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Sixth report on the expulsions of aliens

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Addendum

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D. Implementation of the expulsion decision

1. 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 of Great Britain and Northern Ireland,[1] also include a ban on return.

1. Voluntary departure

2. 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 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."[2] Similarly, in its proposal for a directive on return of 1 September 2005, the Commission of the European Communities 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".[3]

2. Forcible implementation

3. 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".[4] 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

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[1] Source: Documents de travail du Sénat français (série législation comparée), *L'expulsion des étrangers en situation irrégulière*, No. LC 162, April 2006.

[2] 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.

[3] Proposal for a directive of the European Parliament and of the Council, 1 September 2005, on common standards and procedures in Member States for returning illegally staying third-country nationals, COM(2005) 391 final.

[4] Recommendation No. 1547 (2002) of 22 January 2002 of the Parliamentary Assembly of the Council of Europe on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity.

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.

4. In its guidelines on forced return of illegal aliens adopted in May 2005, the Committee of Ministers of the Council of Europe recalled that "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]."[5]

3. Conditions for the return of the expelled person

5. 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".[6]

(a) Auxiliary measures in the return

6. A number of steps must be taken to ensure the orderly return of the expelled person to the country of destination. Most expulsions are effected by air, and international conventions on aviation contain specific provisions that may apply in certain situations or to certain persons, such as expellees. Annex 9 to the Convention on International Civil Aviation,[7] signed at Chicago on 7 December 1944, 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.

7. The dignity of the alien subject to expulsion must be respected during the flight. In the case of flights with transit stops, the Chicago Convention 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

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[5] Twenty guidelines of the Committee of Ministers of the Council of Europe on forced return, op. cit. 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.

[6] A.-B. Ba, *Le droit international de l'expulsion des étrangers: une étude comparative de la pratique des Etats africains et de celle des Etats occidentaux*, thesis, Paris II, 1995, 930 p., p. 610.

[7] The text is available on the website of the International Civil Aviation Organization (http://www.icao.int). See also the publication "Convention on International Civil Aviation, signed at Chicago on 7 December 1944", S. I., coll. ICAO 7300, 49 pages, and "Convention on International Civil Aviation: drafting and coordination of the technical annexes to the Convention", S. I., coll. ICAO 7300, 1951.

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.[8] The provisions of the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft[9] apply when a person, who may be an alien subject to expulsion, jeopardizes safety in flight by his actions.[10] 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.[11] He may also disembark the person concerned or deliver him to competent authorities.[12]

8. 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.[13]

9. 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.[14] 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.[15] Without prejudice to the provisions of the 1963 Tokyo Convention, the new text should also cover "security measures that apply on board an aircraft, or during a flight, of Community air

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[8] 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.

[9] Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963. On this Convention, see P. Richard, *La Convention de Tokyo. Étude de la Convention de Tokyo relative aux infractions et à certains autres actes survenant à bord des aéronefs*, Lausanne, Pont frères, 1971, 240 pages.

[10] The Convention does not apply to aircraft used in military, customs and police services.

[11] Art. 6, para. 1, of the Tokyo Convention.

[12] Ibid.

[13] Art. 15, para. 2, of the Tokyo Convention.

[14] 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. 894/2004 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.

[15] 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.

carriers". 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".[16] It is specified that potentially disruptive passengers shall be subjected to appropriate security measures before departure.[17]

(b) Respect for the fundamental rights of the expelled person during the return travel

10. 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.[18] Persons subject to expulsion have also been drugged and beaten.[19] From 1998 to 2001, 10 aliens died during expulsion from Austria, Belgium, France, Germany, Italy and Switzerland[20] after such treatment. Alerted to the situation by non-governmental organizations, 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.[21] Those serious incidents are apparently the result of the violent and dangerous methods used by the officials responsible for enforcing expulsions[22] and by carriers. As the Parliamentary Assembly noted, aliens do not face the risk of ill-treatment only while awaiting expulsion.[23] 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.[24] The European Court acknowledges the "immense difficulties faced by States in modern times in protecting their communities from terrorist violence",[25] but considers that recourse to physical force against a person suspected or accused of

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[16] For the purposes of article 3 (18) of the draft regulation.

[17] For the rules related to transport in Europe see, for example, L. Grard (ed.), *L'Europe des transports*, actes du Colloque d'Agen, 7 and 8 October 2004, Université Montesquieu-Bordeaux IV, Paris, *La documentation française*, 2005, 857 pages.

[18] 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.

[19] H. Lambert, *The position of aliens in relation to the European Convention on Human Rights*, Human Rights Files No. 8 (revised), Council of Europe, Strasbourg, 2001, p. 31.

[20] Recommendation No. 1547 (2002) of 22 January 2002 of the Parliamentary Assembly of the Council of Europe concerning expulsion procedures in conformity with human rights and enforced with respect for safety and dignity.

[21] Ibid. The analysis that follows, on the observations and proposals of the Parliamentary Assembly, is taken from the thesis of A. L. Ducroquetz, *L'expulsion des étrangers en droit international et européen*, op. cit., pp. 395 *et seq*.

[22] 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 (source: 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), op. cit.

[23] Recommendation No. 1547 (2002) of the Parliamentary Assembly of the Council of Europe, op. cit.

[24] Ibid.

[25] European Court of Human Rights, Judgment of 12 May 2005, *Öcalan* v. *Turkey*, para. 179. In that case, the applicant was forcibly transferred by aircraft from Kenya to Turkey. During the flight, he was sedated, handcuffed and blindfolded.

such an act must be "made strictly necessary" by his own conduct".[26] 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".[27]

11. The Parliamentary Assembly also noted that police and security forces are not normally trained to carry out these duties.[28] 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.[29] 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. These guidelines were prepared in cooperation with the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).[30] The Committee recognizes that it is a "difficult task"[31] 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 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."[32] In the case of deportation by air, CPT noted that a manifest risk of inhuman and degrading treatment exists both during "preparations for deportation and during the actual flight".[33] 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".[34] Furthermore, it invited

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[26] European Court of Human Rights, Judgment of 4 December 1995, *Ribitsch* v. *Austria*, para. 38, series A, No. 336, cited by H. Lambert, *The position of aliens in relation to the European Convention on Human Rights,* op. cit., p. 31.

[27] 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/Rec(2001)1, para. 16.

[28] Recommendation No. 1547 (2002) of 22 January 2002 of the Parliamentary Assembly of the Council of Europe concerning expulsion procedures in conformity with human rights and enforced with respect for safety and dignity.

[29] Twenty guidelines of the Committee of Ministers of the Council of Europe on forced return, op. cit.

[30] Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Fifteenth General Report on activities covering the period 1 August 2004 to 31 July 2005, 22 September 2005, CPT/Inf(2005)17.

[31] Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Seventh General Report on activities covering the period 1 January to 31 December 1996, 22 August 1997, CPT/Inf(97)10[EN], para. 36.

[32] Ibid.

[33] Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Thirteenth General Report on activities covering the period 1 January 2002 to 31 July 2003, 10 September 2003, CPT/Inf(2003)35, para. 31.

[34] Ibid., para. 42.

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.[35]

12. 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.[36] 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.[37] 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).[38] 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 of 7 December 1944. Rules are established for cooperation among operators and the States concerned.[39] 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.[40] 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.[41] 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.[42]

13. 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"[43] should be guaranteed. The

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[35] Ibid., paras. 44 and 45.

[36] Recommendation of 19 September 2001 of the Commissioner for Human Rights, op. cit., No. 1765, para. 17.

[37] Communication from the Commission to the Council and the European Parliament of 14 October 2002, op. cit. 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. And, broadly, see A. L. Ducroquetz, *L'expulsion des étrangers en droit international et européen*, op. cit., pp. 395 and 396.

[38] 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).

[39] 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 (para. 3.4).

[40] IATA/CAWG, Guidelines on Deportation and Escort, loc. cit., paras. 3.6, 4.6 and 8.7.

[41] Ibid., paras. 1.2 and 3.10.

[42] Ibid., para. 8.5.

[43] Twenty guidelines on forced return, Committee of Ministers of the Council of Europe, op. cit.

IATA/CAWG guidelines state that deportees requiring physical restraints should be boarded as discreetly as possible.[44]

14. 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 (A/CN.4/611), and subsequently referred by the Commission to the Drafting Committee as revised by the Special Rapporteur in document A/CN.4/617. 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 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.

15. 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: firstly, they demonstrate a concern for the protection of the rights of the person being expelled; in addition, they are backed up by European Union Directive 2008/115/EC of 16 December 2008, although that Directive cannot be said to be well established in general international law.

[44] IATA/CAWG Guidelines on Deportation and Escort, op. cit., para. 6.4.

IV. Appeals against the expulsion decision

A. Basis in international law and domestic law

16. In addendum 1 to the Special Rapporteur's sixth report (A/CN.4/625/Add.1), 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.

17. In the "draft regulations on the expulsion of aliens" introduced by L.-J.-D. 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.[45]

18. 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 1948 Universal Declaration of Human Rights provides that: "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 that: "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."

19. 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 United Nations 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

[45] Study commission on the rights of admission and expulsion of aliens of the Institute of International Law, *Projet de réglementation de l'expulsion des étrangers*, submitted by Mr. L.-J.-D. Féraud-Giraud, Hamburg session, September 1891, *Annuaire de l'Institut de Droit international*, vol. XI, 1889-1892, pp. 275-282, especially p. 279.

and the entitlement to review by a competent authority may only be departed from when 'compelling reasons of national security' so require."[46]

20. 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."[47]

21. 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.

22. 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, annexed to General Assembly resolution 40/144:[48]

> "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."

23. In its general recommendation XXX, 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

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[46] Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant, 1 April 1986, para. 10. In *Eric Hammel* v. *Madagascar* [communication No. 155/1983, 3 April 1987, *Official Records of the General Assembly, Forty-second Session, Supplement No. 40* (A/42/40), annex VIII, A, para. 19.2], the Committee found that the appellant had not been able to exercise an effective appeal against his expulsion.

[47] Concluding observations of the Human Rights Committee: Syrian Arab Republic, 5 April 2001, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40), para. 81 (22), p. 75.

[48] *Official Records of the General Assembly, Fortieth Session, Supplement No. 53* (A/40/53), resolution 40/144, annex.

have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies".[49]

24. 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[50] states that: "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."[51]

25. 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.[52]

26. 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".[53]

27. The scope of review may be limited to the legality of the expulsion decision rather than the factual basis for the decision.[54] 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.[55]

28. 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 (1) a decision reached in accordance with due process of law,[56] as we have already seen; (2) the right of the

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[49] Committee on the Elimination of Racial Discrimination, general recommendation XXX, para. 25. See also Concluding observations of the Committee on the Elimination of Racial Discrimination: France, 1 March 1994 (A/49/18), para. 144 (recognizing the right of appeal).

[50] However, the applicability of article 6 of the European Convention on Human Rights in cases of expulsion seems less clear; see G. Gaja, "Expulsion of Aliens: Some Old and New Issues in International Law", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. 3, 1999, pp. 283 to 314, especially pp. 309 and 310.

[51] European Court of Human Rights, *Chahal* v. *United Kingdom*, Judgment of 25 October 1996, para. 145.

[52] Twenty guidelines of the Committee of Ministers of the Council of Europe on forced return, op. cit.

[53] See the reply from the Committee of Ministers of the Council of Europe dated 4 December 2002 to Parliamentary Assembly Recommendation 1504 (2001) of 14 March 2001, adopted at the 820th meeting of the Ministers' Deputies, document 9633, 6 December 2002 and, in the appendix, the opinion of the Steering Committee for Human Rights on Recommendation 1504 (2001) of the Parliamentary Assembly, adopted at its 54th meeting, 1-4 October 2002, para 13.

[54] See Guy S. Goodwin-Gill, "Mass Expulsion: The Legal Aspects", 1984 (unpublished), p. 274 (quoting the *Neer* case, op. cit., p. 60 (1926)).

[55] Ibid., p. 265.

[56] In *Ceskovic* v. *Minister for Immigration and Ethnic Affairs*, Australia, Federal Court, General Division, 13 November 1979, International Law Reports, vol. 73, E. Lauterpacht (ed.),

refugee to submit evidence to clear himself or herself; (3) an appeal before a competent authority; and (4) representation for purposes of the appeal. As we know, these procedural guarantees do not apply where "compelling reasons of national security" so require.[57]

29. The procedural guarantees listed above are discussed in N. 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 para. 2 speaks of 'compelling' reasons, they must really be of a very serious nature and the exception to sentence one cannot be applied save very sparingly and in very unusual cases."[58]

30. 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:

> "[I]ndependently 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

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C. J. Greenwood, pp. 627-634, 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.

[57] "Being an exception, this provision is subject to restrictive interpretation." Atle Grahl-Madsen, *The Status of Refugees in International Law; Asylum, Entry and Sojourn*, vol. II, Leiden, A. W. Sijthoff, 1972, para. 8.

[58] Nehemiah Robinson, Convention Relating to the Status of Refugees. Its History, Contents and Interpretation, Institute of Jewish Affairs, World Jewish Congress, 1953 (reprinted in 1997 by the Division of International Protection of the Office of the United Nations High Commissioner for Refugees), pp. 134 and 135. See also Atle Grahl-Madsen, op. cit., para. 7.

> the completion of the formalities envisaged in the foregoing legislative and regulatory provisions."[59]

31. 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.[60] 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",[61] 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".[62] The Committee recalled that suspensive effect in 2005.[63]

32. 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.[64] 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.[65] It has further been suggested that the alien must, as has already been noted, be informed of the right of review.[66]

33. 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:

> "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

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[59] *Pagoaga Gallastegui* v. *Minister of the Interior*, France, Conseil d'État, 27 May 1977, *International Law Reports*, vol. 74, E. Lauterpacht, C. J. Greenwood (eds.), op. cit., pp. 430-444.

[60] 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.

[61] Ibid.

[62] Ibid.

[63] Twenty guidelines of the Committee of Ministers of the Council of Europe, on forced return, op. cit.

[64] See the Memorandum by the Secretariat on the expulsion of aliens, op. cit., paras. 658-687 and the references cited in note 1541: L. B. Sohn and T. Buergenthal (eds.), op. cit., p. 91; Plender, op. cit., p. 472; E. Brochard, op. cit., pp. 50, 52 and 55.

[65] See also Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Seventh General Report on activities covering the period 1 January to 31 December 1996, CPT/Inf (97) 10 [FR], 22 August 1997.

[66] See M. Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Kehl, N.P. Engel Publisher, 1993, p. 231 (citing respectively cases Nos. 27/1978, paras. 6 and 12-16, and 319/1988, para. 2.4).

courts as this is contrary to the spirit and letter of the Charter and international law."[67]

34. Similarly, in another 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."[68]

35. Recalling article 7(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."[69]

36. 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: [...] ii. 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; iii. if an appeal against expulsion is lodged, the appeal procedure shall be completed within three months of the original decision to expel."[70]

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[67] African Commission on Human and Peoples' Rights, Communication No. 159/96, op. cit., para. 20.

[68] African Commission on Human and Peoples' Rights, Communication No. 212/98, op. cit.

[69] Ibid.

[70] Parliamentary Assembly of the Council of Europe, recommendation 1624 (2003): Common policy on migration and asylum, 30 September 2003, para. 9. Moreover, the Parliamentary Assembly of the Council of Europe considered that the right to a review should also apply to illegal aliens: "An alien without a valid residence permit may be removed from the territory of a member state 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; A person holding a valid residence permit may only be expelled from the territory of a member state in pursuance of a final court order." [Council of Europe, recommendation 769 (1975) on the legal status of aliens, op. cit., paras. 9-10].

37. 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."

38. The right to challenge an expulsion has also been stressed by the Special Rapporteur on the rights of non-citizens, 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".[71]

39. 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) pointed out that Ethiopia had denied some workers expelled 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."[72]

40. Attention may also be drawn to the relevant legislation of the European Union dealing with the expulsion of Union citizens as well as third country nationals. Regarding Union citizens, article 31 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 provides:

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[71] 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, Mr. David Weissbrodt, E/CN.4/Sub.2/8003/23., para. 28.

[72] International Labour Organization, 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), 1998, para. 37.

"1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

"2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

– where the expulsion decision is based on a previous judicial decision; or

– where the persons concerned have had previous access to judicial review; or

– where the expulsion decision is based on imperative grounds of public security under Article 28(3).

"3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based.

They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

"4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory."[73]

41. 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]",[74] as well as Council Directive 2003/109/EC of 25 November 2003, whose article 12, paragraph 4, 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."[75]

42. Doctrinally, the Institut de Droit international 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 Institut was of the

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[73] European Union, Corrigendum to 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 amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004), Official Journal L 229, 29 June 2004, pp. 35-48.

[74] Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, Official Journal L 149, 2 June 2001, pp. 34-36, art. 4.

[75] Council Directive 2003/109/EC, op. cit., pp. 44-53.

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" (article 28, paragraph 10, of the rules adopted by the Institut):

> "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.[76]

43. National laws[77] differ as to whether[78] or not[79] they permit review of a decision on expulsion. A State may likewise (1) allow a motion to reopen or reconsider the relevant decision,[80] including with respect to a new claim of protected status;[81] (2) expressly grant the Government a right of appeal;[82] (3) prohibit an appeal or certain forms of relief from deportation when the expelled alien threatens the State's order public or national security, or is allegedly involved

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[76] *Règles internationales sur l'admission et l'expulsion des étrangers,* op. cit., art. 21.

[77] The following analysis of national legislation and case law draws on paragraphs 680-687 of the Memorandum by the Secretariat on the expulsion of aliens, op. cit.

[78] 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, 1931 Act, art. 12, 1973 Regulation, art. 16; Italy, 2005 Law, art. 3(4), (5), 1998 Decree-Law No. 286, arts. 13(3), (5bis), (8), (11), 13bis (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; Republic of Korea, 1992 Act, art. 60(1), 1993 Decree, arts. 74, 75(1); 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; South Africa, 2002 Act, art. 8(1)-(2); Spain, 2000 Law, art. 26(2); Sweden, 1989 Act, sects. 7.1-8, 7.11-18; Switzerland, 1949 Regulation, art. 20(2), 1931 Federal Law, art. 20; United States, INA, 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: (1) 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, INA, sect. 505); (2) the decision concerns the alien's claimed protected status (Bosnia and Herzegovina, 2003 Law, art. 76(6); and Sweden, 1989 Act, sects. 7.4-5); or (3) 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).

[79] 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, INA, 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)).

[80] Brazil, 1980 Law, art. 71; Guatemala, 1986 Decree-Law, art. 130; United States, INA, sect. 240(b)(5)(C)-(D), (c)(6)-(7).

[81] United States, INA, sect. 240(c)(6)-(7).

[82] Canada, 2001 Act, arts. 63(4), 70(1)-(2), 73; Switzerland, 1931 Federal Law, art. 20(2); United States, INA, 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, INA, sect. 505(c)(1)).

in terrorism;[83] (4) allow certain appeals to be raised only by aliens located outside the State;[84] (5) confer a right of appeal specifically on permanent residents[85] or protected persons;[86] or (6) reserve review to a domestic court, including with respect to claims raised under the terms of international conventions.[87]

44. A State may require that a decision inform the alien about any available rights of appeal.[88] The period for seeking review may begin when the expulsion decision is taken,[89] or when notice or the decision's reasoning is provided.[90] A State may or may not[91] stay execution of the decision during the pendency of the appeal.[92] A State may grant a stay (i) when the alien has been or is likely to be expelled;[93] or (ii) upon the request of a relevant international body unless there are extraordinary reasons not to issue the stay.[94] A State may imprison an official for deporting an alien unless a final and binding decision has been taken to expel the alien.[95] 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.[96]

45. The scope of review in relevant situations may be limited to (1) due process and reasonableness;[97] (2) whether the challenged decision is wrong in law, fact or

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[83] Canada, 2001 Act, art. 64(1); United States, INA, sects. 242(a)(1)(B)(ii), 504(k).

[84] 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).

[85] Canada, 2001 Act, art. 63(2).

[86] Ibid., art. 63(3).

[87] United States, INA, sect. 242(a)(4)-(5).

[88] 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)).

[89] Argentina, 2004 Act, art. 35; United States, INA, sects. 238(b)(3), 240(b)(1).

[90] 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, 1973 Regulation, art. 16; and Panama, 1960 Decree-Law, art. 86.

[91] 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, 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, INA, sects. 101(a)(47)(B), 242(f), 237(a)(5). A stay may be entered subject to conditions (Canada, 2001 Act, art. 68; France, Code, art. L513-3; Iran, 1931 Act, art. 12; United States, INA, sect. 242(f)). A refusal of the requested stay may entail the dismissal of the related appeal (Canada, 2001 Act, art. 69(1)).

[92] 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)-(4bis), 1998 Decree-Law No. 286, art. 13(5bis); 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)-(4bis)).

[93] Australia, 1958 Act, arts. 151, 153.

[94] Sweden, 1989 Act, sect. 8.10a.

[95] Paraguay, 1996 Law, arts. 108, 110.

[96] Iran, 2004 Act, art. 76.

[97] Ibid., art. 89.

both;[98] (3) whether natural justice has been observed;[99] (4) the objection's reasonability[100] or well-groundedness;[101] or (5) abuse of discretion or whether the decision's conclusions are manifestly contrary to law or the clear and convincing facts in the record.[102] 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.[103] A State may limit the scope of review if the alien has already departed the State.[104] A State may limit the reviewing body's right to apply humanitarian considerations unless the alien is specifically eligible for such treatment.[105] 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.[106]

46. Numerous national courts have recognized the right to a review procedure for a decision on expulsion.[107] The Supreme Court of the United States, in the case of *Immigration and Naturalization Service* v. *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."[108]

47. Some national courts have noted, however, that the scope of such review is often limited. For instance, in the United Kingdom:

> "34. 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."[109]

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[98] Canada, 2001 Act, art. 67(1)(a).
[99] Ibid., arts. 67(1)(b), 71.
[100] Japan, 1951 Order, arts. 11(3), 49(3).
[101] Republic of Korea, 1992 Act, art. 60(3).
[102] United States, INA, sects. 210(e)(3)(B), 240(b)(4)(C)-(D).
[103] Ibid., sect. 505(a)(3), (c)(4)(C)-(D).
[104] Austria, 2005 Act, art. 3.57.
[105] Canada, 2001 Act, arts. 65, 67(1)(c).
[106] Poland, 2003 Act No. 1775, art. 21(1)(7).
[107] See the national case law of Belgium, Brazil, Canada, Russia and the United States referred to in relation to this matter in the Memorandum by the Secretariat on the expulsion of aliens, op. cit., note 1599.
[108] *Immigration and Naturalization Service* v. *St. Cyr*, United States Supreme Court, 25 June 2001 [No. 00-767], 533 U.S. 289 (2001).
[109] *Secretary of State for the Home Department* v. *Rehman,* op. cit., p. 540 (Lord Hoffman).

48. 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.[110] 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.[111]

49. 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. We believe it now has the force of customary law.[112]

B. Impact of judicial review on expulsion decisions

1. Time frame for reviewing an appeal

50. 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 judgment swiftly. This "short period" is determined on a case-by-case basis, in the light of the circumstances of each case.[113] 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.[114] Most often, courts make rulings not on the formal validity of the detention order, but on the "lawfulness of detention pending expulsion".[115] 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

51. In 1892 the Institute of International Law, in article 21, paragraph 1, of the *Règles internationales sur l'admission et l'expulsion des étrangers*, had suggested that "expulsion may be carried out provisionally, notwithstanding an appeal".[116] As a general rule, the fact that a remedy is effective does not imply that it has

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[110] See, for instance, *Secretary of State for the Home Department* v. *Rehman*, op. cit. "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, 3 April 1940, Annual Digest and Reports of Public International Law Cases, 1919-1942 (Supplementary Volume), H. Lauterpacht (ed.), case No. 105, pp. 198 and 199.

[111] *Secretary of State for the Home Department* v. *Rehman*, op. cit., pp. 531 and 532.

[112] On the value of the obligation to afford judicial protection, see A.-B. Ba, thesis, Paris II, 1995, op. cit., pp. 561-565.

[113] European Court of Human Rights, Judgment of 24 October 1979, *Winterwerp* v. *Pays-Bas*, para. 60, Series A No. 33. In the *Sanchez-Reisse* case, loc. cit., the Court recognized that the proceedings could be entirely in written form.

[114] European Court of Human Rights, 21 October 1986, *Sanchez-Reisse*, loc. cit., para. 55.

[115] F. Sudre, "*Le contrôle des mesures d'expulsion et d'extradition par les organes de la Convention européenne de sauvegarde des droits de l'homme*", in D. Turpin (ed.), *Immigrés et réfugiés dans les démocraties occidentales. Défis et solutions*, Economica, Aix-Marseille University Press, 1989, 319 pages, p. 257.

[116] Institute of International Law, *Règles internationales sur l'admission et l'expulsion des étrangers*, Geneva session, 9 September 1892, *Annuaire de l'Institut de droit international*, vol. XII, 1892-1894, p. 218 et. seq.

suspensive effect. However, article 22, paragraph 4, of the 1990 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 the decision is executed.[117] 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.[118] 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* judgment, article 13 of the European Convention on Human Rights being applicable and the claim under article 3 being arguable, the European Court 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 (art. 13) requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (art. 3).[119] 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]".[120]

52. In 2001, the Commissioner for Human Rights advised the States members of the Council of Europe that "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

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[117] S. Sarolea, "Les droits procéduraux du demandeur d'asile au sens des articles 6 et 13 de la Convention européenne des droits de l'homme", *Revue Trimestrielle des Droits de l'Homme*, 1999, No. 37, pp. 119-145, particularly pp. 136-140.

[118] 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. 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: European Court of Human Rights, *Klass and Others* v. *Germany*, Judgment (Merits), 6 September 1978, Application number 5029/71.

[119] European Court of Human Rights, judgment of 15 November 1996, *Chahal*, op. cit., para. 151.

[120] European Court of Human Rights, judgment of 11 July 2000, *Jabari* v. *Turkey*, para. 50, *Reports of Judgments and Decisions 2000-VIII*. 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.

expulsion order, at least where contravention of Articles 2 or 3 of the [Convention] is alleged".[121]

53. In its *Čonka* judgment 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"[122] and that "it is [consequently] inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention".[123] 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".[124]

54. 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* judgment, the European Court stressed in more general terms "the importance of having remedies with suspensive effect (...) in deportation or extradition proceedings".[125]

55. 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 1990 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

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[121] Recommendation dated 19 September 2001 of the Council of Europe Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders, CommDH/Rec(2001)1, para. 11.

[122] European Court of Human Rights, judgment of 5 February 2002, *Čonka*, op. cit., para. 79.

[123] Ibid.

[124] Ibid., para. 82.

[125] European Court of Human Rights, judgment of 4 February 2005, *Mamatkulov and Askarov* v. *Turkey*, para. 124.

reasons, the Special Rapporteur doubts whether the proposal for a draft article on this issue is justified.

C. Remedies against a judicial expulsion decision

56. 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. A judicial expulsion decision in fact generally accompanies a sentence passed against an alien who has committed any offence in the expelling State.

57. 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.

58. In Switzerland, where the great majority of foreign prisoners are subject to an expulsion decision,[126] article 55 of the previous Penal Code provided that: "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 (see art. 15) if the alien has been convicted by a judicial authority for an indictable offence. A remedy against a judicial expulsion decision may be sought from a regional court of human rights once domestic remedies have been exhausted. In *Emre* v. *Switzerland*, the European Court 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

[126] E. Montero Pérez de Tudela, "L'expulsion judiciaire des étrangers en Suisse: La récidive et autres facteurs liés à ce phénomène", *Crimiscope*, No. 41, May 2009.

confirmed on 6 March 2003 by the Court of Criminal Cassation of the canton of Neuchâtel".[127] 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.

59. 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 States' domestic legislation, 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.

V. Relations between the expelling State and the transit and receiving States

60. 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

61. 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

[127] European Court of Human Rights, judgment of 28 May 2008, *Emre* v. *Switzerland*, para. 11.

understands in the fullness of its sovereignty the implication of the facts underlying this ban."[128]

62. The European Court of Human Rights has also stated, in various cases, that the right of States to control aliens' entry 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."[129]

63. As early as 1891, the United States Supreme Court 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."[130]

64. 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 *Attorney-General for Canada* v. *Cain*: "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."[131]

2. Limitation: the right of any person to return to his or her own country

(a) General rule

65. 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:

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[128] *Ben Tillett* (*United Kingdom* v. *Belgium*), arbitral award of 26 December 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.

[129] *Moustaquim* v. *Belgium*, Judgment (Merits and Just Satisfaction), application No. 12313/86, para. 43. See also *Vilvarajah and Others* v. *the United Kingdom*, para. 102; *Chahal* v. *the United Kingdom*, op. cit., para. 73; *Ahmed* v. *Austria*, European Court of Human Rights, Judgment (Merits and Just Satisfaction), 17 December 1996, application No. 25964/94, para. 38; *Bouchelkia* v. *France*, op. cit., para. 48; *H.L.R.* v. *France*, op. cit., para. 33.

[130] *Nishimura Ekiu* v. *United States* et al., United States Supreme Court, 18 January 1892, 142 U.S. 651. See also *Chae Chan Ping* v. *United States*, United States Supreme Court, 13 May 1889, 130 U.S. 581, 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.").

[131] [1906] A.C. 542, p. 546.

> "In principle, a State may not prohibit either its nationals or persons who are no longer nationals of that State but have not acquired the nationality of any other State from entering or remaining in its territory."[132]

66. 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,[133] the International Covenant on Civil and Political Rights[134] and the African Charter on Human and Peoples' Rights.[135] 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[136] and in the American Convention on Human Rights.[137]

67. 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:[138]

> "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' [citation omitted]. 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 ...
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> 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

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[132] Institute of International Law, "Règles internationales sur l'admission et l'expulsion des étrangers", op. cit.

[133] General Assembly resolution 217 A (III), Universal Declaration of Human Rights, 10 December 1948, art. 13, para. 2.

[134] General Assembly resolution 2200 A (XXI), annex, International Covenant on Civil and Political Rights, 16 December 1966, art. 12, para. 4.

[135] African Charter on Human and Peoples' Rights, art. 12, para. 2.

[136] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, recognizing certain rights and freedoms other than those already included in Section I of the Convention and in the First Protocol to the Convention, as amended by Protocol No. 11, Strasbourg, 16 September 1963, European Union, *European Treaty Series* No. 46, art. 3, para. 2. According to the European Court of Justice: "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* v. *Home Office*, case 41/74, Judgment of the Court [1974] European Court reports 1337; [1975] Common Market Law Report No. 1, 18, 4 December 1974 (This case concerned freedom of movement rather than expulsion).

[137] American Convention on Human Rights, "Pact of San José, Costa Rica", art. 22, para. 5.

[138] Hurst Hannum, *The Right to Leave and Return in International Law and Practice*, Dordrecht, Martinus Nijhoff Publishers, 1987, pp. 62 and 63.

> 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."[139]

68. 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 nationality[140] and explains the existence of repatriation treaties (e.g. Convention between Belgium and the Netherlands concerning Assistance to and Repatriation of Indigent Persons, of May 15, 1936.[141] 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.[142]

69. 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.[143]

> "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

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[139] Human Rights Committee (International Covenant on Civil and Political Rights), General Comment No. 27: Freedom of movement (Art. 12), 2 November 1999, paras. 20 and 21.

[140] Acts of the Conference for the Codification of International Law, vol. 2, Minutes of the First Committee: Nationality, League of Nations Doc. No. C.351(a).M.145(a).1930.V.

[141] See League of Nations, *Treaty Series*, vol. CLXXIX, 1937-1938, No. 4131, p. 141. Rainer Hofmann, op. cit., p. 1005.

[142] See Ruth Donner, *The Regulation of Nationality in International Law*, 2nd ed., New York, Transnational Publishers, Inc., 1994, p. 153; David A. Martin, op. cit., p. 41.

[143] "It cannot be concluded that the refusal to receive is countenanced by international law. There is no dissent from the proposition that every state 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 State refuses to fulfil the conditions which it presupposes, and which are essential to its exercise." [Lawrence Preuss, "International Law and Deprivation of Nationality", *Georgetown Law Journal*, vol. 23, 1934, pp. 250 to 276, at 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." [Niall MacDermot (ed.), op. cit., p. 23].

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."[144]

70. 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."[145]

(b) Specific case of refugees

71. 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."

72. As explained in Robinson's commentary to the Convention, 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

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[144] Charles Cheney Hyde, op. cit., pp. 231 and 232; see also John Fischer Williams, op. cit., p. 61.

[145] Special Protocol concerning Statelessness, The Hague, 12 April 1930, *International Legal Materials*, vol. 13, 1974, p. 1. Art. 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."

article 31, paragraph 2, of the Convention.[146] 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 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 'qu'ils jugeront opportune') while the latter mentions measures 'which *are* necessary' (in French 'qui sont necessaries'). 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."[147]

73. As noted by the author cited above, the Convention 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 judgment of the German Bundesverwaltungsgericht in *Hodzic* v. *Land Rheinland-Pfalz* a period of two months is too short."[148]

74. 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 A. 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."[149]

B. Determination of the State of destination

1. Freedom of the expellee to determine his or her State of destination

75. In principle, the expellee must be able to choose a State of destination for him or herself. The Special 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

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[146] 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."

[147] Nehemiah Robinson, op. cit., pp. 135 and 136.

[148] Atle Grahl-Madsen, op. cit., para. 11.

[149] Ibid.

the border of the territory of the nation to which he or she belongs, or to the closest border.[150] 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.[151] 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.[152] 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 State of destination's choice, rather than the designation of a border exit from the expelling State.

76. 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 that "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".[153] The 1951 Convention relating to the Status of Refugees also contains that precise rule:[154] 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 make such a search for a country able to admit the refugee in question fruitless. 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".[155]

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[150] Commission d'étude sur le droit d'admission et d'expulsion des étrangers de l'Institut de droit international, *Projet de réglementation de l'expulsion des étrangers*, presented by M. L.-J.-D. Féraud-Giraud, Hamburg session, September 1891, Yearbook of the Institute of International Law, vol. XI, 1889-1892, pp. 275-282, especially p. 280, para. XV.

[151] Ibid.

[152] Institute of International Law, "Règles internationales sur l'admission et l'expulsion des étrangers", Geneva session, 9 September 1892, Yearbook of the Institute of International Law, vol. XII, 1892-1894, pp. 218 et seq.

[153] The Convention was adopted by the General Assembly in its resolution 45/188 of 18 December 1990 and entered into force on 1 July 2003, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 49*, vol. 1 (A/45/49).

[154] V. Chetail, "*Le principe de non refoulement et le statut de réfugié en droit international*", in V. Chetail (dir.), *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés 50 ans après: bilan et perspectives*, Publication of the Institut international des droits de l'homme, Brussels, Bruylant, 2001, 456 pages, pp. 3-61, especially p. 49.

[155] Conclusion No. 7 (XXVIII) (1977) of the UNHCR Executive Committee, quoted by M. Chetail, loc. cit., p. 49.

2. Substitution of the expelling State for the expellee in choosing a State of destination

77. 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.

78. 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. That Convention provided for certain steps designed to have an application for asylum examined by one of the member States instead of it 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 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*.[156] 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."[157] 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".[158] 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".[159] 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".[160] However, it found that "it is not established that there is a real risk that Germany would expel the applicant to Sri Lanka in

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[156] European Court of Human Rights, decision of 7 March 2000, *T. I.* v. *United Kingdom*, Application No. 43844/98.

[157] Ibid.

[158] Ibid.

[159] Ibid.

[160] Ibid.

breach of article 3 of the Convention".[161] 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".[162]

79. When the European Court 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.

80. 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."[163]

81. 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

82. As was apparent from the Special Rapporteur's fifth report,[164] the State capable of receiving an alien expelled by another State must meet certain criteria so

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[161] Ibid.

[162] Ibid.

[163] Goodwin-Gill, op. cit., pp. 223 and 224 (see *R.* v. *Governor of Brixton Prison*, ex parte *Sliwa* [1952] 1 All E.R. 187).

[164] A/CN.4/611.

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

83. The "safe country" concept first appeared in Germany, in article 16 of its Basic Law,[165] 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.[166] Safe third countries are countries that are deemed to comply with the 1951 Geneva Convention and the European Convention on Human Rights[167] 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.[168] The "safe country" concept has been incorporated into European Community legislation. Article 3, paragraph 5, of the 15 June 1990 Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities states that: "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."[169] Similar language is used in article 3, paragraph 3, of the Council of the European Union of Regulation (EC) 343/2003 of 18 February 2003,[170] which replaced the Dublin Convention.

84. In 1992, the European Ministers responsible for immigration adopted a resolution in which they defined the "safe third country" concept.[171] 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 1951 Geneva Convention; 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

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[165] N. Berger, *La politique européenne d'asile et d'immigration — Enjeux et perspectives*, Brussels, Bruylant 2000, 269 pages, p. 185.

[166] Source: French Senate, European Affairs Service, summary note entitled "L'immigration et le droit d'asile", available at http://www.senat.fr/lc/lc34/lc344.html.

[167] Ghana and Senegal, for example, are included in this list, which may be amended by a legislative text.

[168] Laws of 1 December 1994 and 2 February 1995. Source: French Senate, European Affairs Service, summary note entitled "L'immigration et le droit d'asile", available at http://www.senat.fr/lc/lc34/lc344.html.

[169] Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, Official Journal of the European Communities, No. C 254 of 19 August 1997, p. 1.

[170] Council Regulation (EC) 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, op. cit. Commission Regulation (EC) 1560/2003 of 2 September 2003 deals with the procedures for the application of Council Regulation (EC) No. 343/2003, Official Journal of the European Union, No. L 222 of 5 September 2003, p. 3.

[171] 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.

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: (i) 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; (ii) observance by the third country of international principles relating to the protection of refugees as embodied in the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, with special regard to the principle of non-refoulement; (iii) the third country will provide effective protection against refoulement and the possibility to seek and enjoy asylum; (iv) 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 resolution of 30 November 1992 of European immigration ministers on a harmonized approach to questions concerning host third countries (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.

85. 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.[172]

86. To establish the parameters which an expelling State should use in assessing the situation in a State of destination, the Council 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, the Office of the United Nations High Commissioner for Refugees, 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.

[172] 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.

Article 36 of the directive stipulates that a third European country shall be considered safe if it has ratified and observes the provisions of the 1951 Geneva Convention 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".[173]

87. This approach has been criticized by some authors. F. Julien-Laferrière notes in this regard that "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 (…)".[174] 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".

88. 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

89. 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.[175] The determination of the State of destination may involve consideration of the admissibility of an alien to a particular State.

(a) State of nationality

90. 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 1928 Convention on the

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[173] Para. 21 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member States for granting and withdrawing refugee status.

[174] F. Julien-Laferrière, "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", in V. Chetail (ed.), *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés 50 ans après: bilan et perspectives*, publication of the International Institute of Human Rights, Brussels, Bruylant, 2001, 456 pages, pp. 257-286, especially p. 282.

[175] "National law commonly makes provision for the deportation or expulsion of aliens to a wide variety of jurisdictions." Richard Plender, op. cit., p. 468.

Status of Aliens.[176] 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 that: "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."

91. The duty of a State to admit its nationals has also been considered in the literature.[177] As early as 1892, the Institute of International Law had recognized that a State may not prohibit its nationals from entering its territory.[178] 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.[179]

92. The question arises whether a State has a duty to admit a national who has been subject to unlawful expulsion.[180] 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.[181]

93. 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

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[176] Convention on the Status of Aliens, adopted by the VI International American Conference, signed at Havana on 20 February 1928, League of Nations, *Treaty Series*, No. 3045, 1932, p. 306. Art. 6, para. 2, provides that: "States are required to receive their nationals expelled from foreign soil who seek to enter their territory."

[177] See Karl Doehring, op. cit., p. 111; Guy S. Goodwin-Gill, op. cit., p. 255; David John Harris, op. cit., p. 505; Richard Plender, "The Ugandan Crisis and the Right of Expulsion under International Law", op. cit., p. 26; Ivan Anthony Shearer, op. cit., p. 78; see also S. K. Agrawala, op. cit., p. 103.

[178] "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." *Règles internationales sur l'admission et l'expulsion des étrangers*, op. cit., art. 2.

[179] See Guy S. Goodwin-Gill, op. cit., p. 136 (citing Schwarzenberger, *International Law* (3rd ed., 1957), vol. I, p. 361; Oppenheim, *International Law* (8th ed., 1955), vol. I, pp. 645 and 646); Robert Jennings and A. Watts, op. cit., p. 944; and Richard Plender, op. cit., p. 459.

[180] "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." Guy S. Goodwin-Gill, op. cit., pp. 201-202.

[181] See Louis B. Sohn and T. Buergenthal (eds.), op. cit., pp. 39-40 (citing the judgments of the International Court of Justice in *Notteböhm* (Liechtenstein v. Guatemala), *I.C.J. Reports* 1955, p. 4, and the European Court of Justice in *van Duyn* v. *Home Office*, Case 41-74, *Reports of Cases before the Court*, 1974, p. 1337).

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, L. B. Sohn and T. Buergenthal concluded that:

> "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."[182]

94. 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,[183] 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.

95. The national laws of some States[184] provide for the expulsion of an alien to the State of nationality or another State with special ties to the individual. Thus, the expelling State may return an alien to the State of which the alien is a citizen or national,[185] or a native;[186] to which the alien "belongs";[187] which is the alien's State of "origin" (when this State is clearly distinguished from the State of nationality);[188] or which was the alien's birthplace.[189] The expelling State may

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[182] Louis B. Sohn and T. Buergenthal, op. cit., pp. 46 and 47; David John Harris, op. cit., p. 506.

[183] For the third report, see International Law Commission, Fifty-ninth session, 7 May to 5 June and 9 July to 10 August 2007, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10); for the fourth report, see International Law Commission, Sixtieth session, 5 May to 6 June and 7 July to 8 August 2008, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10).

[184] The analysis of these national laws and elements of domestic case law is taken from Memorandum by the Secretariat on the expulsion of aliens, op. cit., paras. 511-513.

[185] Belarus, 1998 Law, arts. 19, 33; Brazil, 1980 Law, art. 57; France, Code, arts. 513-2(1), 532-1; 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, INA, sect. 241(b)(1)(C)(i), (2)(D), 250.

[186] United States, INA, sect. 250.

[187] 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).

[188] 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.

[189] Japan, 1951 Order, art. 53(2)(4)-(5); Republic of Korea, 1992 Act, art. 64(2)(1); United States, INA, sect. 241(b)(1)(C)(ii), (2)(E)(iv)-(vi).

establish this destination as the primary option,[190] an alternative primary option,[191] a secondary option that it may choose,[192] or an alternative secondary option.[193]

96. 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.[194] Moreover, some national courts have indicated that there is a presumption that the State of nationality would accept an expelled national.[195] 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.[196] 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

97. 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

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[190] Belarus, 1998 Law, art. 19; France, Code, arts. 513-2(1), 532-1; 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).

[191] 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, INA, sect. 250. A State may: (1) expressly allow the alien to choose this option (United States, INA, sect. 250); (2) 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 (3) 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).

[192] United States, INA, sect. 241(b)(1)(C), (2)(D) (but only when the destination State is the alien's State of nationality).

[193] 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)).

[194] See *Mackeson* v. *Minister of Information, Immigration and Tourism and Another*, op. cit., p. 252; *Mohamed and Another* v. *President of the Republic of South Africa and Others*, op. cit., pp. 469-500; *Residence Prohibition Order Case* (1), op. cit., pp. 431-433; *Chan* v. *McFarlane*, op. cit., pp. 213-218; *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, H. Lauterpacht (ed.), 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.").

[195] See, e.g., *United States Ex Rel. Tom Man* v. *Shaughnessy*, United States, District Court, Southern District, New York, 16 May 1956, *International Law Reports*, 1956, H. Lauterpacht (ed.), 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.").

[196] See *Aronowicz* v. *Minister of the Interior*, Appellate Division of the Supreme Court, 15 November and 12 December 1949, *International Law Reports*, 1950, H. Lauterpacht (ed.), Case No. 79, p. 259 ("He pointed out that not all States were now willing to receive back their nationals when another State wished to repatriate them …"); *Ngai Chi Lam* v. *Esperdy*, op. cit., pp. 536-538 (State of nationality declined to accept deportee).

entering the expelling State.[197] The expelling State may establish this destination as the primary option,[198] or a secondary option that it may choose.[199]

(c) State of passport issuance

98. 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 him with a passport, 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 […]."[200]

99. 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 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."[201]

100. The national laws of some States provide for the expulsion of aliens to any State which issued travel documents[202] to the alien. The expelling State may

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[197] Belarus, 1998 Law, art. 19; Japan, 1951 Order, art. 53(2)(1)-(2); Republic of Korea, 1992 Act, art. 64(2)(1); United States, INA, 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, INA, sect. 241(b)(2)(E)(iii)).

[198] Belarus, 1998 Law, art. 19.

[199] Republic of Korea, 1992 Act, art. 64(2)(1)-(2); United States, INA, sect. 241(b)(1)(C) (but only when the State of destination is also the State of nationality of the alien).

[200] Guy S. Goodwin-Gill, op. cit., p. 45. The author cites, inter alia, the following cases and documents: *Feldman* v. *Justica Publica*, Ann. Dig. 1938-40, Case No. 54, United Nations, *Treaty Series*, vol. 414, p. 211; 1954 Agreement between Sweden and the Federal Republic of Germany, United Nations, *Treaty Series*, vol. 200, p. 39; 1954 Agreement between Denmark and the Federal Republic of Germany, United Nations, *Treaty Series*, vol. 200, p. 53; 1958 Agreement between Belgium and the Netherlands, United Nations, *Treaty Series*, vol. 330, p. 84; 1962 Agreement between Austria and France, United Nations, *Treaty Series*, 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).

[201] Ibid., p. 50 (italics in the original).

[202] 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.

establish this destination as the primary option,[203] an alternative primary option[204] or an alternative secondary option.[205]

(d) State of embarkation

101. The national laws of some States[206] provide for the expulsion of aliens to the State of embarkation.[207] 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.[208] 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."[209] The expelling State may establish this destination as the primary option,[210] an alternative primary option,[211] the secondary option,[212] an alternative secondary option that the alien may choose[213] or a tertiary option that the alien may choose.[214]

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[203] Italy, 1996 Decree-Law, art. 7(3); Nigeria, 1963 Act, art. 17(1)(c).

[204] 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)).

[205] A State may not specify who shall make the choice (Portugal, 1998 Decree-Law, art. 21(1)).

[206] Source: Memorandum by the Secretariat on the expulsion of aliens, op. cit., para. 516.

[207] See Ivan Anthony Shearer, op. cit., pp. 77 and 78; see also D. P. O'Connell, op. cit., pp. 710 and 711.

[208] 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, INA, sects. 241(b)(1)(A)-(B), (2)(E)(i)-(ii), 250.

[209] Ivan Anthony Shearer, op. cit., pp. 77 and 78; see also D. P. O'Connell, op. cit., pp. 710 and 711.

[210] Canada, 2001 Act, art. 115(3); Portugal, 1998 Decree-Law, art. 21(1); United States, INA, sect. 241(b)(1)(A)-(B).

[211] Belarus, 1998 Law, art. 33; Bosnia and Herzegovina, 2003 Law, art. 64(1); Brazil, 1980 Law, art. 57; Guatemala, 1986 Decree Law, art. 88; Honduras, 2003 Act, art. 3(23); Italy, 1998 Law No. 40, art. 8(3); Kenya, 1967 Act, art. 8(2)(a); Lithuania, 2004 Law, art. 129(1); Panama, 1960 Decree-Law, art. 59; Paraguay, 1996 Law, art. 78; Sweden, 1989 Act No. 529, sect. 8.5; Switzerland, 1999 Ordinance, art. 9; United States, INA, sect. 250. A State may: (1) expressly allow the alien to choose this option (United States, INA, sect. 250); (2) 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 (3) 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).

[212] Italy, 1998 Decree-Law No. 286, art. 13(12), 1998 Law No. 40, art. 11(12), 1996 Decree Law, art. 7(3).

[213] Japan, 1951 Order, art. 53(2)(3); Republic of Korea, 1992 Act, art. 64(2)(3).

[214] United States, INA, sect. 241(b)(2)(E)(i)-(ii).

102. A State may limit the range of choices under this heading to those destination States falling under a special arrangement or agreement.[215] A State may place conditions on the choice of a contiguous or adjacent State,[216] specifically apply this heading to aliens holding transitory status,[217] and, in the case of protected persons, choose an alternative State if the destination State has rejected the alien's claim for refugee protection.[218]

103. 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".[219] 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 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."[220]

(e) State party to a treaty

104. A State may assume the obligation to receive aliens who are nationals of other States parties to a treaty.[221] 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

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[215] Italy, 1996 Decree Law, art. 7(3).

[216] United States, INA, sect. 241(b)(1)(B).

[217] Italy, 1998 Decree-Law No. 286, art. 10(3).

[218] Canada, 2001 Act, art. 115(3).

[219] David A. Martin, op. cit., p. 42 [citing, inter alia, the Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, 15 June 1990, *Official Journal of the European Communities*, C. 254/1 (1997)].

[220] Ibid.

[221] Robert Jennings and A. Watts, op. cit., 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 (United Nations *Treaty Series*, vol. 199, p. 29) [concluded on 22 May 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 (United Nations *Treaty Series*, vol. 322, p. 245) (Iceland became a party effective from 1966), as modified by a further agreement in 1979: RG, 84 (1980), p. 376; and the Convention between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands on the transfer of controls of persons to the external frontiers of Benelux territory, 1960 (United Nations, *Treaty Series*, vol. 374, p. 3)).

admission or entry to such aliens under certain circumstances provided for in the relevant treaty. Thus, the nature and extent of the duty a State to admit aliens would depend upon the terms of the treaty, which may vary.[222]

105. 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.[223] The treaty founding the Community guarantees in article 39, 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."

106. 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."[224]

107. The Convention between Denmark, Finland, Norway and Sweden concerning the waiver of passport control at the intra-Nordic frontiers, adopted in 1957, provides for the waiver of passport control with respect to their frontiers in cases involving the expulsion of their respective nationals as follows:

> "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.

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[222] See Ian Brownlie, op. cit., p. 498 (quoting a treaty between the United States and Italy of 1948); Rainer Arnold, op. cit., at p. 104.

[223] Karl Doehring, "Aliens, Admission", op. cit., pp. 108 and 109.

[224] Consolidated version of the Treaty Establishing the European Community, *Official Journal of the European Communities*, C/325/33, 24 December 2002, arts. 39 and 43.

"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."[225]

(f) Consenting and other States

108. The national laws of some States[226] provide for the expulsion of aliens to consenting and other States. A State may return an alien to any State,[227] or to one which will accept the alien or which the alien has a right to enter.[228] A State may provide such a destination when the alien would face persecution in the original destination State,[229] 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.[230] A State may establish this destination as an alternative primary option,[231] an alternative secondary option[232] or an option of last resort.[233]

109. 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. R. Jennings and A. 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

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[225] Convention between Denmark, Finland, Norway and Sweden concerning the waiver of passport control at the intra-Nordic frontiers, Copenhagen, 12 July 1957, United Nations, *Treaty Series*, vol. 322, No. 4660, p. 290.

[226] The following analyses of national laws are drawn from the Secretariat Memorandum on the expulsion of aliens, op. cit., para. 523.

[227] Canada, 2001 Act, art. 115(3); Sweden, 1989 Act No. 529, sect. 8.5; Switzerland, 1999 Ordinance, art. 9.

[228] 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, INA, sects. 241(b)(1)(C)(iv), (2)(E)(vii), 507(b)(2)(B).

[229] Belarus, 1998 Law, art. 33; Portugal, 1998 Decree-Law, art. 104(3).

[230] Canada, 2001 Act, art. 115(3).

[231] 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).

[232] Portugal, 1998 Decree-Law, art. 21(1), which does not specify who shall make the choice.

[233] Canada, 2001 Act, art. 115(3); Sweden, 1989 Act, sect. 8.5; United States, INA, sect. 241(b)(1)(C)(iv), (2)(E)(vii).

from the whole, or any part, of its territory".[234] They later add that: "Since a state need not receive aliens at all, it can receive them only under certain conditions".[235] A State does not therefore have a duty to admit aliens into its territory in the absence of a treaty obligation,[236] such as those relating to human rights or economic integration.[237]

110. The right of a State to decide whether or not 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."[238] In addition, the Convention regarding the Status of Aliens in the respective Territories of the Contracting Parties, adopted by the VIth 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.[239] It was on that basis that, as we have seen, the Arbitral Tribunal expressly recognized, in the *Ben Tillett* 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.[240]

111. 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".[241]

112. In terms of domestic law, as early as 1891, the United States Supreme Court held that every sovereign nation had the power to decide whether to admit aliens and under what conditions as a matter of international law. "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

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[234] Robert Jennings and A. Watts, op. cit., pp. 897-898.

[235] Ibid., p. 899.

[236] See *Ekiu* v. *U.S.*, 142 U.S. 651 (1892); Vattel, *Le Droit des gens*, 1758, liv. ii, sect. 94; Shigeru Oda, op. cit., p. 481; Ian Brownlie, op. cit., p. 498; Green Haywood Hackworth, op. cit., p. 717. See also Hurst Hannum, op. cit., p. 61; Hans Kelsen, op. cit., p. 366; Louis B. Sohn and T. Buergenthal, op. cit., p. 46.

[237] See H. Lambert, op. cit., p. 11.

[238] Convention on Territorial Asylum, Caracas, 28 March 1954, United Nations, *Treaty Series*, vol. 1438, No. 24378, p. 127.

[239] Article 1: "States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory". League of Nations, *Treaty Series*, vol. CXXXII, 1932-1933, No. 3045, p. 306.

[240] *Ben Tillett* case (*United Kingdom* v. *Belgium*), arbitral award of 26 December 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 [French original].

[241] *Moustaquim* v. *Belgium*, op. cit., para. 43. See also *Vilvarajah and others* v. *United Kingdom*, op. cit., para. 102; *Chahal* v. *United Kingdom*, op. cit., para. 73; *Ahmed* v. *Austria*, European Court of Human Rights, Judgment (Merits and Just Satisfaction), 17 December 1996, Application No. 25964/94, para. 38; *Bouchelkia* v. *France*, op. cit., para. 48; *H.L.R.* v. *France*, op. cit., para. 33.

as it may see fit to prescribe."[242] In the same vein, 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 in *Att.-Gen. for Canada* v. *Cain*, as follows: "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."[243]

D. Expulsion to a State which has no duty to admit

113. 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.

114. 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:[244] "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". 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.[245] Richard Plender also writes that: "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." 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

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[242] *Nishimura Ekiu* v. *United States et al.*, op. cit., (citation omitted). See also *Chae Chan Ping* v. *United States*, Supreme Court of the United States, 13 May 1889, 130 U.S. 581, 603, 604 ("Jurisdiction over its own territory to that extent [to exclude aliens] is an incident of every independent nation. It is part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.").

[243] [1906] A. C. 542 at p. 546.

[244] Richard Plender, op. cit., p. 468.

[245] Ibid., p. 469.

protect human rights. In particular, 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".

115. 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 D. P. 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".[246] 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".[247] Richard 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."[248]

116. 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.

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.

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[246] D. P. O'Connell, op. cit., p. 710.
[247] I. Brownlie, op. cit., p. 499.
[248] Richard Plender, op. cit., p. 468.

E. State of transit

117. 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.[249] 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.

118. 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.

[249] Paragraph 3.3. of the Green Paper on a community return policy on illegal residents, European Commission, 10 April 2002, COM(2002) 175 final.

Part three
Legal consequences of expulsion

VI. 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

119. 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,[250] 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 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."[251]

120. 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".[252] 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 Soviet Union (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 European, 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

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[250] F. P. Weber, "Expulsion: genèse et pratique d'un contrôle en Allemagne", *Cultures et Conflits*, No. 23 (1996), pp. 107-153.

[251] R. Pommerin. "*Die Ausweisungen von 'Ostjuden' aus Bayern 1923*", as cited by F. P. Weber, ibid.

[252] See A. Bazin, "Les décrets Beneš et l'intégration de la République tchèque dans l'Union européenne", *Questions d'Europe*, No. 59, 22 September 2002.

populations, both flight and expulsion, began with the liberation of the territories occupied by the Nazis and the westward advance of the Soviet army.

121. Under chapter six the multilateral Convention on the Settlement of Matters Arising out of the War and the Occupation[253] 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 that chapter stipulates: "No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraph 1 and 2 of this Article, or against international organisations, foreign governments or persons who have acted upon instructions of such organisations or governments", while article 5 stipulates that "[t]he 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".[254]

122. 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.[255]

123. 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

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[253] This Convention is still in force.

[254] A "reparations act" (*Lastenausgleichgesetz*) was passed by the Federal Republic of Germany on 16 May 1952. This law entitled expelled persons to receive from the West German Government 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 East Germany, "refugees" were not accorded a special status and the Communist East German 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 *Lastenausgleichgesetz*.

[255] A. Bazin, "Les décrets Beneš et l'intégration de la République tchèque dans l'Union européenne", op. cit., p. 4.

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 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.[256]

124. 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 *Notteböhm* case,[257] the expulsion of Asians by Uganda,[258] and the expulsion of British nationals from Egypt.[259] The lawfulness of such expulsions has been questioned from the perspective of the absence of a valid ground for expulsion[260] as well as human rights relating to property interests discussed below.

2. Protection of property of aliens, including those who have been lawfully expelled

125. 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 that "[n]o 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:

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256 Ibid. It should be noted that the Beněs 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.

257 See details in G. S. Goodwin-Gill, op. cit., p. 211.

258 Ibid., pp. 212-216.

259 Ibid., p. 216.

260 See Louis B. Sohn and R. R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens", *American Journal of International Law*, vol. 55, 1961, pp. 545-584, at 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 1969, 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, 1961, *Yearbook of the International Law Commission*, 1969, vol. II (A/CN.4/217), annex VII, p. 142.

"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."

126. At the regional level, article 14 of the African Charter on Human and Peoples' Rights states that:

"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."

127. The American Convention on Human Rights (Pact of San José, Costa Rica) states in article 21 on the right to property that:

"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."

128. Protocol 1, article 1, of the European Convention on Human Rights 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.

129. Expulsions that have involved illegal confiscations,[261] destruction or expropriation,[262] as well as "summary expulsions, by which individuals were compelled to abandon their property, subjecting it to pillage and destruction, or by

[261] "When taxation becomes confiscatory, it becomes illegal. In like manner, it is reasonable to conclude that where expulsion becomes confiscatory, it also becomes illegal." Guy S. Goodwin-Gill, op. cit., 1978, p. 217.

[262] "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." Vishnu D. Sharma and F. Wooldridge, op. cit., p. 412 (citing *Hollander*, *U.S.* v. *Guatemala*, IV *Moore's Digest* 102).

which they were forced to sell it at a sacrifice"[263] may be considered illegal expulsions.

130. 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."[264] In this connection, attention may be drawn to the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by the General Assembly in 1985, which provides that "[n]o alien shall be arbitrarily deprived of his or her lawfully acquired assets".[265]

131. The national laws of some States[266] contain provisions aimed at protecting the property and economic interests of aliens in relation to expulsion. The relevant legislation may expressly: (i) 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 entitlements;[267] or (ii) provide for the transfer of work entitlement contributions to the alien's State.[268]

132. 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.[269] 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,[270] or by order of a competent court.[271] 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.[272] A State may also allow the seizure,[273] disposition[274] or destruction[275] of forfeited items.

3. Property rights and similar interests

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[263] Edwin M. Borchard, op. cit., pp. 59-60. These types of expulsion "have all been considered by international commissions as just grounds for awards". Citing *Gardiner (US)* v. *Mexico*, 3 March 1849, opin. 269; *Jobson (US)* v. *Mexico*, 3 March 1849, opinion 553; *Gowen and Copeland (US)* v. *Venezuela*, 5 December 1885, Moore's Arb. 3354-3359. See also B. O. Iluyomade, op. cit., pp. 47-92; Karl Doehring, "Aliens, Expulsion and Deportation", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 111.

[264] Guy S. Goodwin-Gill, op. cit., p. 209; see also pp. 216, 307 and 308.

[265] *Official Records of the General Assembly, Forty-first session, Supplement No. 53* (A/40/53), resolution 40/144, annex, art. 9.

[266] Analysis drawn from Memorandum by the Secretariat on the expulsion of aliens, op. cit., para. 481.

[267] Argentina, 2004 Act, art. 67.

[268] Italy, 1996 Decree Law, art. 5.

[269] Australia, 1958 Act, arts. 3B, 261 H(3)(b)(ii), (6).

[270] Ibid., art. 223(1)-(8).

[271] Ibid., arts. 222, 223(9)-(14); and Belarus, 1999 Council Decision, art. 26.

[272] Ibid., arts. 223(14)-(20), 224.

[273] Ibid., arts. 261B(1)-(2), 261D.

[274] Ibid., arts. 261F-261I, 261K.

[275] Ibid., art. 261E(1)-(2).

133. 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 Institut de droit international 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."[276]

134. According to some authors, "[e]xcept 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".[277] G. 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".[278] 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". It claimed that "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 ...".[279]

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[276] *Règles internationales sur l'admission et l'expulsion des étrangers*, op. cit., art. 41.

[277] See L. B. Sohn and T. Buergenthal (eds.), op. cit., p. 96 and Shigeru Oda, op. cit., p. 483.

[278] Georg Schwarzenberger, op. cit. See also Edwin M. Borchard, op. cit., p. 56 (citing in particular *Hollander* v. *Guatemala* (*Foreign Relations*, 1895, II, 776)) and several cases from the end of the 19th century: *Scandella* v. *Venezuela* (1898) ["*Jobson (U.S.)* v. *Mexico*, op. cit.; *Gowen and Copeland (U.S.)* v. *Venezuela*, op. cit.] and note 5 ["*Maal (Netherlands)* v. *Venezuela*, op. cit.; *Boffolo (Italy)* v. *Netherlands*, op. cit.; *Jaurett (U.S.)* v. *Venezuela*, op. cit."]. See in addition Amos S. Hershey, op. cit., p. 375.

[279] John Bassett Moore, History and Digest of the International Arbitrations to which the United States has been Party, vol. IV, Washington, D.C., Government Printing Office, 1898, p. 107. See also David John Harris, *Cases and Materials on International Law*, 4th ed., London, Sweet & Maxwell, 1991, p. 503 (citing *Breger* (expelled from Rhodes in 1938, six months notice probably sufficient)), Letter from U.S. Department of State to a Congressman, 1961, 8 Whiteman 861.

135. More than a century later, the Iran-United States Claims Tribunal held, in *Rankin* v. *The Islamic Republic of Iran*, 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."[280]

136. Such considerations are taken into account in national laws. The relevant legislation may expressly: (i) afford the alien a reasonable opportunity to settle any claims for wages or other entitlements even after the alien departs the State;[281] or (ii) provide for the winding up of an expelled alien's business.[282] 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.[283]

137. In its partial award on Eritrea's civilian claims, 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 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.

138. 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.

139. In particular, the Commission considered in depth the lawfulness of: (i) the powers of attorney system established for the preservation of property; (ii) the compulsory sale of immovable property; (iii) taxation measures; (iv) the foreclosure of loans; and (v) the cumulative effect of the various measures relating to the

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[280] *Rankin* v. *The Islamic Republic of Iran*, cited by Karl Doehring, "Aliens, Admission", in Rudolf Bernhardt (ed.), op. cit., p. 147.

[281] Argentina, 2004 Act, art. 68.

[282] Nigeria, 1963 Act, art. 47.

[283] Belarus, 1999 Council Decision, art. 17.

property of expelled enemy aliens. Paragraphs 124-129, 133, 135-136, 140, 142, 144-146, 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, "[t]he 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".

140. 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."[284] 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."[285] However, some aspects of the award also shed light on the rules applicable to the protection of the property of aliens expelled in peacetime.

141. 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."[286]

142. With regard to the preservation of property by power of attorney, the 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 that "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."[287]

143. 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

[284] *Partial Award, Civilians Claims, Eritrea's Claims*, 15, 16, 23 and 27-32, Ibid., para. 124.
[285] Ibid.
[286] Ibid., para. 129.
[287] Ibid., para. 133.

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."[288]

144. 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."[289] However, it did not find that "the measures to collect overdue loans were in themselves contrary to international law."[290] 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 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, "if 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."[291]

145. Considering the collective impact of all Ethiopia's measures, the 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."[292]

146. 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 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.

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[288] Ibid., paras. 135 and 136.
[289] Ibid., para. 140.
[290] Ibid., para. 142.
[291] Ibid., para. 144.
[292] Ibid., para. 151.

147. 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."[293]

148. In the partial award on Ethiopia's civilian claims, responsibility was reversed; this time Eritrea was found liable. The Commission stated that:

> "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.
>
> …
>
> "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."[294]

149. 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:

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[293] Ibid., p. 38.

[294] *Partial Award, Civilian Claims, Ethiopia's Claim 5*, paras. 133 and 135.

> "12. 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."[295]

150. 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

151. 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 of 18 December 1990 provides that: "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."

152. 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:

> "To 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."[296]

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[295] Ibid., p. 31.

[296] Inter-American Commission on Human Rights resolution 30/81, case 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.

153. There are similar provisions in the national legislation of some countries. Article L. 524-4 of the French Code on the Entry and Stay of Aliens and on the Right to Asylum provides that: "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 L. 521-3, paragraphs 1 to 4, and came under the scope of article L. 313-11, 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.

154. 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", 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."[297]

155. 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.[298]

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[297] Comments reproduced in document A/CN.4/628.

[298] See response of the Netherlands to the request for information contained in the Commission's report on its sixty-first session, referred to above: Permanent Mission of the Kingdom of the Netherlands to the United Nations, "Statement by the Representative of the Kingdom of the Netherlands", Dr. Liesbeth Lijnzaad, Sixth Committee, sixty-fourth session of the General Assembly, New York, October 2009, Annex.

156. 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 decision *Kordoghliazar* v. *Romania*, European Court of Human Rights, 25 May 2008)."[299]

157. 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."[300]

158. 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.

159. The following draft article may therefore be proposed:

Draft article H1. Right of return to the expelling State

An alien expelled on mistaken grounds or in violation of law or international law shall have the right of return to the expelling State on the basis of the annulment of the expulsion decision, save where his or her return constitutes a threat to public order or public security.

160. 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

[299] Comments reproduced in document A/CN.4/628.
[300] Ibid.

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.

VII. Responsibility of the expelling State as a result of an unlawful expulsion

161. 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

162. Responsibility is the direct consequence of conduct contrary to the rule of law. According to D. 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".[301]

163. The International Law Commission completed its draft articles on State responsibility for internationally wrongful acts in 2001. The text of the draft articles is contained in the annex to General Assembly resolution 56/83 of 12 December 2001,[302] which took note of the draft articles. These draft articles outline the relevant rules for determining the legal consequences of an internationally wrongful act,[303] including unlawful expulsion. The intent of the present report is not to

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[301] D. Anzilotti, "La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers", *Revue générale du droit international public*, 1928, pp. 5-28, especially p. 6.

[302] The text of the draft articles on State responsibility for internationally wrongful acts was adopted by the International Law 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 *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1).

[303] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), arts. 28-54.

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 International Law Commission on the topic is justified in law.

164. 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.[304] A State may incur international responsibility in the following situations: (i) the expulsion is unlawful as such; (ii) the applicable procedural requirements have not been respected; or (iii) 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 International Law Commission by the Special Rapporteur, 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".[305]

165. 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".[306]

166. The principle whereby a State which expels an alien in breach of the rules of international law incurs international responsibility has been established for a very long time. In the *Boffolo Case*, the Umpire, after having stressed that "[…] the Commission may inquire into the reasons and circumstances of the expulsion",[307] 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

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[304] See draft art. 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"), and Article 38, paras. 1 (a), (b) and (c) of the Statute of the International Court of Justice.

[305] See International Law Commission, "International responsibility, sixth report" by F. V. García Amador, Special Rapporteur (Responsibility of the State for injuries caused in its territory to the person or property of aliens — reparation of the injury), *Yearbook of the International Law Commission*, vol. 11 (A/CN.4/134 and Add.1), pp. 1-54, art. 5, para. 1.

[306] G. S. Goodwin-Gill, "The limits of the power of expulsion in public international law", *British Yearbook of International Law*, 1974-1975, pp. 55 and 56; p. 88.

[307] *Boffolo*, op. cit., p. 534 (Umpire Ralston).

demands, state the reason of such expulsion before an international tribunal, and an inefficient reason or none being advanced, accepts the consequences".[308]

167. 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:

> "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 it may be necessary to exercise this right even upon bear 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". [309]

168. 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".[310] 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 supra: "3. Property rights and similar interests").

169. 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

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[308] 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, United Nations*, Reports of International Arbitral Awards*, vol. X, pp. 600-609, at pp. 604-605.

[309] *J. N. Zerman* v. *Mexico*, award of 20 November 1876, in John Bassett Moore, op. cit., vol. IV, p. 3348.

[310] *Partial Award, Civilian Claims, Eritrea's Claims 15, 16, 23 and 27-32*, para. 152.

is responsible: … 7. For permitting local authorities to forcibly to expel to Eritrea an unknown, but considerable, number of dual nationals for reasons that cannot be established …".[311]

B. Expellee's right to diplomatic protection

170. The goal here is not to revisit the law of diplomatic protection, which has been competently analysed by the Special Rapporteur for the topic, Mr. John Dugard, and on which the International Law Commission adopted draft articles in second reading in 2006.[312] 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 *Ahmadou Sadio Diallo* (*Republic of Guinea* v. *Democratic Republic of the Congo*)[313] before the International Court of Justice.

171. 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 the International Court of Justice, 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 DRC giving rise to its responsibility".[314] 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.[315] 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.[316]

172. 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 the Court stated in the *Interhandel* (*Switzerland* v. *United States of America*) case, "[t]he 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".[317] However, while States do not

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[311] Ibid., p. 38.

[312] The text of the draft articles and the commentaries thereto is published in Report of the International Law Commission, Fifty-eighth Session, 1 May-9 June and 3 July-11 August 2006, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10).

[313] International Court of Justice, *Ahmadou Sadio Diallo* (*Republic of Guinea* v. *Democratic Republic of the Congo*), Preliminary objections, judgment of 24 May 2007.

[314] Ibid., para. 40.

[315] Ibid.

[316] Ibid., para. 41.

[317] *I.C.J. Reports 1959*, p. 27.

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 available local remedies".[318] The Court refers to its judgment in the case of *Elettronica Sicula S.p.A. (ELSI)* (*United States of America* v. *Italy*).[319] It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted.[320]

173. In the *Diallo* case, the Court found it necessary to address the question of local remedies solely in respect of Mr. Diallo's expulsion. It recalled that "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 DRC 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".[321] The Court noted, however, that:

> "even if this was a case of expulsion and not refusal of entry, as the DRC maintains, the DRC has also failed to show that means of redress against expulsion decisions are available under its domestic law. The DRC 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".[322]

174. 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

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[318] *I.C.J. Reports 2007*, *Ahmadou Sadio Diallo* (*Republic of Guinea* v. *Democratic Republic of the Congo*), op. cit., para. 44.

[319] *Elettronica Sicula S.p.A. (ELSI)* (*United States of America* v. *Italy*) , *I.C.J. Reports 1989*, p. 15.

[320] *I.C.J. Reports 2007*, *Ahmadou Sadio Diallo* (*Republic of Guinea* v. *Democratic Republic of the Congo*), op. cit., para. 44.

[321] Ibid., para. 46.

[322] Ibid., para. 47.

expulsion, a State cannot cite this requirement as a cause of inadmissibility of an appeal before the International Court of Justice. This was, in fact, the conclusion that the Court came to after considering the various arguments of the parties in respect of this requirement.[323]

175. Furthermore, an alien who is unlawfully expelled may take proceedings before specialized human rights courts to invoke the responsibility of the expelling State. Although the International Court of Justice 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.

C. Proof of unlawful expulsion

176. 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.[324]

177. 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."[325]

178. 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."[326]

179. 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:

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[323] Ibid., para. 48.

[324] See Sixth report on the expulsion of aliens (A/CN.4/625 and Add.1).

[325] *Oliva*, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 600-609, at p. 607 (Agnoli, Commissioner).

[326] Ibid., p. 605 (Zuloaga, Commissioner).

> "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 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 this 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."[327]

180. 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."[328]

> "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."[329]

> "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."[330]

181. 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

182. 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

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[327] *J. N. Zerman* v. *Mexico*, arbitral award of 20 November 1876, in John Bassett Moore, op. cit., p. 3348.

[328] *Rankin* v. *The Islamic Republic of Iran*, Iran-United States Claims Tribunal, award of 3 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17, pp. 135-152, especially p. 142, para. 22.

[329] Ibid., p. 151, para. 38.

[330] Ibid., para. 39.

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.

183. 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.

184. 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."[331]

1. Grounds for reparation

185. Article 22, paragraph 5, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, of 18 December 1990, accords migrant workers and members of their families the right "to seek compensation according to the law".[332]

186. Article 63, paragraph 1, of the American Convention on Human Rights provides that "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."[333]

187. 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

188. 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 articles on State responsibility. The various forms of reparation are listed in article 34.

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[331] Inter-American Court of Human Rights, judgments in *Vargas-Areco* v. *Paraguay* (Merits, reparations), Series C, No. 155, 26 September 2006, para. 142; and *La Cantuta* v. *Peru* (Merits, reparations), Series C, No. 162, 29 November 2006, para. 202.

[332] Adopted by the United Nations General Assembly in its resolution 45/158 of 18 December 1990, entered into force on 1 July 2003, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 49,* vol. I (A/45/49).

[333] United Nations, *Treaty Series*, vol. 1144, No. 17955.

(a) Restitution

189. Restitution as a form of reparation is addressed in article 35 of the articles on State responsibility. 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

190. 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

191. 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 subjudice case."[334] In *Emre* v. *Switzerland*[335] considered by the European Court of Human Rights, the applicant complained of "avoir subi un préjudice matériel du fait de l'impossibilité de travailler liée à la décision d'expulsion, en réparation duquel il sollicite une somme de 153 000 francs suisses (environ 92 986 euros). Par une lettre du 15 novembre 2007, il demande en outre une somme de 700 000 francs suisses (environ 425 426 euros) en compensation de la future incapacité partielle de travailler qu'entraîneront, selon lui, ses problèmes de santé, qu'il attribue à la menace d'expulsion et à la mise à exécution de celle-ci" ["… 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 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"].[336] Since the applicant could not prove that he had suffered loss of earnings as a result of his expulsion, the Court determined that "le lien entre son expulsion et la future

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[334] Inter-American Court of Human Rights, *Bámaca Velásquez* v. *Guatemala* (Reparations), Series C, No. 91, 22 February 2002, para. 43.

[335] European Court of Human Rights, *Emre* v. *Switzerland*, judgment of 22 May 2008.

[336] Ibid., para. 95.

perte de salaire alléguée est purement spéculatif. Dès lors, aucun montant ne saurait être dû à ce titre" ["the link between his expulsion and the alleged future loss of earnings was pure speculation. Accordingly, no monies shall be payable for this purpose]".[337]

b. Moral damage

192. 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 that "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".[338] 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 of Human Rights 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 …".[339]

193. In *Emre* v. *Switzerland*,[340] the applicant requested the sum of 20,000 Swiss francs (about 12,155 euros) for moral damage which, in his view, comprised "la conséquence de la détresse profonde dans laquelle il a été plongé du fait de la décision d'expulsion et de la séparation forcée de ses proches. Cette souffrance morale s'est notamment concrétisée par ses actes d'automutilation ou ses tentatives de suicide" ["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]."[341] On this point, the Court found that "[…] l'intéressé a certainement éprouvé des sentiments de frustration et d'angoisse — non seulement lors de sa première expulsion mais aussi face à l'éventualité de la seconde — que le constat d'une violation ou la publication du présent arrêt ne suffiraient pas à réparer. Statuant en équité, comme le veut l'article 41 de la Convention, elle lui octroie à ce titre une somme de 3 000 euros" ["[…] 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

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337 Ibid., para. 99.

338 Inter-American Court of Human Rights, judgments in *La Cantuta* v. *Peru*, op. cit., para. 217; *Mapiripán* v. *Colombia* (Merits, reparations), Series C, No, 134, 15 September 2005; and *Villagrán Morales* v. *Guatemala* (Reparations), Series C, No. 77, 26 May 2001.

339 See, for example, Inter-American Court of Human Rights, judgments in *Mapiripán* v. *Colombia*, op. cit.; and *Pueblo Bello* v. *Colombia* (Merits, reparations), Series C, No. 140, 31 January 2006.

340 European Court of Human Rights, *Emre* v. *Switzerland* case, judgment of 22 May 2008.

341 Ibid., para. 99.

Convention, the Court awards this person the sum of 3,000 euros"].[342] In the *Ben Salah* v. *Italy* case,[343] the applicant considered that he had suffered moral injury as a result of the decision on expulsion to a State in which he was in danger of suffering ill-treatment, but did not ask for specific monetary amounts in compensation. Without referring to the injury suffered by the applicant, the Court held that "[…] le constat que l'expulsion, si elle était menée à exécution, constituerait une violation de l'article 3 de la Convention représente une satisfaction équitable suffisante" ["[…] 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]".[344]

c. The emergence of particular damages for the interruption of the life plan

194. 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 judgment 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."[345] 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".[346] 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".

195. However, in the *Benavides Cantoral* judgment, 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".[347] As a result, the Court ordered the State to provide the

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[342] Ibid., para. 100.

[343] European Court of Human Rights, *Ben Salah* v. *Italy*, judgment of 24 March 2009, paras. 57 et seq.

[344] Ibid., para. 59.

[345] Inter-American Court of Human Rights, *Loayza Tamayo* v. *Peru* (Reparations), Series C, No. 42, 27 November 1998, para. 148.

[346] Ibid., para. 152.

[347] Inter-American Court of Human Rights, judgment in *Cantoral Benavides* v. *Peru* (Reparations),

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.[348] In the *Wilson Gutiérrez* judgment, the same 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".[349]

(ii) The form of compensation

196. 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".[350]

197. 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;
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> "That, besides, the sum demanded does not appear to be exaggerated.
>
> "Decides that this claim of Mr. Paquet is allowed for 4,500 francs."[351]

198. 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.[352] Commissioner Agnoli had considered that

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Series C, No. 88, 3 December 2001, para. 60.

[348] Ibid., para. 80.

[349] Inter-American Court of Human Rights, judgment in *Gutiérrez Soler* v. *Colombia* (Merits, reparations), Series C, No. 132, 12 September 2005, paras. 88 and 89.

[350] See generally Guy S. Goodwin-Gill, op. cit., pp. 278-280; E. Borchard, op. cit., p. 57.

[351] *Paquet* case (Expulsion), Mixed Claims Commission Belgium-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. IX, p. 325 (Filtz, Umpire).

[352] *Oliva*, op. cit., pp. 608-610 (Ralston, Umpire), containing details about the calculation of damages in the particular case.

the arbitrary nature of the expulsion would have justified by itself a demand for indemnity:

> "[…] [A]n 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."[353]

199. 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."[354]

200. In *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

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[353] Ibid., p. 602 (Agnoli, Commissioner).

[354] *Maal (Netherlands)* v. *Venezuela*, op. cit., pp. 730-733 (Plumley, Umpire).

the sum in which an award should be made, can be properly fixed at $2500, U.S. currency, without interest".[355]

201. 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;[356] and for the money seized at the airport by the "Revolutionary *Komitehs*".[357]

202. 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, *Moustaquim* v. *Belgium*, 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 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.[358] In the same way, in *Čonka* v. *Belgium*, 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 European Convention on Human Rights (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.[359]

(c) Satisfaction

203. Satisfaction as a form of reparation is addressed in article 37 of the State responsibility articles. This form of reparation may be applied in case of unlawful expulsion.[360] On this subject, C. 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'". 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."[361] Mr. García Amador referred in this context to the cases of *Lampton* and

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[355] *Daniel Dillon (U.S.A.)* v. *United Mexican States*, Mexico-U.S.A. General Claims Commission, Award of 3 October 1928, United Nations, *Reports of International Arbitral Awards*, vol. IV, pp. 368-371, at p. 369.

[356] *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.

[357] Ibid., p. 110, paras. 61-63.

[358] European Court of Human Rights, *Moustaquim* v. *Belgium,* op. cit., paras. 52-55.

[359] European Court of Human Rights, *Čonka* v. *Belgium*, op. cit., p. 99, para. 42.

[360] Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, p. 231 (quoting Communication to the Minister in Caracas, 28 February 1907, Foreign Relations 1908, 774, 776, Hackworth, Dig., III, 690).

[361] Ibid., para. 99.

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.[362]

204. 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 judgment 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 case of *Beldjoudi* v. *France*,[363] the case of *Chahal* v. *the United Kingdom*,[364] and the case of *Ahmed* v. *Austria*.[365] 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".[366]

205. In the case of *Chahal* v. *the United Kingdom*, 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.[367]

206. As we 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

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[362] Ibid., para. 99, note 159. These cases are mentioned in John Basset Moore, op. cit., pp. 99-101. In the case of 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".

[363] European Court of Human Rights, *Beldjoudi* v. *France*, Judgment (Merits and Just Satisfaction), 26 March 1992, Application No. 12083/86, para. 86: "The applicant must have suffered non-pecuniary damages, but the present judgment provides them with sufficient compensation in this respect".

[364] European Court of Human Rights, *Chahal* v. *the United Kingdom*, op. cit., 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".

[365] European Court of Human Rights, *Ahmed* v. *Austria*, op. cit. 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 judgment affords him sufficient compensation in that respect" (para. 51).

[366] Inter-American Court of Human Rights, *Bámaca-Velásquez* v. *Guatemala*, op. cit., paras. 73 and 106.

[367] European Court of Human Rights, *Chahal* v. *the United Kingdom*, op. cit., para. 158.

very recently by the International Court of Justice in the case concerning *Amadou Sadio Diallo*. 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 I1. 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 J1. Diplomatic protection

The expelled alien's State of nationality may exercise its diplomatic protection on behalf of the alien in question.