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Sixth report on the expulsion of aliens*

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Introduction

1. In his fifth report (A/CN.4/611), the Special Rapporteur on Expulsion of Aliens continued his study of the issues associated with protection of the human rights of persons who have been or are being expelled as limitations on the State's right of expulsion. The misunderstanding that had arisen in the Commission as a result of the approach taken by the Special Rapporteur in this connection was dispelled in document A/CN.4/617, which constitutes an attempt to incorporate various concerns expressed by members of the Commission during the plenary debates, and restructures the linkage of draft articles 8 to 15 while adding a new draft article extending the application of those draft articles to the State of transit. It was the Special Rapporteur's understanding that the draft articles in question, so amended, were to be sent to the Drafting Committee in accordance with the decision of the majority of members of the Commission.

2. During the consideration in the Sixth Committee of the General Assembly of the United Nations of the report of the International Law Commission on the work of its sixty-first session,[1] Some delegations acknowledged the complexity of the subject of expulsion of aliens and expressed reservations regarding the relevance of codifying it. Attention was also drawn to the difficulties inherent in establishing general rules on the subject. While some delegations insisted on the need for the Commission to base its work on the practices being followed in States, others considered that some of the proposed draft articles were too general or were not supported by sufficient practices in terms of customary law.

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

4. Some delegations sought a clear delimitation of the topic, taking into account in particular the various situations and measures to be covered. The view was expressed that issues such as denial of admission, extradition, other transfers for law enforcement purposes and expulsions in situations of armed conflict should be excluded from the scope of the draft articles. Attention was also drawn to the distinction between the right of a State to expel aliens and the implementation of an expulsion decision through deportation. The need to distinguish between the situation of legal and illegal aliens was also underlined.

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

6. With regard to the protection of the rights of persons being expelled, delegations welcomed the emphasis the Commission had placed on human rights protection in considering the subject. Some delegations emphasized the need to reconcile the right of States to expel aliens and the rights of the persons expelled,

[1] See the topical summary prepared by the Secretariat of the discussion held in the Sixth Committee of the General Assembly during its sixty-fourth session, A/CN.4/620, 26 January 2010, paras. 27-39.

also taking into account also the situation in the State of destination. While a preference was expressed for a comprehensive approach that would not be limited to a list of specific rights, according to another view the Commission's analysis should be limited to those rights that were specifically relevant in the event of expulsion, including the role of assurances given by the State of destination concerning respect for those rights.

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

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

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

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

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

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

13. The point was made the treatment to be given to the principle of non-discrimination in the context of expulsion was not clear. The view was expressed that the principle of non-discrimination applied only in relation to the expulsion procedure and was without prejudice to the discretion of States in controlling admission to their territories and establishing grounds for the expulsion of aliens

under immigration law. Some delegations also raised some doubts as to the existence, in the context of expulsion, of an absolute prohibition of discrimination based on nationality.

14. Regarding grounds for expulsion, the view was expressed that State had a sovereign right to expel aliens if they had committed a crime or an administrative offence, if their actions had violated its immigration laws or threatened its national security or public order, or if expulsion was necessary for the protection of the life, health, rights or legitimate interests of its nationals. It was also said that expulsion must serve a legitimate purpose and satisfy the criterion of proportionality between the interests of the expelling State and those of the individuals being expelled.

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

16. As to the other comments and concerns indicated by members of the Sixth Committee, some of them are answered in document A/CN.4/617 referred to above, and others will be in the present report. In a new draft workplan (A/CN.4/618) containing, inter alia, a restructuring of the draft articles, the Special Rapporteur gave the Commission an overview of the treatment of the topic of expulsion of aliens, indicating the work which in his view remained to be done. The present report follows that plan, enlarging upon it with regard to the points in respect of which detail was lacking. Thus it fills out the last part of the plan, dealing with "General rules", by developing the aspect of the protection of the rights of persons who have been or are being expelled which he had not been able to take up in previous reports. Thus the present report complements the "general rules" before taking up, in the second part of the examination of "expulsion procedures" and then culminating with the third part dealing with "Legal consequences of expulsion".

I. Additions to Part 1: General Rules

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

Chapter 3. Prohibited expulsion practices (continued)

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

A. Collective expulsion

19. This question was already addressed in the third report on the expulsion of aliens.[2] Draft article 7 thereon was sent to the Drafting Committee which did the necessary editing work and adopted it at its last session. Just to complete the picture, it may be added that the issue of collective or mass expulsions was discussed by the International Law Association at its sixty-second conference, held in Seoul in August 1986, which approved a Declaration of Principles of International Law on the subject.[3] In that Declaration, containing 20 principles, only principles 17 and 18 concern the mass expulsion of aliens. They do not rule out on principle, the mass expulsion of aliens, but state simply that it must not be arbitrary and discriminatory in its application or serve as a pretext for genocide, confiscation of property or reprisal; the power of expulsion must, moreover, be exercised in accordance with the principles of good faith, proportionality and justice, while respecting the fundamental rights of the persons concerned.

20. The question of the collective expulsion of aliens is briefly reverted to in order simply to dispel a persistent concern on the part of certain Commission members with regard to paragraph 3 of this draft article 7, which deals with the possibility of expelling a group of persons acting as a group, in the event of armed conflict, for armed activities endangering the security of the State of residence engaged in conflict with their State of nationality. In its original version, the paragraph is worded as follows: “Foreign nationals of a State engaged in armed conflict shall not be subject to measures of collective expulsion unless, taken together as a group, they have demonstrated hostility towards the receiving State.” The discussions on this paragraph in plenary continued in the Drafting Committee, which amended it as it deemed necessary.[4] Some members of the Commission wished to be assured that such a provision was not contrary to international humanitarian law.

21. Various provisions of the Fourth Geneva Convention of 12 August 1949 may be invoked to address this concern. Some authors who have tackled this question of the collective or mass expulsion of aliens in time of armed conflict have considered it mainly with reference to deportations, transfers and evacuations,[5] placing the emphasis on article 49 of the Fourth Geneva Convention, the first paragraph of which prohibits “individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not (...), regardless of their motive”. Another author considers, however, that account should be taken rather of articles 35 to 46 of the aforementioned Convention, which in his view concern the treatment

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[2] A/CN.4/581.

[3] International Law Association, Declaration of Principles of International Law on Mass Expulsion, Sixty-second conference of the International Law Association, Seoul, 24-30 August 1986, Conference Report 1986.

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

[5] See, in particular, Lassa Francis Lawrence Oppenheim and Hersch Lauterpacht, *International Law, A Treatise, Vol. 2, Disputes, War and Neutrality*, 7th ed., London, Longman, 1952, pp. 441-442; G.J.L. COLES, “The Problem of Mass Expulsion. A Background Paper” prepared for the Working Group of Experts on the Problem of Mass Expulsion convened by the International Institute of Humanitarian Law, San Remo, Italy (16-18 April 1983), particularly pp. 78-80; Shigeru Oda, “The Individual in International Law”, Max Sørensen (ed.) *Manual of Public International Law*, London, Melbourne, Toronto, MacMillan, 1968, p. 482.

to be accorded to aliens in the territory of a State party to the conflict, and of articles 27 to 34, which are provisions common to the territories of the parties to the conflict and to occupied territories.[6]

22. Admittedly, apart from the case of voluntary departures provided for by article 35 under the conditions laid down in article 36 of the Convention, there is a risk that aliens who have not been repatriated may subsequently be subject to a measure of collective or mass expulsion. It could be contended in this connection, first, that article 38 concerning persons who have not been repatriated stipulates that "the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace", and, secondly, that article 45 concerning transfer to another Power regulates all individual or collective movement of protected persons by the Detaining Power.

23. It might indeed be thought from a combined reading of articles 45 and 4 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 that the aforementioned paragraph 3 of draft article 7 flies in the face of humanitarian law. Such is by no means the case.

24. Article 45 provides as follows: "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs." Protected persons are defined in article 4 of the Convention as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". The situation envisaged in draft article 7, paragraph 3, does not come within the scope of articles 45 and 4 of the Geneva Convention. First, article 4 does not seem to refer clearly to the case of a group of aliens usually residing in the territory of a State in armed conflict with their State of nationality. And even assuming that a broad interpretation of the words "those (...) in the hands of a Party to the conflict or Occupying Power of which they are not nationals" allows the inclusion in their number of the group of aliens in question, it will be noted that the said group of aliens would not come under the definition of "protected persons" within the meaning of the Convention in so far as they may be assimilated to "combatants" by virtue of their hostile armed activities that endanger the security of the expelling State, which is in this case the State of residence of the persons concerned. It will be recalled that, in international humanitarian law, combatants are taken to mean "members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention)" (art. 43, para. 2, of Additional Protocol I of 1977). Secondly, in so far as the group of aliens in question carries out its hostile armed activities in the interest of the State of nationality of its members engaged in an armed conflict with the State of residence, the members of the group who have been or are being expelled cannot "fear persecution for [their] political opinions or religious beliefs". The mere fact of fighting for their country would shield them from such a risk.

25. As was rightly noted by one author, "In 1949, on the basis of experience in the war, the concern was to protect enemy civilians not so much from mass expulsion as from internment or forced labour, which could turn them into virtual hostages.

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[6] See Richard Perruchoud, "L'expulsion en masse d'étrangers", *Annuaire français de droit international*, XXXIV, 1988, pp. 677-693, particularly p. 687.

Article 35 accordingly grants to all protected persons the right to leave the territory at the outset of or during a conflict".[7] It is therefore not surprising that expulsion, whether individual or collective, is not mentioned either in article 4 or in the other provisions discussed. From the foregoing considerations, the following conclusion has been drawn, confirming the position expressed by the Special Rapporteur during the deliberations on paragraph 3 of draft article 7, contained in his third report: "Thus, in the law of armed conflict, there is no specific provision relating to mass expulsion, whether in the case of international or of non-international armed conflict, and so we have to fall back on the general peacetime rules".[8]

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

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

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

B. Disguised expulsion

29. The term "disguised expulsion" is often used in the writings of various organizations that defend the rights of aliens or those of members of certain professions such as journalists. A few recent examples include the "disguised expulsion" of the special correspondent for the Australian television network ABC and a team from the New Zealand network TV3. They were all forced to leave Fiji, on 14 April 2009, by the military junta that took power in Suva following a coup d'état in December 2006. The three journalists were not formally arrested by the Fijian security forces, but were left with no choice other than to leave the country after the security forces escorted them to the airport of the capital city.[10] This was a case of de facto expulsion through the conduct of a State, without a formal act of

[7] Ibid., p. 687.

[8] Ibid., p. 687-688.

[9] Institution of International Law, Geneva session, 1982, "International Regulations on the admission and expulsion of aliens", (Rapporteurs Louis-Joseph Delphin Féraud-Giraud and Ludwig von Bar), arts. 23 and 24.

[10] See "Censure préalable et expulsion des journalistes étrangers : Fidji devient une dictature militaire", Thursday, 16 April 2009, by Jesusparis.

expulsion;[11] Thus it can only be considered "disguised" on the understanding that expulsion can only occur through a formal act. Likewise, the non-renewal of the visas of French nationals residing in Madagascar, including the correspondent for Radio France Internationale and Deutsche Welle, was denounced as "disguised expulsion". It was argued that the Malagasy authorities did not provide the grounds for their decision not to renew the visas, whereas such grounds must be provided, at least in the case of journalists.[12] However, not only is such an obligation absent from the laws of Madagascar and those of most other countries, but the granting or renewal of visas is a sovereign prerogative of States recognized by international law.

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

31. It is not always easy to distinguish between disguised or indirect expulsion and expulsion in violation of the procedural rules. The latter situation may cover not only cases of expulsion through the conduct of a State, but also cases of expulsion that are based on a measure taken by an authority that lacks competence, or are executed without complying with the various time limits stipulated in national legislation. By contrast, the disguised expulsion that may be akin to what has been termed "constructive expulsion"[13] only concerns cases where, because the expulsion is feigned or masked, it is not in execution of a formal measure. Practical examples of disguised expulsion other than those mentioned above include "disguised expulsion" based on the confiscation groundless or invalidation of an alien's legal residence permit; "disguised expulsion" based on "incentive" measures for a return that is "allegedly voluntary" but that in fact leaves the alien with no choice; and "disguised expulsion" resulting from the hostile conduct of a State towards an alien.

32. Disguised expulsion based on the confiscation or groundless invalidation of the legal residence permit of an alien may be illustrated by the case of Mr. Sylvain Urfer, a Jesuit priest who lived in Madagascar for 33 years. In 2007, he was notified that his permanent residence visa had been cancelled, and he thus had no choice other than to leave the country. The Malagasy Minister of the Interior reversed that disguised expulsion decision two years later, allowing the priest to return to Madagascar.[14] This type of disguised expulsion also includes the cases, frequently seen in Africa in the past few years, where persons are arrested while their residence permits are still valid, or where the residence permits are destroyed or confiscated,

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[11] In his second report, the Special Rapporteur showed that expulsion could occur based solely on the "conduct" of a State, in the absence of a formal act (A/CN.4/573, para. 189).

[12] See www.courierinternational.com/fiche-pays/Madagascar24.05.2005, which cites, inter alia, the Malagasy newspapers *La Gazette de la Grande Île*, *L'Express* and *Midi Madagasikara*.

[13] See *Expulsion of aliens*. *Memorandum by the Secretariat*(A/CN.4/565), p. 37.

[14] http://www.madagascar-tribune.com.

leaving those persons with no choice other than to leave the country. Such cases have been reported in South Africa[15] and are recurrent in Equatorial Guinea.[16]

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

34. Meanwhile, where "incentive" measures for return that leave the alien with no choice are concerned, they form part of the new policies being adopted by certain States, notably in Europe, to control immigration and reduce the number of aliens they admit. Spain and France, for example, have instituted "voluntary" return or departure programmes that are in fact forcible return schemes. As Guy S. Goodwin-Gill points out: "In practice, there may be little difference between forcible expulsion in brutal circumstances, and 'voluntary removal' promoted by laws which declare continued residence illegal and encouraged by threats as to the consequences of continued residence".[17] He also indicates that "State authorities can also induce expulsion through various forms of threat and coercion … In *Orantes-Hernandez v. Meese* 685 F. Supp. 1488 (C.D. Cor. 1988) the court found that substantial numbers of Salvadoran asylum-seekers were signing 'voluntary departure' forms under coercion, including threats to detention, deportation, relocation to a remote place and communication of personal details to their government".[18]

35. In Spain, as one of the measures to combat rising unemployment following the economic crisis, the Government has established a "voluntary return programme" for nationals of 20 countries with which Spain has signed social security agreements. That programme, which was validated on 19 September 2008, "encourages" unemployed legal immigrants to return to their country of origin. In return, the Government of Spain agrees to pay all the benefits to which they are entitled, in two instalments: 40 per cent before their departure, and 60 per cent one month after they return to their country. The persons in question, along with their families — if the families came to Spain under the family reunification programme — must leave Spanish territory within a few days following the first payment of the benefits, and must give an undertaking that they will not return to Spain for the three years following their return to their country of origin.[19] But

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[15] Such cases have been reported notably in *The Sunday Independent* of 9 April 2000. According to the Amnesty International official, Sarah Motha: "Police officers arrest all immigrants without discrimination. They pay little attention to the status of the asylum-seeker. We have been told of several cases where police officers pretended not to see the paper attesting to an ongoing application for asylum." There is also talk of "persons arrested while their residence permits were still valid, and of destroyed or confiscated documents". Source: http://www.parlament.ch/i/suche/pagine/geschaefte.aspx?geschidentification=19973467.

[16] See, inter alia, the daily *Mutations*, No. 2508, 13 October 2009, p. 5, which reports that "residence permits required from all foreigners, and purchased for about 600.000 francs CFA, were simply confiscated by the law enforcement officials of Equatorial Guinea. In this case, and based on the testimony of the foreigners upon their arrival in Douala, these documents are often torn up by dishonest officials."

[17] Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed., Oxford, Clarendon Press, 1996, p. 128.

[18] Ibid., p. 155.

[19] Source: www.planderetornovolontario.es. For more details, see the Spanish daily *El Pais*, Madrid, 19 September 2008; http://www.elpais.com/articulo/espana/plan/retorno/voluntario/inmigrantes/entrara/vigor/novi/embre/caracter/permanente/elpepuesp/20080919elpepunac10/tes.

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

36. In France, "return assistance", established pursuant to the Stoléru act[20] — named after the Minister of the Interior who introduced it but repealed by the Socialists when they came to power in 1981 — resurfaces under the expression "humanitarian return". As the "control of migratory flows" had become the primary objective of immigration policies, the French Government came up with the solution of "forcible humanitarian returns", especially when faced with the "difficulty" — recognized by its Minister in charge of National Immigration — of having to "expel Romanians and Bulgarians", whose countries are now members of the European Union (EU). Those mechanisms for "humanitarian return" assistance, established by a circular of 2006, were used on several occasions to disguise operations designed to expel those new European citizens. GISTI, an association that defends the rights of foreign workers, points out, for example, that at Bondi on 26 September, at Saint-Denis on 10 October, and at Bagnolet on 24 October 2007 and in other cities, the police carried out down raids on sites occupied by Roma (Bulgarian and Romanian nationals), loaded the occupants onto specially chartered buses, and gave them the choice between "prison" and immediate departure to their countries of origin "with return assistance". They were not even allowed to take their belongings, or "to present documents that could have proved that they met all the conditions for a prolonged stay in France. Those who were in possession of their passports had them confiscated".[21] These forcible returns are all the more striking because the victims are European citizens who enjoy the right of free movement and residence within the European Union.

37. In his second report, the Special Rapporteur noted that expulsion does not necessarily presuppose a formal measure, but that it can also derive from the conduct of a State which makes life in its territory so difficult that the alien has no choice other than to leave the country.[22] In this connection, it is worth noting the decision rendered by the Iran-United States Claims Tribunal after examining various applications related to this form of expulsion which seems disguised. The Tribunal summarized the characteristics of such "constructive expulsion" as follows:

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[20] For an overview of French legislation on immigration, see Danièle Lochak, "La politique de l'immigration au prisme de la législation sur les étrangers" in *Les lois de l'inhospitalité*, La Découverte, 1997; and "La politique de l'immigration au prisme de la législation sur les étrangers (2)". Source: http://www.gisti.org/doc/presse/1997/lochak/po-2html.

[21] GISTI, "Les nouveaux retours humanitaires forcés: un nouveau concept! Un communiqué de GISTI", November 2007. They were offered 153 euros for adults and 46 euros for children upon arrival in their respective countries of origin.

[22] See Second report on the expulsion of aliens, C/CN.4/573, 17 July 2006.

> "Such cases would seem to presuppose at least that the circumstances in the country of residence are such that the alien cannot reasonably be regarded as having any real choice, and that behind the events or acts leading to the departure there is an intention of having the alien ejected and these acts, moreover, are attributable to the State in accordance with principles of State responsibility".[23]

38. The Eritrea-Ethiopia Claims Commission also had to examine the issue of disguised expulsion, although it concluded that there was no disguised expulsion in that case. Ethiopia claimed that Eritrea was responsible for the "indirect" or "constructive" expulsion of Ethiopians, contrary to international law. In rejecting that claim, the Commission concluded that the Ethiopians were not expelled by the Eritrean Government or due to Government policy, but instead left for economic reasons or owing to dislocation associated with the war, reasons for which Eritrea was not responsible. The Commission noted that there was a spectrum of "voluntariness" in Ethiopian departures from Eritrea in 1999 and early 2000. Obviously, the evidence suggests that the trip back to Ethiopia or to other destinations could be harsh, particularly for those who had to cross the desert. "However, the evidence does not establish that this was the result of actions or omissions by Eritrea for which it is responsible. Accordingly, Ethiopia's claims in this respect are dismissed".[24]

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

40. Similarly, the definition of the term "expulsion" contained in the *Declaration of Principles of International Law on Mass Expulsion*, adopted by the International Law Commission at its 62nd Conference in Seoul, also covers situations in which the compulsory departure of individuals is achieved by means other than a formal decision or order by the State. This definition encompasses situations in which a

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[23] David J. Harris, Cases and Materials on International Law, 4th ed., London, Sweet and Maxwell, 1991, p.502 (commenting on the decisions of the Iran-United States Claims Tribunal concerning "constructive expulsion"). See also Giorgio Gaja "Expulsion of Aliens: Some Old and New Issues in International Law", Cursos Euromediterráneos Bancaja de Derecho Internacional, vol. 3, 1999, pp. 283-314, particularly pp. 289-290 which cited the following decisions of the Tribunal: *Short v. Iran* case Judgement of 14 July 1987. 16 *Iran-United States Claims Tribunal Reports (1987-III) 76*, pp. 85-86; *International Technical Products Corporation v. Iran* case, Judgment of 19 August 1985. 9 *Iran-United States Claims Tribunal Reports* (1985-II) 10, p. 18; et *Rankin v. Iran* case, Judgment of 3 November 1987, 17 *Iran-United States Claims Tribunal Reports (1987-IV) 135*, pp. 147-148; Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed., London/New York, Routledge, 1997, p. 262 : John R. Crook, "Applicable law in international arbitration : The Iran-U.S. Claims Tribunal Experience", *American Journal of International Law*, vol. 83, 1989, pp. 278-311, at pp. 308-309; and Ruth L. Cove, "State responsibility for constructive wrongful expulsion of foreign nationals", *Fordham International Law Journal*, vol. 11, 1987-1988, pp. 802-838.

[24] *Eritrea-Ethiopia Claims Commission, Partial Award, Civilians Claims, Eritrea's Claims*, 15, 16, 23 and 27, 32, The Hague December 17, 2004.

State aids, abets or tolerates acts committed by its citizens with the intended effect of provoking the departure of individuals from the territory of the State:[25]

> "… 'expulsion' in the context of the present Declaration may be defined as an act, or failure to act, by a State with the intended effect of forcing the departure of persons, against their will from its territory for reason of race, nationality, membership of a particular social group or political opinion… 'a failure to act' may include situations in which authorities of a State tolerate, or even aid and abet, acts by its citizens with the intended effect of driving groups or categories of persons out of the territory of that State, or where the authorities create a climate of fear resulting in panic flight, fail to assure protection to those persons or obstruct their subsequent return…".[26]

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

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

Draft article A: Prohibition of disguised expulsion

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

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

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

C. Extradition disguised as expulsion

44. The expulsion of an alien may take the form of disguised extradition. Even when the two procedures lead to the same result, namely the removal of the alien from the territory of the State where he resides, they differ in many respects in terms of both substantive and procedural requirements. It should be recalled that

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[25] See Expulsion of aliens, Memorandum by the Secretariat, para. 72.

[26] International Law Association, *Declaration of Principles of International Law on Mass Expulsion*, 62nd Conference of the ILA, Seoul, 24-30 August 1986, *Conference Report 1986*, p. 13.

extradition is an inter-State procedure whereby one State surrenders to another State, at the request of the latter, a person on its territory who is subject to "a criminal prosecution or sentence by the second party and is sought to stand trial or to serve a sentence there."[27] This is a procedure that can have far-reaching consequences for the human rights and individual freedoms of the person in question. In fact, "ordinary law, as laid down in existing extradition conventions, (...) considers the surrender of an offender to foreign courts to be a serious action which, out of respect for individual freedom and honour to the State, must be subject to strict substantive and procedural safeguards."[28] This is why "disguised" extradition is generally condemned under international law. As one author has written, "disguised extradition stems from seeming agreements and seemingly lawful agreements which in fact constitute an abuse of procedure. Their true purpose, kept secret, is to obtain an extradition by using a parallel procedure which generally has another purpose but which, in the particular case, achieves the same result."[29]

45. First of all, the terminology must be clarified in the light of the distinction suggested by some authors between "disguised extradition" and "de facto extradition."[30] The expression "disguised extradition" may have a negative connotation since it implies an ulterior motive which may indicate an abuse of right or bad faith. In contrast, the term "de facto extradition" may have a neutral connotation since it implies the recognition of an additional consequence of the expulsion of an alien as a factual matter. One author has written the following on this subject:

> "It is undoubtedly true that, where the destination selected is one at which the authorities are anxious to prosecute or punish the deportee for a criminal offence, the deportation may result in a *de facto* extradition. Thus it has become usual to describe such deportation as 'disguised extradition', but it would seem advisable to use this term with caution. A true 'disguised extradition' is one in which the vehicle of deportation is used with the prime motive of extradition. This would appear most clearly, for example, where the fugitive, a national of A, enters the territory of B from State C, but is deported to State D, where he is wanted on criminal charges. Examples, however, of such blatant disguised extradition are rare. Where deportation is ordered to the State of embarkation or the national State, the description 'disguised extradition' is really a conclusion drawn by the authors of it as to the mind of the deporting authorities. While the motive of restoring a criminal to a competent jurisdiction may indeed be uppermost in the intention of the deporting State, it may also in many cases be a genuine coincidence that deportation has this result. It is proposed therefore to use the neutral term '*de facto* extradition' here ."[31]

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[27] Gérard Cornu. *Vocabulaire juridique*, Paris, PUF, 2008, Association Henri Capitant, 4th ed., p. 395.

[28] André Decocq, "La livraison des délinquants en dehors du droit commun de l'extradition", *Revue critique de droit international privé*, 1964, p. 412; see also Didier Rouget, "Le respect du droit extraditionnel et les extraditions déguisées", RTDH, 1999, No. 37, pp. 169-197, p. 169.

[29] Claude Lombois, *Droit pénal international*, Paris, Dalloz, 1979, 2nd ed., 688 pp., p. 563.

[30] See *Expulsion of aliens, Memorandum by the Secretariat, op. cit.*, paras. 432-433, pp. 278-279.

[31] I. A. Shearer, *Extradition in International Law*, Manchester University Press, 1971, p. 78.

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

> "In the practice known as 'disguised extradition', the usual procedure is for the individual to be refused admission at the request of a foreign State, and for him to be deported to that or any other State which wishes to prosecute or punish him. The effect is to override those usual provisions of municipal law which commonly permit the legality of extradition proceedings to be contested and allow for the submission of evidence to show that the individual is being pursued for political reasons.
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> "While the legality of the resort to immigration laws for such purposes has long been controversial, it may also be argued that the immigration laws have a supporting role to play in the international control of criminals, and that therefore de facto extraditions made under those laws are justified. It may indeed be a little spurious to demand the use of extradition proceedings in a State which has already decided, as a matter of immigration policy, that the alien will not be allowed to remain. Be that as it may, the established and primary purpose of deportation is to rid the State of an undesirable alien, and that purpose is achieved with the alien's departure. His destination, in theory, should be of little concern to the expelling State, although in difficult cases it may put in issue the duty of another State to receive its national who has nowhere else to go. Unlike extradition, which is based on treaty, expulsion gives no rights to any other State and, again in theory, such State can have no control over the alien's destination.
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> […]
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> "The case for simplified extradition procedures will continue to be strongly argued, particularly between allied or friendly States. Delay and expense are reduced, and expulsion under the immigration laws circumvents the inconveniences of a weak case, the absence of the offence charged from the extradition treaty, and even the lack of a treaty itself. Yet it is apparent that modern expulsion laws have been developed with some regard being paid to the requirements of due process and to the desirability of a right of appeal. To this extent, these laws reflect the growth of human rights principles and they may be taken as some evidence of contemporary State attitudes to the rights of individuals."[32]

47. In fact, the issue of disguised extradition engaged the attention of judges and legal commentators at a very early stage. Shearer traces the use of the term "disguised extradition" to the decision of a French court in the mid-nineteenth century: "The term *extradition déguisée* was used as early as 1860 by a French court...".[33] In 1892, the Institut de Droit International declared that "the fact that extradition has been refused does not mean that the right to deport has been renounced" and that "a deportee who has taken refuge in a territory in order to avoid

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[32] Guy S. Goodwin-Gill, *The Limits of the Power of Expulsion in Public International Law*, Oxford University Press, United Kingdom, 1977, 525 p., pp. 55-156.

[33] I. A. Shearer, *op. cit.*, p. 78, note 2 (citing André Decocq, "La livraison des délinquants en dehors du droit commun de l'extradition", *Revue critique de droit international privé*, 1964, pp. 411-424).

criminal prosecution may not be handed over, by devious means, to the prosecuting State unless the conditions for extradition have been duly met".[34] Much later, in 1983, the Institut de Droit International recalled that the "fact that the extradition of an alien may be forbidden by municipal law should not prevent his expulsion by legal procedures."[35]

48. There is no explicit statement in treaty law on the illegality of extradition disguised as expulsion and while national courts, as we shall see, offer an abundance of precedents on this issue, international case law here is in short supply. However, the European Court of Human Rights, following the French courts, unambiguously declared the illegality of such a practice in the *Case of Bozano v. France*[36] by referring to article 5, paragraph 1, of the European Convention on Human Rights.

49. These are the facts of the case: Mr. Bozano, an Italian national, was arrested by the Italian police on 9 May 1971, released on 12 May then rearrested on 20 May, for abusing and murdering a 13-year-old Swiss girl, Milena Sutter, in Genoa on 6 May 1971. He was also charged with indecency and assault with violence against four women. On 15 June 1973, after several months of hearings, the Genoa Assize Court sentenced him to two years and 15 days' imprisonment for offences committed against one of the four women and acquitted him of the other offences, including that committed against Milena Sutter, for lack of evidence. The prosecution appealed. However, following the commencement of the trial, the accused applied for an adjournment, arguing, on the basis of a medical certificate, that he had been hospitalized for ill health. The Genoa Assize Court of Appeal found that he was deliberately refusing to appear and proceeded with the trial. Following other procedural considerations, on 22 May 1975 the Court sentenced Mr. Bozano in absentia to life imprisonment for the offences committed against Milena Sutter and to four years' imprisonment for the other offences. The Court held that there were no extenuating circumstances. On 25 March 1976, the Italian Court of Cassation dismissed Mr. Bozano's appeal; the Public Prosecutor's Office of Genoa thereupon issued a committal order and an international arrest warrant was circulated by the Italian police on 1 April 1976.

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

51. On the evening of 26 October 1979, at about 8.30 p.m., three plain-clothes policemen, at least one of whom was armed, stopped Mr. Bozano as he was returning home, handcuffed him and drove him to police headquarters. They served

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[34] Institut de Droit International, "Règles internationales sur l'admission et l'expulsion des étrangers", Session of Geneva, 9 September 1892, *Annuaire de l'Institut de Droit International*, vol. XII, 1892-1894, pp. 218 et seq.

[35] Institut de Droit International, Resolution of 1 September 1983 on "New Problems of Extradition", Session of Cambridge, article VIII, para. 2.

[36] European Court of Human Rights, *Bozano Case*, 18 December 1986, in *International Law Reports*, vol. 86, pp. 322 et seq.

him with the following order, which had been made more than a month earlier and was signed by the Minister of the Interior and addressed to the Prefect of Haute-Vienne:

> "THE MINISTRY OF THE INTERIOR
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> Having regard to Article 23 of the Aliens (Conditions of Entry and Residence) Ordinance of 2 November 1945,
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> Having regard to the Decree of 18 March 1946,
>
> Having regard to information obtained concerning Lorenzo BOZANO, born on 3 October 1945 in GENOA (Italy);
>
> Deeming that the presence of the above-mentioned alien on French territory is likely to jeopardize public order (ordre public),
>
> BY THIS ORDER REQUIRES :
>
> 1. the above-named to leave French territory;
>
> 2. the Prefects to execute this order."[37]

52. Although Mr. Bozano opposed "deportation" and asked to be brought before the Appeals Board provided for in article 25 of the Ordinance of 2 November 1945, he was told that this was out of the question and that he "was going to be taken at once to Switzerland (and not to the Spanish border, which was the nearest frontier)."[38] Accordingly, without being allowed to leave France for a country of his choice or to inform his wife or his lawyer, he was placed inside a vehicle in handcuffs and expelled to Switzerland via the frontier near Annemasse, where he was handed over to the Swiss police.

53. It should be recalled that in 1976, Italy, to which Switzerland is bound by the European Convention on Extradition of 13 December 1957, had requested Switzerland to extradite Mr. Bozano. Having been expelled by France to Switzerland, Mr. Bozano was then extradited to Italy on 18 June 1980 after the Swiss Federal Court had rejected his objection of 13 June.

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

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

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[37] Reproduced in ibid., para. 24.

[38] Ibid., para. 25.

> "It therefore appears that this operation consisted, not in a straightforward expulsion on the basis of the deportation order, but in a prearranged handing over to the Swiss police…".[39]

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

> "Viewing the circumstances of the case as a whole and having regard to the volume of material pointing in the same direction, the Court consequently concludes that the applicant's deprivation of liberty in the night of 26 to 27 October 1975 was neither "lawful", within the meaning of Article 5(1)(f), nor compatible with the "right to security of person". Depriving Mr. Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of 15 May 1979 by the Indictment Division of the Limoges Court of Appeal, and not to "detention" necessary in the [27] ordinary course of "action… taken with a view to deportation". The findings of the presiding judge of the Paris *tribunal de grande instance* — even if *obiter* — and of the Limoges Administrative Court, even if that court had only to determine the lawfulness of the order of 17 September 1979, are of the utmost importance in the Court's view; they illustrate the vigilance displayed by the French courts.
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> "There has accordingly been a breach of Article 5(1) of the Convention."[40]

56. Doctrine shares this approach. The author of a commentary on article 5 of the European Convention on Human Rights, reflecting European Court of Human Rights jurisprudence in 1986, notes that the two requirements contained in article 5, paragraph 1, of the European Convention on Human Rights are, on the one hand, respect for domestic law, which is incorporated in the Convention through the expression "in accordance with a procedure prescribed by law" and, on the other hand, compatibility with the purpose of this article, which is to "protect the individual from arbitrariness", as stated by the Court in the *Bozano Case* (para. 54). In this instance, arbitrariness arose from the circumstances in which the expulsion order was implemented: not informing Mr. Bozano about a decision taken one month earlier and implementing that decision at the same time that he received notification; not giving him the choice of host country[41] or taking him to the closest border; and, lastly, handing him over to Switzerland, to which Italy was bound by an extradition convention, which had been notified by the International Criminal Police Organization (Interpol) about his imminent expulsion and which was the State of nationality of the victim for whose murder Mr. Bozano had been sentenced in Italy. The author concludes: "This expeditious form of police cooperation is neither

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[39] Ibid., para 31.

[40] Ibid., para. 60.

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

lawful within the meaning of article 5, nor is it compatible with the right to security; the deprivation of liberty imputable to France arises from its prerogative to expel and is merely arbitrary detention in the service of disguised extradition (*Bozano Case*, paras. 55 to 60)."[42] Another author states, more simply, that the first ruling against France by the European Court of Human Rights occurred with the *Bozano Case* "in a particular judicial context involving 'disguised extradition' to Italy, where Mr. Bozano had been sentenced in absentia for a sordid crime."[43]

57. The issue of disguised extradition was raised again in the *Case of Öcalan v. Turkey*.[44] In the light of the judgment handed down by the European Court of Human Rights in this case, the facts of the case may be summarized as follows: Mr. Abdullah Öcalan is a Kurd from Turkey. Prior to his arrest, he was the leader of the Workers' Party of Kurdistan (PKK). On 9 October 1998, Mr. Öcalan was expelled from Syria, where he had been living for many years. He arrived the same day in Greece, where the Greek authorities asked him to leave Greek territory within two hours and refused his application for political asylum. On 10 October 1998, he travelled to Moscow in an aircraft that had been chartered by the Greek secret services. His application for political asylum in the Russian Federation was accepted by the Duma, but the Russian Federation Prime Minister did not implement that decision. On 12 November Mr. Öcalan went to Rome, where he made an application for political asylum. The Italian authorities initially detained him but subsequently placed him under house arrest. Although they refused to extradite him to Turkey, they also rejected his application for refugee status. Mr. Öcalan had to bow to pressure for him to leave Italy. After spending one or two days in the Russian Federation he returned to Greece, probably on 1 February 1999. The following day, 2 February 1999, he was taken to Kenya. He was met at Nairobi Airport by officials from the Greek Embassy and accommodated at the Greek Ambassador's residence. He lodged an application with the Greek Ambassador for political asylum in Greece, but never received a reply. On 15 February 1999, the Kenyan Ministry of Foreign Affairs announced that Mr. Öcalan had been on board an aircraft that had landed at Nairobi and had entered Kenyan territory accompanied by Greek officials without declaring his identity or going through passport control. On the final day of his stay in Nairobi, he was informed by the Greek Ambassador, after the latter had returned from a meeting with the Kenyan Minister of Foreign Affairs, that he was free to leave for the destination of his choice and that the Netherlands was prepared to accept him. On 15 February 1999, Kenyan officials went to the Greek Embassy to take Mr. Öcalan to the airport. The Greek Ambassador said that he wished to accompany the applicant to the airport in person and a discussion between the Ambassador and the Kenyan officials ensued. In the end, Mr. Öcalan got into a car driven by a Kenyan official. On the way to the airport this vehicle left the convoy and, taking a route reserved for security personnel in the international transit area of Nairobi Airport, took Mr. Öcalan to an aircraft in which Turkish officials were waiting for him. He was arrested after boarding the aircraft at approximately 8 p.m.[45]

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[42] See Vincent Coussirat-Coustère, "La jurisprudence de la Cour européenne des droits de l'homme en 1986", *Annuaire français de droit international* (AFDI), vol. 33, 1987, p.245.

[43] Emmanuel Decaux, "Le droit international, malgré tout...", *Accueillir* No. 252, December 2009, p. 54.

[44] European Court of Human Rights, Application No. 46221/99, Judgment of 12 May 2005.

[45] Ibid., paras. 14, 15, 16 and 17.

58. The Turkish courts had issued seven warrants for Mr Öcalan's arrest, and a wanted notice ("Red Notice") had been circulated by Interpol. In each of those documents he was accused of founding an armed gang in order to destroy the territorial integrity of the Turkish State and of instigating various terrorist acts that had resulted in loss of life.[46]

59. During the Court proceedings, the applicant pointed out that no extradition procedure had been initiated against him in Kenya, and that the Kenyan authorities had not accepted responsibility for transferring him to Turkey. Mere collusion between unauthorized Kenyan officials and the Government of Turkey could not be characterized as cooperation between States. According to the defendant, his arrest was the result of an operation planned in Turkey, Italy and Greece, as well as in other States. Citing the case of *Bozano v. France* (judgment of 18 December 1986, Series A no. 111, p. 23, para. 54), he stressed the need to protect the individual's liberty and security from arbitrariness. He said that in the instant case "his forced expulsion had amounted to extradition in disguise and had deprived him of all procedural and substantive protection."[47] He pointed out in that connection that the requirement of lawfulness under article 5 paragraph 1 applied to both international and domestic law. For the applicant, the Commission's decision in the case of *Ramirez Sánchez v. France* (No. 28780/95, Commission decision of 24 June 1996, DR 86, p. 155) was not relevant to the present case. Whereas in the aforementioned case there had been cooperation between France and the Sudan, the Kenyan authorities had not cooperated with the Turkish authorities in the instant case. In the former case, the Commission had taken the view that Mr. Ramirez Sánchez was indisputably a terrorist. The extremely sensitive nature of the question touched upon in this case certainly was a factor in the decision of the Court. The extent to which terrorism has become a bogeyman is well known. The applicant and the Kurdistan Workers' Party stated that they had had recourse to the use of force in order to assert the right of the population of Kurdish origin to self-determination. Relying on the case law of various national courts,[48] the applicant maintained that the arrest procedures followed did not comply with Kenyan law or the rules established by international law, that his arrest amounted to abduction and that his detention and trial, which were based on that unlawful arrest, had to be regarded as null and void.

60. The Court accepted the Turkish Government's version of events rather than that of the applicant. According to the Government of Turkey, "The applicant had been apprehended by the Kenyan authorities and handed over to the Turkish authorities by way of cooperation between the two States." For the Government of Turkey, "There had been no extradition in disguise: Turkey had accepted the Kenyan authorities' offer to hand over the applicant, who was in any event an illegal immigrant in Kenya."[49] Following this line of argument, the Court stated:

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[46] Ibid., para. 18.

[47] Ibid., para. 77.

[48] See, in particular, the House of Lords decision in the case of *R. v. Horseferry Road Magistrates' Court, ex parte Bennett, Appeal Cases* 1994, vol. 1, p. 42; the decision of the Court of Appeal of New Zealand in the case of *Reg. v. Hartley, New Zealand Law Reports* 1978, vol. 2, p. 199; the decision of the United States Court of Appeals for the Second Circuit in the case of *United States v. Toscanino* (1974) 555 F. 2d. pp. 267-8; the decision of 28 May 2001 of the Constitutional Court of South Africa in the case of *Mohammed and Dalvie v. The President of the Republic of South Africa and Others, South African Law* Reports 2001, vol. 3, p.893 (CC).

[49] European Court of Human Rights, Application No. 46221/99, Judgment of 12 May 2005, para. 81.

"The Convention does not prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that it does not interfere with any specific rights recognised in the Convention (ibid., pp. 24-25, § 169) ... As regards extradition arrangements between States when one is a party to the Convention and the other not, the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the States concerned are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the Court was lawful. The fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful or, therefore, give rise to any problem under Article 5 (see *Freda v. Italy*, no. 8916/80, Commission decision of 7 October 1980, DR 21, p. 250; *Altmann (Barbie) v. France*, no. 10689/83, Commission decision of 4 July 1984, DR 37, p. 225; and *Reinette v. France*, no. 14009/88, Commission decision of 2 October 1989, DR 63, p. 189)."[50]

The Court subsequently added:

"(…) Subject to it being the result of cooperation between the States concerned and provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an atypical extradition cannot as such be regarded as being contrary to the Convention (see Sánchez Ramirez, cited above)."[51]

61. Thus, the European Court of Human Rights believes that, in and of itself, disguised extradition does not run counter to the European Convention on Human Rights if it is the result of cooperation between the States involved and if the transfer is based on an arrest warrant issued by the authorities of the country of origin of the person concerned.[52] Despite this position taken by the Court, the facts seem to confirm its position in the *Bozano* case. It is highly likely that if the facts of the case had not been related to terrorism cases, the Court would have had no difficulty in confirming the case law set forth in *Bozano*.

62. United States practice seems to be consistent with this position confirmed in the Öcalan case rather than with the one asserted by the *Bozano* decision. Thus, in late 2001, the United States sought the cooperation of the European Union in the context of its immigration policies and anti-terrorism efforts, and requested that it explore "alternatives to extradition including expulsion and deportation, where legally available and more efficient."[53]

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[50] Ibid., paras. 86-87.

[51] Ibid., para. 89.

[52] See also: European Commission of Human Rights, decision of 4 July 1984, *Klaus Altmann (Barbie) v. France*, appeal No. 10689/83, D. R. 37, p. 225; European Commission of Human Rights, decision of 24 June 1996, *Ramirez Sánchez v. France*, appeal No. 28780/95, *D. R.* 155; ECHR, judgment of 12 March 2003, *Öcalan v. Turkey*, § 91, confirmed by ECHR, judgment of 12 May 2005, *Öcalan v. Turkey*, § 89.

[53] Text of letter from the President of the United States George W. Bush with proposals for EU cooperation, 16 October 2001, www.statewatch.org. For the complete text of the letter see www.statewatch.org/news/2001/nov/06Ausalet.htm. This source is cited by Véronique Champeil-Desplats, "Les conséquences du 11 septembre 2001 sur le droit des étrangers: perspective comparative", Conference at Nanterre organized by the Centre de recherche et d'études juridiques européennes et comparées and the Centre d'études sur les droits fondamentaux, *Droits de l'homme et droit des étrangers depuis le 11 septembre 2001: approche comparée France, Europe, Etats-Unis*, 20 May 2003, proceedings published in *la Gazette du Palais*, 19-21 October 2003, Nos. 292 to 294, pp. 2-24, particularly pp. 12-19, p. 16.

63. The courts of a number of States have had occasion to assess whether an expulsion was in fact a disguised extradition.[54] In some cases, these courts have considered the purpose of the expulsion and the intention of the States in order to issue an opinion.[55]

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[54] See for example *Barton v. Commonwealth of Australia*, High Court, 20 May 1974, *International Law Reports*, vol. 55, Elihu Lauterpacht and Christopher J. Greenwood (ed.), pp. 11-37; *Lülf v. State of the Netherlands*, The Hague Court of Appeal, 17 June 1976, *International Law Reports*, vol. 74, Elihu Lauterpacht and C. J. Greenwood (ed.), pp. 424-6; *R. v. Bow Street Magistrates*, ex parte *Mackeson*, High Court of England (Divisional Court 25 June 1981, *International Law Reports*, vol. 77, Elihu Lauterpacht and Christopher J. Greenwood (ed.), pp. 336-45; *R. v. Guildford Magistrates' Court*, ex parte *Healy*, High Court of England (Divisional Court), 8 October 1982, *International Law Reports*, vol. 77, Elihu Lauterpacht (ed.) and Christopher J. Greenwood, pp. 345-350; *Mackeson v. Minister of Information, Immigration and Tourism and Another*, Zimbabwe Rhodesia, High Court, General Division, 21 November 1979, *International Law Reports*, vol. 88, Elihu Lauterpacht, Christopher J. Greenwood and Andreas G. Oppenheimer (ed.), pp. 246-59; residence prohibition order case (2), op. cit., pp. 433-6; *Hans Muller of Numberg v. Superintendent, Presidency Jail, Calcutta, and Others*, 1955, op. cit., p. 497; *Mohamed and Another v. President of the Republic of South Africa and Others*, op. cit., p. 469. In analysing contested expulsions and their consequences, courts have looked in particular at the form, the substance and the purpose of disputed procedures. The examples of national case law referred to in the following five paragraphs come from Expulsion of aliens, Memorandum by the Secretariat, op. cit., paras. 438-442.

[55] "[T]here was no question of veiled extradition, because there had been no evidence that the State had influenced West Germany's decision to withdraw the request for extradition, and the State reasonably felt obliged to hand over the West German to the West German border police since only West Germany was bound to admit him, and the State was justified in assuming that no other country would be willing to admit him since he had no valid travel document." *Lülf v. the State of the Netherlands*, op. cit., p. 426. "If, therefore, the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America because they had asked for him, then it would be unlawful. But if the Home Secretary's purpose was to deport him to his own country because the Home Secretary considered his presence here to be not conducive to the public good, then the Home Secretary's action is lawful. It is open to these courts to inquire whether the purpose of the Home Secretary was a lawful or an unlawful purpose." *Reg v. Governor of Brixton Prison*, ex parte *Soblen*, op. cit., p. 280. "[T]here is no ground whatever for supposing the police have tried to persuade the United States' authorities to deport this applicant so that they could arrest him in this country and thus circumvent the provisions of the extradition treaty between the two countries." *R. v. Guildford Magistrates' Court*, ex parte *Healy*, op. cit., p. 348; "Put simply, the question is this: Was the power to detain the petitioner exercised for the purpose of ensuring the expulsion from this country of an undesirable inhabitant — a person whose continued presence is not conducive to public good? Or was such power exercised for the ulterior purpose of removing to the United Kingdom, in the interests of justice generally, a person accused of having transgressed the laws of that country?" *Mackeson v. Minister of Information, Immigration and Tourism and Another*, op. cit., p. 251; "Similarly, expulsion may not be ordered as a means of evading this prohibition against extradition. However, such expulsion is deemed inadmissible only where it has become evident that the intention of the authorities was to avoid the restrictive regulations on extradition". Residence Prohibition Order Case (2), op. cit., p. 435; see also *Lopez de la Calle Gauna*, Conseil d'État, France, 10 April 2002 (expulsion to State of nationality is allowed even if criminal charges are pending there so long as no request for extradition has been submitted). But see, "[T]he fact that a request [for extradition] has been made does not fetter the discretion of the Government to choose the less cumbrous procedure [of expulsion] of the Aliens Act when a foreigner is concerned, provided always that in that event the person concerned leaves India a free man." *Muller v. Superintendent, Presidency Jail, Calcutta, and Others*, op. cit., p. 500; "If the petitioner, outside of our territory, were not left at liberty but were to be sent to Italy [where criminal charges for political activities were likely], there would really be carried out a true extradition which the Italian Government has not requested and which the Brazilian Government has not decided to grant." *In re Esposito*, Federal Supreme Court of Brazil, 25 July 1932, *Annual Digest and Reports of Public International Law Cases*, 1933-1934, Elihu Lauterpacht (ed.), Case No. 138, p. 333.

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

> "Deportation and extradition serve different purposes. Deportation is directed to the removal from a state of an alien who has no permission to be there. Extradition is the handing over by one state to another state of a person convicted or accused there of a crime, with the purpose of enabling the receiving state to deal with such person in accordance with the provisions of its law. The purposes may, however, coincide where an illegal alien is 'deported' to another country which wants to put him on trial for having committed a criminal offence the prosecution of which falls within the jurisdiction of its courts.
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> "Deportation is usually a unilateral act while extradition is consensual. Different procedures are prescribed for deportation and extradition, and those differences may be material in specific cases, particularly where the legality of the expulsion is challenged. In the circumstances of the present case, however, the distinction is not relevant. The procedure followed in removing Mohamed to the United States of America was unlawful whether it is characterised as a deportation or an extradition. Moreover, an obligation on the South African government to secure an assurance that the death penalty will not be imposed on a person whom it causes to be removed from South Africa to another country cannot depend on whether the removal is by extradition or deportation. That obligation depends on the facts of the particular case and the provisions of the Constitution, not on the provisions of the empowering legislation or extradition treaty under which the 'deportation' or 'extradition' is carried out".[56]

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

> "The Aliens Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision limiting this discretion in the Constitution, an unrestricted right to expel remains. [...] The Aliens Act is not governed by the provisions of the Extradition Act. The two are distinct and neither impinges on the other. Even if there is a request and a good case for extradition, the Government is not bound to accede to the request ... Therefore, if it chooses not to comply with the request, the person against whom the request is made cannot insist that it should. The right is not his; and the fact that a request has been made does not fetter the discretion of the Government to choose the less cumbrous procedure of the Aliens Act when a foreigner is concerned, provided always that in that event the person concerned leaves India a free man. If no choice had been left to the Government, the position would have been different; but as the

[56] *Mohamed and Another v. President of the Republic of South Africa and Others*, op. cit., pp. 486-487, paras. 41-42.

> Government is given the right to choose, no question of lack of good faith can arise merely because it exercises the right of choice which the law confers. This line of attack on the good faith of the Government falls to the ground".[57]

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

> "In the absence of an Extradition Treaty between Brazil and Australia, the Embassy has the honour to request that the detention action be taken under the terms of Article 114 of decree law 66.689 of 11 June 1970. Although similar legislation does not exist in Australian law, there are deportation procedures under the Migration Act which, with the approval of Ministers, could be applied in the event of a fugitive being sought by Brazil from Australia".[58]

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

> "In contrast to extradition as a means of surrender, most countries exercise a right of expulsion of persons whose continued presence in the country is considered undesirable. Where this right of expulsion is the subject of statutory regulation, as it usually is in common law countries, there are limitations upon its exercise, often involving and limiting the purpose which may prompt the expulsion. At times, questions may arise as to whether the actual purpose of the expulsion is impermissible and whether in truth an unauthorized, or what a writer has called 'disguised extradition' (see O'Higgins in 27 Mod LR 521), is on foot. Clearly, a power of expulsion, as for example under migration or immigration laws, is no equivalent of a power to extradite. It is an unsatisfactory practice, from an international as well as a domestic point of view, to employ a power of expulsion as such a substitute. Further, an executive, being bound by statute as to the occasions for and purposes of expulsion, cannot validly agree to employ that power as a general equivalent to a power to extradite, however much on occasions the expulsion may serve as an extradition in an individual case because of its circumstances. There are obvious objections to the use of immigration or expulsive powers as a substitute for extradition: see Shearer, *Extradition in International Law*, pp. 19, 87-90; see also O'Higgins, *Disguised Extradition*, 27 Mod LR 521-539; *Hackworth's Digest of International Law*, vol. 4, p. 30.
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> […]
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> "Thus, where the power to surrender does not exist apart from statute, as is the case in Australia, the requesting country cannot with propriety offer reciprocity in respect of persons or crimes falling outside the scope of the relevant legislation or with States to which the legislation does not apply. Nor could a country pledge itself to use its power of expulsion as a power to extradite so as to satisfy the need of reciprocity. For reasons to which I have

[57] *Muller v. Superintendent, Presidency Jail, Calcutta, and Others*, op. cit., pp. 498-500.

[58] *Barton v. Commonwealth of Australia*, op. cit., p. 12.

> briefly adverted, the limited purpose for which the power of expulsion may properly be used renders it quite inadequate to support an assurance of extradition of any fugitive on request. Thus, in the case of Australia, the Migration Act 1958-1966 could not serve as an equivalent of the power of extradition, nor could that Act's existence warrant an assurance of reciprocal treatment in extradition. But, of course, it is for the requested State to decide for itself whether or not it is satisfied with an assurance of reciprocity".[59]

68. With regard to the consequences of disguised extradition, the issue was raised in the case *R. v. Bow Street Magistrates, ex parte Mackeson*,[60] in which the High Court of England examined whether it could proceed in considering the case of an alien who had been expelled from Zimbabwe, with the purpose of effecting a disguised extradition. The Court stated as follows:

> "Whatever the reason for the applicant being at Gatwick Airport on the tarmac, whether his arrival there had been obtained by fraud or illegal means, he was there. He was subject to arrest by the police force of this country. Consequently the mere fact that his arrival there may have been procured by illegality did not in any way oust the jurisdiction of the Court".[61]

69. Nevertheless, the Court exercised its discretion not to exercise jurisdiction over the case, as an equitable remedy.[62]

70. The practice of extradition disguised as expulsion is nevertheless inconsistent with positive international law. It may be considered contrary to article 9, paragraph 1, of the International Covenant on Civil and Political Rights, which provides that "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". Furthermore, article 13 authorizes the expulsion of an alien lawfully in the territory of a State party only "in pursuance of a decision reached in accordance with law [...]".

71. As regards case law, the judgment of the European Court of Human Rights in the *Bozano* case finds support in the decision of the United Nations Human Rights Committee in the case of *Cañón García v. Ecuador*,[63] even though the explicit grounds for the decision were not disguised extradition. The latter case involved the expulsion of a Colombian national from Ecuador to the United States of America, where he had been charged with drug trafficking. It was found that the United States Government had not applied the provisions of the extradition treaty signed by the

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[59] Ibid., pp. 14-16. "However, expulsion may under these circumstances be unlawful under municipal law. Should this be the case, as the Federal Court of Australia noted in *Schlieske v. Minister for Immigration and Ethnic Affairs*, the 'distinction [...] between a deportation for the purpose of extradition ("disguised extradition") and a deportation for immigration control purposes which incidentally effects a de facto extradition' may be 'difficult of practical application'." Gaja, op. cit., p. 299 (quoting Judgement of 8 March 1988, Australian Law Reports, vol. 84, p. 725).

[60] *R. v. Bow Street Magistrates, ex parte Mackeson*, op. cit., p. 343. In reaching its conclusion, the Court relied heavily on the findings of the Rhodesia High Court in the *Mackeson* case, op. cit., pp. 246-259.

[61] *R. v. Bow Street Magistrates, ex parte Mackeson*, op. cit., p. 343.

[62] Ibid., pp. 336-345.

[63] United Nations Human Rights Committee, views of 5 November 1991, *Edgar A. Cañón Garcia versus Ecuador*, communication No. 319/1988 of 4 July 1988, CCPR/C/43/D/319/1988, 12 November 1991. Case cited by Didier Rouget, op. cit., p. 181.

two countries concerned because it questioned whether the Ecuadorian authorities would agree to extradite the applicant. The party concerned was not able to speak to counsel or to request that an Ecuadorian judge examine the lawfulness of his expulsion. On the basis of the Ecuadorian authorities' recognition that the expulsion had involved procedural irregularities, the Committee found that articles 9 and 13 of the Covenant of 1966 had been violated.[64]

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

Draft article 8: Prohibition of extradition disguised as expulsion

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

D. Grounds for expulsion

73. It is recognized that while the conditions for admission of aliens into the territory of a State fall under its sovereignty and therefore its exclusive competence, a State may not at will strip them of their right of residence. "An expulsion must be ordered only on the basis of good reason, on serious grounds of public interest and public necessity that render it imperative".[65] Most of the literature on the expulsion of aliens has been consistent with that position at least since the end of the nineteenth century.[66]

74. It is also established in international law that the expelling State "must, when occasion demands, state the reason of such expulsion",[67] whether the request is made by the expelled person, the State of destination of the expelled person[68] or

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[64] V. Anne-Lise Ducroquetz, "L'expulsion des étrangers en droit international et européen", thesis, University of Lille 2, 2007, p. 414.

[65] See Alexis Martini, *L'expulsion des étrangers*, thesis, Paris, 1909, p. 54.

[66] See in particular: de Bar, in *Journal du droit international privé*, 4th ed., transl. Antoine, Vol. 3, No. 1297, p. 93.

[67] See *Boffolo* case in Jackson H. Ralston, *The Law and Procedure of International Tribunals*, para. 515, pp. 287-288.

[68] For example, a number of treaties concluded in the nineteenth century between France and several States in the Americas stipulated that before carrying out an expulsion, the Government of each State party would communicate the reasons for the expulsion to the diplomatic or consular envoys of the foreign States concerned. This the case for the treaty of 9 December 1834 between France and Bolivia; the treaty of 6 June 1843 between France and Ecuador; the treaty of 8 March 1848 between France and Guatemala; the treaty of 22 February 1856 between France and El Salvador; and the treaty of 9 March 1861 between France and Peru. And by operation of the most-favoured-nation clause, these provisions extended to relations with other States (see Paul Fauchille, *Traité de droit international public*, vol. 1, Part 1, paix 1922, No. 447, *in fine*, p. 878 and No. 450, p. 982; Frantz Despagnet and Charles De Boeck, *Cours de droit international public*, 4th ed., 1910, No. 337 *in fine*, p. 478; Edwin Montefiore Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of Diplomatic Protection*, The Banks Law Publishing Co., 1915, para. 30, p. 56).

before an international tribunal.[69] In other words, the expulsion must be substantiated by the expelling State. The reasons provided, moreover, must not be arbitrary. "Just grounds must be provided in order to exercise the right of expulsion", said Canonico,[70] a position that was supported by various authors of the late nineteenth century and early twentieth century.[71] These "just grounds" were thought to be "related to the basic notion that, consistent with a higher interest in conservation, the State may expel an alien whose presence in the territory poses a danger to the internal or external security of the State".[72]

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

76. Based on the examination of current international conventions and international case law, there are in fact very few established grounds for the expulsion of aliens, the principal two being public order and public security.[73] The question is whether these are the only two grounds for expulsion permitted under international law, and whether they rule out all other grounds, despite the fact that, in practice, various other grounds are invoked by States for the expulsion of aliens.

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

1. Public order and public security

78. The concepts of public order and public security are often used as grounds for expulsion.[74]

79. As noted previously, article 32, paragraph 1, of the Convention relating to the Status of Refugees of 28 July 1951 and article 31, paragraph 1, of the Convention relating to the status of Stateless Persons of 26 April 1954 stipulate that Contracting States shall not expel a refugee or stateless person, as the case may be, lawfully in

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[69] See aforementioned *Boffolo* case, Jackson Harvey Ralston, op. cit., para. 515, pp. 287-288; Edwin Montefiore Borchard, op. cit., p. 56, note 4, and p. 57, note 4; Nicolas Socrate Politis, *Le problème de la limitation de la souveraineté*, 1926, p. 487.

[70] Canonico in *Journal du droit international privé (Edouard Clunet)*, 1890, p. 219.

[71] See in particular: Alexis Martini, "L'expulsion des étrangers", thesis, Paris, 1909, p. 54; Charles De Boeck, "L'expulsion et les difficultés internationales qu'en soulève la pratique", *RCADI*, 1927, II, pp. 532-533.

[72] Charles De Boeck, op. cit., p. 532.

[73] See the international conventions and case law cited in the second, third and fifth reports.

[74] V. Anne-Lise Ducroquetz, *L'expulsion des étrangers en droit international et européen*, op. cit., p. 55.

their territory "save on grounds of national security or public order". Article 13 of the International Covenant on Civil and Political Rights makes a similar provision, although it refers only to "compelling reasons of national security" — and not to public order — as grounds for the expulsion of an alien lawfully in the territory of a State party. Similarly, article 3, paragraph 1, of the European Convention on Establishment of 1955 provides that nationals of Contracting Parties lawfully residing in the territory of another Party may be expelled if they "endanger national security or offend against *ordre public*". By extension, these two grounds for expulsion may be understood to extend to all aliens lawfully in the territory of the expelling State, in which case the violation of laws relative to the entry and residence of aliens is considered sufficient grounds for expelling aliens lawfully in the territory of the State. This is without prejudice to the protection offered by some States' domestic legislation to certain categories of illegal aliens, depending on considerations that vary from State to State, as discussed below.

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

(a) Public order

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

82. Significantly, the *Dictionnaire de droit international public* defines public order as "the set of principles of *the domestic legal order of a given country*" that are deemed fundamental at any given time and are non-derogable".[75] As indicated above, international law as it pertains to the expulsion of aliens operates by reference to such principles. In this connection, the Protocol to the European Convention on Establishment of 13 December 1955 provides that: "Each Contracting Party shall have the right to judge by national criteria: 1. the reasons of "*ordre public*, national security, public health or morality" […] 3. the circumstances which constitute a threat to national security or an offence against *ordre public* or morality." Section III (a) of the Protocol provides that: "The concept of "*ordre public*" is to be understood in the wide sense generally accepted in continental countries". In addition to the afore-mentioned international conventions, the European Court of Human Rights accepts that "by reason of their particular gravity and public reaction to them, certain offences might give rise to a social disturbance capable of justifying pre-trial detention, at least for a time [...] in so far as domestic

[75] See explanations provided on the concepts of "European *ordre public*" and "international public order" by the *Dictionnaire de droit international public* (ed. Jean Salmon).

law recognises ... the notion of disturbance to public order caused by an offence".[76] International private law precedents use the same technique of reference in deciding that the courts of a State are bound to apply a foreign law only if the application or respect for the rights acquired under that law "does not violate the principles or provisions of the State's laws of the State which are considered essential for public order".[77] It is also worth noting that in its written submissions in the case of *Certain Norwegian Loans*, France pointed out that the Government of Norway, by extending the scope of application of the provisions which it felt were required by its national public order, exceeded its right "in that [...] it subjects aliens living beyond its sovereignty to a domestic concept of public order that is not recognized by the laws of the countries of those aliens".[78]

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

> "On 31 October 1995, the Prime Minister of Zaire issued an expulsion Order against Mr. Diallo. The Order gave the following reason for the expulsion: Mr. Diallo's 'presence and conduct have breached public order in Zaire, especially in the economic, financial and monetary areas, and continue to do so'. On 31 January 1996, Mr. Diallo, already under arrest, was deported from Zaire and returned to Guinea by air. The removal from Zaire was formalized and served on Mr. Diallo in the shape of a notice of refusal of entry (*refoulement*) on account of 'illegal residence' (*séjour irrégulier*) that had been drawn up at the Kinshasa airport on the same day".[79]

The Democratic Republic of the Congo gave this notion of "public order" such a vague content that it seemed to include all of Mr. Diallo's actions that it found questionable. Indeed, it "adds that the decision expelling Mr. Diallo was justified by his 'manifestly groundless' and increasingly exaggerated financial claims against Zairean public undertakings and private companies operating in Zaire and by the disinformation campaign he had launched there 'aimed at the highest levels of the Zairean State, as well as very prominent figures abroad'". The DRC notes that 'the total sum claimed by Mr. Diallo as owed to the companies run by him came to over 36 billion United States dollars ..., which represents nearly three times the [DRC's] total foreign debt'. It adds: 'the Zairean authorities also discovered that Mr. Diallo had been involved in currency trafficking and that he was moreover guilty of a number of attempts at bribery'. Mr. Diallo's actions thus allegedly threatened seriously to compromise not only the operation of the undertakings concerned but also public order in Zaire".[80] The written submissions cited by the Court also state

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[76] European Court of Human Rights, *Letellier*, judgment of 26 June 1991, Series A.

[77] French Cour de cassation, *State of Russia v. La Ropit*, judgement of 5 March 1928, *Journal de droit international privé (Clunet)*, 1928, p. 674.

[78] International Court of Justice, *Certain Norwegian Loans*, Reply of the Government of the French Republic of 20 February 1957, *Memorial*, volume 1, p. 398.

[79] International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 24 May 2007, §15.

[80] Ibid., para. 19.

that it was those "activities [of Mr. Diallo], fraudulent and detrimental to public order, which motivated his removal from Zairean territory".[81]

84. In ruling on the preliminary objections, the Court probably did not believe that it had to assess — at that stage of the proceedings — the components of the concept of public order that had been invoked, nor even to point out the contradiction between the invocation of "public order in Zaire" in the expulsion order and the reference to "illegal residence" in the notice of refusal of entry, still less to venture a definition of the concept of public order. It is highly likely that, by remaining silent on the issue, the Court intended to refer the matter implicitly to the domestic legal order. However, international law must develop some criteria for assessing the invocation of this ground — and that of "public security" — in order to avoid possible abuses in the exercise by States of a jurisdiction with international implications, without any control. In this connection, it is admitted in domestic law, such as that of France, that the administration must forestall threats to public order that it is aware of,[82] ensure that illegal situations do not persist[83] and, where applicable, assist the authorities in enforcing court rulings.[84] This logical and common-sense obligation is "a condition for the rule of law, a corollary of State continuity and, quite simply, a requirement of life in society".[85]

85. In both domestic and international legal systems, the existence of a public order objective determines the legality of the acts or actions of the administrative police authority. This authority must demonstrate that it is pursuing a public order objective and not only a general interest objective, in the broad sense, otherwise there would be abuse of power.[86]

86. However, it should be noted that existing texts on the subject often only provide grounds for the jurisdiction of the police authority and rarely define the content of public order.[87] At most, they enumerate the components of this highly indeterminate "standard".[88] The public order objective is particularly elusive because its assessment depends essentially on considerations of fact, and therefore on the circumstances.

87. There is no need here to enter into the distinction established in certain laws between "general" public order (where the police authorities exercise their jurisdiction

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[81] Ibid., para. 81.

[82] Conseil d'Etat (CE), 23 October 1959, *Doublet* and CE, Sect. 14 December 1962, *Doublet*; CE Ass. 27 October 1995, *Commune de Morsang-sur-Orge*. In general, see Paul Bernard, *La notion d'ordre public en droit administratif*, Paris, Librairie générale de droit et de jurisprudence, 1962.

[83] CE 20 October 1972, *Ville de Paris v. Marabout*.

[84] CE 20 November 1923, *Couitéas*.

[85] Didier Truchet, "L'autorité de police est-elle libre d'agir?", *Actualité juridique du droit administratif (AJDA)*, 1991, p. 81.

[86] See Vincent Tchen, "Police administrative — Théorie générale", *Jurisclasseur administratif* (No. 04, 2007), Fasc. 200, 6 June 2007, § 64, p. 24.

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

[88] See Vincent Tchen, "Police administrative — Théorie générale", op. cit. p. 26.

on a given territory in respect of all activities and all persons) and "special" public order (where a specific text establishes the scope, content or terms of the exercise of police powers). It is worth noting, though, that certain national laws provide a non-exhaustive view of the content of public order. In France, for example, article L.2212-2 of the general code for territorial authorities states that public order comprises, "inter alia", "good order, safety, security and health". This text is a good illustration of the difficulty involved in trying to understand the concept, because it not only provides a manifestly non-exhaustive list of components, but also contains the concept of "public security", which, in international law, is a separate ground for the expulsion of aliens.

88. Incidentally, paragraph 2 of article L.2212-2 associates the concept of "public peace" with that of "good order", without indicating whether the two are synonymous. French case law also adds complementary elements such as public morality,[89] human dignity[90] and aesthetics[91] to the above-mentioned components.

(b) Public security

89. The exception of "national security" or "essential security interests" is set forth in various international treaties on such varied subjects as international trade law (see, for example, the famous article XXI of the General Agreement on Tariffs and Trade or article 2102 of the North American Free Trade Agreement), or the law on the protection of international investments, freedom of transit or judicial assistance.[92] We shall essentially concern ourselves, however, with the human rights conventions since the issue of the expulsion of aliens involves these rights rather than the questions just referred to. As with regard to the ground relating to public order, the exception of public security is contained inter alia in the International Covenant on Civil and Political Rights (arts. 4 and 13), the Convention on the Status of Refugees (art. 32), the Convention relating to the Status of Stateless Persons (art. 31), the European Convention on Human Rights (art. 15), the American Convention on Human Rights (art. 27), and the African Charter on Human and People's Rights (art. 12).

90. The notion of public security is no more precise than that of public order. The difficulty of determining its content is complicated by a certain lack of terminological precision. Are the terms "public security", "public safety" or

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[89] See a few old judgements addressing the concept of "moral hygiene", CE, 7 November 1924, *Club sportif indépendant chalonnais, Recueil*, CE 1924, p. 863; *Dalloz Périodique* (DP) 1924, 3; p. 58, *Conclusion Cahen-Salvador* (for boxing matches); CE 30 September 1960, Jauffret, Rec. CE 1930, p. 582 (for reasons of "decency").

[90] See inter alia CE Ass., 27 October 1995, *Communes Morsang-sur-orge et Aix-en-Provence, JurisData* No. 1995-047649; Rec. CE 1995, p. 372; Tribunal administratif de Versailles, 25 February 1992, *Société Fun Productions, Wachenein v. Commune Morsang-sur-orge, AJDA* 1992, p. 525, note C. Vimbert; *Revue française de droit administratif* 1992, p. 1026, note J.-F. Flauss; see also Conseil Constitutionnel, 19 January 1995, Decision No. 94-359 D.C., Preambular paragraph 6, and also Conseil constitutionnel, 27 July 1994, Decision No. 94-343, preambular paragraph 2.

[91] See, inter alia, with regard to the legality of preserving the aesthetics of a public site: CE, 2 August 1924, *Leroux, Rec. CE*, 1924, p. 780 - CE, 23 October 1936, *Union parisienne des syndicats de l'imprimerie*, Rec. CE, 1936, p. 906.

[92] See Théodore Christakis, "L'Etat avant le droit? L'exception de 'sécurité nationale'". *Revue générale de droit international public* (RGDIP). 2008, vol. 112, No. 1, pp. 16-22. The analysis that follows is based to a large extent on this study.

"national" or "internal and external" and "national security" synonymous? National legislation does not help to answer this question. It maintains the state of confusion, giving the impression sometimes that these concepts are different and at other times that they are interchangeable. Article 13 of the Polish Aliens Act of 25 June 1997 refers inter alia to participation in activities that threaten the independence, territorial integrity, political regime or defence capability of the State; terrorism; arms and drug trafficking; as well as any other reason involving a threat to State security or the need to protect law and order. In spite of these attempts to formulate a definition, it has been pointed out that these notions are vague and "catch-all" terms and set the stage for making an arbitrary judgement.[93] International law studies on the question do not seem to give particular attention to this problem of terminology, using the expressions "national security" and "public security" as equivalent terms.[94] Thus, for practical convenience, we shall also opt for the approach that considers them as synonymous.

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

92. The term is used abundantly in all national legislation, without necessarily being defined. It is so vague, flexible and imprecise, an American author contends, that everything that happens to a country can be considered as impinging in one way or another on national security.[95] According to an author, national security "covers (...) any threat that may imperil the independence of a State or its sovereignty, or impair its institutions or democratic freedoms",[96] whereas public order covers "particularly grave offences".[97] The difficulty of defining this concept was also underscored by some national courts. Thus, the United States Supreme Court in its ruling in the case *United States v. United States District Court* observes that: "Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent". Similarly, the High Court of Australia emphasized the elasticity of this notion in the 1982 case *Church of Scientology Inc. v. Woodward*, in which the High Court stressed "that security is a concept with a fluctuating content, depending very much on circumstances as they exist from time to time".[98]

93. Some elements for a definition of the "notion of national security" in a few countries have been found here and there; and, refraining from examining systematically how each legal system has attempted to fix the limits of this notion, the author of that exercise writes: "For the time being, it suffices to note that: (a) it seems generally accepted that the term covers both external as well as internal threats; (b) Governments seem to be in no hurry to give a precise definition (or

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[93] See the report of Manuela Agujar, Rapporteur of the Committee on Migration, Refugees and Demography of the Parliamentary Assembly of the Council of Europe, the report of 27 February 2001, Doc. 8986.

[94] Ibid., p. 10.

[95] He writes: "The fact is that virtually anything that happens in the country can be said, in one way or another, to touch on our 'national security'.". Cited by Théodore Christakis, op. cit. p. 10.

[96] Nathalie Berger, *La politique européenne d'asile et d'immigration — Enjeux et perspectives*, Brussels, Bruylant 2000, 269 pp., p. 197.

[97] Ibid.

[98] These two decisions were cited by Peter Hanks, "National Security — A Political Concept", *Monash University Law Review*, 1988, vol. 14, p. 118, and taken up by Théodore Christakis, op. cit., p. 11.

a fortiori a non-restrictive definition) of this term in order, probably, to maintain their freedom of action; and (c) the risks arising from the imprecise nature of the notion have often been denounced by civil society and at times even by national courts".[99]

94. At the international level, since the international conventions which refer to public security as a ground for expulsion are silent[100] with regard to its definition, we should turn our attention to jurisprudence.

95. In recent years, the threat to national security resulting from international terrorism has been an increasingly frequent consideration in the expulsion of aliens on such a ground. Several States, such as France,[101] Germany,[102] Italy[103] and the United States,[104] have amended their national legislation in order to address this concern more effectively. The United Kingdom has announced a new policy with respect to deportation for activities relating to fomenting or provoking terrorism, and new legislation to that effect is pending.[105] The notion of "national security" may be broadly interpreted to encompass acts or threats directed against the existence or external security of the territorial State as well as possibly other States, as discussed below.

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[99] Ibid., p. 12.

[100] Cf., for example, art. 6 (1) of the Convention on the Status of Aliens.

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

[102] "German states such as Bavaria are making use of a January 1, 2005, federal law that allows them to expel legal foreign residents who 'endorse or promote terrorist acts', or incite hatred against sections of the population.", Benjamin Ward, "Expulsion doesn't help", *International Herald Tribune*, 2 December 2005, at http://www.eht.com/articles/2005/12/02/opinions/edward.php (accessed 26 January 2006). See Germany, 2004 Act, articles 54 (4) and (6) and 55 (2) and 8 (a), which incorporate the relevant anti-terrorism provisions.

[103] "Italy has expelled at least five imams since 2003; and an antiterrorism law adopted on July 31, 2005, makes it even easier to do so.", Benjamin Ward, note 791 above. See generally Italy, 2005 Law.

[104] See United States, INA, sections 212 (a) (3) (B) and (F), 237 (a) (4) (B) and Title V generally for relevant anti-terrorism provisions.

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

96. ICJ jurisprudence provides little assistance in defining this notion. On the other hand, that of other international or regional courts, such as the Court of Justice of the European Union, is of greater interest with regard to this question. Indeed, the Court has often had to render an opinion on the definition and content of the exception of "public security", clearly opting for a broad conception of this notion. For example, in the case *Svenska Journalistförbundet v. Council of the European Union*, the claimant suggested that, without a definition of the notion of public security in Council decision 93/731, which applied this exception to the principle of disclosure of Council documents, the exception could be defined as applying to "documents or passages of documents whose access by the public would expose Community citizens, Community institutions or the member States' authorities to terrorism, crime, espionage, insurrection, destabilization and revolution, or would directly hinder the authorities in their efforts to prevent such activities (...)".[106] The Council of the European Union, supported by France, contended on the other hand "that there is in any case no need to adopt a restrictive definition of public security for the purpose of the application of Decision 93/731. 'Public security' must be defined in a flexible way in order to meet changing circumstances".[107] The Court of First Instance supported this position maintained by the Council. For the Court of First Instance, "The case-law of the Court of Justice shows that the concept of public security does not have a single and specific meaning".[108]

97. It must indeed be said that, according to the consistent case-law of the Court of Justice since 1991, the notion of "public security" covers, as in the internal conception of most States, not only the domestic security of a State member of the European Union, but also its external security, with the latter, moreover, being viewed in a rather broad context, as can be seen from the *Leifer* judgement of 17 October 1995.[109] This broad conception of the notion of public security is also found in the Court of Justice of the European Communities judgement of 10 July 1984, *Campus Oil* (Ireland v. United Kingdom), relating to a case involving oil supplies. It seems to be shared by other courts, also in areas that do not directly relate to human rights. This is true of the four tribunals of the International Centre for Settlement of Investment Disputes (ICSID), as demonstrated by the awards handed down between 12 May 2005 and 28 September 2007 within the framework of proceedings instituted by foreign investors against Argentina for measures taken by that State between 2000 and 2003 in order to address the serious financial crisis that it was undergoing at the time.[110]

98. In the field of the international protection of human rights, on the other hand, an attempt has sometimes been made to give a restrictive interpretation of what can be permitted under the exception of public security in order to prevent abuse. particularly in the context of combating terrorism. Thus, in a recent report to the General Assembly, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, observed that "national security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation

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[106] Court of First Instance decision of 17 June 1998, case T-111/74/95, para. 91.

[107] Ibid., para. 95.

[108] Ibid., para. 21.

[109] *Leifer* case, judgement of 17 October 1995, paras. 27-28.

[110] See e.g. the award of 12 May 2005 handed down in the case *CMS v. Argentina*. With respect to these arbitral awards see Théodore Christakis, op. cit., pp. 14-16.

or its territorial integrity or political independence against force or the threat of force. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order", or used as a pretext for expulsion. In 1994, the United Nations Commission on Human Rights, while admitting that the notion of public order "is in itself somewhat vague", specified that national security is in danger " in the most serious cases of a direct political or military threat to the entire nation".[111]

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

2. Criteria used to assess public order and public safety grounds

100. The right of aliens to enter into, and to reside in, a State is therefore understood as being subject to limitations justified on the grounds of public order and public safety. As has been seen, international practice refers to national legal systems to determine the meaning of these grounds. The question is whether the State nonetheless has absolute power of discretion in this area.

101. The answer to this question is negative in the light of doctrine, international jurisprudence and the position of certain States,[112] as well as that of the Commission of the European Communities, regarding the scope of public order reservations, which, in our view, could be extended to public safety grounds. Despite the broad discretion of States in assessing threats to national security, some authors believe that the national security ground for expulsion may be subject to a requirement of proportionality: "Some treaties require States not to expel aliens, unless there are specific reasons [e.g., national security]. … It would be difficult to deny the expelling State some discretion in establishing whether a danger to national security exists and whether in the specific case the presence of the concerned individual affects it. It is clear that the expelling State is in the best position to assess the existence of a threat to its own security and public order. The State will make an appreciation on the basis of the circumstances that are known at the time of expulsion; a later judgement based on hindsight would not seem fair. Thus, from the point of view of a supervising body it seems justified to leave the expelling State a 'margin of appreciation' — to borrow from the language used by the European

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[111] United Nations Commission on Human Rights, "Question of the human rights of all persons subjected to any form of detention or imprisonment", fifty-first session, 14 December 1994, E/CN.4/1995/32.

[112] In France, for example, the administrative judge does not grant the police absolute power of discretion in matters of public order. He verifies whether the disturbance or threat of disturbance is "sufficiently serious" to justify the measure taken, and does not hesitate to substitute his assessment of the specific situation for that of the municipal authority. In this case, the judge makes discretion a condition of legality: See the case law of the Council of State, in particular the following judgments: *Benjamin* (Council of State, 19 May 1933, *Recueil Dalloz Sirey* 1934, 3, p. 1, Opinion of Michel; *Ville Brest v. Laurent* (Council of State, 8 December 1989, No. 71172, *Juris-Data*, No. 1979, tables p. 653; *Bedat v. Commune de Borce* (Council of State, 29 June 1990, Opinion of Toutée, note by Cardon; the case law of the Administrative Court of Appeal of Bordeaux in the *Commune de Tarbes* Judgment (Administrative Court of Appeal, 26 April 1999, No. 97BX01773); and André de Laubadere, Jean-Claude Venzia and Yves Gaudemet, Traité de droit administratif, Paris, LGDJ, 14th ed., 1996, vol. 1.

Court of Human Rights and the Human Rights Committee. This margin does not only affect the power of review that a judicial or other body may have, but also the extent of the State's obligation".

102. When the restrictions in question apply, proportionality is also required. In other words, "even when a State is entitled to consider that an alien represents a danger to national security, expulsion would nevertheless be excessive if the appraised danger is only minimal".[113] It is true that international jurisprudence relating to the arbitral award delivered in the *J. N. Zerman v. Mexico Case* confirmed the right of a State to expel an alien based on reasons relating to national security. However, this indicated that in a situation where there is no war, a State cannot expel an alien as a threat to national security without preferring charges against the alien or subjecting him or her to trial. "The umpire is of opinion that, strictly speaking, the President of the Republic of Mexico had the right to expel a foreigner from its territory who might be considered dangerous, and that during war or disturbances it may be necessary to exercise this right even upon bare suspicion; but in the present instance there was no war, and reasons of safety could not be put forward as a ground for the expulsion of the claimant without charges preferred against him or trial; but if the Mexican Government had grounds for such expulsion, it was at least under the obligation of proving charges before the commission. Its mere assertion, however, or that of the United States consul in a dispatch to his government, that the claimant was employed by the imperialist authorities does not appear to the umpire to be sufficient proof that he was so employed or sufficient ground for his expulsion."[114]

103. Indeed, it appears that, insofar as the European Communities Treaty is concerned, public order does not provide States with general grounds for intervention and may not be invoked outside the situations expressly envisaged: "In order to avail themselves of article 36 [new article 30], member States must observe the limitations imposed by that provision both as regards the objective to be attained and as regards the nature of the means used to attain it."[115] Furthermore, as a consequence of the mixed nature of the public order concept now recognized by doctrine,[116] this concept, owing to its purpose, retains a strong national dimension, as the purpose *depends on the specific circumstances particular to a given place and time*;[117] however, within the European Community system, this "nonetheless does

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[113] Giorgio Gaja, op. cit., p. 296.

[114] *J. N. Zerman v. Mexico*, in John Bassett Moore, History and Digest of the International Arbitrations to which the United States has been Party, vol. IV, Washington, Government Printing Office, 1898, p. 3348.

[115] Court of Justice of the European Communities, 10 December 1968, Case 7-68, *Commission of the European Communities v. Italy*: European Court reports 1968, p.628.

[116] See, in particular: Emmanuelle Picard, "L'influence du droit communautaire sur la notion d'ordre public", L'actualité juridique droit administrative, 1996, p. 62, numéro spécial; Sylvaine Poillot-Peruzzetto, "Order public et droit communautaire", *Recueil Dalloz Sirey*, chronique, p. 177; Francis Hubeau, "L'exception d'ordre public et la libre circulation des personnes en droit communautaire", *Cahiers de droit européen*, 1981, p. 212.

[117] See Caroline Picheral, "Ordre public et droit communautaire — Communautarisation des réserves d'ordre public", *Jurisclasseur Europe Traité*, Fasc. 650, 5 February 2007, p. 6.

not mean that [...] States are free to define and interpret the concept of public order in accordance with their own practices and traditions."[118]

104. Admittedly, this reasoning is consonant with a comprehensive legal system built on a treaty that is binding on all member States and cannot be mechanically transposed to the international system. In the light of State practice, it could therefore be agreed that, in contrast to the concept for assessing public order under European Community law, it seems that States are free to define and interpret the notion of public order in accordance with their own practices and traditions in the context of the rights of aliens. Nonetheless, States do not have absolute freedom to do so because, where human rights and freedoms are involved, any State act is necessarily limited by the requirement for conformity, or non-conflict, with the relevant norms of international law, particularly those related to the protection of human rights. For, in this instance, it is indeed international law which establishes public order and safety as grounds for expulsion, and thus as exceptions to the right of residence of aliens, particularly legal aliens. Thus, a State can determine the scope of these exceptions unilaterally only insofar as there is compliance with international law or control under international law. Building on the ideas of Jean-Claude Venezia regarding "discretionary power", the State must use its power of expulsion "taking into account the particular circumstances of each case before it, which requires a prior examination of the circumstances."[119] Article 3 of Directive 64/221, concerning provisions relating to removal from a territory on the grounds of public order or public safety, provides that such measures "shall be based exclusively on the personal conduct of the individual", which exactly reproduces article 27, paragraph 2, of Directive 2008/38. Similarly, the Court of Justice of the European Communities systematically recalls this rule in its case law.

105. In the *Bonsignore Case* of 26 February 1975,[120] the individual concerned was an Italian national, residing in the Federal Republic of Germany, who had been convicted for an offence against the firearms law and for causing death by negligence. The competent aliens authority had then ordered his expulsion. The Court of Justice of the European Communities, to which the Cologne Administrative Court had referred for a ruling on the validity of this deportation decision, recalled, first of all, that article 3, paragraph 1, of the 1964 directive provides that "measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual."[121] It specified that measures adopted "on grounds extraneous to the individual case" could not be justified.[122] The Court of Justice of the European Communities then recalled that the purpose of the directive was to eliminate all discrimination "between the nationals of the State in question and those of other member States" and concluded that "the concept of 'personal conduct' expresses the requirement that a deportation order may only be made for

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[118] European Commission communication on "special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health", 19 July 1999: Doc. COM(1999)372 final, p. 8.

[119] Jean-Claude Venezia, *Le pouvoir discrétionnaire*, dissertation, Paris, 1959, 176 p., p. 138.

[120] Court of Justice of the European Communities, Judgment of 26 February 1975, *Carmelo Angelo Bonsignore v. Oberstadtdirektor der Stadt Köln*, Case 67-74, reports p. 297; Opinion of Advocate General Henri Mayras delivered on 19 February 1975, European Court reports, p. 308).

[121] Ibid., para. 5.

[122] Ibid., para. 6.

breaches of the peace which might be committed by the individual affected."[123] A deportation therefore may not be ordered for the purpose of deterring other aliens from committing an offence similar to that of the case in question. In other words, a deportation order may only be made on grounds of a special preventive nature and not if it is based on reasons of a general preventive nature.[124]

106. The 2004 directive embodies this case law of the Court of Justice of the European Communities by providing that " Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."[125] In any event, deportation must therefore be based on personal conduct and must not occur as a result of the adoption of general measures to maintain public order and public safety.

107. While pursuing research on this point regarding the basis in European Community law for the criteria used to assess the concept of public order and public safety grounds, it should be noted that the Council of the European Economic Community, in recognition of the risks that discretionary derogation might present to the free movement of persons, adopted Directive 64/221 dated 25 February 1964 on the coordination of national provisions relating to measures which are justified on grounds of public policy, public security or public health.[126] While it did not define these concepts, the Council Directive nevertheless invoked several substantive and procedural requirements. This legal framework subsequently increased in clarity and scope in the light of the preliminary responses of the Court of Justice of the European Communities. The knowledge acquired in this area has now been codified and enhanced within the framework of Directive 2004/38 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 Members States.[127]

108. It should be noted that the Court of Justice of the European Communities explicitly recognizes in its case law that fundamental rights must be respected where public order is invoked. Indeed, according to the precedent established in the *Elliniki Radiophonia Tiléorassi (ERT)* case, public order reservations must be implemented in a shared context of respect for human rights and democratic principles.[128] The case law underscores that, taken as a whole, the limitations placed on the power of States in respect of control of aliens are a specific manifestation of the more general principle, enshrined in various provisions of the European Convention on Human Rights, which provides that no restrictions shall be placed on the rights secured other than such as are necessary for the protection of public order or public safety "in a democratic society".[129] A State should therefore

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[123] Ibid., para. 6.

[124] Ibid., para. 7.

[125] See article 27 (2) of Directive 2004/38/CE of the European Parliament and of the Council dated 29 April 2004.

[126] See the *Official Journal of the European Communities*, 4 April 1964.

[127] See the *Official Journal of the European Communities*, 30 April 2004.

[128] Doc. COM(1999)372 final, cited above, p. 7.

[129] Court of Justice of the European Communities, 28 October 1975, Case 36-75, *Rutili*, European Court reports 1975, p. 1219, para. 32.

invoke these limitations only if the regulations or restrictive measures in question comply with fundamental rights.[130]

109. One criteria for compliance with fundamental rights is striking a fair balance between protecting public order and the interests of the individual. The Court of Justice of the European Communities has ruled to this effect, particularly in the *Orfanopoulos and Oliveri Case*,[131] by basing its relevant case law on that of the European Court of Human Rights in the *Boultif* judgment.[132] According to the Court of Justice of the European Communities, to assess whether the restrictive measure is proportionate, account must be taken of the serious nature of the offence committed, the length of residence in the host member State, the period which has elapsed since the commission of the offence, the family circumstances of the person concerned and the seriousness of the difficulties which the spouse and any of their children risk facing in the country of origin of the person concerned.[133]

110. It should be borne in mind that public order and public safety exceptions fall within the framework of the European Community, where the Court of Justice of the European Communities, the European Commission and several adherents to doctrine argue that the concept of European citizenship requires a stricter interpretation of the scope of these public order exceptions[134] to administrative law, namely legal or discretionary grounds unrelated to the conduct of the persons concerned.[135]

111. There is no definition of personal conduct in the context of expulsion in any of the international and Community documents or in the national legislation available to the Special Rapporteur. The Court of Justice of the European Communities has been called upon to provide certain clarifications on this point. Accordingly, in the *Van Duyn Case*, the Court held that association with a body or an organization, insofar as it reflects participation in their activities and identification with their aims, could be considered a voluntary act of the person concerned and, consequently, as an integral part of his personal conduct.[136] In the *Rutili Case* — concerning a prohibition on residence in four French départements where the presence of the person concerned, according to the Ministry of the Interior, could have created disturbances in view of the trade union and political activities in which he had been engaged in 1967 and 1968 — the Court of Justice of the European

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[130] Court of Justice of the European Communities, 18 June 1991, Case C-260/89, ERT: European Court reports 1991, p. I-2925, para. 43, on the freedom to provide services; for an application with respect to the overriding requirements of public interest in the free movement of goods see: Court of Justice of the European Communities, 26 June 1997, Case C-368/95, *Vereinigte Familiapress*: European Court reports 1997, p. I-3689, para. 24.

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

[132] Court of Justice of the European Communities, 2 August 2001, *Boultif*, para. 48.

[133] *Orfanopoulos and Oliveri*, cited above, para. 99; see also Directive 2004/38, art. 38.

[134] See the Court of Justice of the European Communities, 29 April 2004, Case C-493/01, *Oliveri*, European Court reports 2004, p.I-5257, para. 65; Doc. COM(1999)372 final, para. 8; Jean-Philippe Lhernould "Les mesures nationales d'éloignement du territoire sont-elles conformes aux règles communautaires de libre circulation?", édition générale, 1999, II, 10104; Georges Karydis "L'ordre public dans l'ordre juridique communautaire : un concept à contenu variable", *Revue trimestrielle de droit européen*, 2002, p. 8.

[135] See Michel Distel, "Expulsion des étrangers, droit communautaire et respect des droits de la défense", *Recueil Dalloz Sirey*, 1977, chronique XXI, p. 169.

[136] See the Court of Justice of the European Communities, 4 December 1974, Case 41-47, *Van Duyn*, European Court reports 1975, p. 1231.

Communities acknowledged that the mere presence of the Community national could be perceived as such a danger to public order that it justified restricting the right to stay and move within the territory of member States.[137] These clarifications were neither reversed nor confirmed by Directive 2004/38, which confined itself to recalling, in accordance with the case law of the Court of Justice of the European Communities, that: "The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". Indeed, according to the *Rutili*[138] and *Bouchereau*[139] precedents on free movement, the invocation of public order "presupposes, in any event, the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society".

112. European Directive 2004/38 prohibits considerations of general prevention for the invocation of public order or public safety. Pursuant to article 27, paragraph 2: "Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted". The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. However, the Court's attempt to clarify the concept of "threat" remains inadequate. What is understood by a "present" threat? What if a long time has elapsed, for example, between the adoption and execution of an expulsion decision? Neither the language in article 3 of Directive 64/221 nor the case law of the Court of Justice provides clearer indications of the accepted date for determining the "present" nature of a threat. The Commission has referred to the role played by the existence of criminal convictions in assessing the threat that the person concerned could pose to public order and public safety. It has emphasized the fact that consideration should be given to the passage of time and developments in the situation of the person concerned. It considers that "the way in which the situation of the person concerned has developed is of particular importance in cases where the threat is assessed long after the acts threatening public order were committed, where a long period elapses between the taking of the initial decision and its enforcement and where the person concerned exercises his right to enter [a further appeal]. When the grounds for the removal (...) of a national of another member State, good conduct should have the same importance as in the case of a national".[140]

113. European Community legislators, wishing to limit as far as possible the misuse of public order by States for the purposes of expulsion, established in article 27, paragraph 2 (first subparagraph), of the 29 April 2004 directive, that "Previous criminal convictions shall not in themselves constitute grounds" for measures based on public order or safety. In addition, and this contribution is significant, legislators stipulated that "if an expulsion order" issued as a penalty or legal consequence "is

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[137] See the Court of Justice of the European Communities, 28 October 1975, Case 36-75, *Rutili*, European Court reports 1975, p. 1231.

[138] Ibid., p. 2014.

[139] Court of Justice of the European Communities, 27 October 1977, Case 30-77, European Court reports 1977, p. 2014.

[140] Communication of 19 July 1999 from the Commission to the Council and the European Parliament on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health, COM(1999)372 final.

enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued". All expulsion must be justified on the basis of the continued threat posed to public order and safety, and must be considered in the light of the personal and present situation of the individual on whom it is imposed.[141]

114. It was on the basis of these rules that the Court of Justice rendered its decision in the *Orfanopoulos and Oliveri* judgment,[142] whereby it interpreted the concept of a present threat. In this case, an expulsion decision was imposed on two European Union citizens, one of Greek nationality, the other of Italian nationality, on the grounds of serious offences and the risk of recidivism. The persons concerned had been lawfully residing in German territory. The Court first of all recalled that, according to Article 18 EC "the principle of movement for workers must be given a broad interpretation, whereas derogations from the principle must be interpreted strictly".[143] It further recalled that, in line with its own case law, an offence disturbs public order if it creates a genuine and sufficiently serious threat affecting one of the fundamental interest of society. In this instance, "while it is true that a Member State may consider that the use of drugs constitutes a danger for society",[144] the public policy exception must, however, be interpreted restrictively, with the result that the existence of a previous criminal conviction can justify an expulsion only insofar as the circumstances which gave rise to that conviction "are evidence of personal conduct constituting a present threat to the requirements of public policy".[145] However, the Court did not merely draw on its previous case law; it clarified, at the invitation of the Advocate General, that the present nature of the threat should be assessed on the basis of all relevant elements and factors. Indeed, as pointed out by Advocate General Stix-Hackl, the problem is that neither article 3 of Directive 64/221 nor the Court's case law specify what should be the accepted date for determining the "present" nature of a threat.[146] The Court responded that national jurisdictions should take into account factual matters which occurred after the decision on expulsion, insofar as they may point to "the cessation or the substantial diminution of the present threat": such may be the case if a lengthy period has elapsed between the date of adoption of an expulsion order and the time that it is reviewed.[147] Therefore, account needs to be taken of all the circumstances, including factual matters having occurred after the decision on expulsion, which could have substantially diminished or eliminated the danger represented by the individual for the requirement of public policy. This solution was confirmed in the context of the case of a Turkish national challenging the expulsion procedure

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[141] See Anne-Lise Ducroquetz, dissertation, op. cit., p. 116.

[142] Court of Justice of the European Communities, Judgment of 29 April 2004, *Georgios Orfanopoulos* et al. *and Raffaele Oliveri* v. *Land Baden-Württemberg*, Joined Cases C-482/01 and C-493/01, para. 20, reports p. I-5295; Opinion of Advocate General Christine Stix-Hackl delivered on 11 September 2003, reports p. I-5262.

[143] Ibid., p. 64.

[144] Ibid., p. 66.

[145] Ibid., p. 67.

[146] See the Opinion of Advocate General Christine Stix-Hackl, delivered on 11 September 2003.

[147] Court of Justice of the European Communities, *Georgios Orfanopoulos* et al. *and Raffaele Oliveri* v. *Land Baden-Württemberg*, op. cit., p. 82.

initiated against him by the German authorities.[148] The Court of Justice decided, in accordance with Directive 64/221, its own case law and the provisions of the Association Agreement concluded between the European Economic Community and Turkey,[149] that "national courts must take into consideration, in reviewing the lawfulness of the expulsion (...), factual matters which occurred after the final decision of the competent authorities which may point to the cessation or the substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public policy".[150]

115. Indeed, the need to reconcile public order measures with the fundamental principle in European Community law of free movement of persons led the Court of Justice of the European Communities to hold that national authorities should not impose measures on Community nationals which cannot be "justified on grounds extraneous to the individual case".[151] It follows that the person concerned may not be expelled as an example "for the purpose of deterring other aliens", in this instance to enforce national legislation on the possession of arms,[152] and may not be denied a residency permit on the grounds that his or her activities would provide habitual support for banditry, unless contact with the underworld had been established in the particular case.[153] Similarly, the Institut de Droit International, in its resolution of 1892 on the *Règles internationales sur l'admission et l'expulsion des étrangers*, stated that "Deportation must never be ordered for personal gain, to prevent legitimate competition or to halt a just claim or an action or appeal that has been filed in the proper manner with the courts or competent authorities".[154]

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

117. National courts have also dealt with cases of expulsion on public order grounds.[155] Their assessment criteria do not deviate from those found in the aforementioned international and regional case law.

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

[149] Agreement establishing an association between the EEC and Turkey, signed in Ankara on 12 September 1963, concluded, approved and confirmed by Council Decision 64/732/CEE of 23 December 1963, Official Journal No. 217 of 1964, p.3685.

[150] Court of Justice of the European Communities, Judgment of 11 November 2004, *Cetinkaya*, loc. cit., para. 47.

[151] Court of Justice of the European Communities, 26 February 1975, *Bonsignore*, Case 67-74, European Court reports 1975, p. 297, paras. 5 and 6.

[152] Ibid.

[153] Court of Justice of the European Communities, 18 May 1982, Joined Cases 115 and 116/81 Adoui and Cornuaille, European Court reports 1982, p. 1708.

[154] Institut de Droit International, Session of Geneva, 1892: *Règles internationales sur l'admission et l'expulsion des étrangers* (Rapporteurs: Louis-Joseph Delphin Féraud-Giroud and Ludwig von Bar), art. 14.

[155] See, for example, *Keledjian Garabed v. Public Prosecutor*, Court of Cassation (Chambre Criminelle), 17 December 1937; *Maffei v. Minister of Justice*, Conseil d'État (Comité du Contentieux), 12 November 1980, *International Law Reports*, volume 73, Elihu Lauterpacht (ed.), Christopher J. Greenwood, pp. 652-657; *In re Salom*, Conseil d'État, 3 April 1940, *Annual Digest and Reports of Public International Law Cases*, 1919-1942 (Supplementary Volume), Hersch Lauterpacht (ed.), Case No. 105, pp. 198-199.

118. It therefore appears that the crucial factors in assessing or verifying the validity of public order and public safety grounds are the factual circumstances, the present nature of the threat and the specific context for the personal conduct of the individual. The reason for this is that public order and safety exceptions, particularly in the context of the law relating to the expulsion of aliens, are grounds and not goals. The difference between goals and grounds is the following: "While the goal of an act is subsequent to this act, its grounds are an antecedent".[156] An act committed with a goal in mind pursues the achievement of an objective, which may be general, while an act accomplished on the basis of a ground can be such only when this ground arises. Thus, the grounds for an administrative act are the legal or factual situation which led the administration to adopt this act. It follows from the preceding analysis that:

(a) The State does not have absolute discretion in the assessment of breaches, or threats of breaches, of public order or public safety; it must respect or take into account certain objective considerations;[157]

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

– The specific circumstances and the circumstances of the factual situation contributing to or constituting a breach, or threat of breach, of public order or public safety; this is a general principle of the law relating to the expulsion of aliens;[158]

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

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

3. Other grounds for expulsion

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

(a) Higher interest of the State

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

121. However, national laws specify a variety of grounds for the expulsion of an alien, which may be grouped under the general heading of the "higher interest of the

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[156] Pauline de Fay, "Police municipale", *Jurisclasseur Administratif*, Fasc. 126-20, 16 May 2007, p. 26.

[157] See Guy S. Goodwin-Gill, who believes that "public order cannot be a concept determined solely by reference to national criteria", (op. cit., p. 154).

[158] See Joseph André Darut, *L'expulsion des étrangers. Principe général — Application en France*, Dissertation, Law, Aix, 1902, who writes: "(...) it is not the mere fact of the disruption that he [the alien] causes that leads a State to expel him, it is the circumstances" (p. 64).

State".[159] In particular, a State may expel an alien who is perceived to endanger or threaten its national or public interests,[160] fundamental interests,[161] substantial interests,[162] dignity (including that of the State's nationals),[163] national "utility"[164] or convenience,[165] social necessity,[166] public[167] or foreign policy,[168] international agreements[169] or international relations with other States[170] or generally.[171]

122. A State may expressly base a determination under this heading partly or wholly on its obligations under international agreements,[172] its diplomatic relations,[173] or a consideration of the international relations of other States with which it has a special arrangement.[174] A State may also expressly seek to maintain political neutrality when dealing with the expulsion of aliens under this heading.[175] Grounds relating to the "higher interest of the State" may also apply to an alien on the basis of the alien's membership in an organization that engages in activities raising concerns about the State's interests.[176] Furthermore, a State's interest may affect the conditions or obligations imposed on the alien when entering or while staying in the State's territory.[177] Violation of the conditions for entry into the territory of the State may constitute a separate ground for expulsion.

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[159] See preliminary report on the expulsion of aliens, op.cit., annex I, part I, II.C.1(c). Examination of national legislation on this subject is drawn from the memorandum by the Secretariat on the expulsion of aliens, op. cit., paras. 377-379.

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

[161] France, Code, art. L521-3.

[162] Germany, 2004 Act, art. 55(1).

[163] Portugal, 1998 Decree-Law, art. 99(1)(c).

[164] Chile, 1975 Decree, arts. 64 and 66.

[165] Brazil, 1980 Law, art. 26; and Chile, 1975 Decree, arts. 64 and 66.

[166] Panama, 1960 Decree-Law, art. 38.

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

[168] United States, Immigration and Nationality Act (INA), sect. 212(a)(3)(C).

[169] Czech Republic, 1999 Act, sect. 9(1).

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

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

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

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

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

[175] Ecuador, 2004 Law, art. 3.

[176] Bosnia and Herzegovina, 2003 Law, arts. 27(1)(b) and 47(1)(b).

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

(b) Violation of law

123. An alien is subject to the national law and jurisdiction of the State in which he or she is present under the principle of the territorial jurisdiction of a State.[178] Failure to comply with the national law of the territorial State may be a valid ground for expulsion. The validity of this ground for expulsion has been recognized in the European Union, State practice[179] and literature.[180] In some instances, this ground for expulsion may be extended to the unlawful activity of an alien in a State other than the territorial State.[181]

124. The view has been expressed that the expulsion of an alien is a measure undertaken to protect the interests of the territorial State rather than to punish the alien.[182] Whereas criminal activity may be a ground for expelling an alien, the expulsion of the alien is to be determined based on the need to protect the interests of the territorial State rather than to punish the alien. Nonetheless, expulsion or deportation may be provided for as a punishment for a crime committed by an alien

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[178] As discussed previously, there are special categories of aliens, such as diplomats, who are entitled to special privileges and immunities. These aliens are not considered in the present section. "With his entrance into a state, an alien falls at once under its territorial supremacy, although he remains at the same time under the personal supremacy of his home state. He is therefore, unless he belongs to one of those special classes (such as diplomats) who are subject to special rules, under the jurisdiction of the state in which he stays, and is responsible to it for all acts he commits on its territory. […] Since an alien is subject to the territorial supremacy of the local state, it may apply its laws to aliens in its territory, and they must comply with and respect those laws.", Robert Jennings and Arthur Watts, (eds.), Oppenheim's International Law, 9th ed., vol. 1, Peace (parts 2 of 4), London, Longman, 1996, pp. 904-905 (citations omitted).

[179] "The municipal law systems examined display a perhaps unremarkable consistency in their choice of grounds for expulsion. Generally, an alien will render himself liable to deportation if he qualifies under one or more of the following heads: … 4. Involvement in criminal activities. […] State practice accepts that expulsion is justified… for involvement in criminal activities…", Guy S. Goodwin-Gill, op. cit., pp. 255 and 262. "Very commonly, an alien's deportation may be ordered … on account of the alien's criminal behaviour.", Richard Plender, International Migration Law, revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, pp. 468 and 482, note 119 (referring to Denmark, 8 June 1983 Aliens Act No. 226, art. 25(1); Norway, 1956 Aliens Act, art. 13(l)(d); Portugal, Decree-Law 264-B181, art. 42; Sweden, 1980 Aliens Act (Utlanningslag) No. 376, Prop. 1979/80:96, sect. 40; Turkey, 15 July 1980 Act on Residence and Travel of Aliens No. 5683, art. 22).

[180] "It is accepted that expulsion is justified for activities in breach of the local law, and, further, that the content of that local law is a matter for the expelling State alone.", Guy S. Goodwin-Gill, op. cit., p. 206 (citations omitted). See also *Règles internationales*, op. cit., art. 28, paras. 5 and 6.

[181] "In some countries, e.g., in Belgium and Luxemburg, expulsion may be ordered for crimes committed abroad, presumably only when a conviction has been had." Edwin Montefiore Borchard, op. cit., p. 52.

[182] "Deportation is, after all, intended not as a punishment but primarily as a method of relieving the expelling country of the presence of an individual considered to be undesirable …", John Fischer Williams, op. cit., pp. 58-59. "Expulsion is a measure primarily directed to the protection of the interests of the State. It is not essentially a measure for the punishment of aliens, although obviously its effects may be devastating.", Guy S. Goodwin-Gill, op. cit., p. 257. "Expulsion is, in theory at least, not a punishment, but an administrative measure consisting in an order of the government directing a foreigner to leave the country.", Robert Jennings and Arthur Watts, op. cit., p. 945 (citations omitted). "Expulsion of an alien is not a punishment, but an executive act comprising an order directing the alien to leave the state.", Shigeru Oda, op. cit., p. 482. "Expulsion is not a punishment and must therefore be executed with the utmost consideration and taking into account the individual's particular situation." [French original] *Règles internationales*, op. cit., art. 17.

under the national criminal law — rather than the immigration law — of the State concerned.[183] It should be noted that different substantive and procedural law may apply with respect to a criminal proceeding in contrast to an expulsion proceeding. The relationship between the two proceedings may vary under the national laws of different States.

125. Within the European Union, recourse to expulsion as a penalty is limited in many respects.[184] According to article 33 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, expulsion may not be inflicted as a penalty on Union Citizens or members of their family, unless such a measure satisfies the requirements of other provisions of the same Directive allowing expulsion for reasons of public order, public security or public health.

> "Article 33 Expulsion as a penalty or legal consequence
>
> "1. Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27,[185] 28[186] and 29.[187]
>
> "2. If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued."[188]

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[183] "In particular, as a State is entitled to punish an alien who commits a gross violation of its laws while in its territory, in certain instances such punishment may include the expulsion or deportation of an alien convicted for a major crime.", Louis B. Sohn and Thomas Buergenthal (eds.), op. cit., 1992, p. 89. "The following features of recent developments in the exercise of the power of expulsion may be noted: It is used as a supplementary penalty against the alien for the more important crimes …", Edwin Montefiori Borchard, op. cit., p. 55.

[184] For an analysis of issues relating to expulsion as a double penalty in the national laws and practice of member States of the European Union, including Belgium, Denmark, France, Germany, Italy, Portugal and the United Kingdom, see "La double peine", *Documents de travail du Sénat*, France, *Législation comparée* series, Division des études de législation comparée du Service des Études Juridiques, No. LC 117, February 2003.

[185] See Expulsion of aliens, Memorandum by the Secretariat, op. cit., part VII.A.6(c).

[186] This article provides as follows:

> "Protection against expulsion
>
> "1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
>
> "2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
>
> "3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
>
> "(a) have resided in the host Member State for the previous 10 years; or
>
> "(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."

[187] See Memorandum by the Secretariat, op. cit., part VII.A.6(g). This provision specifies the diseases that may justify expulsion on grounds of public health.

[188] Corrigendum to Directive 2004/38/EC, op. cit.

126. Failure to comply with the national law of the territorial State, including its criminal law, is a ground for expulsion according to the legislation of several States. The convicting court may[189] or may not[190] be required to be that of the expelling State. With respect to the substantive criminal standard, the relevant law may: (1) expressly require it to be that of the expelling State;[191] (2) identify specific provisions whose violation provides grounds for expulsion;[192] (3) recognize violations of a foreign State's law,[193] sometimes subject to a comparison with the expelling State's law;[194] or (4) not specify a particular criminal standard, but evaluate or categorize it in terms of the expelling State's law.[195]

127. The national laws of some States do not specify the type of violation or proceeding which can lead to expulsion on this ground.[196] In contrast, the national laws of other States provide for expulsion as a punishment for certain types of behaviour. For example: if the alien has assisted in the smuggling or illegal entry of other aliens (apart from cases of trafficking covered under morality), or if the alien belongs to an organization engaged in such activity,[197] the relevant law may (1) consider this grounds for expulsion;[198] (2) require a criminal sentence to have been passed for grounds to be found;[199] (3) specify penalties in addition to expulsion;[200] or (4) impute a legal responsibility to the alien but not expressly impose expulsion.[201] In cases not involving the smuggling of illegal entrants, the relevant legislation may specify that the expulsion shall take place upon fulfilment of the sentence imposed.[202] This ground for expulsion may be imputed to the alien's entire family.[203]

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

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

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

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

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

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

[195] Chile, 1975 Decree, arts. 15(3), 16(1) and 65(1).

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

[197] Canada, 2001 Act, art. 37(1)(b).

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

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

[200] Brazil, 1980 Law, arts. 124(XII) and (XIII) and 125-27; and Paraguay, 1996 Law, arts. 108(2) and 111.

[201] Belarus, 1998 Law, art. 26.

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

[203] Brazil, 1980 Law, art. 26(2).

128. Where the legislation permits expulsion to follow an alien's sentencing,[204] a threshold in terms of the severity of punishment may have to be met.[205] The expulsion in such cases may (1) be imposed as an independent or combined penalty;[206] (2) discharge, replace or occur during a custodial or other sentence;[207] (3) be ordered to occur after the alien fulfils a custodial or other sentence[208] or completes some other form of detention involving a potential or actual criminal prosecution;[209] or (4) be ordered for the express reason that the alien has received a sentence which does not include expulsion, or when the sentence was not otherwise followed by expulsion.[210]

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[204] Argentina, 2004 Act, arts. 64(a) and (b); Australia, 1958 Act, arts. 200 and 201(a)-(c); Austria, 2005 Act, art. 3.54(2)(2); Bosnia and Herzegovina, 2003 Law, arts. 47(4) and 57(1)(h); Canada, 2001 Act, arts. 36(1)(a)-(c); China, 1992 Provisions, arts. I(i) and II(i) and (ii); Colombia, Act, art. 89(1); Denmark, 2003 Act, art. 22; Finland, 2004 Act, sect. 149(2); France, Code, art. L521-2; Greece, 2001 Law, art. 44(1)(a); Japan, 1951 Order, arts. 5(4) and 24(4)(g) and (i); Kenya, 1967 Act, art. 3(1)(d); Republic of Korea, 1992 Act, art. 46(1)(11); Norway, 1988 Act, sects. 29(b) and (c); Panama, 1960 Decree-Law, art. 37(f); Paraguay, 1996 Law, arts. 6, 7(3) and 81(5); Portugal, 1998 Decree-Law, art. 25(2)(c); Spain, 2000 Law, art. 57(1); Sweden, 1989 Act, sects. 4.2(3) and 4.7; Switzerland, Penal Code, art. 55(1); and United States, INA, sects. 101(a)(48) and (a)(50)(f)(7). This standard may include a requirement that the crime be of a specified type or quality, such as money-laundering or a premeditated or intentional crime (Argentina, 2004 Act, arts. 29(c) and 62(b); Brazil, 1981 Decree, art. 101, and 1980 Law, art. 67; Germany, 2004 Act, arts. 53(1) and (2) and 54(1); Hungary, 2001 Act, art. 32(1)(e); Japan, 1951 Order, arts. 5(9)-2, 24(4)(f) and (4)-2); Nigeria, 1963 Act, art. 18(1)(c); Poland, 2003 Act No. 1775, art. 88(1)(9); and United States, INA, sects. 212(a)(2), 237(a)(2) and 238(c)).

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

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

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

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

[209] Australia, 1958 Act, arts. 250(3)-(5); and Belarus, 1998 Law, art. 14.

[210] Bosnia and Herzegovina, 2003 Law, arts. 47(4) and 57(1)(g)-(h); and Colombia, Act, art. 89(1).

129. According to the relevant national legislation, grounds under this heading may also be found if the alien (1) is convicted or otherwise found guilty,[211] charged,[212] accused,[213] wanted,[214] being prosecuted[215] or caught in a violation;[216] (2) has[217] or is suspected[218] of having committed a violation; (3) has a criminal record;[219] (4) displays[220] or is dedicated to,[221] engaged in,[222] intending[223] or predisposed[224] to criminal acts and behaviour; (5) has been expelled from the State or another State pursuant to certain criminal provisions;[225] or (6) is a member of an organization deemed to be engaged in criminal activities.[226]

130. The expulsion of an alien on this ground may depend on (1) whether the alien was a citizen at the time of the act's commission,[227] has been granted permission to stay or reside in the State's territory,[228] has been pardoned or had the relevant

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

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

[213] Panama, 1960 Decree-Law, art. 37(f).

[214] South Africa, 2002 Act, art. 29(1)(b).

[215] Brazil, 1980 Law, art. 66.

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

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

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

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

[220] Argentina, 2004 Act, art. 62(b).

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

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

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

[224] Paraguay, 1996 Law, art. 6(7).

[225] Japan, 1951 Order, art. 5(5)-2.

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

[227] Australia, 1958 Act, arts. 201(a) and (b), 203(1)(a) and (b), (7), 204(1) and (2) and 250(1)-(3); and Brazil, 1980 Law, arts. 74, 75 and 76(I).

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

conviction quashed[229] or has been rehabilitated;[230] (2) the length of the alien's stay in the State's territory at the time the act was committed;[231] (3) whether the alien's nationality is granted special treatment by the expelling State's law;[232] (4) whether the alien's State has a relevant special relationship with the expelling State;[233] or (5) the alien's method of arrival or location at the relevant time.[234]

131. The national legislation may expressly declare irrelevant the timing of the alien's conviction relative to the law's entry into force,[235] and may[236] or may not[237] consider as grounds for inadmissibility the fact that the alien's entry was achieved with the help of a person or organization engaged in illegal activity.

132. Numerous cases in national courts have involved expulsions of aliens convicted[238] of committing serious crimes.[239]

133. Thus, State practice would appear to recognize the validity of this ground for expulsion. However, divergent State practice with respect to some elements of this

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[229] Canada, 2001 Act, art. 36(3)(b).

[230] Ibid., art. 36(3)(c).

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

[232] Australia, 1958 Act, art. 201(b)(ii).

[233] South Africa, 2002 Act, art. 29(1)(b).

[234] Australia, 1958 Act, art. 250(1).

[235] Ibid., arts. 201(a) and 203(1)(a).

[236] Ibid., art. 250(1)(a).

[237] Canada, 2001 Act, art. 37(2)(b).

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

[239] *Ceskovic v. Minister for Immigration and Ethnic Affairs*, Federal Court, General Division, 13 November 1979, *International Law Reports*, op. cit., pp. 627-634 (convicted for crimes of violence including malicious shooting with intent to do grievous bodily harm); *Deportation to U. Case*, Federal Republic of Germany, Superior Administrative Court (Oberverwaltungsgericht) of Rhineland-Palatinate, Federal Republic of Germany, 16 May 1972, *International Law Reports*, op. cit., pp. 613-617 (convicted of manslaughter); *Urban v. Minister of the Interior*, op. cit., pp. 340-342; *Homeless Alien (Germany) Case*, op. cit., pp. 507-508 ("A foreign national who has been found guilty of a criminal offence is, as a general rule, expelled to his home State."). In *Leocal v. Ashcroft*, the Supreme Court of the United States ruled that State driving under the influence offences similar to the one in Florida, which either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle, do not qualify as a "crime of violence" under a deportation statute (*Leocal v. Ashcroft, Attorney General, et al.*, United States Court of Appeals, Eleventh Circuit, 9 November 2004, No. 03-5830). In some cases, national courts have considered convictions for serious crimes committed outside of the territorial State a sufficient ground for sustaining an order expulsion, based on considerations of public order.

ground may require further consideration in terms of (1) a sufficiently serious violation of national law; (2) the type of unlawful conduct in terms of planning, preparing, inciting, conspiring or committing such a violation;[240] (3) the evidentiary requirement for such unlawful conduct ranging from mere suspicion to a final judgment;[241] (4) the right of the alien to have the opportunity to negate the allegations of unlawful conduct;[242] and (5) the necessity of separate proceedings to determine the violation of national law and the expulsion of the alien.[243]

(c) Sentence of imprisonment

134. Among these different grounds, the commission of an offence by, or the imprisonment of, an alien has often been invoked, and it appears in the laws of several States. Moreover, this ground for expulsion is not new, as is clearly confirmed by relevant studies from the late nineteenth and early twentieth centuries. According to Martini, for example, "there is no doubt that convicted aliens may seriously compromise public security; hence, convictions constitute an essential cause for expulsion. In fact, a glance at decisions taken against individuals charged with violating the regulations applicable to them suffices to indicate that such aliens were almost always expelled following their conviction".[244] Furthermore, an alien who was convicted even for a misdemeanour was liable to expulsion; the alien could thus be expelled following the very first conviction, even if it was a suspended sentence,[245] unless the conviction was minor or was for an insignificant offence, or for an offence that did not constitute a danger to public order.[246]

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

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[240] "It may expel from its territory one who commits acts that are forbidden by its laws, or who may be fairly regarded as a prospective violator of them, or who proclaims his opposition to them, regardless of the view of his conduct or anticipated conduct that is entertained by his own State.", Charles Cheney Hyde, International Law Chiefly as Interpreted by the United States, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, p. 234 (citation omitted).

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

[242] "To minimize the harsh and arbitrary use of the power, numerous treaties between states stipulate … that the person expelled shall have an opportunity to clear himself of the charges against him…", Edwin Montefiori Borchard, op. cit., p. 56.

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

[244] Alexis Martini, op. cit., p. 55.

[245] Ibid, pp. 55-56.

[246] Circular of the French Minister of the Interior dated 20 July 1893, cited by Alexis Martini, op. cit., note 1, pp. 55-56.

136. A comparative study of legislation shows that such a ground exists in the laws of countries that include Belgium, Denmark, France, Germany, Italy, Portugal and the United Kingdom. In Belgium,[247] Denmark,[248] Germany,[249] Italy,[250] Portugal,[251] and the United Kingdom,[252] some criminal convictions may constitute grounds for expulsion. The basis for an expulsion decision may be the existence of a sentence of imprisonment, the length of such a sentence, or conviction for a given offence. In France, aliens who commit an offence on French territory are not only liable to the punishment stipulated by law for the offence, but may also be returned to their countries of origin. It should be noted that the aliens in question are persons of full age who have a legal residence permit.

137. In general, it appears that the principle of double punishment, namely a prison sentence coupled with a judicial or administrative expulsion decision, is allowed in the countries studied,[253] except in Belgium. Moreover, in Belgium and Germany, the criminal record of an alien may give rise to an expulsion measure on the ground of threat to public order.[254] The determination of double punishment is generally left to the discretion of the relevant authority. However, German law spells out the offences that must give rise to expulsion, while the laws of Italy and Portugal prohibit double punishment for aliens belonging to protected categories,[255] who may be expelled only if they constitute a threat to public order. The criterion of breach or "serious breach" of public order also holds true in Belgium,[256]

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[247] See Law of 15 December 1980 on access to the territory, stay, residence and deportation of aliens, in particular arts. 20-26.

[248] See Aliens Act of 17 July 2002, in particular part IV.

[249] See 1990 Aliens Act, in particular arts. 45-48.

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

[251] See Decree-Law No. 244 of 8 August 1998 respecting the legal regime of aliens.

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

[253] See *Les documents de travail du Sénat (français). Série Législation comparée. La double peine* No. LC 117, February 2003, Legal Studies Service. Division of Comparative Legislative Studies, 11 February 2003, published on the website http://www.parlement.ch/i/suche/pagine/geschaefte.aspx?geshid=19973467, p. 20, as well as on the Senate website: http://www.senat.fr/europe.

[254] Ibid.

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

- Holders of an unlimited and unconditional residence permit;
- Holders of a residence permit of unlimited duration who were born in Germany or arrived in the country when they were minors;
- Holders of a residence permit of unlimited duration who are married to (or "cohabiting" with) an alien belonging to either of the preceding groups;
- Have been granted asylum or refugee status;
- Holders of a specific residence permit given for urgent humanitarian reasons. Alien family members of a German citizen are afforded the same protection.

[256] The following categories are protected in Belgium:

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

Denmark,[257] Italy,[258] Portugal[259] and the United Kingdom.[260] In other words, the categories of persons in question cannot suffer double punishment.

• Aliens declared incapable of working.

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

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

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

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

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

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

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

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

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

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

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

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

• Age;
• Length of residence in the United Kingdom;
• Strength of connections with the United Kingdom;
• Personal history, including character, conduct and employment record;
• Domestic circumstances;
• Previous criminal record and the nature of any offence of which the person has been convicted;

138. In all cases, the competent authority on expulsion has considerable discretion. In Germany, when the expulsion measure is not mandatory, the Administration must consider the length of the alien's period of residence and the consequences of the expulsion before ruling that the offender should be deported. The same applies in Italy and Portugal when the offender does not belong to a protected category. Likewise, in Belgium, Denmark and the United Kingdom, the laws governing aliens stipulate that no expulsion measure may be taken without considering the alien's degree of integration into the host society. The situation in the United Kingdom is unique in that an expulsion measure ordered by a criminal judge, but ultimately taken by the Secretary of State, may be extended to the offending alien's family members, provided they depend financially on him or her.[261]

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

140. The Institute of International Law had, in article 28 of its resolution of 1892 cited above, already drawn up a list of ten grounds on which aliens may be expelled. That list, which reflected both practice drawn from domestic laws[262] and the prevailing opinion of the day, deserves to be reproduced *in extenso* [French original]:

> "The following persons may be expelled:
>
> 1. Aliens who have entered into the territory fraudulently, in violation of regulations on the admission of aliens; however, if there are no other grounds for expulsion, once they have spent six months in the country they may no longer be expelled;

- Compassionate circumstances;
- Any representations received on the person's behalf.

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

[261] See *Les documents de travail du Sénat (français)* … op. cit. p. 21.

[262] These include: France (Penal Code and Law of 3 December 1849; Belgium (Law of 9 February 1885; Law of 27 November 1891; Law of 12 February 1897); Spain (Royal Decree of 17 November 1852, Royal Order of 26 June 1858; Great Britain (Aliens Act of 11 August 1905); Greece (Penal Code of 24 June 1885); Italy (Penal Code of 1859, law of 22 December 1888; Decree of 30 June 1889 and Regulation; Royal Decree No. 1848 of 6 November 1926 approving the consolidated text of the public security laws (title V: Of the residence and expulsion of aliens; Luxembourg (law of 30 December 1893); Netherlands (Law of 13 August 1849); Portugal (Law of 20 July 1912 and Decree of 1 July 1927); Romania (Law of 7 April 1881; Regulation of 2 August 1990; Switzerland (Order of 17 November 1919); United States of America (Acts of 20 February 1907, 1 May 1917, 16 October 1918, and 10 May and 5 June 1920); Cuba (Law of 19 February 1919); Costa Rica (Law of 18 July 1894); Brazil (Law of 7 January 1908); Venezuela (Law of 25 July 1925): cited by Charles De Boeck, op. cit, pp. 480-481.

2. Aliens who have established their domicile or residence within the territory, in violation of a strict prohibition;

3. Aliens who, at the time they crossed the border, suffered from an illness that posed a threat to public health;

4. Aliens in a situation of begging or vagrancy, or dependent on public assistance;

5. Aliens convicted by the courts of the country for serious offences;

6. Aliens who have been convicted or are subject to prosecution abroad for serious offences which, according to the legislation of the country or under extradition agreements entered into by the State with other States, could give rise to their extradition;

7. Aliens who are guilty of incitement to commit serious offences against public safety even though such incitement is not in itself punishable under the territory's legislation and even though such offences were intended to be carried out only abroad;

8. Aliens who, in the territory of the State, are guilty or are strongly suspected of attacking, either in the press or by some other means, a foreign State or sovereign or the institutions of a foreign State, provided that such acts, if committed abroad by nationals and directed against the State itself, are punishable under the law of the expelling State;

9. Aliens who, during their stay in the territory of the State, are guilty of attacks or insults published in the foreign press against the State, the nation or the sovereign;

10. Aliens who, in times of war or when war is imminent, imperil the security of the State by their conduct."

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

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

(d) Failure to fulfil administrative formalities

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

right of free movement of nationals of member States within Community space. Indeed, "just as criminal convictions cannot in themselves constitute a threat to public order for them to constitute automatically a ground for deportation, failure to fulfil administrative formalities cannot in itself disrupt public order or security enough to warrant deportation".[263] European Community law concurs. Article 3, paragraph 3 of Directive No. 64/221 provided that: "Expiry of the identity card or passport used by the person concerned to enter the host country and to obtain a residence permit shall not justify expulsion from the territory".[264] This rule seemed obvious, given the provisions of the preceding paragraph of the directive[265] and its explanation by the Court of Justice of the European Communities. However, its application also raised issues of interpretation and therefore required clarification.

144. The 1964 directive was thus at the heart of the *Royer* case of 1976.[266] Mr. Royer, a French national, was residing in Belgium with his wife, who was running a café. As Mr. Royer failed to fulfil the necessary administrative formalities for his residence, the competent Belgian authorities ordered him to leave the territory. In considering a reference for a preliminary ruling, the Court of Justice of the European Communities held that the right of the nationals of a member State to enter the territory of and reside in another member State is "a right acquired under the Treaty".[267] Then, relying on Directives Nos. 68/360 and 64/221, it concluded that the mere failure by a national of a member State to comply with the legal formalities concerning access, movement and residence of aliens "[…] cannot therefore by itself justify a measure ordering expulsion or temporary imprisonment for that purpose.[268] It follows from the *Royer* case that "the expiry of the passport used [by an alien] to enter the national territory" of a member State other than his or her own or the absence of a residence permit cannot justify an expulsion order, in the light of those directives.[269] Likewise, failure to comply with the reporting and registration administrative formalities prescribed by domestic regulations cannot

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[263] See Anne-Lise Ducroquetz, op. cit., 119. The analysis in this section (d) are based on the work of this author (pp. 119-123).

[264] Council Directive No. 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, Official Journal No. 56 of 4 April 1964, p. 850.

[265] It should be noted that art. 3, para. 2 of Council Directive No. 64/221/EEC of 25 February 1964 states that "previous criminal convictions shall not in themselves constitute grounds for the taking of such measures [of public policy or of public security]".

[266] Court of Justice of the European Communities, Judgement of 8 April 1976, *Jean-Noël Royer*, Case C- 48/75, Rec. p. 497; Conclusions of the Advocate General Henri Mayras, presented on 10 March 1976, *Rec*. p. 521

[267] Ibid., pt. 39.

[268] Ibid., pt. 51.

[269] See Georges Karydis, "L'ordre public dans l'ordre juridique communautaire : un concept à contenu variable", *Revue trimestrielle de droit européen*, p. 6. In 1997, the High-Level Panel on the Free Movement of Persons, chaired by Mrs. Simone Veil, still had to insist on the fact that, unlike the situation often found in the member States concerned, non-possession of a valid residence permit should never, in itself, give rise to a threat of deportation. See the panel's review of the report dated 18 March 1997 annexed to the 1 July 1998 Commission Communication to the European Parliament and the Council on the follow-up to the recommendations of the High-Level Panel on the Free Movement of Persons, COM (1998) 403 final. Summary of the report: *in* Agence Europe, Europe documents, No. 2030, 9 April 1997; See also note of Fabienne Kauff-Gazin, Europe, May 1997, No. 5, Comm. No. 133, p. 9.

give rise to an expulsion.[270] For persons protected by Community law, such expulsion would be incompatible with the provisions of the Treaty establishing the European Economic Community, as it would constitute denial of the right of free movement conferred and guaranteed by articles 39 to 55 of the Treaty and their implementation instruments.[271]

145. In the *Royer* case, the Court specified that such conduct could not in itself constitute a breach of public order or security. It stated that the public order and public security reservation is not " a condition precedent to the acquisition of the right of entry and residence", but allows for "restrictions on the exercise of a right derived directly from the Treaty".[272] The Court then added that member States may "still expel from their territory a national of another member State where the requirements of public policy and public security are involved for reasons other than the failure to comply with formalities concerning the control of aliens".[273] In other words, non-compliance with legislation governing the terms of entry and residence "does not in itself constitute a threat to public order or public security".[274] Hence, any decision to expel a national of another member State based solely on such violation would be contrary to Community law.

146. Community case law on this point is sanctioned by Directive No. 2004/38,[275] notably article 15, paragraph 2, which, replicating the rule of article 3, paragraph 3 of Directive No. 64/221, provides that: "Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State". In addition, article 5, paragraph 5 and article 8, by which a member State may require Union citizens to report their presence within its territory, for periods of residence longer than three months, states that failure to comply with this requirement may make the person concerned liable to "proportionate and non-discriminatory sanctions".[276] In other words, failure to comply with administrative formalities is not a sufficiently serious offence for the member State in question to be able to order an expulsion.

147. Following this position, the Court of Justice ruled against a Netherlands pre-expulsion detention measure taken against a French national pursuant to the Aliens Act of 2000 for failure to present an identity card. First, the Court noted that

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[270] See Court of Justice of the European Communities, Judgment of 7 July 1976, Lynne Watson and Alessandro Belmann, Case C-118/75, Rec. p. 1185; Conclusions of the Advocate General Alberto Trabucchi, presented on 12 June 1976, Rec. p. 1201.

[271] Ibid., in particular pt. 20.

[272] Court of Justice of the European Communities, Judgment of 8 April 1976, *Royer*, op. cit., pt. 29.

[273] Ibid., pt. 41.

[274] Georges Karydis, "L'ordre public dans l'ordre juridique communautaire … ", op. cit., p. 6.

[275] Directive No. 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, *Official Journal of the European Union*, No. L 158, 30 April 2004, p. 77; corrigendum in the *Official Journal of the European Union*, No. L 229, 29 June 2004, p. 35, corrigendum to the corrigendum in the *Official Journal of the European Union*, No. L197 of 28 July 2005, p. 34.

[276] Art. 5, para. 5 also holds true for family members who are not nationals of a member State. Concerning these family members, the same protection is provided in the case where they do not fulfil the obligation of applying for a residence card for periods of residence of more than three months or the permanent residence card (arts. 9, para. 3 and art. 20, para. 2 of Directive No. 2004/38).

the presentation of an identity card is a mere "administrative formality the sole objective of which is to provide the national authorities with proof of a right which the person in question has directly by virtue of their status".[277] It then recalled that "detention and deportation based solely on the failure of the person concerned to comply with legal formalities concerning the monitoring of aliens impair the very substance of the right of residence directly conferred by Community law and are manifestly disproportionate to the seriousness of the infringement".[278] In fact, Directive No. 73/148 "allows Member States to place restrictions on the right of residence of nationals of other Member States in so far as such restrictions are justified on grounds of public policy, public security or public health".[279] However, echoing its *Royer* case, the Court said that: "Failure to comply with legal formalities pertaining to aliens' access, movement and residence does not by itself constitute a threat to public policy or security".[280] Accordingly, a measure to detain a national of another member State for the purposes of deportation taken on the ground of failure to present a valid identity card or passport constitutes an unjustified obstacle to the free provision of services, and hence contravenes article 49 of the Treaty establishing the European Economic Community.[281]

148. Moreover, the Court of Justice held, in a case dated 23 March 2006, that automatic service of a deportation order for failure to produce within the prescribed period the documents required to obtain a residence permit, is contrary to Community law.[282] This reasoning is consistent with European Community law and cannot be extended to the right to expel non-Community aliens. However, it is already indicative of a trend whose spread can all the more readily be foreseen given the development of community integration in many regions of the world and the fact that European integration has often been a source of inspiration for other integration efforts of the same type.

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[277] Court of Justice of the European Communities, Judgment of 17 February 2005, *Salah Oulane v. Minister of Alien Affairs and Integration*, Case C-215/03, pt. 24, Rec. I- p. 1245; Conclusions of the Advocate General Philippe Léger, presented on 21 October 2004, Rec. I- p. 1219. In Directive No. 2004/38, the Community legislator considers the identity card or passport a formality (see preambular para. 9).

[278] Ibid., pt. 40.

[279] Ibid., pt. 41. In this regard, see Court of Justice of the European Communities, Judgment of 16 January 2003, *Commission v. Italy*, Case C-388/01, Rec. I- p. 721, pt. 19.

[280] Court of Justice of the European Communities, Judgment of 17 February 2005, *Salah Oulane*, loc. cit. pt. 42.

[281] Fabienne Kauff-Gazin challenges the justification used by Community jurisdiction, namely Directive No. 73/148, to determine the right of movement and residence of a tourist, as since 28 June 1990 there has been a directive relating to the general right of residence, namely Directive No. 90/364/EEC (Official Journal of the European Communities No. L 180 of 13 July 1990, p. 26): see F. Kauf-Gazin, Europe, April 2005, No. 4, Comm. No. 127, pp. 13-14.

[282] Court of Justice of the European Communities, Judgment of 23 March 2006, *Commission v. Kingdom of Belgium*, Case C- 408/03, pt. 72, Rec. Ip. 2663; Conclusions of the Advocate General Damaso Ruiz-Jarabo Colomer, presented on 25 October 2005, Rec. Ip. 2650. For Union citizens, under Directive No. 2004/38, the residence card has been replaced by a registration certificate to be issued by the relevant authorities of the host member State (article 8).

(e) Public health

149. For expulsion purposes, what should this notion of public health include? Should it be taken that any person who is ill may for that reason be expelled? Or would only those persons who have a serious infection or who are voluntary or involuntary vectors of a contagious disease be affected?

Public health appears in both old and recent texts as a specific ground for expulsion. For example, the Convention Respecting Conditions of Residence and Business and Jurisdiction contained in the Lausanne Treaty of Peace 24 July 1923 between the British Empire, France, Italy, Japan, Greece, Romania and the Serb-Croat-Slovene State, of the one part, and Turkey, of the other part, provided in article 7 that Turkey "reserves the right to expel, in individual cases, nationals of the other Contracting Powers, either under the order of Court or in accordance with the laws and regulations relating to public morality, public health or pauperism, or for reasons affecting the internal or external safety of the State. The other Contracting Powers agree to receive persons thus expelled, and their families, at any time. The expulsion shall be carried out in conditions complying with the requirements of health and humanity".[283]

150. The State may have wide discretion in determining whether the expulsion of an alien is justifiable on public safety or public health grounds.[284]

151. National laws of the late nineteenth and early twentieth centuries had also dealt with the responses to these questions. Considering that public health is of vital importance for the preservation of the State, many of those laws provided that "aliens afflicted with epidemic or contagious diseases"[285] could face expulsion. As a case in point, section 2 of the United States Immigration Act of 20 February 1907 provided that: "The following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feebleminded persons, epileptics, insane persons, and persons who have been insane within five years previous; […] paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis […] persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; […], anarchists, […] prostitutes […], persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution; persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment […] to perform labor in this country of any kind, skilled or unskilled […]".[286] Naturally, aliens who violated those provisions faced deportation.[287] While indicating that the measure "may appear

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[283] The French text of this convention is published in the *Journal du droit international*, vol. L, 1923, p. 1098. [The English version of the convention can be consulted online in *League of Nations Treaty Series*, vol. 28: http://treaties.un.org/pages/filessearch.aspx?tab=LON].

[284] "In the *Hockbaum* case, decided in 1934 by the Upper Silesian Arbitral Tribunal, it was held that when expulsion is based on grounds of public safety the Tribunal will not, as a rule, review the decision of the competent state authorities: *Decisions of the Tribunal*, vol. 5, No 1, p. 20ff; AD, 7 (1933-34), No 134; Z6V, 5 (1935), pp 653-5. See also *Re Rizzo and Others (No. 2)*, op. cit., pp. 500, 507; *Agee v. UK*, op. cit. 7, p 164; *R. v. Secretary of State for Home Affairs*, ex parte *Hosenball*, op. cit. p. 944".

[285] Charles De Boeck, op. cit. p. 545.

[286] On this law, see *inter alia* Paul Goulé, "L'immigration aux Etats-Unis et la loi du 20 février 1907", *Revue de droit international privé* (Edouard Clunet), 1908, p. 372 et seq.

[287] See Alexis Martini, op. cit. p. 65.

inhumane, or at least strict", Charles De Boeck nevertheless noted the following: "But the dominant trend today in America, and one that was adopted by Great Britain in 1905, is that of the system of selection and exclusion: instead of being expelled, aliens who represent a danger to public health are barred from entering the country".[288] This practice of exclusion at the border was so systematic that there was no record of any alien with an illness being expelled from Great Britain in the first six years of implementation of the Aliens Act of 1905. But what explanation is there for the expulsion of aliens who were quite healthy when they first entered the country, but who ended up contracting an epidemic or contagious disease, victims of their environment rather than importers of deadly diseases? It is hard not to agree with De Boeck on this point: such expulsion "would be inhumane".[289]

152. In recent years, the Acquired Immune Deficiency Syndrome (AIDS) epidemic has raised new issues with respect to the expulsion of aliens based on considerations of public health. It has been noted that the international movement of persons has contributed to the spread of the global epidemic.[290] The fact that a person is infected with HIV/AIDS may be a valid public heath concern for the refusal to admit aliens.[291] The extent to which these travel restrictions are justified[292] has been questioned, as noted by G.S. Goodwin-Gill:

> "The World Health Organization has long maintained that HIV/AIDS constitutes no threat to public health. […].
>
> In this context, HIV screening appears to serve two functions, neither of which is dictated by health or economics. […]. In fact, its limitations with respect to the prevention of transmission of HIV are common knowledge, including the 'window of uncertainty' between possible infection and the development of antibodies, and the notorious reluctance on the part of states to test citizens returning from abroad, even from 'high risk' areas. […]. As one commentator has remarked, countries requiring HIV testing commonly accept refugees for resettlement having medical conditions likely to incur public expense far in

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[288] See Charles De Boeck, op. cit., p. 545; and the examples given on pages 545-549.

[289] Ibid., p. 550.

[290] "For with the exception of the relatively small contribution of blood and blood products to the global epidemic, HIV has largely been spread through the movement of people." See Mary Haour-Knipe and Richard Rector (eds.), *Crossing Borders: Migration, Ethnicity and AIDS*, London/Bristol, Taylor & Francis, 1996, p. viii.

[291] "A State may require a person seeking entry into its territory to be in possession of a certificate of medical fitness or a certificate of inoculation against specified contagious diseases. That document must comply with the national regulations of the State of entry, which are usually based on international health regulations of a general or regional health organization. Such regulations apply in particular to all travellers or travellers arriving from specific regions, and are intended to prevent the spread of those diseases. […] The World Health Organization regulations provide for quarantine action which member nations may take with respect to four diseases, namely, cholera, the plague, yellow fever, and small pox. […] To this list of communicable diseases, 'AIDS' (Acquired Immune Deficiency Syndrome) has now been added." Louis B. Sohn and Thomas Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 64.

[292] The analysis from this para. 152 to para. 165 is taken from *Expulsion of aliens, Memorandum by the Secretariat*, op. cit. paras. 394-407.

excess of anything an HIV patient is likely to incur, and this rather negates the argument for screening on economic grounds".[293]

153. The question arises as to whether an alien with this illness can be expelled on public health and safety grounds. It should be noted that the discretion of a State with respect to immigration controls for reasons of public health may be broader for the exclusion of aliens than for the expulsion of aliens.[294] This question may require consideration of the relevant human rights of the alien.[295] The relevant criteria would appear to include the state of the illness of the alien and the medical conditions or the possibility of treatment in the State of nationality to which the alien would presumably be expelled.[296]

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

> 1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.
>
> 2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.
>
> 3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled

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[293] Guy S. Goodwin-Gill, "AIDS and HIV, Migrants and Refugees: International Legal and Human Rights Dimensions", in Mary Haour-Knipe and Richard Rector (eds.), op. cit. p. 63-64.

[294] "States also have wide discretion in establishing grounds for deportation or expulsion of those who have made an entry into national territory. As a matter of practice, the grounds for expulsion are typically more limited than grounds for barring entry. Contracting a contagious disease while on national territory is less likely to be per se a ground for deportation, for example, even though the same illness might well have blocked initial admission if the disease had developed before entry." David A. Martin, "The Authority and Responsibility of States" in Thomas Alexander Aleinikoff and Vincent Chetail (eds.), Migration and International Legal Norms, The Hague, T.M.C. Asser Press, 2003., p. 34.

[295] See Stephanie Palmer, "AIDS, Expulsion and Article 3 of the European Convention on Human Rights", *European Human Rights Law Review*, vol. 5, 2005, pp. 533-540; Guy S. Goodwin-Gill, op. cit., pp. 50-69.

[296] "An important question arises under human rights law whether returning persons to countries where they may not have access to adequate health services constitutes inhuman or degrading treatment. These issues have been examined under the European Court of Human Rights in a variety of cases. More often than not, return has been allowed. [...] The benchmarks would thus appear to be the state of the illness and the conditions in the country of origin. [...] Finally, cases in which non-citizens contest expulsion based on a claim of illness and lack of facilities in the country of origin are likely to succeed only under special circumstances." Peter Van Krieken, "Health and Migration: The Human Rights and Legal Context" in Thomas Alexander Aleinikoff and Vincent Chetail (eds.), op. cit. pp. 289, 301 and 302.

to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine."

155. The national laws of several States recognize public health considerations as a valid ground for the expulsion of aliens.[297] A State may expel or refuse entry to an alien who suffers from (1) a disease that is listed or enumerated hereditary,[298] (or a family disease),[299] incapacitating[300] chronic,[301] epidemic, infectious, contagious or communicable,[302] or makes the alien's presence undesirable for medical reasons;[303] (2) HIV/AIDS,[304] tuberculosis,[305] leprosy[306] or venereal diseases;[307] (3) physical defects;[308] (4) a mental illness or handicap[309] or retardation;[310] (5) alcoholism, drug addiction or drug abuse;[311] (6) old age;[312] or (7) a grave state of health.[313] A

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[297] The review of national laws and case law on this point is taken from Expulsion of aliens, Memorandum by the Secretariat, op. cit., paras. 392-399.

[298] Belarus, 1998 Law, arts. 14-15 and 20; Chile, 1975 Decree, arts. 15(5), 64(4), 65(1) and 66; China, 1986 Rules, arts. 7(4) and 20; Greece, 2001 Law, art. 44(1)(c); Japan, 1951 Order, arts. 5(1) and 7(4); Russian Federation, 2002 Law No. 115-FZ, arts. 7(13), 9(13) and 18(9); and South Africa, 2002 Act, art. 29(1)(a). Brazil, 1981 Decree, art. 52(II); and Paraguay, 1996 Law, art. 6(3) and 7(2).

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

[300] Brazil, 1981 Decree, art. 52 (III).

[301] Paraguay, 1996 Law, arts. 6(3), 7(2).

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

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

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

[305] China, 1986 Rules, arts. 7(4) and 20.

[306] Ibid.

[307] Ibid.

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

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

[310] Paraguay, 1996 Law, art. 6(3), 7(2).

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

[312] Paraguay, 1996 Law, art. 35(b).

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

State may do likewise if an alien: (1) threatens the health of the public[314] or of the State's animals;[315] (2) comes from a region of epidemiological concern;[316] (3) fails specified health standards or conditions;[317] (4) is likely to place excessive demands on the State's health services;[318] or (5) fails to present vaccination records.[319]

156. The alien may be required to undergo a medical examination[320] (which may involve detention)[321] or to have sufficient funds to cover the alien's medical costs.[322] The expulsion of an alien on this ground may be affected by (1) the alien's compliance with the State's health authorities;[323] or (2) a special arrangement or relationship existing between the alien's State and the expelling State.[324] Family connections to nationals of the State may[325] or may not[326] affect the alien's status under this heading, while grounds found under this heading may be extended to the alien's entire family.[327] This heading may expressly apply to aliens with transitory status.[328]

157. It should be noted that some national courts have held that aliens suffering from severe medical conditions cannot be expelled where such an expulsion would constitute a violation of human rights.[329]

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

[315] Belarus, 1998 Law, art. 20.

[316] Belarus, 1998 Law, art. 20; and Italy, 1996 Decree-Law, art. 4(2).

[317] Brazil, 1980 Law, arts. 7(V) and 26.

[318] Canada, 2001 Act, art. 38(1)(c), (2).

[319] United States, INA, sects. 212(a)(1)(A)(ii), (B), (g)(2) and 232(a).

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

[321] United States, INA, sect. 232(a).

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

[323] Greece, 2001 Law, art. 44(1)(c).

[324] Finland, 2004 Act, sect. 168(1)-(2); and Italy, 1998 Law No. 40, art. 45(2)(b).

[325] Canada, 2001 Act, art. 38(2); Paraguay, 1996 Law, arts. 7, 35(b); and United States, INA, sect. 212(a)(1)(B), (g)(1).

[326] Panama, 1960 Decree-Law, art. 38.

[327] Brazil, 1980 Law, art. 26(2).

[328] Panama, 1960 Decree-Law, art. 36 (as amended by Act No. 6 (1980), para. 10); and United States, INA, sect. 232(a).

[329] See the case law provided in Expulsion of aliens, Memorandum by the Secretariat, op. cit., paras. 579-584.

(f) Morality

158. Morality has been recognized as a valid ground for the expulsion of aliens in treaty law, State practice[330] and the literature.[331]

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

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

160. Expulsion on grounds of morality is contemplated in the national laws of several States.[332] Thus, a State may expel an alien who has furthered, promoted or profited from prostitution or other sexual exploitation[333] or from human trafficking.[334] A State may do likewise if the alien (1) has engaged in or is prone to prostitution;[335] (2) is otherwise involved in forbidden sexual behaviour[336] or sexual crimes;[337] (3) has trafficked in human organs;[338] (4) has profited from,[339] smuggled,[340] traded or trafficked in,[341] produced,[342] possessed[343] or otherwise

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330 "Very commonly, an alien's deportation may be ordered… on account of the alien's… immoral conduct (including prostitution and use of narcotics)…" Richard Plender, *op. cit.*, pp. 467-468 (citing inter alia Denmark, Aliens Act No. 226 of 8 June 1983, art. 25(2); Nigeria, 1963 Act, sect. 17(l)(g)-(h)).

331 "The power of expulsion or deportation may be exercised if an alien's conduct or activities after being admitted into the state violate certain basic rules. Such conduct or activities include: […] 3. Engaging in activities which […] are prejudicial to […] morality […]" Louis B. Sohn and Thomas Buergenthal (eds.), op. cit. pp. 90-91.

332 The review of national laws on this subject is taken from Expulsion of aliens, Memorandum by the Secretariat, op. cit. paras. 403-406.

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

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

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

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

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

338 Paraguay, 1996 Law, art. 6(6).

339 Ibid.

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

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

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

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

been involved with[344] drugs such as narcotics or other psychotropic or psychogenic substances; (5) has abducted minors or otherwise involved them in illicit activities;[345] (6) has committed crimes of domestic violence;[346] or (7) has been a gambler or derived significant income from gambling.[347]

161. According to the legislation of some States, expulsion on grounds of morality may apply to an alien who is a member of an organization that engages in human trafficking[348] or drugs;[349] harms or threatens national or public morality;[350] commits a crime of moral turpitude;[351] gravely offends morals;[352] engages in immoral conduct[353] or is not of good moral character;[354] operates in a morally inferior environment;[355] is unable to lead a respectable life;[356] or intends to engage in commercialized vice.[357]

162. This ground may be applied either once criminal procedures have begun,[358] or once the alien has committed the relevant act or broken the relevant law.[359] The

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

[345] Greece, 2001 Law, art. 44(1)(a); Italy, 1998 Decree-Law No. 286, arts. 4(3) and 8; Japan, 1951 Order, art. 2(7)(b)-(c); Nigeria, 1963 Act, art. 18(1)(h)(ii)-(iv), (3)(b)-(d) and (f); and United States, INA, sect. 212(a)(10)(C). The United States may exempt a foreign government official from the application of this ground upon the discretionary decision of the U.S. Secretary of State, or if the child is located in a State Party to the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980 (United States, INA, sect. 212(a)(10)(C)(iii)(II)-(III)).

[346] France, Code, art. L541-4; and United States, INA, sect. 237(a)(2)(E).

[347] Panama, 1960 Decree-Law, art. 37(b); and United States, INA, sect. 101(a)(50)(f)(4)-(5).

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

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

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

[351] United States, INA, sect. 212(a)(2)(A)(i)(I), (ii).

[352] Switzerland, 1949 Regulation, art. 16(2).

[353] Panama, 1960 Decree-Law, art. 37(a).

[354] United States, INA, sect. 101(a)(50)(f).

[355] Paraguay, 1996 Law, art. 6(7).

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

[357] United States, INA, sect. 212(a)(2)(D)(iii).

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

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

relevant law may set forth penalties in addition to expulsion,[360] or specify that the expulsion shall occur: (1) after the alien completes a sentence or other detention;[361] or (2) if the alien's sentence did not include expulsion.[362]

163. The expulsion of an alien on grounds relating to morality may depend in part on the alien's (1) residency status,[363] or the residency status of the alien's family;[364] (2) eligibility for exemption from visa or other such requirements;[365] (3) length of stay in the State's territory at the time of the relevant act;[366] (4) having entered the State's territory prior to the grounds for expulsion becoming evident;[367] (5) threat to national interests;[368] (6) involvement of aliens from a State not having a special arrangement or relationship with the expelling State;[369] (7) status as a victim of trafficking when committing the relevant act;[370] or (8) transitory status.[371] The alien's dependents may be subject to expulsion under this heading if grounds exist to expel the alien.[372]

164. The national courts of some States have upheld the expulsion of aliens on grounds of morality.[373]

(i) Begging-vagrancy

165. In the context of the right of expulsion, up until the start of the twentieth century begging and vagrancy were also regarded as causes for expulsion, because

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[360] Italy, 1998 Decree-Law No. 286, art. 12(3ter), 1998 Law No. 40, art. 10(3), 1996 Decree-Law, art. 8(1); and United States, INA, sect. 278.

[361] Bosnia and Herzegovina, 2003 Law, art. 47(4).

[362] Ibid., art. 57(1)(g).

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

[364] United States, INA, sect. 212(h)(1)(B).

[365] Austria, 2005 Act, art. 3.53(2)(3).

[366] Ibid.; Denmark, 2003 Act, art. 22(iv); and United States, INA, sect. 212(h).

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

[368] Bosnia and Herzegovina, 2003 Law, art. 27(1)(b).

[369] Italy, 1996 Decree-Law, art. 8(1).

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

[371] Japan, 1951 Order, art. 24(4).

[372] United States, INA, sect. 212(a)(2)(C)(ii), (H)(ii)-(iii).

[373] See, e.g., *Re* Th. and D., Conseil d'État, Egypt, 16 March 1953, International Law Reports, 1951, H. Lauterpacht (ed.), Case No. 92, pp. 301-302, at p. 302 ("Art. 2 (2) of the Decree-Law of June 22, 1938, enumerates amongst the grounds justifying expulsion the fact of having committed an act contrary to public morality, and the applicants have undoubtedly committed such an act, an act which is against divine as well as human law; if the expulsion is based upon this ground it is certainly justifiable in law.") (involving concubinage); *Hecht v. McFaul and Attorney-General of the Province of Quebec*, Quebec Superior Court, 26 January 1961, International Law Reports, vol. 42, Elihu Lauterpacht (ed.), pp. 226-229 (expulsion for conviction of crimes of moral turpitude). See also *Brandt v. Attorney-General of Guyana and Austin*, Court of Appeal of Guyana, 8 March 1971, pp. 450-496, at p. 460 ("That which was not 'conducive to the public good' of a country might consist of not only opposition to its peace and good order, but also to its 'social' and 'material interests', thereby embracing a wider ambit than the limited category of 'peace and good order'.").

beggars and vagrants were held to be "dangerous".[374] For example, in France article 272 of the penal code under the monarchy explicitly provided that "individuals declared vagabonds by a judgement, may, if they are foreigners, be conveyed, by order of the Government, out of the territory of the Kingdom". Measures of expulsion were taken against many persons in this category.

166. In Switzerland, "persons without resources" could be expelled.[375] Likewise, article 6 of the Luxembourg Act of 17 December 1893 stated that a non-resident alien "found in a state of vagrancy or begging or in contravention of the law on itinerant trades may be immediately escorted to the frontier by the police".

167. These causes for expulsion can be linked to the ground of public order, which as we have seen can be very elastic; its content may even vary from one country to another. It could be linked to public tranquillity. But does the latter form part of public order or does it constitute an autonomous ground? In any event, it may be doubted whether such causes are acceptable nowadays in the light of international law. Moreover, the domestic law of some States makes begging, for example, subject to the rules of local administration[376] and considers that restrictions may be applied to begging on a public thoroughfare, but on condition that these restrictions are limited in space and time, taking the circumstances into account.[377] Clearly, these are "restrictions" which moreover are spatio-temporarly limited, and do not constitute prohibitions; still less could they, under these circumstances, constitute grounds for expulsion.

(ii) Debauchery-disorderliness

168. Some old legislations regarded debauchery and disorderliness, like begging and vagrancy, as grounds for expulsion. Older works refer, by way of illustration, the expulsion of a three-member French family, the Bettingers, from the Canton of Solothurn in Switzerland towards the end of the nineteenth century not only because the family had been for a long time been a public charge, but also because the father and the son had fallen into complete dissoluteness and were no longer able to find anywhere to live, and all the members of the family had in addition become unfit for work.[378] Still in Switzerland, on 1 September 1885 a resident of Basel-Landschaft requested the Federal Council to expel one Georg Grüner, of Vienna, who, the author of the request alleged, "is engaging in immoral conduct and disturbing the peace of a number of families". The Federal Council communicated the request to the Government of the Canton which was competent to decide the matter. Alexis Martini referred at the start of the twentieth century to the case of foreigners "expelled for contravention of the gaming laws",[379] and also indicated that consuls could naturally take this measure where they had retained "the right to expel their

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[374] Alexis Martini, *L'expulsion des étrangers*, op. cit., pp. 59-60.

[375] Ibid., p. 61.

[376] See art. L. 2213-6 of the Code générale des collectivités territoriales in France.

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

[378] See *Journal du droit international privé* (Edouard Clunet), 1893, p. 661. Charles de Boeck, op. cit., p. 543.

[379] Alexis Martini, *L'expulsion des étrangers*, op. cit., p. 61.

nationals", as in China.[380] Prostitution also forms part of this ground of debauchery and disorderliness. In the United Kingdom, for example, prostitution was an offence, and the Aliens Act of 1905 authorized the Secretary of State to issue an expulsion order if a court certified that it had convicted an alien of an offence as a prostitute.[381] The United States Act of 20 February 1907, in section 2, excluded prostitutes and procurers from admission to its territory, and in section 3 authorized the deportation of these two classes of persons.[382] Similarly, although it did not explicitly mention prostitution, the Brazilian Law of 7 December 1907 provided in article 2 that "sufficient grounds for expulsion are: ... 3 duly established vagrancy, begging or procuring".[383] Charles de Boeck wrote in 1927 that the principle according to which "notorious and repeated acts of debauchery and disorderliness constitute legitimate grounds for expulsion" "is tacitly accepted and established in the laws of all countries. It is universally applied".[384]

169. Apart from the four cases discussed above, national legislations establish various other grounds for expulsion, sometimes unexpected ones. At the time, expulsions were noted for political causes as diverse as "anarchist machinations", "praise of murder",[385] "nefarious incitement",[386] "Espionage" or suspicion of espionage, [387] "intrigues and plots against the State"[388] or against third powers,[389] "resistance to the laws",[390] "violent antimilitarism",[391] "seditious slogans" [392] and "tearing up flags".[393]

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

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[380] Ibid., pp. 61-62.

[381] See Alexis Martini, op. cit., p. 82.

[382] Charles de Boeck, op. cit., pp. 544-545.

[383] Ibid., p. 545.

[384] Ibid., p. 542.

[385] Alexis Martini, op. cit., p. 69.

[386] Cf, for example the expulsion from Switzerland in 1881 of Prince Kropotkin for having made "statements in public inciting the workers to seize property violently and overthrow the established order by force" and for having "glorified the assassination of Tsar Alexander V", etc. (see Alexis Martini, op. cit., p. 69).

[387] Cf. the case of Carlsbad Hoffmann, sentenced for fraud in Switzerland. Under the name of Baron Courtier, stating that he was a colonel in the reserves, he gained access to the military facilities at Thun (Switzerland); suspected of espionage, he was immediately expelled (see *Journal de droit international privé*, 1893, p. 671).

[388] Cf. the case of the expulsion in 1718 of Prince de Cellamare, Ambassador of Spain in Paris, for conspiring against the regent of France (see *Revue de droit international public*, 1907, end of p. 181).

[389] Cf. the case of the expulsion from Belgium, in 1872, of the Count of Chambord "after the secret meetings held by this pretender with his supporters in the Hotel Saint-Antoine in Antwerp" (see *Journal de droit international privé*, 1889, p. 73).

[390] Cf. the case of the expulsion of Mgr Montagnini, secretary of the Nunciature of the Holy See, "for having transmitted to three priests in Paris the order to violate the law on separation of church and State and led the clergy to battle in the name of the clerical party" (see *Revue de droit international public*, 1907, p. 175 et seq.).

[391] Cf. the case of the expulsion of Hugo Nanni (see Alexis Martini, op. cit., p. 73).

[392] Cf. the case of the expulsion from Switzerland, in 1901, of six Italians, including one student, who in the course of a public demonstration shouted "down with the army" (ibid., p. 74).

[393] Cf. the case of the expulsion of Ghio, expelled from France for tearing up French flags in Le Canet (ibid.).

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

(g) Ideological grounds and political activity

(i) Ideology

172. This is associated with the advent of the socialist regime in Russia. The Law of 19 May 1903 there was replaced by the Decree on Expulsion of Aliens of the Government of the Union of Soviet Socialist Republics (USSR) of 29 August 1921, article 1 of which provided that "aliens whose way of life, activity or conduct are regarded as incompatible with the principles and way of life of a worker and peasant State may be expelled by the special committee (Cheka or GPU), or by order of a court, even if they have previously been authorized to stay in Russia".[394]

(ii) Political activities

173. Political considerations may be a relevant factor in determining the expulsion of aliens on the basis of public order or national security rather than as a separate ground under international law.[395]

174. As noted previously, the Parliamentary Assembly of the Council of Europe affirmed the prohibition of the expulsion of aliens, including illegal aliens, on political or religious grounds in recommendation 769 (1975).[396]

175. The national laws of some States provide for the expulsion of an alien who (1) takes part in the State's domestic politics,[397] such as by voting when not

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[394] Cited by Paul Fauchille, *Traité de droit international public*, vol. I, part 1, *Paix*, 1922, No. 447, p. 978.

[395] "The classical writers acknowledged a power to expel aliens but often asserted that the power may be exercised only for cause. Grotius wrote of the sovereign right to expel aliens who challenge the established political order of the expelling State and indulge in seditious activities there. Pufendorff echoed this sentiment. In early diplomatic correspondence the same principle is expressed with the same qualification." Richard Plender, op. cit., p. 461 (citing Hugo Grotius, *De Jure ac Pacis, Libri Tres*, 1651, Book II, Chap. II, p. xvi; and Samuel von Pufendorf, *De Jure Naturae et Gentium, Libri Octo*, 1866, Book III, Chap. Ill, para. 10). "In addition to the economic and social grounds of undesirability, political reasons, especially war, have often been the basis of expulsion orders." Edwin M. Borchard, op. cit., p. 52. "The power of expulsion or deportation may be exercised if an alien's conduct or activities after being admitted into the state violate certain basic rules. Such conduct or activities include: … 4. Participating in undesirable political activities." Louis B. Sohn and Thomas Buergenthal (eds.), op. cit., pp. 90-91. "Expulsion following judicial sentence and expulsion which is ordered by the executive on general political grounds are readily distinguishable [from an acceptable expulsion for violation of local law], but here too, in respect to the latter, it is accepted that the 'policy' of each nation must determine whether it will permit the continued residence of the alien." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 206-207 (citations omitted).

[396] "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." Council of Europe, Recommendation 769 (1975), op. cit., para. 9.

[397] A State may prohibit or restrict the alien's participation in its domestic politics or public affairs (Brazil, 1980 Law, arts. 106-07; and Republic of Korea, 1992 Act, art. 17(2)-(3)), or in its cultural or other organizations (Brazil, 1980 Law, arts. 107-09).

authorized to do so,[398] or by abusively interfering with the political participation rights which the State reserves for its nationals;[399] (2) is a member of a totalitarian or fascist party, or a party focused on worldwide revolution;[400] or (3) presents ideologically false documents or other information to the State's authorities.[401] The relevant legislation may expressly permit the application of criminal penalties in addition to expulsion when grounds exist under this heading.[402]

176. The national courts of some States have dealt with cases involving the expulsion of aliens for reasons relating to their political activities.[403] However, most of these expulsions have been justified on other grounds, such as public order or national security.[404]

(h) The "cultural" ground

177. This consists of something which certain Arab Gulf States regard today as being an "identity threat". It is reported that in a recent column, Tarik Al Maeena of *Arab Review* writes about the concern of the Arab countries over the "identity threat" posted by the presence of too many foreign workers in their territories. According to the Labour Minister of Bahrain, "In some areas of the Gulf, you can't tell whether you are in an Arab Muslim country or in an Asian district. We can't call this diversity and no nation on Earth could accept the erosion of its culture on its

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[398] Brazil, 1980 Law, arts. 124(XI), 127; and United States, INA, sects. 212(a)(10)(D) and 237(a)(6).

[399] Portugal, 1998 Decree-Law, art. 99(1)(d).

[400] Belarus, 1998 Law, art. 14; and United States, INA, sects. 101(a)(37), (40), (50)(e) and 212(a)(10)(D).

[401] Argentina, 2004 Act, arts. 29(a) and 62(a).

[402] Brazil, 1980 Law, arts. 124(XI), 125-27; and Portugal, 1998 Decree-Law, art. 99(2).

[403] See, e.g., *Perregaux*, Conseil d'État, France, 13 May 1977, *International Law Reports*, vol. 74, Elihu Lauterpacht, Christopher J. Greenwood (eds.), pp. 427-430; *Bujacz v. Belgian State (Minister of Justice)*, Conseil d'État, Belgium, 13 July 1953, *International Law Reports*, 1953, Hersch Lauterpacht (ed.), pp. 336-337; *Lopez v. Howe, Immigration Commissioner*, United States Circuit Court of Appeals, Second Circuit, 14 May 1919 [Annual Digest of Public International Law Cases, 1919-1922, Sir John Fischer Williams and H. Lauterpacht (eds.), Case No. 177, pp. 252-253 (Expulsion of prominent philosophical anarchist)]; *Ex Parte Pettine*, United States District Court, District of Massachusetts, 3 June 1919, Annual Digest of Public International Law Cases, 1919-1922, Sir John Fischer Williams and Hersch Lauterpacht (eds.), Case No. 176, pp. 251-252; *Galvan v. Press Officer in Charge, Immigration and Naturalization Service*, United States, Supreme Court, 24 May 1954, *International Law Reports*, 1954, Hersch Lauterpacht (ed.), pp. 213-218.

[404] See, e.g., *Perregaux*, op. cit., at p. 429 ("Behaviour of a political nature is not, of itself, sufficient to provide legal justification for the deportation of an alien whose presence on French territory does not constitute a threat to public order or public confidence."); *Bujacz v. Belgian State (Minister of Justice)*, Conseil d'État, Belgium, 13 July 1953, *International Law Reports*, 1953, Hersch Lauterpacht (ed.), pp. 336-337, at p. 337 ("The applicant claims that aliens are entitled to enjoy 'freedom of thought' and 'freedom of political association'; however, the enjoyment of these liberties by aliens is necessarily limited by legal provisions which, in application of Article 128 of the Constitution, permit activities deemed harmful to the safety of the country to be punished by expulsion."); *In re Everardo Diaz*, Supreme Federal Tribunal of Brazil, 8 November 1919, Annual Digest of Public International Law Cases, 1919-1922, Sir John Fischer Williams and Hersch Lauterpacht (eds.), Case No. 179, pp. 254-257, at pp. 255-256 ("The State had no obligation to be burdened with the difficult work, at times ineffective, of constant vigilance over the actions of foreigners putting their theory into practice. It need not await overt action on the part of such aliens.") (involving the expulsion of an anarchist).

own land."[405] According to the columnist Al Maeena, the Labour Minister of Bahrain announced that his country would propose a six-year residency cap on all expatriates working in the Gulf. The proposal was to be submitted to the summit of the Gulf Cooperation Council (comprising social, moral and culture). According to the Labour Minister quoted above, "the majority of foreign workers in the region come from cultural and social backgrounds that cannot assimilate or adapt to the local cultures.[406] Moreover, they were taking away much-needed jobs from the locals. The Labour Minister of the United Arab Emirates, Ali Bin Abdullah Al Ka'abi, said that his country shared Bahrain's concern, and with over 14 million expatriates in the region, the issue would be on the top of the agenda for the Gulf Cooperation Council Summit referred to above. The columnist Al Maeena concluded as follows: "That would send a message to the 14 million or so expatriates currently living in the Gulf Cooperation Council that it is time now to consider other options. For some, such a scenario may be too painful to bear as they have brought up their families here and have made it their home."[407]

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

179. From the cultural standpoint, it clashes with the non-discrimination rules set forth in a number of international conventions, particularly those cited in paragraph 147 of the fifth report on expulsion of aliens.[408] It is not without interest in this connection to note that the Arab Charter of Human Rights, adopted by the Council of the League of Arab States on 15 September 1994 itself contains a number of provisions explicitly or implicitly setting forth this rule. In particular, article 2 provides that "Each State Party to the Charter undertakes to ensure to all individuals within its territory and subject to its Jurisdiction, the right to enjoy all the rights and freedoms recognized herein, without any distinction on grounds of race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status, and without any discrimination between men and women". And article 3 in a sense reinforces this obligation when it provides "(a) No restrictions shall be placed on the rights and freedoms recognized in the present Charter except where such is provided by law and deemed necessary to protect the national security and economy, public order, health or morals or the rights or freedoms of others. (b) No State Party to the present Charter shall derogate from the fundamental freedoms recognized herein and which are enjoyed by the nationals of another State that shows less respect for those freedoms".

180. From the standpoint of the right of foreign workers, there can be no doubt that such a policy would clash with the relevant provisions of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, particularly article 7. What is more, it will be noted that "abundance of labour" has long been regarded as not constituting cause for expulsion. According to Martini, this issue was studied above all at the end of the nineteenth century, "when the Chinese were excluded from the United States, from 1888 to 1892".[409]

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[405] Source: "Expatriates' impact on Gulf's labour, social situation", by Tarik Al Maeena, 27 October 2007, http://www.arabview:com/articles.asp?article=921.

[406] Ibid.

[407] Ibid.

[408] A/CN.4/611 of 27 March 2009, paras. 146 et seq.

[409] Alexis Martini, op. cit., p. 62.

"And relying on the authors of the period, the science of international law does not accept that labour protection is a sufficient reason for ordering the expulsion of an entire category of individuals".[410] This opinion remains good

(i) Illegal entry

181. Entry in violation of the immigration laws of the territorial State has been recognized as a valid ground for the expulsion of an alien in State practice and literature.[411]

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

> "There is a significant scope for States to enforce their immigration policies and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may not be exercised arbitrarily. A State might require, under its laws, the departure of persons who remain in its territory longer than the time allowed by limited-duration permits."[412]

183. Dans l'affaire *Amnesty International c. Zambie*, la Commission africaine des droits de l'homme et des peuples a reconnu que le fait pour un étranger de se trouver irrégulièrement sur le territoire de l'État constituait un motif valable d'expulsion.

> "The Commission does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide. It is however of the view that it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter and international law."[413]

184. While the national laws of some States provide that aliens who have entered the territory illegally may be subject to exclusion rather than expulsion in certain

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[410] Joseph-André Darut, L'Expulsion des étrangers, op. cit., p. 50. Darut also writes: "protection of labour is not of itself sufficient ground for non-admission, a fortiori for expulsion" (ibid., p. 51).

[411] State practice accepts that expulsions justified: (a) for entry in breach of law ...", Guy S. Goodwin-Gill (op. cit.), p. 262. "An unlawful entry can result in the expulsion of the foreigner on the ground that the entry was not justified", Karl Doehring, "Aliens, Expulsion and Deportation", in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. I, 1992, p. 108. "Very commonly, an alien's deportation may be ordered ... for breach of immigration law", Richard Pender, op. cit., p. 467-468 (citation omitted). "The alien can be expelled or deported at any time if it is discovered later that he or she entered the country illegally, unless the alien can benefit from a local statute of limitations, an amnesty or a pardon", Louis B. Sohn and Thomas Buergenthal (eds.) (op. cit.), p. 90. See also "*Régles internationles sur l'admission et l'expulsion des étrangers*, op. cit., art. 28, paras. 1 and 2. The analysis that follows of the grounds for expulsion listed as (i) to (n) are taken from Expulsion of aliens. Memorandum by the Secretariat, op. cit., paras. 326-339, 377-380, 381-390, 408-417 and 422.

[412] The rights of non-citizens.

[413] African Commission on Human and Peoples' Rights, Communication No. 159/96, Union Interafricaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme du Sénégal et Association Malienne des Droits de l'Homme v. Angola, Eleventh Annual Activity Report, 1997-1998, para. 20.

cases,[414] the national laws of other States recognize illegal entry as a valid ground for the expulsion of an alien as noted by some authors.[415] The ground of illegal entry can be applied when expelling someone who is staying or residing in the State without having first received entry authorization, or who is otherwise inadmissible.[416] The alien's unintentionally illegal entry, or the illegal entrant's accidental admission to the State, may or may not statutorily lead to the State's legitimation of the entry.[417] Stowaways, whether[418] or not[419] defined as a special category of aliens in the relevant law, may be subject to expulsion either because of their status[420] or on the same grounds as other aliens.

185. Among the specific grounds for expulsion relating to illegal entry are the situations in which an alien (1) enters or attempts to enter when the borders have been closed temporarily to aliens[421] or to a particular group of aliens,[422] or at a place or time not designated as an authorized crossing point;[423] (2) evades, obstructs or attempts to evade or obstruct immigration controls or authorities,[424]

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[414] See *Seyoum Faisa Joseph v. U.S. Immigration and Naturalization Service*, op. cit. ("Mr. Joseph arrived in this country as a stowaway and therefore is classified under the INA as "excludable").

[415] "In most statutes governing immigration, the right of expulsion of deporation is a sanction for the provisions relating to exclusion, and numerous expulsions are founded on the charge of presence in the territory in violation of its laws or the regulations concerning the admission of foreigners." Edwin Montefiori Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, pp. 51-52. "The municipal law systems examined display a perhaps unremarkable consistency in their choice of grounds for expulsion. Generally, an alien will render himself liable to deportation if he qualifies under one or more of the following heads: 1. Entry in breach of immigration law ..." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 255, Guy Goodwin-Gill, op. cit., p. 255.

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

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

[418] United States, INA, sect. 101(a)(49).

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

[420] Kenya, 1967 Act, art. 8; and United States, INA, sects. 212(a)(6)(D) and 235(a)(2).

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

[422] Australia, 1958 Act, arts. 177, 189-90, 198, 230, 249(1)(a) and 251; and Nigeria, 1963 Act, art. 25.

[423] Argentina, 2004 Act, arts. 29 and 37; Australia, 1958 Act, arts. 189-90; Chile, 1975 Decree, arts. 3 and 69; Czech Republic, 1999 Act, sect. 9(1); Guatemala, 1986 Decree-Law, art. 74; Japan, 1951 Order, art. 2; Nigeria, 1963 Act, art. 16; Paraguay, 1996 Law, art. 79(3); Tunisia, 1968 Law, art. 4; and United States, INA, sects. 212(a)(6)(A), 271(b) and 275(a)(1), (b).

[424] Argentina, 2004 Act, arts. 29 and 37; Australia, 1958 Act, arts. 190, 230-31, 233; Brazil, 1980 Law, art. 124(I); Chile, 1975 Decree, art. 69; Guatemala, 1986 Decree-Law, art. 74; Italy, 1998 Decree-Law No. 286, art. 13(2)(a), 1998 Law No. 40, art. 11(2); Japan, 1951 Order, art. 24(2); Nigeria, 1963 Act, art. 46; Paraguay, 1996 Law, arts. 79(3) and 81(1); Portugal, 1998 Decree-Law, art. 99; United States, INA, sect. 275(a)(2). Persons may be characterized as stowaways on the basis of such acts (Australia, 1958 Act, arts. 230-31, 233). In order to identify and exclude such stowaways, a State may require landing ships to submit their manifests to the relevant authority (Australia, 1958 Act, art. 231; and Nigeria, 1963 Regulations (L.N. 93), art. 8(2)), or permit a search of the ship by the relevant authority (Republic of Korea, 1992 Act, arts. 69-71).

including with respect to an entry inspection[425] or a required fee;[426] (3) lacks required documents,[427] or presents ones which are either damaged or unusable;[428] (4) presents forged or misleading documents or other information;[429] (5) fails, for whatever reason, after crossing the border to obtain the necessary entry documents, correct a violation or regularize the alien's status;[430] (6) violates the terms of the alien's transitory presence in the State's territory;[431] or (7) is considered to be

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

[426] Poland, 2003 Act No. 1775, art. 21(1)(1).

[427] The alien may in this respect fail to hold, present or be eligible for any or all necessary documentation, including a passport or visa, or to provide any or all necessary information (Australia, 1958 Act, arts. 177, 190, 229 and 233A; Belarus, 1999 Council Decision, art. 2, 1993 Law, art. 20(4); Brazil, 1980 Law, arts. 124(VI) and 127; Chile, 1975 Decree, arts. 15(7) and 65(1); Czech Republic, 1999 Act, sect. 9(1); France, Code, art. L511-1(1); Italy, 1998 Decree-Law No. 286, art. 10, 1998 Law No. 40, art. 5; Japan, 1951 Order, art. 24(1)-(2); Kenya, 1967 Act, arts. 4(2) and 7; Nigeria, 1963 Act, arts. 18 and 46(3)(b); Panama, 1960 Decree-Law, arts. 58 and 60; Paraguay, 1996 Law, art. 79(1); Poland, 2003 Act No. 1775, art. 21(1); Tunisia, 1968 Law, art. 5; and United States, INA, sects. 212(a)(7) and 275(a)). The alien's entry may also be illegal due to a visa or other necessary document that has been cancelled or is susceptible to cancellation prior to or upon the entry, even if the entry occurs during an otherwise legal stay (Australia, 1958 Act, arts. 229, 232 and 252; Bosnia and Herzegovina, 2003 Law, art. 47(1)(d), (3); Chile, 1975 Decree, art. 65; Czech Republic, 1999 Act, sect. 9(1); Portugal, 1998 Decree-Law, art. 13(4); and Sweden, 1989 Act, sects. 2.9-10), or if the alien's visa is of insufficient duration to cover the whole of the alien's expected stay (Czech Republic, 1999 Act, sect. 9(2)-(3)).

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

[429] Argentina, 2004 Act, arts. 29(a), 35; Australia, 1958 Act, arts. 233A and 234, 236; Belarus, 1993 Law, art. 20(4); Brazil, 1980 Law, arts. 64, 124(XIII), 127; Bulgaria, 1998 Law, art. 3; Canada, 2001 Act, art. 40(1)(a)-(b); Chile, 1975 Decree, arts. 63(3), 65(1)-(2) and 68; China, 1986 Law, arts. 29-30; Czech Republic, 1999 Act, sect. 9(1); Guatemala, 1999 Regulation, art. 97, 1986 Decree-Law, art. 73; Italy, 1998 Decree-Law No. 286, arts. 4, 8 and 10; Japan, 1951 Order, arts. 22-4(1)-(4) and 24(3); Kenya, 1967 Act, art. 7; Republic of Korea, 1992 Act, arts. 46(1-2), 89(1)(2); Nigeria, 1963 Act, art. 46(3)(a); Panama, 1960 Decree-Law, art. 61; Paraguay, 1996 Law, arts. 38, 79(1), 81(2), 108(1) and 110-11; Poland, 2003 Act No. 1775, art. 21(4); Portugal, 1998 Decree-Law, art. 13(4); Russian Federation, 2002 Law No. 115-FZ, arts. 7(4), 9(4) and 18(9)(4), 1996 Law, art. 26(5); Sweden, 1989 Act, sects. 2.9-10 and 7.18; United Kingdom, 1971 Act, sects. 24A(1)(a) and 33(1) (as amended by the Asylum and Immigration Act 1996); and United States, INA, sects. 212(a)(6)(C) and 275(a)(3). An alien may be expressly defined on this basis as a stowaway (Japan, 1951 Order, art. 74).

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

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

undesirable[432] or otherwise unsuitable for entry into the State's territory based either on the alien's lifestyle or perceived personal qualities,[433] or on the alien's past breach of the State's conditions for entry or stay.[434]

186. The expulsion of an alien on this ground may be affected by: (1) the alien's route of arrival;[435] (2) international considerations such as a special arrangement between the alien's State and the State entered,[436] any relevant international agreement or convention,[437] or the request or requirement of an international body;[438] (3) intertemporal considerations such as the timing of the alien's entry relative to the relevant legislation's entry into force,[439] or the relevant law in force at the time of the alien's entry;[440] or (4) the amount of time that has passed since the alien's entry into the State's territory.[441]

187. The relevant national legislation may expressly permit the application of criminal penalties in addition to expulsion when grounds relating to illegal entry exist.[442] It may likewise specify that the expulsion shall take place after the completion of the sentence imposed.[443] A State may apply to the alien's dependents the alien's grounds for expulsion relating to illegal entry.[444]

188. National practice in some jurisdictions, as exemplified by the rulings of national courts and tribunals, also supports the validity of expulsion on the ground

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

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

[434] The alien may in this respect have failed to comply during a previous stay with either the expelling State's exit requirements (Russian Federation, 1996 Law, art. 26(5)-(6)), or more generally with the laws or obligations placed upon aliens (Belarus, 1993 Law, art. 20(3); and Czech Republic, 1999 Act, sect. 9(1)).

[435] Nigeria, 1963 Act, arts. 16, 25.

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

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

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

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

[440] Australia, 1958 Act, art. 14(2); Kenya, 1967 Act, art. 3(1)(i); and United States, INA, sect. 237(a)(1)(A).

[441] Sweden, 1989 Act, sect. 4.2.

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

[443] Chile, 1975 Decree, art. 69; and Guatemala, 1986 Decree-Law, art. 74.

[444] Canada, 2001 Act, art. 42(a)-(b).

of illegal entry or presence.[445] However, where an individual has maintained a residence in the territorial State for an extended period of time, some national courts have ruled that mere illegal presence is not sufficient to support a decision of expulsion.[446]

(j) Breach of conditions for admission

189. An alien may be lawfully admitted to the territory of a State in accordance with its national immigration law subject to certain conditions relating to the admission or the continuing presence of the alien in the State. Such a legal alien may acquire the status of an illegal alien by violating these conditions. Breach of the conditions for the admission or continuing presence of an alien has been recognized as a valid ground for expulsion in State practice.[447]

190. The national laws of a number of States provide for the expulsion of aliens who have violated conditions for admission, such as those relating to the duration of their stay, the purpose of their stay and the permissible activities during their stay in the territory of the State.[448] A breach of the conditions for admission as a ground for expulsion may be broadly defined as illegal residence or presence,[449] a lack of grounds to justify the alien's stay,[450] the alien's undesirability,[451] a violation of any

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[445] See, e.g., *United States ex rel. Tom Man v. Murff, District Director, INS*, Court of Appeals for the Second Circuit, 264 F.2d 926, 3 March 1959; *Khan v. Principle Immigration Officer*, Supreme Court of South Africa, Appellate Division, 10 December 1951.

[446] See, e.g., *In re Rojas et al.*, Supreme Court of Costa Rica, 26 July 1938; *Homeless Alien (Germany) Case*, Federal Republic of Germany, Federal Administrative Supreme Court, 30 September 1958, *International Law Reports*, vol. 26, 1958-II, Elihu Lauterprecht (ed.), pp. 393-395; Re Sosa, Supreme Court of Argentina, 23 March 1956; Re Leiva, Cámara Nacional de Apelaciones de Resistencia, Argentina, 20 December 1957.

[447] "The power of expulsion or deportation may be exercised if an alien's conduct or activities after being admitted into the state violate certain basic rules. Such conduct or activities include: 1. Residence or stay in the territory in violation of the conditions of entry…" Louis B. Sohn and Thomas Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 90-91. "State practice accepts that expulsion is justified… (b) for breach of the conditions of admission…" Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 262.

[448] "The municipal law systems examined display a perhaps unremarkable consistency in their choice of grounds for expulsion. Generally, an alien will render himself liable to deportation if he qualifies under one or more of the following heads … 2. Breach of the conditions of entry; for example, working without a work permit." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 255. The review of national legislation and case law on this point is taken from Expulsion of Aliens, Memorandum by the Secretariat, op. cit., paras. 335-338.

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

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

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

part of the relevant law,[452] or the violation of any condition of stay or residence.[453] More specific instances include the alien's failure to depart after the expiry of the permit or authorized period of stay,[454] defects in the permit,[455] the permit's revocation or refusal when protected status is not at stake,[456] the alien's failure otherwise to seek, obtain, hold or be eligible for a required permit,[457] impediments to the alien settling in the State;[458] the insufficiency of the alien's marriage to

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

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

[454] Bosnia and Herzegovina, 2003 Law, art. 57(1)(a); Brazil, 1980 Law, arts. 124(II) and 127; Chile, 1975 Decree, art. 71; Finland, 2004 Act, sect. 143(3); France, Code, arts. L511-1(2) and L621-1; Guatemala, 1986 Decree-Law, art. 76; Italy, 1998 Decree-Law No. 286, art. 13(2)(e); Japan, 1951 Order, art. 24(2)-3, (4)(b), (7); Madagascar, 1994 Decree, art. 18, 1962 Law, art. 12; Nigeria, 1963 Act, art. 19(1), (4); Paraguay, 1996 Law, art. 81(3); Russian Federation, 1996 Law, art. 25.10, Administrative Code, Chapter 18, art. 18.8; Spain, 2000 Law, arts. 53(a) and 57(1); Sweden, 1989 Act, sect. 4.3; and United States, INA, sect. 212(a)(9)(B)-(C).

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

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

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

[458] Argentina, 2004 Act, art. 29(j).

establish a right to stay,[459] or the presentation of forged or otherwise misleading documents or information for any purpose of stay not involving marriage.[460]

191. Grounds relating to the breach of conditions for admission may also exist when the alien fails to comply with integration or assimilation requirements or expectations,[461] a restriction on residence or place of stay,[462] or an obligation or prohibition placed either on all aliens or on the alien individually or as a member of a class,[463] such as one to register or notify authorities when so required, as when relevant documents are lost or when the alien changes residence, domicile or nationality,[464] to present proof of identification or authorization for presence in the State's territory when required to do so,[465] to refrain from travel to a forbidden area,[466] not to take up residence or obtain permission to reside outside the State,[467] or not to depart the State for longer than a certain period[468] or without authorization.[469]

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

[460] Argentina, 2004 Act, arts. 29(a) and 62(a); Belarus, 1998 Law, arts. 14-15; Bosnia and Herzegovina, 2003 Law, arts. 27(1)(f) and 47(1)(f); Brazil, 1980 Law, arts. 64(a), 124(XIII) and 127; Chile, 1975 Decree, arts. 64(2) and 66; China, 1986 Law, arts. 29-30, 1986 Rules, art. 47; Nigeria, 1963 Act, art. 46(3)(a) and (c); Panama, 1960 Decree-Law, art. 61; Paraguay, 1996 Law, arts. 81(2), 108(1), 110-11; Russian Federation, 2002 Law No. 115-FZ, arts. 7(4), 9(4) and 18(9)(4); Spain, 2000 Law, arts. 53(c) and 57(1); Sweden, 1989 Act, sects. 2.9-10; Switzerland, 1931 Federal Law, arts. 9(2)(a) and (4)(a); United Kingdom, 1971 Act, sect. 24A(1)(a); and United States, INA, sects. 101(a)(50)(f)(6); 212(a)(6)(C), 237(a)(3), 246(a)-(b) and 266(c).

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

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

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

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

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

[466] China, 1986 Law, arts. 29-30, 1986 Rules, art. 46; and Switzerland, 1931 Federal Law, art. 13e.

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

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

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

192. The expulsion of an alien on this ground may be affected by a special arrangement between the alien's State and the State in which the alien is staying,[470] or any relevant international agreement or convention.[471] The relevant legislation may expressly permit the application of criminal penalties in addition to expulsion when grounds exist under this heading.[472] It may likewise specify that the expulsion shall take place after the completion of the sentence imposed.[473]

193. The national courts of several States have upheld a breach of conditions for admission as a valid ground for the expulsion of aliens.[474]

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

(k) Economic grounds

195. Economic reasons may be considered as a relevant factor in determining the expulsion of an alien on the basis of the public order or welfare of a State (*ordre public*) rather than as a separate ground under international law. Economic reasons have been rejected, however, as a valid consideration with respect to the expulsion

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

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

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

[473] Bosnia and Herzegovina, 2003 Law, art. 47(4).

[474] See, e.g., *INS v. Stevic, U.S. Supreme Court*, 467 U.S. 407, 104 S.Ct. 2489, 81 L.Ed.2d 321, 5 June 1984 (appeal against deportation proceedings commenced respondent when he overstayed his 6-week period of admission); *Hitai v. INS*, U.S. Court of Appeals for the Second Circuit, 343 F. 2d 466, 29 March 1965 (appellant violated the terms of his permission to enter territorial State by accepting employment); *United States ex rel. Zapp et al. v. District Director of Immigration and Naturalization*, U.S. Court of Appeals for the Second Circuit, 6 June 1941 (appellants expelled for violating the conditions of their admission by ceasing to exercise the profession they were admitted to exercise); *Urban v. Minister of the Interior*, Supreme Court of South Africa, Cape Provincial District, 30 April 1953 (alien expelled for engaging in an occupation within the first three years of residence in South Africa other than that stated in the application form); *Simsek v. Minister of Immigration and Ethnic Affairs and Another*, High Court of Australia, 10 March 1982 (appellant expelled after overstaying a three-month temporary entry permit). In addition, a group of cases exists wherein ship's crew members violate the conditions of their admission to the territorial State by remaining in the territorial State after the ship sets sail. See, e.g., *Re Immigration Act Re Vergakis*, British Columbia Supreme Court, 11 August 1964, *International Law Reports*, volume 42, E. Lauterpacht (ed.), pp. 219-226; *United States ex rel. Tie Sing Eng v. Murff, District Director, INS*, Southern District of New York, 6 October 1958, 165 F. Supp. 633, affirmed *per curium*, 266 F.2d 957 (2d Cir. 1959), *certiorari* denied, 361 U.S. 840, 4 L.Ed. 2d 79, 80 Sup. Ct. 73 (1959), *International Law Reports*, vol. 26; 1958-II, Elihu Lauterprecht (ed.), pp. 509-512; *Sovich v. Esperdy*, U.S. Court of Appeals for the Second Circuit, 15 May 1963; *Re* Sosa, Supreme Court of Argentina, 23 March 1956.

of EU citizens. Nonetheless, economic reasons have been recognized as a valid ground for the expulsion of aliens in the national laws of a number of States.[475]

196. The Protocol to the European Convention on Establishment recognizes economic reasons as a possible consideration in the expulsion of aliens on the ground of *ordre public*. The Protocol provides a definition of *ordre public* which includes situations in which aliens are unable to finance their stay in the country or intend to work illegally.[476]

197. In contrast, within the European Union, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 prohibits the expulsion of Union citizens and their family members on grounds of public policy, public security or public health with a view to serving economic ends. The Directive further provides in article 14, paragraph 3, as follows:

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

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

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

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[475] "The municipal law systems examined display a perhaps unremarkable consistency in their choice of grounds for expulsion. Generally, an alien will render himself liable to deportation if he qualifies under one or more of the following heads: ... 3. Becoming a 'public charge', to include illness and 'living off social security'." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 255. See also *Règles internationales*, note 56 above, art. 46. "As a rule expulsion is only resorted to in case where a person has committed some offence or has become a charge on public funds." Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951 (Arts. 32 and 33)*, 1963, published by Division of International Protection of the United Nations High Commissioner for Refugees, 1997, *ad art. 33*, para. (2).

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

[476] Protocol to the European Convention on Establishment, *Sect. III — Arts. 1, 2 and 3* (Paris, 13 December 1955).

199. At the domestic level, the national laws of several States include economic reasons as a ground for the expulsion of aliens.[477] The alien's dependents may be subject to expulsion under economic grounds if such grounds exist to expel the alien.[478] In particular, a State may expel or refuse entry to an alien who (1) is in debt,[479] a "gypsy",[480] a vagrant or a person lacking or unable to show means of subsistence,[481] homeless at a given time or for a prolonged period,[482] or unable or unwilling to support the alien's dependents;[483] (2) requires or threatens to require social assistance;[484] (3) lacks a profession, occupation or skills;[485] (4) is idle,[486] or fails to undertake the job or activity for which the entry permit was granted;[487] (5) cannot exercise the alien's chosen profession, or loses or leaves a job;[488] (6) is disabled or handicapped and thus unable to work;[489] or (7) acts against or threatens the State's economic order[490] or its national economy,[491] industry,[492] trade,[493] workers[494] or livelihood.[495]

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[477] The review of national legislations and jurisdiction on this is taken from Expulsion of Aliens. Memorandum by the Secretariat, subject op. cit., paras. 412-414.

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

[479] Italy, 1998 Law No. 40, art. 11(4)(a).

[480] Panama, 1960 Decree-Law, art. 37(b).

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

[482] Germany, 2004 Act, art. 55(2)(5); and Russian Federation, 2002 Law No. 115-FZ, arts. 7(9) and 9(9).

[483] Canada, 2001 Act, art. 39; Kenya, 1967 Act, art. 3(1)(a); and Russian Federation, 2002 Law No. 115-FZ, arts. 7(8) and 9(8).

[484] Such a public charge or need for social assistance may involve either the alien or the alien's dependents (Canada, 2001 Act, arts. 38(1)(c) and (2), 39; Chile, 1975 Decree, arts. 15(4), 17, 64(4), 65(1) and 66; Japan, 1951 Order, art. 5(3); Nigeria, 1963 Act, art. 18(1)(a); Panama, 1960 Decree-Law, art. 37(e); Republic of Korea, 1992 Act, art. 11(1)(5), (1)(8); Switzerland, 1931 Federal Law, art. 10(1)(d) and (2)-(3); and United States, INA, sects. 212(a)(4), 237(a)(5) and 250).

[485] Paraguay, 1996 Law, art. 6(7).

[486] Switzerland, 1949 Regulation, art. 16(2).

[487] Kenya, 1967 Act, art. 6(1)(a); compare Argentina, 2004 Act, art. 65, which prohibits expulsion for failure to fulfil a work contract obligation unless it was a prerequisite for the grant of the permit.

[488] Chile, 1975 Decree, arts. 15(4), 17, 64(4), (7), 65(1) and 66; and Kenya, 1967 Act, art. 6(1)(b).

[489] Brazil, 1981 Decree, art. 52(III)-(IV); Panama, 1960 Decree-Law, art. 37(e); and Paraguay, 1996 Law, art. 6(3). An exception may be made where such disability or handicap only partially reduces the alien's ability to work (Paraguay, 1996 Law, art. 7(2)).

[490] Republic of Korea, 1992 Act, art. 11(1)(4) and (1)(8).

[491] Brazil, 1981 Decree, arts. 101 and 104, 1980 Law, arts. 64, 67 and 70; Honduras, 2003 Act, art. 89(3); and Panama, 1960 Decree-Law, art. 38.

[492] Japan, 1951 Order, art. 7(2).

[493] Panama, 1960 Decree-Law, art. 36.

[494] Brazil, 1980 Law, arts. 2 and 64; and Panama, 1960 Decree-Law, arts. 36 and 37(e).

[495] Brazil, 1980 Law, arts. 2 and 64.

200. National legislation may prohibit the expulsion of an alien on the basis of such grounds once the alien has been in the territory of the State for a certain period of time.[496] The expulsion of an alien on this ground may depend on whether the alien is a national of a State having a special arrangement with the expelling State.[497] Depending on the relevant national legislation, these grounds may[498] or may not[499] also apply to aliens with transitory status.

201. National jurisprudence has also recognized economic reasons as a valid ground for expulsion.[500]

(l) Preventive measures and deterrent

202. The expulsion of aliens has been used to prevent or deter certain conduct. The expulsion of aliens on such grounds appears to have diminished by the early twentieth century.[501] As mentioned previously, in *Carmelo Bonsignore v. Oberstadtdirektor der Stadt Köln*, the European Court of Justice held that public policy grounds for expulsion may only be invoked if they are related to the personal conduct of the individual concerned, and that reasons of a "general preventive nature" are not admissible.[502] Nonetheless, it has been suggested that international law does not prohibit this ground for expulsion in the absence of a treaty obligation.[503]

(m) Reprisal

203. The expulsion of aliens has sometimes been used a means of reprisal, particularly in cases of mass expulsion, which is considered separately. The

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[496] Austria, 2005 Act, art. 3.53(2)(5)-(6); Sweden, 1989 Act, sects. 2.11 and 4.2; and United States, INA, sect. 237(a)(5).

[497] Sweden, 1989 Act, sect. 2.14.

[498] Lithuania, 2004 Law, art. 7(3); Nigeria, 1963 Regulations (L.N. 93), arts. 5(4) and 6(4); Poland, 2003 Act No. 1775, art. 15(1); and Portugal, 1998 Decree-Law, art. 14(1).

[499] Japan, 1951 Order, art. 24(4)(a).

[500] See, for example, *Pieters v. Belgian State (Minister of Justice)*, Conseil d'État, Belgium, 30 September 1953, *International Law Reports*, 1953, Hersch Lauterpacht (ed.), p. 339 ("In this case the order states that the presence of the complainant is considered harmful to the economy of the country. It appears from the file that the expulsion was ordered by reason of the non-payment by the complainant of taxes due from him.").

[501] "The following features of recent developments in the exercise of the power of expulsion may be noted:[…] it is now rarely used as a preventive measure". Edwin Montefiore Borchard, op. cit., p. 55.

[502] "The reply to the questions referred should therefore be that art. 3, paras. 1 and 2 of Directive No. 64/221 prevents the deportation of a national of a member state if such deportation is ordered for the purpose of deterring other aliens, that is, if it is based, in the words of the national court, on reasons of a 'general preventive nature'." Court of Justice of the European Communities, *Carmelo Bonsignore v. Oberstadtdirektor der Stadt Köln*, op. cit., para. 7.

[503] "States generally are not prevented from using expulsion as a deterrent measure, i.e. expelling an individual as a warning for others. Such actions, however, may be declared unlawful by treaties (e.g. by the Treaty establishing the European Economic Community, art. 48, as interpreted by the Court of Justice of the European Communities." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), op. cit., p. 111.

expelling State may indicate other grounds for the expulsion of aliens which nonetheless appear to be reprisals.[504]

204. The legality of the expulsion of aliens as a means of reprisal has been questioned in the literature.[505] Similarly, according to the Institute of International Law, retaliation or retorsion does not constitute a valid ground for expelling an alien who has been expressly authorized to reside in a country:

> "The following rules shall not apply in cases of retaliation or retorsion. Nevertheless, aliens residing in the country with the express authorization of the Government may not be deported on the grounds of retaliation or retorsion".[506]

(n) Other grounds

205. There may be other grounds for the expulsion of aliens that are not as widely recognized or as relevant in contemporary practice, for example, bringing an unjust diplomatic claim.[507]

206. Many old grounds, which represented the moral values of the day, are now obsolete. For example, although prostitution remains an offence in many countries around the world, expulsion on the ground of prostitution is not practised anywhere. The determination to protect victims of human trafficking or enforced prostitution

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[504] "In the nineteenth century, collective expulsions were sometimes stated to be justifiable as a reprisal. Rolin Jacquelmyns, the distinguished Belgian jurist stated that the collective expulsion of aliens in peacetime is only permissible by way of reprisal: see in his article 'Droit d'Expulsion des Etrangers', *Revue de droit international* (1888) at p. 498. Indonesia justified her expulsion of Dutch nationals in 1957 on the grounds of Holland's failure to negotiate over West Irian. Dahm rightly, it is submitted, considers this justification as having no foundation in international law, Völkerrecht, Vol. 1 at p. 529, and it appears his view is correct." Vishnu D. Sharma and Frank Wooldridge, op. cit., p. 411, n. 85. "When in December 1934 Yugoslavia expelled a great number of Hungarian subjects as a reprisal against alleged complicity of Hungarian authorities in the activities of terrorists, it was explained that, in view of a large measure of unemployment in Yugoslavia, the persons in question lived in Yugoslavia under periodically renewable permits only: Toynbee, *Survey*, 1934, pp. 573-577." Robert Jennings, and A. Watts, op.cit., p. 944, n. 16. "General Amin did not state that the expulsions were a reprisal for Britain's refusal to grant a larger number of special vouchers to her Ugandan citizens and nationals […].He did, however, state that he had been inspired by God, and intended to teach Britain a lesson when he made his original announcement concerning the expulsions […]" Vishnu D. Sharma and Frank Wooldridge, op.cit., p. 411 and n. 83.

[505] "From its function, it follows that the power of expulsion must not be 'abused'. If its aim and purpose are to be fulfilled, the power must be exercised in good faith and not for some ulterior motive, such as […] an unlawful reprisal." Guy S. Goodwin-Gill, op. cit., pp. 307-308 and n. 1 (the note stating that "[t]here are difficulties in determining when a reprisal is lawful. Brownlie observes that, in principle, it should be a reaction to a prior breach of legal duty and be proportionate: *Principles of Public International Law* (2nd ed., 1973), p. 524."). Reprisals which may be contrary to international *jus cogens* can hardly be permissible. Vishnu D. Sharma and Frank Wooldridge, op. cit., p. 411 and n. 84 (referring to "the dissenting opinion of Judge Tanaka in the *South West Africa* cases (1966) I.C.J. Reports at para. 298, which states that human rights, being derived from natural law, are part of the *jus cogens*").

[506] *Règles internationales sur l'admission et l'expulsion des étrangers*, op. cit., art. 4. [French original]

[507] "In some countries of Latin-America the bringing of an unjust diplomatic claim against the State, unless it be adjusted in a friendly manner, is a ground for expulsion". Edwin Montefiore Borchard, op. cit., p. 52, n. 3 (Constitution of Nicaragua, art. 12).

could justify, at most, expulsion on the ground of assisting or benefiting from the prostitution of another. Another example: no State today would seek expulsion on the ground of ill-health, regardless of its nature or seriousness. On the contrary, human rights associations are calling for illness to be recognized as a ground for non-expulsion, especially when the patient cannot receive appropriate care in his or her country or in the country to which he or she is expelled.[508] True, the European Court of Human Rights delivered a judgment on 27 May 2008 where it held that Great Britain, in expelling from its territory a Ugandan suffering from HIV/AIDS did not violate human rights. According to the Court, the expulsion did not constitute "inhuman or degrading treatment" as set out in article 3 of the European Convention for Protection of Human Rights and Fundamental Freedoms. Nonetheless, the Court did not intend in any way to legitimize the ground of expulsion based on illness, however serious. It is the risky behaviour of the person involved which constituted a risk for another person that served as the ground for the expulsion, and it is that behaviour which the Court wanted to "punish". That is why it considered that the same principles that applied in that case must also apply to expulsion of any person suffering from a naturally occurring illness, physical or mental. The idea that a patient may not constitute per se a ground for expulsion is corroborated by the domestic laws of some countries. The 2003 report of the *Observatoire du Droit à la santé des Etrangers* noted that: "it is in 1997 that the non-expellability of aliens 'suffering from a serious illness' was first included in a law. Since the Chevènement law of 1998, legislative provisions have expanded the conditions for protection against deportation (art. 25.8) and have incorporated the right of residence, which is sanctioned by the issuance by statute of a "private and family life" temporary residence card.

207. It is therefore highly likely that the cases examined above do not cover all the grounds for expulsion contained in different domestic laws, and any attempt to establish an exhaustive list on the subject would be illusory. Joseph-André Darut noted in the early nineteenth century that, in 1865, the Chamber of Representatives of Belgium rejected a proposal to indicate in a legislative text the cases where the right of expulsion will be exercised, justifying its decision as follows: "The importance of facts often depends on the events in which they occur; this is why circumstances vary as the external situation changes, such that an act may be dangerous today but not tomorrow. Only the Government can determine at any time what is in the public interest".[509] As early as 1878, Pradier-Fodéré wrote on this subject that: "The determination of grounds belongs to the State and its Government, which are the only entities that can exercise sovereignty within the territory". Professor Laîné and Doctor Haenel then followed suit. When, during the same period, in a text published in 1893, Advocate General Desjardin wondered "how all the circumstances where public order and peace were compromised could be specified", he replied by repeating almost word for word the argument raised by the Belgian Chamber of Representatives.[510] In the same vein, Martini wrote: "[...] it appears to us *impossible*, practically speaking, to list accurately the cases where expulsion should be invoked".[511] Like Darut, Piédelièvre says: "that it depends on

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[508] See Agnès Lenoire, "L'Europe et les expulsions des étrangers malades", www.cn-feux.com/billets/leurope-et-les-expulsions-detrangers-malades.php.

[509] Cited by Joseph-André Darut, op. cit., p. 64.

[510] All these authors are cited by Alexis Martini, op. cit., pp. 86-87.

[511] Alexis Martini, op. cit., p. 86.

the circumstances; only the competent authority should decide on the factors for its determination".[512]

208. The late-nineteenth-century authors who examined the issue of expulsion of aliens as well as contemporary practice of international courts on the subject all agree that the State has considerable latitude in making a determination based on the circumstances. However, the State does not have a free hand in this regard. With respect to an act that affects relations between States and the international legal order, international law cannot be indifferent to the manner in which the State justifies expulsion. It is the reference by which the international validity of the act of expulsion will be determined.

209. In this regard, contemporary law allows for judicial review of decisions concerning such acts. Expulsion does not fall within the scope of what some domestic laws call "governmental acts"[513] which are not subject to any judicial review, because it involves the rules of human rights protection. Similarly, expulsion falls outside the ambit of what international law considers the exclusive jurisdiction of the State, which is not subject to international review. A judge may review the criteria that are used to determine grounds for expulsion, to verify whether they comply not only with the domestic laws of a State, but also with relevant rules of international law. In this regard, public order and public security, as we have seen, are established in domestic laws and are sanctioned in international law as legitimate grounds for the expulsion of aliens. The law of the European Community, in particular the case law, provides some clarifications, and its evaluation criteria may be of great assistance for the purposes of codification and gradual development of rules governing the grounds for expulsion of aliens. The expelling State may invoke any other grounds, provided they do not breach the rules of international law.

210. Considering the aforementioned developments, the following single draft article on the grounds for expulsion may be proposed, and the analysis that led to its development may be reflected in the commentaries in order to clarify the scope of its provisions:

Draft article 9: Grounds for expulsion

1. Grounds must be given for any expulsion decision.

2. A State may, in particular, expel an alien on the grounds of public order or public security, in accordance with the law.

3. A State may not expel an alien on a ground that is contrary to international law.

4. The ground for expulsion must be determined in good faith and reasonably, taking into account the seriousness of the facts and the contemporary nature of the threat to which they give rise, in the light of the circumstances and of the conduct of the person in question.

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[512] Robert Piédelièvre, *Précis de droit international*, T. 1, No. 210, p. 182.

[513] See inter alia, in the case of France, Maurice Hauriou, note under C.E. 18 December 1891, *Vandelet et Faraud*, Sirey 1983, p. 129.

E. Conditions in which the person being expelled is detained

211. Let us begin with a semantic clarification. National legislations do not necessarily use one and the same concept to describe the situation of an alien who is being detained in a given place, conceived specially for this purpose, pending his or her actual expulsion. While the majority of countries use the term "detention" to designate this situation, the preferred legal term in French is "*rétention*" or even "*maintien*". In France, the term "*détention*" is reserved for situations in which the deprivation of liberty of origin is strictly punitive and is enforced in a penal establishment over a long or very long period, whereas "*rétention*" and "*retenue*" refer to a relatively brief confinement within the jurisdiction, not only of a punitive authority,[514] but also of a parapunitive[515] or an administrative authority.[516] In the case of aliens "retenus" or "maintenus" at the border, the purpose is not to penalize a criminal offence but rather to take a precautionary step as part of an administrative procedure relating to an admission to or removal from the territory. Hence, "*rétention*" takes place, not in penitentiaries, but in facilities under the control of the police.[517]

212. However, as has been observed, the semantic propriety of the terms "*rétention*" and "*retenue*" ill conceals the fact that, in all instances, the person is being subjected to a deprivation of liberty that *stricto sensu* is directly contrary to the right to security guaranteed by article 5 (of the European Convention on Human Rights).[518] Accordingly, in the analysis that follows, the French term "*détention*" will be used in a generic sense that also covers the term "*rétention*", with both designating a situation of deprivation of liberty.

213. The conditions in which aliens are detained prior to expulsion are among the most criticized aspects of State practice with respect to expulsion. It is generally during this phase of expulsion that some of the worst violations of an alien's rights occur. This report will illustrate the poor conditions with a few examples taken from the practice in certain States, before turning to the provisions of some national laws and to the international rules in this area.

1. Examples of detention conditions that violate the rights of aliens who are being expelled

214. The Special Rapporteur wishes to emphasize that the cases presented here serve purely as illustrations. The selection has been dictated solely by the availability of information, not by personal preference. It is not the intent of this presentation to stigmatize the countries mentioned, nor, of course, is there any claim to comprehensiveness.

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[514] For example, "*retenue*" of a minor between 10 and 13 years old authorized by article 4 of the ordinance of 2 February 1945.

[515] For example, "*retenue*" by customs.

[516] For example, the placement in "rétention" of an illegal alien as specified by the Code on the Entry and Stay of Aliens and on the Right to Asylum.

[517] See François Julien-Laferrière, "La rétention des étrangers aux frontières françaises", *Cultures et Conflits* No. 23 (1996), pp. 7-43 (available at http://www.conflits.org/index2270.html).

[518] Renée Voering-Joulin, "Droit à la sûreté", *JurisClasseur Libertés* Fasc. 620, 20 September 2007, p. 11.

215. *Germany*. The idea of interning expellees in specific locations seems to have gained ground slowly in the minds of Prussian and German leaders. The first cases of detention with a view to expulsion were de facto arrangements in which "the expellees were assembled in makeshift facilities", their expulsion having been blocked by the refusal to readmit them into their country of origin. This is what happened during the mass expulsions of 1885-1890, when the authorities refused to allow into their territory some Poles and some Jews who were Russian subjects.[519] A note by the Prussian Ministry of Foreign Affairs proposed that "the elements be placed in an internment camp, because that will make it possible to contain the housing shortage and discourage unauthorized immigration".[520] The assumption of power by Adolf Hitler and the installation of the Nazi dictatorship led, as we know, to a change in the scope and purpose of these internment ideas. It would be inappropriate to dwell here on detention as practised under this regime, whose excesses are well known. After the 1938 decree on the policing of aliens, which was the principal legal text on the subject until the 1965 Act, placement in detention centres was regulated by the Aliens Acts of 9 July 1990 and 30 June 1993. It has not been possible, however, to gain access to information on the conditions in those centres.

216. *Spain*. In recent years, Spain has been the preferred country of destination for many immigrants, some legal but the majority clandestine. In January 2007, there were approximately 10 official alien internment centres. They were situated in the provinces of Barcelona (Free Zone), Las Palmas (Matorral in Fuerteventura, Barranco Seco in Gran Canaria and Lanzarote), Tenerife (Hoya Fría), Málaga (Capuchinos), Madrid (Carabanchel), Valencia (Zapadores), Murcia (Sangonera la Verde) and Algeciras (La Pinera). There were also two temporary residence centres for immigrants (CETI), in Melilla and Ceuta, and the informal detention centres of questionable legality, such as those in the Straits, including the centre on Isla de Paloma (Tarifa), where sub-Saharan nationals are interned, the Las Heras centre (Algeciras), a former army barracks, the Almería centre, an industrial warehouse located in the fishing port and formerly used for cooking shellfish, where 113 immigrants rioted in November 2006 because of the conditions in which they were detained, and the centres in the Canary Islands.

The following extracts represent the essence of the complaints made about the majority of the centres by a Spanish human rights association[521] in reporting violations of basic rights by those centres:

Valencia: Zapadores Centre (former barracks)

"Many non-governmental organizations have reported violations of immigration regulations, poor health and hygiene conditions, absence of a resident doctor or social workers and, frequently, a high occupancy rate. In August 2006, 50 immigrants mutinied at the centre."

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[519] See Frank Paul Weber, "Expulsion: genèse et pratique d'un contrôle en Allemagne (partie 1)", *Cultures et Conflits* No. 23 (1996), pp. 107-153 (available at http: ww.conflits.org/index350html on 31 May 2009).

[520] Cited by Frank Paul Weber, op. cit.

[521] Asociación Pro Derechos Humanos de Andalucía (address: c. Blanco White No. 5, 41018 Sevilla, España 9, tel. (34) 954536270, e-mail: andalucia@alpha.org, website: www.apdha.org), "*Procédes d'expulsion et centres d'internement et de rétention en Espagne*", January 2007.

Murcia: Sangonera la Verde Centre

"Constant overcrowding owing to the availability of only 60 places. This is the Centre's biggest problem, and it creates serious health and security risks for the detainees. The Centre has experienced considerable difficulties in recent years and has had to deal with uprisings by detainees, the suicide of a female detainee awaiting expulsion to Russia, and the escape of two inmates in March 2005..."

Barcelona: Free-zone Centre

This Centre replaced the "notorious" "La Verneda" in the police station of the same name. It is described as "a cellar without natural light, poorly ventilated, lacking a courtyard..." and has been "denounced by all the non-governmental organizations and even the Ombudsman" on account of the frequent ill-treatment meted out there. "The centre has made prominent use of penitentiary features: electromagnetic closure system, common areas and cells, screens to separate visiting relatives from detainees, camera surveillance system, cells with bars..."

Málaga: Capuchinos Centre (former barracks)

This is one of the centres that have received the most complaints and that have a truly sinister history. The Capuchinos Centre began functioning in 1990, with room for 80 people. As early as 1992, the State Treasurer denounced the poor state of its facilities.[522] This past summer, the scandalous abuse of inmates induced the media to reveal the long list of shortcomings accumulated throughout its history and denounced by social organizations on multiple occasions: poor food, overcrowding, lack of health care, medication provided by the police because of the lack of health personnel, lack of interpreters, serious hygiene problems and badly deteriorated facilities. Since its inception, there have been two "suicides" and five cases of arson (three of them documented). Despite the shortness of its existence, it has had to close twice for improvements to be made, but there has been no reduction in the number of complaints about poor conditions.

As early as 1994, 46 inmates led the first hunger strike to protest against conditions at the Centre. In 1995, a female inmate of Brazilian nationality filed the first of many complaints about sexual abuse. In the same year, 103 immigrants, after being tranquillized with haloperidol, left "Hotel Capuchinos", as some officials liked to call it, and were flown in five military aircraft to Mali, Senegal, Cameroon and Guinea Conakry. Aznar, who had thus violated all manner of international standards, stated: "We had a problem and now we have solved it".

During the past month of June, the provincial police station in Málaga was unable to conceal any longer its discovery of goings-on which it itself described as being of a serious nature. They consisted of "night-time festivities in which the inmates participated and possibly ended up by having sexual relations with the officials". Six of the female inmates stated that they had been victims of sexual abuse. Seven members of the National Police Force were detained and six of them became the subjects of legal proceedings (three being accused of sexual assault and three others of failing to prosecute the offence). According to the record of

[522] We are reproducing word for word the passage on the Capuchinos Centre in the already cited article of Decio Machado published in the Diagonal (note in the aforementioned Association Report, No. 3).

proceedings, the female immigrants who did not go to the gatherings were insulted and threatened. The purpose of the gatherings was to "drink, dine and have sex", according to one of the victims. The head of security at the Alien International Centre was dismissed from his post, as was the director of the Centre, Luís Enrique López Moreno, who remains free but with charges against him. Two months later, a further incident occurred: an immigrant who was a witness to the sexual abuse described had an abortion at the Centre. The woman, of Brazilian origin, received no care for more than an hour after the police had been informed by other inmates, according to the only immigrant who was present and had not been deported at dawn of that same day. Moreover, the victim of the abortion would no longer be able to attend the abuse proceedings because she was subsequently deported, as were all the other female witnesses of sexual assaults. Her counsel accused the police of the crime of "failing in their duty to provide assistance". Lastly a delegation of non-governmental organizations accompanied Francisco Garrido, a deputy from the Green Party, in preparing a further report on the situation at the Centre.[523]

Algeciras: Pinera Centre

"The Asociación Pro Derechos Humanos de Andalucía (APDHA) reported the same problems at the majority of the centres: inadequate bathroom facilities and living accommodation, seasonal overcrowding, legal irregularities, shortcomings in the legal aid and interpretation service, a tightly restricted system of visits, difficulties of communication with the outside world…Moreover, as a former penitentiary centre, it has every appearance of being a prison."

Paloma Island Centre in Tarifa

"This 'reception' centre for illegal immigrants is located in the former military base of Tarifa and has out-of-date, run-down facilities and grossly substandard conditions of habitability (the facilities were repainted for the visit of the United Nations Rapporteur in 2003). The Centre comes under the Civil Guard, and the responsibility for the identification and administrative aspects of expulsion lies with the National Police.

"The use of this space was a temporary measure, adopted in 2002 by the Aznar government to accommodate the increased number of immigrants arriving at the Cádiz coastline. From being temporary, however, it became in actuality an extension of the alien internment centre in Algeciras.

"According to the Spanish Police Confederation, the Ministry of the Interior is deceiving public opinion, the Red Cross, citizens and officials by trying to conceal the location of this clandestine internment centre." The barracks functions as an extension of the internment centre in Algeciras but fails to meet any of the requirements for this type of facility.

"The immigrants sleep in two cells on mattresses placed on the floor. There is only one boiler with a two-hundred litre capacity for heating water to provide showers for approximately 120 people. When the pump breaks down, there is no running water."

[523] Available at http://www.malaga.acoge.org/docs/sensibilizacion/camp/informecie.pdf (ibid., No. 4).

Fuerteventura: Matorral Centre

"This is the probably the largest alien internment centre in Spain. It replaced the former centre located at the airport, which was severely criticized by Human Rights Watch, among others, in 2002 because of the terrible conditions experienced by the detainees.[524]

"According to the report on the visit by European Parliamentarians, the Centre resembles a real prison, the situation is appalling and the immigrants complained of not getting enough food."

Las Palmas: Barranco Seco Centre

"The complaint was made to the United Nations Special Rapporteur that some of the migrants had only three minutes a week to speak with the lawyer and that they did not know the status of their files."

Tenerife: Las Raíces Barracks

"In March 2006, Las Raíces Barracks was given temporary authority to accommodate 1,300 persons in tents.[525] However, this number has been exceeded for virtually the entire year. Located near Las Raíces Airport, it is in a very cold and unpleasant place and in terms of habitability the conditions are substandard. In September, approximately 150 immigrants managed to escape from Las Raíces, only to be detained subsequently nearby, some of them hiding in refuse bins."

Gran Canaria: La Isleta military encampment

"As reported by the Unified Police Syndicate in August [2006], rats live comfortably in the facility and refuse is everywhere. The facility 'was full of excrement, of flies and of insects of every kind, because the water with which the inmates showered and washed their few clothes formed stagnant pools and rivers of mud. Since no part of the encampment was paved, the dust must constantly have found its way into the army stores'.

"The immigrants have to urinate into empty bottles and leftover cardboard packaging, which they must traverse in order to wash. This is an inhumane situation for the inmates of this overcrowded facility."

217. *United States*. The United States Border Patrol and the Immigration and Naturalization Service (INS) are required to apprehend undocumented immigrants and have processing and detention centres available to them for the purpose. There are 34 crossing points on the United States/Mexico border, each with its own centre for processing undocumented immigrants. Of the 17 centres in the United States, 7 are on the border with Mexico, and one is in a military camp, on a coast guard

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[524] See www.hrw.org/spanish/informes/2002//inmigrantes.html (ibid., No. 5).

[525] See the Report on the public hearing of the European Parliamentarians in April 2006 (http://www.europarl.europa.eu/meetdocs/2004_2009/documents /pv/623/623483/623483es.pdf); see also the report of Amnesty International, June 2006 (www.es.amnesty.organisation/uploads/ txuseraitypdb/MisionCanarias01.pdf (ibid., No. 6).

base in Boston.[526] According to one author, "many of those repatriated are said to be apprehended five, or even more, times in a single day ... Moreover, since most of these immigrants are extremely poor, it seems quite unrealistic to expect them to be able to afford legal assistance. Such being the case, many of the victims of abuse by the Border Patrol or the INS have their expenses paid by philanthropic or political organizations".[527]

218. France. Prior to 1 January 2009, there were 27 detention centres in France. It was planned that the number would increase to 30 after that date.[528] The deplorable conditions in the centres in which aliens destined for expulsion are detained prompted 18 deputies in the French National Assembly in 2008 to draft a resolution calling for "a commission of inquiry to evaluate and analyse the legal framework in place in the detention centres for the internment of migrant women, men and children".[529] The explanation of reasons for this proposed resolution warns of the threat of revolt at various detention centres, from Mesnil-Amelot in Vincennes to Satolas near Lyon and states: "Detainees are protesting about the fate in store for them and the veritable manhunt to which they are being subjected. These children, women and men live in an intolerable atmosphere of fear. Each alien becomes a potential criminal. This policy of stigmatizing 'aliens', which is contrary to all spirit of solidarity, foments xenophobia and hence is a gangrene affecting French society as a whole".[530] Later, it continues: "The living conditions inside the detention centres are difficult. At Mesnil-Amelot, where most of the inmates are young men, medical care is inadequate; thus a detainee with heart problems has had no care since his arrival. The legal assistance is insufficient for the indispensable needs expressed. Many detainees show moral deterioration, with a profound feeling of solitude and abandonment (family visits last 15 minutes only)".[531] According to the 2006 report of the Commission Intermouvement des Evacués (CIMADE), which until 2007 was the only non-governmental organization mandated by the State to watch over the exercise of the rights of aliens: "The confinement of thousands of women and men is effected in a quasi-clandestine manner owing to minimal reporting requirements, lack of scrutiny from outside, very limited legal support in terms of both written texts and practice, and material conditions that are so wretched that at times they constitute inhuman and degrading treatment".[532] Moreover, there are isolation rooms for detainees who are considered difficult. Isolation is carried out in humiliating conditions: those isolated "are handcuffed to a bench, behind the police guard room, next to the areas set aside for searches and visits".[533] Generally speaking, confinement affects parents as well as minors and pregnant women. As

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[526] The other centres are distributed as follows: Arizona 1, California 2, Texas 4, Colorado 1, Florida 1, Louisiana 1, Massachusetts 1, New York 2, Puerto Rico 1, Washington D.C. 1, Source: United States Department of Justice, Immigration and Naturalization Service, INS, Fact Book, US; and Samuel Schmidt, "Détentions et déportation à la frontière entre le Mexique el les Etats-Unis (partie 2)"; *Cultures et Conflits* No. 23 (1996), pp. 155-185.

[527] Samuel Schmidt, op. cit.

[528] See "Centres de rétention — Le juge met un coup d'arrêt à la réforme Hortefeux"(available at http://tfl.lci.fr/inos/France/societe/0,,4143397,00-le-juge-met-un-coup-d-arret-a-la-reforme-hortefeux-.html).

[529] See document No. 175, registered with the Presidency of the National Assembly on 13 February 2008 and circulated on 20 February 2008.

[530] Op. cit, p. 3.

[531] Op. cit, p. 6.

[532] Cited in op. cit., p. 8.

[533] Ibid., p. 11.

CIMADE has stated, “confinement has implications for children, who should not be in an alien detention centre”. It also noted: “At the Choisy-le-Roi centre, the female detainees are confined for 48 hours in a small unlit room of 4.5 square metres that contains two superimposed bunk beds and provides no privacy (glass door). The room is very dirty. Even women who are six months pregnant have been put in this unhygienic room”.[534] CIMADE has no hesitation in denouncing the “excessiveness of the expulsion policy” and in stating that “some centres have become veritable camps” where “the withholding of liberty is established as a means of administering migrants”.[535] The sponsors of the proposed resolution may therefore state: “Government policy is fertile ground for all sorts of excesses and becomes a potential source of inadmissible and unacceptable practices”.[536]

219. The situation is all the more disturbing in that some aliens destined for expulsion are detained in penitentiaries. As Robert Badinter, a former French Minister of Justice, said when summarizing the Louis Mermaz report in the National Assembly, “We must also take into account the very substantial number of aliens in local prisons. This is often the consequence of unmasking the use of the penitentiary establishment, which becomes a sort of general-purpose detention centre. (…) The question of detention centres and the living conditions in them, which international reports have denounced, in conjunction with penitentiary policies, is one that cannot be evaded. The transformation of administrative policies into punitive policies, and the resulting implications for local prisons, has gone too far. This issue requires close scrutiny”.[537] In its 2004 *Etude*, the Commission consultative des droits de l’homme noted that “aliens find it hard to endure detention after leaving prison. They regard this further deprivation of liberty as an additional hardship”. It added: “The situation becomes even worse when the removal of an alien causes the children to be placed in detention. The material conditions of detention are currently such that it is impossible for there to be compliance with the international conventions that protect the rights of the child”.[538]

220. *Great Britain*. It has been observed that in Great Britain, “aliens being expelled experience a great deal of legal insecurity”. Some of them spend “up to 17 months in detention” in more than one camp.[539] In, for example, the Dungavel Centre, located at approximately 30 kilometres from Glasgow, “the detainees are adult men for the most part; but some women, at times families and a few isolated minors are also inmates”. Detention for persons awaiting expulsion or asylum-seekers has ended tragically in a number of instances. In 2004, for example, the following occurred: “A Ukrainian asylum seeker at Harmondsworth Removal Centre was found hanged last Monday 19th July. There was subsequently a significant disturbance at Harmondsworth and detainees were transferred to other Removal Centres and to main-stream prisons. Days later on Friday 23rd July, a Vietnamese detainee who had been moved from Harmondsworth to Dungavel Removal Centre hung himself — he was taken to Hairmyres Hospital in East Kilbride, where he later

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[534] 2006 CIMADE report, cited in op. cit., p. 12.

[535] Ibid., p. 13

[536] Ibid., p. 8.

[537] Cited in the Commission consultative des droits de l’homme: *Etude sur les étrangers détenus. Propositions*, adopted by the plenary Assembly on 18 November 2004, p. 21.

[538] Ibid., p. 25.

[539] E. Michard, “Etrangers en Grande Bretagne: prisonniers à durée indéterminée” 19 October 1994 (available at http://www.echanges-partenariats.org-ep@reseau-ipam.org).

died. A fellow Dungavel detainee is reported to have said that the Vietnamese man had been detained for over a year and simply gave up hope of being released".[540] As regards asylum-seekers under the Immigration Act, 1971, the study published in 1996 stated that they "are placed in detention centres for immigrants or prisons for criminals or police-station cells. The Immigration Act, 1971, entitles the police and the immigration services to arrest people without a warrant. In the police cells and Her Majesty's prisons, the detainees are treated like pre-trial prisoners. They can be locked up in small cells and deprived of recreation and exercise for 20 hours out of 24. The major difference that exists between common criminals and these detainees is that the latter can be detained indefinitely without a trial."[541]

221. *Greece*. The cases of Dougoz (Judgment of 6 March 2001) and *Peers* (Judgment of 19 April 2001) brought before the European Court of Human Rights gave some insight into the conditions which these individuals experienced while in detention awaiting expulsion. Following the Judgments of the European Court in these cases, the Committee of Ministers of the Council of Europe adopted, on 7 April 2005, an interim resolution on those conditions of detention in which it invited the competent Greek authorities "to continue and intensify their efforts to align the conditions of detention with the requirements of the Convention [for the protection of human rights and fundamental freedoms], as set out in particular in the Court's judgements and to look into the question of ensuring the availability of effective domestic remedies".[542] In communications from the Greek Government at the time the cases were being considered by the Committee of Ministers, there was confirmation of the lamentable state of detention facilities in Greece. The Greek Government wrote, for example: "With regard to the police detention centres and the prison in question in these cases, the Government notes that: the Alexandras Avenue police headquarters is no longer used for the detention of aliens awaiting expulsion; also, the Drapetsona police detention centre has been refurbished to create the best possible conditions of hygiene and decent living for detainees; finally, with regard to Koridallos prison, the biggest prison in Greece, necessary maintenance work is carried out there on a regular basis".[543] It also stated: "The regularisation procedures, since 1998, for illegal immigrants in Greece have substantially eased the overcrowding of detention facilities because many were released to submit their requests provided they met the conditions of the law".[544] In *Tabesh v. Greece*, the European Court of Human Rights wrote at length about the conditions of detention experienced by the applicant pending his expulsion. The applicant claimed that the conditions of his detention did not comply with article 3 of the (European) Convention (on Human Rights) and the standards set by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).[545] He singled out for mention the total lack of physical exercise and contact with the outside world, the overcrowding of cells, and issues with hygiene and inadequate nutrition. In particular, he stated that the daily sum of 5.87 euros allocated for food was not sufficient to purchase three meals a

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[540] See "Two deaths in UK Immigration Removal Centres" (available at www.racism.net).

[541] Barbara Harrell-Bond, "La rétention des demandeurs d'asile dans la forteresse britannique (partie 1)", Cultures et conflits No. 23 (1996, pp. 87-106) p. 93 (available at http://www.conflits.org/index260.html).

[542] ResDH (2005) 21.

[543] Appendix 2, Interim Resolution ResDH (2005) 21.

[544] Ibid.

[545] European Court of Human Rights, see Judgment of 26 November 2009, para. 33 [French only].

day of satisfactory nutritional value. Before reviewing the conditions of detention themselves, the Court reaffirmed that article 3 of the Convention establishes one of the most basic values of democratic societies in that it prohibits in absolute terms that a person be subjected to torture or to inhuman or degrading treatment or punishment under any circumstance. The Court further stipulated: "[T]he measures which deprive an individual of his or her freedom inevitably involve suffering and humiliation. This is a situation that cannot be avoided and that is not, in and of itself, a violation of article 3. Nevertheless, this article requires a State to ensure that the conditions in which a person is detained are compatible with respect for human dignity, that detention arrangements do not cause distress or hardship to a degree that exceeds the inevitable level of suffering inherent in such a measure, and that, in terms of the practical aspects of confinement, an individual's health and well-being are provided for adequately.[546] The Court added that, while States were authorized to detain potential immigrants by virtue of their "undeniable sovereign rights to control aliens' entry into and residence in their territory" (*Amuur v. France*, 25 June 1996, para. 41, Reports 1996-III), that right "must be exercised in accordance with the provisions of the Convention".[547] To assess the truth of the applicant's allegations about the conditions of detention at the premises of the immigration police subdirectorate in Thessalonika where he remained from 31 December 2006 to 28 March 2007, the Court noted that the allegations were corroborated by the statements in the report issued by the Ombudsman of the Republic in May 2007 and the reports issued by CPT following its visits in 2007 and 2008 to a number of police stations and immigrant detention centres in Greece. The Court observed that "the report relating to the 2008 visit referred to the conditions of detention on immigration police premises in Thessalonika, emphasizing that the detainees slept on dirty mattresses placed on the floor and also commenting on the absence of space for walking and exercising. Furthermore, it confirmed that each detainee was entitled to 5.87 euros a day with which to order meals for delivery from outside."[548] This circumstance caused the Court to state that "quite apart from the problems of promiscuity and hygiene as described by the report cited, it (the Court) considered that the arrangements for recreation and meals on the police premises where the applicant was detained posed a problem in terms of article 3 of the Convention. In particular, the applicant, having no opportunity to walk or pursue an activity in the open air might well feel cut off from the outside world, with potentially negative consequences for his physical and moral well-being."[549] The Court noted that "the shortcomings with respect to recreational activities and appropriate meals for the applicant derived from the fact that the Thessalonika police premises were an unsuitable place for the period of detention which the applicant was required to undergo; that, by their very nature, the premises were intended to accommodate individuals for very short stays and were therefore altogether unfitted for a detention of three months, especially in the case of a person who was not serving a criminal sentence but instead awaiting the application of an administrative measure."[550] The Court concluded that "holding the applicant in detention for three months on the

[546] Ibid., para. 36.
[547] Ibid., para. 39.
[548] Ibid., para. 40.
[549] Ibid., para. 41.
[550] Ibid., para. 43.

premises of the immigration police subdirectorate in Thessalonika can be construed as degrading treatment within the meaning of article 3 of the Convention."[551]

222. The situation is sometimes worse in Africa where few countries have centres in which to detain aliens prior to expulsion.

223. In South Africa, for example, where a wave of xenophobia occurred in 2005, many aliens, according to a number of associations, have been "subjected to acts of bullying, violence or humiliation before making their escape by train back to their native countries. Abuse has been suffered not only by clandestine workers but also by immigrants, refugees or asylum-seekers who are lawfully present.[552] Some of the aliens apprehended by the police are taken to Lindela, a repatriation centre at which aliens, whether illegal or awaiting regularization of their situation, are detained before being expelled. Some have been arrested before their residence permits have expired or following the destruction or confiscation of their papers, according to *The Sunday Independent*, a South African newspaper.[553] Sarah Motha, the Human Rights Education Coordinator at Amnesty International South Africa, reports: "The police arrest all the immigrants indiscriminately, without regard to the status of the asylum-seeker. In several of the reported cases, the police claim not to have seen the document which states that an asylum application is pending." The author of the article which appeared on the website www.afrik.com observes that, according to *The Sunday Independent* of 9 April 2000, "a number of testimonials state that the South African police ask asylum-seekers for bribes and sexual favours in return for not sending them to Lindela."[554] *The Sunday Independent* of 9 April 2000 also describes the living conditions at Lindela as "absolutely deplorable". The speakers describe in no particular order the filthy nappies, the food "which is unfit for a dog", and the blatant absence of a doctor. Overcrowding is another problem: the Centre has room for 4,004 aliens, but it often accommodates many more. The lowest point in this regard was probably reached during an operation to deal severely with illegal immigrants launched in mid-March 2000. At the height of the raids, more than 7,000 persons were detained at Lindela, and thousands were presumably deported, although the media report that many escaped from detention in the course of the expulsion process, according to the letter sent to two South African ministers. Some "detainees" complain that they have been held at the Centre for longer than the law permits, a statement also made by some associations. But *The Sunday Independent*, on the basis of a letter faxed by Lindie Gouws, an administrator at Lindela, said that people are not detained at the Centre for more than one month, except by order of the High Court, and it is only in extreme cases that the Ministry of the Interior prolongs the period of detention to a maximum of 90 days. Most tragic of all are the unexplained deaths of refugees at the Centre. Since January 2005, approximately 50 persons have died, according to Sarah Motha of Amnesty International. Last August, the Zimbabwe Exiles Forum reported the deaths of 28 refugees at Lindela between January and July, most of them Zimbabwean.[555]

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[551] Ibid., para. 44.

[552] Habibou Bangré, "Afrique du Sud: expulsion d'étrangers par dizaines de milliers. La xénophobie au cœur de cette politique", 15 November 2005 (available at www.afrik.com).

[553] Ibid.

[554] Ibid.

[555] Ibid.

224. In Equatorial Guinea where the mass expulsion of aliens has been a recurring practice in recent years, many Africans, including a clear majority of Cameroonians, followed by Malians, have been expelled, irrespective of whether they were legal residents or in an unlawful situation, in deplorable circumstances, often pursued by the police. They fended for themselves or were deported to the border between Equatorial Guinea and Cameroon in inhumane conditions. These expulsions occurred after the expiration of the ultimatum issued by the Equatorial Guinean Ministry of Foreign Affairs, Cooperation and la Francophonie on 12 May 2009, which urged all aliens in an unlawful situation to leave the country before 26 May. According to an information site on the Internet: "Approximately 300 Cameroonians living in Equatorial Guinea returned to their native country, having been compelled to do so. They arrived in makeshift canoes last Thursday at the Port of Limbé, 320 kilometres to the west of Yaoundé. Many were half-naked, dressed only in underpants, having lost their money and their property. Their return is part of a vast repatriation operation involving Cameroonians, but also Nigerians, Ghanaians and Congolese, which was launched on 6 March last by the Equatorial Guinean authorities and has affected the entire island of Bioko.

225. "A version corroborated by Agence France Presse carries various testimonies by expelled Cameroonians, including that of Moïse Bessongo, a merchant in business for a number of years. He was stopped at midnight while on the way home. His place of residence was ransacked, and his passport, residence permit, Cameroonian identity card and diplomas were torn up by the police. He spent three days in a cell before being repatriated on Wednesday during the night. Many Cameroonians were arrested on 6 and 7 March and spent five days locked up at the military base in Malabo. Besides accounts of theft and extortion, many of the people describe being tortured and having the marks and scars to prove it".[556]

226. When questioned about these events, the Ambassador of Cameroon to Equatorial Guinea expressed concern about the situation. He went on to say: "We are not happy when we see Cameroonians maltreated. However, it is not for us to turn the knife in the wound. I do not deny that some of the actions are by individuals and are not known to and accepted by the Equatorial Guinean authorities. Cameroonians who are experiencing difficulties should come to the Embassy and the Consulate and we may find a way of helping them. Despite these incidents, Cameroonians will continue to go to Equatorial Guinea, but arrangements for these departures must be made so that they can live in dignity".[557]

227. In the *Diallo* case, Guinea complained about the circumstances in which its national was arrested and detained in the Democratic Republic of the Congo (DRC) before being expelled. It claimed that Mr. Diallo was "secretly placed in detention, without any form of judicial process or even examination" on 5 November 1995; that he remained imprisoned for two months, before being released on 10 January 1996 further to intervention by the [Zairean] President himself only then to be "immediately rearrested and imprisoned for two [more] weeks before being expelled". During a total detention of 75 days in all, Mr. Diallo was allegedly mistreated in prison and was deprived of the benefit of the 1963 Vienna Convention

[556] See "Chasse aux étrangers. La Guinée Equatoriale fait le ménage" (available at www.afrik.com).
[557] *Cameroon Tribune* (Government daily newspaper), 12 June 2009.

on Consular Relations.[558] The DRC rejected those allegations without argument, merely stating that "the duration and conditions of Mr. Diallo's detention during the expulsion process were in conformity with Zairean law".[559]

2. Conditions of enforcement of expulsion

228. Expulsion may be rendered illegal by virtue of the way in which it is carried out.[560] The expulsion of aliens must, in particular, comply with international human rights law, especially the prohibition of torture and other inhuman or degrading treatment.[561] The requirement that aliens not be subjected to torture or to cruel, inhuman or degrading treatment is set forth in General Assembly resolution

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[558] International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment of 24 May 2007, para. 17.

[559] Ibid., para. 19.

[560] "An otherwise lawful deportation order may be rendered illegal if it is carried out in an unjust or harsh manner. Physical force which would cause or would be likely to cause bodily harm or injury should not be used in executing the order." Louis B. Sohn and Thomas Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington, D.C., op. cit., p. 96. "'Every state is authorized, for reasons of public order, to expel foreigners who are temporarily residing in its territory. But when a state expels a foreigner without cause, and in an injurious manner, the state of which the foreigner is a citizen has the right to prefer a claim for this violation of international law.'" Richard Plender, "The Ugandan Crisis and the Right of Expulsion under International Law", *The Review: International Commission of Jurists*, No. 9, 1972, p. 25 (quoting Calvo's *Dictionary of International Law*). The analysis under 2 (Conditions of enforcement of expulsion) is taken from *Expulsion of aliens. Memorandum by the Secretariat*, op. cit., paras. 703-709.

[561] "Expulsion should not be carried out with hardship or violence or unnecessary harm to the alien expelled." Shigeru Oda, op. cit., p. 483. "Irrespective of the existence or non-existence of an unlimited right to expel foreigners, their ill-treatment, abrupt expulsion or expulsion in an offensive manner is a breach of the minimum standards of international law with which their home State may expect compliance. If a State chooses to exercise its sovereign discretion in contravention of this rule, it does not abuse its rights of sovereignty. It simply breaks a prohibitory rule by which its rights of exclusive jurisdiction are limited." Georg Schwarzenberger, "The Fundamental Principles of International Law", *Recueil des cours de l'Académie de droit international*, vol. 87, 1955-I, pp. 309-310. (See also Georg Schwarzenberger, *International Law and Order*, London, Stevens & Sons, 1971, pp. 89-90.) "An expulsion amply justified in principle is nevertheless delictual under international law if it is conducted without proper regard for the safety and well-being of the alien. Once again, this is so either because the expulsion would amount to an abuse of rights, or because it would amount to violation of the 'minimum standard'. The proposition is so clear that it scarcely needs justification ..." Richard Plender, op. cit., pp. 24-26. "[A] State, in executing an expulsion or deportation order, should act in accordance with standards upholding human rights and human dignity. These standards have a direct bearing on the power of a State to deport or expel an alien. ... [T]here are various other norms and principles relating to human rights and human dignity which are recognized in multilateral instruments and are accepted by the vast majority of nations. These principles include ... the right of an individual not to be subjected to inhuman or degrading treatment." Louis B. Sohn and Thomas Buergenthal (eds.), op. cit., p. 95. See also Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, Grotius Publications Ltd., 1987, p.36.

40/144.[562] This type of conduct in connection with the expulsion of an alien has been a common ground for complaint.[563]

This limitation on the right of expulsion has been recognized in diplomatic practice[564] and by international tribunals.[565]

229. Annex 9 to the Convention on International Civil Aviation provides:

> "5.2.1 During the period when an inadmissible passenger or a person to be deported is under their custody, the state officers concerned shall preserve the dignity of such persons and take no action likely to infringe such dignity."[566]

230. There are several other instances of practice supporting the requirement that a deportation be carried out humanely and with due respect to the dignity of the individuals involved.

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[562] Resolution 40/144, art. 6.

[563] "The most numerous cases arise because of the unduly oppressive exercise of the power of expulsion. It is fundamental that the measure should be confined to its direct object, getting rid of the undesirable foreigner. All unnecessary harshness, therefore, is considered a justification for a claim. Even where an expulsion is admitted to be justifiable, it should be effected with as little injury to the individual and his property interests as is compatible with the safety and interests of the country which expels him." Edwin Montefiori Borchard, op. cit., pp. 59-60. "While the right of exclusion or expulsion is discretionary, a harsh, arbitrary, or unnecessarily injurious manner of exercising the discretion often gives rise to dispute." B. O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal*, vol. 16, No. 1, 1975, p. 85. "Calvo maintained that when a government expels a foreigner in a harsh inconsiderate manner ('*avec des formes blessantes*') the latter's State of nationality has a right to base a claim on the expulsion as a violation of international law." Richard Plender, *International Migration Law*, op. cit., pp. 469-471 (quoting *Dictionnaire de droit international public et privé*). " [A] State engages international responsibility if it expels an alien ... in an unnecessarily injurious manner." Richard Plender, op. cit., p. 459.

[564] "Diplomatic practice, too, demonstrates amply the principle that an expulsion contravenes international law if it is achieved without due regard for the alien's welfare." Richard Plender, "The Ugandan Crisis and the Right of Expulsion under International Law", op. cit, pp. 24-26. "Arbitrary expulsions ... under harsh or violent circumstances unnecessarily injurious to the person affected have given rise to diplomatic claims..." Edwin Montefiori Borchard, op. cit., p. 57. "Other instances have arisen in more recent years where the procedure applied in the course of expulsion has manifested a harsh treatment against which the United States has felt constrained to make emphatic protest." Charles Cheney Hyde, op. cit, p. 233 (citations omitted).

[565] "The principle that an expulsion must be carried out in a manner least injurious to the person affected has been enunciated on several occasions by international tribunals. Thus, summary expulsions ... by which they were subjected to unnecessary indignities, harshness or oppression, have all been considered by international commissions as just grounds for awards." Edwin Montefiori Borchard, op. cit., p. 60 (citing *Maal (Netherlands) v. Venezuela*; and *Boffolo (Italy) v. Venezuela*; also referring to *Jaurett (U.S.) v. Venezuela*, Sen. Doc. 413, 60th Cong. 1st Sess., 20 et seq., 559 et seq. (settled by agreement of 13 February 1909, For. Rel., 1909, 629)). "Arbitrary expulsions ... under harsh or violent circumstances unnecessarily injurious to the person affected have given rise to ... awards by arbitral commissions." Edwin M. Borchard, op. cit., p.57. "Thus in cases concerning the expulsion of aliens, an international tribunal would normally accept as conclusive the reasons of a serious nature adduced by the State as justifying such action. It would, however, regard as unlawful measures of expulsion those which are... accompanied by unnecessary hardship." Bin Cheng, op. cit., p. 133 (citations omitted).

[566] Convention on International Civil Aviation, p. 295.

231. The existence of such a requirement was implicitly affirmed in the *Lacoste* case, although it was held that the claimant had not been subjected to harsh treatment:

> "Lacoste further claims damages for his arrest, imprisonment, harsh and cruel treatment, and expulsion from the country. [...] The expulsion does not, however, appear to have been accompanied by harsh treatment, and at his request the claimant was allowed an extension of the term fixed for his leaving the country."[567]

Similarly, in the *Boffolo* case, the Umpire indicated in general terms that

> "Expulsion must be accomplished in the manner least injurious to the person affect ..."[568]

232. In the *Maal* case, the umpire stressed the sacred character of the human person and the requirement that an expulsion be accomplished without unnecessary indignity or hardship:

> "[H]ad the exclusion of the claimant been accomplished without unnecessary indignity or hardship to him the umpire would feel constraint to disallow the claim ... From all the proof he came here as a gentleman and was entitled throughout his examination and deportation to be treated as a gentleman, and whether we have to consider him as a gentleman or simply as a man his rights to his own person and to his own undisturbed sensitivities is one of the first rights of freedom and one of the priceless privileges of liberty. The umpire has been told to regard the person of another as something to be held sacred, and that it could not be touched even in the lightest manner, in anger or without cause, against his consent, and if so done it is considered an assault for which damages must be given commensurate with the spirit and the character of the assault and the quality of the manhood represented in the individual thus assaulted."[569]

233. The Parliamentary Assembly of the Council of Europe has expressed its deep concern about incidents and ill-treatment occurring during deportations.[570] Furthermore, it has stressed the subsidiary character of forced expulsion and the need to respect safety and dignity in all circumstances.

> "7. The Assembly believes that forced expulsion should only be used as a last resort, that it should be reserved for persons who put up clear and continued resistance and that it can be avoided if genuine efforts are made to provide deportees with personal and supervised assistance in preparing for their departure.
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> "8. The Assembly insists that the Council of Europe's fundamental values will be threatened if nothing is done to combat the present climate of

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[567] *Case Lacoste v. Mexico* (Mexican Commission), op. cit., pp 3347-3348.

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

[569] *Maal* case, Mixed Claims Commission Netherlands-Venezuela, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 732.

[570] Council of Europe, Parliamentary Assembly, Recommendation 1547 (2002): Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, 22 January 2002, para. 6.

hostility towards refugees, asylum seekers and immigrants, and to encourage respect for their safety and dignity in all circumstances."[571]

234. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has also stressed that recourse to force when implementing an expulsion order should be limited to what is reasonably necessary, and has provided details concerning the means and methods of deportation that should not be used. The Committee has also insisted on the need for the establishment of internal and external monitoring systems and for proper documentation of deportation.

> "The CPT recognises that it will often be a difficult task to enforce an expulsion order in respect of a foreign national who is determined to stay on a State's territory. Law enforcement officials may on occasion have to use force in order to effect such a removal. However, the force used should be no more than is reasonably necessary. It would, in particular, be entirely unacceptable for persons subject to an expulsion order to be physically assaulted as a form of persuasion to board a means of transport or as punishment for not having done so. Further, the Committee must emphasise that to gag a person is a highly dangerous measure."[572]

The same Committee held that:

> "**[I]t is entirely unacceptable for persons subject to a deportation order to be physically assaulted as a form of persuasion to board a means of transport or as a punishment for not having done so**. The CPT welcomes the fact that this rule is reflected in many of the relevant instructions in the countries visited. For instance, some instructions which the CPT examined prohibit the use of means of restraint designed to punish the foreigner for resisting or which cause unnecessary pain.
>
> "**[T]he force and the means of restraint used should be no more than is reasonably necessary**. The CPT welcomes the fact that in some countries the use of force and means of restraint during deportation procedures is reviewed in detail, in the light of the principles of lawfulness, proportionality and appropriateness.
>
> "[...] The CPT has made it clear that **the use of force and/or means of restraint capable of causing positional asphyxia should be avoided whenever possible and that any such use in exceptional circumstances must be the subject of guidelines designed to reduce to a minimum the risks to the health of the person concerned.**
>
> "In addition to the avoidance of the risks of positional asphyxia referred to above, the CPT has systemically recommended **an absolute ban on the use of means likely to obstruct the airways (nose and/or mouth) partially or**

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[571] Ibid., paras. 7 and 8.

[572] Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Seventh General Report on the CPT's activities covering the period 1 January to 31 December 1996, CPT/Inf (97) 10, 22 August 1997, "Foreign nationals detained under aliens legislation", para. 36. For the committee, see Jean-Manuel Larralde, "La protection du détenu par l'action du Comité européen pour la prévention de la torture", *Cahiers de la recherche sur les droits fondamentaux*, 2004, No. 3, special issue "Surveiller et punir / Surveiller ou punir?", pp. 29-41.

wholly. [...] It notes that this practice is now expressly prohibited in many States Parties and **invites States which have not already done so to introduce binding provisions in this respect without further delay.**

"It is essential that, in the event of a flight emergency while the plane is airborne, the rescue of the person being deported is not impeded. Consequently, **it must be possible to remove immediately any means restricting the freedom of movement of the deportee, upon an order from the crew.**

"[...] In the CPT's opinion, **security considerations can never serve to justify escort staff wearing masks during deportation operations.** This practice is highly undesirable, since it could make it very difficult to ascertain who is responsible in the event of allegations of ill-treatment.

"The CPT also has very serious reservations about the use of incapacitating or irritant gases to bring recalcitrant detainees under control in order to remove them from their cells and transfer them to the aircraft.

"[T]he importance has been highlighted of allowing immigration detainees to undergo a medical examination before the decision to deport them is implemented. This precaution is particularly necessary when the use of force and/or special measures is envisaged.

"Operations involving the deportation of immigration detainees must be preceded by measures to help the persons concerned to organise their return, particularly on the family, work and psychological fronts.

"Similarly, **all persons who have been the subject of an abortive deportation operation must undergo a medical examination as soon as they are returned to detention.**

"The importance of establishing internal and external monitoring systems in an area as sensitive as deportation operations by air cannot be overemphasised.

"Deportation operations must be carefully documented.

"[...] Further, **the CPT wishes to stress the role to be played by external supervisory (including judicial) authorities, whether national or international, in the prevention of ill-treatment during deportation operations.** These authorities should keep a close watch on all developments in this respect, with particular regard to the use of force and means of restraint and the protection of the fundamental rights of persons deported by air."[573]

235. Respect for human dignity is also required by the legislation of the European Union concerning the expulsion or removal of a third country national. The Council Decision of 23 February 2004 indicates in its preamble:

"This decision respects the fundamental rights and observes the principles reflected in particular in the Charter of Fundamental Rights of the European Union. In particular this Decision seeks to ensure full respect for

[573] 13th General Report on the CPT's activities, CPT/Inf (2003) 35.

human dignity in the event of expulsion and removal, as reflected in Articles 1, 18 and 19 of the Charter."[574]

236. In its *Règles sur l'admission et l'expulsion des étrangers*, the Institut de Droit international enunciated the principle according to which

"[d]eportation is not a punishment and must therefore be executed with the utmost consideration and taking into account the individual's particular situation."[575]

3. Conditions of detention of aliens being expelled

237. Several instances of practice support the view that detention pending deportation is not unlawful provided that it is in conformity with certain requirements.[576]

238. In the *Ben Tillett* case, the arbitrator recognized the right of the expelling State to detain an alien with a view to ensuring his or her deportation. Moreover, the arbitrator was of the opinion that, depending on the circumstances of the case and, in particular, on the danger which the individual may represent for public order, a State may lawfully detain an alien even before a deportation order. The arbitrator also held that a State was under no obligation to provide special detention facilities for deportees:

"Considering that while recognizing the right of a State to expel, it should not be denied the means to guarantee the effectiveness of its injunctions; that it has to be able to watch over aliens of whom it may see the presence as an hazard for the public order, and that it may keep them in custody if ever it fears that those who are banned from its territory might elude its surveillance;"[577]

"Considering ... that, since an expulsion order does normally not precede the events that justify it, if a State was not able to use the necessary means of

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[574] Council Decision of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals, 2004/191/EC, *Official Journal L 060*, 27 February 2004, pp. 55-57. See Charter of Fundamental Rights of the European Union, *Official Journal C 364*, 18 December 2000, pp. 1-22, article 1 ("Human dignity — Human dignity is inviolable. It must be respected and protected."), article 18 ("Right to asylum — The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.") and article 19 ("Protection in the event of removal, expulsion or extradition — 1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.")

[575] *Règles internationales*, ibid., art. 17 [French original].

[576] See, however, Shigeru Oda, op. cit., p. 483 ("Compulsory detention of an alien under an expulsion order is to be avoided, except in cases where he refuses to leave or tries to escape from control of the state authorities.") The analysis in 3 (Conditions of detention of aliens being expelled) is taken from *Expulsion of aliens, Memorandum by the Secretariat*, op. cit., paras. 715-726.

[577] Affaire Ben Tillett (Grande-Bretagne/Belgique), sentence arbitrale du 26 décembre 1898, in G. Fr. de Martens, Nouveau Recueil Général de Traités et autres actes relatifs aux rapports de droit international, Deuxième série, Tome XXIX, Leipzig, Librairie Dieterich Theodor Weicher, 1903, p. 269 [French original].

coercion in order to keep in custody for a few hours, until the measure is officially adopted, an alien whose conduct has become a cause of trouble, the latter would have the opportunity to escape from the police, and the Government would find itself armless;"[578]

"Considering, on the other hand, in law, that it is impossible to force a State either to build special facilities which would be exclusively affected to the preventive detention of aliens from the time of their arrest until the enforcement of the expulsion measure, or to reserve to those aliens a special place in the facilities that already exist; that the Government of Belgium, by isolating Ben Tillett and then protecting him from contact with other accused, has satisfied the requirements of international courtesy."[579]

239. The Arbitrator also found that, given the circumstances of the case, Belgium had not acted unlawfully by detaining Mr. Ben Tillett for 26 hours,[580] and that the conditions of detention were acceptable.[581]

240. The Commission which delivered the decision in the *Daniel Dillon* case addressed the issue of the minimum standard of treatment prescribed by international law with respect to the detention of an alien pending deportation. The Commission held that the long period of detention and the lack of information given to the claimant with respect to the purpose of his detention constituted maltreatment incompatible with international law.

"With regard to the question of mistreatment the Commission holds that there is not sufficient evidence to show that the rooms in which the claimant was detained were below such a minimum standard as is required by international law. Also the evidence regarding the food served him and the lack of bed and bed clothing is scanty. The long period of detention, however, and the keeping of the claimant *incommunicado* and uninformed about the purpose of his detention, constitute in the opinion of the Commission a maltreatment and a hardship unwarranted by the purpose of the arrest and amounting to such a degree as to make the United Mexican States responsible under international law."[582]

241. Commenting on article 13 of the International Covenant on Civil and Political Rights, the Human Rights Committee has pointed out that if a deportation procedure entails arrest, the State Party shall grant the individual concerned the safeguards

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[578] Ibid., p. 270.
[579] Ibid., p. 271.
[580] Ibid.
[581] Ibid., pp. 271-272.
[582] *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, p. 369.

contained in articles 9[583] and 10[584] of the Covenant for the case of deprivation of liberty.[585]

242. The European Convention on Human Rights explicitly recognizes the right of a State to detain an alien pending his or her deportation. Article 5, paragraph 1, of the Convention provides as follows:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> […]
>
> "(f) the lawful arrest or detention […] of a person against whom action is being taken with a view to deportation…"

243. In the *Case of Chahal v. United Kingdom*, the European Court of Human Rights clarified in many respects the content of article 5, paragraph 1 (f). The Court held that this provision did not require that detention pending deportation be "reasonably considered necessary, for example to prevent his committing an offence or fleeing".[586] However, the Court indicated that detention was permitted only as long as deportation proceedings were in progress and provided that the duration of such proceedings was not excessive.

> "The Court recalls, however, that any deprivation of liberty under Article 5 paragraph 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 paragraph 1 (f) … It is

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[583] Article 9 of the Covenant provides: "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

[584] Article 10 of the Covenant provides: "1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."

[585] Human Rights Committee, General Comment No. 15: The Position of Aliens under the Covenant, 11 April 1986, para. 9.

[586] European Court of Human Rights, *Case of Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application number 22414/93, para. 112. The Court reiterated its position in the *Case of Conka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, Application number 51564/99, para. 38.

thus necessary to determine whether the duration of the deportation proceedings was excessive."[587] (*Case of Chahal v. United Kingdom*, Judgment, 15 November 1996).

244. In addition, according to the Court, detention pending deportation should be in conformity with law and subject to judicial review. In this regard, "lawfulness" refers to conformity to national law, but also requires "that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness."[588] Moreover, judicial review "should … be wide enough to bear on those conditions which are essential for the 'lawful' detention of a person according to Article 5 paragraph 1 …".[589]

245. Attention may also be drawn to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, annexed to General Assembly resolution 43/173, of 9 December 1988, especially Principle 8 concerning detention pending deportation. Generally speaking, of the 36 Principles contained in the annex, the 19 reproduced below seem relevant to an analysis of the conditions of detention of a person awaiting deportation:[590]

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 2

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or person authorized for that purpose.

Principle 3

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

Principle 5

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

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[587] Ibid., para. 113.

[588] Ibid., para. 118. See also *Case of Conka v. Belgium*, op. cit., para. 39.

[589] Ibid., para. 127.

[590] See resolution 43/173 concerning the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted at the forty-third session of the United Nations General Assembly.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

Principle 8

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

Principle 9

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

Principle 10

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 12

1. There shall be duly recorded:

(a) The reasons for the arrest;

(b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

(c) The identity of the law enforcement officials concerned;

(d) Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority

responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.

Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to this arrest.

Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16

2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

Principle 21

It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise ...

Principle 22

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

Principle 24

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers...

246. The issue of detention pending deportation was raised by the Special Rapporteur on the human rights of migrants, Gabriela Rodríguez Pizarro. Among the aspects highlighted by the Special Rapporteur are the need for periodical review of decisions on detention; the existence of a right to appeal; the non-punitive character of administrative detention; the requirement that detention not last more than the time necessary for the deportation of the individual concerned; and the requirement that detention end when a deportation cannot be enforced for reasons that are not attributable to the migrant.

> "... The right to judicial or administrative review of the lawfulness of detention, as well as the right to appeal against the detention/deportation decision/order or to apply for bail or other non-custodial measures, are not guaranteed in cases of administrative detention."[591]
>
> "Administrative deprivation of liberty should last only for the time necessary for the deportation/expulsion to become effective. Deprivation of liberty should never be indefinite."[592]
>
> "... The Special Rapporteur is particularly concerned that recently enacted anti-terrorism legislation, allowing for the detention of migrants on the basis of vague, unspecified allegation of threats to national security, can lead to indefinite detention when migrants cannot be immediately deported because that would imply a threat to their security and human rights."[593]
>
> "... Administrative detention should never be punitive in nature ..."[594]

247. The Special Rapporteur then made the following recommendation:

> It is necessary to ensure "that the law sets a limit on detention pending deportation and that under no circumstance is detention indefinite
>
> [...] The decision to detain should be automatically reviewed periodically on the basis of clear legislative criteria. Detention should end when a deportation order cannot be executed for other reasons that are not the fault of the migrant."[595]

248. In 1982, the Institut de Droit international was of the view that a person expelled should not be deprived of her or his liberty pending deportation.[596] Such

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[591] Commission on Human Rights, Migrant Workers, Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizzaro, op. cit., para. 20.

[592] Ibid., para. 35.

[593] Ibid., para. 37.

[594] Ibid., para. 43.

[595] Ibid., para. 75 (g).

[596] "If the deportee is free no restriction shall be placed on such person during this period." *Règles internationales...*, ibid., art. 32 [French original].

an opinion now seems unrealistic in the majority of cases, and it is doubtful whether the Institute would be of the same mind today.

249. National laws vary considerably with respect to the legality and the conditions of detention pending deportation.[597] A State may detain an alien prior to deportation as a standard part of the deportation process,[598] or (1) when the alien has evaded or threatens to evade deportation, or has violated conditions of provisional release from detention;[599] (2) when the alien has committed certain criminal or other violations, or threatens the State's public order or national security;[600] (3) to allow the relevant authorities to determine the alien's identity or nationality, or to ensure the alien's post-transfer security;[601] or (4) when deemed necessary to fulfil the deportation, including with respect to the arrangement of transportation.[602] A State may:

(1) Prohibit the alien's detention when the alien has been ordered to depart voluntarily;[603] or

(2) Permit the alien's detention or other restrictions on the alien's residence or movements prior to the alien's voluntary departure.[604]

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[597] The review of national legislation and jurisprudence on this subject is taken from Expulsion of aliens. Memorandum by the Secretariat, op. cit., paras. 726-737.

[598] Argentina, 2004 Act, arts. 35 and 70-72; Australia, 1958 Act, arts. 196, 253 and 255; Austria, 2005 Act, art. 3.76(2); Belarus, 1998 Law, art. 30; Bosnia and Herzegovina, 2003 Law, arts. 28(3), 43(5) and 68(1); Brazil, 1980 Law, art. 60; Kenya, 1967 Act, art. 12(2); Madagascar, 1962 Law, art. 17; Malaysia, 1959-1963 Act, arts. 31 and 34(1), 35; Nigeria, 1963 Act, art. 23(2); Russian Federation, 2002 Law No. 115-FZ, arts. 31(9) and 34(5); and United States, INA, sects. 241(a)(2) and 507(b)(1), (2)(C), (c). Such detention may be specifically imposed on an alien allegedly involved in terrorism, and may include the period of the alien's criminal trial and the alien's fulfilment of a resulting sentence (United States, INA, sect. 507(b)(1), (2)(C), (c)).

[599] Belarus, 1993 Law, art. 26; Bosnia and Herzegovina, 2003 Law, art. 68(2); Greece, 2001 Law, art. 44(3); Hungary, 2001 Act, art. 46(1)(a)-(b); Italy, 1998 Law No. 40, art. 11(6), 1996 Decree-Law, art. 7(3); Japan, 1951 Order, art. 55(1); Republic of Korea, 1992 Act, art. 66, 1993 Decree, art. 80; Poland, 2003 Act No. 1775, art. 101(1); and Switzerland, 1931 Federal Law, art. 13b(1)(c).

[600] Bosnia and Herzegovina, 2003 Law, art. 68(2); Colombia, 1995 Decree, art. 93; Czech Republic, 1999 Act, sect. 124(1); Greece, 2001 Law, art. 44(3); Hungary, 2001 Act, art. 46(1)(c)-(e), (2), (9); and United States, INA, sect. 241(a)(6).

[601] Austria, 2005 Act, art. 3.80(4)(1); Brazil, 1980 Law, art 60; China, 2003 Provisions art. 184; Italy, 1998 Decree-Law No. 286, art. 14(1), 1998 Law No. 40, art. 12(1), 1996 Decree-Law, art. 7(3); and Nigeria, 1963 Act, art. 31(3).

[602] China, 2003 Provisions, art. 184; Croatia, 2003 Law, art. 58; France, Code, art. L551-1; Germany, 2004 Act, art. 62(10); Italy, 1998 Decree-Law No. 286, art. 14(1), 1998 Law No. 40, art 12(1); Japan, 1951 Order, art, 13-2, 52(5); Kenya, 1967 Act, art. 8(2)(b), (3)-(4); Republic of Korea, 1992 Act, art. 63(2); Malaysia 1959-1963 Act, art. 34 (1); Nigeria, 1963 Act, art. 31 (3), 45; Panama, 1960 Decree-Law, art. 59, 83; Poland, 2003 Act No. 1775, art. 101 (4); Portugal, 1998 Decree Law, art. 22(4), 124(2); Switzerland, 1931 Federal Law, art. 13b (1) (a)-(b); and United States, INA, sect. 241(a)(1)(C). Such detention may be expressly permitted during wartime (Nigeria, 1963 Act, art. 45).

[603] Portugal, 1998 Decree-Law, art. 100(1).

[604] Japan, 1951 Order, art. 55-3(3); and Portugal, 1998 Decree-Law, art. 123(2).

250. The relevant law may establish a detention's term, relevant procedures, or the rights and recourses available to the alien.[605] A State may specifically provide for the detention of minors,[606] potentially protected persons,[607] or aliens allegedly involved in terrorism.[608] A State may allow for the alien to post bail.[609] A State may restrict the alien's residence or activities, or impose supervision, in lieu of detention or without otherwise specifically providing for detention.[610] A State may arrange for the transfer of the alien's custody between itself and another State.[611] A State may require the alien to pay for the detention,[612] or expressly bind itself to pay for it.[613] A State may expressly characterize the alien's removal as not constituting a detention.[614]

251. In its Recommendation 1547 (2002), Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministries should urge member States to adapt without delay their legislation and practices regarding holding prior to expulsion, in order to:

(a) Limit the length of detention in waiting or transit zones to a maximum of fifteen days;

(b) Limit the length of detention in police stations to the amount of time strictly necessary for any arrest and to separate foreigners awaiting expulsion from people being questioned for common law crimes;

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[605] Argentina, 2004 Act, art. 70-72; Australia, 1958 Act, art. 196, 253-54, 255(6); Austria, 2005 Act, arts. 3.76(3)-(7) and 3.78-80; Belarus, 1998 Law, art. 30, 1993 Law art. 26; Bosnia and Herzegovina, 2003 Law, art. 65 (4), 69-71; Brazil, 1980 Law, art. 60; Croatia, 2003 Law, art. 58; Czech Republic, 1999 Act, sect. 24(2); France, Code, arts. L551-2, L551-3, L552-1, L-552-2, L552-3, L552-6, L552-7, L552-8, L552-9, L552-10, L552-11, L552-12, L553-1, L553-2, L553-3, L553-4, L553-5, L553-6, L554-1, L554-2, L554-3, L555-1, L555-2 and L561-1; Germany, 2004 Act, art. 62(1)-(3); Greece, 2001 Law, art. 44(3); Hungary, 2001 Act, art. 46(3)-(7); Italy, 1998 Decree-Law No. 298, art. 14(1)-(5bis), (7) and (9), 1998 Law No. 40, art. 12(1)-(7) and (9), 1996 Decree-Law, art. 7(3); Japan, 1951 Order arts. 2(15)-(16), 13-2, 54, 55 (2)-(5), 61-3, 61-3-2, 61-4, 61-6 and 61-7; Republic of Korea, 1993 Decree, art. 77(1), 78; Malaysia, 1959-1963 Act, art. 34(1), (3), 35; Nigeria, 1963 Act, art. 31; Panama, 1960 Decree-Law art. 59; Poland, 2003 Act, No. 1775, art 101(1)-(2), (3)(1), (4)-(7); Russian Federation, 2002 Law No. 115-FZ, art. 31(9), 34(5); Sweden, 1989 Act, sects. 6.18-31; Switzerland, 1931 Federal Law, art. 13b(2)-(3), 13 c d; and United States, INA, sects. 241 (g) and 507(b)(2)(D), (c)(2), (d)-(e).

[606] Austria, 2005 Act, art. 3.79(2)-(3); and Sweden, 1989 Act, sects. 6.19 and 6.22.

[607] Austria, 2005 Act, art. 3.80(5); and Switzerland, 1931 Federal Law, arts. 13a(a), (d) and 13b(1)(d).

[608] United States, INA, sect. 507(b)(2)(D), (c)(2) and (d)-(e).

[609] Belarus, 1998 Law, art. 30; Japan, 1951 Order, art. 54(2)-(3), 55(3); Republic of Korea, 1992 Act, art. 65, 66(2)-(3), 1993 Decree, art. 79-80; Malaysia, 1959-1963 Act, art. 34(1); and United States, INA sect. 241(c)(2)(C).

[610] China, 1986 Rules, art. 15; France, Code, arts. L513-4, L552-4, L552-5, L552-6, L552-7, L552-8, L552-9, L552-1-, L552-11, L552-12 and L555-1; Hungary, 2001 Act, art. 46(8); Japan, 1951 Order, art. 52(6); Republic of Korea, 1992 Act, art. 63(2), 1993 Decree, art. 78(2)-(3); Madagascar, 1962 Law, art. 17; Nigeria, 1963 Act, art. 23(2); and United States, INA, sect. 241(a)(3).

[611] Australia, 1958 Act, art. 254.

[612] Ibid., art. 209, 211.

[613] Italy, 1998 Decree-Law No. 286, art. 14(9), 1998 Law No. 40, art. 12(9); Switzerland, 1999 Ordinance, art. 15(2)-(3); and United States, INA, sects. 103 (a) (11) and 241 (c)(2)(B).

[614] Australia, 1958 Act, art. 198A(4).

(c) Limit prison detention to those who represent a recognized danger to public order or safety and to separate foreigners awaiting expulsion from those detained for common law crimes;

(d) Avoid detaining foreigners awaiting expulsion in a prison environment, and in particular to:

– Put an end to detention in cells;

– Allow access to fresh air and to private areas and to areas where foreigners can communicate with the outside world.

– Not hinder contacts with the family and non-governmental organisations;

– Guarantee access to means of communication with the outside world, such as telephones and postal services;

– Ensure that during detention foreigners can work, in dignity and with proper remuneration, and take part in sporting and cultural activities;

– Guarantee free access to consultation and independent legal representation;

(e) Guarantee, under regular supervision by the judge, the strict necessity and the proportionality of the use and continuation of detention for the enforcement of the deportation order, and to set the length of detention at a maximum of one month;

(f) Favour alternatives to detention which place less restrictions on freedom, such as compulsory residence orders or other forms of supervision and monitoring, such as the obligation to register; and to set up open reception centres;

(g) Ensure that detention centres are supervised by persons who are specially selected and trained in psycho-social support and to ensure the permanent, or at least regular, presence of "inter-cultural mediators", interpreters, doctors and psychologists as well as legal protection by legal counsellors.

252. Some national courts have recognized that right to detain aliens pending deportation.[615] With respect to the length of detention, numerous national courts

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[615] "At the same time, however, this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Charles Denmore, District Director, San Francisco District of Immigration and Naturalization Service, et al., v. Hyung Joon Kim*, United States Supreme Court, 29 April 2003 [No, 01-1491], 538 U.S. 510; "By virtue of article 22 (part 2) of the Constitution of the Russian Federation, an alien or stateless person present in the territory of the Russian Federation may, in the event of forcible deportation from the Russian Federation, be subjected, prior to a court decision, to detention for the period necessary for the deportation, but not for more than 48 hours." *Ruling No. 6, Case of the review of the constitutionality of a provision in the second part of article 31 of the USSR Act of 24 July 1981, "On the legal status of aliens in the USSR" in connection with the complaint of Yahya Dashi Gafut*, Constitutional Court of the Russian Federation, 17 February 1998; "Ex abundantia, the Court of appeal holds that if, in the opinion of the State, it would be in the interests of public order or safety that M could not be released from custody pending his possible expulsion to a country other than Yugoslavia, or that other restrictive measures be taken against him, it is the responsibility of the State to take such measures as are necessary and possible within the law." *SM v. State Secretary for Justice*, Netherlands Court of Appeal of The Hague, 29 May 1980; "It is understood that detention of the expelled individual is lawful, if the public interest demands it, during the time necessary to arrange his embarkation or transportation abroad." In re de Souza, Federal Supreme Court, 29 October 1934, *Annual Digest and Reports of Public*

have indicated that an alien may be detained only as long as is reasonably necessary to arrange the alien's deportation.[616] In some cases, courts have held extensive periods of detention pending deportation to be excessive.[617]

International Law Cases, 1933-1934, Hersch Lauterpacht (ed.), Case No. 139, p. 334; "The charge that there is an obligation to set the illegal immigrant at liberty while his case is under consideration is manifestly incompatible with the above views; such a charge would be equivalent to weakening or even to annulling the exercise of power recognized above. Should the Office of Immigration decide not to deport the alien or should the appellant not choose this solution, there remains no other alternative than to hold him in custody in the place of detention for immigrants until the necessary requisites for his admission to the country have been completed." *In re Grunblatt*, Supreme Court, Argentina, 7 April 1948, *Annual Digest and Reports of Public International Law Cases*, 1948, Hersch Lauterpacht (ed.), Case No. 84, p. 278; "By the second [provision], the Executive Power is enabled to order the detention of more dangerous aliens for the period up to the moment of embarkation, when the public safety requires this." *In re Bernardo Groisman*, p. 346; "*In R v. Governor of Durham Prison, ex p Singh* [1984] 1 All ER 983, [1984] 1 WLR 704 it was held, in a decision which has never been questioned (and which was followed by the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1996] 4 All ER 256. [1997] AC 97), that such detention was permissible only for such time as was reasonably necessary for the process of deportation to be carried out." *A and others v Secretary of State for the Home Department*, United Kingdom House of Lords, [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169, 16 December 2004 (Lord Bingham of Cornhill); *Rex v. Governor of H.M. Prison at Brixton and the Secretary of State for Home Affairs, Ex parte Sliwa*, Court of Appeal of England, 20 December 1951, *International Law Reports*, 1951, Hersch Lauterpacht (ed.), Case No. 95, pp. 310-313; *Aronowicz v. Minister of the Interior*, op. cit., pp. 258-259; and *Al-Kateb v Godwin*, High Court of Australia, [2004] HCA 37, 6 August 2004.

[616] See, e.g., *In re de Souza*, Federal Supreme Court, 29 October 1934, *Annual Digest and Reports of Public International Law Cases*, 1933-1934, Hersch Lauterpacht (ed.), Case No. 139, pp. 333-334, at p. 334 "It is understood that detention of the expelled individual is lawful, if the public interest demands it, during the time necessary to arrange his embarcation or transportation abroad."; "In answering that basic question, the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal." *Kestutis Zadvydas, Petitioner, v Christine G.. Davis, United States Supreme Court*, 533 U. S. 678, 28 June 2001; "However justifiable may be the reasons of public order which determined the Executive to decree the removal of an inhabitant of this territory, it is beyond doubt that the deprivation of liberty to that end may not be continued beyond the period in which that precautionary measure is changed into a punishment without the law." *In re Flaumembaum*, Cámara Criminal de la Capital, 24, June 1941, *Annual Digest and Reports of Public International Law Cases*, 1941-1942, Hersch Lauterpacht (ed.), Case No. 94, pp. 313-315, at p. 313.

[617] See e.g., Constitutional Court of the Russian Federation *Ruling No. 6*, op. cit. "It is not possible to interpret that decision [*In re Bernardo Groisman*] as a recognition of the right of the Executive to prolong the detention in the country of a person domiciled here, even for the purpose of making effective his legal expulsion, beyond the period in which such precautionary measure is transformed into a penalty not authorized by law, in this case nineteen months, without judgment or hearing, and under a branch of government which even in a state of siege does not have such power (National Constitution, Arts. 23, 29, and 95). On the contrary, it is for the courts in each case to inquire whether or not the detention exceeds the proper limits." *In re Cantor*, Federal Supreme Court, Argentina, 6 April 1938, *Annual Digest and Reports of Public International Law Cases*, 1938-1940, Hersch Lauterpacht (ed.), Case No. 143, pp. 392-393; *In re Hely*, Venezuelan Federal Court of Cassation, 16 April, 1941 (Per ILR, 1941-42, p. 313) (alien should be set at liberty, having already been in confinement longer than the penalty (six months to one year) provided by law for the offence with which he was charged); *In re de Souza*, op. cit., pp. 333-334 (detention of seven months is unlawful). But see *In re Bernardo Groisman* op. cit., pp. 345-347 (detention could exceed three days); "As a result, negotiations on the reception of a deportee tended to be prolonged, and Aronowicz's seven weeks in custody could not be considered excessive. There was no evidence that the Minister had acted in bad

253. In a recent series of cases,[618] national courts have considered the question of whether aliens can be detained indefinitely where expulsion is not possible in the foreseeable future. In a case decided in 1998,[619] the Constitutional Court of the Russian Federation examined, in the context of the expulsion of a stateless alien, the constitutionality of a statute which would allow the alien's indefinite detention. The Court concluded:

> "6. By virtue of article 22 (part 2) of the Constitution of the Russian Federation, an alien or stateless person present in the territory of the Russian Federation may, in the event of forcible deportation from the Russian Federation, be subjected, prior to a court decision, to detention for the period necessary for the deportation, but not for more than 48 hours. The person may remain in detention for a longer period only on the basis of a court decision and only if the deportation order cannot be implemented without such detention.
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> "Thus a court decision is required to give the person protection not only from arbitrary extension of the period of detention beyond 48 hours but also from unlawful detention as such, since the court in any case evaluates the lawfulness and validity of the use of detention for the person concerned. It follows from article 22 of the Constitution of the Russian Federation, read in conjunction with article 55 (parts 2 and 3), that detention for an indefinite period cannot be considered an admissible restriction of everyone's right to liberty and security of person and is essentially a derogation of that right. For that reason, the provision of the USSR Act on the legal status of aliens in the USSR concerning detention for the period necessary for deportation, which the complainant is contesting, should not be considered grounds for detention for an indefinite period, even when the solution of the question of deportation of a stateless person may be delayed because no State agrees to receive the person being deported.

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faith, and therefore he had not exceeded his powers.") *Aronowicz v. Minister of the Interior*, op. cit., pp. 258-259; *Re Janoczka*, Manitoba Court of Appeal, Canada, 4 August 1932, *Annual Digest of Public International Law Cases*, 1931-1932, Hersch Lauterpacht (ed.), Case No. 154 pp. 291-292 (no undue delay for nine months detention while negotiating admission to other State); "The period of time which Judges have found to be appropriate in peace-time varies from one month to four months. Perhaps, under war-time circumstances, a longer period might be justified." *United States Ex Rel. Janivaris v. Nicolls*, United States, District Court, District of Massachusetts, 20 October 1942, *Annual Digest and Reports of Public International Law Cases*, 1941-1942, Hersch Lauterpacht (ed.), Case No. 95, p. 317 (citations omitted).

618 Earlier cases addressing the question of the indefinite detention of aliens pending deportation include the following: "The right to arrest and hold or imprison an alien is nothing but a necessary incident of the right to exclude or deport. There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as a punishment for crime. Slavery was abolished by the Thirteenth Amendment. It is elementary that deportation or exclusion proceedings are not punishment for crime." *Petition of Brooks*, United States District Court, District of Massachusetts, 28 April, 1925, *Annual Digest of Public International Law Cases*, 1927-1928, Arnold D. McNair and Hersch Lauterpacht (eds.), Case No. 232, p. 340; "Indefinite imprisonment, however, finds no support in the law, because it contravenes the principles of defence of liberty and the imperatives of justice embodied in our legislation." *In re de Souza* op. cit., pp. 333-334; *In re Forster*, Supreme Federal Tribunal of Brazil, 28 January, 1942. (The former legislation which limited the time of imprisonment had been abrogated, and there was now no limit, except at the discretion of the Ministry of Justice).

619 Constitutional Court of the Russian Federation, *Ruling No. 6*, op. cit.

> "Otherwise detention as a measure necessary to ensure implementation of the deportation decision would become a separate form of punishment, not envisaged in the legislation of the Russian Federation and contradicting the above-mentioned norms of the Constitution of the Russian Federation".[620]

254. In *Zadvydas v. Davis*,[621] the Supreme Court of the United States was asked to decide the constitutionality of a statute according to which an alien present in the United States[622] could be kept in detention indefinitely pending deportation.[623] Rather than invalidating the statute the Court noted that:

> "[I]t is a cardinal principle of statutory interpretation, however, that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possibly by which the question may be avoided'."[624]

The Court subsequently noted:

> "A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's due Process Clause forbids the Government to 'depriv[e]' any 'person ... of ... liberty ... without due process of law.' Freedom from imprisonment — from government custody, detention, or other forms of physical restraint — lies at the heart of the liberty that Clause protects. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). [...]

The statute, according to the Government, had two regulatory goals:

> "ensuring the appearance of aliens at future immigration proceedings' and '[p]reventing danger to the community.' Brief for Respondents in No. 99-7791, p. 24. But by definition the first justification — preventing flight — is weak or nonexistent where removal seems a remote possibility at best. As this Court said in *Jackson v. Indiana*, 406 U. S. 715 (1972), where detention's goal is no

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620 The Court also held that the statute, to the extent it allowed detention for more than 48 hours without a court order, was unconstitutional. Constitutional Court of the Russian Federation, *Ruling No. 6*, op. cit. [Russian original].

621 *Kestutis Zadvydas, Petitioner, v Christine G. Davis* and *Immigration and Naturalization Service v. Kim Ho ma*, U.S. Supreme Court, 28 June 2001, Nos. 99-7791 and 00-38.

622 Rather than an alien seeking admission into the United States. See discussion on *Clark v. Martinez*, infra. The Court distinguished *Zadvydas* from other cases in which it had seemingly allowed for indefinite detention, such as *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (involving a once lawfully admitted alien who left the United States, returned after a trip abroad, was refused admission, and was left on Ellis Island, indefinitely detained there because the Government could not find another country to accept him), on this basis.

623 "[The statute] sets no 'limit on the length of time beyond the removal period that an alien who falls within one of the Section 1231(a)(6) categories may be detained'. *Kestutis Zadvydas*, note 616 above, p. 689.

624 Ibid., p. 689 (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932); see also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78, (1994); *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); cf. *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (construction of statute that avoids invalidation best reflects congressional will)).

longer practically attainable, detention no longer 'bear[s] [a] reasonable relation to the purpose for which the individual [was] committed.' *Id.*, at 738."[625]

Accordingly, the Court held that:

"In answering that basic question [of whether a set of particular circumstances amounts to detention within, or beyond, a period reasonably necessary to secure removal is determinative of whether the detention is, or is not, pursuant to statutory authority], the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's basic purpose, namely assuring the alien's presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute. In that case, of course, the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions. [...]

"We realize that recognizing this necessary Executive leeway will often call for difficult judgments. In order to limit the occasions when courts will need to make them, we think it practically necessary to recognize some presumptively reasonably period of detention. [...]

"While an argument can be made for confining any presumption to 90 days, we doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time. We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months. (See Juris. Statement of United States in *United States v. Witkovich*, O. T. 1956, No. 295, pp. 8-9.) Consequently, for the sake of uniform administration in the federal courts, we recognize that period. After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink. This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future."[626]

255. In a subsequent decision, *Clark v. Martinez,*[627] the Supreme Court of the United States extended its ruling that an alien may only be detained only as long as

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[625] The Court, however, limited the scope of its decision to expulsion of lawful immigrants and specifically noted that "Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matter of national security." *Kestutis Zadvydas*, op. cit., pp. 690 and 696.

[626] Ibid., pp. 699-701.

[627] Seattle, *Immigration and Customs Enforcement, et al. v. Martinez,* U.S. Supreme Court, 12 January 2005, No. 03-878.

may be reasonably necessary to effect removal to inadmissible aliens. As a consequence, it held that:

> "Since the Government has suggested no reason why the period of time reasonably necessary to effect removal is longer for an admissible alien, the 6-month presumptive detention period we prescribed in *Zadvydas* applies. (See 533 U.S., at 699-701.) Both Martinez and Benitez were detained well beyond six months after their removal orders became final. The Government having brought forward nothing to indicate that a substantial likelihood of removal subsists despite the passage of six months (indeed, it concedes that it is no longer even involved in repatriation negotiations with Cuba); and the District Court in each case having determined that removal to Cuba is not reasonably foreseeable; the petitions for habeas corpus should have been granted."[628]

256. A similar question was addressed by the High Court of Australia in *Al-Kateb v. Godwin*,[629] in which the Court considered whether administrative detention of unlawful non-citizens could continue indefinitely. The Court upheld the constitutionality of the contested statute. Judge McHugh noted that:

> "A law requiring the detention of the alien takes its character from the purpose of the detention. As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive."[630]

257. Several of the Lords also distinguished the judgements rendered in the *Zadvydas v. Davis* case[631] of the United States Supreme Court, the *R v. Governor of Durham Prison, ex parte Hardial Singh* case[632] of the Queen's Bench Division in the United Kingdom, and *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* case[633] of the Privy Council for Hong Kong, in which indefinite detention had been found unlawful. They pointed out that indefinite detention had already survived a legal challenge in the *Lloyd v. Wallach* case,[634] involving the War Precautions Act of 1914 (Cth), and *Ex parte Walsh*,[635] regarding the National Security (General) Regulations of 1939 (Cth).

258. In *Al-Kateb*, it was also noted that while the statute was constitutional, no consideration was given to the question of whether the statute conformed with Australia's international obligations. The Court specifically addressed the contention that the Constitution should be interpreted in conformity with principles

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628 Ibid., p. 15.

629 *Al-Kateb v. Godwin*, High Court, 6 August 2004, 2004 HCA 37.

630 Ibid.

631 *Kestutis Zadvydas*, op. cit.

632 "Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorize detention if the individual is detained in one case pending the making of a deportation order and, in the other case, pending his removal. ... Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose." *Regina v. Governor of Durham Prison, ex parte Hardial Singh*, [1984] 1 WLR 704; [1984] 1 All ER 983.

633 *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre*, Privy Council of Hong Kong, [1997] AC 97.

634 *Lloyd v. Wallach*, 20 CLR 299 (1915).

635 *Ex parte Walsh*, [1942] ALR 359.

of public international law by stating that the rules of international law which existed at the time might in some cases help to explain the meaning of a constitutional provision.[636]

259. In *A and others v. Secretary of State for the Home Department*,[637] the House of Lords of the United Kingdom considered whether the United Kingdom could, pursuant to a derogation to Article 5 of the European Convention on Human Rights, detain indefinitely aliens subject to an expulsion order but whose deportation was not possible.

260. It was noted that pursuant to the prior ruling of the House of Lords in *R. v. Governor of Durham Prison ex parte Singh*, individuals subject to expulsion could be detained "... only for such time as was reasonably necessary for the process of deportation to be carried out."[638] Moreover, it was recalled that in accordance with the ruling of the European Court of Human Rights in the *Chahal* case, some individuals involved in international terrorism could not be expelled from the United Kingdom. Hence, a formal notice of derogation had been submitted with regard to Article 5.

261. The House of Lords ruled that the provisions of the challenged statute allowing for the indefinite detention of aliens without charge or trial were unlawful despite the derogation requested. The provision was considered disproportionate and discriminatory, since it applied differently to non-nationals and nationals suspected of involvement in terrorism. Lord Bingham of Cornhill pointed out that:

> "Article 15 requires any derogating measures to go no further than is strictly required by the exigencies of the situation and the prohibition of discrimination on grounds of nationality or immigration status has not been the subject of derogation. Article 14 remains in full force. Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. What has to be justified is not the measure in issue but the difference in treatment between one person or group and another. What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another."[639]

4. Duration of the detention

262. The duration of detention has an undeniable impact on the conditions of detention. The duration of the detention is the time which elapses between the day a person is placed in detention pending his expulsion and the day he is released or

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[636] "Finally, contrary to the view of Kirby J, courts cannot read the Constitution by reference to the provisions of international law that have become accepted since the Constitution was enacted in 1900. Rules of international law at that date might in some cases throw some light on the meaning of a constitutional provision." *Ex parte Walsh*, [1942] ALR 359. (Gleeson, C.J.).

[637] *A and others v. Secretary of State for the Home Department*, United Kingdom House of Lords, [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169, 16 December 2004.

[638] Ibid., para. 8 (Lord Bingham of Cornhill). Lord Nicholls of Birkenhead pointed out that "[I]ndefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified."

[639] Ibid., para. 68.

actually expelled. There are no international conventions which specify with any precision the authorized duration of a detention pending expulsion. While international jurisprudence recommends a reasonable period of detention and considers some periods excessive, it does not state what exactly the limits should be. It should be noted, however, that the duration of detention can be calculated only when the expulsion procedure is regular. In *Hokic and Hrustic v. Italy*, the European Court of Human Rights stated that "a period of detention is in principle regular when it takes place pursuant to a judicial decision. Under national law, a subsequent declaration by the judge that there has been a breach does not necessarily affect the validity of the detention undergone in the meantime".[640]

263. The majority of national legislations place limits on the duration of detention pending expulsion. The limits vary from state to state and are renewable. However, fulfilling these requirements in practice may be difficult because, as one author remarks: "The stay at the detention centre serves two purposes. First, it provides the time necessary to establish the identity of the detained alien and to issue him or her the appropriate documents (passport, pass or laissez-passer ...). Secondly, the time can be used to try to modify the detainee's attitude to his or her expulsion with a view to, for example, enlisting his or her assistance in the arrangements for his or her own expulsion by giving, say, some information about himself or herself (personal data, country of transit...)".[641] Opinions regarding the placement of an alien in detention pending his or her expulsion may differ among the authorities of the same State. Under national law, an alien may be detained as a result of an administrative or court decision. In general, the decision includes a direct enforcement clause. Normally, it is for the authority which issued the decision on placement in detention to rule on time limits and extensions.

264. *In Germany*, article 57 (4) (3) of the Aliens Acts of 9 July 1990 and 30 June 1993 provides that "[d]etention on ground of safety [*Sicherungshaft*] can be ordered for six months". The same legislation allows this period to be extended by twelve months if the alien "opposes" his or her expulsion, making a total of 18 months' detention altogether. Decisions on extension must be taken by the same procedure as the initial decisions on placement in detention. In practice, as the courts of first instance are not specialized in the law pertaining to aliens,[642] they generally endorse the position of the authorities and deliver decisions requiring placement in detention which are valid for three months and can be renewed if necessary. Placement in a detention centre is regulated by article 57 of the Aliens Acts of 9 July 1990 and 30 June 1993.

265. *In Belgium*, the duration of the detention is in principle limited to five months by the law of 15 December 1980, with the possibility of an eight-month extension if this is warranted by considerations of public order or national security. In practice, the length of confinement has no limits in Belgium, since a new time period begins to run if a person opposes his or her expulsion. But a duration of one year appears to

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[640] European Court of Human Rights, *Hokic and Hrustic v. Italy*, Judgment of 1 December 2009, para. 22 [French original].

[641] Frank Paul Weber, "Expulsion: genèse et pratique d'un contrôle en Allemagne (partie 1)", *Cultures & Conflits*, 23, autumn 1996 (available at http://www.conflits.org/index350.html on 31 May 2009) [French original].

[642] Cases involving aliens are within the jurisdiction of administrative tribunals.

be the exception.[643] However, the data on duration of detention provided by the Ministry of Internal Affairs do not give the full picture. This is because of the way in which the duration of detention is calculated. The only figures transmitted by the Aliens Office relate to average duration of detention per centre, not per detainee. There is therefore no record of the total amount of time that each person actually spends in detention, since transfers between centres are not recorded. And there are many transfers between centres. For example, the 2006 report of centre "127 bis" notes: "Of the 2,228 persons registered, 126 came from other centres. In 2006, 176 residents were transferred to another closed centre".[644] A detainee who spent, say, two months at centre "127" then three months at centre "127 bis" and 24 hours at "INAD" before being repatriated will appear three times in the statistics. To the authorities, the statistics show, not one person who has spent over five months in detention, but rather three persons for whom the duration of detention recorded by centre is, respectively, two months, three months and 24 hours. Paradoxically, because of this detainee, who will have spent five months in several closed centres, the authorities' statistics on duration of detention will be considerably lower than if there had been no transfers.[645] According to various NGOs, despite the five-month limit on the duration of detention imposed by law in Belgium, detention is sometimes far longer in reality. Thus, some detainees have already spent over one year, without interruption, in various closed centres. The psychological effects of such a long detention are devastating for the person concerned.[646]

266. *In Denmark*, the total duration of detention is not restricted. Decisions on extension are taken by the same procedure as the initial decisions on placement in detention. They must observe the principle of proportionality: the judge must verify that progress is being made in meeting the formal requirements for expulsion and that expulsion is possible within a "reasonable" time frame.

267. *In Spain*, the duration of detention, limited to the minimum necessary, may not exceed 40 days. The decision on placement in detention may be the subject of an application for review by the judge who took the decision in the three days following that decision or, alternatively, by the higher court. The application is without suspensive effect. At the end of 40 days, any aliens whom it has not been possible to expel — for example, because they have no papers or because the authorities in their countries refuse to cooperate — are released. They cannot be placed in detention again on the same grounds, but they are marginalized by the expulsion order delivered to them, as it prevents them from finding housing or lawful employment.

268. *In Italy*, the Constitutional Court held in 2001 that detention constituted a deprivation of liberty incompatible with article 13 of the Constitution. That article states: "no restriction of individual liberty is allowed unless ordered in a substantiated decision by a judicial authority in such cases and forms as are provided for by law". Accordingly, decisions to place a person in detention must be validated by a judge. The duration of the detention is restricted to 30 days. It may, at

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643 Cf. European Parliament, Committee on Civil Liberties, Justice and Home Affairs (LIBE), Rapport de la délégation de la commission LIBE sur la visite aux centres fermés pour demandeurs d'asile et immigrés de Belgique du 11 octobre 2007, Rapporteur: Giusto Catania, p. 3 [French only].

644 Ibid.

645 Ibid., p. 5.

646 Ibid., p. 7.

the request of the police, be extended by 30 days by the judge. The decision on extension may also be the subject of an application for judicial review, without suspensive effect. The application must be filed within 60 days.

269. *In Switzerland*, article 76 of the Aliens Act provides, with respect to detention pending return or expulsion, that:

> "2. The duration of the detention referred to in paragraph 1 (b) 5 may not exceed 20 days.
>
> "3. The duration of the detention referred to in paragraph 1 (a) (b) 1 to 4 may not exceed 3 months; if any particular obstacles prevent the return or the expulsion from being enforced, detention may, subject to the agreement of the cantonal judicial authority, be extended by a maximum of 15 months or, in the case of a minor aged from 15 to 18 years, a maximum of 9 months. The number of days of detention referred to in paragraph 2 must be included when determining the duration of maximum detention."

270. Article 554-1 of the Code on the Entry and Stay of Aliens in France provides that "an alien may not be placed or held in detention for longer than is strictly necessary for his departure. The authorities must take all necessary steps to that end." It would therefore seem important for the authorities to publish the duration of detention for each detainee, and not solely for each centre, a step which appears to be technically feasible. The involvement of both the administrative authorities and the judges in decisions on the detention of persons being expelled creates confusion and loss of control over periods of detention. Moreover, the possibility that the detention may be renewed makes for a more complicated calculation of the duration of detention.

271. In calculating the duration of the detention, international jurisdictions, and in the present instance the European Court of Human Rights, take into consideration the period which elapses between the day on which an alien is placed in detention with a view to his or her expulsion and the day of his or her release.[647] The calculation of periods of detention is not feasible when an expulsion procedure is irregular or an authority abuses its powers.

272. Besides jurisprudence and doctrine, the international institutions also agree on the need to keep detention pending expulsion relatively short so as not to prolong the confinement of the expellee. In paragraph 13 of recommendation 1547 (2002) "Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity", the Parliamentary Assembly of the Council of Europe recommends that the Committee of Ministers urge Member States:

> "To adapt without delay their legislation and practices regarding holding prior to expulsion, in order to:
>
> "(a) Limit the length of detention in waiting or transit zones to a maximum of 15 days;
>
> "(b) Limit the length of detention in police stations to the amount of time strictly necessary for any arrest and to separate foreigners awaiting expulsion from people being questioned for common law crimes."

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[647] European Court of Human Rights, *Case of Hokic and Hrustic v. Italy*, Judgment of 1 December 2009, para. 18.

273. The duration of the detention must be consistent with legislative provisions. This is what the European Court of Human Rights stated in the case of *Shamsa*, which concerned two Libyan nationals who were staying illegally in Poland and who were the subject of an expulsion decision because of a breach of public order. They were detained with a view to their expulsion and, after various fruitless efforts to expel them, the border police kept them in detention at Warsaw airport in the transit area. Commenting on the arbitrary nature of this deprivation of liberty, and hence its incompatibility with article 5, paragraph 1, of the European Convention on Human Rights, the Court stated that the general principle of legal certainty must be observed and that "it is [therefore] essential that the conditions of deprivation of liberty under internal law should be clearly defined and that the law itself should be predictable in its application, so as to fulfil the criterion of 'legality' established by the Convention [...]"[648] In this case, the detention of the applicants exceeded the period provided for under Polish law, which does not specify whether that type of detention is possible. The Court therefore held that Polish law failed to meet the condition of "predictability" required by article 5, paragraph 1, of the Convention and that, as the decision to expel had continued to be enforced in the absence of any legal basis,[649] the deprivation of liberty was not in accordance with a procedure prescribed by law as provided in that article.

274. As regards extensions of detention, the European Court of Human Rights has held that an extension must be decided by a court or a person authorized to exercise judicial power.[650] In paragraph 59 of the Judgment in the Shamsa case, the Court inferred this rule from article 5 as a whole, and in particular paragraphs 1 (c)[651] and 3.[652] The Court also referred to "the right of *habeas corpus*" contained in article 5, paragraph 4, of the Convention to "support the idea that detention extended beyond the initial period as envisaged in paragraph 3 calls for the intervention of a court as a guarantee against arbitrariness".[653] In its Proposal for a Directive on return of 1 September 2005, the Commission of the European Communities provided in

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[648] European Court of Human Rights, Judgment of 27 November 2003, *Case of Shamsa v. Poland*, para. 49 [French only].

[649] Ibid., para. 53. For another example of detention without any legal basis, see European Court of Human Rights, Judgment of 23 May 2001, *Case of Denizci and others v. Cyprus*, Reports 2001-V (detention of Cypriot nationals with a view to their expulsion from the Republic of Cyprus to the northern part of Cyprus).

[650] Ibid.

[651] Article 5, paragraph 1(c), reads as follows: "[No one shall be deprived of his liberty save in the following cases (...)] the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

[652] Article 5, paragraph 3, establishes that "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial".

[653] European Court of Human Rights, Judgment of 27 November 2003, *Case of Shamsa*, para. 59 [French only].

article 14, paragraph 4, that "temporary custody [for the purpose of removal] may be extended by judicial authorities" but may not exceed six months.[654]

275. Article 7 of the American Convention on Human Rights, 1969, prohibits arbitrary arrest or imprisonment and to that end provides procedural guarantees.[655] On this basis, the Inter-American Commission on Human Rights has held that "there is no international legal rule that justifies prolonged detention on the basis of emergency powers, far less one that justifies imprisoning someone without bringing charges against that person for presumed violations of national security or other laws while depriving him or her of the right to exercise the guarantees that ensure a fair and equitable trial".[656]

276. In the light of the foregoing analysis, the Special Rapporteur proposes the following draft article, whose provisions derive from various international legal instruments, firmly established international jurisprudence, especially arbitral jurisprudence, and abundant concordant national legislation and case-law, all of the above elements being buttressed by doctrine:

Draft article B: Obligation to respect the human rights of aliens who are being expelled or are being detained pending expulsion

1. The expulsion of an alien must be effected in conformity with international human rights law. It must be accomplished with humanity, without unnecessary hardship and subject to respect for the dignity of the person concerned.

2. (a) The detention of an alien pending expulsion must be carried out in an appropriate place other than a facility in which persons sentenced to penalties involving deprivation of liberty are detained; it must respect the human rights of the person concerned.

(b) The detention of an alien who has been or is being expelled must not be punitive in nature.

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

655 According to article 7 of the American Convention on Human Rights of 22 November 1969: "1. Every person has the right to personal liberty and security; "3. No one shall be subject to arbitrary arrest or imprisonment; " 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him; "5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial".

656 Inter-American Commission on Human Rights, *Ten Years of Activities — 1971-1981*, Organization of American States, Washington, 1982, p. 320, reference cited by the International Federation for Human Rights, report No. 429 of October 2005 "L'anti-terrorisme à l'épreuve des droits de l'homme: les clés de la compatibilité", http://www.fidh.org/IMG/pdf/onu429f.pdf/ [French only]. This report was supplemented a month later by a second report entitled "Violations des droits de l'homme en Afrique sub-saharienne au motif de la lutte contre le terrorisme: une situation à hauts risques", Report No. 429-A, November 2005 [French only].

3. (a) The duration of the detention may not be unrestricted. It must be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out. All detention of excessive duration is prohibited.

(b) The extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power.

4. (a) The decision to place an alien in detention must be reviewed periodically at given intervals on the basis of specific criteria established by law.

(b) Detention shall end when the expulsion decision cannot be carried out for reasons that are not attributable to the person concerned.