. Thus, the Joint Separate Opinion of Judges Higgins, Kooijmans and Buerghental in the *Case Concerning the Arrest Warrant of 11 April 2000* states: “Whether he [the Minister for Foreign Affairs] is also entitled to immunities during private travels and what is the scope of any such

D. Acts of a State exercising jurisdiction which are precluded by the immunity of an official

38. Within the framework of this topic, criminal jurisdiction is understood to mean not just the trial phase of the criminal process but the totality of criminal procedure measures taken by a State against a foreign official. As noted in the preliminary report:

Immunity from foreign criminal jurisdiction protects [an] individual... from criminal process and criminal procedure actions by judicial and law enforcement agencies of the foreign State possessing jurisdiction. (It might be more accurate to speak not of immunity of State officials from foreign criminal jurisdiction or criminal process but of immunity from certain measures of criminal procedure and from criminal proceedings by the foreign State. However, this question cannot be answered until the question of the scope of immunity has been considered.)⁸²

This differentiates this topic substantially from the subject of immunity from civil jurisdiction.

39. To the question of whether immunity protects an official from all measures which may be taken in the exercise of foreign criminal jurisdiction or only from some of these measures must be added the question of what measures may be taken with regard to an official who is not a suspect but features in a criminal case in another capacity, in particular as a witness.

40. In its judgment in the *Case Concerning the Arrest Warrant of 11 April 2000*, ICJ concluded that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability”. It stated: “That immunity and that inviolability protect the individual concerned against any act of authority of another state which would hinder him or her in the performance of his or her duties”.⁸³ It added:

Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office... Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her functions.⁸⁴

immunities, is far less clear” (*I.C.J. Reports 2002*, p. 88, para. 84). Here, however, the authors make the proviso: “Certainly, he or she may not be subjected to measures which would prevent effective performance of the functions of a Foreign Minister.” Watts puts forward differences between official and private visits of Heads of State to a foreign State from the viewpoint of scope of immunity. Among other things, he voices doubts that a Head of State enjoys immunity during a private visit in the three cases which are excluded from the immunity of a diplomatic agent under article 31 (1) of the Vienna Convention on Diplomatic Relations (actions in connection with private immovable property, on matters of succession and in connection with activity exercised outside official functions). He also notes that although “[a Head of State] cannot be sued in respect of... official acts while in office, or even after he has left office, and must also be granted immunity in respect of them when he is travelling privately... to the extent that immunity is refused in respect of a Head of State’s private acts when he is in a foreign State on some official basis or when he is sued there although not present there, it is likely that it will also be refused when he is on a private visit” (footnote 55 above, p. 74).

⁸² Preliminary report (footnote 4 above), para. 66.

⁸³ *Judgment, I.C.J. Reports 2002*, p. 22, para. 54.

⁸⁴ *Ibid.*, para. 55. Applying this criterion, ICJ came to the conclusion that the arrest warrant violated the immunity of the Minister for Foreign

Thus, in the circumstances of this case (which, it is recalled, concerned the lawfulness of a warrant for the arrest of the Minister for Foreign Affairs of another State), ICJ formulated criteria for deciding the question of whether a particular criminal procedure measure may be implemented against a foreign official: a State exercising or intending to exercise criminal jurisdiction over the official may not perform such criminal procedure acts as hamper or prevent this person from exercising his or her functions. (It should be noted that this criterion was determined by the Court as it applies to a Minister for Foreign Affairs who features in this case.)

41. This criterion underwent certain development in the judgment of ICJ in *Certain Questions of Mutual Assistance in Criminal Matters*. In this case, considering the question of whether the invitation or serving of a summons to a Head of State to appear as a witness in a criminal case constituted a violation of the norm concerning the immunity of a Head of State, the Court, referring to the position cited above from the judgment in the *Case Concerning the Arrest Warrant of 11 April 2000*, ruled: “[T]he determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority”.⁸⁵ Having applied this criterion, the Court came to the conclusion that:

The summons addressed to the President of the Republic of Djibouti by the French investigating judge... was not associated with the measures of constraint...; it was in fact merely an invitation to testify which the Head of State could freely accept or decline. Consequently, there was no attack by France on the immunities from criminal jurisdiction enjoyed by the Head of State, *since no obligation was placed upon him in connection with the investigation of the Borrel case*.⁸⁶

(Footnote 84 continued.)

Affairs of the Democratic Republic of the Congo. The conclusions of the Court in this regard follow in many respects the arguments which the Democratic Republic of the Congo party put forward in the case, although the Court does appear to narrow the range of measures, exercise of which prevents immunity, by introducing the criterion indicated. In addition, the Democratic Republic of the Congo, in its memorial of 15 May 2001, points out: “Inviolability and immunity are in fact functional, in the sense that they are automatically granted in general international law to the person who benefits as a result of the official functions that he or she exercises, to allow the proper performance of those functions by protecting against foreign interference which is not authorized by the State that the person represents.” (para. 47). As regards the arrest warrant directly: “The mere fear of the execution of the arrest warrant is indeed likely to limit travel abroad of the minister in question, thereby prejudicing the conduct of international relations of the State that the principles of inviolability and immunity are intended to save” (para. 52).

⁸⁵ *I.C.J. Reports 2002*, p. 63, para. 170.

⁸⁶ *Ibid.*, p. 64, para. 171. France adopted approximately the same position, stating that “only limiting the freedom of action he requires in order to perform his duties might fail to respect the immunity from criminal jurisdiction and the inviolability of a foreign Head of State” (*ibid.*, p. 63, para. 167.) In its counter-memorial of 13 July 2007, the French party notes that: “in general, a request for testimony to the representative of a foreign power... has no binding and amounts to a simple invitation that does not infringe upon the immunity from criminal jurisdiction and the inviolability which foreign Heads of State enjoy – as France fully agrees” (para. 4.41). Djibouti, for its part, in its memorial of 15 March 2007, acknowledging that an invitation to testify is different in nature from an arrest warrant (with reference to the *Case Concerning the Arrest Warrant of 11 April 2000*), noted that, in itself, a summons to court already constitutes an infringement of immunity: “Certainly, a witness summons is not in itself an act of coercion comparable to an arrest warrant, but it still unquestionably has a binding component, the fact that the summons to appear is sent to the summoned

Thus, the Court clarified that a criminal procedure measure against a foreign official violates his immunity if it hampers or prevents the exercise of the functions of that person by imposing obligations upon him.⁸⁷

42. In applying such a criterion, ICJ narrowed the scope or extent of immunity compared, for instance, with the judgement of the court in the Federal Republic of Germany in the *Honecker* case in 1984, according to which “[a]ny inquiry or investigation by the police or the public prosecutor is... inadmissible”.⁸⁸ It is evident that where the criterion formulated by ICJ is used, immunity is far from precluding all criminal procedure measures against a foreign official, and prevents only those which impose a legal obligation on the person, i.e. may be accompanied by sanctions for their non-fulfilment or measures of constraint or be coercive in nature. For example, the commencement of a preliminary investigation or institution of criminal proceedings, not only in respect of the alleged fact of a crime but also actually against the person in question, cannot be seen as a violation of immunity, if it does not impose any obligation upon that person under the national law being applied.⁸⁹

person: such a summons then contradicts the sovereign immunity. Both aforementioned summonses against the President of the Republic of Djibouti, which sought to force him to testify in the ‘Borrel’ case, violate his immunity, even though they are not coercive acts of the same nature as a warrant.” (para. 135).

⁸⁷ That immunity precludes the adoption specifically of coercive, prescriptive measures against a Head of State was discussed by the parties in the case before ICJ, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*. See, for example, Application of Congo, 11 April 2003, p. 15; statement by the Agent of France, R. Abraham, 28 April 2003: “In any event, the immunities enjoyed by foreign Heads of State would oppose that coercive measures are taken against them” (CR 2003/21, p. 15).

⁸⁸ *Re Honecker*, Federal Republic of Germany, Federal Supreme Court (Second Criminal Chamber), judgement of 14 December 1984, ILR, vol. 80, p. 365, at p. 366.

⁸⁹ As David notes (footnote 49 above, p. 193), “As the simple fact of opening an investigation in no way hinders the exercise of functions, this instruction is compatible with sovereign immunity”. As noted in the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Case Concerning the Arrest Warrant of 11 April 2000*, “commencing an investigation on the basis of which an *Arrest Warrant* may later be issued does not of itself violate those principles [principles of the inviolability or immunity of the persons concerned]. The function served by the international law of immunities does not require that States fail to keep themselves informed” (*I.C.J. Reports 2002*, p. 80, para. 59). The question arises here as to whether immunity prevents acts which do not bind the person enjoying immunity directly, but restrict him in some way or other. For example, is the seizure of his personal property, in particular, bank accounts (used, for example, in illegal operations) or car (for example, in a case where the alleged crime was committed with the use of this car) legal? It would appear that such acts are legal.

Support by ICJ for this line may also be pointed to in connection with the *Case concerning certain criminal proceedings in France*, where the Court, having considered the question of provisional measures, refused them, finding that the circumstances were not such as to require that France be prohibited from continuing the investigation in relation to officials of the Congo, including the President of the Congo. This conclusion was drawn, in particular, on the basis that the Congo did not present evidence that the immunity of the Head of State had been violated as a result of the investigation being conducted (in circumstances where France had not undertaken any measures of a binding nature or preventing the President from discharging his duties). Despite the fact that this decision does not predetermine the decision of the Court on the substance of the case, it is significant if only in that it does not rule out the possibility of investigation proceedings being continued. See *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, *I.C.J. Reports 2003*, p. 102.

43. Given such an approach to immunity, a State which has grounds to believe that a foreign official has performed an act which is criminally punishable under its legislation, is able to carry out at least the initial collection of evidence for this case (to collect witness testimonies, documents, material evidence, etc.), using measures which are not binding or constraining on the foreign official.⁹⁰ After this stage, it is possible, in particular, to judge with greater or lesser certainty whether this person was involved (and if so to what extent) in the commission of the alleged crime, whether the person's acts should be considered official, etc. If there are sufficient grounds for supposing the involvement of the foreign official in the crime, then, depending on the circumstances, the State exercising jurisdiction retains the option of further measures which do not violate the immunity of the person concerned. It may, for example, notify the foreign State concerned of the circumstances of the case and propose that it waive the immunity of the official; it may send a request for assistance in this criminal matter; it may hand over materials collected within the framework of the preliminary investigation or initiated criminal case to this State, proposing that it institute a criminal prosecution of this person. If the case concerns an alleged crime which falls under the jurisdiction of an international criminal tribunal or the International Criminal Court, then such an approach allows the handing over of the collected materials to the relevant organization exercising international criminal jurisdiction. Finally, having collected evidence, it may, refraining from further steps which immunity prevents, wait until the immunity ceases to apply, and then initiate a criminal prosecution of the person concerned (where the acts concerned are those of persons enjoying personal immunity which were performed in a private capacity before they took up office or during their term in office).

44. As Buzzini rightly notes, "the criterion identified by the Court seems to be convincing".⁹¹ Also appearing convincing to Buzzini is the opinion of ICJ that:

The concept of "constraining act of authority" covers not only those acts that are addressed to state officials who are themselves accused of criminal conduct, but also certain acts—such as witness summonses or other orders—that may be notified, in connection with a judicial proceeding, to individuals who are not (or not yet) accused of criminal conduct.⁹²

The criterion formulated by ICJ does, indeed, seem to be completely convincing in the case of officials enjoying immunity *ratione personae* who are suspects or are

See, however, the position of Watts: "A head of government or a foreign minister who, while on an official visit to another State was subject to legal proceedings in that State would be likely to find his ability to carry out his functions seriously impaired. Even the risk that by visiting another State he might be opening the way for the institution of legal proceedings against him could deter him from making the visit at all, to the prejudice of his conduct of the international affairs of his State" (footnote 55 above, p. 106).

⁹⁰ O'Donnell (footnote 23 above, p. 396) comments thus on the decision of ICJ on the issue of provisional measures in the *Certain Criminal Proceedings in France* case: "While carefully recognizing a head of state as inviolate from prosecution while in office, the ICJ is increasing opportunities for human rights victims to successfully build a case against an official when evidence is still fresh and witnesses are still alive or locatable. Thus, once the official leaves office and is no longer cloaked in impenetrable immunity, he may be subject to prosecution, depending on the claims and evidence at issue".

⁹¹ *Loc. cit.* (footnote 23 above), p. 476.

⁹² *Ibid.*

summoned as witnesses in a criminal case. However, as it applies to officials enjoying immunity *ratione materiae*, the issue requires further clarification.

45. An official enjoying immunity *ratione materiae* is protected from criminal procedure measures in respect of acts performed by him in an official capacity. It is therefore logical to assume that restrictive measures cannot be taken against him solely in connection with an alleged crime committed by this person in the performance of such acts.

46. A former official is, of course, no longer performing official functions. In this regard, it cannot be said that his remaining immunity *ratione materiae* protects him from criminal procedure measures which hamper/preclude the performance of his functions at this time. It can be stated only that the absence of such protection after the person has left his post would hamper the official in the independent performance of his functions while occupying the post. The clarification of ICJ that the protection concerned is protection from criminal procedure measures *imposing obligations* on the person in respect of whom they are being implemented is particularly important here. For States, it is important in terms of safeguarding their sovereignty and equality that their officials cannot be subjected to such criminal procedure measures by a foreign State as impose obligations on them in connection with their official activity, not only during the performance of this activity by them but also subsequently. Thus, a former official, like a serving official enjoying immunity *ratione materiae*, is protected by immunity from criminal procedure measures in connection with an alleged crime committed by this person during the performance of official acts which impose obligations. Of course, what is at issue here is immunity specifically from being summoned as a witness. An invitation to give witness testimony, which, in contrast to a summons, does not impose any legal obligation on the invited official and which therefore may be rejected without any detrimental legal consequences, does not violate his immunity and is a legitimate procedural measure.⁹³

47. The situation as regards the immunity of an official enjoying immunity *ratione materiae* from being summoned as a witness requires further commentary. It is clear that in principle an official enjoying immunity *ratione materiae* may be summoned as a witness if testimony concerning the acts of other persons or of the official himself in a private capacity is required (provided, of course, that this summons does not restrict this person in the performance of their official activity). But what is the situation if the case concerns the giving of testimony in respect of acts performed by a serving or former official himself, or by another person?

48. One of the questions in the *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* was that of the immunity of Djiboutian officials enjoying immunity *ratione materiae* from being summoned as witnesses.⁹⁴ Djibouti pointed out that

⁹³ See para. 41 and footnote 86 above.

⁹⁴ The issue of the peculiarities of French legislation on this issue, which was analyzed in detail in this case both by the parties and by ICJ, will not be touched upon here.

in order to be sure that the two Djiboutian officials had been acting in an official capacity and therefore enjoyed immunity from being summoned as witnesses with regard to acts as such, it was necessary to verify concretely in what capacity—private or official—these acts had been performed.⁹⁵ ICJ, responding to this point, noted that:

It has not been “concretely verified” before it that the acts which were the subject of the summonses as *témoins assistés* issued by France were indeed acts within the scope of their duties as organs of State.⁹⁶

This became one of the grounds on which the Court did not recognize the immunity of the *Procureur général* of the Republic of Djibouti and the Head of the National Security Service of Djibouti from being summoned as witnesses to a French court. Thus, following the logic of the Court in this case, an official enjoying immunity *ratione materiae* can be said to have immunity from being summoned as a witness in a case where the person is being summoned to give testimony concerning acts performed by him within the scope of his duties as a State organ.

49. This criterion is clear and sufficient in the circumstances of the case considered by ICJ. But would it be sufficient if the matter concerned the summoning of an official enjoying immunity *ratione materiae* as a witness to a foreign court not in connection with acts within the scope of his duties but in connection with *ultra vires* acts or in connection with the acts of other persons?

50. It would appear that the logic applied to the summoning of such an official to give testimony in connection with his *ultra vires* acts may be the same as that which applies to his immunity in respect of such acts. It may therefore be presumed that immunity must provide protection from such a summons as a witness.

51. Moreover, it would appear that, where a case concerns the giving of testimony concerning the acts of other persons, events or facts which became known to the official as a result of the discharge of his official functions, immunity *ratione materiae* protects the official from the imposition of any obligations upon him by a foreign State in this regard.⁹⁷

⁹⁵ *Judgment, I.C.J. Reports 2008*, p. 70, para. 190.

⁹⁶ *Ibid.*, para. 191.

⁹⁷ Buzzini writes: “Arguably a more appropriate criterion [than the one used by ICJ in the *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*] would be whether the required testimony possibly involves the provision of information or evidence on facts knowledge of which would have been acquired by the state official in connection with the performance of his or her functions as an organ of state” (footnote 23 above, p. 468). In a civil judgement cited in the memorandum by the Secretariat (footnote 5 above), the German Federal Appeal Court in 1988 refused to subpoena as a witness the Indian Minister of Defence concerning the question of the actions of Indian troops against Tamils in Sri Lanka, concluding that State immunity protects it and its officials from being summoned as witnesses on questions concerning sovereign acts of the State, which include acts of its armed forces (memorandum by the Secretariat (footnote 5 above), para. 238, first footnote in the paragraph). The position of the Appeals Chamber of the International Tribunal for the former Yugoslavia in the *Prosecutor v. Blaskic* case was similar, ruling that it was not admissible to serve the Minister of Defence of Croatia with a summons to appear in order to produce official documents (*subpoena duces tecum*), *Prosecutor v. Blaskic*, Case No. IT-95-14, Appeals Chamber Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber of 18 July 1997 (Issuance of *Subpoenae Duces Tecum*), 29 October 1997 (available at www.icty.org/case

E. Territorial scope of immunity⁹⁸

52. In its judgment in the *Case Concerning the Arrest Warrant of 11 April 2000*, ICJ stated that a Minister for Foreign Affairs enjoys immunity from foreign criminal jurisdiction, when he is abroad.⁹⁹ The same judgment states:

In international law it is firmly established that... certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister of Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.¹⁰⁰

The parties in both the *Case Concerning the Arrest Warrant of 11 April 2000*,¹⁰¹ and the *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters*

/blaskic/4). As noted in the memorandum by the Secretariat (footnote 5 above), “[a]lthough the case concerns immunity before an international tribunal rather than a national criminal court, the Appeals Chamber noted that exercises of judicial authority of the Tribunal follow similar rules of those of a national court”. In the *Prosecutor v. Radislav Krstic* case, the same Appeals Chamber of the International Tribunal for the former Yugoslavia delivered a judgement pointing in a different direction, stating that the functional immunity of an official, on which the Appeals Chamber relied in the *Blaskic* case on the issue referred to above, does not include immunity “against being compelled to give evidence of what the official saw or heard in the course of exercising his official functions”, and “[s]uch immunity does not exist” (*Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Appeals Chamber Decision on Application for Subpoenas, 1 July 2003, para. 27). It is explained in the Chamber’s decision that “[u]nlike the production of State documents, the State cannot itself provide the evidence which only such a witness could give” (*ibid.*, para. 24). The logic of this decision does not appear to be fully understandable. The dissenting opinion of Judge Shahabuddeen seems more convincing. He noted that the immunity of an official from subpoena does not come down to a situation involving a demand to produce official documents, but extends to all information obtained by a person in the fulfilment by him of his official functions: “It is not right to narrow the definition of information to material collected in some central place under the authority of the State, such as its archives. A State acts through its officials; it has information held by them over the whole field of its activity, national and international, including information of matters seen or heard by them”. Referring to the *Blaskic* case, he stated that “the test which it lays down is whether the material was acquired by the proposed witness in his capacity as a State official” (*Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Decision on Application for Subpoenas, Dissenting opinion of Judge Shahabuddeen, 1 July 2003, paras. 15–16). As Buzzini writes (footnote 23 above, p. 468, footnote 78), “it remains difficult to understand why a subpoena to give evidence as a witness on facts knowledge of which was acquired by the state official in the discharge of his or her functions should be treated differently, for purposes of immunity *ratione materiae*, from a subpoena to produce official documents”. Nonetheless, in the *Prosecutor v. Bagosora et al.* case, for example, the International Criminal Tribunal for Rwanda, referring to the aforementioned decision within the scope of the *Krstic* case, stated without further commentary in its decision on the question of a subpoena to give witness testimony that “Government officials enjoy no immunity from a subpoena, even where the subject-matter of their testimony was obtained in the course of government service” (*The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Trial Chamber I, Decision on Request for a Subpoena for Major Jacques Biot, 14 July 2006).

⁹⁸ See the memorandum by the Secretariat (footnote 5 above), para. 153.

⁹⁹ “[T]he functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability”. *I.C.J. Reports 2002*, p. 23, para. 54.

¹⁰⁰ *Ibid.*, pp. 21–22, para. 51. This provision was also reproduced in the judgment of the Court in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *I.C.J. Reports 2008*, pp. 236–237, para. 170. The Court does not speak of jurisdiction of other States, but of jurisdiction “in” other States.

¹⁰¹ See, for example, memorial of the Democratic Republic of Congo.

(*Djibouti v. France*),¹⁰² talked of State officials having immunity when they are travelling abroad. This position is understandable in the circumstances of both cases. However, to what extent is it in principle accurate to assert that immunity operates only in a situation when the official is abroad?

53. Of course, in cases where officials are representing a State in international relations, it is important that a foreign State not be able to impede the exercise of precisely this function. Immunity is therefore particularly important at a time when such an official is abroad. Moreover, it is precisely when he finds himself outside his own State that an official is most vulnerable, unprotected from criminal procedure measures by the foreign State. However, immunity from the jurisdiction of a foreign State also appears to operate while an official is in the territory of the State which he is serving or has served. It follows from what has been stated above that immunity is a procedural protection, based on the sovereignty of a State, from foreign criminal procedure measures which impose on its official an obligation of some kind. From the legal point of view, it is in this sense not entirely clear why this protection comes into effect when the person is abroad. Immunity as a legal rule includes obligations of the State exercising jurisdiction not to take (but possibly also to prevent) criminal procedure measures which would hamper or prevent an official from exercising his official activity, by imposing obligations upon him. It is not very clear why such an obligation takes effect or may be considered to have been violated only when the official is outside the territory of his own State. In addition, immunity is also enjoyed by officials not engaged in representing the State in international relations, or in functions which amount to such representation. Doesn't, for example, a prosecutor, judge or other official exercising only "domestic" functions also enjoy, while in the territory of his own State, the same immunity *ratione materiae* from an arrest warrant issued by a foreign State or from a summons imposing an obligation to appear as a witness in a criminal case as he would enjoy if he were abroad? Criminal procedure measures imposing an obligation on a foreign official could appear to violate the immunity which he enjoys and therefore the sovereignty of his State, irrespective of whether this person is abroad or in the territory of his own State. Violation of an obligation not to take such measures against a foreign official takes effect from the moment such a measure is taken, and not only when the person, against whom it has been taken, is abroad. It is therefore also legitimate to pose the question of the abrogation of such a measure and not of its suspension for the period during which the official is abroad (the latter would be more logical if such a measure violated the immunity of the official only during the period of his stay abroad).¹⁰³

¹⁰² See, for example, *I.C.J. Reports 2008*, p. 235, para. 164 of the judgment, and also paras. 4.21 and 4.34 of the counter-memorial of France.

¹⁰³ During the course of discussion of this topic at the sixtieth session of the Commission, in 2008, Mr. Gaja touched upon the issue of the immunity of an official from the jurisdiction of third States, expressing the hope that it would be considered in the next report (*Yearbook ... 2008*, vol. I, 2983rd meeting, p. 190, para. 35). The Special Rapporteur is not yet sure of the need to consider this issue since he does not, yet at least, see, grounds for assuming that immunity

F. Are there exceptions to the rule on immunity?¹⁰⁴

1. PRELIMINARY CONSIDERATIONS

54. We note the following as preliminary considerations. Firstly, the Special Rapporteur is dealing here with such exceptions to immunity as are founded in customary international law. There can be no doubt that it is possible to establish exemptions from or exceptions to immunity through the conclusion of an international treaty. Immunity, as noted at the beginning of this part of the report, is a rule existing in general customary international law. The hypothesis of the existence of exceptions to it in customary international law, i.e. the existence of or even tendency toward the emergence of a corresponding customary international legal norm (norms) has to be proven, accordingly, on the basis of the practice and *opinio juris* of States. Secondly, the Special Rapporteur proceeds on the assumption that exceptions to the rule on immunity are not identical to the normal absence of immunity. For example, for all officials who do not enjoy immunity *ratione personae* (i.e. the overwhelming majority of serving officials and all former officials), the absence of immunity from foreign criminal jurisdiction in connection with crimes committed by them in the performance of acts in a private capacity, is a normal occurrence and not an exception to the rule. Thus, if it is known (proven) that in the commission of criminal acts, a former official was acting in a private capacity, the absence of immunity is self-explanatory and not requiring of proof. An exception to immunity is considered within the scope of this topic to be a situation where, as a general rule, an official enjoys immunity, but due to certain circumstances does not have immunity. For example, officials as a general rule enjoy immunity in respect of crimes committed by them in the exercise of official acts. However, there is a view that when these crimes are of the utmost gravity and recognized as crimes under international law, then immunity from foreign jurisdiction is absent. Such a situation is considered in the present report as an exception to immunity.

55. The question of exceptions to the rule on immunity is posed chiefly with regard to serving and former officials enjoying immunity *ratione materiae*. At least in respect of serving senior officials—Heads of State, Heads of Government and Ministers for Foreign Affairs—the prevailing view is that the immunity *ratione personae* from foreign criminal jurisdiction, which they enjoy, is not subject to exceptions. Knowing no exceptions, absolute immunity *ratione personae*, as it is called, has been upheld by ICJ in the *Case Concerning the Arrest Warrant of 11 April 2000* and *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters*,¹⁰⁵ in the judgements of national

(scope of immunity) depends on whether a foreign official is in the territory of his own or of a third State. Further consideration is required of the issue of whether immunity depends on the whereabouts of the person (or alleged performance by him of the criminal acts) in the territory of the State which exercises criminal jurisdiction. This issue will be considered below.

¹⁰⁴ See the memorandum by the Secretariat (footnote 5 above), paras. 141–153, 180–212.

¹⁰⁵ Respectively, *I.C.J. Reports 2002*, pp. 21–24, paras. 51, 54, 56, 58; and *I.C.J. Reports 2008*, pp. 236–237 para. 170, p. 238, para. 174.

courts,¹⁰⁶ and in resolutions of the Institute of International Law.¹⁰⁷ Such is also the prevailing viewpoint in the doctrine.¹⁰⁸ Thus, Frulli notes, “state practice consistently shows that the rules on personal immunities cannot be derogated from at the national level”.¹⁰⁹ There is, however, also a view according to which there have to be exceptions to the rule on immunity *ratione personae*.¹¹⁰ This view is held by a number of authors.¹¹¹ It is from such a position, for example, that Belgium came to ICJ in the *Case Concerning the Arrest Warrant*

¹⁰⁶ France, Court of Cassation, Criminal Chamber, *Gaddafi*, 13 March 2001, 125 ILR 490; Belgium, Court of Cassation *H.S.A. et al. v. S.A. et al.*, Decision related to the indictment of Ariel Sharon, Amos Yaron and others, No. P.02.1139.f, 12 February 2003, reproduced in ILM, vol. 42, No. 3 (May 2003), pp. 596–605; United States, Court of Appeals for the Seventh Circuit, *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 2004 U.S. App. LEXIS 18944 (8 September 2004); United States, Court of Appeals for the Second Circuit, *Tachiona v. United States (Magabe case)*, 386 F.3d 205, 2004 U.S. app. LEXIS 20879 (2d Cir., 6 October 2004); Austria, Supreme Court, *Anita W. v. Johannes (Hans) Adam, Fürst von Liechtenstein*, judgment of 14 February 2001, 7Ob316/00x; United Kingdom, Court of Appeal (Civil division), *Ronald Grant Jones v. The Ministry of the Interior Al-Mamlaka Al-Arabiya AS Saudiya (The Kingdom of Saudi Arabia) & Anor*, judgement of 28 October 2004, EWCA Civ 1394; *Jones v. the Ministry of the Interior Al-Mamlaka Al-Arabiya AS Saudiya* (the Kingdom of Saudi Arabia), House of Lords Judgment, 14 June 2006; United Kingdom, District Court, *Tatchell v. Mugabe*, judgement of 14 January 2004; and *Application for Arrest Warrant against general Shaul Mofaz*, Judgment of 12 February 2004, both cited in “Current developments”, *International and Comparative Law Quarterly*, vol. 53, Part 3, July 2004, pp. 769–774. Procedures for calling Fidel Castro to account for crimes in Spain and Belgium were also discontinued in connection with the affirmation of his immunity (www.trial-ch.org/).

¹⁰⁷ Resolution of the Institute—2001, art. 2: “In criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity” (this case concerns a serving Head of State). Resolution of the Institute—2009, art. III, para. 1: “No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes” (this case concerns the immunity of persons acting on behalf of the State).

¹⁰⁸ See memorandum by the Secretariat (footnote 5 above), para. 137, second footnote of this paragraph. According to Hamida, “Even when in the case of a State official perpetrating an international crime while in office, he can still enjoy immunity *ratione personae* (personal or status immunity)... and is inviolable and immune from prosecution so long as he is in office” (Hamida, Sein and Kadouf, “Immunity versus international crimes: the impact of Pinochet and Arrest Warrant cases”, p. 511). Parlett considers that “It is not disputed that immunity applies for torture in proceedings against persons accorded immunity *ratione personae*” (“Immunity in civil proceedings for torture: the emerging exception”, p. 60).

¹⁰⁹ Frulli, “Immunities of persons from jurisdiction”, p. 369.

¹¹⁰ See memorandum by the Secretariat (footnote 5 above), para. 151; on the commentary to Principle 5 of the *Princeton Principles on Universal Jurisdiction* (“...the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment”), the developers comment: “A substantive immunity from prosecution would provide heads of state, diplomats, and other officials with exoneration from criminal responsibility for the commission of serious crimes under international law when these crimes are committed in an official capacity. Principle 5 rejects this substantive immunity” (Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction*, p. 48). However, it is further noted that this principle does not affect “procedural” immunity, which remains in effect during a Head of State’s or other official’s tenure in office: “Under international law as it exists, sitting heads of state, accredited diplomats, and other officials cannot be prosecuted while in office for acts committed in their official capacities” (*ibid.*, p. 49).

¹¹¹ See memorandum by the Secretariat (footnote 5 above), para. 151.

of 11 April 2000.¹¹² This position received support in the opinions of the judges who did not agree with the decision of the Court adopted by a significant majority of the judges¹¹³ and was reflected to a certain extent in the joint separate opinion of three judges in this case.¹¹⁴

2. RATIONALES FOR EXCEPTIONS

56. The need for the existence of exceptions to immunity is explained, above all, by the requirements of protecting human rights from their most flagrant and large-scale violations and of combating impunity. The debate here is about the need to protect the interests of the international community as a whole and, correspondingly, the fact that these interests, as well as the need to combat grave international crimes, most often perpetrated by State officials, dictate the need to call them to account for their crimes in any State which has jurisdiction.¹¹⁵ This, in turn, requires that exceptions to the immunity of officials from foreign criminal jurisdiction exist. Exceptions to the immunity of serving and former officials enjoying immunity *ratione materiae* are reasoned in various ways. The principal rationales boil down to the following. Firstly, as already noted, the view exists that grave criminal acts committed by an official cannot under international law be considered as acts performed in an official capacity.¹¹⁶ Secondly, it is considered that since an international crime committed by an official in an official capacity is attributed not only to the State but also to the official, then he is not protected by immunity *ratione materiae* in criminal proceedings.¹¹⁷ Thirdly, it is pointed out that peremptory

¹¹² In its counter-memorial, Belgium pointed out, in particular, that: “... international sources are not lacking to show that the head of State or a member of his government does not benefit from immunity when accused of having committed crimes under international humanitarian law”, Arrest Warrant, Counter-Memorial of the Kingdom of Belgium, 28 September 2001, para. 3.5.13. See also *Case Concerning the Arrest Warrant of 11 April 2000*, *I.C.J. Reports 2002*, p. 24, para. 56.

¹¹³ See memorandum by the Secretariat (footnote 5 above), para. 149. In his separate opinion in the *Case Concerning the Arrest Warrant of 11 April 2000*, Judge Al-Khasawneh notes that “[t]he effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance. Therefore, when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail” (*I.C.J. Reports 2002*, p. 98, para. 7). A tough stance was also taken by Judge Van den Wyngaert, in whose opinion “[i]mmunity should never apply to crimes under international law, neither before international courts nor national courts”, (*ibid.*, p. 161, para. 36).

¹¹⁴ In the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, doubts are expressed regarding the cases where immunity is absent, listed in paragraph 61 of the judgment of ICJ. In particular, the authors of the opinion note with regret: “The only credible alternative... seems to be the possibility of starting proceedings in a foreign court after the suspected person ceases to hold the office of Foreign Minister” (*ibid.*, p. 87, para. 78).

¹¹⁵ See, for example, O’Donnell (footnote 23 above, p. 416): “Upon leaving office... a state should be able to hold a head of state accountable for international crimes. Victims of human rights violations should not be left without a remedy. Ideally, the knowledge that the cloak of immunity will be unveiled upon completion of office will serve as a sufficient deterrence for sitting heads of state so as to prevent the commission of international crimes”.

¹¹⁶ See memorandum by the Secretariat (footnote 5 above), paras. 191 and 192. Also, footnote 71 above.

¹¹⁷ For example, three NGOs—Redress Fund, Amnesty International and Justice—adopt a similar position in their submission to the European Court of Human Rights in the *Jones v. United Kingdom* (Application No. 34356/06) and *Mitchell and Others v. United Kingdom* (Application No. 40528/06) cases made in 2010 (available at www.interights.org/jones, paras. 10–17).

norms of international law which prohibit and criminalize certain acts prevail over the norm concerning immunity and render immunity invalid when applied to crimes of this kind.¹¹⁸ Fourthly, it is stated that in international law a norm of customary international law has emerged, providing for an exception to immunity *ratione materiae* in a case where an official has committed grave crimes under international law.¹¹⁹ Fifthly, a link is being drawn between the existence of universal jurisdiction in respect of the gravest crimes and the invalidity of immunity as it applies to such crimes.¹²⁰ Sixthly, an analogous link is seen between the obligation *aut dedere aut judicare* and the invalidity of immunity as it applies to crimes in respect of which such an obligation exists.¹²¹ In one way or another, all these rationales for exceptions are fairly close to one another.

57. The viewpoint whereby grave crimes under international law¹²² cannot be considered as acts performed in an official capacity, and immunity *ratione materiae* does not therefore protect from foreign criminal jurisdiction exercised in connection with such crimes, has become fairly widespread.¹²³ Therefore, if this viewpoint is followed, immunity protects from foreign criminal jurisdiction only persons who enjoy immunity *ratione personae*, i.e. the “threesome” and, possibly, certain other high-ranking officials during their tenure of office. Other serving officials and all former officials, including the “threesome”, are, according to this view, subject to foreign criminal

¹¹⁸ This approach is constructed on the basis of the “normative hierarchy” theory and relies on the proposition that norms prohibiting torture and certain other acts are *jus cogens* norms, while immunity of the State and its officials is not of a peremptory nature. See, for example, Bassiouni, “Searching for Peace and Achieving Justice: The Need for Accountability”, p. 56 (“Crimes against humanity, genocide and war crimes... and torture are international crimes which have risen to the level of *jus cogens*. As a consequence, the following duties arise: the obligation to extradite or prosecute... to eliminate immunities of superiors up to and including heads of states”).

¹¹⁹ See memorandum by the Secretariat (footnote 5 above), paras. 197–204.

¹²⁰ See Principle 5 of the *Princeton Principles on Universal Jurisdiction* (available at: http://lapa.princeton.edu/hosteddocs/unive_jur.pdf). “In fact, it would appear that the notion of immunity from criminal liability for crimes under international law perpetrated in an official capacity, whether by existing or former office holders, is fundamentally incompatible with the proposition that gross human rights offences are subject to universal jurisdiction” (International Law Association, Committee on International Human Rights Law and Practice, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offence, p. 14).

¹²¹ See the memorandum by the Secretariat (footnote 5 above), para. 10 (e) and para. 205.

¹²² It is difficult to speak of a list of crimes generally recognized by proponents of this position as being among those crimes which cannot be considered as official acts. They usually talk of those crimes which fall under the jurisdiction of the International Criminal Court—genocide, crimes against humanity, war crimes and aggression. As Verhoeven of the Institute of International Law noted in his Final Report (Rapport définitif) on the issue of immunities of the Thirteenth Commission of the Institute, “The difficulty remains agreeing on the crimes that allow a waiver of immunity. The Commission preferred to remain rather vague on this issue. These crimes are certainly those that are covered by the Statute of the International Criminal Court (aggression, war crimes, genocide, crimes against humanity)” (pp. 594–595). “The Commission declined to endorse a definition of these crimes so as to leave the door open to changes that would be considered serious crimes of international law violations that do not fit at the moment in the jurisdiction of the international criminal tribunals and the International Criminal Court” (p. 615).

¹²³ See footnote 116 above.

jurisdiction in a case where they have committed such a crime. In principle, ICJ has left its judgment in the *Case Concerning the Arrest Warrant of 11 April 2000* open to similar interpretation. Listing the circumstances in which immunity does not prevent the exercise of foreign criminal jurisdiction, the Court indicated, *inter alia*:

Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office as well as *in respect of acts committed during that period of office in a private capacity*.¹²⁴

This gave three judges, who on the whole agreed with the judgment of the Court, grounds for stressing in their joint separate opinion that immunity protects a Minister for Foreign Affairs after he has left office only in connection with “official” acts, and to state further:

It is now increasingly claimed in the literature... that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform... This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, is evidenced in judicial decisions and opinions.¹²⁵

58. Prior to the judgment in the *Case Concerning the Arrest Warrant of 11 April 2000*, this point of view was formulated by Lord Steyn and Lord Nicholls in the *Pinochet I* case and by Lord Hatton and Lord Phillips in the *Pinochet III* case.¹²⁶ In the judgement of the Amsterdam

¹²⁴ *I.C.J. Reports 2002*, p. 26, para. 61.

¹²⁵ *Ibid.*, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 85. The judges refer to the article by Andrea Bianchi, “Denying State immunity to violators of human rights”, *Austrian Journal of Public and International Law*, vol. 46 (1994), pp. 227–228; and also to the judgement of the Supreme Court of Israel in the *Eichmann* case, Supreme Court Judgment, 29 May 1962, 36 ILR, p. 312 and to the judgement of the Amsterdam Court of Appeal in the *Bouterse* case (Gerechtshof Amsterdam, 20 November 2000, para. 4.2). In addition, reference is made to the opinions of the judges of the national courts of the United Kingdom who spoke in the *Pinochet I* and *Pinochet III* cases (Lords Steyn and Nicholls, and Lords Hutton and Phillips of Worth Matravers, respectively). See also ILM, vol. 38, No. 3 (May 1999), p. 581.

¹²⁶ Lord Steyn: “It is therefore plain that statutory immunity in favour of a former Head of State is not absolute. It requires the coincidence of two requirements: (1) that the defendant is a former Head of State (*ratione personae* in the vocabulary of international law) and (2) that he is charged with official acts performed in the exercise of his functions as a Head of State (*ratione materiae*). In regard to the second requirement it is not sufficient that official acts are involved: the acts must also have been performed by the defendant in the exercise of his functions as Head of State... the development of international law since the Second World War justifies the conclusion that by the time of the 1973 coup d’etat, and certainly ever since, international law condemned genocide, torture, hostage taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a Head of State” *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 1) (Hereinafter “*Pinochet I*”) (available at www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino09.htm, accessed 29 July 2016). Lord Nicholls of Birkenhead: “In my view, article 39.2 of the Vienna Convention, as modified and applied to former heads of state by section 20 of the 1978 Act, is apt to confer immunity in respect of acts performed in the exercise of functions which international law recognises as functions of a head of state, irrespective of the terms of his domestic constitution... International law does not require the grant of any wider immunity. And it

Court of Appeal in the *Bouterse* case in 2000, it was noted, in particular, that “the commission of very grave criminal offences of this kind cannot be regarded as part of the official duties of a Head of State”.¹²⁷

59. At the same time, this point of view has, as the memorandum by the Secretariat confirms, been subject to criticism both in national courts and in the doctrine.¹²⁸ In particular, Lord Goff said in the *Pinochet III* case that an act performed by a Head of State, provided it is performed not in a private capacity, is not deprived of its character as a “State” act by its illegality, and stressed that this was true of crimes of any nature.¹²⁹ The judgement referred to in the *Bouterse* case has been interpreted sceptically by some experts.¹³⁰ In her dissenting opinion in the *Case Concerning the Arrest Warrant of 11 April 2000*, Judge ad

hoc Van den Wyngaert, criticizing ICJ for pointing in its list of restrictions on immunity to its absence for a former Minister for Foreign Affairs in respect of acts performed during his tenure of office in a private capacity, noted that in its judgment the Court

could and indeed should have added that war crimes and crimes against humanity can never fall into this category... Some crimes under international law (e.g. certain acts of genocide and of aggression) can, for practical purposes, only be committed with the means and mechanisms of a State and as part of State policy. They cannot, from that perspective, be anything other than “official” acts.¹³¹

The fact that the idea that the functional immunity of foreign officials protects the acts of the States they serve, “is increasingly echoed in judicial and academic thinking”, is recognized even by authors who are critically disposed towards it.¹³²

(Footnote 126 continued.)

hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state... [I]nternational law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law” (*ibid.*). Lord Hutton: “Therefore having regard to the provisions of the Torture Convention, I do not consider that Senator Pinochet or Chile can claim that the commission of acts of torture after 29 September 1988 were functions of the head of state. The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime... My conclusion that Senator Pinochet is not entitled to immunity is based on the view that the commission of acts of torture is not a function of a head of state, and therefore in this case the immunity to which Senator Pinochet is entitled as a former head of state does not arise in relation to, and does not attach to, acts of torture” (*Pinochet III*) (available at www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino6.htm, accessed 29 July 2016). Lord Phillips of Worth Matravers: “Insofar as Part III of the Act of 1978 entitles a former head of state to immunity in respect of the performance of his official functions I do not believe that those functions can, as a matter of statutory interpretation, extend to actions that are prohibited as criminal under international law” (*ibid.*).

¹²⁷ See memorandum by the Secretariat (footnote 5 above), para. 191 and its last footnote. The former leader of Suriname has been accused of the torture and murder of 15 people in December 1982. Commentary on this case: Zegveld, “*The Bouterse case*”.

¹²⁸ See list of judgements of national courts: Memorandum by the Secretariat (footnote 5 above), para. 192 and its footnotes. See also van Alebeek (footnote 49 above), pp. 286 *et seq.*

¹²⁹ Lord Goff of Chieveley: “The functions of, for example, a head of state are governmental functions, as opposed to private acts; and the fact that the head of state performs an act, other than a private act, which is criminal does not deprive it of its governmental character. This is true of a serious crime, such as murder or torture, as it is of a lesser crime” (*Pinochet III*) (available at www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino3.htm). Lord Slynn in the *Pinochet I* case also noted that: “clearly international law does not recognise that it is one of the specific functions of a Head of State to commit torture or genocide. But the fact that in carrying out other functions, a Head of State commits an illegal act does not mean that he is no longer to be regarded as carrying out one of his functions. If it did, the immunity in respect of criminal acts would be deprived of much of its content. I do not think it right to draw a distinction for this purpose between acts whose criminality and moral obliquity is more or less great” (available at www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino02.htm, accessed 29 July 2016).

¹³⁰ According to Zegveld (footnote 127 above, p. 115), “In my view, no order from a head of state in his capacity of the commander of the military to its subordinates could be qualified as ‘non-official’. The decision of Amsterdam Court of Appeal, that the December killings are ‘non-official’ acts and as consequence fall outside the immunity claim, should therefore be rejected.”

60. It is also said in this regard that if crimes under international law committed by an official are not considered as acts which can be attributed to the State which this person serves or, in the case of a former official, served, then it will not be possible to speak of the responsibility of this State under international law for this crime.¹³³ This argument is logical and, possibly, appropriate, however it is founded on considerations of expediency rather than on a basis of law.

61. If the situation is looked at from an exclusively legal point of view, then the following considerations emerge. It is not fully clear why the gravity of a criminal act may lead to a change in its attribution both for accountability purposes and for immunity purposes. If the illegal official acts of an official are as a general rule attributed to the State and continue to be considered as its, i.e. official, acts, then why do the gravest of these cease to be attributed to the State and lose their official character? And, correspondingly, why does the gravity of an act allegedly committed by a foreign official suspend operation of the principle of the sovereign equality of States, from which the foreign State derives the immunity *ratione materiae* of its official? Of course, in a number of cases, grave international crimes are also committed by persons who are not State officials (for example, representatives of a non-governmental party during an armed conflict of a non-international nature). But in these situations the question of immunity does not even arise. It arises only with regard to State officials. Meanwhile, as a rule, the very possibility of performing illegal acts on a large scale arises for State officials only by virtue of the fact that they are backed by the State, are acting on its behalf, using the relevant apparatus of enforcement, issuing orders, etc. In this situation, the assertion that acts of this kind are of a private, not an official, nature, looks, perhaps, like an artificial and not entirely legal attempt to overcome the barrier of an official’s immunity *ratione materiae* from foreign criminal jurisdiction.

¹³¹ *I.C.J. Reports 2002*, p. 162, para. 36.

¹³² See, for example, van Alebeek (footnote 49 above), pp. 303–304. Although this author holds just the other point of view.

¹³³ See, for example, Koller (footnote 36 above), p. 29: “First, such acts quite often are official acts in the sense that state actors carry them out in the name of the state... Second, this legal fiction would effectively eliminate state responsibility, as acts done in one’s own capacity are no longer attributable to the state”. See also Wirth, “Immunity for core crimes? The ICJ’s judgment in *Congo v. Belgium* case”, p. 891.

62. Another rationale is that immunity *ratione materiae* is inapplicable since a criminal act is attributed not only to the State but also to the official who performed it.¹³⁴ It may be noted in this regard that the preliminary report also stated that the attribution to the State of an illegal act performed by an official acting as such does not preclude the attribution of this same act to the official.¹³⁵ However, the official character of these acts is not altered by this. It is not fully clear in this context why this precludes the protection of an official by immunity *ratione materiae*, in essence State immunity, when a case concerns not merely an illegal act but a crime under international law.¹³⁶

63. A further rationale for the absence of immunity *ratione materiae* for serving and former officials in the event of their committing grave crimes under international law consists in the proposition that these very grave human rights violations are criminalized and prohibited by the peremptory norms of general international law. Therefore, in the opinion of the proponents of this point of view, these *jus cogens* norms prevail over the customary dispositive norm of immunity *ratione materiae*.¹³⁷ Such a position was held, in particular, by a minority of the judges in the *Al-Adsani* case in the European Court of Human Rights.¹³⁸ The dissenting opinion of Judges Rosakis, Cafilish, Costa, Wildhaber, Cabral Barreto and Vajic stated, in particular:

Due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on State immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of *jus cogens*.¹³⁹

Lord Millett spoke of approximately the same thing in the *Pinochet III* case.¹⁴⁰ In the *Ferrini* case, the Italian Court of Cassation stated that the commission of international crimes is a grave violation of fundamental human rights and of the universal values of the global community and that these values are protected by the peremptory norms of international law, which entails that national courts

¹³⁴ See footnote 117 above.

¹³⁵ See paragraph 89 of the preliminary report (footnote 4 above).

¹³⁶ In principle, if the logic of the proponents of the point of view under consideration is followed, then the immunity of officials *ratione materiae* from foreign criminal jurisdiction does not necessarily exist at all, and not only in respect of international crimes, since any (and not only a grave) illegal act of an official in an official capacity may be attributed not only to the State but also to the official himself.

¹³⁷ Despite the fact that immunity derives from the principle of the sovereign equality of States, one of the fundamental principles of international law, it is evidently correct to consider the norm of immunity as a dispositive norm from which States may, by agreement between themselves, deviate.

¹³⁸ ECHR, *Case of Al-Adsani v. The United Kingdom*, Application No. 35763/97, judgement of 21 November 2001, <http://hudoc.echr.coe.int>.

¹³⁹ *Ibid.* Joint dissenting opinion of Judges Rozakis and Cafilish, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, para. 3 (available at: <http://hudoc.echr.coe.int>).

¹⁴⁰ Lord Millett: "The international community had created an offence for which immunity *ratione materiae* could not possibly be available. International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose" (*Pinochet III*).

have universal criminal and civil jurisdiction with respect to them, and they prevail over the principle of immunity.¹⁴¹ In the *Lozano* case, which centred on the issue of the immunity from Italian criminal jurisdiction of an American serviceman in connection with a crime allegedly committed in Iraq, the Court of Cassation stated that "a customary rule was emerging to the effect that the immunity of a state did not cover acts which qualified as crimes under international law. The rationale behind this exception to immunity lay in the fact that, in case of conflict between the rules on immunity and those establishing international crimes, the latter, being rules of *jus cogens*, had to prevail".¹⁴² This view is advanced in the doctrine,¹⁴³

¹⁴¹ *Ferrini v. Republica Federale di Germania*, *Rivista di Diritto Internazionale*, vol. LXXXVII, No. 2 (2004), p. 539, Corte di Cassazione, Joint Sections, judgement of 6 November 2003, 11 March 2004, No. 5044, paras. 9, 9.1. This case, like the *Al-Adsani* case in the European Court of Human Rights, concerned the immunity of a State and not that of its officials. At the same time, the Court also considered the judgements of certain other domestic courts in criminal cases against foreign officials and held that it shows that the functional immunity of such persons is invalid in cases where they are charged with international crimes. This position of the Italian Supreme Court was developed in the judgement in the *Milde* civil case (13 January 2009, No. 1072, *ibid.*, vol. XCH, No. 2 (2009), p. 618). (See Moneta, "State immunity for international crimes: The case of Germany versus Italy before the ICJ", available at www.haguejusticeportal.net. See also the *Prefecture of Voiotia v. Germany* case in the Supreme Court of Greece, Case No. 11/2000 of 4 May 2000 (AJIL, vol. 95, p. 198). In the opinion of Lord Bingham of Cornhill, "[t]he *Ferrini* decision cannot... be treated as an accurate statement of international law as generally understood", *Jones* case (footnote 106 above), para. 22.

¹⁴² *Lozano v. Italy*, appeal judgement, Case No. 31171/2008. Here, the English wording of the judgement cited in Oxford Reports on International Law, ILDC 1085 (IT 2008) is used. In this judgement, the Court recognized, despite the quoted wording, that the Italian courts are unable to exercise jurisdiction in respect of the crime alleged to have been committed by Lozano because it is not a war crime, and therefore the exception referred to does not extend to it and a foreign serviceman enjoys the immunity *ratione materiae* which State organs enjoys under customary international law. With regard to immunity *ratione materiae*, the judgement stated the following (to judge from the account used): "Under a well-established rule of customary international law, which was universally accepted both in the prevailing legal literature and in domestic and international judicial decisions... *acta iure imperii* performed by organs of a state in the discharge of their functions were covered by immunity and therefore could not be subjected to the civil or criminal jurisdiction of a foreign state. The rule of immunity *ratione materiae*, which had to be distinguished from that concerning immunity *ratione personae* enjoyed by certain state officials, was simply a corollary to the customary international rule establishing the immunity of a state from the jurisdiction of a foreign state in relation to *acta iure imperii* of its organs. Since each sovereign state was free to determine its internal structure and to designate the individuals acting as state organs, it followed that acts performed by state organs constituted the exercise of state functions and therefore were to be attributed to the state. Consequently, only the state could be held responsible for such acts".

¹⁴³ See, for example, Taylor: "Because torture violates *jus cogens* norms, it may be an implied waiver of immunity. *Jus cogens* norms are internationally accepted rules of conduct for sovereign states. They have the highest status in international law. Sovereign immunity, on the other hand, stems from customary international law and is not a *jus cogens* norm. Sovereign immunity may therefore be unavailable for violators of *jus cogens*—in effect, the violations may be implied waivers of immunity", "Pinochet, confusion, and justice: the denial of immunity in U.S. courts to alleged torturers who are former Heads of State", p. 114. Parlett (footnote 108 above, p. 51), explains the basis of this approach thus: "Although the trumping argument has not been generally accepted, the reasoning behind it has some validity. First, the effects of a *jus cogens* norm are not limited to treaties, but extend to customary international law and to domestic law and practice. Secondly, to give proper effect to a *jus cogens* norm, it must override not only contrary rules of substance, but rules which prevent its enforcement. In

and was that held by Judge Al-Kasawneh in his dissenting opinion in the *Case Concerning the Arrest Warrant of 11 April 2000*.¹⁴⁴

64. However, the majority of the judges in the *Al-Adsani* and *Kalogeropoulou et al. v. Greece and Germany* cases¹⁴⁵ in the European Court of Human Rights did not agree with such a position. The judgement in the *Al-Adsani* case stated in this regard:

Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.¹⁴⁶

The position of the European Court of Human Rights in these cases has been supported in the doctrine.¹⁴⁷ At the same time, it must be borne in mind that in the cases mentioned the European Court was dealing with the immunity of the State from civil jurisdiction and not with the immunity of State officials from foreign criminal jurisdiction. The memorandum by the Secretariat notes:

It may not seem to be self-evident that a substantive rule of international law criminalizing certain conduct is incompatible with a rule preventing under certain circumstances, prosecution for that conduct in a foreign criminal jurisdiction.¹⁴⁸

It does, however, appear that the situation is more definite. Peremptory norms criminalizing international crimes lie within the sphere of substantive law. The norm concerning immunity is, as noted above, procedural in character, does not affect criminalization of the acts under discussion, does not abrogate liability for them and does not even fully exclude criminal jurisdiction in respect of these acts, where they were committed by a foreign official (immunity provides protection only from certain acts). Since the norm concerning immunity on the one hand and the norms criminalizing certain conduct or establishing liability for it on the other regulate different matters and lie in different areas of law (procedural and substantive,

(Footnote 143 continued.)

the context of torture, this would mean the *jus cogens* prohibition overrides not only domestic law permitting the practice of torture, but also the operation of immunity to prevent enforcement of rights related to the norm itself. As the rules of immunity are not *jus cogens*, they must yield to the effect of the hierarchically superior norm”.

¹⁴⁴ *I.C.J. Reports 2002*, p. 98, para. 7 (“The effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance. Therefore when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail.”)

¹⁴⁵ *Kalogeropoulou et al. v. Greece and Germany*, ECHR, Application No. 59021/00, Decision of 12 December 2002, *Reports of Judgments and Decisions*, 2002-X.

¹⁴⁶ *Al-Adsani v. The United Kingdom* (footnote 138 above), para. 61. This position was also reflected in the judgement in the *Kalogeropoulou* case: “The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity”.

¹⁴⁷ See, for example, Caplan, “State Immunity, Human Rights, and *Jus Cogens*: a Critique of the Normative Hierarchy Theory”, and Rau, “After Pinochet: Sovereign Immunity in Respect of Serious Human Rights Violations—The Decision of the European Court of Human Rights in the *Al-Adsani* Case”.

¹⁴⁸ See memorandum by the Secretariat (footnote 5 above), para. 195.

respectively), they can scarcely conflict with one another, even in spite of the fact that one of them is peremptory and the other dispositive.¹⁴⁹

65. The highest judicial instance of the United Kingdom did not agree in the *Jones* case in 2006 (this case concerned the immunity from foreign jurisdiction both of the State and of its official) that the peremptory norm prohibiting torture prevails over the norm relating to the immunity of a foreign State.¹⁵⁰ In this case, Lord Hoffmann noted, in particular:

The *jus cogens* is the prohibition on torture... To produce a conflict with state immunity, it is... necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged. Such a rule may be desirable and, since international law changes, may have developed. But, contrary to the assertion of the minority in *Al-Adsani*, it is not entailed by the prohibition of torture.¹⁵¹

66. Germany considered the judgement directed against it in the *Ferrini* case, as well as several other Italian court decisions in this same vein, to be acts by Italy which violated its immunity and therefore conflicted with international law, and appealed to ICJ. In its application to the Court, Germany states, *inter alia*:

In the *Ferrini* case and in subsequent cases the Corte di Cassazione has openly acknowledged that it did not apply international law as currently in force, but that it wished to develop the law, basing itself on the rule “in formation”, a rule which does not exist as a norm of positive international law. Through its own formulations, it has thus admitted that by its restrictive interpretation of jurisdictional immunity, i.e. by expanding Italy’s jurisdiction, it is violating the rights which Germany derives from the basic principle of sovereign equality.¹⁵²

¹⁴⁹ Zimmermann, for example, noted in this regard that “it seems to be more appropriate to consider both issues as involving two different sets of rules which do not interact with each other” (“Sovereign immunity and violations of international *jus cogens*—some critical remarks”, p. 438). It may be appropriate here also to refer by analogy to the opinion that ICJ stated in its judgment in the *East Timor* case. In this case, Portugal had asserted, *inter alia*, that “[t]he rights which Australia allegedly breached were rights *erga omnes* and that accordingly Portugal could require it, individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner”. In response to this, the Court stated the following: “[T]he Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligation invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*” (*East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, para. 29). Stern refers to this opinion of ICJ in the same context (“Vers une limitation de l’irresponsabilité souveraine des États et chefs d’État en cas de crime de droit international?” pp. 546-547). Also critical of the “normative hierarchy” theory, albeit in a somewhat different key, Caplan (*loc. cit.*, p. 772) writes: “Essentially, the norms of human rights and state immunity, while mutually reinforcing, govern distinct and exclusive aspects of the international legal order. On the one hand, human rights norms protect the individual’s “inalienable and legally enforceable rights... against state interference and the abuse of power by governments”. On the other hand, state immunity norms enable state officials “to carry out their public functions effectively and... to secure the orderly conduct of international relations. To demonstrate a clash of international law norms, the normative hierarchy theory must prove the existence of a *jus cogens* norm that prohibits the granting of immunity for violations of human rights by foreign states. However, the normative hierarchy theory provides no evidence of such a peremptory norm”.

¹⁵⁰ *Jones* case (footnote 106 above).

¹⁵¹ *Ibid.*, Lord Hoffman, paras. 44–45.

¹⁵² *Case concerning jurisdictional immunities of the State (Germany v. Italy)*, Application of Germany, 23 December 2008, para. 13, available at www.icj-cij.org.

The Ontario Superior Court of Justice in Canada indicated in its judgement in the *Bouzari* case in 2002:

An examination of the decisions of national courts and international tribunals, as well as state legislation with respect to sovereign immunity, indicates that there is no principle of customary international law which provides an exception from state immunity where an act of torture has been committed outside the forum, even for acts contrary to *jus cogens*. Indeed, the evidence of state practice, as reflected in these and other sources, leads to the conclusion that there is an ongoing rule of customary international law providing state immunity for acts of torture committed outside the forum state.¹⁵³

At the same time, in the *Ferrini* and *Bouzari* cases, the courts were exercising civil jurisdiction. In so doing, a distinction was drawn in the *Bouzari* case between situations involving immunity from foreign jurisdiction and concerning the crime of torture, depending on whether civil or criminal jurisdiction was being exercised. Having upheld State immunity in the first case, the Court of Appeal noted that an individual may be held criminally liable for torture committed abroad, without one State being subjected to the jurisdiction of another.¹⁵⁴ The judgement provides certain grounds for presuming that it is possible to bring action against a foreign official for torture in Canada in connection with Canada's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or, though highly hypothetically, in connection with the fact that torture could not be considered as a function of the State, but in any case not in connection with the existence of a customary peremptory norm of international law prevailing over a dispositive norm with regard to immunity.¹⁵⁵ The question arises as to whether it can in principle be said that the consequences for immunity of prohibiting grave international crimes by *jus cogens* norms may be different depending on what kind of jurisdiction is being exercised—civil or criminal. Neither practice nor logic appear to show that such consequences would differ.¹⁵⁶

67. There is one further question arising in connection with the rationale for exception to immunity which is under consideration. If norms criminalizing and prohibiting certain acts, being *jus cogens* norms, prevail over the immunity of the State and/or an official, then why only over immunity *ratione materiae*? Immunity *ratione personae* is also dispositive.¹⁵⁷ It would be logical to assume

that it, too, would be invalidated by the effect of the peremptory norm conflicting with it. However, even those advocating the view that immunity *ratione materiae* vanishes where grave international crimes are concerned do not generally want to go “that far” and do not contest the validity of the personal immunity of the highest-ranking serving officials.¹⁵⁸

68. One further rationale for exception to immunity *ratione materiae* is the idea that a customary norm of international law has developed, under which such immunity does not operate where an official has committed a grave crime under international law.¹⁵⁹ The existence of such a norm is substantiated by references to the provisions of the constituent documents and judgements of international criminal tribunals, starting with those of Nuremberg and Tokyo,¹⁶⁰ and to international treaties criminalizing such

of which their serving Heads of State will not enjoy immunity from the criminal jurisdiction of any of the parties to this agreement. It seems there are no grounds for assuming that such an agreement will be invalid. See article 8 (I) of the resolution of the Institute of International Law, “Immunities from jurisdiction and execution of Heads of State and Government in international law”: “States may, by agreement, derogate to the extent they see fit, from the inviolability, immunity from jurisdiction and immunity from measures of execution accorded to their own Heads of State”.

¹⁵⁸ The following passage from an article by Stern (“Vers une limitation de l’irresponsabilité souveraine des États et chefs d’État en cas de crime de droit international?” pp. 525–526) is of interest in this regard:

“Another question concerns the status of currently serving Heads of State, for whom absolute immunity in criminal matters was reaffirmed. If the solution adopted for the former Head of State is based on the nature of *jus cogens* prohibition of a crime, which takes precedence over any rule granting impunity for such crimes, it is difficult to understand why it not also applied to the serving Heads of State, unless their absolute immunity is also considered a rule of *jus cogens*, which is far from clear. Yet this is the position taken by Lord Hope in the second decision [in the Pinochet case], because he invoked ‘the *jus cogens* character of the immunity enjoyed by serving heads of states’ precisely to say it is not clear that immunity, holding that place in the hierarchy of standards, should be easily removed from serving Heads of State.

“But the opposite argument is also possible, and already some consider that, since the immunity was lifted for certain acts committed by former Heads of State, we do not see why it would not also apply to the serving Heads of State. Of course, the decline of impunity should be encouraged, but not at any price. Personally, I think the next step called for by some NGOs, allowing the pursuit of serving Heads of State by any national court exercising universal jurisdiction, should not be taken. The example of a court of Belgrade condemning, on 21 September 2000, 14 Western leaders—including Bill Clinton, Tony Blair and Jacques Chirac—to 20 years’ imprisonment for NATO actions in Yugoslavia, shows some of the possible counter-productive effects in opening up too much that way.”

¹⁵⁹ See memorandum by the Secretariat (footnote 5 above), paragraphs 197–204. The Italian Court of Cassation itself also refers in the judgments mentioned earlier to a customary rule establishing exemption from immunity *ratione materiae*, but in a narrower sense—there the discussion is of the development, in the Court’s view, of a customary rule of international law, according to which peremptory norms prohibiting international crimes prevail over immunity *ratione materiae*.

¹⁶⁰ Of the relatively recent judgements by international tribunals cited in this regard, the judgement of the International Tribunal for the former Yugoslavia in the *Blaskic* case, which states, in particular, that exceptions to the customary norm of international law on the functional immunity of State officials “arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity” (*Prosecutor v. Blaskic*, Case No. IT-95-14, Appeals Chamber Judgment on the Request of The Republic of Croatia for Review of the Decision of

¹⁵³ *Bouzari v. Iran* [2002] O.J. No. 1624, Ontario Superior Court of Justice, Judgment, para. 63 (available at www.haguejusticeportal.net). This judgement was upheld by the Court of Appeal of Ontario in 2004. *Bouzari v. Islamic Republic of Iran* [2004], Court of Appeal of Ontario, Judgment, para. 95. The subject matter of this case was a civil claim for compensation by the Islamic Republic of Iran for damages caused as a result of torture committed in the Islamic Republic of Iran’s territory against its citizens.

¹⁵⁴ Court of Appeal of Ontario, *ibid.*, paras. 91, 93.

¹⁵⁵ See, in particular, *ibid.*, paras. 69–81 and 89–91.

¹⁵⁶ The nature of the two types of jurisdiction is the same—the exercise of the prerogatives of authority by the State. If a peremptory norm prevails over immunity, then immunity from which jurisdiction—civil or criminal—is of no account. And vice versa. All the more so since sometimes the two types of jurisdiction exercised are very close—for example, when a civil action is brought and is considered within the scope of a criminal case.

¹⁵⁷ One may also encounter the assertion that immunity of a serving Head of State, i.e. personal immunity, is peremptory in nature (see, for example, the opinion of Lord Hope, mentioned in the following footnote), but it is difficult to concur with this. It would appear that States are certainly able to conclude an international agreement in pursuance

acts, as, for example, genocide and apartheid. These arguments are set out in considerable detail in the memorandum by the Secretariat.¹⁶¹ They were also cited by Belgium before ICJ in the *Case Concerning the Arrest Warrant of 11 April 2000*.¹⁶² As is well known, ICJ did not agree with these arguments either as applied to the immunity *ratione personae* of an incumbent Minister for Foreign Affairs (and other officials enjoying such immunity),¹⁶³ or as applied to the immunity *ratione materiae* of former officials, having acknowledged the existence of such immunity.¹⁶⁴ Nonetheless, the idea of the existence of the aforementioned customary norm continues to be put forward. Apart from those listed, one of the main arguments in its favour is the reference to a whole range of national court judgements which, in the opinion of the proponents of this point of view, are evidence that immunity is not an obstacle to the exercise of criminal jurisdiction over foreign officials. As one of the most recent expressions of this position, we would cite the submissions to the European Court of Human Rights of three non-governmental organizations—Redress Trust, Amnesty International and the International Centre for the Legal Protection of Human Rights—in the *Jones* and *Mitchell* cases.¹⁶⁵ These submissions contain references to a number of national court judgements supporting the viewpoint stated. In particular, these concern the national criminal prosecution of foreign officials who committed crimes during the Second World War, the *Pinochet* case, and cases against foreign officials in France, Italy, the Netherlands, Senegal, Spain, Sweden and the United States.¹⁶⁶ In order to assess the extent to which these judgements may be considered as demonstrating the existence of the above-mentioned norm

(Footnote 160 continued.)

Trial Chamber of 18 July 1997 (Issuance of *Subpoenae Duces Tecum*), 29 October 1997, para. 41) (available at www.icty.org/case/blaskic/4); see also footnote 97 above. This decision does not state that a customary norm of international law has developed establishing exception to immunity *ratione materiae*, and no explanations at all are put forward as to why exceptions exist. If an attempt is made to suppose which rationale this opinion of the Tribunal most closely approximates, then it is perhaps the rationale considered above, according to which norms prohibiting crimes mentioned in the judgement are *jus cogens* in nature. It is otherwise difficult to see from this judgement why they prevail over immunity.

¹⁶¹ See memorandum by the Secretariat (footnote 5 above), paras. 197–204.

¹⁶² See the Counter-Memorial of Belgium, 28 September 2001, paras. 3.5.13 *et seq.* It is worth noting that in para. 3.5.84 of the Counter-Memorial, the Belgian party, responding to possible objections, in essence equates the consequences of applying the norm on exceptions demonstrated by it in respect of immunity *ratione materiae* and immunity *ratione personae*, adopting in this sense a radical position (“...other judges... in the Judgment of 24 March 1999 [in the *Pinochet III* case], while considering that Pinochet did not benefit from immunity *ratione materiae*, nevertheless reserved the case of immunity *ratione personae*, that being the immunity of a Head of State in power. In Belgium, this reservation is not founded, given the international rules recalled above, on the exclusion of immunity for crimes of international humanitarian law, rules which make no distinction at all between immunity *ratione materiae* and immunity *ratione personae*”).

¹⁶³ *I.C.J. Reports*, para. 58.

¹⁶⁴ *Ibid.*, para. 61. ICJ was, of course, also aware of the International Tribunal for the former Yugoslavia judgement in the *Blaskic* case referred to above (see footnotes 97 and 160 above).

¹⁶⁵ *Jones v. United Kingdom* (Application No. 34356/06) and *Mitchell and Others v. United Kingdom* (Application No. 40528/06) (footnote 117 above). Written comments by Redress, Amnesty International, Interights and Justice, submitted to the Court on 14 and 25 January 2010, available at www.interights.org/jones (accessed 29 July 2016).

¹⁶⁶ *Ibid.*, paras. 18–21.

of customary international law, it is necessary to dwell in somewhat greater detail upon them, and also on the reaction of interested States which followed in the wake of certain of these judgements.

69. The “thousands of former Axis officials prosecuted for crimes committed during the Second World War”, mentioned in the submissions,¹⁶⁷ were punished on the basis of the “Nuremberg law” (article 7 of the Charter of the Nuremberg Tribunal, stated, as is well known, that “the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment”;¹⁶⁸ the Charter of the Tokyo Tribunal and Control Council Law No. 10 contained analogous provisions),¹⁶⁹ and of national law adopted in development thereof. Materials of which the Special Rapporteur is aware on criminal proceedings against officials who had perpetrated war crimes and crimes against humanity during the Second World War do not provide evidence that the States which these persons served asserted their immunity from foreign criminal jurisdiction as former officials.¹⁷⁰ This may be viewed as evidence of general agreement between the States exercising jurisdiction and the States which these persons served that in respect of the specified crimes committed by the officials of Axis countries immunity is inapplicable. However, this does not yet seem to confirm the existence of a general customary norm of international law regarding the absence of immunity from foreign criminal jurisdiction in respect of such crimes perpetrated by other officials after the Second World War.¹⁷¹

(a) In the case of *Ben Said* (a former Tunisian consular employee) in France in 2008, there is no evidence that his immunity *ratione materiae* (as police commissar, in which capacity he committed the alleged criminal act of torture) was considered. The judgement was reached *in absentia* and has not had any consequences in practice.¹⁷²

¹⁶⁷ *Ibid.*, footnote 37.

¹⁶⁸ Charter of the International Military Tribunal at Nuremberg in the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London, 8 August 1945) (United Nations, *Treaty Series*, vol. 82, No. 251, p. 279).

¹⁶⁹ Charter of the International Military Tribunal for the Far East, 19 January 1946, reproduced in *Documents on American Foreign Relations*, vol. VIII, Princeton University Press, 1948, p. 355. Control Council Law No. 10, 20 December 1945, available at: <http://avalon.law.yale.edu/imt/imt10.asp> (accessed 29 July 2016).

¹⁷⁰ The issue of immunity was advanced as a defence in the *Eichmann* case. However, the immunity at issue here was not that of an official but that deriving from Eichmann’s presence in Argentina as a fugitive in respect of acts which did not fall under a formal extradition act (“immunity for a fugitive offender” taking into account the “specialty principle”). See Israel, District Court of Jerusalem, *Israel v. Eichmann*, ILR, vol. 36.

¹⁷¹ Van Alebeek (footnote 49 above, p. 216) writes: “The legislation enacted by some states after the Second World War was limited to crimes committed in that war and did not provide courts with a general competence to deal with crimes against international law committed abroad. Only in a handful of cases did national courts actually exercise universal jurisdiction, and these trials—like the *Eichmann* case in Israel, the *Barbie* case in France, the *Finta* case in Canada and the *Polyukhovich* case in Australia—all concerned Nazi crimes.”

¹⁷² See the case of Khaled Ben Said, Criminal Court of Strasbourg, judgement of 15 December 2008 (International Federation of Human Rights, *l’Affaire Khaled Ben Said*, Groupe d’action judiciaire de la FIDH, no. 512, March 2009).

(b) Cases in Italy in 2000–2001 against seven former Argentine servicemen, including General G. Suarez, charged with the murders and kidnapping of Italian citizens, related to the “dirty war” period. Argentina did not request that Italy not exercise criminal jurisdiction over these persons by claiming immunity.¹⁷³ It is known that Argentina also plans to try servicemen involved in the “dirty war” under its jurisdiction, for which the relevant laws on amnesty have been revoked, but in the cases of these persons the question now is one of the prevailing jurisdiction, rather than of immunity.¹⁷⁴

(c) The case of the former Head of Intelligence and former Deputy Minister for State Security of Afghanistan (case of the director of the military intelligence service KhAD-e-Nezami) in the Netherlands in 2008¹⁷⁵ did indeed touch upon the issue of immunity (the charge involved war crimes).¹⁷⁶ However, it must be borne in mind that the accused performed the acts during the course of military operations in Afghanistan in the 1980s, and the current Government of Afghanistan did not uphold their immunity;

(d) The *Scilingo* case in Spain has already been touched upon in this report.¹⁷⁷ It is possible here to talk of a waiver of immunity by Argentina.¹⁷⁸

70. In respect of the arrest warrants referred to in this context in the submission of three NGOs to the European Court of Human Rights,¹⁷⁹ the following can be noted:

(a) The French and Spanish warrants in respect of a group of high-ranking Rwandan officials provoked protests from Rwanda and the African Union. In particular, a decision of the eleventh AU summit declared that those developments violated the sovereignty and territorial inviolability of Rwanda and were an abuse of universal

jurisdiction.¹⁸⁰ In November 2006, in connection with this incident, Rwanda broke off diplomatic relations with France, not restoring them until November 2009, and threatened to bring court actions against French citizens in response.¹⁸¹ In the meantime, these developments have led only to tension in relations between States,¹⁸² which the parties are attempting to ease (the statements of the President of France Sarkozy during an official visit to Rwanda in February 2010 are evidence of this).¹⁸³ The case in France against Rose Kabuye, the Rwandan President’s Chief of Protocol, which was referred to in the submission of the NGOs,¹⁸⁴ has been stopped.¹⁸⁵

(b) The execution of arrest warrants issued in Spain for former officials of Argentina, Guatemala and other countries who have been charged with grave crimes under international law¹⁸⁶ has run up against the complex situation of conflicting jurisdictions and not against the issue of immunity;

(c) The Swedish arrest warrant relates to the Argentine A. Astiz, a former Argentine military intelligence captain, charged with crimes committed during the “Dirty War”, who has been sentenced to life imprisonment in France. Argentina has refused to extradite him either to France,¹⁸⁷ or to Sweden.¹⁸⁸ Argentina intends to try him independently, and the issue of immunity will not be considered in this case. As far as cases concerning crimes dating from the “Dirty War” period are concerned, it would appear on the whole that where attempts have been made to consider these in various States, the principle issue has been that of priority jurisdiction.¹⁸⁹

¹⁷³ See “Disappeared, but not forgotten”, *The Guardian*, 15 June 2006 (www.guardian.co.uk/world/2006/jun/15/worlddispatch.argentina, accessed 29 July 2016).

¹⁷⁴ See, for example, “Argentina holds ‘Dirty War’ trial”, *BBC News*, 21 June 2006 (<http://news.bbc.co.uk/2/hi/americas/5099028.stm>, accessed 29 July 2016).

¹⁷⁵ LJN: BG1476, Hoge Raad, 07/10063 (E), appeal ruling with translation into English—(<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=bg1476>, accessed 29 July 2016).

¹⁷⁶ The appeal of the defence (*ibid.*) stated, *inter alia*, that the court “failed to hold (*ex proprio motu*) that the prosecution... is inadmissible for want of jurisdiction as the defendant enjoyed immunity as a person in authority at that time in Afghanistan [para. 7.1]”. The Supreme Court of the Netherlands stated in response to this: “The ground of appeal is unsuccessful if only in that the defendant is not entitled to immunity from jurisdiction as referred to above at 6.6 [in 6.6 it is said, *inter alia*: ‘Although article 8 of the Criminal Code [of the Netherlands] does indeed provide that the applicability of the Dutch provisions on jurisdiction is limited by the exceptions recognized in international law this does not amount [...] to more than a statutory recognition of immunity from jurisdiction derived from international law’.] either in his former capacity of Head of Afghanistan’s state intelligence service or in his capacity of deputy minister of state security [para. 7.2]”.

¹⁷⁷ See paragraph 16 above.

¹⁷⁸ “The Spanish courts have jurisdiction to try former Argentine Navy captain Adolfo Scilingo, on trial in Spain for genocide and torture, Argentina’s Human Rights Secretary Eduardo Duhalde said in an interview with IPS” (see “Argentina Recognizes Spain’s Jurisdiction to Try Rights Abuser”, *Inter Press Service*, 18 April 2005).

¹⁷⁹ See footnote 117 above.

¹⁸⁰ “The political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States”, Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/AU/14 (XI), para. 5 (ii) (Assembly/AU/Dec.199(XI)). It may be assumed that this situation became one of the reasons for discussions between the African and European Unions on universal jurisdiction. See also “African Presidents Condemn Western Indictments”, *Radio Nederland Wereldomroep*, 2 July 2008.

¹⁸¹ “Rwandan president Kagame threatens French nationals with arrest”, *The Guardian*, 12 November 2008 (www.guardian.co.uk/world/2008/nov/12/rwanda-france, accessed 29 July 2016).

¹⁸² “Smear against Rwanda unfounded, Spanish official said”, *The Kigali New Times*, 17 October 2009; “Rwanda and Spain discuss genocide warrants”, *Expatica.com*, 18 October 2009.

¹⁸³ See “On Visit to Rwanda, Sarkozy Admits ‘Grave Errors’ in 1994 Genocide”, *The New York Times*, 25 February 2010 (www.nytimes.com/2010/02/26/world/europe/26france.html, accessed 29 July 2016).

¹⁸⁴ See footnote 117 above.

¹⁸⁵ See footnote 19 above.

¹⁸⁶ “Spanish courts have issued Arrest Warrants for current and former officials from Argentina, Chile, Guatemala”, *Audiencia Nacional, Juzgado Central de Instrucción No. 1, Diligencias previas 331/1999* (2008).

¹⁸⁷ See “Argentina rejects French Astiz bid”, *BBC News*, 21 September 2003 (<http://news.bbc.co.uk/2/hi/americas/3126260.stm>, accessed 29 July 2016).

¹⁸⁸ See “Astiz Freed: Extradition bid fails”, *Mercopress*, 29 January 2002 (<http://en.mercopress.com/2002/01/29/astiz-freed-extradition-bid-fails>, accessed 29 July 2016).

¹⁸⁹ A notable example is the case of Argentine military officer Ricardo Cavallo (charged with genocide and terrorism), which has been examined in Spain. He was handed over to Argentina on 31 March 2008. (See <https://trialinternational.org/latest-post/ricardo-miguel-cavallo/>, accessed 29 July 2016.)

(d) The *Alvarez* case (*Sosa v. Alvarez-Machain*),¹⁹⁰ referred to in the submissions of the NGOs in the United States, did not concern the immunity of foreign State officials, and in the *Hissein Habré* case in Senegal, as mentioned in paragraph 16 above, immunity was waived.

71. The above-cited results of the analysis of a number of criminal cases to which the three NGOs refer in their submissions to the European Court of Human Rights are, of course, far from exhaustive. However, they do give grounds for substantial doubts as to whether these cases (and all the more so in conjunction with the rulings of national courts and law enforcement agencies in which immunity has been upheld directly, and also the reactions of the States involved) confirm the existence of a norm of customary international law establishing exception to immunity *ratione materiae*. Rather, they are confirmation of attempts to exercise universal or extraterritorial national criminal jurisdiction with respect to certain crimes under international law and of the fact that these attempts are far from always being fruitful.

72. Nonetheless, the view is also advanced that the immunity *ratione materiae* of an official does not operate in those cases when the crime concerned is one in respect of which universal or similar extraterritorial national criminal jurisdiction is exercised by a foreign State.¹⁹¹ No generally recognized definition of universal jurisdiction exists. For the purposes of the present report it is not deemed necessary to examine and define what universal national criminal jurisdiction is and to determine whether it differs, and if so how, from extraterritorial national jurisdiction. It seems sufficient to proceed on the basis of one of the definitions available in the doctrine or in the documents of NGOs. For instance, in a 2005 resolution, the Institute of International Law gives the following definition:

Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.¹⁹²

The resolution notes that universal criminal jurisdiction is primarily based on customary international law and is exercised over international crimes defined in international law such as genocide, crimes against humanity, serious violations of international humanitarian law,

unless agreement is reached otherwise.¹⁹³ Thus, the crimes concerned are the same as those for which other rationales of exceptions to immunity *ratione materiae* are cited.

73. It is asserted, in particular, that universal or extraterritorial jurisdiction over the gravest international crimes and the immunity of officials from foreign criminal jurisdiction are incompatible. Lords Phillips, Brown-Wilkinson and Hope spoke about this in the *Pinochet III* case (the issue there was jurisdiction on the basis of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).¹⁹⁴ Such a viewpoint is encountered in the doctrine.¹⁹⁵ It is also reflected in the Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, produced by the International Law Association in 2000. It noted, in particular:

It would appear that the notion of immunity from criminal liability for crimes under international law perpetrated in an official capacity, whether by existing or former office holders, is fundamentally incompatible with the proposition that gross human rights offences are subject to universal jurisdiction.¹⁹⁶

It should be pointed out in respect of the cited provision of the Association's report that the issue is not about immunity from criminal *liability* as there simply is none. Immunity, as previously noted, is merely a procedural obstacle to certain criminal-procedure measures.

74. At first sight, the possibility of exercising universal jurisdiction in respect of grave international crimes is enshrined in the legislation of many States. At the same time, close consideration often reveals that this is not fully universal jurisdiction since, in order to exercise jurisdiction, a connection of some kind to the State exercising jurisdiction is required.¹⁹⁷ The adoption of such legislation

¹⁹³ "Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes", paras. 2 and 3 (a). The report by AU and EU experts which has been mentioned also discusses the extension of universal criminal jurisdiction to these same crimes and to piracy. AU-EU expert report, para. 9. As Jessberger notes, "the range of crimes that may be prosecuted under the universality principle may, at least theoretically, well extend beyond these core crimes under international law" ("Universal jurisdiction", p. 556). Also, see a non-exhaustive list of the literature on universal jurisdiction (*ibid.*, p. 558).

¹⁹⁴ See memorandum by the Secretariat (footnote 5 above), para. 205 and first footnote.

¹⁹⁵ *Ibid.*, para. 206 and first footnote.

¹⁹⁶ International Law Association, "Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences", p. 14.

¹⁹⁷ For example, concerning the legislation of the member States of the AU and of the member States of the EU providing for universal criminal jurisdiction and the limitations thereof, see the AU-EU Expert Report on the Principle of Universal Jurisdiction (footnote 14 above), paras. 16–18 and 22–25. As Ambos ((footnote 23 above) pp. 445 and 446, footnote 230) notes, with reference to the study of the Max Planck Institute for Foreign and International Criminal Law (see *Nationale Strafverfolgung Völkerrechtlicher Verbrechen* (Albin Eser *et al.*, eds., 2003–2006), "extraterritorial jurisdiction on the basis of universal jurisdiction is 'practically always limited by one way or other'. Either it depends on an international (treaty-based) duty to prosecute (in Austria, Belarus, China, Croatia, Estonia, Greece, Poland, Russian Federation, [United Kingdom:] England and Wales) or on the presence of the suspect in the forum State (Canada, Croatia, the Netherlands, Serbia [and Montenegro], Spain, Switzerland, the U.S.). Only in exceptional cases does universal jurisdiction apply to all international core crimes (Australia, Germany, Slovenia) or for some of them (Finland, Italy, Israel, Sweden)".

¹⁹⁰ Supreme Court of the United States, 542 U.S. 692 (2004).

¹⁹¹ See memorandum by the Secretariat (footnote 5 above), paras. 205–207.

¹⁹² "Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes", Institute of International Law, Krakow session, 2005, Seventeenth Commission, resolution, para. 1, available from www.idi-iil.org. In 2009, AU and EU experts gave it the following definition: "Universal criminal jurisdiction is assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction. In other words, universal jurisdiction amounts to the claim by a state to prosecute crimes in circumstances where none of the traditional links of territoriality, nationality, passive personality or the protective principle exists at the time of the commission of the alleged offence" (The AU-EU Expert Report on the Principle of Universal Jurisdiction, footnote 14 above, para. 8).

is carried out, in particular, in order to implement the Statute of the International Criminal Court and/or in order to ensure application of the principle of complementarity. There are cases here, very few in number, it is true, where such legislation directly repudiates the immunity of foreign officials.¹⁹⁸ (The question arises as to what extent such legislation repudiating immunity conforms to international law.¹⁹⁹) Though not in all these cases, this legislation rejecting immunity has withstood the test of practice. In Belgium, for example, it was changed, in particular, in order to take account of the existence of the immunity of foreign officials in accordance with international law. The immunity which officials possess under international law is an obstacle to the exercise of universal criminal jurisdiction not only under Belgian law, but also under the law of a number of other States.²⁰⁰

75. Considered above were a number of domestic criminal cases resulting from the exercise of universal or extraterritorial jurisdiction which are cited to support the notion of the existence of a customary norm of international law providing for exceptions to immunity. The AU-EU Expert Report on the Principle of Universal Jurisdiction contains references to a whole range of cases in which universal criminal jurisdiction has been exercised in respect of foreign officials.²⁰¹ Some of these cases featured persons who enjoyed personal immunity while others featured persons who enjoyed functional immunity (including Heads of State and Government, Ministers for Foreign Affairs, Defence, etc., and former officials). The report notes:

¹⁹⁸ The AU-EU Expert Report on the Principle of Universal Jurisdiction (footnote 14 above) refers in paragraph 17 to at least three such States in Africa—the Democratic Republic of the Congo, Niger and South Africa. The Special Rapporteur has no information on cases of the application of this legislation and the reaction of interested States to it. Belgium's Act Concerning the Punishment of Grave Breaches of International Humanitarian Law 1999 r. contained in article 5 (3): "The immunity attaching to the official capacity of a person does not preclude the application of this Act" (ILM, vol. 38 (1999) at p. 924). However, in 2003, after the judgment of ICJ in the *Case Concerning the Arrest Warrant of 11 April 2000*, the law indicated was changed. The new article 5 (3) appeared thus: "The international immunity attached to the official capacity of a person does not prevent the application of this Act, except within the limits established by international law" (see Pierre d'Argent, "Les nouvelles règles en matière d'immunités selon la loi du 5 août 2003", *jura falconis*, jg 40, 2003–2004, No. 1, p. 73). In the same year, this law too was changed, and its provisions included in Belgium's Criminal and Criminal Procedure Codes. Article 1 *bis* of the latter contained the following provision on immunity: "Under international law, prosecution is excluded in respect of Heads of State, Heads of Government and foreign ministers, during the period in which they perform their duties, as well as other people whose immunity is recognized by international law – people who have immunity, total or partial, based on a treaty that binds Belgium".

¹⁹⁹ See preceding footnote.

²⁰⁰ The AU-EU Expert Report on the Principle of Universal Jurisdiction (footnote 14 above), paras. 18 and 25. European Arrest Warrant 2002, the scope of which covers, *inter alia*, crimes to which ICC jurisdiction extends, also contains an article on privileges and immunities and the waiver of these. Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), art. 20, *Official Journal* L190, 18 July 2002, pp. 1–20, also available at www.eur-lex.europa.eu. Legislation of the Russian Federation also provides directly for the immunity of officials of foreign States from criminal proceedings (Art. 3 (2) Code of Criminal Procedure of the Russian Federation. See para. 38 of the Preliminary Report).

²⁰¹ The AU-EU Expert Report on the Principle of Universal Jurisdiction (footnote 14 above), paras. 24 and 26.

There have been differing outcomes in these proceedings. Some prosecutions have led to convictions. The majority of cases have been discontinued on various grounds, including the recognition of immunities accorded by international law.²⁰²

76. It is not difficult to see that attempts to exercise universal criminal jurisdiction are, in the absolute majority of cases, undertaken in developed countries with respect to serving or former officials of developing States. This is perceived by the latter not as the exercise of justice but as a political instrument for resolving various issues, a manifestation of a policy of double standards, and leads not so much to the results sought by justice as to complications in inter-State relations.²⁰³ It is precisely this that led to the dialogue between the AU and EU on universal jurisdiction, one outcome of which has been the report cited in this section. One of the recommendations of this report states:

Those national criminal justice authorities considering exercising universal jurisdiction over persons suspected of serious crimes of international concern are legally bound to take into account all the immunities to which foreign state officials may be entitled under international law and are consequently obliged to refrain from prosecuting those officials entitled to such immunities.²⁰⁴

This recommendation circumvents the issue of whether the immunity *ratione materiae* of an official is preserved if foreign criminal jurisdiction is exercised over him. However, neither the content of the report, which sums up the practices and anxieties of many African and European States, nor this recommendation speak in favour of universal criminal jurisdiction precluding such immunity.

77. If it is argued that immunity is not compatible with universal jurisdiction, then it is not fully clear why this should not relate not only to functional but also to personal immunity. In considering the relationship between universal jurisdiction and immunity as a whole or immunity *ratione materiae* alone, the position of ICJ in this regard, which has already been cited in the preliminary report²⁰⁵ but which is important in this context, should also be recalled:

It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend the criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of foreign State, even where those courts exercise such a jurisdiction under these conventions.²⁰⁶

78. In the light of the foregoing, it would appear that there are no satisfactory arguments in place in favour of the rationale under consideration for exception to immunity. At least, the Institute of International Law, in a

²⁰² *Ibid.*, para. 26.

²⁰³ See, for example, *ibid.*, section IV.1, "African concerns", paras. 33–38, and also footnotes 14 and 192 above; Ambos (footnote 23 above), pp. 444–445.

²⁰⁴ The AU-EU Expert Report on the Principle of Universal Jurisdiction (footnote 14 above), para. 46, R.8.

²⁰⁵ Preliminary report (footnote 4 above), para. 59.

²⁰⁶ *I.C.J. Reports 2002*, pp. 25–26, para. 59.

resolution on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes adopted in 2005 (i.e. within four years of its adoption of a resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, in which it denied former Heads of State and of Government immunity *ratione materiae* from foreign jurisdiction in the event of their having perpetrated grave crimes under international law),²⁰⁷ limited itself to the following statement in the final paragraph thereof:

The above provisions are without prejudice to the immunities established by international law.²⁰⁸

79. The rationale which is under consideration for exception to immunity with reference to universal jurisdiction is similar to another, admittedly less widespread, rationale, according to which immunity does not operate if, in respect of a crime allegedly perpetrated by a foreign official, the principle of *aut dedere aut judicare* operates. The memorandum by the Secretariat notes that such a position was endorsed by Lord Saville in the *Pinochet III* case.²⁰⁹ In the preliminary report on the obligation to extradite or prosecute (*aut dedere aut judicare*) presented to the Commission by the Special Rapporteur Mr. Galicki in 2006, immunities were spoken of as one of the obstacles to the effectiveness of prosecution systems for crimes under international law that is not appropriate to such crimes.²¹⁰ At the same time, it was noted during discussion of this topic in the Sixth Committee of the General Assembly that the application of this obligation “should not... affect the immunity of State officials from criminal prosecution”.²¹¹ The Special Rapporteur does not have at his disposal evidence of any widespread practice of States, including judicial practice, or their *opinio juris*, which would confirm the existence of exception to

²⁰⁷ “Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law”, arts. 13 and 16. Article 13 provides the following:

“1. A former Head of State enjoys no inviolability in the territory of a foreign State.

“2. Nor does he or she enjoy immunity from jurisdiction, in criminal, civil or administrative proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof. Nevertheless, he or she may be prosecuted and tried when the acts alleged constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State’s assets and resources.

“3. Neither does he or she enjoy immunity from execution.”

In accordance with article 16, article 13 applies to former Heads of Government.

²⁰⁸ “Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes” (footnote 192 above), para. 6.

²⁰⁹ See memorandum by the Secretariat (footnote 5 above), para. 259. Lord Saville noted, in particular: “So far as the states that are parties to the Convention are concerned, I cannot see how, so far as torture is concerned, this immunity can exist consistently with the terms of that Convention. Each state party has agreed that the other state parties can exercise jurisdiction over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution; and thus to my mind can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged torture”.

²¹⁰ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571, pp. 262–263, para. 14.

²¹¹ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-second session (A/CN.4/588), para. 161.

the immunity of foreign officials where the exercise of national criminal jurisdiction over them on the basis of the *aut dedere aut judicare* rule is concerned. The position of ICJ, reproduced above (para. 77) in the context of the issue of universal jurisdiction, which was formulated in the judgement in the *Case Concerning the Arrest Warrant of 11 April 2000* as it applied not only to the relationship between immunity and universal jurisdiction but also to that with the obligation *aut dedere aut judicare*, seems fully convincing.

80. In practice, to substantiate exceptions to the immunity of State officials from foreign criminal jurisdiction, where the latter is being exercised in connection with the commission of a grave crime under international law, it is customary for several of the rationales cited above to be used, possibly in consideration of the fact that each of them is by no means undisputed. What is more, the proponents of exceptions are far from always in agreement among themselves as to the correctness of one rationale or another. The question of exceptions to immunity *ratione materiae* in cases of grave crimes under international law continues to be raised by lawyers and NGOs. This position has been reflected in two Institute of International Law resolutions. As previously mentioned, the 2001 resolution contains articles 13 and 16, which provide for such exceptions as they apply to former Heads of State and of Government. The resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes adopted by the Institute in 2009 states that in accordance with international law no immunity other than personal immunity applies in respect of international crimes to persons acting on behalf of a State and that when the position or mission of any person enjoying personal immunity has come to an end, such immunity ceases.²¹² However, as we can see, not only is this not the prevailing viewpoint in the doctrine but it would also appear that it is not as yet exerting a decisive influence on the practice and positions of States.

81. The posing of the question of whether immunity *ratione materiae* is absent where a crime is perpetrated in the territory of the State which exercises jurisdiction stands apart.²¹³ Here, the case does not necessarily concern grave international crimes. The priority of jurisdiction of the State in whose territory a crime has been perpetrated over immunity may hypothetically be supported by the factor that, in accordance with the principle

²¹² “Resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes”, art. III. This article provides the following:

“1. No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.

“2. When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases.”

“At the same time, in accordance with article IV of this resolution, the above provisions “are without prejudice to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an agent of the former State”.

²¹³ See memorandum by the Secretariat (footnote 5 above), paras. 162–165. For an analysis of the issue of immunity of the State from the civil jurisdiction of a State in whose territory an activity was carried out, as a result of which damage was caused, see, for example, Yang, “State immunity in the European court of human rights: reaffirmation and misconceptions”.

of sovereignty, a State has absolute and supreme power and jurisdiction in its own territory. However, it should be remembered that this supremacy is exercised taking into account exemptions established by international law and, in particular, the immunity of a foreign State and its officials.²¹⁴

82. As noted in the memorandum by the Secretariat:

It has been suggested that, in determining whether acts carried out by a State official in the territory of a foreign State are covered by immunity *ratione materiae*, the crucial consideration would be whether or not the territorial state had consented to the discharge in its territory of official functions by a foreign State organ.²¹⁵

The consent of the receiving State not only to the discharge of functions but also to the very presence of a foreign official in its territory may be of importance. In the context of the topic under consideration, several types of situation can be distinguished.²¹⁶ For instance, a foreign official may be present and perform an activity resulting in a crime in the territory of a State exercising jurisdiction with the consent of the latter. In addition, an analogous situation is possible, but with the distinction that no consent was given by the receiving State to the activity which led to the crime. Finally, there are situations where not only the activity but also the very presence of the foreign official in the territory of the State exercising jurisdiction take place without the consent of that State.

83. Applied to the first type of situation, no special problems appear to arise. In essence, the State in whose territory the alleged crime has occurred, consented in advance that the foreign official located and operating in its territory would have immunity in respect of acts performed in an official capacity. For instance, if a foreign official had come for talks and en route to the talks committed a violation of the traffic rules entailing a criminal punishment in the receiving State, then it would appear that this person must enjoy immunity.

84. In the second situation, the question seems to be whether immunity arises in a case where the scope of activity of the official has been determined in advance and the consent of the receiving State was given to such activity, but there was no consent by that State to the activity which resulted in the crime. For example, if an official has come for talks on agriculture, but beyond the scope of the talks engages in espionage or terrorist activity, there are doubts as to whether he enjoys immunity from the criminal jurisdiction of the receiving State in connection with such illegal acts. Here, however, what is evidently important is the extent to which the activity which led to the crime is connected with the activity to which the State gave its consent. In this situation, the acts of the official are on the one hand of an official nature and are attributed

to the State which the person is (was) serving, and correspondingly there are grounds for raising the question of the immunity of this person, based upon the sovereignty of that State. On the other hand, this State, in the person of its official, has engaged in activity in the territory of the other State without its consent to do so, i.e. in violation of the sovereignty of the latter State.²¹⁷

85. If a State did not give its consent to the presence of a foreign official and his activity, which led to the commission of a criminally punishable act, in its territory, there would appear to be sufficient grounds for assuming that the official does not enjoy immunity *ratione materiae* from the jurisdiction of that State. In the situation considered in the preceding paragraphs, the State, consenting to the presence and activity of a foreign official in its territory, consented in advance to the immunity of that person, in connection with his official activity. If, though, there was no such consent, and the person is not only acting illegally but is present in the State territory illegally, then it is fairly difficult to assert immunity. Examples of this type of situation include espionage, acts of sabotage, kidnapping, etc. In judicial proceedings concerning cases of this kind, immunity has either been asserted but not accepted,²¹⁸ or not even asserted.²¹⁹ It should also be noted here that, such cases as *Distomo*²²⁰ and *Ferrini*,²²¹ where Greek and Italian courts did not recognize the immunity of Germany from Italian jurisdiction, concerned crimes perpetrated in the territory of the State exercising jurisdiction.²²² The judgement in the *Bouzari* case, in which a Canadian court recognized immunity in spite of the fact that torture is prohibited by a peremptory norm, contains passages from which, interpreting them *a contrario*, it can be concluded that the judgement may have been different

²¹⁷ In the opinion of van Alebeek (footnote 49 above, p. 129), in order to assess a situation involving the immunity of a foreign official, it is also of significance whether his activity is of a criminally punishable nature under the law of the State in whose territory it was performed. ("Whether a foreign state official is effectively called to account depends however on whether a particular act in fact constitutes a violation of the national law of the state whose territorial sovereignty has been violated or whether only an interstate norm has been violated." See also the examples cited by the author of national court judgements in cases of foreign officials who had perpetrated crimes in the territory of the State exercising jurisdiction.)

²¹⁸ See the case of the United States Central Intelligence Agency (CIA) agents arrested in Italy in connection with charges of abduction of a person in 2003 (memorandum by the Secretariat (footnote 5 above), first footnote of para. 163).

²¹⁹ For example, the *Rainbow Warrior* case (*ibid.*, footnote of para. 162). Situations are possible, however, when an official, in exercising official activities, finds himself in the territory of a foreign State without its consent, but not intentionally. The sole criminally punishable activity of the official in this case is the illegal crossing of the border. It seems that in such a case there are grounds for posing the question of immunity. For example, in 2005 during training, a Russian military aircraft found itself unintentionally in Lithuanian airspace and crashed. Criminal proceedings were instituted in Lithuania against the pilot, who had survived. The Russian Federation raised the question of whether the pilot, having in the course of carrying out his work accidentally found himself in the territory of a foreign State, enjoys immunity from the jurisdiction of that State (see commentary of the Ministry of Foreign Affairs of the Russian Federation of 19 September 2005 in connection with this case, available at www.mid.ru/brp_4.nsf/).

²²⁰ *Prefecture of Voiotia v. Germany* (footnote 141 above).

²²¹ *Ferrini v. Republica Federale di Germania* (footnote 141 above).

²²² The opinion has been advanced in the doctrine that it was precisely this circumstance that was the reason for the non-recognition of immunity for Germany in these (see Yang, "*Jus cogens* and state immunity", pp. 164–169).

²¹⁴ See Draft Declaration on Rights and Duties of States, article 2: "Every State has the right to exercise jurisdiction over its territory and over all persons... therein, subject to the immunities recognized by international law". (*The Work of the International Law Commission*, 7th ed., vol. I (United Nations Publication, Sales No. E.07.V.9), New York, 2007, p. 262).

²¹⁵ Para. 163.

²¹⁶ The Special Rapporteur emphasizes that only the immunity *ratione materiae* of officials is at issue here. The immunities of consular officials or of the personnel of special missions do not fall under this topic, though certain analogies may be useful.

if the torture had been committed in the territory of the State exercising jurisdiction.²²³

86. The situations examined may occur with any State officials, including military personnel. At the same time, the issue of the criminal prosecution and immunity of military personnel for crimes perpetrated during military conflict in the territory of a State exercising jurisdiction would seem to be governed primarily by humanitarian law, and to be a special case and should not be considered within the framework of this topic.

87. The 2001 Institute of International Law resolution states that a former Head of State (and correspondingly a Head of Government) may be criminally prosecuted if his acts “are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State’s assets and resources”.²²⁴ Two further instances in which a former Head of State (and correspondingly a Head of Government) do not enjoy immunity *ratione materiae* have thereby been added to the situation of commission of the gravest international crimes. Thus, in the opinion of the authors of the resolution, even if an official who possessed personal immunity was acting in an official capacity but for the purposes of personal enrichment, by departing from his duty he loses the protection of immunity *ratione materiae*. An analogous viewpoint has been expressed in the doctrine by some authors in relation to other similar ways of personal enrichment in the exercise of official activity.²²⁵ If this kind of activity by an official were not considered to be official, then this position would be understandable. However, since it continues to be considered the official activity of an official and, correspondingly, of a State, then certain doubts arise as to the soundness of this position. A whole series of international treaties are devoted to combating corruption and the illicit acquisition of personal wealth by officials.²²⁶ They criminalize such acts (including those which may be performed only using the position or service rank) of officials, and lay down the duties and rights of States to establish and exercise criminal jurisdiction in respect of such acts by officials. In some treaties, the issue of the immunity of foreign officials from criminal jurisdiction is not touched upon.²²⁷ Others contain clauses stipulating that their provisions do not prejudice the provisions of other international treaties insofar as the waiving of the immunity of these persons is concerned.²²⁸ It would appear that the simplest way of deciding the issue of the immunity of officials from foreign criminal jurisdiction in

cases where they have committed crimes directed toward personal enrichment would be to include appropriate provisions in an international treaty devoted to combating these crimes. However, this has not yet occurred. Unless, of course, these treaties are considered as providing an implicit waiver of immunity.

88. In order to resolve the issue of whether an official enjoys immunity from foreign criminal jurisdiction in the cases considered, it is, however, evidently necessary to consider in each concrete case the question of whether the act which led to illicit enrichment, etc., was an act performed by that person in an official capacity or in a private capacity. Situations are known where foreign jurisdiction has been exercised in connection with crimes of this kind, and a State has not requested immunity for its official. This was the situation, for example, in the *Marcos* case of the former President of the Philippines in the United States.²²⁹ At the same time, in the case of the former Minister of Atomic Energy of the Russian Federation, *Adamov*, the issue of whose extradition to the United States or to the Russian Federation was considered by the Swiss Federal tribunal, the Russian Federation asserted the immunity of its former official from United States criminal jurisdiction, noting, *inter alia*, that the illicit enrichment with which Adamov had been charged had taken place in the Russian Federation as a result of his official activities (abuse of official position).²³⁰

89. The foregoing does not give grounds for asserting that the provisions of the 2001 Institute of International Law resolution referred to above reflect a customary norm of international law.²³¹ At the same time, immunity *ratione materiae* does not appear to protect an official from criminal procedure measures taken by a foreign State in relation to his personal assets (for example, funds in foreign banks) within the scope of criminal law proceedings

²²⁹ In its judgement in the *Marcos* case (Switzerland, Federal Tribunal, *Marcos and Marcos v. Federal Department of Police*, 2 November 1989, 102 ILR 198) the Supreme Court of Switzerland did not go into a detailed analysis of the nature of the activity of this person, having determined that he did not enjoy immunity by virtue of the fact that the Philippines had refused to recognize this activity as official. The situation was similar in the judgement in his case in the United States (*In re Grand Jury Proceedings*, 817 F.2d at 1111): the Government of the Philippines informed the United States State Department within the scope of this case of the waiving of Marcos’ immunity. In the case *United States v. Noriega* (117 F.3d 1206; 1197 U.S. app. LEXIS 16493, see memorandum by the Secretariat, para. 211, footnote 605), a United States court denied immunity to Manuel Noriega, the former Head of State of Panama, on the grounds that the United States Government had not recognized Noriega as the Head of State at the time of performance by him of the acts in question. Panama did not assert Noriega’s immunity. In other words, in this case, the nature of the acts performed by him was not a determining factor. If the United States executive authorities had recognized the legitimacy of Noriega’s authoritative competency, his immunity would evidently also have been recognized. See, for example, Heidi Altman, “The Future of Head of State Immunity: The Case against Ariel Sharon”, April 2002, p. 6, available at www.scribd.com.

²³⁰ *Adamov gegen Bundesamt für Justiz*, sentence of 22 December 2005, para. 3.4.2; see also “Comments by the Foreign Ministry’s Information and Press Department in connection with a question from the Russian mass media on measures taken by the Russian side aimed at bringing Yevgeny Adamov back into the Russian Federation” of 18 May 2005, http://www.mid.ru/Brp_4.nsf/arh/61C69CBAC851731AC3257006003264A0?OpenDocument (accessed 29 July 2016).

²³¹ See the opinion of Hazel Fox cited in the memorandum by the Secretariat (footnote 5 above) (para. 209) that at issue is the wording of these provisions of article 13 of the resolution *de lege ferenda*.

²²³ For example, *Bouzari v. Iran* (footnote 153 above), para. 63.

²²⁴ See footnote 207 above.

²²⁵ See memorandum by the Secretariat (footnote 5 above), para. 211.

²²⁶ For example, the United Nations Convention against Corruption, the Inter-American Convention against Corruption, the Criminal Law Convention on Corruption, the African Union Convention on Preventing and Combating Corruption.

²²⁷ At the same time, provisions concerning the immunity of a State’s own officials are encountered (see, for example, article 30 paragraph 2, of the United Nations Convention against Corruption and article 9 paragraph 5, of the African Union Convention on Preventing and Combating Corruption).

²²⁸ See, for example, article 16 of the Criminal Law Convention on Corruption and article 4, paragraph 4, of the Convention on the fight against corruption involving officials of the European Communities or officials of member States of the European Union.

exercised in connection with a crime aimed at personal enrichment allegedly committed by him. Such measures cannot be considered as restricting his official acts.

3. CONCLUSIONS CONCERNING EXCEPTIONS

90. In the opinion of the Special Rapporteur, the arguments set out above demonstrate that the various rationales for exceptions to the immunity of officials from foreign criminal jurisdiction prove upon close scrutiny to be insufficiently convincing. These rationales continue to be discussed in the doctrine. The practice of States is also far from being uniform in this respect. The judgment in the *Pinochet* case, having given an impetus to discussion on this issue, has not led to the establishment of homogeneous court practice. In this respect, it is difficult to talk of exceptions to immunity as having developed into a norm of customary international law, just as, however, it is impossible to assert definitively that there is a trend toward the establishment of such a norm. A situation where criminal jurisdiction is exercised by a State in whose territory an alleged crime has taken place, and this State has not given its consent to the exercise in its territory of the activity which led to the crime, and to the presence in its territory of the foreign official who committed this alleged crime stands alone in this regard. There would in such a situation appear to be sufficient grounds for talking of an absence of immunity.

91. The question arises of the extent to which further restrictions on immunity *de lege ferenda* are desirable. It should be recalled in this regard certain recommendations, including some referred to above, contained in the AU-EU Expert Report on the Principle of Universal Jurisdiction:

R6. When exercising universal jurisdiction over serious crimes of international concern... states should bear in mind the need to avoid impairing friendly international relations. ...

R.8. Those national criminal justice authorities considering exercising universal jurisdiction over persons suspected of serious crimes of international concern are legally bound to take into account all the immunities to which foreign state officials may be entitled under international law and are consequently obliged to refrain from prosecuting those officials entitled to such immunities.²³²

92. It is also questionable whether the emergence of such exceptions in general international law and, correspondingly, of the possibility of exercising national criminal jurisdiction over foreign officials would be desirable, for the purposes of combating impunity, as a supplement to international criminal jurisdiction or to the jurisdiction of the State which an official serves (served), if this State does not carry into effect his criminal prosecution.²³³ Such a subsidiary exercise of criminal jurisdiction is provided for under the legislation of certain States.²³⁴ However, the possibility of exercising jurisdiction provided for by legislation does not yet, as evident from the explanations above, signify exceptions to the immunity of foreign officials.

²³² The AU-EU Expert Report on the Principle of Universal Jurisdiction (footnote 14 above), para. 46, R6 and R8.

²³³ See speeches at the sixtieth session of the Commission of Mr. McRae (*Yearbook ... 2008*, vol. I, 2984th meeting, p. 194, para. 19), Ms. Jacobsson (*ibid.*, 2985th meeting, p. 204, paras. 5–6), Mr. Vargas-Carreño (*ibid.*, 2987th meeting, p. 231, para. 17).

²³⁴ See K. Ambos (footnote 23 above), pp. 414, 423 and 440.

93. That States are undoubtedly entitled to establish restrictions on the immunity of their officials from the criminal jurisdiction of one another by concluding an international treaty is another matter.²³⁵ In this regard, the Commission could consider, alongside the codification of customary international law currently in force, the question of drawing up an optional protocol or model clauses on restricting or precluding the immunity of State officials from foreign criminal jurisdiction.

G. Summary

94. The contents of this report can be summarized in the following statements:

(a) On the whole, the immunity of a State official, like that of the State itself, from foreign jurisdiction is the general rule, and its absence in a particular case is the exception to this rule;

(b) State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction, i.e. immunity in respect of acts performed in an official capacity, since these acts are acts of the State which they serve itself;

(c) There are no objective grounds for drawing a distinction between the attribution of conduct for the purposes of responsibility on the one hand and for the purposes of immunity on the other. There can scarcely be grounds for asserting that one and the same act of an official is, for the purposes of State responsibility, attributed to the State and considered to be its act, and, for the purposes of immunity from jurisdiction, is not attributed as such and is considered to be only the act of an official. The issue of determining the nature of the conduct of an official—official or personal—and, correspondingly, of attributing or not attributing this conduct to the State, must logically be considered before the issue of the immunity of the official in connection with this conduct is considered;

(d) Classification of the conduct of an official as official conduct does not depend on the motives of the person or the substance of the conduct. The determining factor is that the official is acting in a capacity as such. The concept of an “act of an official as such”, i.e. of an “official act”, must be differentiated from the concept of an “act falling within official functions”. The first is broader and includes the second;

(e) The scope of the immunity of a State and the scope of the immunity of its official are not identical,

²³⁵ The Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination (signed at the International Conference on the Great Lakes Region on 29 November 2006) contains article 12 on the application of its provisions concerning the combating of genocide, war crimes and crimes against humanity to “official authorities”. These provisions “shall apply equally to all persons suspected of committing the offences to which this Protocol applies, irrespective of the official status of such persons. In particular the official status of a Head of State, of Government, or an official member of a Government or parliament, or an elected representative or agent of a State shall in no way shield or bar the criminal liability”. It is possible that this article is viewed by the parties to the treaty as precluding the immunity of their officials from the criminal jurisdiction of any of them, even though the Protocol does not speak directly of the restriction or preclusion of immunity (unfortunately, the Special Rapporteur is not aware of the practical application of the cited provision of the Protocol by the courts of its member States).

despite the fact that in essence the immunity is one and the same. An official performing an act of a commercial nature enjoys immunity from foreign criminal jurisdiction if this act is attributed to the State;

(f) Immunity *ratione materiae* extends to *ultra vires* acts of officials and to their illegal acts;

(g) Immunity *ratione materiae* does not extend to acts which were performed by an official prior to his taking up office; a former official is protected by immunity *ratione materiae* in respect of acts performed by him during his time as an official in his capacity as an official;

(h) Immunity *ratione materiae* is scarcely affected by the nature of an official's or former official's stay abroad, including in the territory of the State exercising jurisdiction. Irrespective of whether this person is abroad on an official visit or is staying there in a private capacity, he obviously enjoys immunity from foreign criminal jurisdiction in respect of acts performed in his capacity as an official;

(i) Immunity *ratione personae*, which is enjoyed by a narrow circle of high-ranking State officials, extends to illegal acts performed by an official both in an official and in a private capacity, including prior to taking office. This is what is known as absolute immunity;

(j) Being linked to a defined high office, personal immunity is temporary in character and ceases when a person leaves office. Immunity *ratione personae* is affected neither by the fact that acts in connection with which jurisdiction is being exercised were performed outside the scope of the functions of an official, nor by the nature of his stay abroad, including in the territory of the State exercising jurisdiction;

(k) The scope of immunity from foreign criminal jurisdiction of serving officials differs depending on the level of the office they hold. All serving officials enjoy immunity in respect of acts performed in an official capacity. Only certain serving high-ranking officials additionally enjoy immunity in respect of acts performed by them in a private capacity. The scope of immunity of former officials is identical irrespective of the level of the office which they held: they enjoy immunity in respect of acts performed by them in an official capacity during their term in office;

(l) Where charges (of being an alleged criminal, suspect, etc.) have been brought against a foreign official, only such criminal procedure measures as are restrictive in character and prevent him from discharging his functions by imposing a legal obligation on this person, may not be taken when the person enjoys immunity *ratione personae* or immunity *ratione materiae*, if the measures concerned are in connection with a crime committed by this person in the performance of official acts. Such measures may not be taken in respect of a foreign official appearing in criminal proceedings as a witness when this person enjoys immunity *ratione personae* or immunity *ratione materiae*, if the case concerns the summoning of such a person to give testimony in respect of official acts performed by the person himself, or in respect of acts of which the official became aware as a result of discharging his official functions;

(m) Immunity is valid both during the period of an official's stay abroad and during the period of an official's stay in the territory of the State which he serves or served. Criminal procedure measures imposing an obligation on a foreign official violate the immunity which he enjoys, irrespective of whether this person is abroad or in the territory of his own State. A violation of the obligation not to take such measures against a foreign official takes effect from the moment such a measure is taken and not merely once the person against whom it has been taken is abroad;

(n) The various rationales for exceptions to the immunity of State officials from foreign criminal jurisdiction are not sufficiently convincing;

(o) It is difficult to talk of exceptions to immunity as a norm of international law that has developed, in the same way as it cannot definitively be asserted that a trend toward the establishment of such a norm exists;

(p) A situation where criminal jurisdiction is exercised by a State in whose territory an alleged crime has taken place, and this State has not given its consent to the performance in its territory of the activity which led to the crime and to the presence in its territory of the foreign official who committed this alleged crime, stands alone in this regard as a special case. It would appear that in such a situation there are sufficient grounds to talk of an absence of immunity.²³⁶

²³⁶ The Special Rapporteur would like to express his gratitude to Ms. S. S. Sarenkova and Mr. M. V. Musikhin for their assistance in the preparation of this report.

SETTLEMENT OF DISPUTES CLAUSES

[Agenda item 15]

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Note by the Secretariat

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Multilateral instruments cited in the present document

	<i>Source</i>
Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958)	United Nations, <i>Treaty Series</i> , vol. 559, No. 8164, p. 285.
Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 450, No. 6466, p. 169.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	<i>Ibid.</i> , vol. 500, No. 7310, p. 95.
Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes (Vienna, 18 April 1961)	<i>Ibid.</i> , vol. 500, No. 7312, p. 241.
Convention on the Reduction of Statelessness (New York, 30 August 1961)	<i>Ibid.</i> , vol. 989, No. 14458, p. 175.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	<i>Ibid.</i> , vol. 596, p. 261.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
Convention on Special Missions (New York, 8 December 1969)	United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 125.
Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (New York, 14 December 1973)	United Nations, <i>Treaty Series</i> , vol. 1035, No. 15410, p. 167.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	United Nations, <i>Juridical Yearbook 1975</i> (Sales No. E.77.V.3), p. 87.
Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)	United Nations, <i>Treaty Series</i> , vol. 1946, No. 33356, p. 3.
Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Vienna, 8 April 1983)	United Nations, <i>Juridical Yearbook 1983</i> (Sales No. E.90.V.1), p. 139.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997)	<i>Official Records of the General Assembly, Fifty-first Session, Supplement No. 49</i> (A/51/49), vol. III, resolution 51/229, annex.
International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997)	United Nations, <i>Treaty Series</i> , vol. 2149, No. 37517, p. 256.
International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)	<i>Ibid.</i> , vol. 2178, No. 38349, p. 197.
United Nations Convention against Transnational Organized Crime (New York, 15 November 2000)	<i>Ibid.</i> , vol. 2225, No. 39574, p. 209.
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000)	<i>Ibid.</i> , vol. 2241, No. 39574, p. 480.
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000)	<i>Ibid.</i> , vol. 2237, No. 39574, p. 319.
Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (New York, 31 May 2001)	<i>Ibid.</i> , vol. 2326, No. 39574, p. 211.
United Nations Convention against Corruption (New York, 31 October 2003)	<i>Ibid.</i> , vol. 2349, No. 42146, p. 41.
United Nations Convention on Jurisdictional Immunities of States and their Property (New York, 2 December 2004)	<i>Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49</i> (A/59/49), vol. I, resolution 59/38.
International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 13 April 2005)	United Nations, <i>Treaty Series</i> , vol. 2445, No. 44004, p. 89.
International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006)	<i>Ibid.</i> , vol. 2716, No. 44088, p. 3.

Introduction

1. At its sixty-first session, in 2009, the International Law Commission decided that, at its sixty-second session, it would devote at least one meeting under the agenda item “Other business” to a discussion of “Settlement of disputes clauses”. In that connection, the Commission requested the Secretariat “to prepare a note on the history and past practice of the Commission in relation to such clauses, taking into account recent practice of the General Assembly”.¹ The present note has been prepared pursuant to that request.

2. The present note is divided into three chapters. Chapter I provides an overview of the history of the study by the Commission of topics related to the settlement of

disputes. Chapter II details the practice followed by the Commission in relation to settlement of disputes clauses. It first examines relevant clauses as they have been included in draft articles adopted by the Commission; it then considers other draft articles in which the inclusion of such clauses, while substantially discussed, has not been eventually retained. For each set of draft articles, a brief description is provided of the factors considered by the Commission in deciding to include, or not, settlement of disputes clauses and, if applicable, of the settlement of disputes clause eventually included in the instrument. Finally, chapter III provides information on the recent practice of the General Assembly in relation to settlement of disputes clauses inserted in conventions which have not been concluded on the basis of draft articles adopted by the Commission.

¹ *Yearbook ... 2009*, vol. II (Part Two), p. 151, para. 238.

CHAPTER I

Topics relating to the settlement of disputes completed or already considered for possible future study by the Commission

3. At its tenth session, in 1958, the Commission completed its study of arbitral procedure by adopting a set of model rules on the issue. Since then, the Commission has not considered topics directly dealing with the settlement of disputes but addressed on several occasions the possibility of devoting a study to specific aspects of that legal field.

A. Model rules on arbitral procedure, 1958

4. At its first session, in 1949, the Commission selected arbitral procedure as one of the topics for codification to which it gave priority and appointed Mr. Georges Scelle as Special Rapporteur.² The Commission considered this topic at its second, fourth, fifth, ninth and tenth sessions, in 1950, 1952, 1953, 1957 and 1958, respectively. In 1952, the Commission adopted on first reading a draft on arbitral procedure and communicated it to Governments for comments.³ The following year, the Commission adopted the revised draft on arbitral procedure.⁴ In its report on the fifth session to the General Assembly, the Commission expressed the view that the draft, which was then intended to be final, should be recommended to Member States with a view to the conclusion of a convention.⁵

5. The Commission emphasized that the draft had a dual aspect, representing both a codification of existing law on international arbitration and a formulation of what the Commission considered to be desirable developments in the field.⁶ Thus, the Commission had taken as a basis the traditional features of arbitral procedure in the settlement of international disputes, such as those relating to the undertaking to arbitrate, the constitution and powers of an arbitral tribunal, the general rules of evidence and

procedure and the award of arbitrators. At the same time, the Commission had also provided certain procedural safeguards for securing the effectiveness, in accordance with the original common intention of the parties, of the undertaking to arbitrate.⁷

6. The draft was considered by the General Assembly at its eighth and tenth sessions, in 1953 and 1955, and subjected to criticism, particularly in view of the Commission’s recommendation for the conclusion of a convention on the topic. The Assembly, in resolution 989 (X) of 14 December 1955, noting that a number of suggestions for improvements on the draft had been put forward, invited the Commission to consider the comments of Governments and the discussions in the Sixth Committee in so far as they might contribute further to the value of the draft on arbitral procedure, and to report to the Assembly at its thirteenth session.

7. At its ninth session, in 1957, the Commission appointed a committee to consider the matter in the light of the General Assembly resolution.⁸ The committee came to the conclusion that it would be necessary for the Commission to decide on the ultimate object to be attained in reviewing the draft on arbitral procedure and, in particular, whether that object should be a convention or simply a set of rules which might inspire States, wholly or in part, in the drawing up of provisions for inclusion in international treaties and special arbitration agreements. The Commission decided in favour of the second alternative.⁹

8. At its tenth session, in 1958, the Commission adopted a set of “Model Rules on Arbitral Procedure”

² See *Yearbook ... 1949*, p. 281, paras. 17 and 21.

³ *Yearbook ... 1952*, vol. II, p. 58, para. 14.

⁴ *Yearbook ... 1953*, vol. II, p. 208, para. 57.

⁵ *Ibid.*, para. 55.

⁶ *Ibid.*, para. 54.

⁷ For example, in order to prevent one of the parties from avoiding arbitration by claiming that the dispute in question was not covered by the undertaking to arbitrate, the draft provided for a binding decision by ICJ as to the arbitrability of the dispute (art. 2).

⁸ *Yearbook ... 1957*, vol. II, p. 143, para. 18.

⁹ *Ibid.*, pp. 143–144, para. 19.

followed by a general commentary.¹⁰ In submitting the final set to the General Assembly in the report on its tenth session, the Commission recommended that the Assembly adopt the report by resolution.¹¹ The Assembly, in resolution 1262 (XIII) of 14 November 1958, took note of chapter II on arbitral procedure of the Commission's report on its tenth session; brought the draft articles on arbitral procedure to the attention of Member States for their consideration and use; and invited Governments to send to the Secretary-General any comments they might wish to make on the draft, and in particular on their experience in the drawing up of arbitral agreements and the conduct of arbitral procedure, with a view to facilitating a review of the matter by the United Nations at an appropriate time.

B. Topics relating to the settlement of disputes already considered for possible future study by the Commission

1. REVIEW OF THE "PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES" AS A POSSIBLE TOPIC FOR CODIFICATION IN 1949

9. At its first session, in 1949, the Commission undertook a survey of the whole field of international law with a view to selecting particular topics the codification of which it considered necessary or desirable.¹² On the basis of a proposal by Mr. Ricardo J. Alfaro,¹³ the Commission had an exchange of views on the necessity of retaining the pacific settlement of international disputes as a suitable topic. A variety of opinions was expressed, with some members of the Commission indicating that the question was only procedural or pertaining to progressive development, while others supported the proposal on the understanding that a study of the topic by the Commission should not duplicate the work done by the Interim Committee of the General Assembly.¹⁴ At the end of that debate,¹⁵ the Commission eventually decided not to include the topic in the provisional list of those selected for codification.¹⁶

2. CONSIDERATION BY THE COMMISSION OF THE SUBJECT OF THE PEACEFUL SETTLEMENT OF DISPUTES ON THE BASIS OF THE "SURVEY OF INTERNATIONAL LAW" PREPARED BY THE SECRETARY-GENERAL IN 1971

10. At its twentieth session, in 1968, the Commission decided to give attention to its long-term programme of work and for that purpose asked the Secretary-General to prepare a new survey of the whole field of international law on the lines of the memorandum entitled "Survey of international law in relation to the work of codification

of the International Law Commission",¹⁷ submitted at the Commission's first session in 1949. On the basis of such a new survey, the Commission could then draw up a list of topics that were ripe for codification. Pursuant to that request, the Secretariat submitted, at the twenty-second session of the Commission, in 1970, a preparatory working paper concerning the review of the Commission's programme of work.¹⁸ In the part of that working paper devoted to topics suggested or recommended for inclusion in the Commission's programme of work, the Secretariat summarized views and proposals put forward by Member States regarding the pacific settlement of international disputes, particularly in respect of the "recourse to procedures for investigation, mediation and conciliation"¹⁹ and of the "obligatory jurisdiction of the International Court of Justice".²⁰ The Secretariat also indicated that the study of the topic "Model rules on conciliation" had also been suggested by a member of the Commission in 1967.²¹

11. At its twenty-third session, in 1971, the Commission had before it another working paper entitled "Survey of International Law",²² prepared by the Secretary-General in response to the Commission's request referred to above. The working paper contained some information regarding the consideration by the Commission of the subject of the peaceful settlement of disputes;²³ it contained a concluding assessment reading as follows:

The Commission has not in general been concerned, when elaborating texts setting out substantive rules and principles, with determining the method of implementation of those rules and principles, or with the procedure to be followed for resolving differences arising from the interpretation and application of the substantive provisions—with one exception. That exception arises when the procedure is seen as inextricably entwined with, or as logically arising from, the substantive rules and principles, or, in the Commission's words "as an integral part" of the codified law. Otherwise the question of the settlement of disputes and, indeed, of implementation as a whole, have been regarded as issues to be decided by the General Assembly or by the codification conference of plenipotentiaries which acts on the draft.²⁴

12. The Commission considered the issue in the context of its review of its long-term programme of work both in 1971 and during its twenty-fifth session, in 1973.²⁵ It listed the "peaceful settlement of disputes" as one of the "[o]ther topics on which one or more members thought that the Commission might envisage undertaking work",²⁶ and decided to give further consideration to the various proposals suggested in the course of future sessions.²⁷

¹⁷ A/CN.4/1/Rev.1, United Nations publication, Sales No. 1948.V.1(1).

¹⁸ See *Yearbook ... 1970*, vol. II, p. 247, document A/CN.4/230.

¹⁹ *Ibid.*, pp. 262–263, paras. 92–93.

²⁰ *Ibid.*, p. 263, paras. 97–100.

²¹ *Ibid.*, p. 269, para. 143; see also *Yearbook ... 1967*, vol. I, 929th meeting, p. 188, para. 73.

²² See *Yearbook ... 1971*, vol. II (Part Two), p. 1, document A/CN.4/245.

²³ *Ibid.*, pp. 31–34, paras. 130–144.

²⁴ *Ibid.*, pp. 33–34, para. 144 (the exception referred to concerned the provision for the settlement of disputes relating to the invalidity, termination and suspension of the operation of treaties, included in the draft articles on the law of treaties; see chap. II, sect. A.4 below).

²⁵ See *Yearbook ... 1973*, vol. II, pp. 230–231, paras. 170–176.

²⁶ *Ibid.*, para. 173.

²⁷ *Ibid.*, p. 231, para. 174.

¹⁰ *Yearbook ... 1958*, vol. II, p. 83, para. 22.

¹¹ *Ibid.*, p. 82, para. 17.

¹² See *Yearbook ... 1949*, p. 280, para. 13.

¹³ *Ibid.*, p. 43, para. 70.

¹⁴ *Ibid.*, pp. 43 and 44, paras. 69–82.

¹⁵ The Chairman of the Commission, Mr. Manley O. Hudson, concluded that "the general opinion for the moment did not favour retaining the question of the pacific settlement of international disputes among the topics the codification of which seemed necessary or desirable" (*ibid.*, p. 44).

¹⁶ *Ibid.*, p. 281, para. 16. The topic "arbitral procedure" was separately included in the provisional list (see sect. A above).

3. TOPICS RELATING TO SETTLEMENT OF DISPUTES LISTED AS POSSIBLE FUTURE TOPICS UNDER THE LONG-TERM PROGRAMME OF WORK IN 1996

13. At its forty-eighth session, in 1996, the Commission decided to establish a working group on the long-term programme of work to assist it in selecting topics for future study.²⁸ As a result of that exercise, the Commission established a scheme of 13 “very general fields of public international law governed mainly by rules of customary international law”.²⁹ Under each of those fields, the committee listed topics which had already been completed, those which had been previously proposed by the Commission or by individual members, and “some possible topics on which the Commission does not intend to take a firm position on their feasibility for future work”.³⁰ Under the field “Settlement of disputes”, the Commission mentioned the Model Rules on Arbitral Procedure as the

²⁸ See *Yearbook ... 1996*, vol. II (Part Two), p. 97, para. 244.

²⁹ *Ibid.*, annex II, p. 133, para. 2 (a).

³⁰ *Ibid.*, para. 2 (c).

only topic already completed.³¹ As possible future topics, together with the “Pacific settlement of international disputes [1949]”,³² it listed “Model clauses for the settlement of disputes relating to application or interpretation of future codification conventions” and “Mediation and conciliation procedures through the organs of the United Nations”.³³ Since then, the Commission has not addressed the settlement of disputes as a potential topic for future study; reference to such a possibility was, however, expressly made during the final debate on the draft articles on responsibility of States for internationally wrongful acts.³⁴

³¹ See sect. A above.

³² See sect. B.I above.

³³ See *Yearbook ... 1996*, vol. II (Part Two), annex II, p. 136.

³⁴ During the plenary debate, one member indicated that “The question of dispute settlement was undoubtedly a fundamental problem in itself, a general problem on which the Commission might one day, in the framework of its long-term programme of work, prepare some sort of model clauses on dispute settlement for insertion in the codification conventions” (*Yearbook ... 2001*, vol. I, 2668th meeting, pp. 14–15, para. 40).

CHAPTER II

Practice of the Commission in relation to settlement of disputes clauses

14. Although no general debate has so far been held by the Commission regarding settlement of disputes clauses,³⁵ the possibility and ways of including such clauses have frequently been addressed in the course of discussions on specific draft articles. The present chapter examines in turn the clauses eventually included in the draft articles adopted by the Commission, and other draft articles in which the inclusion of such clauses, while substantially discussed, has not been finally retained. In each case, the factors considered by the Commission in deciding upon the clauses and, if applicable, the mechanism eventually adopted in the instrument are briefly described.

A. Settlement of disputes clauses included in drafts adopted by the Commission

15. This section examines the provisions regarding settlement of disputes included in the final drafts adopted by the Commission on various topics of international law. For each instrument, it describes the settlement of disputes mechanism; the rationale for the inclusion of such a regime as it emerges from the discussion in the Commission; and any subsequent action taken by the General Assembly or the diplomatic conference.

1. DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS AND DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS, 1954

16. The two draft conventions adopted by the Commission in 1954 contained identical settlement of disputes

clauses, according to which the parties undertook to establish an agency to act on behalf of stateless persons and, within the framework of the United Nations, a tribunal to decide both complaints presented by that agency on behalf of the persons concerned and disputes brought by the parties. The parties also agreed that any dispute between them not referred to the tribunal be submitted to ICJ.³⁶

17. At its fifth session, in 1953, the Commission concluded that the establishment of an agency representing stateless persons and of a tribunal where those persons, through the agency, could bring their claims, was necessary given the specific and vulnerable situation of persons threatened with statelessness; the details of the organization of the agency and the tribunal were, however, in the opinion of the Commission, to be provided by the contracting parties.³⁷ During the sixth session, in 1954, different views were expressed as to the possibility of establishing the tribunal as a procedure of first instance and ICJ as an appellate jurisdiction: some members of the Commission mentioned as a potential issue of dual jurisdiction the possibility of having the tribunal and the Court dealing with the same submission simultaneously. The objection to establishing such a tribunal expressed by some Governments in their comments was also recalled during the debate in plenary.³⁸ The Commission finally decided that jurisdiction on disputes between the parties should be vested with the “special tribunal” but that those disputes, if not referred to the tribunal, should be adjudicated by ICJ.³⁹

³⁵ For the purposes of the present note, “settlement of disputes clauses” are understood either as those which have been considered as such by the Commission or as those which refer to one or several of the peaceful means of settlement of disputes enumerated in Article 33 of the Charter of the United Nations.

³⁶ *Yearbook ... 1954*, vol. II, p. 145 (art. 11 of both conventions).

³⁷ *Yearbook ... 1953*, vol. II, pp. 227–228, paras. 157–160.

³⁸ *Yearbook ... 1954*, vol. I, 244th meeting, pp. 12–14, paras. 12–39; 245th meeting, p. 15, paras. 13–21.

³⁹ *Yearbook ... 1954*, vol. II, p. 142, paras. 23–24.

18. The text of the Convention on the Reduction of Statelessness adopted at the United Nations Conference on the Elimination or Reduction of Future Statelessness in 1961 only retained the submission to ICJ at the request of any party to the dispute if the difference could not be settled by other means.⁴⁰ The idea of establishing an agency to act on behalf of stateless persons and a tribunal was not ultimately retained.

2. ARTICLES CONCERNING THE LAW OF THE SEA, 1956

19. In the Articles concerning the law of the sea adopted by the Commission in 1956, two sets of settlement of disputes procedures were provided for disputes regarding living resources of the high seas and the continental shelf, respectively.⁴¹ A seven-member arbitral commission which could order preliminary measures and take decisions binding upon the parties in dispute was designed to settle disputes concerning the living resources, while disputes regarding the continental shelf were to be submitted to ICJ at the request of any of the parties to the dispute, unless they agreed on another method of peaceful settlement.

20. A wide variety of views was expressed in the Commission concerning the procedure for solving disputes regarding the living resources of the high seas. The insertion of a compulsory arbitration clause was opposed on the ground that the task of the Commission was to codify or develop the law but not to safeguard its application.⁴² For some members, a general reference to existing provisions imposing on States an obligation to settle their disputes peacefully was sufficient.⁴³ The majority, however, was of the view that an impartial authority was essential to secure the effective application of the draft articles,⁴⁴ and that the idea of an ad hoc arbitral commission would be more likely to be accepted by States than that of a central permanent judicial authority.⁴⁵

21. There were also several approaches in the Commission concerning the settlement of disputes regime for the continental shelf. Initially, the Articles only contained a general arbitration clause.⁴⁶ The main reason for including such a clause instead of simply referring to the peaceful means of settlement of disputes provided in Article 33 of the Charter was to reconcile the rights of coastal States and the long-respected freedom of the high seas, and to leave room for "a measure of elasticity and discretion" in this exercise of reconciliation.⁴⁷ The Commission later amended the article and provided that disputes regarding the continental shelf should be submitted to ICJ at the request of any of the parties, unless they agreed on another method of peaceful settlement.⁴⁸ In doing so, the majority of the Commission dissociated itself from the objection

made by some members to the effect that the insertion of such a clause would render the draft "unacceptable to a great many States".⁴⁹ It also deliberately differentiated itself from the arbitral commission regime designed for disputes regarding living resources in the high seas, on the ground that matters regarding the continental shelf would not be "of an extremely technical character as in the case of the conservation of the living resources of the sea".⁵⁰

22. During the debate on the topic, the Commission also considered the possibility of adopting a rule pursuant to which all disputes concerning the breadth of the territorial sea should be submitted to the compulsory jurisdiction of ICJ.⁵¹ The Commission decided, however, not to include such a clause on the ground that "the international community had not yet succeeded in formulating a rule of law" on the matter, which would make it inappropriate to "delegate an essentially legislative function to a judicial organ".⁵²

23. The Convention on Fishing and Conservation of Living Resources of the High Seas adopted in 1958⁵³ contains an arbitral commission procedure similar to that included in the draft prepared by the Commission. All other matters arising out of the interpretation or application of any of the conventions on the law of the sea of 1958 are subject to the compulsory jurisdiction of ICJ as stipulated in the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes.

3. DRAFT ARTICLES ON DIPLOMATIC INTERCOURSES AND IMMUNITIES, 1958

24. Article 45 of the draft articles on diplomatic intercourse and immunities adopted by the Commission in 1958 provided that, when disputes concerning the interpretation or application of the Convention could not be settled through diplomatic channels, they should be referred to conciliation or arbitration or, failing that, they should, at the request of either of the parties, be submitted to ICJ.⁵⁴

25. During the Commission's debate on the topic, different opinions emerged on whether, where in the draft and in what form a settlement of disputes clause should be adopted. Some members believed that the Commission should focus on the codification of substantive rules, without dealing with the question of their implementation, while others suggested dealing with the settlement of disputes procedure in the form of a protocol. For the majority, however, it was necessary to provide for a dispute settlement procedure ultimately referring to the jurisdiction of the Court in the text, if the draft were to be submitted in the form of a Convention.⁵⁵

26. The Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory

⁴⁰ See article 14.

⁴¹ *Yearbook ... 1956*, vol. II, pp. 263 and 264 (arts. 57–59 and 73, respectively).

⁴² *Ibid.*, p. 288, commentary to article 49, para. (17).

⁴³ *Ibid.*

⁴⁴ *Ibid.*, para. (18).

⁴⁵ *Ibid.*, para. (19).

⁴⁶ *Yearbook ... 1953*, vol. II, p. 213.

⁴⁷ *Ibid.*, p. 217, para. 87.

⁴⁸ *Yearbook ... 1956*, vol. II, p. 300, art. 73.

⁴⁹ *Ibid.*, commentary to article 73, para. (4).

⁵⁰ *Ibid.*, commentary to article 73, para. (3).

⁵¹ *Ibid.*, commentary to article 73, para. (9).

⁵² *Ibid.*

⁵³ See articles 9–12.

⁵⁴ *Yearbook ... 1958*, vol. II, p. 105.

⁵⁵ *Ibid.*, commentary to article 45.

Settlement of Disputes, adopted in 1961, contains a procedure which is substantially identical to that proposed by the Commission.

4. DRAFT ARTICLES ON THE LAW OF TREATIES, 1966

27. In the draft articles on the law of treaties adopted in 1966, the Commission designed a specific procedure of notification to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty.⁵⁶ Draft article 62 provided in particular that, if an objection to the notification by one party was raised by any other party, the parties should seek a solution through the means indicated in Article 33 of the Charter of the United Nations.⁵⁷

28. The necessity of including a general reference to the peaceful settlement of disputes in the specific context of invalidity, termination or suspension of the operation of a treaty was first emphasized by the Commission as a means to limit the effect that arbitrary assertions may have on the stability of treaties.⁵⁸ Although some members of the Commission supported, especially during the first reading of the draft articles,⁵⁹ the need to provide for compulsory judicial settlement by ICJ should the parties fail to agree on another means of settlement, the Commission eventually confined itself to a mere reference to Article 33 of the Charter, on the understanding that the establishment in the draft of these procedural provisions “as an integral part of the law relating to the invalidity, termination and suspension of the operation of treaties” would be “a valuable step forward”.⁶⁰

29. In the Vienna Convention on the Law of Treaties (1969 Vienna Convention), the settlement of disputes procedure is provided for in two separate articles. Article 65, dealing with the procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty, is substantially identical to draft article 62 as adopted on second reading by the Commission. Article 66 specifically details the procedures for judicial settlement, arbitration and conciliation to be followed in cases in which the notifying and objecting parties under article 65 have not been able to solve their dispute within a period of 12 months. At the United Nations Conference on the Law of Treaties, the settlement of disputes relating to the application of norms of *jus cogens* was given specific consideration: according to article 66 (a) of the Vienna Convention, unless the parties agree to resort to arbitration, any of them may request a decision from ICJ when the dispute relates to the application or interpretation of article 53 or 64 of the Convention. For disputes relating to any other provision in part V of the Convention, any of the parties may set in motion the procedure of conciliation specified in the Annex to the Convention.

⁵⁶ *Yearbook ... 1966*, vol. II, p. 261, draft article 62.

⁵⁷ *Ibid.*, para. 3.

⁵⁸ See *Yearbook ... 1963*, vol. II, p. 214, commentary to draft article 51, para. (1).

⁵⁹ See *ibid.*, p. 215, para. (2).

⁶⁰ *Yearbook ... 1966*, vol. II, p. 263, commentary to draft article 62, para. (6).

5. DRAFT ARTICLES ON THE REPRESENTATION OF STATES IN THEIR RELATIONS WITH INTERNATIONAL ORGANIZATIONS, 1971

30. In the draft articles on the representation of States in their relations with international organizations, adopted at the twenty-third session, in 1971, the Commission included a dual mechanism for the settlement of disputes. Draft article 81 first organized a procedure of consultations, should a dispute arise between the sending State, the host State and the organization, to be held at the request of any of them.⁶¹ If the dispute could not be disposed of as a result of this initial process, draft article 82 provided that it be either submitted to any procedure established in the organization or, at the request of any State party to the dispute, to a conciliation commission to be constituted in accordance with the provisions of the article.⁶²

31. Initially, the Commission had only envisaged including in the draft articles a provision regarding the possible holding of consultations.⁶³ In the light of comments received from some Governments,⁶⁴ the Commission later re-examined the question and added, in draft article 82, the utilization of any procedure available in the organization, as “the logical steps following the consultation in case they prove unsatisfactory”, and the conciliation procedure, as “the largest measure of common ground that could be found at present among Governments as well as in the Commission on the question”.⁶⁵

32. In the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, concluded in Vienna on 14 March 1975, the settlement of disputes regime is provided in articles 84 and 85. Article 84 is largely similar to draft article 81, although it does not put the organization on an equal footing with the States parties to the dispute. Article 85 mainly deals with the submission of the dispute to, and the composition and functions of, the conciliation commission; it specifies that the recommendations formulated by the commission shall not be binding on the parties to the dispute unless they all have accepted them.

6. DRAFT ARTICLES ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST DIPLOMATIC AGENTS AND OTHER INTERNATIONALLY PROTECTED PERSONS, 1972

33. Although the Commission retained in its draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons a settlement of disputes clause similar in some respects to the one adopted in the draft articles on the representation of States in their relations with international organizations, it took an innovative approach to the manner in which such a clause was to be incorporated in the text. Article 12 of the draft adopted at the twenty-fourth session, in 1972, was indeed presented in alternative formulations providing, respectively, for the reference of the dispute to conciliation (alternative A) or to an optional

⁶¹ *Yearbook ... 1971*, vol. II (Part One), p. 333.

⁶² *Ibid.*, draft article 82, para. 1.

⁶³ See *Yearbook ... 1969*, vol. II, p. 221, draft article 50.

⁶⁴ See *Yearbook ... 1971*, vol. II (Part One), p. 334, commentary to draft article 82, para. (5).

⁶⁵ *Ibid.*, paras. (6)–(7).

form of arbitration (alternative B).⁶⁶ As emphasized by the Commission itself, alternative A “reproduce[d], with the requisite adaptations, article 82 of the draft articles on the representation of States in their relations with international organizations”.⁶⁷ As to alternative B, it provided for compulsory arbitration, accompanied by the possibility of referring the dispute to ICJ should the parties fail to agree on the organization of the arbitration, but expressly included a provision allowing the parties to make a reservation to that particular article.⁶⁸

34. In deciding to include in the draft these alternative methods of settlement of disputes, the Commission had to make a number of assessments. First, it considered that “a variety of disputes could arise out of the draft articles”,⁶⁹ although some of its members were of a different opinion and believed that potential disputes under the draft articles would, by their nature, be “unamenable to the application of settlement procedures”.⁷⁰ Secondly, the Commission concluded that the conciliation or arbitration procedures “represent[ed] the largest measure of common ground that would appear to exist at present among Governments on the question of dispute settlement”⁷¹ and decided to submit alternative formulations as a way of “seeking an expression of views from Governments”⁷² on the issue.

35. Article 13 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, concluded in 1973, provides a procedure very similar to that embodied in alternative B of draft article 12.

7. DRAFT ARTICLES ON THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS, 1982

36. In addressing the issue of the settlement of disputes in the context of the law of treaties between States and international organizations or between international organizations, the Commission referred both to its own draft articles on the law of treaties adopted in 1966 and to the additions brought to this general procedure during the United Nations Conference on the Law of Treaties. The draft articles on the law of treaties between States and international organizations or between international organizations adopted by the Commission at its twenty-fourth session, in 1982, thus substantially reproduced the mechanism established under the 1969 Vienna Convention,⁷³ with some modifications justified by the particularities entailed by the potential involvement of an international organization in the dispute.

37. Emphasizing that the system it had proposed regarding the procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty had been endorsed during the Conference

on the Law of Treaties, the Commission decided to extend it to the draft articles, so as “to ensure a fair procedure for the [parties] in dispute, based on notification, explanation, a moratorium, and the possibility of recourse to the means for settlement specified in Article 33 of the Charter”.⁷⁴

38. In deciding to transpose to the draft articles the settlement of disputes clause adopted at the Vienna Conference on the Law of Treaties, the Commission acknowledged the “peculiarities of article 66”,⁷⁵ which appeared in the body of the treaty, and not among its final clauses, and covered only disputes pertaining to part V of the Vienna Convention.⁷⁶ After considering various means of addressing the “major procedural difficulty”⁷⁷ entailed by the impossibility of international organizations being parties to cases before ICJ, the Commission eventually opted for a “simple”⁷⁸ solution, according to which disputes concerning draft articles 53 and 64 would be submitted to arbitration while, for disputes concerning other provisions in part V, the system of compulsory recourse to conciliation instituted by the 1969 Vienna Convention would be retained.⁷⁹

39. The settlement of disputes mechanism provided for in article 66 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations appears in some respects more complex than the one adopted by the Commission, particularly as far as disputes regarding the application or interpretation of articles 53 or 64 of the Convention are concerned. Depending on the character of the parties to the dispute, ICJ may indeed be called to render a decision or give an advisory opinion, unless all the parties to the dispute agree to submit it to an arbitration procedure.⁸⁰

8. DRAFT ARTICLES ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES, 1994

40. As emphasized by the Commission itself, draft article 33 of the draft articles on the law of the non-navigational uses of international watercourses provided “a basic rule for the settlement of watercourse disputes”,⁸¹ residual in nature and consisting in a three-step procedure: if unsuccessful, consultations and negotiations should be followed by recourse to methods of impartial fact-finding, through a fact-finding commission; mediation or

⁶⁶ See *Yearbook ... 1972*, vol. II, pp. 321–323, draft article 12.

⁶⁷ *Ibid.*, p. 322, commentary to draft article 12, para. (3).

⁶⁸ *Ibid.*, para. 4.

⁶⁹ *Ibid.*, para. 1.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ See paragraph 29 above.

⁷⁴ *Yearbook ... 1982*, vol. II (Part Two), p. 63, commentary to draft article 65, para. (2). The Commission proposed two amendments to the text of article 65 of the Vienna Convention, concerning the time limit for making an objection and the submission of the notification or objection made by an international organization to the rules of that organization (*ibid.*, pp. 63 and 64, at paras. 3–5). The latter amendment was retained in the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations.

⁷⁵ *Ibid.*, p. 64, commentary to draft article 66, para. (2).

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, p. 65, para. (4).

⁷⁸ *Ibid.*, para. (6).

⁷⁹ *Ibid.*

⁸⁰ See articles 65 and 66 of the Convention on the Law of Treaties between States and International Organizations or between International Organizations.

⁸¹ *Yearbook ... 1994*, vol. II (Part Two), p. 134, commentary to draft article 33, para. (1).

conciliation; and finally arbitration or judicial settlement upon agreement of the parties concerned.⁸²

41. Although the rule embodied in draft article 33 may thus appear basic in character, the question of including settlement of disputes clauses in the draft articles gave rise to an extensive debate in the Commission, particularly at the beginning of the second reading of the draft.⁸³ Some members doubted the value of inserting such clauses, given the diversity of watercourses and “the flexibility of the instrument being prepared”; in their view, disputes in that respect “could more effectively be resolved by political means, rather than by adjudication”.⁸⁴ Conversely, other members pointed to the increasing needs of populations and the scarcity of the resource as supporting the necessity to provide for technical means of solving watercourse disputes.⁸⁵ The majority in the Commission ultimately joined the Special Rapporteur in considering that the recommendation of a “tailored set of provisions”⁸⁶ on dispute settlement would constitute an “important contribution”,⁸⁷ even if the draft articles were to take the form of model rules.⁸⁸

42. While article 33, on the settlement of disputes, of the Convention on the Law of the Non-navigational Uses of International Watercourses maintains the residual character of the draft article adopted by the Commission, it differs significantly from it. Thus, if the parties concerned cannot solve their dispute by negotiation, they may jointly seek a settlement through good offices, mediation, conciliation or the use of joint watercourse institutions, or agree to submit their dispute to arbitration or to ICJ. The recourse to an impartial fact-finding commission at the request of any of the parties to the dispute is understood as an ultimate recommendatory procedure for an equitable solution of the dispute, should the other means previously listed have failed to provide for a settlement.

9. DRAFT ARTICLES ON THE PREVENTION OF TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES, 2001

43. As indicated by the Drafting Committee, article 19 of the draft articles on the prevention of transboundary harm from hazardous activities is a revision, “in summary form”, of article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses, “which had been extensively negotiated by

⁸² *Ibid.*, pp. 134 and 135, paras. 2–11. The Commission also provided the requirement of notification, negotiation and consultation for States wishing to implement planned measures regarding international watercourses, in order to maintain an equitable balance between the parties and avoid disputes among them regarding the uses of watercourses (*ibid.*, pp. 111–118, draft articles 11–19).

⁸³ See *Yearbook ... 1993*, vol. II (Part Two), p. 86, paras. 351–357.

⁸⁴ *Ibid.*, para. 353.

⁸⁵ *Ibid.*, para. 352. The view was also expressed that the “elasticity of the substantive rules made it indispensable to provide for” compulsory fact-finding, conciliation, arbitration and judicial settlement (*ibid.*, para. 357).

⁸⁶ *Ibid.*, para. 351.

⁸⁷ *Ibid.*

⁸⁸ The resolution on confined transboundary groundwater adopted by the Commission upon completion of the second reading of the draft contains an explicit recommendation to the effect that States consider resolving disputes involving transboundary confined groundwater in accordance with the provisions contained in article 33 of the draft articles (see *Yearbook ... 1994*, vol. II (Part Two), p. 135).

States and found acceptable”.⁸⁹ It is “residual in nature”,⁹⁰ as it applies in the absence of any other agreement by the States concerned for the settlement of their disputes; failing an agreement on the traditional means for dispute settlement to be resorted to, draft article 19 provides for a compulsory procedure for the appointment of an impartial fact-finding commission, the recommendations of which are to be considered in good faith by the parties.⁹¹

44. The provisions of draft article 19, as explained by the Drafting Committee, were intended to strike a fair balance between different imperatives. On the one hand, and in contrast to the provision on settlement of disputes adopted on first reading,⁹² it was felt necessary to refrain from including in the draft a mere “‘disabled’ dispute settlement mechanism”,⁹³ i.e. a mechanism requiring the full cooperation of all the parties for the setting up of a fact-finding commission. On the other hand, it was considered prudent “not to establish fully-fledged dispute settlement provisions which might serve as a disincentive to ratification by Governments”.⁹⁴

B. Settlement of disputes clauses discussed but not eventually included in the drafts adopted by the Commission

45. A brief overview of the drafting history of the articles adopted by the Commission since its first session shows that, in almost half the cases, the necessity and opportunity to insert settlement of disputes clauses did not arise as a matter for discussion.⁹⁵ This section examines the draft articles in the context of which the possibility of including such clauses, while substantially discussed, has not been finally retained. While the list presented hereafter is not intended to be exhaustive, it aims to further illustrate the manner in which the Commission has addressed issues relating to settlement of disputes clauses in its history.

1. DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT OF TREATIES, 1974

46. In the course of the concluding debates on the first reading of the draft articles on succession of States in respect of treaties, in 1972, some members of the Commission stressed the importance of examining in due course the question of the possible need for provisions concerning the settlement of disputes arising out of the interpretation and application of the draft. The Commission, however, considered it premature to take up the question at that stage.⁹⁶

⁸⁹ *Yearbook ... 2001*, vol. I, 2675th session, p. 63, para. 28.

⁹⁰ *Yearbook ... 2001*, vol. II (Part Two), p. 170, commentary to draft article 19, para. 1.

⁹¹ *Ibid.*, pp. 169 and 170, draft article 19.

⁹² See *Yearbook ... 1998*, vol. II (Part Two), p. 41, draft article 17.

⁹³ *Yearbook ... 2001*, vol. I, 2675th session, p. 63, para. 27.

⁹⁴ *Ibid.*, para. 28.

⁹⁵ Obviously, the absence of debate on the issue in the Commission does not prevent the eventual adoption of settlement of disputes mechanisms in instruments which, like the 1963 Vienna Convention on Consular Relations or the 1969 Convention on Special Missions (both of which are accompanied by an optional protocol on the compulsory settlement of disputes), have been concluded on the basis of draft articles adopted by the Commission.

⁹⁶ See *Yearbook ... 1972*, vol. II, p. 229, para. 50.

47. The issue was to arise again in the course of the second reading of the draft articles, on the basis of comments made by some Governments foreseeing difficulties in the application of the articles and, hence, the need for some settlement of disputes procedure.⁹⁷ Given the conceptual relationship existing between the draft articles on succession of States in respect of treaties and the 1969 Vienna Convention, some members of the Commission supported the inclusion in the former of procedures for settlement of disputes based on the provisions of the latter.⁹⁸ Ultimately, the view prevailed that “the Commission should not pursue the matter further without reference to the General Assembly”,⁹⁹ on the understanding that the question could be given further consideration if the Assembly so wished in preparation for a convention.¹⁰⁰

48. The Vienna Convention on Succession of States in respect of Treaties contains a Part VI entirely devoted to the settlement of disputes, which refers in turn to consultation and negotiation, conciliation (under a procedure designated in an annex to the Convention), judicial settlement and arbitration upon individual declarations of acceptance by the parties or by common consent.¹⁰¹

2. DRAFT ARTICLES ON THE MOST-FAVOURLED-NATION CLAUSE, 1978

49. The question of settlement of disputes arose during both the first and the second readings of the draft articles on the most-favoured-nation clause. Some members supported the inclusion of a specific clause in that respect, which would specify the right of a party to refer a dispute for judicial settlement failing resolution by other means.¹⁰² The Commission eventually refrained, however, from formulating any provision on settlement of disputes, on the understanding that the question “should be referred to the General Assembly and Member States and, ultimately, to the body that might be entrusted with the task of finalizing the draft articles”.¹⁰³

3. DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT OF STATE PROPERTY, ARCHIVES AND DEBTS, 1981

50. At an early stage of the study of succession of States in respect of matters other than treaties, a diversity of views was expressed in the Commission as to the need to address the question of settlement of disputes. For some members, the Commission should “attempt to work out an adequate system”¹⁰⁴ of judicial settlement of disputes arising out of State succession; for others, the question “went beyond the scope of the topic and should be excluded from the Commission’s work”.¹⁰⁵ The prevailing opinion was

that, pending more progress in studying the substance of the topic, any decision on the issue of dispute settlement would be premature.¹⁰⁶ During the subsequent sessions, however, the Commission never held a debate on the need to design a settlement of disputes procedure specific to the succession of States in respect of State property, archives and debts, even though the intention of taking up the issue at a later stage was reiterated on several occasions.¹⁰⁷ The Commission did not, in particular, consider the possibility of transposing to the draft articles, which it regarded as a complement to the 1978 Vienna Convention,¹⁰⁸ the system adopted during the United Nations Conference on Succession of States in Respect of Treaties.

51. The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts provides, in Part V, a settlement of disputes regime¹⁰⁹ substantially identical to the mechanism embodied in Part VI of the Vienna Convention on Succession of States in respect of Treaties.¹¹⁰

4. DRAFT ARTICLES ON THE STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER AND DRAFT OPTIONAL PROTOCOLS, 1989

52. The question of the settlement of disputes in connection with the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was only addressed at the beginning of the second reading of the draft, and mainly because a few Governments had suggested including provisions “of a flexible nature” on the issue.¹¹¹ The suggestion met with support in the Commission.¹¹² Some members indicated that the most appropriate form for including settlement of disputes clauses would be that of an optional protocol annexed to the instrument to be adopted, as had been done in the Vienna Convention on Diplomatic Relations,¹¹³ the Vienna Convention on Consular Relations and the Convention on Special Missions. The Special Rapporteur, while recognizing the merits of that approach, also mentioned as an alternative course the one taken in the 1975 Vienna Convention on Representation of States in their Relations with International Organizations of a Universal Character, which provides for the settlement of disputes through consultations and conciliation.¹¹⁴

53. At the end of the second reading of the draft articles, the Commission recommended to the General Assembly

¹⁰⁶ *Ibid.*, para. 72. The Commission indicated that it was not possible at that early stage of the study “to determine the type of dispute which might arise from the rules proposed, and the procedures or methods of settlement best suited to those aspects concerning which it might be considered advisable to work out a system of settlement”.

¹⁰⁷ See *Yearbook ... 1976*, vol. II (Part Two), p. 126, para. 103; *Yearbook ... 1977*, vol. II (Part Two), p. 56, para. 58; *Yearbook ... 1978*, vol. II (Part Two), p. 110, para. 122.

¹⁰⁸ See *Yearbook ... 1981*, vol. II (Part Two), p. 16, para. 63.

¹⁰⁹ Arts. 42–46.

¹¹⁰ See paragraph 48 above.

¹¹¹ *Yearbook ... 1988*, vol. II (Part Two), p. 97, para. 489.

¹¹² *Ibid.*, paragraph 491.

¹¹³ See paragraph 26 above.

¹¹⁴ See *Yearbook ... 1988*, vol. II (Part Two), p. 97, para. 492. On the settlement of disputes clauses adopted in the Vienna Convention on Representation of States in their Relations with International Organizations of a Universal Character, see para. 32 above.

⁹⁷ See *Yearbook ... 1974*, vol. II (Part One), p. 173, para. 79.

⁹⁸ *Ibid.*, para. 80.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, para. 81.

¹⁰¹ Arts. 41–45.

¹⁰² See *Yearbook ... 1976*, vol. II (Part Two), p. 10, para. 55, and *Yearbook ... 1978*, vol. II (Part Two), p. 15, para. 68.

¹⁰³ *Yearbook ... 1978*, vol. II (Part Two), p. 15, para. 69 and, for similar language on first reading, *Yearbook ... 1976*, vol. II (Part Two), p. 10, para. 55.

¹⁰⁴ *Yearbook ... 1968*, vol. II, p. 220, para. 71.

¹⁰⁵ *Ibid.*

that an international conference of plenipotentiaries be convened to conclude a convention on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.¹¹⁵ It decided to leave it to the conference “to resolve the usual problems relating to the final clauses of the convention and to the peaceful settlement of disputes”.¹¹⁶

5. DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, 1991

54. At the thirty-eighth session of the Commission, in 1986, the Special Rapporteur on jurisdictional immunities of States and their property proposed a number of amendments to the articles previously adopted on first reading, as well as a number of new draft articles, including provisions for the settlement of disputes. Noting that the insertion of a procedure for the settlement of disputes was “increasingly fashionable”¹¹⁷ in recent works of codification, the Special Rapporteur presented two options for the topic under consideration. On the one hand, the dispute of settlement clauses could cover disputes concerning the application and interpretation of the articles in general, or be confined to specific aspects of the topic, whether or not on the basis of reciprocity.¹¹⁸ On the other hand, the need for a dispute settlement clause might depend on the substance of the draft articles. In the specific context of the topic, he noted that there could only be a dispute if a court decided to exercise jurisdiction in proceedings involving another State. Where such jurisdiction had been exercised, only rarely had the State which had been refused jurisdictional immunity taken any measure or step other than the mere presentation of a protest. In the light of that practice, the Special Rapporteur suggested that the Commission might not find it absolutely necessary to include dispute settlement provisions in the draft articles, and stated that he himself would not propose the inclusion of such provisions. Nevertheless, he added that one might wish to guard against the emergence of a new trend which could entail not only the use of jurisdiction in proceedings involving the interest of another State, but also the exercise of enforcement measures against its property. In order to discourage vexatious litigation, there might be a growing need to devote a part of the draft to the settlement of disputes, which might have the effect of discouraging courts from allowing provisional or enforcement measures against State property. The Special Rapporteur suggested that, should the Commission find it expedient to include such provisions in the draft articles, the regime established under the Vienna Convention on Succession of States in respect of Treaties¹¹⁹ might provide an appropriate precedent in that regard.¹²⁰

55. In his preliminary report presented to the Commission at its fortieth session, in 1988, the new Special Rapporteur noted that the Commission had not given thorough consideration to the question of a settlement of disputes

mechanism due to lack of time.¹²¹ During the discussion at the forty-first session of the Commission, in 1989, one member expressed the view that it might not be appropriate to include rules on the settlement of disputes in the draft articles. He suggested that, should the draft articles take the form of a future convention, the legal mechanism for dispute settlement would most appropriately be incorporated in an optional protocol to the convention. Several members favoured leaving the question to be determined by a diplomatic conference.¹²² It was also pointed out that an indication of the preference of the General Assembly would be useful before the Commission addressed the matter further.¹²³

56. The United Nations Convention on Jurisdictional Immunities of States and their Property contains a settlement of disputes regime based on the proposal made by the chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property.¹²⁴ It provides that State parties should try to settle their disputes through negotiation. If a dispute concerning the interpretation or application of the Convention cannot be settled within reasonable time, it shall, at the request of either party, be submitted for arbitration. If the parties cannot agree upon the organization of the arbitration within six months of such a request, the dispute may be referred to ICJ by either party, in accordance with the Statute of the Court.¹²⁵ The dispute settlement procedure is, however, subject to reservation by State parties.¹²⁶

6. DRAFT ARTICLES ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, 2001

57. In the lengthy drafting history of the draft articles on the responsibility of States for internationally wrongful acts, the Commission discussed both the general question of whether to include a dispute settlement mechanism for the entire set of draft articles and the specific issue of whether there was a connection to be made between such a mechanism (or other available dispute settlement procedures) and recourse to countermeasures.

58. With regard to the first question, it should be noted that, while the draft articles adopted on first reading in 1996 included a set of seven articles, as well as an annex, on settlement of disputes,¹²⁷ the final draft adopted on second reading in 2001¹²⁸ contained no across-the-board provision concerning the settlement of disputes regarding the interpretation or application of the draft articles.

59. The possibility of including in the draft articles general provisions relating to the settlement of disputes

¹²¹ *Yearbook ... 1988*, vol. II (Part One), document A/CN.4/415, para. 274.

¹²² *Yearbook ... 1991*, vol. II (Part Two), p. 13, para. 26.

¹²³ *Ibid.*

¹²⁴ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 22 (A/59/22)*, annex II, sect. A.

¹²⁵ United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 27 (1) and (2).

¹²⁶ *Ibid.*, art. 27 (3).

¹²⁷ *Yearbook ... 1996*, vol. II (Part Two), p. 64 *et seq.*

¹²⁸ *Yearbook ... 2001*, vol. II (Part Two), p. 26, para. 76.

¹¹⁵ *Yearbook ... 1989*, vol. II (Part Two), p. 13, para. 66.

¹¹⁶ *Ibid.*, para. 68.

¹¹⁷ *Yearbook ... 1986*, vol. II (Part One), document A/CN.4/396, p. 33, para. 45.

¹¹⁸ *Ibid.*

¹¹⁹ See paragraph 48 above.

¹²⁰ *Yearbook ... 1986*, vol. II (Part One), p. 33, paras. 46 and 47.

was discussed by the Commission from the earliest years of its work on this topic. At the fifteenth session, in 1963, two members of the subcommittee established by the Commission to consider general aspects of the topic had submitted memorandums in which they emphasized the importance of addressing dispute settlement procedures.¹²⁹ However, the initial programme of work for the topic proposed by the subcommittee and endorsed by the Commission did not envisage a part relating to dispute settlement.¹³⁰ At its twenty-first session, in 1969, the Commission reviewed its plan of work and decided to consider at a later stage the possibility of examining certain problems concerning the implementation of the international responsibility of States and questions relating to the settlement of disputes.¹³¹

60. When the question was discussed on first reading,¹³² some members called for caution in the elaboration of dispute settlement provisions.¹³³ It was pointed out that, in the light of the reluctance of States to accept third-party dispute settlement procedures, it was still premature for the Commission to embark in that direction¹³⁴ and that the Commission should be careful not to make proposals that States would not accept.¹³⁵ Doubts were also expressed as to the possibility of devising a single regime for all types of responsibility disputes, and of distinguishing between the general question of responsibility and the problem of the primary rules the violation of which gave rise to such responsibility.¹³⁶ The majority of the Commission, however, supported the inclusion of a dispute settlement mechanism, which was generally considered necessary for the implementation of the draft articles.¹³⁷ It was emphasized, in that regard, that States had displayed

increased willingness to accept dispute settlement procedures in recent times.¹³⁸

61. The overall issue of dispute resolution was again considered by the Commission at the end of the second reading.¹³⁹ Some members favoured including dispute settlement provisions in the draft articles, particularly if the Commission were to recommend the elaboration of a convention, because of the significance and complexity of the topic and to enhance the capacity of courts and tribunals to develop the law through their decisions.¹⁴⁰ Some other members, however, considered it unnecessary to include such provisions, noting that it could cause an overlap with existing dispute settlement mechanisms, thus leading to their fragmentation and proliferation.¹⁴¹ The proposal was also made to draft a general dispute settlement provision similar to Article 33 of the Charter.¹⁴² The Commission decided that it would not include provisions for a dispute settlement machinery, but would draw attention to the machinery elaborated on first reading as a possible means for settlement of disputes concerning State responsibility, leaving it to the General Assembly to consider whether, and in what form, provisions for dispute settlement could be included in the event that the Assembly should decide to elaborate a convention.¹⁴³

62. The Commission also considered the question of clauses relating to the settlement of disputes with specific reference to the issue of resort to countermeasures. In order to remedy the possible drawbacks of unilateral countermeasures, it was initially proposed that the relevant regime be supplemented by a three-step third-party dispute settlement mechanism (conciliation, arbitration and judicial settlement).¹⁴⁴ While that approach was questioned by some members, it was favoured by others, who pointed out that such a mechanism would protect States from abuses of the right to resort to unilateral measures.¹⁴⁵ On first reading, the Commission decided to include a provision on the conditions for resort to countermeasures, whereby an injured State taking such measures was notably under the prior duty to negotiate and to comply with the obligations in relation to dispute settlement arising under part three of the draft articles or any other binding dispute settlement procedure in force with the wrongdoing State. On second reading, however, that text was

¹²⁹ See *Yearbook ... 1963*, vol. II, pp. 247–250 (Mr. Tsuruoka) and pp. 244–246 (Mr. Paredes).

¹³⁰ *Ibid.*, p. 227 *et seq.* (annex I).

¹³¹ *Yearbook ... 1969*, vol. II, p. 125, document A/7610/Rev.1, paras. 80–82. The Commission's plan, including the possibility of a third stage relating to dispute settlement, met with general approval in the Sixth Committee of the General Assembly during its consideration of the Commission's annual report (*Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, paras. 86–89).

¹³² The possible part three concerning the settlement of disputes was first considered by the Commission at its thirty-seventh and thirty-eighth sessions in 1985 and 1986, on the basis of Mr. Riphagen's sixth and seventh reports (respectively: *Yearbook ... 1985*, vol. II (Part One), p. 3, document A/CN.4/389; and *Yearbook ... 1986*, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1). A set of draft articles and the related annex were then referred to the Drafting Committee. The issue continued to be considered at the forty-fifth session of the Commission in 1993, this time on the basis of Mr. Arangio-Ruiz's fifth report (*Yearbook ... 1993*, vol. II (Part One), p. 1, document A/CN.4/453 and Add.1-3), when the corresponding provisions were again referred to the Drafting Committee (*Yearbook ... 1993*, vol. II (Part Two), p. 35, paras. 205–206). The relevant articles, with commentaries, were adopted by the Commission on first reading at its forty-seventh session in 1995 (*Yearbook ... 1995*, vol. II (Part Two), p. 64, para. 364 (for the articles and commentaries, see: pp. 75–83)).

¹³³ *Yearbook ... 1985*, vol. II (Part Two), p. 24, paras. 159–161. See also *Yearbook ... 1993*, vol. II (Part Two), p. 37, para. 221.

¹³⁴ *Yearbook ... 1985*, vol. II (Part Two), p. 24, para. 160; *Yearbook ... 1993*, vol. II (Part Two), p. 37, para. 221.

¹³⁵ *Yearbook ... 1993*, vol. II (Part Two), p. 37, para. 223 and p. 38, para. 225.

¹³⁶ *Ibid.*, pp. 38–39, paras. 230–231.

¹³⁷ *Yearbook ... 1985*, vol. II (Part Two), p. 24, paras. 159–161. See also: *Yearbook ... 1993*, vol. II (Part Two), p. 37, para. 221.

¹³⁸ *Yearbook ... 1993*, vol. II (Part Two), p. 37, para. 222.

¹³⁹ In his first report, the new Special Rapporteur, Mr. Crawford, had noted that the Commission's decision on this issue would depend to a great extent upon the eventual form of the draft articles, which he suggested should be dealt at a later stage (*Yearbook ... 1998*, vol. II (Part One), document A/CN.4/490, pp. 8–9, paras. 33, 38 and 42). The Special Rapporteur also pointed to the fact that “[a]ny compulsory system of dispute settlement under the draft articles potentially becomes a general dispute settlement for inter-State disputes” (*ibid.*, para. 33).

¹⁴⁰ *Yearbook ... 2001*, vol. II (Part Two), p. 23, para. 57.

¹⁴¹ *Ibid.*, para. 58.

¹⁴² *Ibid.*, para. 59.

¹⁴³ *Ibid.*, para. 60. In its recommendation to the General Assembly, the Commission specified that it “was of the view that the question of the settlement of disputes could be dealt with by the [...] international conference [of plenipotentiaries], if it considered that a legal mechanism on the settlement of disputes should be provided in connection with the draft articles” (*Yearbook ... 2001*, vol. I, 2709th meeting, pp. 304–305, para. 71).

¹⁴⁴ See the proposal by Special Rapporteur Arangio-Ruiz, as described in *Yearbook ... 1993*, vol. II (Part Two), p. 36, para. 214.

¹⁴⁵ *Ibid.*, p. 38, para. 228.

criticized as being unfounded in international law and as unduly cumbersome and restrictive.¹⁴⁶ A simplified provision was thus adopted in the final draft articles in 2001.¹⁴⁷

7. DRAFT PRINCIPLES ON THE ALLOCATION OF LOSS IN THE CASE OF TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES, 2006

63. During the fifty-sixth session of the Commission, in 2004, the Special Rapporteur in his second report proposed a set of draft principles, including a clause on settlement of disputes which provided a regime including arbitration or submission to ICJ on the basis of mutual agreement.¹⁴⁸ The text adopted by the Commission on first reading at the same session, however, did not include such a clause on the understanding that the final form of the instrument would be reconsidered in the light of the comments and observations received from Governments.¹⁴⁹ The question of the settlement of disputes clause would be revisited should the Commission have to prepare a draft framework convention in the future.¹⁵⁰

8. DRAFT ARTICLES ON THE LAW OF TRANSBOUNDARY AQUIFERS, 2008

64. The need for a settlement of disputes regime in connection with the law of transboundary aquifers was mentioned during the debate at the fifty-fifth session of the Commission, in 2003, on the basis of the first report of the Special Rapporteur, in which reference was made to the Convention on the Law of the Non-navigational

¹⁴⁶ Fourth report on State responsibility by Mr. James Crawford, Special Rapporteur, *Yearbook ... 2001*, vol. II (Part One), pp. 16–17, document A/CN.4/517 and Add.1, para. 67.

¹⁴⁷ See draft article 52 and commentary thereto, *Yearbook ... 2001*, vol. II (Part Two), pp. 135–137.

¹⁴⁸ *Yearbook ... 2004*, vol. II (Part One), p. 76, document A/CN.4/540, para. 38; see also *Yearbook ... 2004*, vol. II (Part Two), p. 63, footnote 351.

¹⁴⁹ *Yearbook ... 2004*, vol. II (Part Two), p. 65.

¹⁵⁰ *Ibid.*

Uses of International Watercourses, which includes compulsory reference to an impartial fact-finding commission.¹⁵¹ The Special Rapporteur had also recalled that the question of whether a compulsory fact-finding regime was practical was solved by allowing States to make reservations.¹⁵²

65. The articles proposed by the Special Rapporteur at the fifty-seventh session of the Commission, in 2005, did not include any general clause concerning settlement of disputes, but an option to establish a fact-finding body to assess the effect of planned activities was provided in draft article 17, paragraph 2.¹⁵³ Some members stressed the need for separate provisions on settlement of disputes.¹⁵⁴ The Special Rapporteur, however, questioned that necessity as transboundary aquifers, unlike watercourses, did not have a long history of international cooperation and the settlement of disputes regime adopted in the Watercourses Convention had partially been reflected in the current draft articles.¹⁵⁵

66. On second reading of the draft articles, at the sixtieth session, in 2008, the Commission recommended that the General Assembly adopt a two-step approach, namely, that it first take note of the draft articles and then consider the elaboration of a convention based on the draft. In so doing, the Commission decided to leave the issue of the inclusion of dispute settlement articles aside, as they would only be necessary if and when the second step were to be initiated.¹⁵⁶

¹⁵¹ *Yearbook ... 2003*, vol. II (Part Two), p. 95, para. 405. On the settlement of disputes clauses of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, see paragraph 42 above.

¹⁵² *Yearbook ... 2003*, vol. II (Part One), pp. 120–121, document A/CN.4/533 and Add.1, paras. 10 and 11.

¹⁵³ *Yearbook ... 2005*, vol. II (Part One), p. 73, document A/CN.4/551 and Add.1, para. 36.

¹⁵⁴ *Yearbook ... 2005*, vol. II (Part Two), p. 20, para. 60.

¹⁵⁵ *Ibid.*, p. 26, para. 106.

¹⁵⁶ *Yearbook ... 2008*, vol. II (Part Two), pp. 22 *et seq.*, para. 54.

CHAPTER III

Recent practice of the General Assembly in relation to settlement of disputes clauses

67. Pursuant to the request by the Commission that the Secretariat prepare a note on the history and past practice of the Commission in relation to settlement of disputes clauses, “taking into account recent practice of the General Assembly”, the present chapter focuses on conventions which were not formulated and adopted on the basis of draft articles elaborated by the Commission. During the last 15 years, the General Assembly has adopted six conventions and three protocols which were not based on a draft prepared by the Commission, and which contain provisions relating to the settlement of disputes between the parties. These instruments all provide for the same mechanism for the settlement of disputes between their respective parties.

68. The three conventions relating to the suppression of terrorism—the International Convention for the

Suppression of Terrorist Bombings,¹⁵⁷ the International Convention for the Suppression of the Financing of Terrorism¹⁵⁸ and the International Convention for the Suppression of Acts of Nuclear Terrorism¹⁵⁹—were drafted by the ad hoc committee on measures to eliminate terrorism.¹⁶⁰ The clauses pertaining to the peaceful settlement of disputes in these Conventions provide that States parties shall endeavour to settle disputes concerning the application or interpretation of the Convention by negotiation. A dispute which cannot be settled by negotiation within a reasonable time shall, at the request of either

¹⁵⁷ See article 20.

¹⁵⁸ See article 24.

¹⁵⁹ See article 23.

¹⁶⁰ Established pursuant to General Assembly resolution 51/210 of 17 December 1996.

party, be submitted to arbitration. If, within six months from the date of the request, the parties are unable to agree on the organization of the arbitration, any party may refer the dispute to ICJ, by application, in conformity with the Statute of the Court. A State party may, at the time of signature, ratification, acceptance or approval of the Convention, make a reservation with regard to the settlement of disputes procedure.

69. The same procedures for the settlement of disputes were included in the United Nations Convention against Transnational Organized Crime, including its three protocols (the Protocol against the Smuggling of Migrants by

Land, Sea and Air,¹⁶¹ the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children¹⁶² and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition¹⁶³); the United Nations Convention against Corruption;¹⁶⁴ and the International Convention for the Protection of All Persons from Enforced Disappearance.¹⁶⁵

¹⁶¹ See article 20.

¹⁶² See article 20.

¹⁶³ See article 16.

¹⁶⁴ See article 66.

¹⁶⁵ See article 42.

CHECKLIST OF DOCUMENTS OF THE SIXTY-SECOND SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/619	Provisional agenda for the sixty-second session	Mimeographed. For agenda as adopted, see <i>Yearbook ... 2010</i> , vol. II (Part Two).
A/CN.4/620 and Add.1	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fourth session	Mimeographed.
A/CN.4/621	Shared natural resources: feasibility of future work on oil and gas, paper prepared by Mr. Shinya Murase	Reproduced in the present volume.
A/CN.4/622 and Add.1	Effects of armed conflicts on treaties: Comments and information received from Governments	<i>Idem.</i>
A/CN.4/623	Settlement of disputes clauses: Note by the Secretariat	<i>Idem.</i>
A/CN.4/624 and Add.1–2	Fifteenth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/625 and Add.1–2	Sixth report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur	<i>Idem.</i>
A/CN.4/626 and Add.1	Sixteenth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/627 and Add.1	First report on the effects of armed conflicts on treaties, by Mr. Lucius Caffisch, Special Rapporteur	<i>Idem.</i>
A/CN.4/628 and Add.1	Expulsion of aliens: Comments and information received from Governments	<i>Idem.</i>
A/CN.4/629	Third report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur	<i>Idem.</i>
A/CN.4/630	Survey of multilateral instruments which may be of relevance for the work of the International Law Commission on the topic “The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>)”, Study by the Secretariat	<i>Idem.</i>
A/CN.4/631	Second report on immunity of State officials from foreign criminal jurisdiction, by Mr. Roman Anatolevich Kolodkin, Special Rapporteur	<i>Idem.</i>
A/CN.4/632 and Add.1	Filling of casual vacancies in the Commission, Note by the Secretariat	A/CN.4/632. Reproduced in the present volume; A/CN.4/632/Add.1 mimeographed.
A/CN.4/633	Shared natural resources: Comments and observations received from Governments	Reproduced in the present volume.
A/CN.4/L.760 and Add.1–3	Reservations to treaties: Text and titles of the draft guidelines provisionally adopted by the Drafting Committee	Mimeographed.
A/CN.4/L.761	Draft report of the International Law Commission on the work of its sixty-second session, chapter I (Introduction)	<i>Idem.</i> See the text approved in <i>Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10 (A/65/10)</i> . The final text appears in <i>Yearbook ... 2010</i> , vol. II (Part Two).
A/CN.4/L.762	<i>Idem.</i> , chapter II (Summary of the work of the Commission at its sixty-second session)	<i>Idem.</i>
A/CN.4/L.763 and Add.1	<i>Idem.</i> , chapter III (Specific issues on which comments would be of particular interest to the Commission)	<i>Idem.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.764 and Add.1–10	<i>Idem</i> , chapter IV (Reservations to treaties)	<i>Idem</i> .
A/CN.4/L.765	<i>Idem</i> , chapter V (Expulsion of aliens)	<i>Idem</i> .
A/CN.4/L.766 and Add.1	<i>Idem</i> , chapter VI (Effects of armed conflicts on treaties)	<i>Idem</i> .
A/CN.4/L.767 and Add.1	<i>Idem</i> , chapter VII (Protection of persons in the event of disasters)	<i>Idem</i> .
A/CN.4/L.768	<i>Idem</i> , chapter VIII (The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>))	<i>Idem</i> .
A/CN.4/L.769	<i>Idem</i> , chapter IX (Immunity of State officials from foreign criminal jurisdiction)	<i>Idem</i> .
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A/CN.4/L.776	Protection of persons in the event of disasters: Texts and titles of draft articles 6, 7, 8 and 9 provisionally adopted by the Drafting Committee on 6, 7 and 8 July 2010	<i>Idem</i> .
A/CN.4/SR.3036–A/ CN.4/SR.3079	Provisional summary records of the 3036th to 3079th meetings	<i>Idem</i> . The final text appears in <i>Yearbook ... 2010</i> , vol. I.

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