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Sixth report on expulsion of aliens

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Addendum

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Part Two. Expulsion proceedings

1. Aside from some rare provisions — moreover, very general in nature — concerning the rights of aliens lawfully present in a State contained in some international instruments, strictly speaking there are no detailed rules in international law establishing expulsion proceedings and reconciling the rights of the individual subject to expulsion and the sovereign right of the expelling State. The matter of expulsion is not entirely regulated in the legal system and the procedural rules applicable to this matter, whether in form or in substance, for example the possibility of review offered to those concerned, are discerned for the most part from a detailed analysis of national laws and jurisprudence. From this analysis it is clear that there is a need for a distinction between the procedure applied to expulsion of aliens who entered the territory of a State legally and those who may have entered illegally. In the latter category, some national laws specify separate treatment for aliens who, although they entered the State illegally, have resided there for some time.

I. Preliminary considerations: Distinction between "legal aliens" and "illegal aliens"

A. Grounds for the distinction between "legal aliens" and "illegal aliens"

2. At the outset, a brief clarification of the terminology is needed. Ordinary language uses images in its vocabulary to distinguish among foreign migrants as a function of their legal status in the State of residence. Thus, there are references to "clandestine immigrants" as opposed to "legal" or "lawful". Nor do legal documents use uniform terminology. In some cases, they distinguish between "legal" aliens and "illegal" aliens or aliens "lawfully" in the territory of a State, as opposed to those who are there "unlawfully". Others speak of "legal aliens" as opposed to "illegal aliens" in the territory of a State. However, all of these terms describe one single reality: immigrants residing in a State in conformity with laws on the entry and residence of foreigners and those who are in violation of those laws. Therefore the terms referring to aliens lawfully or legally in the territory of a State and illegal or unlawful aliens will be used as synonyms.

3. International instruments that expressly state the principle of a distinction between aliens legally and illegally present in a State are nevertheless rare. It appears, moreover, that the 1951 Convention relating to the Status of Refugees is the only one explicitly to state such a distinction. Article 31 of this Convention, expressly entitled "Refugees unlawfully in the country of refuge", governs the treatment of this category of refugee by the Contracting States, while article 32, specifically devoted to "Expulsion", only prohibits Contracting States from expulsion of "a refugee lawfully in their territory".

4. This distinction is all the more necessary because its basis is implicit in various other international legal instruments. It can, in fact, be noted in article 13 of the International Covenant on Civil and Political Rights,[1] which states:

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with the law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for that purpose before, the competent authority or a person or persons especially designated by the competent authority."

5. This provision covers only the alien "legally" in the territory of a State, which means, on the contrary, that it excludes those who are in the territory "illegally", thus suggesting that there are two categories of aliens and they cannot be treated in the same way.

6. The distinction between "legal" and "illegal" aliens in the territory of a State can also be inferred from article 20, paragraph 2, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[2] which states:

> "No migrant worker or member of his or her family shall be deprived of his or her authorization of residence or work permit or expelled merely on the ground of failure to fulfil an obligation arising out of a work contract unless fulfilment of that obligation constitutes a condition for such authorization or permit."

7. Here as well there is reason to believe that this provision concerns only legal migrant workers, as does the Convention as a whole. Indeed, assuming that a migrant worker can, if necessary, be "deprived of his or her authorization of residence" or "work permit" also assumes that he or she already has such an authorization, which in many States is a condition for the granting of a "work permit". Thus there is no doubt that here only legal migrant workers under the laws on entry and residence of the receiving State are intended, as opposed to illegal workers commonly called "clandestine workers" or "undeclared workers".

8. It is also true that article 31, paragraph 1, of the 1954 Convention Relating to the Status of Stateless Persons[3] stipulates that the Contracting States "shall not expel a stateless person lawfully in their territory".

9. Alien "protected persons" make up a category most often found in national legislation rather than international instruments. This category benefits from

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[1] International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, p. 171 (adopted and opened for signature, ratification and accession by the United Nations General Assembly in its resolution 2200 A (XXI) of 16 December 1966).

[2] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, New York, 18 December 1990, United Nations, *Treaty Series*, vol. 2220, p. 3 (adopted by the General Assembly in its resolution 45/158 of 18 December 1990 and entered into force on 1 July 2003).

[3] Convention Relating to the Status of Stateless Persons, New York, 28 September 1954, United Nations, *Treaty Series*, vol. 360, p. 117 [adopted by a conference of plenipotentiaries meeting in pursuance of Economic and Social Council resolution 526 A (XVII) of 26 April 1954].

specific guarantees that the law does not offer to recent illegal immigrants, who are subjected to the procedure of refoulement or removal for violating the rules on entry into the territory of a State. As can be seen below, the laws of most States provide for a summary procedure of refoulement or removal of such aliens, the modalities of which can vary from one State to another.

10. It should be noted that while the distinction between these different categories of aliens may be necessary in an attempt at codification and perhaps progressive development, taking into account both the guidance provided by international law and that arising from State practice, it is not at all required in respect of the rights of expelled persons. They remain human beings whatever the conditions under which they entered the expelling State, and as such have the same right to protection of the fundamental rights inherent to human beings, in particular the right to respect for human dignity.

B. Semantic clarification of the concept of "resident" alien or an alien "lawfully" or "unlawfully" in the territory of a State

11. Article 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) states in paragraph 1 that "an alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with the law (...)". In its explanatory report on this article, the Steering Committee for Human Rights of the Council of Europe explained that the word "resident" did not include an "alien who has arrived at a port or other point of entry but has not yet passed through the immigration control or who has been admitted to the territory for the purpose only of transit or for a limited period for a non-residential purpose".[4] Concerning the word "lawfully", the Steering Committee noted that each State determined the conditions that an alien must fulfil in order for his or her presence in the territory to be considered lawful. Also, article 1 of Protocol No. 7 "applies not only to aliens who have entered lawfully but also to aliens who have entered unlawfully and whose position has been subsequently regularised".[5] On the contrary, a person who no longer meets the conditions for admission and stay as determined by the laws of the State party concerned "cannot be regarded as being still lawfully present".[6]

12. Other texts adopted by the Council of Europe give a more precise definition of the term "lawful residence". Subparagraph (b), section II of the Protocol additional to the European Convention on Establishment of 1955 states briefly that "nationals of a Contracting Party shall be considered as lawfully residing in the territory of another Party if they have conformed to the regulations [governing the admission, residence and movement of aliens]". In 1993, the European Commission on Human Rights declared that article 1, paragraph 1, of Protocol No. 7 did not apply to "an alien whose residence permit has expired ... while he is awaiting a decision on his

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[4] Council of Europe, Explanatory Report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984, *European Treaty Series*, No. 117. A. L. Ducroquetz, *L'expulsion des etrangers en droit international et europeen*, Typewritten thesis, University of Lille, 2007.

[5] Ibid.

[6] Ibid.

request for political asylum or for a residence permit".[7] The Commission added that the article in question also did not apply when the individual did not have a residence permit, once his application for asylum had been definitively rejected.[8]

13. The European Court of Human Rights also had the opportunity to rule on the modalities for application of this provision, in particular in the *Sejdovic* case, where it considered that "at the time when the Italian authorities decided to expel the applicants, they were not 'lawfully' in Italy, given that they were not in possession of a valid residence permit, and that article 1 of Protocol No. 7 did not apply in that case".[9] On the other hand, in the *Bolat* judgment of 5 October 2006 concerning the expulsion of a Turkish national from Russia, the Court noted that article 1 of Protocol No. 7 was applicable to the extent that, in the case at hand, the applicant "had been lawfully admitted to Russian territory for residence purposes and had been issued with a residence permit, which was subsequently extended pursuant to a judicial decision in his favour".[10]

14. For its part, the United Nations Human Rights Committee, in its general comment No. 15 of 1986, explained that the condition of legality stipulated in article 13 of the 1966 Covenant implies that national law concerning the requirements for entry and stay must be taken into account "in determining the scope of [the protection provided to aliens], and that illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions".[11] Nevertheless, it adds that, if the legality of an alien's entry or stay is in dispute, any decision leading to expulsion ought to be taken "in accordance with article 13".[12]

15. Therefore:

(a) An alien is considered a "resident" of a State when he or she has passed through immigration controls at the entry points, including ports, airports and border posts, of that State;

(b) On the other hand, an alien is not considered a resident if he or she was admitted to the territory of a State solely for purposes of transit or as a non-resident for a limited period;

(c) An alien is considered to be "legal" or "lawfully" in the territory of a State if he or she fulfils the conditions for entry or stay established by law in that State;

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[7] European Commission of Human Rights decision of 13 January 1993, *Voulfovitch and others v. Sweden*, app. no. 19373/92, Decisions and Reports 74, p. 199.

[8] European Commission of Human Rights decision of 8 February 1993, *S.T. v. France*, app. no. 20649/92.

[9] European Court of Human Rights, decision on admissibility of 14 March 2002, *Sejdovic and Sulemanovic v. Italy*, app. no. 57575/00, pt. 8, case stricken from the Court's list by an order of 8 November 2002.

[10] European Court of Human Rights, judgment of 5 October 2006, *Bolat v. Russia*, app. no. 14139/03, para. 77.

[11] United Nations Human Rights Committee, general comment No. 15, twenty-seventh session, 1986, "The position of aliens under the Covenant" (HRI/GEN.1/Rev.1), para. 9.

[12] Ibid.

(d) On the other hand, an alien is considered to be "illegal" or "unlawfully" in the territory of a State if he or she does not fulfil or no longer fulfils the conditions for entry or stay as established by law in that State.

16. In the view of the Special Rapporteur, these explanations of the terminology could contribute to the improvement and enrichment of the definitions contained in draft article 2, which was sent by the Commission to the Drafting Committee in 2007.[13]

II. Procedures for the expulsion of aliens illegally entering the territory of a State

A. Aliens who have recently entered illegally the territory of the expelling State

17. In most countries, the administrative authorities alone are competent to make decisions regarding the expulsion of aliens entering the territory of the State illegally. Indeed, many countries do not involve a judge in the expulsion proceeding for an illegal alien. A study conducted by the French Senate on the expulsion of illegal aliens in certain European States shows this to be widely the case.[14] The study underlines the disparate nature of national legislation on the issue.

18. In Germany, the rules on the expulsion of illegal aliens stem from the Act of 30 July 2004 regarding the stay, employment and integration of aliens in federal territory. It entered into force on 1 January 2005 and, on this issue, reproduced most of the provisions of the Aliens Act of 1990. The Act favours the voluntary departure of illegal aliens. No specific decision is required for expulsion; as a result it cannot be contested. On the other hand, the decision to place an individual in administrative detention, taken by a judge at the request of the administration, can be appealed. In that State, expulsion measures do not require a specific decision because expulsion is simply a way of executing the obligation of any illegal alien to leave the territory. For illegal aliens, the obligation to leave the territory is enforceable immediately in all cases: solely through the Aliens Act when the absence of a residence permit is the result of illegal entry or because the alien has not requested a residence permit, or on the basis of the administrative act denying residency. In that State, the enforcement of the Aliens Act falls to the administration responsible for immigration in the *Länder* (federal States).

19. The possibility for forced removal, provided in the Aliens Act, exists in a general manner in German administrative law. According to the Administrative Enforcement Act of 1953, an administrative act containing an obligation or prohibition is only binding and can be directly enforced by the administration as well, without the intervention of a judge. The binding obligation to leave the territory can be imposed on all aliens without residence permits: either solely on the basis of the Aliens Act or on the basis of an administrative act notifying them that their right to remain in the territory of the Federal Republic has expired. In cases

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[13] See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 188, p. 133.

[14] See documents de travail du sénat (série législation comparé), l'expulsion des étrangers en situation irrégulière, no LC 162, April 2006.

where the lack of a residence permit results from unlawful entry or from the fact that an alien has not requested a permit, the Aliens Act states that the obligation to leave the territory can be enforced without the need for an administrative decision. In other cases, the Aliens Act gives rise to an obligation to leave the territory, either because the administration refuses to issue a residence permit, or as a result of another administrative act (withdrawal of the permit issued or limitation of its period of validity, for example). The obligation to leave the territory can be enforced only once the administrative act providing the grounds for it has itself entered into force, i.e. as soon as the appeals[15] relating to that act have been definitively rejected. Enforcement of the obligation to leave the territory is therefore not subject to the issuance of a specific administrative act since it is directly enforceable.

20. There are two procedures for the expulsion of illegal aliens. The first, a summary procedure and comparable to *refoulement* at the border, is applicable to aliens who entered Germany illegally within the previous six months. They can be expelled without prior injunction and without written notice. However, it is not possible to expel an illegal alien to a country where the person is at risk of persecution. The law provides for the possibility of guaranteeing the expulsion of certain aliens by placing them in detention (*Abschiebungshaft*: expulsion-related detention). It lists the reasons justifying such a measure, which include having entered the territory of the Federal Republic without valid documentation. Aliens who entered Germany illegally within the previous six months and who meet the criteria for the first expulsion procedure can therefore be placed in administrative detention. The second procedure, which offers more guarantees to individuals, is addressed to other illegal aliens. This category includes those who entered the country legally but have not obtained a residence permit, as well as those who entered the country illegally and have remained there over six months because they have not been the subject of any removal order during the first six months of their stay in Germany. The expulsion procedure for this category of aliens will be addressed in more detail below in the chapter on the expulsion procedure for “illegal aliens who are long-term residents”. In both cases, the execution of the expulsion order can be guaranteed via the transfer of the persons concerned to a transit centre or detention centre.

21. In Belgium, the rules on the expulsion of illegal aliens stem from the Law of 15 December 1980 on access to the territory, stay, residence and deportation of aliens, and from the Royal Decree of 8 October 1981, implementing it. These two texts have been revised many times since their entry into force. The Law favours the voluntary departure of illegal aliens in such a way that expulsion is only ordered if the person concerned has not complied with an order to leave the territory by a certain deadline. All expulsion-related measures, including placement in detention, are taken by the administration. Indeed, according to the Law of 1980, expulsion decisions are taken by the minister responsible for immigration matters, i.e. the Minister of the Interior. However, the decree from the Minister of the Interior dated 17 May 1995 delegating ministerial powers relating to access to the territory, stay, residence and deportation of aliens provides that decisions regarding the expulsion of aliens who entered Belgium by eluding border controls can be made by officials

[15] These appeals have no suspensive effect.

of the Aliens Office[16] — on the condition that they hold a certain rank — by mayors and municipal employees responsible for policing aliens,[17] by judicial police officers and by non-commissioned officers of the *gendarmerie*. Expulsion decisions for other aliens liable to expulsion (for example those who have been refused the right to asylum who did not leave the country when they should have) can only be taken by officials of the Aliens Office holding a certain rank. Appeals for annulment and petitions to suspend expulsion decisions can be made before the State Council, whereas custodial measures are challenged before a court judge.

22. In Cameroon, regarding aliens who enter Cameroon illegally, article 59 of decree No. 2000/286 of 12 October 2000 specifying entry, stay and departure conditions for visitors to Cameroon provides clearly that: "The measure of *refoulement* is taken upon entry to the national territory, by the Chief of the border post or immigration office."

23. In Denmark, the principal rules on expulsion stem from the Aliens Act. It has been revised frequently in recent years. The text currently in force is Act No. 826 of 24 August 2005. The ministry responsible, the Ministry for Refugees, Immigrants and Integration, has specified the legislation in several circulars. The Act encourages the voluntary return of illegal aliens to their own countries, so that expulsion is ordered only if the individual does not cooperate with the authorities and leave the country. With the exception of custodial decisions, which fall under the jurisdiction of a judge,[18] all decisions relating to expulsion are taken by the administration and can be subject only to administrative review without suspensive effect. When they relate to illegal aliens, expulsion decisions are taken by the Aliens Agency, which reports to the Ministry for Refugees, Immigrants and Integration and is responsible for the implementation of the Aliens Act.

24. An expulsion decision from the Aliens Agency is communicated and executed by the police. This decision must take into account the alien's personal situation, with particular regard for their level of integration into Danish society, age and health, ties with persons living in Denmark, etc. It must also mention the deadline by which the person must leave the country; the Aliens Act specifies that no fewer than 15 days must be allowed. In accordance with the general rules expressed in the law on administrative acts, there must be grounds for an expulsion decision and it must mention the means of review available to the alien and provide practical information on that subject. The police notifies the person concerned of the decision taken by the Aliens Agency. The notification must be translated, unless there is no doubt as to the alien's understanding of Danish. In order to guarantee the proper execution of the expulsion decision, even before such a decision is taken, the police can adopt control measures. They can require illegal aliens to surrender their

[16] The Aliens Office is part of the Federal Domestic Civil Service, which is the administration governed by the Minister of the Interior. The Aliens Office is responsible for the implementation of the Aliens Act. In particular, it has a "deportation" department.

[17] In larger communes, there is a separate office with responsibility for aliens, whereas, in others, the population department deals with issues regarding aliens.

[18] There is only one type of jurisdiction, made up of 82 courts, two courts of appeal and the Supreme Court. There is no administrative jurisdiction: disputes between the administration and citizens are generally resolved by specialized bodies before being submitted to the ordinary jurisdictions, where necessary.

identity papers, post bail, be transferred to one of the three transit centres[19] or report to them regularly. The measure used most often is transfer to a transit centre, with the obligation to report to the police twice a week. These control measures can be appealed without suspensive effect before the Minister for Integration. If necessary, the alien can be placed in administrative detention (*frihedsberøvelse*: deprivation of liberty). The Aliens Act restricts the use of this measure to cases where other control mechanisms are insufficient to guarantee the presence of the person concerned and to cases where the alien does not cooperate with regard to departure, for example by refusing to provide information about his or her identity.

25. In Spain, the rules on expulsion of illegal aliens are derived from Organic Law No. 4 of 11 January 2000 concerning the Rights and Freedoms of Foreigners in Spain (Aliens Act). This law has been amended several times since its entry into force, in particular by Organic Law No. 8 of 22 December 2000. In the original version of Organic Law No. 4 of 11 January 2000, illegal aliens were subject only to an administrative fine. Royal Decree No. 2393 of 30 December 2004 further developed the provisions of the law on aliens, in particular the articles relating to expulsion. The expulsion of aliens is an administrative measure that is immediately enforceable. However, the alien can request suspension of the expulsion order while waiting for a decision to be reached on its annulment. On the other hand, the decision for placement in administrative custody is taken by a court judge at the request of the administration. The expulsion decision is taken by the administration, delegated by the Government, meaning by the representative of the national government in the province. In the autonomous communities made up of just one province, the government representative has competence. These administrative structures include units specializing in the enforcement of the Aliens Act. A decision on expulsion may be preceded by a police investigation. After passage of the Law on Foreigners, being in Spain without a residence permit represents a serious administrative violation.[20] Those who commit such a violation are subject to an administrative fine of 301 to 6,000 euros, the amount being determined by the financial status of the individual. However, rather than a fine, illegal aliens may also incur the penalty of expulsion. The expulsion of illegal aliens is not decided according to an administrative procedure under common law, but under a summary procedure whereby expulsions can be ordered within 48 hours. The summary procedure, nevertheless, follows various procedural steps under common law. The police notify the illegal alien that an expulsion proceeding has been initiated by providing him with a “preliminary report” on the grounds for expulsion. The individual then has 48 hours to provide any relevant information. He can in particular provide evidence of integration into Spanish society and dispute the validity of the use of the summary procedure, which in theory is reserved for exceptional cases where it is appropriate to order expulsion as soon as possible.

26. Once the expulsion proceeding has begun, the alien has the right to the assistance of a lawyer free of charge, and if necessary, an interpreter. If the police investigating the proceedings do not accept the individual’s observations or if there is no response, the preliminary report is transmitted as such to the competent administration to issue the expulsion order and the alien is so informed. Otherwise,

[19] These transit centres also accomodate asylum-seekers, until their requests are heard, and those who have been refused the right to asylum, while they are waiting to leave the country.

[20] The Law on Foreigners establishes three categories of administrative violations: minor, serious and very serious.

if the alien's observations are verified within the three-day period, a new report is sent to the individual, who has a further 48 hours to provide information. Once that time has elapsed, the report is sent to the competent administration. The decision on expulsion must be taken within six months from the date on which the proceedings were initiated. During this period, the individual can be subjected to control measures listed in the Aliens Act: confiscation of his passport, regular reporting to the authorities, house arrest, 72 hours of "precautionary detention"[21] and placement in administrative custody. Once it has become final, the individual is notified of the decision on expulsion. The avenues of review available to the foreigner must also be presented. The decision is immediately enforceable.[22]

27. In the United Kingdom, matters having to do with expulsion are dealt with by the members of the immigration service, but the Home Secretary has the ability to take the decision himself, independent of any particular case, for example to speed up the proceeding. The rules on expulsion of illegal aliens are derived from various laws on aliens currently in force: the Immigration Act 1971, the Immigration and Asylum Act 1999, the 2002 Nationality, Immigration and Asylum Act, and the 2004 Act on Processing of Asylum and Immigration Requests, including their various amendments. Their provisions were complemented by implementing regulations. In addition, an instruction manual for staff of the immigration service details the modalities of implementation of the legislative and regulatory provisions concerning expulsion.

28. The expulsion of an illegal alien is an administrative measure that, as a general rule, is immediately enforceable. Only persons entering the United Kingdom legally may file a suspensive appeal. Other aliens must leave the country before filing their appeal. Appeals are considered by an independent agency specializing in immigration disputes, the Asylum and Immigration Tribunal (AIT), whose decisions can be disputed only on the grounds of an error of law. Furthermore, multiple appeals as a delaying tactic are impossible: in principle, an alien may appear before AIT only once. In the absence of new evidence, appeals against decisions on denial of residence preclude review of expulsion decisions. Like all matters concerning immigration, expulsion decisions are under the competence of the Home Office. They are taken by an official of the immigration service. The Immigration Act 1971 stipulates that foreigners who have entered the United Kingdom by evading border controls can be expelled on the basis of a decision by an Immigration Service official, while the Immigration and Asylum Act 1999 states that foreigners who entered lawfully but have overstayed their entitlement may also be expelled by a decision of the same administrative authority. The instruction manual for the immigration services specifies that cases of expulsion of illegal aliens are dealt with by officials with a certain level of competence and experience or by designated inspectors who have received a specific delegation of powers. This rule applies in the simplest cases, for example:

– The alien has resided in the United Kingdom for less than 10 years;

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[21] This is a measure of deprivation of liberty reserved for illegal aliens which differs from pretrial detention. The law limits its duration to 72 hours, but there is no possibility of appeal against this deprivation of liberty, which is not ordered by a judge. Consequently, a foreigner so detained may, like any person detained illegally, demand *habeas corpus*, in order to appear before a judge as quickly as possible.

[22] On the other hand, common law procedures, applicable for example to aliens working without the necessary authorizations, give the individual 72 hours to leave the territory.

– His route to the United Kingdom is easy to trace;

– He has no particular ties to the United Kingdom, for example, no family;

– There are no exceptional circumstances justifying his presence in the United Kingdom.

29. In the most complex cases the decision can be taken only with the agreement of a high-level official, even the Home Secretary if the matter is sensitive, for example if a member of Parliament has intervened or if the case is likely to be reported in the media or to have an impact on relations with the community of which the alien is a member. Since 2000, the jurisprudence considers that an individual who enters British territory without authorization is not necessarily illegal. That is why the instruction manual for the Immigration Service henceforth states that an official can only declare an illegal entry if he is convinced, given the information gathered, that this is indeed the case and that his decision will not subject the person concerned to unwarranted harm. The official must draft a short note explaining his evaluation process. In all cases, a decision on expulsion may be taken by the Home Secretary, who may have access to any dossier at any time for reasons of ease or effectiveness, for example when it is clear that the proceedings will not be resolved without his intervention.

30. In Italy, Legislative Decree No. 286 of 25 July 1998,[23] referred to as the "single text on immigration", and its principal implementing regulation, Presidential Decree No. 394 of 31 August 1999, set out the rules on the expulsion of illegal aliens. Originally, the single text combined several texts, including Law No. 40 of 6 March 1998 establishing various measures on immigration and the status of aliens, referred to as the Napolitano-Turco Law. It was amended several times, in particular by Law No. 189 of 30 July 2002 amending the relevant provisions on immigration and asylum, referred to as the Bossi-Fini Law. The current provisions dealing with expulsion result from two contradictory trends: on the one hand, the determination to control the entry of aliens into the country and to combat clandestine immigration, evidenced mainly by the amendments to the single text stemming from the Bossi-Fini Law, and, on the other hand, the need to guarantee aliens — even illegal ones — the fundamental rights set forth in the Constitution. This requirement led the legislature to amend the single text on several occasions starting in 2002, after the Constitutional Court, which had been petitioned to consider the exception of unconstitutionality, had found some paragraphs of the single text to be unconstitutional.

31. Unlike in other States, the judge intervenes in the administrative decision of expulsion because a judge must validate the decision before it can be enforced. Since 2002, accompanying the alien to the border under police escort is the rule for any administrative expulsion. When petitioned to consider the exception of unconstitutionality, the Constitutional Court held that this measure violated personal freedom and should therefore be validated by a judge. In addition, the Constitutional Court does not require this validation to follow a written procedure requiring, for

[23] Legislative decrees are legislative texts adopted by the Government under authority delegated to it by Parliament through the adoption of an enabling legislation, whereas decree-laws are texts adopted by the Government in cases of emergency and later converted into laws by Parliament. During the conversion, Parliament may amend the provisions adopted by the Government. Several amendments of the single text on immigration stem from decree-laws.

example, that a judicial trial must be held or that the alien must be assisted by counsel. Since 2004, justices of the peace — non-professional judges — of the location where the expulsion decision is taken have been responsible for validating the administrative decision of expulsion. The validation hearings take place within 48 hours following the expulsion decision and the alien cannot be accompanied to the border under police escort unless the validation decision has been taken. This decision may be appealed before the Court of Cassation and that appeal is not suspensive.

32. The expulsion of illegal aliens, whether they entered the country by evading border controls or remain in the country although their residence permits have expired or have been withdrawn, is an administrative decision taken by the Prefect. Grounds for the expulsion decision must be provided; the facts justifying the expulsion must be spelled out clearly; and a copy of the expulsion decision must be delivered to the alien in person by a law enforcement official. If the alien cannot be found, he or she shall be notified of the decision at his or her last known residence. If the alien does not understand Italian, the decision must be accompanied by a "summary" written in a language understood by the alien, or in English, French or Spanish. According to case law, translation is an integral part of the right to defence. If the expulsion decision is not translated into the language of the alien, reasons must be given for the absence of a translation, otherwise the expulsion decision would be voided. The English, French or Spanish translation is admissible only if the administration does not know the country of origin, and hence the language, of the alien. At the same time as the expulsion decision is communicated to the alien, the alien shall be informed of his or her rights: assistance of counsel, possibly through legal aid, in all legal proceedings related to expulsion, and the possibility of appealing the expulsion decision. Under the Napolitano-Turco law, the expulsion decision included both the order to leave the territory within 15 days, and the order to observe certain travel restrictions and to report to border police. Nonetheless, in certain cases, the expulsion decision could include accompanying the alien to the border by the police. This possibility was essentially limited to cases where the alien had not complied with a previous expulsion decision and to those where the Administration suspected that the alien would not comply. Under the Bossi-Fini law, accompanying the alien to the border under police escort has become the rule. Only when the ground for expulsion is that more than 60 days have elapsed since the expiration of the residence permit would the alien be ordered to leave the territory within 15 days. Nonetheless, even in this case, if the Administration fears that the alien would not comply with the expulsion decision, accompanying the alien to the border under police escort may be considered. The expulsion decision shall be immediately enforceable by the police.

33. In general, it is apparent from national laws that a summary or special expulsion procedure may be applied when the alien manifestly has no chance of obtaining entry authorization,[24] or when grounds for expulsion may exist with respect to illegal entry,[25] or certain breaches of admission conditions.[26] A special

[24] Switzerland, 1949 regulation, art. 17 (i).

[25] Belarus, 1999 Council Decision, art. 3; and Nigeria, 1963 Law, art. 25 (i) and (ii). If an international agreement does not institute between the States concerned a special procedure for the return of an expelled alien, the alien may be handed over to the authorities of the expelling State, who would then proceed with his or her expulsion (Belarus, 1999 Council Decision, art. 3).

procedure may also apply when the alien is not a national of a State having a special arrangement or relationship with the expelling State.[27]

B. Illegal aliens who are long-term residents of the expelling State

34. As indicated above, some laws make a distinction between recent and long-term illegal aliens, which may give rise to some variations in expulsion procedures. The first group is subject to a summary procedure, while the second group is subject to a procedure that guarantees some of their rights, in particular the possibility of arguing their case before a competent authority. For example, aliens who enter Germany clandestinely and have not been issued a deportation order during the first six months of their stay in the country are subject to this procedure. They are under the obligation to leave the territory; no written order is required. They must do so as quickly as possible, unless they have been given a time limit within which to leave the territory,[28] the law having set a maximum time limit of six months for an illegal alien to leave the territory. The Administration established this time limit to give the alien enough time to prepare his or her departure and to avoid expulsion by leaving the country voluntarily. One month is generally considered sufficient. Strictly speaking, the expulsion procedure is applicable only if the alien being expelled cannot leave the territory on his own initiative, or if circumstances justify monitoring of the alien's departure. Doubts concerning the voluntary departure of the alien must be based on concrete elements, for instance, failure to notify the landlord of departure. Moreover, the circumstances justifying the need to monitor the alien's departure are spelled out by law. They include the lack of financial resources, lack of identity papers, expression of the desire to remain in Germany, and providing incorrect information to the Administration. The expulsion proceeding starts with a written notification sent to the alien, which must state the date by which the alien must leave the territory. This is not additional time, but the time limit by which the alien must leave the territory. The notification must also indicate the State of destination and the consequences of the alien's refusal to leave the territory within the prescribed time limit. The notification is an integral administrative act, and as such may be subject to a prior administrative appeal and an appeal for annulment before an administrative judge. Nonetheless, these appeals have no effect on the expulsion itself. They can be taken into account only if the notification violates the alien's rights. Although the absence of notification makes the expulsion illegal, some of the case law shows that the formality of notification is not necessary if the alien entered the territory of the Federal Republic without authorization.

35. We have also seen that in countries such as Denmark, the expulsion decision must take into account a number of elements, in particular the level of integration of the alien into Danish society and ties with Danish residents, and that Spain, Italy and the United Kingdom afford major procedural guarantees to their illegal aliens. But overall, there are few laws that provide for the application of the same rules of

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[26] Brazil, 1981 Decree, art. 104, 1980 Law, art. 70; Italy, 1998 Decree-Law No. 286, arts. 13 (4)-(5), (5 bis)-(5 ter), 15; and Sweden, 1989 Act, sect. 4.6.

[27] France, Code, art. L531-3.

[28] This is particularly the case of aliens who have been denied a residence permit or whose residence permit has been withdrawn. The administrative decision concerning the residence permit sets out the obligation to leave the territory within a given time frame.

procedure for illegal immigrants — even long-term ones — as for aliens who entered the territory of the expelling State legally.

36. Quite the contrary, in the precedent-setting case of *Harisiades v. Shaughnessy* in United States law, "the Supreme Court held that the United States had the power to expel an alien notwithstanding his long residence, that the exercise of this power violated neither due process nor freedom of speech, and that deportation because of membership of a 'subversive organization' prior to the effective date of the statute did not constitute an ex post facto law within the constitutional prohibition. In addition, the alien who is subject to the 'civil' procedure of deportation cannot rely upon the otherwise far-reaching implications of the Supreme Court decision in the *Miranda Case*. In criminal prosecutions this decision precludes the use of statements made by a person in custody unless he is first told of his right to remain silent and of his right to have a lawyer present at his interrogation."[29]

37. In any event, such distinction and its possible legal procedural ramifications are a matter of State sovereignty. The Federal Court of Cassation of Venezuela agreed as much when it ruled in 1941 that:

> "The right of expulsion of undesirable foreigners as well as of exclusion or expulsion of ineligible aliens, being based on the free exercise by the State of its sovereignty, it is natural that there should be no right of appeal on any ground against it. … But by a Venezuelan provision, as a safeguard against possible error committed in a decree of expulsion with regard to the nationality of the person to be expelled, the law permits the allegation that he is a Venezuelan. It is easy to see that such allegation does not affect in any way the actual right of expulsion, which is a categorical manifestation of national sovereignty. It is, indeed, an implicit confirmation of the essential unimpeachability of the decree for the expulsion of pernicious foreigners."[30]

38. It should simply be noted that whenever a deportation decision concerns a second-generation immigrant or a long-term illegal immigrant, the debate about its discriminatory nature is rekindled. The Parliamentary Assembly of the Council of Europe joined this debate following a report by its Committee on Migration, Refugees and Demography of 27 February 2001,[31] which described the expulsion of long-term immigrants convicted in criminal proceedings as being discriminatory, "because the state cannot use this procedure against its own nationals who have committed the same breach of the law".[32]

39. Be that as it may, in the light of the few cases described above, State practices seem so varied and depend so much on the specific national conditions of each State that it appears virtually impossible to determine uniform rules of procedure for the expulsion of aliens lawfully in the territory of the expelling State, and any attempt to codify those rules would be risky. The Special Rapporteur therefore believes that, as the rules on the conditions of entry and residence of aliens are a matter of State

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[29] See Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, at p. 239.

[30] *In re Krupnova*, Venezuela, Federal Court of Cassation, 27 June 1941, *Annual Digest and Reports of Public International Law Cases*, 1941-1942, H. Lauterpacht (ed.), Case No. 92, p. 309.

[31] Committee on Migration, Refugees and Demography of the Council of Europe, report on the non-expulsion of long-term immigrants, 27 February 2001, document 8986.

[32] Ibid., pt. I-3.

sovereignty, it is legally and politically appropriate to leave the establishment of such rules up to the legislation of each State. With regard to the procedure for expelling aliens, we believe that the exercise of codification, possibly even the progressive development of international law, should be limited to the formulation of rules that are established indisputably in international law and in international practice, or that derive from the clearly dominant trend of State practice. These rules may constitute the ordinary law of the procedure for the expulsion of aliens lawfully in the territory of a State, without prejudice to the freedom of each State to apply them also to the expulsion of illegal aliens, in particular those who have been residing in the territory of the expelling State for some time or who have a special status in that country.

40. In the light of these considerations, we propose a specific draft article devoted to the determination of the scope of the rules of procedure which would be outlined in the present section of the draft rules. It reads as follows:

Draft article A1
Scope of [the present] rules of procedure

1. The draft articles of the present section shall apply in case of expulsion of an alien legally [lawfully] in the territory of the expelling State.

2. Nonetheless, a State may also apply these rules to the expulsion of an alien who entered its territory illegally, in particular if the said alien has a special legal status in the country or if the alien has been residing in the country for some time.

III. Procedural rules applicable to aliens lawfully in the territory of a State

A. General considerations

41. An alien facing expulsion may claim the benefit of the procedural guarantees contained in the various human rights conventions. For example, the alien can claim various possible violations of his or her rights in case of return to the State of destination.[33] To that end, the right of appeal must exist at both the national and the international levels. In general, such claims may be submitted to the administrative or legal authorities. Opinions rendered by national bodies specializing in immigration, even if they cannot be imposed on the competent authorities, may be useful in order to avoid a summary expulsion.[34] Judicial review is allowed in most

[33] On all guarantees, both substantive and procedural, see the study of M. Puéchavy, "Le renvoi des étrangers à l'épreuve de la Convention européenne des droits de l'homme", in P. Lambert and C. Pettiti, *Les mesures relatives aux étrangers à l'épreuve de la Convention européenne des droits de l'homme*, proceedings of the seminar of 21 March 2003 organized by the human rights institutes of the bars of Brussels and Paris, Brussels, Bruylant, "Droit et justice" collection, 2003, 149 p., pp. 75-95.

[34] M. Aguiar, Explanatory memorandum of the report of the Committee on Migrations, Refugees and Demography of the Council of Europe on the non-expulsion of long-term immigrants, 27 February 2001, doc. 8986, pt. III-27.

States, but "the effectiveness of the right of appeal mainly depends on its suspensive effect",[35] which is obviously not systematic in all States.

42. It is understood that the expulsion of an alien, in particular when the alien is lawfully present in the territory of the expelling State, must meet the necessary procedural requirements.[36] An expulsion, even if founded on a just cause, may be tainted by the manner in which it is carried out. The requirements for the lawful expulsion of aliens have evolved over the centuries. The procedural requirements for the lawful expulsion of aliens can be found in international jurisprudence[37] and the practice of States, which have placed general limitations such as the prohibition of arbitrariness or abuse of power.[38]

43. As expulsion proceedings are generally not characterized as criminal proceedings, the procedural guarantees in expulsion proceedings are therefore not as extensive as those for criminal proceedings, because expulsion is, in theory at least, not a punishment, but an administrative measure consisting in an order of the Government directing a foreigner to leave the country.[39] A study on the expulsion of immigrants prepared by the Secretariat over 50 years ago noted that there was a contrary opinion at the time. According to the study, "it has been stated that 'deportation is a punishment. It involves first an arrest, a deprival of liberty; and second: a removal from home, from family, from business, from property ... Everyone knows that to be forcibly taken away from home, and family, and friends and business, is punishment …' It is even 'a penalty more severe than the loss of freedom by imprisonment for a period of years'".[40]

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[35] Ibid.

[36] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States* (note 29 above), p. 263; similarly, Rainer Arnold, "Aliens", in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, p. 104; Louis B. Sohn and T. 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. 89; Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I — Peace (Parts 2 to 4), 1996, p. 940.

[37] Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 459; Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, pp. 55-56 [citing Casanova (U. S.) v. Spain, Feb. 12, 1871, Moore's Arb. 3353]; Robert Jennings and A. Watts (note 36 above), p. 945.

[38] See Expulsion of aliens, Memorandum of the Secretariat, A/CN.4/565 and Corr.1, pp. 132-141 and 148-154.

[39] See David A. Martin, "The Authority and Responsibility of States" in Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 31-45, at p. 39; see also Guy S. Goodwin-Gill (note 29 above), pp. 238-239 (citing *Yick Wo v. Hopkins* 118 U.S. 356 (1886); *Kaoru Yamataya v. Fisher* 189 U.S. 86 (1903) (The Japanese Immigrant Case); *Ludeck v. Watkins* 335 U.S. 160 (1948) as well as *Netz v. Ede* [1946] Ch. 224; *R. v. Bottrill, ex parte Küchenmeister [194.7] 1* K.B. 41). Guy S. Goodwin-Gill expresses the same opinion, citing several authors and various cases from United States case law, such as *Muller v. Superintendent, Presidence Jail, Calcutta* (note 29 above); *Bugajewitz v. Adams* 228 U.S. 589 (1913); and the elements provided in the Memorandum by the Secretariat entitled "Expulsion of aliens" (note 38 above).

[40] United Nations, "Study on Expulsion of Immigrants", Secretariat, 10 August 1955, pp. 1-77, at pp. 29-31, paras. 45-48 (ST/SOA.22 and Corr.2 (replaces Corr.1)) (quoting, respectively, Mr. Justice Brewer, in the case *Fong Yue Ting v. United States* (U.S.698/1893/), dissenting opinion; and Mr. Justice Rutledge, in the case *Knauer v. United States* (14 U.S. Law Week 4450/1946), dissenting opinion.

44. Yet the same study noted that "procedure in matters of expulsion has developed in various countries under the impact of the principle that expulsion does not constitute a punishment, but a police measure taken by the government in the interest of the State".[41] In 1930, A. Blondel, relying on the rules of European and United States public international law, wrote that "expulsion is always an administrative or government measure; it follows therefore that expulsion ... remains a police measure left at the discretion of the executive or administrative authorities and is not a punishment, even when the expulsion [decision is taken following a conviction]".[42] Likening expulsion to punishment is, in any event, no longer applicable, and in general, national laws try not to apply, by mere transposition, the principles of both substantive and procedural criminal law to expulsion. For example, the vital principle of non-retroactivity in criminal law is not found in the laws of most countries concerning immigration and expulsion of aliens. With regard to procedural guarantees, article 13 of the International Covenant on Civil and Political Rights merely requires that the procedure established by law should be respected and that the alien should "be allowed to submit the reasons against his expulsion". It simply states that the alien should have the right "to have his or her case reviewed by a competent authority and to be represented before the latter".[43] The view has been expressed that States retain a wide margin of discretion with respect to the procedural guarantees in expulsion proceedings.[44] This approach has been subject to criticism. According to one author who has studied the legal aspects of international migration extensively, "it is both undesirable and unnecessary to adopt the habit of certain municipal courts, which is to characterize deportation as 'not punishment', and from that characterization to deduce certain consequences, such as the absence of a right of appeal".[45]

45. The procedural requirements for the expulsion of aliens were considered in the above-mentioned study by the Secretariat on the expulsion of immigrants,[46] which noted that "since expulsion is thus considered as a more or less routine administrative process, the legislative provisions on expulsion in many countries do not contain rules for the procedure to be followed in the issuance of expulsion orders and/or their implementation; or these provisions are restricted to very general

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[41] Ibid.

[42] A. Blondel, "Expulsion", in A. de Lapradelle and J. P. Niboyet, *Répertoire de Droit International* (Paris, Sirey), VIII: Théorie générale de la condition des étrangers, 1930, 706 p., pp. 105-162, in particular p. 109.

[43] Robert Jennings and Arthur Watts, *Oppenheim's International Law*, 9th ed., vol. I — Peace (Parts 2 to 4), 1996, p. 945 and n. 2 (citing *Artukovicv Immigration and Naturalization Service* (1982), ILR, 79, pp. 378, 381). But Guy S. Goodwin-Gill has shown that, according to the Supreme Court of the United States, provisions with retroactive effect in laws on expulsion do not make such laws unconstitutional. See Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, at p. 239 (citing *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Mandel v. Mitchell*, 325 F. Supp. 620 (1971); reversed, *sub nom; Kleindienst v. Mitchell,* 408 U.S. 753 (1972); *Miranda v. Arizona* 384 U.S. 436 (1966); *Pang v. INS* 368 F.2d 637 (1966); *Lavoie v. INS*, 418 F.2d 732 (1969), *cert. den.* 400 U.S. 854 (1970); *Valeros v. INS*, 387 F.2d 921 (1967); and *Kung v. District Director*, 356 F. Supp. 571 (1973).

[44] See David A. Martin (note 39 above), p. 39; Shigeru Oda, "Legal Status of Aliens", in Sørensen, Max (dir.) *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 481-495, at pp. 482-483.

[45] Guy S. Goodwin-Gill (note 29 above), pp. 257-258.

[46] Supra, n. 40.

indications which aim rather at keeping the machinery of expulsion functioning properly than at affording protection to the persons concerned".[47] The study also states that: "together with the proposal to restrict by international law the discretionary power of States to expel aliens (see chapter V, section I), and with the definition in various national laws of cases in which expulsion is admissible, suggestions have been put forward for a close association of judicial authorities with expulsion proceedings and for according to the persons involved all the guarantees which are provided to those on trial for criminal offences. It has been maintained that conferring the responsibility in this field on such authorities would contribute to ensuring that individual consideration would be given to each case and that thereby the danger of disregarding the legitimate interests of the human beings involved would be removed. This would be particularly justified in cases where the alleged behaviour for which expulsion is envisaged constitutes a statutory penal offence and where the decision as to whether such reason exists in the particular case should be given by a court rather than left to the discretion of an administrative organ."[48]

46. It appears that as a result of these suggestions, statutory procedural rules have been adopted in some countries to protect persons under the threat of expulsion, by making administrative and related decisions subject to review, ensuring that the merits of the case are considered by judicial or semi-judicial authorities either before the expulsion order is made or after, by way of appeal, etc.[49]

47. This development, however, is far from being complete, the various national laws having failed in many respects to provide the person under the threat of expulsion with the same level of protection and procedural guarantees. It cannot be stated, therefore, that there are rules of customary law on the subject, but only that there are dominant trends that can be gleaned from a comparative analysis of State practices.

48. It should be noted that while these national practices were widely disparate and based on rudimentary, often inconsistent legislation in the nineteenth and first half of the twentieth centuries, the development of international human rights law in the twentieth century led to the establishment of more stringent procedural requirements for the legal expulsion of aliens. It has been observed that: "In many countries, the power of expulsion or deportation is regulated by statute which specifies the grounds on which it may be exercised and the procedural safeguards that should be followed. These statutes usually apply the generally accepted principles of international human rights. Thus it is usually provided: that no person be expelled or deported from the territory of a State except on reasonable grounds and pursuant to a written order conforming to law; that the order be communicated to the person sought to be expelled or deported along with the grounds on which it is based; and that the alien be afforded a reasonable opportunity to challenge the legality or the validity of the order in appropriate proceedings before a court of law. The requirement that an order of deportation or expulsion should be in writing and in accordance with the law of the State is designed to safeguard against an arbitrary exercise of power."[50] The fundamental procedural requirements for the expulsion of aliens have been addressed in treaty law and international jurisprudence. More

[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Louis B. Sohn and Thomas Buergenthal (eds.) (note 36 above), p. 91.

specific procedural requirements are generally to be found in national legislation. The national laws of some States provide in expulsion proceedings even greater procedural safeguards which are similar to those applicable in criminal proceedings. The view has been expressed that "many states go significantly beyond the protections offered by the procedural principles provided for by article 13 of the International Covenant on Civil and Political Rights, such as entitling aliens in expulsion proceedings access to a court independent of the initial decision-maker, the right to be represented by counsel, and the right to present evidence and examine evidence used against him".[51] More specifically, "most developed nations in fact apply procedures that go far beyond these minimums".[52]

49. It may be possible to glean general principles from the divergent national laws with respect to the necessary procedural guarantees for expulsion proceedings. The question is to what extent the guarantees contained in international instruments with respect to criminal proceedings may be applicable mutatis mutandis in cases of expulsion.

B. Nature of the proceedings

50. In a number of States, expulsion proceedings may be administrative or judicial and in some cases, the two types of proceedings are combined. Some authors do not distinguish between an administrative expulsion and a judicial expulsion, which is considered a punishment, on the grounds that they have identical consequences for the expelled person.[53] In fact, national laws on the subject differ considerably. In some States, expulsion may even be the result of different proceedings depending on the nature of the expulsion concerned (e.g., political, criminal or administrative).[54] A State may reserve to an executive authority the right to decide an expulsion or its revocation,[55] or otherwise establish instances in which an administrative rather than judicial decision is sufficient to expel the alien.[56] A State may expressly permit an authority below the national level to order an expulsion.[57] A State may specify

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[51] Alexander T. Aleinikoff, "International Legal Norms and Migration: A Report" in Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 1-27, p. 19 in particular.

[52] David A. Martin (see note 39 above), p. 39.

[53] See J.-L. Guerrive, "Double peine et police des étrangers", *Recueil Dalloz*, 7 March 2002, No. 10, pp. 829-832, particularly p. 829; X. Rolin, "La double peine, une punition de la nationalité", *Revue de droit européen*, 2002, pp. 205-216, particularly p. 210.

[54] For example, prior to 1 January 2007 (on which date expulsion was abolished as an accessory penalty imposed by a criminal court judge), the Swiss legal order established three different procedures for the expulsion of an alien, which corresponded to three different kinds of expulsion: (1) political expulsion (Switzerland, Federal Constitution, article 121, para. 2); (2) administrative expulsion (Switzerland, 1931 Federal Law, articles 10 and 11); and (3) penal, judicial expulsion (Switzerland, Penal Code, former article 55, and Switzerland, Military Penal Code, former article 40).

[55] Bosnia and Herzegovina, 2003 Law, article 28(1)-(2); Brazil, 1980 Law, article 65; France, Code, article L522-2; Madagascar, 1994 Decree, article 37, 1962 Law, articles 14, 16; Panama, 1960 Decree-Law, articles 85-86; and Portugal, 1998 Decree-Law, article 119.

[56] Bosnia and Herzegovina, 2003 Law, articles 21(1), 28(1); Nigeria, 1963 Act, article 25; Paraguay, 1996 Law, article 84; Portugal, 1998 Decree-Law, article 109; Spain, 2000 Law, article 23(3)(b)-(c); Sweden, 1989 Act, sections 4.4-5; and United States, INA, sections 235(c)(1), 238(a)(1), (c)(2)(C)(4), 240.

[57] China, 2003 Provisions, article 187.

instances in which a court judgment or order is necessary or sufficient for an expulsion to occur[58] and instances in which expulsion matters may be given judicial priority over other cases.[59]

51. In many States, the administrative authorities are the first to act in cases of expulsion. In most cases, expulsion proceedings are instituted by an order issued by the administrative authorities of the alien's place of residence. As it is not considered punishment requiring judicial proceedings, the expulsion is entirely subject to evaluation by those authorities, whose discretionary power can easily become arbitrary.

52. In addition to the European States already examined within the framework of the expulsion of illegal aliens, the following cases may also be mentioned by way of illustration:

– In Cameroon, article 63 of the aforementioned decree of 12 October 2000, which specifies the conditions for entry, stay and departure of aliens in Cameroon, states that "expulsions are decided by order of the Prime Minister, Head of Government".

– "In Lebanon, article 17 of the law regulating the conditions for entry, stay and departure of aliens in Lebanon, in force since 10 July 1962, states that: "The expulsion of an alien from Lebanon will be decided by the Director of General Security, in the event that his or her presence is considered a threat to public security. The Director of General Security must submit immediately to the Minister of the Interior a copy of the decision. The expulsion will be carried out either by notifying the person concerned of the order to leave Lebanon by the deadline set by the Director of General Security or by having the expelled person escorted to the border by the Internal Security Forces."

53. A State may commence expulsion proceedings upon the finding or involvement of an official,[60] or upon the introduction of an international arrest warrant,[61] a final and binding court decision,[62] or relevant operational information available to State authorities.[63] The relevant legislation may specify the form, content or manner of an application or other formal submission made with respect to the alien's potential expulsion.[64] A State may expressly provide for the cancellation of a visa or other permit upon the alien's expulsion.[65]

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[58] Bosnia and Herzegovina, 2003 Law, articles 27(2), 47(2); Canada, 2001 Act, article 77(1); China, 2003 Provisions, article 183; Italy, 1998 Decree-Law No. 286, article 16(6); Nigeria, 1963 Act, articles 19(1), 44, 48(1); Paraguay, 1996 Law, articles 38, 84; Portugal, 1998 Decree-Law, articles 102, 109, 126(1); Spain, 2000 Law, articles 23(3)(a), 57(7); and Sweden, 1989 Act, sections 4.8-9.

[59] Nigeria, 1963 Act, article 43(1).

[60] Australia, 1958 Act, article 203(2), (4)-(7); Nigeria, 1963 Act, article 19(3); and Republic of Korea, 1992 Act, articles 58, 67.

[61] Bosnia and Herzegovina, 2003 Law, articles 27(2), 47(2).

[62] Ibid.

[63] Ibid.

[64] Belarus, 1999 Council Decision, article 3, 1998 Law, article 15; Brazil, 1981 Decree, article 101; Cameroon, 2000 Decree, article 62(1); Canada, 2001 Act, articles 44(1), 77(1); Japan, 1951 Order, articles 62, 65; Portugal, 1998 Decree-Law, article 111(2); and United States, INA, sections 238(c)(2)(A)-(B), 503(a)(1)-(2).

[65] Belarus, 1999 Council Decision, article 5, 1998 Law, article 15; Brazil, 1981 Decree, article 85(II), 1980 Law, article 48(II); Paraguay, 1996 Law, article 39; and Spain, 2000 Law, article 57(4).

C. Procedural guarantees

54. Procedural guarantees are provided for in the expulsion of legal aliens, although their extent varies from one legal system to another. Such guarantees are provided for in both universal and regional systems for the protection of human rights, as well as in national legislation. Generally speaking, these procedural guarantees can vary from international legal instruments to national laws; the latter are not uniform themselves. Because European Community law exhibits some particularities in this area, as in many others, it should be considered separately.

1. Procedural guarantees in international law and domestic law

(a) Conformity with the law

55. The requirement that an expulsion measure must be in conformity with the law is above all a logical principle, since it is recognized that expulsion is exercised under the law. Indeed, as the Special Rapporteur noted in his first report, "a logical rule holds that if a State has the right to regulate the conditions for immigration into its territory it must nevertheless do so without [...] infringing any rule of international law, [and] in conformity with the rules which it has adopted or to which it has agreed [on the matter]".[66]

(i) Recognition in the universal system for the protection of human rights

56. More generally, article 8 of the Universal Declaration of Human Rights of December 1948 provides that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Likewise, article 13 of the International Covenant of Civil and Political Rights of 1966 provides that "[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority". Article 13 applies to all procedures aimed at obliging an alien to leave the territory of a State, "whether described in national law as expulsion or otherwise".[67] Article 22, paragraph 2, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted by the United Nations General Assembly in its resolution 45/158 of 18 December 1990) further provides that: "Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law."

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[66] Preliminary report on the expulsion of aliens, A/CN.4/554, 4 April 2005, para. 23.

[67] United Nations Human Rights Committee (International Covenant on Civil and Political Rights), General Comment No. 15, "The Position of Aliens under the Covenant", paragraph 9, (HRI/EN/1/Rev.1), 1994.

57. More specifically regarding refugee law, article 32, paragraph 2, of the 1951 Geneva Convention relating to the Status of Refugees provides that the expulsion of a refugee lawfully in the territory of a Contracting State "shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority". Article 31 of the 1954 Convention relating to the Status of Stateless Persons reproduces the full text of that provision in the case of stateless persons.

58. In 1977, a Greek political refugee suspected of being a potential terrorist was expelled from Sweden to her country of origin. She then claimed that the decision to expel her had not been taken "in accordance with law" and therefore was in violation of article 13 of the International Covenant on Civil and Political Rights. The Human Rights Committee took the view that the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned and that it is not within the powers or functions of the Committee "to evaluate whether the competent authorities [...] have interpreted and applied the domestic law correctly in the case before it [...], unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power."[68]

(ii) Recognition in regional instruments

59. At the regional level, a number of human rights conventions contain provisions on expulsion proceedings. These instruments also require such proceedings to be carried out in accordance with law. Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights stipulates that: "A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law." Article 22, paragraph 6, of the American Convention on Human Rights imposes the same requirement by providing that: "An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law." Under the Pact of San José, Costa Rica, the interested party may contest the expulsion order against him or her before a competent jurisdiction if it has not been taken in accordance with law. According to article 25, paragraph 1, "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention [...]". In Europe, article 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which was adopted by the Council of Europe in Strasbourg on 22 November 1984

[68] Human Rights Committee, views of 9 April 1981, *Anna Maroufidou v. Sweden*, Communication No. 58/1979 of 5 September 1979, (CCPR/C/12/D/58/1979), 8 April 1981, para. 10.1.

and entered into force on 1 November 1988,[69] provides that: "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law [...]".

60. It follows from the foregoing that the main guarantee to aliens against whom an expulsion order is issued is that it must be carried out in accordance with law. In that respect, the Steering Committee for Human Rights of the Council of Europe states that expulsion decisions must be taken "by the competent authority in accordance with the provisions of substantive law and with the relevant procedural rules".[70]

(iii) Recognition in national legislation

61. The legislation of various States agrees on the minimum requirement based on which expulsions may be deemed in accordance with law or legal requirements. For instance, article 14, paragraph 5, of the Czech Republic's Charter of Fundamental Rights and Freedoms specifically provides that: "[...] An alien may be expelled only in cases specified by law." Article 58, paragraph 2, of the Constitution of Hungary provides that "[...] Aliens residing lawfully in the territory of the Republic of Hungary shall be removed only in pursuance of a decision reached in accordance with law […]". Article 23, paragraph 5, of the Constitution of the Slovak Republic provides that: "[...] An alien may be expelled only in cases provided by law." Section 9 of the Constitution of Finland in turn provides that: "[...] The right of foreigners to enter Finland and remain in the country is regulated by an Act."

62. This requirement concerning conformity with the law appears as a general principle underpinning the rule of law and according to which a State is expected to observe its own rules: *patere legem/regulam quam fecisti*. This rule is the counterpart of *pacta sunt servanda*, which applies to domestic contractual law and international treaty law, as well as unilateral acts, under the rule *acta sunt servanda*.

63. In terms of the expulsion of aliens, the requirement for conformity with the law is based on the implicit requirement for domestic procedural rules of expulsion to be in conformity with the relevant international norms and standards. A State is thus not free to establish procedural rules that are inconsistent with the latter. It is a general rule of human rights law States cannot derogate from the requirement for

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[69] Some States have signed, but not yet ratified, Protocol No. 7. Those States are: Belgium, Germany, the Netherlands and Turkey. The United Kingdom has not signed this Protocol. Not all European States have ratified it. In that regard, Sweden declared that "*an alien who is entitled to appeal against an expulsion order, may, pursuant to Section 70 of the Swedish Aliens Act (1980:376), make a statement (termed a declaration of acceptance) in which he renounces his right of appeal against the decision. A declaration of acceptance may not be revoked. If the alien has appealed against the order before making a declaration of acceptance, his appeal shall be deemed withdrawn by reason of the declaration*" (Declaration made by Sweden at the time of deposit of the instrument of ratification, on 8 November 1985). Belgium and the Republic of San Marino also made a declaration relative to article 1 of Protocol No. 7. Switzerland made the following reservation: "*When expulsion takes place in pursuance of a decision of the Federal Council taken in accordance with Article 70 of the Constitution on the grounds of a threat to the internal or external security of Switzerland, the person concerned does not enjoy the rights listed in paragraph 1 even after the execution of the expulsion*" (Reservation contained in the instrument of ratification, on 24 February 1988).

[70] Council of Europe, Explanatory report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 11.

conformity with the law except to establish rules that further protect the rights of aliens against whom an expulsion order has been issued.

64. The foregoing demonstrates that the requirement for conformity with the law is well established in universal and regional treaty law as well as in the legislation of many States. In the light of these considerations, the following draft article can be proposed:

Draft article B1
Requirement for conformity with the law

An alien [lawfully] in the territory of a State Party may be expelled therefrom only in pursuance of a decision reached in accordance with law.

65. The African Charter and American Convention do not provide for procedural guarantees beyond the requirement for conformity with the law. However, the instruments of the United Nations and Protocol No. 7 to the European Convention list additional guarantees:

– The first guarantee, as noted previously, is the right of the alien against whom an expulsion order has been issued to "submit the reasons against his expulsion"[71] or to "submit evidence to clear himself".[72] In that regard, the Steering Committee for Human Rights of the Council of Europe clearly indicated that an alien could exercise this guarantee prior to the second guarantee.[73]

– The second guarantee is the right of the person concerned to "have his case reviewed"[74] or to "appeal".[75] The Steering Committee stated that this does not necessarily require "a two-stage procedure before different authorities".[76]

– The third guarantee is the right to counsel for persons against whom an expulsion order has been issued. Specifically, the alien concerned has the right to have his case presented on his behalf to the competent authority or a person or persons designated by that authority. The "competent authority" may be administrative or judicial and does not necessarily have to be the authority with whom the final decision in the question of expulsion rests.[77]

66. The Handbook on Procedures of the Office of the United Nations High Commissioner for Refugees (UNHCR) also contains a number of procedural

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[71] See art. 13 of the 1966 International Covenant on Civil and Political Rights and art. 1, para. 1 (a) of Protocol No. 7 of the European Convention on Human Rights.

[72] See art. 32, para. 2, of the 1951 Convention relating to the Status of Refugees and art. 31, para. 2, of the 1954 Convention relating to the Status of Stateless Persons.

[73] Council of Europe, Explanatory report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

[74] See art. 1, para. 1 (b) of Protocol No. 7 of the European Convention on Human Rights and article 13 of the 1966 International Covenant on Civil and Political Rights.

[75] See art. 32, para. 2, of the 1951 Convention relating to the Status of Refugees and art. 31, para. 2, of the 1954 Convention relating to the Status of Stateless Persons.

[76] Council of Europe, Explanatory report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

[77] Ibid., para. 13.3.

guarantees.[78] In the Handbook, UNHCR suggests that asylum seekers should be permitted to remain in the territory of the country of refuge while their appeal to the national authority is pending. As stated in the Handbook, "Due to the fact that the matter is not specifically regulated by the 1951 Convention, procedures adopted by States parties [...] vary considerably".[79] Procedures should therefore "satisfy certain basic requirements", including giving rejected asylum seekers "a reasonable time to appeal for a formal reconsideration of the decision", as well as permitting him or her to "remain in the country while an appeal to a higher administrative authority or to the courts is pending".[80]

67. Furthermore, the various guarantees outlined above are not the only ones available. Various other procedural rights — which also do not form an exhaustive list — granted to aliens subject to expulsion are provided for in a proposal made in 2001 by the Parliamentary Assembly of the Council of Europe to the member States, on the recommendation of the Committee on Migration, Refugees and Demography.[81] This proposal invites the member States to adopt legislation to grant long-term immigrants subject to expulsion access to a number of procedural safeguards.[82] These safeguards are: the right to a judge; the right to a trial in the presence of all parties; the right to assistance by counsel; and the right to an appeal with suspensive effect, because of the irreversible consequences of enforcing the expulsion. In supporting this recommendation, the Committee of Ministers even recommended the right to a fair hearing and a reasoned decision, which goes further than the requirements of article 1 of Protocol No. 7.[83] Admittedly, these safeguards were being considered within the framework of newly developing European citizenship, but they could serve to inspire rules of more universal application.

68. The alien against whom an expulsion order has been issued must be able to exercise his rights before implementation of that order.

(b) Right to receive notice of expulsion proceedings

69. The Report of the Inter-American Commission of Human Rights on Chile of 9 September 1985[84] states that:

> "Expulsion from the national territory has been applied pursuant to the legal mechanisms established for that purpose, that is to say, Decree Law No. 604 of 1974 and, subsequently, transitory provision 24 of the Constitution.

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[78] Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, 1992. The rules are not binding.

[79] Ibid., para. 191.

[80] Ibid., para. 192.

[81] See Committee on Migration, Refugees and Demography of the Council of Europe, report on the non-expulsion of long-term immigrants, 27 February 2001, document 8986.

[82] Recommendation 1504 (2001) of 14 March 2001 of the Parliamentary Assembly of the Council of Europe on the non-expulsion of long-term immigrants.

[83] See the reply of the Committee of Ministers of the Council of Europe to Recommendation 1504 (2001) of 14 March 2001 of the Parliamentary Assembly, adopted at the 820th meeting of the Ministers' Deputies, doc. 9633, 5 December 2002 and, in the appendix, the opinion of the Steering Committee for Human Rights on Recommendation 1504 (2001) of the Parliamentary Assembly, adopted at its 54th meeting, 1-4 October 2002, point 13.

[84] OEA/Ser.L/V/II/66, Document 17, 9 September 1985.

> "27. In many cases, the person affected normally did not know that this sentence had been imposed on him since there had been no previous proceedings against him in which specified charges had been made and in which the person affected could have exercised his right of defense.
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> "28. In general, the person concerned learns of the expulsion only after he has been taken to the airport or by land to the border. For its part his family has made every effort to obtain information about his fate and to send him money, documents or personal articles he needs before the expulsion takes place, but normally it does not succeed.
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> "29. In the main, the persons affected have been connected with organizations for the defense and promotion of human rights or have been important political or trade union leaders that have been accused of endangering the security of the State".[85]

In all of these cases, the expulsion orders are not only being issued, but carried out, in violation of the rules relating to the protection of human rights.

70. The sixth report (A/CN.4/625) has already shown that under both international law and European Community law, reasons must be provided for any expulsion. The present document therefore will not dwell on demonstrating the existence of that obligation under international law.

71. With regard to the right of aliens subject to expulsion to be informed of that measure, treaty law requires that the reasons for the decision should be communicated to them, as should any available avenues for review. In that connection, it is worth recalling that the provisions of the American Convention on Human Rights are very clear: article 7, paragraph 4, states that "anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him". Moreover, European Community law in particular states that any decision on detention that was taken while expulsion proceedings were ongoing "should be considered null and void if, at the moment of the notification, the person concerned is not informed, in writing and in a language that he or she understands, of his or her rights in these circumstances and advised on how to gain access to free legal advice and representation".[86]

72. Such notification fulfils the obligation to respect the right to defence. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 22, paragraph 3, states that the decision to expel should be communicated to those affected in a language they understand.[87] Article 5, paragraph 2, of the European Convention on Human Rights states that "everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him". These provisions are intended to allow an individual deprived of freedom to present an informed defence. His right of appeal cannot be effective "unless he is promptly and adequately

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[85] This report relies on examples of trials to demonstrate the truth of the assertion that aliens expelled from Chile are not informed of the decision concerning them.

[86] Recommendation 1624 (2003) of 30 September 2003 of the Parliamentary Assembly of the Council of Europe concerning common policy on migration and asylum.

[87] International Convention on the Protection of All Migrant Workers and the Members of Their Families, New York, 18 December 1990, vol. 2220, p. 3 (adopted by the United Nations General Assembly in resolution 45/158 of 18 December 1990; entered into force on 1 July 2003).

informed of the facts and legal authority relied on to deprive him of his liberty".[88] His defence can be effective only if the notification is worded in a language understood by the alien who is subject to removal. According to the European Court of Human Rights, by virtue of that provision, any person arrested "must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4".[89]

73. At the theoretical level, the Institute of International Law expressed the view as early as 1892 that "the expulsion order should be notified to the expellee".[90] Moreover, "if the expellee is entitled to appeal to a superior judicial or administrative court, the expulsion order must indicate this and state the deadline for filing the appeal".[91]

74. The requirement that the alien should be notified of the decision to expel is also set forth in the legislation of a number of States.[92] Such a notification would usually take the form of a written decision.[93] Depending on the relevant legislation, the notification shall include the manner of the alien's deportation,[94] the destination State,[95] a State to which the protected alien shall not be sent,[96] or the deadline for expulsion.[97]

75. It is worth pointing out that whereas international instruments make no distinction with regard to the requirement to notify, national legislation differs according to whether or not the alien is lawfully present, and whether the alien has just entered the country or has lived there unlawfully for some time. According to

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[88] European Court of Human Rights, judgment of 5 November 1981, *Case of X v. the United Kingdom*.

[89] European Court of Human Rights, *Case of Čonka v. Belgium*, judgment of 5 February 2002, para. 50.

[90] "Règles internationales sur l'admission et l'expulsion des étrangers" (International regulations on the admission and expulsion of aliens) adopted on 9 September 1892 at the Geneva session, art. 30.

[91] Ibid., art. 31.

[92] France, Code, arts. L512-3, L514-1(1); Guatemala, Decree-Law of 1986, art. 129; Iran, Act of 1931, art. 11; Japan, Order of 1951, art. 48(8); and Republic of Korea, Act of 1992, arts. 59(1), 60(4); see also the relevant legislation of Belgium, Italy and the United Kingdom. Such notification may be with specific respect to a decision not to expel the alien (Republic of Korea, Act of 1992, arts. 59(1), 60(4)).

[93] "In many countries, the power of expulsion or deportation is regulated by statute which specifies the grounds on which it may be exercised and the procedural safeguards that should be followed. These statutes usually apply the generally accepted principles of international human rights. Thus it is usually provided: that no person be expelled or deported from the territory of a State except (...) pursuant to a written order conforming to law; that the order be communicated to the person sought to be expelled or deported along with the grounds on which it is based (...). The requirement that an order of deportation or expulsion should be in writing and in accordance with the law of the State is designed to safeguard against an arbitrary exercise of power". Louis B. Sohn and T. Buergenthal (eds.), op. cit., p. 91.

[94] Bosnia and Herzegovina, Law of 2003, art. 62 (3).

[95] Ibid., art. 64 (2).

[96] Portugal, Decree-Law of 1998, art. 114 (1) (d).

[97] Iran, Act of 1931, art. 11.

one author, there are some authorities upholding the right of an alien, including an illegal alien, to be informed of the reasons for his or her expulsion.[98]

76. Notification of the expulsion measure extends to the reason for expulsion. In the *Amnesty International v. Zambia* case, the African Commission on Human and Peoples' Rights held that Zambia had violated the right of the alien concerned to receive information, by omitting to supply him with the reasons of his expulsion. According to the Commission, "To the extent that neither Banda nor Chinula were supplied with reasons for the action taken against them means that the right to receive information was denied to them (Article 9(1))".[99]

77. Concerning the European Union, attention may be drawn to article 30, paragraph 2 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004. According to that provision, the notification of an expulsion measure affecting a citizen of the European Union or his or her family members shall include the grounds for the expulsion, unless this is "contrary to the interests of State security". The Court of Justice of the European Communities confirmed that the individual expelled should be notified of the reasons of the expulsion, unless grounds relating to national security make this unreasonable. The Court indicated that "The notification of the grounds relied upon to justify an expulsion measure or a refusal to issue a residence permit must be sufficiently detailed and precise to enable the person concerned to defend his interests".[100]

78. However, it should be noted that the right of an alien to be informed of the reasons for his or her expulsion is not consistently recognized at the national level. National laws differ as to whether and to what extent they grant the individual expelled the right to be informed of the reasons and justification of the expulsion. A State may require,[101] expressly not require,[102] or in certain instances not require[103] a relevant decision to provide reasons or explanations. A State may require that the decision's reasoning correspond to the decision's consequences.[104] A State may

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[98] "There is, however, some support for the proposition that a decision to deport an alien from a territory in which he is not lawfully present is arbitrary, save where there are overwhelming considerations of national security to the contrary, unless he is informed of the allegations against him ...". See Richard Plender (note 37 above), p. 472.

[99] African Commission on Human and Peoples' Rights, communication 212/98, Amnesty International v. Zambia, Twelfth annual report, 1998-1999, paras. 32 and 33.

[100] *Rezguia Adoui v. Belgian State and City of Liège; Dominique Cornuaille v. Belgian State*, Joined Cases C-115/81 and C-116/81, Judgment of 18 May 1982, para. 2.

[101] Canada, Act of 2001, art. 169(b); France, Code, arts. L.213-2, L.522-2, L.551-2; Italy, Decree-Law No. 286 (1998), arts. 13(3), 16(6), Law No. 40 (1998), art. 11(3), Decree-Law of 1996, art. 7(3); Japan, Order of 1951, arts. 10(9), 47(3); Madagascar, Decree of 1994, art. 37; Portugal, Decree-Law of 1998, arts. 22(2), 114(1)(a); Republic of Korea, Decree of 1993, arts. 72, 74; Spain, Law of 2000, art. 26(2); Sweden, Act of 1989, sect. 11.3; Switzerland, Regulation of 1949, art. 20(1), Federal Law of 1931, art. 19(2); and United States, Immigration and Nationality Act, sect. 504(c)(5)(j). Such a requirement may be imposed specifically when the decision concerns the alien's claim of protected status (Bosnia and Herzegovina, Law of 2003, art. 75(5); and Canada, Act of 2001, art. 169(c)-(d)), when the alien is allegedly involved in terrorism (United States, Immigration and Nationality Act, sect. 504(c)(5)(j)), or when the alien comes from a State having a special arrangement or relationship with the expelling State (Sweden, Act of 1989, sect. 11.3).

[102] Bosnia and Herzegovina, Law of 2003, art. 28 (1).

[103] Sweden, Act of 1989, sect. 11.3.

[104] Czech Republic, Act of 1999, sect. 9(3).

require a decision to be written[105] or provided to the alien.[106] A State may permit either the alien or the Government to require that reasons for a decision be provided.[107] A State may provide notice to the alien concerning potential, intended or commenced expulsion proceedings,[108] proceedings which may affect the alien's protected status,[109] or the alien's placement on a list of prohibited persons.[110] A State may require that the notice provide (1) information on potential or upcoming procedures, and the alien's rights or options in their respect;[111] or (2) findings or reasons behind preliminary decisions.[112] A State may also specify a location[113] or manner[114] in which notice is to be given.

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[105] France, Code, arts. L.213-2, L.551-2; Japan, Order of 1951, art. 47(3); Republic of Korea, Decree of 1993, arts. 72, 74; Switzerland, Federal Law of 1931, art. 19(2); United States, Immigration and Nationality Act, sect. 504(c)(5)(j). Such a requirement may be imposed specifically when the decision concerns the alien's claim of protected status (Canada, Act of 2001, art. 169(c)-(d)), or when the alien is allegedly involved in terrorism (United States, Immigration and Nationality Act, sect. 504(c)(5)(j)). A State may allow for the removal of any sensitive information from the decision when the alien is alleged to be involved in terrorism (United States, Immigration and Nationality Act, sect. 504(c)(5)(j)).

[106] France, Code, arts. L.522-2, L.551-2; Italy, Decree-Law No. 286 (1998), art. 16(6); Japan, Order of 1951, arts. 10(9), 47(3), 48(8); Portugal, Decree-Law of 1998, arts. 22(2), 120(2); Republic of Korea, Act of 1992, art. 59(1), Decree of 1993, art. 74; United States, Immigration and Nationality Act, sect. 504(c)(5)(j).

[107] Canada, Act of 2001, art. 169(e).

[108] Australia, Act of 1958, art. 203(2); Belarus, Council Decision of 1999, art. 17, Law of 1998, art. 29; Bosnia and Herzegovina, Law of 2003, art. 8(2); Canada, Act of 2001, arts. 170(c), 173(b); Chile, Decree of 1975, art. 90; Czech Republic, Act of 1999, sect. 124(1)-(2); France, Code, arts. L.213-2, L.512-2, L.522-1(1), L.522-2, L.531-1; Hungary, Act of 2001, art. 42(1); Iran, Act of 1931, art. 11, Regulation of 1973, art. 16; Italy, Decree-Law No. 286 (1998), arts. 13(5), (7), 16(6), Law No. 40 (1998), art. 11(7), Decree-Law of 1996, art. 7(3); Japan, Order of 1951, arts. 47(3)-(4), 48(1), (3); Madagascar, Decree of 1994, art. 35, Law of 1962, art. 15; Malaysia, Act of 1959-1963, art. 9(3); Nigeria, Act of 1963, art. 7(1); Panama, Decree-Law of 1960, arts. 58, 85-86; Paraguay, Law of 1996, art. 35(a); Portugal, Decree-Law of 1998, arts. 22(2), 120(1)-(2); Republic of Korea, Act of 1992, arts. 59(3), 60(5), 89(3); Spain, Law of 2000, arts. 26(2), 57(9); United Kingdom, Act of 1971, sect. 6(2); and United States, Immigration and Nationality Act, sects. 238(b)(4)(A), (D), (c)(2)(A), (3)(B)(5), 239(a), 240(b)(5)(A)-(D), (c)(5), 504(b)(1)-(2).

[109] Canada, Act of 2001, art. 170(c).

[110] Portugal, Decree-Law of 1998, arts. 114(2), 120(2).

[111] Belarus, Council Decision of 1999, art. 17, Law of 1998, art. 29; Bosnia and Herzegovina, Law of 2003, art. 8(2); Italy, Decree-Law No. 286 (1998), arts. 13(5), (7), 16(6), Law No. 40 (1998), art. 11(7), Decree-Law of 1996, art. 7(3); Japan, Order of 1951, arts. 47(4), 48(3); Panama, Decree-Law of 1960, art. 58; Paraguay, Law of 1996, art. 35(a); Portugal, Decree-Law of 1998, arts. 22(2), 120(2); Republic of Korea, Act of 1992, arts. 59(3), 89(3); South Africa, Act of 2002, art. 8(1); Spain, Law of 2000, arts. 26(2), 57(9); United States, Immigration and Nationality Act, sects. 238(b)(4)(A), (c)(2)(A), (3)(B)(5), 239(a), 240(b)(5)(A)-(D), (c)(5), 504(b)(1)-(2).

[112] Belarus, Council Decision of 1999, art. 17; Czech Republic, Act of 1999, sect. 124(2); France, Code, arts. L.222-3, L.522-2, L.531-1; Japan, Order of 1951, art. 47(3); Portugal, Decree-Law of 1998, art. 22(2); Republic of Korea, Act of 1992, art. 89(3); Spain, Law of 2000, art. 26(2); United States, Immigration and Nationality Act, sect. 504(b)(1).

[113] Guatemala, Decree-Law of 1986, art. 129.

[114] Bosnia and Herzegovina, Law of 2003, art. 75(5); France, Code, art. L.512-3; Nigeria, Act of 1963, art. 7(1)-(5); Panama, Decree-Law of 1960, arts. 85-86; Republic of Korea, Act of 1992, art. 91(1)-(3); and United States, Immigration and Nationality Act, sect. 239(c), 240(b)(5)(A)-(B). The relevant legislation may require that delivery be made in person when the notice concerns the decision made on the alien's claim of protected status (Bosnia and Herzegovina, Law of 2003, art. 75(5); and Canada, Act of 2001, art. 169(d)).

79. At the level of case law, some national courts have also upheld the duty to inform an alien of the grounds on which the order of expulsion is based.[115] However, it has normally not been required that the alien be informed prior to the issuance of the order to expel.[116]

80. In view of these considerations, there appears to be little doubt that the obligation to inform the alien subject to expulsion of the decision to expel, and subsequently of the grounds for expulsion, has been confirmed both in legal theory and, albeit with qualifications, by numerous domestic legal systems. Indeed, that requirement is surely the very condition for aliens to invoke the other procedural guarantees.

(c) Right to submit reasons against expulsion

(i) General considerations

81. The right of an alien to submit reasons against the expulsion has been recognized in treaties and other international instruments, as well as in national law and literature.[117]

82. Article 13 of the International Covenant on Civil and Political Rights provides the individual expelled, unless "compelling reasons of national security otherwise require", with the right to submit the reasons against his or her expulsion. This article provides: "An alien lawfully in the territory of a State Party to the present Covenant (...) shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion (...)".[118] The same guarantee is contained in article 7 of the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live, annexed to General Assembly resolution 40/144: "An alien lawfully in the territory of a State (...) shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled (...)".[119]

83. Article 1, paragraph 1 (a), of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that an alien who is lawfully resident in the territory of a State and is subject to a decision to expel should be allowed "to submit reasons against his expulsion (...)". The same guarantee is contained in article 3, paragraph 2, of the European Convention on

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[115] See the Memorandum by the Secretariat on the expulsion of aliens, note 38 above, para. 656 and the case law cited in note 1539.

[116] See *Oudjit v. Belgian State (Minister of Justice)*, Conseil d'État, 10 July 1961, *International Law Reports*, volume 31, 1966, E. Lauterpacht (ed.), pp. 353-355, at p. 355; *Brandt v. Attorney-General of Guyana and Austin* (E. Lauterpacht, note 30 above, p. 468).

[117] See in particular Vishnu D. Sharma and F. Wooldridge, "Some Legal Questions arising from the Expulsion of the Ugandan Asians", *International and Comparative Law Quarterly*, vol. 23, 1974, at pp. 405 and 406 (citing the Chevreau case, *United Nations Reports of International Arbitral Awards*, vol. II, p. 361 (1113)); and Richard Plender (note 37 above), pp. 471 and 472 (citing *Case 17/74*, *Transocean Marine Paint v. Commission* [1974] ECR 1063, p. 1080.

[118] See Human Rights Committee, *Giry v. Dominican Republic*, 20 July 1990, *International Law Review*, E. Lauterpacht (ed.), C. J. Greenwood, volume 95, pp. 321-327, at p. 325, para. 5.5. (The Committee found that the Dominican Republic had violated art. 13 of the Covenant by omitting to take a decision "in accordance with law", to give the person concerned an opportunity to submit the reasons against his expulsion and to have his case reviewed by a competent authority.)

[119] General Assembly resolution 40/144, annex.

Establishment, which provides that a national of any Contracting Party "who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion".

84. Attention may also be drawn to article 7 of the Convention of Application of Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union,[120] which provides: "Nationals of any Contracting Party who have been authorized to settle in the territory of another Contracting Party may be expelled only after notification of the Minister of Justice of the country of residence by a competent authority of that country, before which the persons concerned may avail themselves of their means of defence (...)".

85. The right to submit reasons against the expulsion is also recognized in national laws. According to the relevant national legislation, an alien may be allowed (1) to present any supporting reasons or evidence;[121] (2) to cross-examine or otherwise question witnesses;[122] or (3) to review evidence in all[123] or certain[124] cases, or only when public order or security concerns so allow.[125] However, a State may deny an alien alleged to be involved in terrorism the right to suppress illegally obtained evidence.[126]

(ii) Right to a hearing

86. The right of an alien to submit arguments against his or her expulsion may be exercised through several means, including a hearing. Although article 13 of the International Covenant on Civil and Political Rights does not expressly grant the alien the right to a hearing, the Human Rights Committee has expressed the view that a decision on expulsion adopted without the alien having been given an appropriate hearing may violate article 13 of the Covenant:

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[120] Brussels, 19 September 1960, *United Nations Treaty Series*, vol. 480, p. 424.

[121] Such permission can be given: (1) when the alien contests an expulsion or refusal of entry (Bosnia and Herzegovina, Law of 2003, art. 76(2); France, Code, art. L.522-2; Japan, Order of 1951, art. 10(3); Madagascar, Law of 1962, art. 16; Sweden, Act of 1989, sect. 6.14; United States, Immigration and Nationality Act, sects. 238(b)(4)(C), (c)(2)(D)(i), 240(b)(4)(B)); (2) subject to conditions, when the alien is alleged to be involved in terrorism (United States, Immigration and Nationality Act, sect. 504(c)(2), (e)-(f)); or (3) when the alien requests permission to re-enter the State after having been expelled (France, Code, art. L.524-2).

[122] Canada, Act of 2001, art. 170(e); Japan, Order of 1951, art. 10(3); United States, Immigration and Nationality Act, sects. 238(c)(2)(D)(i), 240(b)(4)(B). Such permission may be specifically granted when the process concerns the alien's claim of protected status (Canada, Act of 2001, art. 170(e)) or, subject to conditions, when the alien is alleged to be involved in terrorism (United States, Immigration and Nationality Act, sect. 504(c)(3), (e)). A State may permit the relevant authority to order the presence of witnesses requested by the alien (Japan, Order of 1951, art. 10(5); United States, Immigration and Nationality Act, sect. 504(d)(1)). Such authorization may be specifically granted when the alien is alleged to be involved in terrorism (United States, Immigration and Nationality Act, sect. 504(d)(1)). In such circumstances, a State may, subject to conditions, bind itself to pay for the attendance of a witness called by the alien (United States, Immigration and Nationality Act, sect. 504(d)(2)).

[123] Bosnia and Herzegovina, Law of 2003, art. 76(2); United States, Immigration and Nationality Act, sect. 238(b)(4)(C), (c)(2)(D)(i).

[124] Sweden, Act of 1989, sect. 11.2.

[125] Switzerland, Federal Law of 1931, art. 19(2); United States, Immigration and Nationality Act, sects. 240(b)(4)(B), 504(c)(3), (d)(5), (e).

[126] United States, Immigration and Nationality Act, sect. 240(e)(1)(B).

> "The Committee is concerned that the Board of Immigration and the Aliens Appeals Board may in certain cases yield their jurisdiction to the Government resulting in decisions of expulsion or denial of immigration or asylum status without the affected individuals having been given an appropriate hearing. In the Committee's view, this practice may, in certain circumstances, raise questions under article 13 of the Covenant".[127]

87. In the context of expulsion, the right to a hearing is not as far-reaching as in criminal proceedings pursuant to article 14 (3) of the Covenant. The formulation "to submit evidence to clear himself", which was adopted from article 32 (2) of the Convention relating to the Status of Refugees of 1951 was replaced in the Covenant with "to submit the reasons against his expulsion", although this did not change the substance of the right. Commenting on certain decisions of the Human Rights Committee with regard to articles 13 and 14 of the Covenant, Manfred Nowak writes: "Even though the reasons against a pending expulsion should, as a rule, be asserted in an oral hearing, Art. 13 does not, in contrast to Art. 14(3)(d), give rise to a right to personal appearance. However, in the case of a Chilean refugee against the Netherlands, the Committee rejected the communication with the reasoning that the author had been given sufficient opportunity to submit the reasons against his expulsion in formal proceedings, which included oral hearings. In the *Hammel* and *Giry* cases, a violation of Art. 13 was found because the authors had been given no opportunity to submit the reasons arguing against their expulsion and extradition, respectively".[128]

88. The national laws of several States grant the alien expelled a right to a hearing in the context of an expulsion procedure.[129] More specifically, a State may give the alien a right to a hearing,[130] or identify conditions under which a hearing need not be conducted.[131] The hearing may be required to be public,[132] closed[133] or held in camera only when secrecy is required owing to the nature of the evidence.[134] If the

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[127] Concluding observations of the Human Rights Committee: Sweden, 1 November 1995, A/51/40 (vol. 1), paras. 73-98, at para. 88.

[128] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, Kehl am Rhein, N.P. Engel Publisher, 1993, pp. 228-229 (citing Chilean refugee case, No. 173/1984, para. 4; *V.M.R.B. v. Canada*, No. 236/1987; *Hammel* case, No. 155/1983, paras. 19.2, 20; and *Giry* case, No. 193/1985, paras. 5.5, 6).

[129] The following analysis of legal systems and national case law is drawn from the Memorandum by the Secretariat on the expulsion of aliens (note 38 above), paras. 621 to 623.

[130] Australia, Act of 1958, art. 203(3); Belarus, Law of 1998, art. 29; Bosnia and Herzegovina, Law of 2003, art. 76(2); Canada, Act of 2001, arts. 44(2), 78(a), 170(b), 173(a), 175(1)(a); France, Code, arts. L.213-2, L.223-3, L.512-2, L.522-1(I)(2), L.524-1; Italy, Decree-Law No. 286 (1998), arts. 13(5 bis), 13 bis, 14(4), 17, Law No. 40 (1998), art. 15(1); Japan, Order of 1951, arts. 10, 47(4), 48(1)-(8); Madagascar, Decree of 1994, arts. 35-36, Law of 1962, art. 15; Portugal, Decree-Law of 1998, arts. 22(1), 118(1)-(2); Republic of Korea, Act of 1992, art. 89(2); Sweden, Act of 1989, sect. 6.14; United States, Immigration and Nationality Act, sects. 216A(b)(2), 238(c)(2)(D)(i), 240(b)(1), 504(a)(1). Such a right may be specifically conferred on an alien allegedly involved in terrorism (United States, Immigration and Nationality Act, sect. 504(c)(5)(g)).

[131] Canada, Act of 2001, arts. 44(2), 170(f); United States, Immigration and Nationality Act, sects. 235(c)(1), 238(c)(5).

[132] France, Code, arts. L.512-2, L.522-2; United States, Immigration and Nationality Act, sect. 504(a)(2).

[133] Madagascar, Decree of 1994, art. 37, Law of 1962, art. 16.

[134] Canada, Act of 2001, art. 166; Sweden, Act of 1989, sect. 6.14.

alien does not attend the hearing, the relevant authorities or court may be permitted to proceed when the alien so consents[135] or per statutory authorization.[136] A State may reimburse the alien's expenses with respect to the hearing[137] or require that a deposit be made to insure the alien's compliance with conditions relating to the hearing.[138]

89. Numerous national tribunals have recognized that right on the basis of national constitutional, jurisprudential or statutory law.[139] For example, the Supreme Court of the United States explained the reasons for such a hearing, as well as its requirements, in *Wong Sang Yung v. McGrath* as follows:

> "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake."[140]

90. Other courts have held that no such hearing was required.[141] For Commonwealth countries, such a conclusion normally relates to a holding that the expulsion decision is purely administrative and not judicial or quasi-judicial.[142]

(iii) Right to be present

91. Although international instruments do not set forth an explicit rule in that regard, the presence of an alien in the expulsion proceedings is either guaranteed or required in the legislation of several States. A State may give the alien a right to

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[135] United States, Immigration and Nationality Act, sect. 240(b)(2)(A)(ii).

[136] Belarus, Law of 1998, art. 29; and France, Code, art. L.512-2.

[137] Sweden, Act of 1989, sect. 6.15.

[138] Canada, Act of 2001, art. 44(3).

[139] See, e.g., *Wong Yang Sung v. McGrath*, Attorney-General, Et Al., United States, Supreme Court, 20 February 1950, *International Law Reports*, 1950, H. Lauterpacht (ed.), Case No. 76, pp. 252-256; *Nicoli v. Briggs*, United States, Circuit Court of Appeals, Tenth Circuit, 7 April 1936, *Annual Digest and Reports of Public International Law Cases*, 1935-1937, H. Lauterpacht (ed.), Case No. 162, pp. 344-345, at p. 345; *Brandt v. Attorney-General of Guyana and Austin* (note 30 above), p. 468; *Re Hardayal and Minister of Manpower and Immigration*, Canada, Federal Court of Appeal, 20 May 1976, *International Law Reports*, volume 73, E. Lauterpacht, C. J. Greenwood (eds.), pp. 617-626; *Gooliah v. Reginam and Minister of Citizenship and Immigration*, Court of Appeal of Manitoba, 14 April 1967, *International Law Review*, volume 43 [*ibid*., pp. 219-224]. In France, a hearing is required except in cases of urgency. See, e.g., *Mihouri* (France), Conseil d'État, 17 January 1970, *International Law Review*, volume 70, (ibid., p. 359).

[140] *Wong Yang Sung v. McGrath, Attorney-General et. al.* (note 139 above, pp. 254 and 255).

[141] See *Urban v. Minister of the Interior* (op. cit., pp. 341 and 342); *Smith v. Minister of Interior and Others*, Lesotho, High Court, 8 July 1975, *International Law Review*, vol. 70 (E. Lauterpacht (ed.), p. 370).

[142] See, e.g., *Smith v. Minister of Interior and Others*, Lesotho, High Court, 8 July 1975, *International Law Review*, vol. 70 (E. Lauterpacht (ed.), pp. 364-372); *Urban v. Minister of the Interior*, pp. 340-342.

appear personally during consideration of the alien's potential expulsion,[143] or summon or otherwise require the alien to attend a relevant hearing.[144] A State may likewise permit the presence of the alien's family member or acquaintance.[145] A State may penalize the alien's failure to attend a hearing by ordering the alien's expulsion and inadmissibility for a set length of time.[146] An alien's absence may be excused if it is due to the alien's mental incapacity,[147] or if the alien did not receive notice of the hearing or otherwise presents exceptional circumstances justifying the absence.[148] However, the alien's failure to attend in person does not prevent expulsion proceedings, especially given that the alien can be represented by a lawyer. In any event, States' practice is too limited for it to be possible to infer any rule on the topic.

(d) Right to effective review

92. Another of the most important procedural rules is that the alien subject to expulsion must be given the opportunity to defend himself before a competent body. However, as is well known, the receiving State can derogate from that rule for "compelling reasons of national security". The Human Rights Committee of the United Nations regularly examines that justification. Two cases can serve as an illustration. In the case *Eric Hammel*,[149] the author was a lawyer of French nationality who had been based in Madagascar for almost 20 years. He had defended political prisoners and the principal leaders of the political opposition. On several occasions, he had represented individuals before the Human Rights Committee. He was arrested and detained for three days. After being given only two hours to gather his belongings, he was expelled from Malagasy territory. According to the Supreme Court of Madagascar, the activities of the individual concerned and his continued presence in the country disturbed public order and public safety. The Human Rights Committee examined the case and, considering whether article 13 of the Covenant had been violated, noted that "the author was not given an effective remedy to challenge his expulsion and that the State party has not shown that there were compelling reasons of national security to deprive him of that remedy".[150] The Committee specified that its views took into account its general comment No. 15 of

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[143] Belarus, Law of 1998, art. 29; Bosnia and Herzegovina, Law of 2003, art. 76(2)-(3); Canada, Act of 2001, arts. 78(a)(i), 170(e); France, Code, arts. L.223-2, L.512-2, L.522-1(I)(2), L.524-1; Italy, Decree-Law No. 286 (1998), arts. 13(5 bis), 14(4), 17, Law No. 40 (1998), art. 15(1); Japan, Order of 1951, art. 10(3); Madagascar, Decree of 1994, arts. 35-36, Law of 1962, arts. 15-16; Portugal, Decree-Law of 1998, art. 118(2); Republic of Korea, Act of 1992, art. 89(2)-(3); Sweden, Act of 1989, sect. 6.14; United States, Immigration and Nationality Act, sects. 238(c)(2)(D)(i), 240(b)(2)(A)-(B), 504(c)(1). Such a right may be specifically conferred on an alien allegedly involved in terrorism (United States, Immigration and Nationality Act, sect. 504(c)(1)). (See Memorandum of the Secretariat on the expulsion of aliens, note 38 above, para. 624).

[144] Australia, Act of 1958, art. 203(3); Portugal, Decree-Law of 1998, art. 118(1). A State may likewise require the alien's presence when the legality of the alien's detention is being reviewed (Canada, Act of 2001, art. 57(3)).

[145] Japan, Order of 1951, art. 10(4).

[146] United States, Immigration and Nationality Act, sects. 212(a)(6)(B), 240(b)(5)(A), (E), (7).

[147] Ibid., art. 240(b)(3).

[148] Ibid., sect. 240(b)(5)(C)(e)(1).

[149] Human Rights Committee, views of 3 April 1987, *Eric Hammel v. Madagascar*, communication No. 155/1983 of 1 August 1983 (CCPR/C/29/D/155/1983), 3 April 1987.

[150] Ibid, para. 19.2.

1986, which stated that an "alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one", and that the procedural rules set forth in article 13 for the benefit of lawful aliens subject to expulsion "can be departed from only when compelling reasons of security so require".[151]

93. In the same general comment, the Committee pointed out that if a deportation procedure entails arrest, the State Party shall also grant the individual concerned the safeguards contained in the Covenant.[152] The guarantees are those contained in articles 9 and 10 of the Covenant. Article 10 addresses the conditions of detention. Article 9 sets forth procedural guarantees that extend to anyone deprived of their liberty. Article 9, paragraph 4 provides that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful". Whatever the objective of the deprivation of liberty, a court must be able to rule on its legality. In 2002, the Special Rapporteur of the Human Rights Commission on the question of torture and other cruel, inhuman or degrading treatment or punishment recalled that "such procedures should function expeditiously".[153] In the case *Mansour Ahani*, the individual concerned was detained as a result of a certificate stating that he posed a threat to internal security. He was kept in detention until his expulsion. The Human Rights Committee noted that the individual had been detained without being convicted of any crime or sentenced to a term of imprisonment.[154] It therefore took the view that by virtue of article 9, paragraph 4, he should have access to judicial review, "that is to say, review of the substantive justification of detention, as well as sufficiently frequent review".[155]

(e) Non-discrimination in procedural guarantees

94. The principle of non-discrimination appears to affect not only the decision of whether an alien may be expelled,[156] but also the procedural guarantees that should be respected. Commenting on article 13 of the International Covenant on Civil and Political Rights, the Human Rights Committee stressed that "discrimination may not be made between different categories of aliens in the application of article 13".[157]

95. For its part, the Committee on the Elimination of Racial Discrimination expressed concern regarding cases of racial discrimination in relation to the

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[151] Ibid. See also Human Rights Committee, general comment No. 15: The position of aliens under the Covenant, para. 10.

[152] Human Rights Committee, general comment No. 15: The position of aliens under the Covenant, para. 9.

[153] Interim report of 2 July 2002 of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, Theo van Boven, submitted to the General Assembly in accordance with resolution 56/143 of 19 December 2001 (A/57/173), para. 16.

[154] Human Rights Committee, views of 29 March 2004, *Mansour Ahani* (views of 29 March 2004, *Mansour Ahani v. Canada*, Communication No. 1051/2002 of 10 January 2002, CCPR/C/80/D/1051/2002, 14 June 2004); G. Heckman in "International Decisions", edited by D. Bodansky, *American Journal of International Law*, 2005, vol. 99, pp. 669-675, para. 10.2).

[155] Ibid.

[156] See the fifth report on the expulsion of aliens (A/CN.4/616 and A/CN.4/617).

[157] Human Rights Committee, general comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 10.

expulsion of foreigners, including in matters of procedural guarantees.[158] In its general recommendation No. 30, the Committee recommended that States parties to the International Convention on the Elimination of All Forms of Racial Discrimination, inter alia, "[e]nsure that [...] non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies".[159]

96. Similarly, the Human Rights Committee stressed the prohibition of gender discrimination with respect to the right of an alien to submit reasons against his or her expulsion: "States parties should ensure that alien women are accorded on an equal basis the right to submit arguments against their expulsion and to have their case reviewed, as provided in article 13. In this regard, they should be entitled to submit arguments based on gender-specific violations of the Covenant such as those mentioned in paragraphs 10 and 11 above."[160]

(f) Right to consular protection

97. An alien under an expulsion order may be entitled to consular protection in accordance with international and national law,[161] as set forth in articles 36 and 38 of the Vienna Convention on Consular Relations.[162] Article 36, paragraph 1, subparagraph (a), guarantees the freedom of communication between consular officers and nationals of the sending State. As this guarantee is formulated in general terms, it would also apply within the context of expulsion procedures. Paragraph 1, subparagraph (b), dealing with the situation of individuals in prison, custody or detained in any other manner, sets forth an obligation for the receiving State to inform the consular post of the sending State at the request of the person concerned and to inform the latter of his or her rights in this respect. Paragraph 1, subparagraph (c) recognizes the right of consular officers to visit a national of the sending State who is in detention.

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[158] See in particular the concluding observations of the Committee on the Elimination of Racial Discrimination: France, 1 March 1994 (A/49/18), para. 144: "Concern is expressed that the implementation of these laws [laws on immigration and asylum] could have racially discriminatory consequences, particularly in connection with the imposition of limitations on the right of appeal against expulsion orders and the preventive detention of foreigners at points of entry for excessively long periods."

[159] Committee on the Elimination of Racial Discrimination, general recommendation No. 30, para. 25.

[160] Human Rights Committee, general comment No. 28: Concerning Article 3, Equality of Rights between Men and Women, 29 March 2000, para. 17. The gender-specific violations referred to in paragraphs 10 and 11 include female infanticide, the burning of widows and dowry killings, domestic and other types of violence against women, including rape, forced abortion and sterilization and genital mutilation.

[161] See Vienna Convention on Consular Relations, 1961: articles 5(a), (d), (e), (g), (h) and (i) and articles 36 and 37; see also the analysis by Louis B. Sohn and T. Buergenthal (eds.) (note 36 above), p. 95; Robert Jennings and A. Watts, ibid., pp. 1140 and 1141, para. 547, note 1. *Reports of International Arbitral Awards*, vol. 2, pp. 1113, 1123-1124; the *Faulker Claim* (1926), *Reports of International Arbitral Awards*, vol. 4, pp. 67 and 70; and note 6 (Vienna Convention, article 8).

[162] See, for example, the comments by Alexander T. Aleinikoff (note 39 above), p. 9 (quoting article 36 of the Convention); Richard Plender, p. 471 (citing article 36 of the Convention; *Bigelow v. Princess Zizianoff, Gazette du Palais*, 4 March 1928; P. Cahier and L. Lee, *International Conciliation*, 1969, p. 63).

98. The International Court of Justice has applied article 36 of the Vienna Convention on Consular Relations in the *LaGrand* and *Avena* cases.[163] The Court noted that "Article 36, paragraph 1 (*b*), spells out the obligations the receiving State has towards the detained person and the sending State",[164] and that, "The clarity of these provisions, viewed in their context, admits of no doubt."[165]

99. Article 38 of the Convention allows consular officers to communicate with the authorities of the receiving State.

100. Attention may be drawn to the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144. Article 10 of the Declaration expresses the right of any alien to communicate at any time with the diplomatic or consular mission of his or her State:[166] "Any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in the absence thereof, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or he is a national in the State where he or she resides."

101. Given that such a right is affirmed in the Declaration in general terms, it appears to be applicable also in the event of an expulsion.

102. Some national laws explicitly recognize the right of an alien to seek consular protection in case of expulsion.[167] More precisely, a State may permit the alien to communicate with diplomatic or consular representatives of the alien's State, or of any State providing representation services for the alien's State,[168] when (1) the alien receives notice of the State's intent to pursue the alien's expulsion;[169] (2) the alien is kept in a specific zone or location,[170] or is otherwise held by the State;[171] (3) the alien is detained and allegedly involved in terrorism;[172] or (4) a final expulsion decision has been made and the alien faces deportation.[173] A State may permit diplomatic or consular personnel to arrange for the alien's departure or extension of stay, including when the alien has violated the terms of his or her transitory status.[174]

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[163] *LaGrand* Case (Germany v. United States of America), Judgment of 27 June 2001, paras. 64-91; Avena and other Mexican Nationals (Mexico v. United States of America), Judgment of 31 March 2004, paras. 49-114.

[164] Ibid., para. 77.

[165] Ibid.

[166] General Assembly resolution 40/44.

[167] See the Memorandum by the Secretariat on the Expulsion of Aliens (note 38 above), para. 631.

[168] United States, Immigration and Nationality Act, section 507(e)(2).

[169] United States, Immigration and Nationality Act, section 507(e)(2); France, Code, articles L.512-1, L.531-1 and L.551-2; Portugal, 1998 Decree-Law, article 24(1).

[170] Portugal, 1998 Decree-Law, article 24(1).

[171] France, Code, article L.551-2.

[172] United States, Immigration and Nationality Act, section 507(e)(2).

[173] Belarus, 1999 Council Decision, article 18.

[174] Chile, 1975 Decree, article 85.

(g) Right to counsel

103. Both treaty law and national law have recognized to some extent the right of an alien to be represented by counsel in expulsion proceedings.[175]

104. Article 13 of the International Covenant on Civil and Political Rights provides that an alien expelled, "except where compelling reasons of national security otherwise require, be allowed [...] to have his case reviewed by, and be represented for the purpose before, the competent authority". Such a right is expressly guaranteed by the Covenant only in appeal proceedings. It follows from the wording of article 13, which was adapted from article 32, paragraph 2, of the Convention relating to the Status of Refugees, that this right is expressly guaranteed only in the proceedings before the appeals authority. A comparison of article 13 with article 14, paragraph 3 (d), further shows that a person threatened with expulsion is not entitled to legal counsel or to the appointment of an attorney. However, the right to designate one's representative follows from the right to have oneself represented; this representative may be an attorney at the cost of the person concerned. Because an expulsion implicates the basic rights of the aliens concerned, a group in particular need of legal counsel, the right to representation by a freely selected attorney is of fundamental importance. Practice before the Human Rights Committee shows that most authors were in fact represented by counsel during the appeal proceedings.[176] Article 7 of the Declaration annexed to General Assembly resolution 40/144[177] contains the same wording as article 13 of the Covenant.

105. As for Europe, article 1, paragraph 1, of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms requires that an alien lawfully resident in the territory of a State be allowed "to be represented [...] before the competent authority" in expulsion proceedings. Similarly, article 3, paragraph 2, of the European Convention on Establishment provides that "[e]xcept where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, *and be represented for the purpose before*, a competent authority or a person or persons specially designated by the competent authority". [Emphasis added.]

106. Also worth mentioning is article 7 of the Convention of Application of Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union,[178] which reads as follows: "Nationals of any Contracting Party who have been authorized to settle in the territory of another Contracting Party may be expelled only after notification of the Minister of Justice of the country of residence by a competent authority of that country, before which the persons concerned may avail themselves of their means of defence *and cause themselves to be represented or assisted by counsel of their own choice*. [...]" [emphasis added].

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[175] See for example William Haney, "Deportation and the Right to Counsel", *Harvard International Law Journal*, vol. 11, 1970, p. 190, citing United States Supreme Court decision, *In re Gault*, 387 U.S. 1, 50, 68 (1967).

[176] See Manfred Nowak (note 128 above), p. 231.

[177] General Assembly resolution 40/144.

[178] Convention of Application of Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union, Brussels, 19 September 1960, United Nations, *Treaty Series*, vol. 480, p. 424.

107. In its assessment of *Josu Arkauz Arana v. France*, the Committee against Torture stressed the importance of giving the individual expelled the possibility to contact his or her family *or lawyer* in order to avoid possible abuse, which may give rise to a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to the Committee, "[t]he deportation was effected under an administrative procedure, [...] without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer. That [...] placed the author in a situation where he was particularly vulnerable to possible abuse" and therefore "constitutes a violation [...] of article 3".[179]

108. The legislation of several States also guarantees the right to counsel in the event of an expulsion. A State may entitle the alien to be assisted by a representative,[180] including specifically legal counsel[181] or a person other than legal counsel,[182] during expulsion proceedings, including with respect to the alien's detention. A State may expressly permit the alien free choice of counsel.[183] A State may designate a representative for minors or other persons unable to appreciate the nature of the proceedings.[184] A State may establish the inviolability of mail sent to the alien from the alien's lawyers or public counsel, or from relevant international bodies.[185]

109. Some national courts, interpreting national legislation, have also upheld the right of an alien to be represented by counsel.[186]

(h) Legal aid

110. With respect to the right of the expellee to be granted legal aid, attention may be drawn to the relevant legislation of the European Union, in particular to Council Directive 2003/109/EC of 25 November 2003, dealing with the situation of third country nationals who are long-term residents. Article 12 of the Directive provides:

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[179] Committee against Torture, *Josu Arkauz Arana v. France*, Communication No. 63/1997, 9 November 1999, para. 11.5 and 12 (A/55/44, pp. 87-88).

[180] Japan, 1951 Order, article 10(3); Panama, 1960 Decree-Law, article 85.

[181] Argentina, 2004 Act, article 86; Bosnia and Herzegovina, 2003 Law, article 76(3); Canada, 2001 Act, article 167(1); France, Code, articles L.221-4, L.221-5, L.222-3, L.512-1, L.512-2, L.522-2, L.551-2, L.555-3; Italy, 1998 Decree-Law No. 286, article 13(5), (8), 14(4), 1998 Law No. 40, articles 11(10), 15(1); Republic of Korea, 1992 Act, article 54; Madagascar, 1994 Decree, article 36, 1962 Law, article 15; Norway, 1988 Act, section 42; Portugal, 1998 Decree-Law, article 24(2); Spain, 2000 Law, article 26(2); Sweden, 1989 Act, sections 6.26, 11.1b, 11.8; United States, Immigration and Nationality Act, sections 238(a)(2), 239(a)(1)(E), (b), 504(c)(1), 507(e)(1). This right may be specifically accorded to minors (France, Code, article L.222-3), or to an alien allegedly involved in terrorism (United States, Immigration and Nationality Act, sections 504(c)(1), 507(e)(1)).

[182] Bosnia and Herzegovina, 2003 Law, article 76(3); France, Code, article L.522-2.

[183] France, Code, article L.213-2; Madagascar, 1994 Decree, article 36; Portugal, 1998 Decree-Law, article 24(2); United States, Immigration and Nationality Act, sections 238(b)(4)(B), 239(a)(1), 240(b)(4)(A), 292.

[184] Canada, 2001 Act, article 167(1); France, Code, articles L.221-5, L.222-3; and Sweden, 1989 Act, sections 11.1b, 11.8.

[185] Sweden, 1989 Act, section 6.26.

[186] See *Oudjit v. Belgian State (Minister of Justice)*, op. cit., p. 355. *Re Immigration Act, Re Kokorinis*, Court of Appeal of British Columbia, 3 May 1967, *International Law Review*, volume 43, E. Lauterpacht (ed.), pp. 225-229; *Re Vinarao*, Court of Appeal of British Columbia, 17 January 1968, *International Law Review*, volume 44, ibid., p. 166.

"4. Where an expulsion decision has been adopted, a judicial redress procedure shall be available to the long-term resident in the Member State concerned.

5. Legal aid shall be given to long-term residents lacking adequate resources, on the same terms as apply to nationals of the State where they reside."[187]

111. Mention can also be made of the concerns expressed by the Committee on the Rights of the Child about "ill-treatment of children by police during forced expulsion to the country of origin where, in some cases, they were deported without access to legal assistance [...]".[188]

112. The right to legal aid in relation to an expulsion procedure is provided in the legislation of several States. Thus, a State may provide legal counsel or assistance to the alien at public expense.[189] A State may also waive court fees if the alien is unable to pay them.[190]

113. Although treaty law does not explicitly provide a basis for the right to legal aid, the Special Rapporteur believes that such a basis could be established, in line with progressive development of international law, by drawing on European Community law, and also acknowledge an important trend in State practice, as had been revealed by the analysis of national legislation.

(i) Translation and interpretation

114. With respect to the right to translation and interpretation in the expulsion proceedings, mention can be made of the concerns expressed by the Committee on the Rights of the Child about "ill-treatment of children by police during forced expulsion to the country of origin where, in some cases, they were deported without access to […] interpretation".[191]

115. The legislation of several States provides the alien expelled with the right to translation or interpretation. In Italy, for example, if the alien does not understand Italian, the expulsion decision must be accompanied by a "summary" of the decision in a language he or she understands, or failing this, in English, French or Spanish. National jurisprudence confirms such translation as an integral part of due process. If the expulsion decision has not been translated into the language of the person

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[187] See European Union Council Directive 2003/109/EC of 25 November 2003 concerning the situation of third-country nationals who are long-term residents, *Official Journal* L.16, pp. 44 to 53.

[188] Concluding observations of the Committee on the Rights of the Child: Spain, para. 45 (a).

[189] Argentina, 2004 Act, art. 86; France, Code, arts. L.221-5, L.222-3, L.522-2, L.555-3; Italy, 1998 Decree-Law No. 286, art. 13(8), 1998 Law No. 40, art. 11(10); Norway, 1988 Act, sect. 42; Spain, 2000 Law, art. 26(2); Sweden, 1989 Act, sects. 6.26, 11.1b, 11.8-10; United States, Immigration and Nationality Act, sect. 504(c)(1). Such a right may be specifically conferred on an alien allegedly involved in terrorism (United States, Immigration and Nationality Act, section 504(c)(1)). A State may, in standard expulsion cases, provide to the alien a list of legal counsel willing to work pro bono, without conferring on the alien a right to free representation (United States, Immigration and Nationality Act, section 239(b)(2)-(3)). In contrast, a State may establish that the alien must bear the costs of counsel; see Canada, 2001 Act, article 167(1); and United States, Immigration and Nationality Act, sects. 238(b)(4)(B), 240(b)(4)(A), (5)(A), 292.

[190] Argentina, 2004 Act, arts. 87-88; Norway, 1988 Act, sect. 42.

[191] Concluding observations of the Committee on the Rights of the Child: Spain, para. 45 (a).

concerned, a reason must be provided for this omission, without which the expulsion decision is invalid. Furthermore, a translation into English, French or Spanish is only admissible if the administration cannot determine the alien's country of origin, and therefore his or her native language. When the expulsion decision is communicated, the alien is also informed of the right to assistance by counsel in all legal proceedings pertaining to the expulsion, which may be furnished through legal aid, and the right to appeal the expulsion order.

116. Overall, a State may in relevant situations (1) provide translation or interpretation assistance to the alien;[192] (2) entitle the alien to receive communications in a language which the alien understands;[193] (3) use a language which the alien understands throughout the relevant proceedings;[194] (4) use the language of the place in which the relevant authority sits;[195] (5) pay a private interpreter's compensation and expenses;[196] or (6) place legal obligations on the interpreter with respect to the form of the printed record.[197]

117. In *Sentence No. 257 (2004)*, the Constitutional Court of Italy upheld the constitutionality of issuing an expulsion decree in English, French or Spanish, where it was not possible to notify the alien in his or her native language or another language actually spoken by the alien. The Court reasoned that such a procedure met certain reasonably functional criteria, and guaranteed to a reasonable degree that the contents of such a decree would be understandable to the recipient.[198]

2. Procedural guarantees under European Community law

118. The procedural regime for expulsion of aliens in the European Community was established by European Council Directive 64/221/CEE of 25 February 1964.[199] The procedural safeguards provided by the Directive were twofold: the host member State has an obligation to notify the individual concerned of a decision on expulsion,

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[192] Argentina, 2004 Act, art. 86; Australia, 1958 Act, arts. 258B, 261A-C; Bosnia and Herzegovina, 2003 Law, arts. 8(3), 76(3); France, Code, arts. L.111-8, L.221-4, L.221-7, L.222-3, L.223-3, L.512-2, L.522-2; Italy, 1998 Decree-Law No. 286, article 13(7); Republic of Korea, 1992 Act, arts. 48(6)-(7), 58; Portugal, 1998 Decree-Law, art. 24(1); Spain, 2000 Law, art. 26(2). Such a right may be specifically accorded to minors (France, Code, article L.222-3), or with respect to an identification test or other investigation (Australia, 1958 Act, articles 258B, 261A-C; and Republic of Korea, 1992 Act, articles 48(6)-(7), 58).

[193] Australia, 1958 Act, arts. 258B, 261A-C; Belarus, 1999 Council Decision, art. 17; France, Code, arts. L.213-2, L.221-4; Italy, 1998 Decree-Law No. 286, arts. 2(6), 4(2), 13(7), 1998 Law No. 40, arts. 2(5), 11(7), 1996 Decree-Law, art. 7(3); United States, Immigration and Nationality Act, sect. 240(b)(7).

[194] France, Code, art. L.111-7. A State may expect the alien to indicate which language or languages the alien understands (France, Code, article L.111-7), or to indicate a preference from among the languages offered (Italy, 1998 Decree-Law No. 286, article 2(6), 1998 Law No. 40, art. 2(5)). A State may establish a default language or languages when the alien does not indicate a language (France, Code, art. L.111-7), or when it is otherwise impossible to provide the alien's indicated language (Italy, 1998 Decree-Law No. 286, arts. 2(6), 4(2), 13(7), 1998 Law No. 40, arts. 2(5), 11(7), 1996 Decree-Law, art. 7(3)).

[195] Switzerland, 1949 Regulation, art. 20(3).

[196] Sweden, 1989 Act, sect. 11.5.

[197] Republic of Korea, 1992 Act, arts. 59(2), 60(1)-(2).

[198] See Sentenza No. 257, Corte Costituzionale, Italy, 18 July 2004.

[199] Council Directive 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, 4 April 1964, p. 850.

and must also grant the individual the right to redress. This Directive was repealed by Council Directive 2004/38/EC of 29 April 2004,[200] which further strengthens the protective aspects of this dual guarantee.

(a) Notification of the expulsion decision

119. The persons concerned must always be notified of expulsion decisions. The notification of the decision must be given "in writing [...] in such a way that they [the persons concerned] are able to comprehend its contents and the implications for them".[201] Regarding the language that should be used, the Court of Justice of the European Communities has specified that the notification must be done in such a way that the individual concerned understands not only its content but also its effects.[202] Article 6 of the 1964 Directive required member States to notify the individual of the public policy, public security or public health grounds for an expulsion decision, unless such communication could affect State security. The Court decided that the notification "must be sufficiently detailed and precise"[203] to enable the person concerned to provide an adequate defence.[204] Article 7 of the 1964 Directive also required that the notification state "the period allowed for leaving the territory", specifying that "this period shall be not less than fifteen days if the person concerned has not yet been granted a residence permit and not less than one month in all other cases". The 2004 Directive provides that individuals must be notified, in writing, of the court or administrative authority with which they may lodge an appeal, as well as the time limit for the appeal. The notification should also specify the time allowed to leave the territory of the host member State, which, with the exception of cases of urgency, should be not less than one month from the date of notification. Regarding the last point, the European Council no longer distinguishes between individuals with residence permits and those without, and now requires cases of urgency to be duly substantiated.

120. Concerning the European Union, attention may be drawn to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004. Article 30, paragraph 1, of the Directive, deals with the notification of expulsion measures affecting citizens of the European Union or their family members. The article, entitled "Notification of decisions", provides in paragraph 1 that European Union citizens or their family members affected by any decision taken under article 27(1) to restrict their freedom of movement and residence, "shall be notified in

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[200] Directive 2004/83/EC of 29 April 2004 of the European Parliament and of the Council 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 L 158*, 30 April 2004, p. 77; corrigendum in *Official Journal L 229*, 9 June 2004, p. 35; corrigendum to the corrigendum in *Official Journal L 19*, 28 July 2005, p. 34. The repeal of Directive 64/221/CEE took effect on 30 April 2006, after a period of two years from the effective date of the new text.

[201] See article 30 of Directive 2004/83/EC of 29 April 2004 of the European Parliament.

[202] Court of Justice of the European Communities, Judgment of 18 May 1982, *R. Adoui v. Belgian State and City of Liège; D. Cornuaille v. Belgian State*, Joined Cases C-115/81 and C-116/81, pt. 13, European Court reports, p. 1668; Opinion of Advocate-General F. Capotorti delivered on 16 February 1982, European Court reports, p. 1714.

[203] Ibid.

[204] See also Court of Justice of the European Communities, Judgment of 8 October 1975, *Roland Rutili v. Minister of the Interior of the French Republic,* Case C-36/75, pt. 9, European Court reports, p. 221; Opinion of Advocate-General H. Hayras delivered on 14 October 1975, European Court reports, p. 1237.

writing [...] in such a way that they are able to comprehend its content and the implications for them". Paragraph 3 indicates that "[t]he notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification."

(b) Right of effective review

121. Article 8 of the 1964 Directive states: "The person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration." Since its ruling on the *Pecastaing* case of 5 March 1980, the Court of Justice of the European Communities has consistently reiterated that decisions covered by the Directive are considered "acts of the administration". Therefore, any person affected by such decisions must have access to the same legal remedies as are available to nationals in respect of acts of the administration.[205] Accordingly, a member State cannot render such persons remedies subject to "particular requirements as to form or procedure which are less favourable than those pertaining to [...] nationals".[206] Therefore, a remedy must be available to any individual "covered by the Directive against any decision which may lead to expulsion before the decision is executed".[207] Regarding the court from which remedies should be sought, the Court states that "if, in a member State, remedies against acts of the administration may be sought from the ordinary courts, the persons covered by Directive No. 64/221 must be treated in the same way as nationals with regard to rights of appeal to such courts in respect of acts of the administration".[208] In addition, if, in a given member State, ordinary courts are empowered to grant a stay of execution, for example, of a deportation decision, while administrative courts do not have such power, the State must permit persons covered by the Directive to apply for a stay of execution from the former, "on the same conditions as nationals".[209]

122. Regarding the suspensive effect of such legal remedies, the Court made clear in its preliminary ruling on the 1976 *Royer* case that "the decision ordering expulsion may not be executed before the party concerned is able to avail himself of

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[205] Court of Justice of the European Communities, Judgment of 5 March 1980, *Josette Pecastaing v. Belgian State*, Case C-98/79, pt. 10, European Court report, p. 691; Opinion of Advocate-General M. G. Reischl delivered on 31 January 1980, European Court reports, p. 680. See also Court of Justice of the European Communities, Judgment of 18 October 1990, *Massam Dzodzi v. Belgian State*, Joined Cases C-297/88 and C-197/89, pt. 58, European Court reports, p. I-3783; Opinion of Advocate-General M. M. Darmon delivered on 3 July 1990, European Court reports, p. I-3763.

[206] Ibid.

[207] Court of Justice of the European Communities, Judgment of the Court, 5 March 1980, *Pecastaing*.

[208] Court of Justice of the European Communities, Judgment of the Court, 5 March 1980, *Pecastaing* (note 205 above), pt. 11.

[209] Ibid. See also Court of Justice of the European Communities, Judgment of the Court, 18 October 1990, *Dzodzi* (note 205 above), pt. 59.

the remedy".[210] Member States are obligated not only to provide persons covered by the Directive the possibility of taking legal action before an expulsion decision is executed, but also to allow such persons to effectively apply to the competent court. It is not enough for a legal remedy to simply exist as a possibility; the persons concerned must actually have the means to access such a remedy. However, a member State is not obligated to maintain in its territory a Community national subject to an expulsion measure throughout the entire course of the appeal process. In this respect, the Court of Justice of the European Communities affirms that Member States must only "ensure that the safeguard of the right of appeal is in fact available to anyone against whom a restrictive measure of this kind has been adopted" and that "this guarantee would become illusory if member States could, by the immediate execution of a decision ordering expulsion, deprive the person concerned of the opportunity of effectively making use of the remedies which he is guaranteed [...]".[211] The Court concluded unequivocally that "a decision ordering expulsion cannot be executed, save in cases of urgency which have been properly justified, [...] until the party concerned has been able to exhaust the remedies guaranteed by articles 8 and 9 of [the] Directive".[212]

123. Furthermore, Directive No. 64/221 states in its article 9, paragraph 1, that "[w]here there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, a decision [...] ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for. [...]". The text specifies that the "competent authority" should not be the same as the authority empowered to order expulsions. These measures are to be taken to ensure that nationals of the Community enjoy procedural guarantees when they face expulsion.

124. The requirements are different when a Community national is illegally present in a member State. The Court faced this issue in the case of an Irish national who was expelled from the United Kingdom in connection with terrorist activities related to Northern Ireland. Based on consistent Court jurisprudence, the right to freedom of movement should be interpreted in a manner favourable to Community nationals. The Court judge therefore logically issued a broad interpretation of article 9, paragraph 1, of Directive 64/22, deciding that it actually covered nationals "*of a Member State who [are] already lawfully residing within the territory of another Member State*,"[213] including persons holding a residence permit, as well as citizens who, according to the legislation of the host State, are not required to hold a

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[210] Court of Justice of the European Communities, Judgment of 8 April 1976, *Jean-Noël Royer*, Case C-48/75, pt. 60, European Court reports, p. 497; Opinion of Advocate-General H. Mayras delivered on 10 March 1976, European Court reports, p. 521.

[211] Court of Justice of the European Communities, Judgment of 8 April 1976, op. cit., pts. 55 and 56.

[212] Ibid., pt. 62.

[213] Court of Justice of the European Communities, Judgment of 30 November 1995, *The Queen v. Secretary of State for the Home Department, ex parte John Gallagher,* case C-17/94, pt. 14, Reports of the Court, p. I-4255. See the analysis on this ruling by M. Luby in "Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes", *Journal du droit international,* April-June 1997, No. 2, pp. 479-637 especially pp. 536-538.

residence permit. In other words, article 9, paragraph 1, applies to decisions on expulsion of nationals of member States who are legally residing in a host member State, even if they are not obligated to hold a residence permit. In its ruling on *Pecastaing*, the Court explained that intervention by a "competent authority" should compensate for an absence of recourse through the courts; enable a detailed examination of a given case, "including the appropriateness of the measure contemplated, before the decision is finally taken"; and allow the person concerned to request, and obtain as appropriate, a stay of execution of the expulsion, failing an opportunity to obtain such a stay from the courts.[214] While paragraph 1 of article 9 concerns the rights of persons holding residence permits, affirming that an administrative authority cannot order their expulsion or refuse to renew a residence permit without obtaining the opinion of another authority, paragraph 2 addresses individuals who have already been affected by a restrictive administrative decision. Migrants who hold a residence permit are therefore better protected than those who do not.

125. Article 9 of Directive 64/221 does not require the "competent authority" to be a court or even to be composed of members of the judiciary.[215] Its members do not have to be appointed "for a specific period".[216] The Court stressed that the authority must operate "in absolute independence" and that member States are free to designate the authority,[217] which may consist of "any public authority independent of the administrative authority called on to adopt any of the [expulsion] measures [...] organised in such a way that the person concerned has the right to be represented and to defend himself before it".[218] The most important point, therefore, is that the person concerned is able to defend him or herself as set forth in the Directive, and that the authority act in complete independence and not be subject to the power of the authority responsible for ordering the measure.

126. The foregoing analysis of procedural rights granted to aliens facing expulsion demonstrates that such rights have an adequate legal basis in international law and in the legislation and case law of several States, with the exception of the right to be present, which has not been established in international law and varies greatly, and is even at times contradictory, across national legislation. Such procedural rights are also largely supported by the majority of specialists on the rights of aliens. The right to legal aid in particular is based on several elements that favour its establishment as part of progressive development. Accordingly, the Special Rapporteur proposes the following draft article:

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[214] Court of Justice of the European Communities, Judgment of 5 March 1980, *Pecastaing* (note 205 above), pt. 15.

[215] Court of Justice of the European Communities, Judgment of 18 May 1982, *Adoui and Cornuaille* (note 202 above), pt. 16. See also Court of Justice of the European Communities, Judgment of 18 October 1990, *Dzodzi* (note 205 above), pt. 65.

[216] Ibid.

[217] *Regina v Secretary of State for Home Affairs*, case 131/79, pt. 19, European Court reports, p. 631; Opinion of Advocate-General J. P. Warner, presented on 27 February 1980, European Court reports, p. 1585.

[218] Court of Justice of the European Communities, Judgment of 29 April 2004, *Orfanopoulos*, op. cit., pt. 114.

Draft article C1
Procedural rights of aliens facing expulsion

1. An alien facing expulsion enjoys the following procedural rights:

(a) The right to receive notice of the expulsion decision.

(b) The right to challenge the expulsion [the expulsion decision].

(c) The right to a hearing.

(d) The right of access to effective remedies to challenge the expulsion decision without discrimination.

(e) The right to consular protection.

(f) The right to counsel.

(g) The right to legal aid.

(h) The right to interpretation and translation into a language he or she understands.

2. The rights listed in paragraph 1 above are without prejudice to other procedural guarantees provided by law.