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**THE POSITION OF ALIENS
IN RELATION TO THE EUROPEAN
CONVENTION ON HUMAN RIGHTS**

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Preface

The law of the European Convention on Human Rights relating to aliens has grown significantly over the last fifteen years. The Council of Europe now comprises 43 members, including Armenia and Azerbaijan as the last two countries to have joined the organisation on 25 January 2001 (they have not yet ratified the European Convention on Human Rights). Supplement rights and freedoms to those guaranteed in the European Convention on Human Rights¹ are provided in Protocols Nos. 1, 4, 6 and 7.² More significantly, Protocol No. 11 has reformed the Strasbourg enforcement institutions and mechanisms.³ Such changes were felt necessary in order to accommodate the increasing case-load of the Strasbourg institutions. In addition, Protocol No. 12 was opened for signature on 4 November 2000. When it enters into force, following ten ratifications, this protocol will enlarge the non-discrimination clause contained in Article 14 of the European Convention on Human Rights to "any rights set forth by law". It is against this background that the "Position of Aliens in Relation to the European Convention on Human Rights" is re-examined in a second edition of this publication.

1. Introduction

Bayefsky recently commented that “Non-citizens, or aliens, are often understood as outside the realm of entitlements that most of us take for granted”.⁴ Traditionally the treatment of aliens has been regulated by the law of state responsibility, in particular, the “international minimum standards” of fundamental justice to be found in customary international law and the standard of “national treatment” (i.e., a state is only required to provide aliens and nationals with equal treatment, not with any special treatment).⁵ More recently, this treatment has come to be measured against a new and higher set of international standards to be found in human rights law.⁶ Two important consequences result from this new approach. Firstly, the doctrine of equality (of treatment) has given rise to the principle of non-discrimination which imposes strict limitations upon the freedom of states to deal with aliens.⁷ Secondly, *all* human beings have become subjects of modern international law to the extent that human rights treaties grant rights to individuals that they may enforce directly before an international body, without a link of nationality.⁸ The traditional rules of the law of state responsibility remain nevertheless applicable to the treatment of aliens in countries which are not parties to or have made important reservations to the basic human rights treaties, and on the matter of remedies.

This study examines the standards of treatment afforded to aliens under the European Convention on Human Rights (hereinafter the ECHR). It is divided into two main sections. Section 1 looks at the general background concerning the position of aliens in international law. Following a general discussion on the ECHR (1.A.), section 1 considers the rights and duties of states towards aliens under general international law in the context of admission and expulsion (1.B.) and non-discrimination (1.C.). Section 2 specifically concentrates on the rights and freedoms of aliens under the ECHR. Following some general observations (2.A.), section 2 examines the concept of alienage under specific provisions of the ECHR (2.B.) as well as in the Strasbourg’s case-law (2.C.).

A. General observations

The European Convention on Human Rights as a treaty with particular characteristics

Unlike other treaties of international law, the ECHR is not subject to the traditional doctrines of “reciprocity” and “nationality”.⁹ The European Court of Human Rights (hereinafter the Court) rejected the doctrine of reciprocity in the case of *Ireland v. the United Kingdom*, when it stated:

unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations, which in the words of the Preamble, benefit from a “collective enforcement”.¹⁰

This was already the view of the International Court of Justice in *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* when it stated:

33. ... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning basic rights of the human person including protection from slavery and racial discrimination.¹¹

More recently, the Court has referred to the ECHR as “a constitutional instrument of European public order (*ordre public*)”.¹² The ECHR does not recognise the doctrine of “nationality” either. As stated by Higgins, “[h]uman rights are rights held simply by virtue of being a human person”.¹³ According to Article 1 ECHR, “everyone” within the jurisdiction of a contracting party benefits from the rights and freedoms enumerated in the ECHR. This means that, in theory at least, the rights and freedoms recognised by the ECHR are universally available to all individuals, including aliens, be they nationals (e.g., immigrants or refugees) or non-nationals (e.g., stateless) of a foreign state. It follows that considerations of nationality, residence or domicile are irrelevant to a determination of a claim of a violation of the ECHR. All that needs to be shown is some physical pres-

ence in the territory of the (alleged) violator contracting party,¹⁴ and some exercise of control by that state over the individual and over the protection of the ECHR's rights secured within the territory of the state.¹⁵ The ECHR further guarantees that the enjoyment of these rights and freedoms must be free from discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (Article 14).

In the context of return, the Court also recognised the extraterritoriality effect of provisions of the ECHR, in particular Article 3, when it held that a contracting party could be held responsible for treatment afforded to a person within a non-contracting party to the ECHR.¹⁶ Extraterritoriality, though a controversial issue in public international law, has nevertheless been accepted in the context of a treaty rule recognising a rule of customary international law,¹⁷ and the *non-refoulement* principle is part of this body of customary rules.¹⁸

The ECHR embodies many of the rights and freedoms covered in the Universal Declaration of Human Rights (1948). However, it contains mostly civil and political rights, leaving the bulk of economic, social and cultural rights to be protected under the European Social Charter and/or the International Covenant on Economic, Social and Cultural Rights.¹⁹ Thus, provisions concerning, for instance, ownership of property, freedom of movement or a right of asylum, were left out from the contents of the ECHR. Various protocols have since extended the scope of these rights and freedoms.²⁰ For instance, the protection of property and the right to education became protected under Protocol No. 1 (Articles 1 and 2), and freedom of movement under Protocol No. 4 (Article 2). This is not the case of the right of asylum, which remains outside the ambit of the ECHR and its protocols. Many States Parties to the ECHR are not, however, parties to the protocols.

Besides rights and freedoms, the ECHR also provides guarantees aimed at reinforcing the efficacy of these rights and freedoms. For instance, Article 13 provides the right to an effective remedy, and Article 14 guarantees the enjoyment of the rights and freedoms contained in the ECHR without discrimination.²¹ Exceptions to the non-discrimination clause are contemplated under the ECHR in the light of the following provisions:

- Article 57, according to which states may “make a reservation in respect of any particular provision of the Convention”;
- Article 15, allowing states to take measures derogating from their obligations under the ECHR; such measures must be limited to the “extent strictly required by the exigencies of the situation” and may not be made against Articles 2, 3, 4 (1), or 7 of the ECHR or against rights provided in Protocol No. 6;
- Article 16, according to which states may restrict the political activities of aliens in connection to their rights under Articles 10, 11 and 14.
- Qualified rights (for example, by the engagement of other rights, or by the needs of society, e.g., Articles 8-11) or limited rights (i.e., only in defined circumstances and ways, e.g., Articles 5 and 6), according to which states are entitled to restrict the enjoyment of these rights on the ground of concepts to be defined by the states (e.g., necessary in a democratic society, in the interest of the Community, with a view to deportation);
- Finally, considerations of necessity and proportionality which have sometimes required the Strasbourg organs to allow a differentiation to be made.²²

The Strasbourg enforcement machinery

According to the ECHR, the primary responsibility for implementing the rights and freedoms guaranteed therein rests with the Contracting Parties, “the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights”.²³ The Strasbourg organs have nevertheless played a crucial role in the enforcement of these rights. The Court has repeatedly “emphasised that the Convention is a living instrument to be interpreted in the light of present-day conditions and this approach applies not only to the substantive rights protected under the Convention, but also to those provisions such as articles 25 and 46 which govern the operation of the Convention’s enforcement machinery”.²⁴ Recently, the Court adopted “the view that the *increasingly high standard* being required in the area of protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies” (emphasis

added).²⁵ In addition, the Court has developed the principle of effective protection through a constant enlargement of the positive obligations of states when implementing the rights and freedoms guaranteed under the ECHR. For instance, the Court found that the prohibition against torture, inhuman or degrading treatment under Article 3 requires two types of states behaviour on the part of states: they must abstain from such treatment but are required also to take immediate steps to prevent, prosecute and punish the authors of such acts and to allow the victim effective access to the procedure of investigation.²⁶ It results from this approach that a state could be found responsible of a violation of the ECHR following the violation of a substantive and/or procedural component of any right or freedom guaranteed under the ECHR.²⁷

Since the entry into force of Protocol No. 11 on 1 November 1998, the new Court has become a full-time institution (Article 19) and its jurisdiction compulsory for contracting states (Article 32).²⁸ All individuals have gained direct access to the new Court and "The Contracting Parties undertake not to hinder in any way the effective exercise of this right" (Article 34). Interstate applications (Article 33) continue to be rare, however, and motivated by considerations of self-interest and politics, in spite of the fact that "[u]nlike the traditional approach to such cases under the international law of state responsibility for injury to aliens, it is not necessary for an applicant state to allege that the rights of its own nationals have been violated".²⁹ This state of affairs is highly regrettable for the treatment of all aliens in Europe, in particular the stateless. Judgments of the Court are legally binding and their execution is supervised by the Committee of Ministers.³⁰

The Council of Europe is now composed of 43 member states, of which almost half are newly constituted republics resulting from the collapse of former communist regimes. Of these 43 member states, 41 have signed and ratified the ECHR. Armenia and Azerbaijan, the last two countries to have joined the organisation (25 January 2001), have as yet only signed the ECHR. Mahoney sees the changed character of contracting parties as constituting a serious challenge for the Court. Not the least, the principle upon which the Court is only empowered to review the exercise of democratic discretion by national authorities (i.e., subsidiarity) has become subject to serious undermining. He predicts, in particular, that in future the new Court is likely to become increasingly involved in cases of blatant and

serious violations of human rights (e.g., Article 2 or 3) as opposed to cases involving the margin of appreciation (e.g., Articles 8-11).³¹

B. Rights and duties of states towards the admission and expulsion of aliens under international law

It has long been a principle of international customary law that states are free to control the entry and residence of aliens into their territory. The absence of any duty to admit aliens in classical international law is supported by the practice of most states and by states' immigration laws, and finds its origins in the principle of sovereignty or territorial supremacy.³² However, this freedom has come to be increasingly limited under contemporary international law, in particular by treaties and principles of general international law in the areas of human rights and economic integration.³³ Thus, the Treaty on European Union recognises freedom of movement and the right of establishment (e.g., the right to reside and work, and the right to vote and stand as candidates in local and European elections) to all European citizens within the member states of the Union,³⁴ and freedom of movement is progressively to be extended to third-country nationals.³⁵ Aliens are also expressly guaranteed freedom of movement, including the right to emigrate and the right to move freely within a state's territory, under several international treaties of human rights.³⁶ This freedom is provided, for instance, in Article 13 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Civil and Political Rights. It is also provided for in Article 2 of Protocol No. 4 to the ECHR.³⁷

However, such express guarantees on freedom of movement have never extended to the "right" to immigrate to a country other than one's own, including the right to asylum, which remains governed primarily by national legislation. Certain categories of people are nevertheless either exempt from control on entry or enjoy privileges when seeking entry into a foreign state's territory. This is the case, for instance, of diplomats and consuls, on the basis of customary international law subsequently codified into treaties; of special missions, on the basis of "modern rules of international law" subsequently codified in treaty law; of international officials, on the basis of treaties; and, finally, of crew members, on the basis of bilateral then multilateral treaties.³⁸ Outside the scope of treaty obligations, states have chosen to admit aliens into their territory for humanitarian motives,

albeit on a discrimination basis (e.g., during the Bosnian war, European countries were imposing visa requirements on persons fleeing certain areas of the former Yugoslavia).

Alongside the rights and duties of states regarding the admission of aliens, states are generally recognised the power to remove aliens as part of their territorial sovereignty.³⁹ In return, the state of the nationality of the alien has a duty to receive him/her back into its territory.⁴⁰ This is because in international law, nationality produces two effects: “a state may protect its nationals *vis-à-vis* other states, and it has a duty to readmit them to its territory should another state decide to expel them”.⁴¹

In a series of cases the (permanent) Court of International Justice clarified the notion of states’ discretionary power to admit and remove aliens and concluded that such power exists within the rule of law (i.e., the international rules relating to nationality and to human rights) and does not therefore equate to arbitrariness.⁴² In particular, such power must be exercised within the rule of law, i.e., it must be in conformity with basic standards, such as fairness and non-discrimination, and it must not clash with other individuals’ basic human rights, such as family reunion, *non-refoulement*, and prohibition of torture or degrading treatment. It follows that recent practices aimed at preventing entry or at denying access to the full-length asylum procedures to entire groups of refugees into Europe may raise concern in the light of the principle of non-discrimination.⁴³ States are required to interpret the Convention Relating to the Status of Refugees in “good faith”, and many such practices may not even have a legitimate aim nor meet the proportionality test.⁴⁴ More specifically, mass expulsion of aliens is unlawful under Article 4 of Protocol No. 4, and certain procedural rights are guaranteed under Article 1 of Protocol No. 7. Furthermore, matters of expulsion may indirectly raise an issue under Article 3 (prohibition of torture), Article 5 (right to liberty and security pending deportation), Article 8 (right to respect for private and family life), and Article 13 (right to an effective remedy), in particular.

Thus, in the absence of general international law and treaty obligations, a state is free to admit or expel an alien from its territory. However, as showed by Goodwin-Gill, this is rarely the case.⁴⁵ Human rights treaties, including specific treaties on refugee rights, have considerably narrowed down the margin of discretion belonging to states. In this regard the ECHR has played a key-role *vis-à-vis* European governments.

C. Non-discrimination

Under classical international law, a state is required to respect the basic human rights of its citizens and to accord to all people within its jurisdiction equal protection of their basic human rights without distinction as to race, sex, language or religion.⁴⁶ This duty of states is reiterated in several other international instruments.⁴⁷ It follows that as a matter of general international law, nothing prevents a state from treating its own nationals better than aliens, provided the “international minimum standard” required in respect of aliens is met. Classical international law does not therefore prevent discrimination by states between aliens and nationals on grounds of nationality. This approach was rejected mostly in human rights treaties of regional character.

It was first rejected by the founding fathers of the Council of Europe and the drafters of the ECHR. Article 14 of the ECHR requires that each of the rights and freedoms guaranteed therein “be secured without discrimination [*sans distinction aucune*] on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.⁴⁸ Although the scope of application of Article 14 is limited to the way in which states guarantee the rights and freedoms defined in the ECHR, and not any other rights, it does not require an actual violation of a substantive provision. For instance, in *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (a case involving non-national wives granted indefinite leave to remain in the United Kingdom and seeking the right to be joined there by their non-national husbands), the Court indicated that the British immigration rules applicable at the time did not *per se* violate Article 8, but since the right sought by the applicants could only be exercised by men, a violation of Article 14 had occurred.⁴⁹ Thus, the provisions of the ECHR are principally applicable without any distinction between nationals and aliens within any given member state; alienage *per se* is generally not a permissible ground for different treatment.⁵⁰ However, Article 14 does not require absolute equality or identity in treatment in every situation, and factual inequalities may exceptionally call for legal inequalities in the form of special measures, but only on the basis of an explicit provision in the ECHR allowing for such a differentiation (e.g., Articles 57, 15, 16, 8-11, 5, or 6). For the purpose of the ECHR, a difference of treatment is discriminatory if it “has no objective and reasonable justification”, i.e., if it does not pursue “a legitimate aim”

or if there is no “reasonable relationship of proportionality between the means employed and the aim sought to be realised”.⁵¹ In *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, for instance, the applicants were able to show that the reason advanced by the UK government for distinguishing between men and women, that they had a different effect on the labour market, was without factual basis.⁵²

In sum, non-discrimination in the ECHR is not guaranteed in absolute terms. The contracting parties enjoy “a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law, but it is for the Court to give the final ruling in this respect”.⁵³ If no justification for the different treatment is offered by the state, the applicant will usually succeed.⁵⁴ So will s/he, when a proper balance is not achieved between the interests involved and when the means employed are therefore disproportionate to the legitimate aim pursued.⁵⁵ However, as things stand, the protection of aliens against discrimination under the ECHR is rather weak. This is particularly so because in matters of immigration, residence, political activity and integration of aliens, the contracting parties remain free to limit the scope of application of the non-discriminatory clause. The Court has been able to control states’ freedom in this area through a generous application of the principle of proportionality and a liberal interpretation of certain provisions of the ECHR. Obviously, a more satisfactory solution lies in Protocol No. 12, which envisages a complete autonomous application of the principle of non-discrimination “to any right set forth by law”.⁵⁶

The traditional approach to non-discrimination in international law was also rejected in other fora. The International Court of Justice endorsed the new approach in the *Barcelona Traction* case, arguing that such view was justified on the basis of “principles and rules concerning basic rights of the human persons”.⁵⁷ Article 24 of the American Convention on Human Rights generally recognises to “all persons” equal protection of the law “without discrimination”, and Article 3 of the Additional Protocol (“of San Salvadore”) in the area of economic, social and cultural rights is more explicit in providing “national ... origin ... or any other social condition” as a basis for non-discrimination. In Africa, Article 2 of the African Charter on Human and Peoples’ Rights explicitly mentions “national ... origin ... or other status” as grounds for non-discrimination. Within the European Union discriminatory treatment on the basis of nationality is generally

prohibited.⁵⁸ This general prohibition does not yet fully extend to third-country nationals.⁵⁹ It is unquestionable that developments in human rights fora have raised the standards of protection of *all* human beings, aliens and nationals alike. Today, aliens and nationals benefit from non-discriminatory protection of their basic human rights. Henceforth, restrictions imposed on aliens but not on nationals must be expressly stated. When such differential treatment is allowed, it must pursue a legitimate aim (i.e., it must have an objective and reasonable justification) and a reasonable relationship of proportionality must exist between the aims sought to be realised and the means employed.⁶⁰ This is also the case concerning the differential treatment of categories of aliens. Exceptionally, such distinction may not only be permissible but also desirable and necessary in any immigration system (e.g., between male and female asylum-seekers).⁶¹

Three key points follow from the above discussion. One, alienage is not a ground for discrimination under the ECHR. Two, restrictions may be imposed on aliens as a matter of exception following an express provision in the ECHR. Against this background aliens are recognised as having specific rights under the ECHR. Three, the system of protection under the ECHR is supplementary to that provided by municipal law and/or other international agreements and may only be resorted to by aliens in order to benefit of a more favourable regime for the protection of their human rights.

2. The scope of the rights and freedoms of aliens under the ECHR

A. General observations

In principle, alienage *per se* is not a ground for discrimination between aliens and nationals under the ECHR. Yet the ECHR contains several exceptions to this principle resulting in the exclusion of aliens from the enjoyment of some basic human rights. This is the case, in particular of Article 5 (1) *f*, Article 16, Article 1 of Protocol No. 1, Articles 2 (1) and 4 of Protocol No. 4, and Article 1 of Protocol No. 7, which all contain direct limitations on the non-discrimination clause. In addition, Articles 8 to 11 have been found to limit indirectly the non-discrimination clause by allowing states to take restrictive measures justified by the need to accommodate the protection of certain human rights on one hand, and the protection of democratic society on the other hand. This is generally recognised as a function of municipal law and wide discretion is exercised by states in their choice of restrictions. Furthermore, Article 6 of the ECHR has been interpreted by the Court to exclude immigration proceedings. In contrast, the ECHR also provide certain provisions which *prima facie* do not concern aliens but which have been interpreted to benefit them in a special way (e.g., Article 3 in connection with Article 13). This led Lillich to observe that “The European Convention on Human Rights provides a classic example of how, with a bit of imagination, principles relating to the human rights of aliens can be extracted from legal instruments which on their surface seemingly have little or nothing to do with the subject”.⁶²

B. Alienage and specific provisions of the ECHR

At present, the ECHR contains at least six provisions according to which aliens and nationals may be treated differently. Like all exceptions, they

must be interpreted restrictively, that is, they “shall not be applied for any purposes other than those for which they have been prescribed” (Article 18 ECHR), and apart from the exception provided in Article 16 they shall not be applied in a discriminatory way, that is, they are subject to the requirements of necessity and proportionality.

Restrictions on the political activity of aliens

Article 16 of the ECHR⁶³ provides the first and only explicit exception to the non-discriminatory clause expressed in Article 14, by allowing the contracting parties to impose restrictions on the political activities of aliens in respect of Article 10 (“Freedom of expression”), Article 11 (“Freedom of assembly and association”) and Article 14 (“Prohibition of discrimination”). The *travaux préparatoires* suggest that Article 16 was included in the ECHR to reflect the customary international law evidence that states are free to restrict the political activity of aliens.⁶⁴ Since then, this provision has been criticised for conflicting with Article 1 of the ECHR (i.e., the enjoyment by everyone of the rights and freedoms guaranteed therein) and for applying to potentially wide provisions such as Article 14.⁶⁵ The Parliamentary Assembly of the Council of Europe even called for its deletion in 1977.

The scope of Article 16 was discussed by the Court in *Piermont v. France*.⁶⁶ The applicant, a German citizen and a member of the European Parliament (MEP), had been invited to French overseas territories (OTs) in the South Pacific by “green” groups against nuclear tests. In French Polynesia she took part in demonstrations against the government and was expelled from the territory with prohibition on re-entering. She claimed that the measure violated her freedom of expression under Article 10. The French government argued that, if not justified under other grounds (e.g., Article 56), the measure could at least fall under the scope of Article 16. The Court disagreed and found, in favour of the applicant, that her “possession of the nationality of a member State of the European Union and, in addition to that, her status as a member of the European Parliament do not allow Article 16 of the Convention to be raised against her, especially as the people of the OTs take part in the European Parliament elections.”⁶⁷ There was great disagreement on the reasons why Mrs Piermont should not be considered an alien for the purposes of her claim. The majority in the Court refused to rely on the concept of citizenship of the European Union because the Community Treaties did not *at the time* recognise any such

citizenship. Similarly, it refused to base its decision on her status as an MEP. Instead, it found that, under the Community Treaties, citizenship of a *member state* was sufficient to remove the status of alien from the applicant. Thus, European Union nationals present in a member state of the European Union of which they do not have citizenship are not “aliens” for the purposes of Article 16. This interpretation is to be welcomed for it provides the Court with an opportunity “to control resort to the Article 16 power” otherwise left at the discretion of the contracting parties.⁶⁸

States’ power to detain aliens

The second exception is contained in Article 5 (1) *f* of the ECHR, which recognises the power of states to detain (aliens) in order to prevent unauthorised entry or with a view to deportation or extradition. The Court’s case-law shows that it is difficult for aliens to invoke successfully Article 5 in respect of expulsion or refusal to grant a residence permit in a state. Article 5 is concerned with the legality of the “deprivation” of liberty,⁶⁹ not with the restrictions or limitations on freedom of movement covered by Article 2 of Protocol No. 4 or the legality of the conditions of detention which is a matter for Article 3 of the ECHR and/or the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

Article 5 (1) guarantees to everyone the right to physical liberty. This right may be limited on six grounds explicitly listed in Article 5 (1) *a-f*. It follows that under the ECHR detention is generally presumed to be arbitrary unless it falls under one of the six grounds listed.⁷⁰ One such ground is especially relevant in the context of this section because it applies only to aliens, i.e., Article 5 (1) *f*.⁷¹ States’ power to detain aliens is not unlimited: in particular, it is subject to three key principles. These principles were discussed by the Court in the context of immigration in *Amuur v. France*, a case involving four sibling asylum-seekers from Somalia held in the international zone of Paris Orly airport for 20 days.⁷² They are summarised as follows:

- Whether the detention in question amounts to a deprivation or a restriction upon liberty is a question of degree or intensity, and not one of nature or substance.⁷³ In its assessment of this degree, the Court looks at each concrete situation, i.e., it looks at the type, duration, effects and manner of implementation of the measure.⁷⁴

Thus, the ECHR does not confer a right of political asylum or, more generally, a right of residence.⁷⁵ However, “the confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status”.⁷⁶

- Once the Court is convinced that it is dealing with a deprivation of liberty, it moves on to establish the legality of the detention, i.e., whether it is “in accordance with a procedure prescribed by law”. The Court has interpreted this requirement to mean that the domestic law authorising the deprivation of liberty “must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness”.⁷⁷ It must also be of “sufficient quality”, i.e., it must offer possibilities for judicial review, provisions setting time-limits and access to legal, humanitarian and social assistance.⁷⁸
- The deprivation of liberty must be “necessary in a democratic society”. In particular, it must “be in conformity with the purpose” of the limitation.⁷⁹ Such purpose includes the prevention of unlawful immigration or of a real risk of absconding. In such cases, account should be taken of the distinction between aliens who are not suspected criminals and others who are suspected criminals.⁸⁰ In *Chahal v. the United Kingdom*, a case of deportation to India of a Sikh separatist on grounds of national security, the Court distinguished the requirement of “necessity” under Article 5 (1) *f* from that under Article 5 (1) *c*, and it found that Article 5 (1) *f* did not require that the detention of an alien against whom action was being taken with a view to deportation be reasonably considered necessary. All that was required was that “action is being taken with a view to deportation”.⁸¹ Thus, detention would be justified even if a deportation order had not yet been in force. However, it would cease to be justified if the deportation proceedings were to be conducted without due diligence.⁸² It was therefore necessary for the Court to determine whether the duration of the deportation proceedings was excessive and whether there existed sufficient guarantees against arbitrariness. The Court found a period of almost four years, during which Mr Chahal’s application for asylum was being considered, not to be excessive in view of the seriousness of the interest involved, i.e., Mr Chahal’s fear of torture balanced against the national security of the country.⁸³ It also

found that in the context of Article 5 (1), the advisory panel procedure provided in cases of national security offered sufficient guarantees against arbitrariness.⁸⁴

Article 5 (2)-(5) sets out a number of safeguards in respect of *anyone* who is lawfully detained.⁸⁵ Under Article 5 (2), anyone arrested must be “informed promptly” and in a language that s/he understands of the reasons why s/he was arrested, so as to be able to seek judicial review of his/her arrest or detention under Article 5 (4).⁸⁶ Thus, in *Zamir v. the United Kingdom*, the Commission was of the opinion that free legal aid should have been made available to an illegal immigrant detained pending deportation because of his poor command of English and the complexity of the case.⁸⁷ Article 5 (3) contains important safeguards for anyone arrested or detained on suspicion of having committed a criminal offence under Article 5 (1) c.⁸⁸ Article 5 (4) guarantees to everyone who is “lawfully” detained under Article 5 the right to seek judicial review of their detention “speedily before a court”. This provision applies to “everyone”, whatever the grounds for detention (e.g., criminal offence or deportation in immigration or asylum cases). The requirement of speediness is particularly important in cases where detention has been ordered by an administrative body. Both access to judicial review and the decision of the review court must be “speedy”. Thus, in *Zamir v. the United Kingdom*, the Commission considered that an application for legal aid related to Article 5 (4) must be considered “speedily”; and seven weeks to hear the review case was found to be in violation for this reason.⁸⁹ Periods of 31 and 46 days for a municipal court to review a case were considered in breach of Article 5 (4) in case of detention pending extradition under Article 5 (1) f.⁹⁰ The requirement of “lawfulness” of the detention under Article 5 (4) has the same meaning as under Article 5 (1), i.e., the detainee must be able to question the conformity of his/her detention with provisions of municipal law and the ECHR, and its arbitrariness.⁹¹ However, Article 5 (4) does not go so far as to require “that the domestic courts should have the power to review whether the underlying decision to expel could be justified under national or Convention law”.⁹² This does not mean that the national authorities can be free from effective control by the domestic courts whenever elements of national security or terrorism are involved.⁹³ Thus, in *Chahal v. the United Kingdom*, the Court found that the advisory panel competent to review national security cases fell short of being considered a “court” since it offered no opportunity of legal representation, it had no power of decision,

and its advice to the Home Secretary was not binding and could not be disclosed.⁹⁴ Thus, a state must provide speedy access to a court in all cases, whether the detention is justified under Article 5 (1) *a-f* or not, as confirmed by the Court's jurisprudence that paragraphs (1) and (4) of Article 5 are separate provisions.⁹⁵ Article 5 (4) is a more specific and restrictive provision than Article 13 on the "right to an effective remedy"; thus, once a violation of Article 5 (4) is found, the Court does not normally find it necessary to consider a claim under Article 13 in relation to Article 5.⁹⁶ This is because both provisions serve the same purpose, i.e., to provide a domestic remedy which would be more easily and quickly attainable under domestic law than at the Strasbourg level. Finally, Article 5 (5) guarantees a right to compensation from the national authorities for unlawful detention.⁹⁷ This right is distinct from the right to just satisfaction from the Court under Article 41 in connection with a breach of Article 5.

To sum up, detention for the purpose of refusing entry into the territory, removing an illegal entrant or deporting an alien is permitted under the ECHR in order to accommodate states in the exercise of their power to control immigration. Even so, judicial review of the legality of the detention must be guaranteed as a safeguard against the arbitrariness of the measure, including the domestic law upon which it is based. It follows that "a blanket policy of detaining all asylum-seekers on arrival would be incompatible with the ECHR".⁹⁸ So would a prolonged detention pending examination of an asylum claim in the absence of a specific reason such as threat to the national security. Furthermore, "Article 5 combined with Article 14 would preclude with selective detention of particular ethnic-sub groups solely on the basis of their race, religion or national origin".⁹⁹

Freedom of movement of aliens lawfully within the territory

The third exception is provided in Article 2 (1) of Protocol No. 4 to the ECHR stating that: "Everyone lawfully (*régulièrement*) within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence", subject to the limitations or restrictions applicable to "everyone" provided in Article 2 (3) and (4).¹⁰⁰ Article 2 (1) of Protocol No. 4 clearly only concerns the free movement of persons *within* (as opposed to between) the states parties to the Protocol. With the exception of Andorra, Armenia, Azerbaijan, Greece, Liechtenstein, Malta, Spain, Switzerland, Turkey and the United Kingdom, all other states

that are parties to the ECHR are also parties to Protocol No. 4.¹⁰¹ Although Article 2 of Protocol No. 4 does not expressly refer to aliens, it has the effect of distinguishing between “everyone lawfully” in a state, who may either be nationals or aliens, and “everyone unlawfully” in a state, who may only be aliens. Consequently, aliens lawfully in a state may move freely within that state and may choose their place of residence, but aliens unlawfully (*en situation irrégulière*) in a state have no such right. The Commission considers that “lawfully” refers to the domestic law of the state in question, and that aliens admitted under certain conditions by the state’s authorities are “lawfully within the territory” as long as they comply with those conditions.¹⁰² Thus, persons authorised entry in a country and allowed to remain for a limited time on humanitarian grounds may not necessarily derive a right of permanent admission from their temporary situation.¹⁰³ It was also agreed that the scope of Article 2 (1) of Protocol No. 4 would not extend to an alien passing through the territory of a state.¹⁰⁴

Prohibition of collective expulsion of aliens

The fourth exception applies explicitly to aliens and is provided in Article 4 of Protocol No. 4: “Collective expulsion of aliens is prohibited”. Originally inspired by the massive expulsion of peoples as a result of the second world war, Article 4 no longer requires that expulsion be on a massive scale to be collective. In *Becker v. Denmark*, the Commission defined collective expulsion as “any measure of the competent authority compelling aliens as a group to leave the country”.¹⁰⁵ These words have been read to mean that “acts of persecution, violations of human rights, discriminatory treatment”, etc., at the hand of state authorities or, if at the hands of non-state agents, against which the state cannot or will not offer protection, constitute collective expulsion.¹⁰⁶ However, the refusal of asylum in identical terms to a number of aliens from the same country does not amount to collective expulsion if each of them had his/her asylum application decided on its individual merits.¹⁰⁷ This follows from the Commission’s finding in *Becker v. Denmark* that aliens may only be expelled as a group following “a reasonable and objective examination of the particular cases of each individual alien of the group”.¹⁰⁸ The procedural guarantee under Article 4 of Protocol No. 4 applies generally to all aliens, whether lawfully or unlaw-

fully in the territory of a state, whether resident or non-resident in the territory of that state, whether or not part of a collective group.

Procedural safeguards relating to the expulsion of aliens

The fifth exception is contained in Article 1 of Protocol No. 7, which guarantees “Procedural safeguards relating to the expulsion of aliens”.¹⁰⁹ According to this provision, individual aliens “lawfully resident” in a country may only be expelled pursuant to a decision reached by law, and they must be allowed to submit reasons against their expulsion, to have their case reviewed, and to be represented before the competent authority, except when such expulsion is necessary on grounds of public order or national security. Article 1 of Protocol No. 7 contains important weaknesses.¹¹⁰ First, it fails to discuss the grounds on which an alien may be expelled. Second, it is limited to aliens “lawfully resident” in a state, thereby excluding from its scope aliens at the border who have not passed through immigration, aliens present in a territory on a non-residence basis, and aliens against whom a decision regarding their residence is pending. Thus, in *Voulfovitch and Oulianova v. Sweden*, the Commission considered that the applicants, who had been authorised entry into Sweden on a one-day transit visa, but who remained in Sweden while a decision on their asylum application was being taken, were not “lawfully resident” and therefore could not benefit from Article 1 of Protocol No. 7.¹¹¹ Third, the conditions of “lawful residence” are determined by municipal law. Fourth, review of the case is by a “competent authority” which does not need to be independent nor to have a power of decision.¹¹² Fifth, the procedural safeguards guaranteed to the alien may be overridden “in the interests of public order” or for reasons of “national security”. Finally, Protocol No. 7 has not yet been ratified by all the members of the Council of Europe. As of 1 March 2001, it remained unratified by fourteen member states, including the United Kingdom, Belgium and Germany. In sum, Article 1 of Protocol No. 7 allows aliens the right to have their arguments against expulsion heard by the executive but it does offer limited guarantee of procedural due process in cases of expulsion. Regrettably, the Court has done nothing to fill the gap through a more liberal interpretation of Article 6 (1).¹¹³

Protection of property

The sixth and last exception is found in Article 1 of Protocol No. 1.¹¹⁴ According to paragraph 1 of this provision, “Every natural or legal person is entitled to the peaceful enjoyment of his possessions” and deprivation of one’s property is prohibited “except in the public interest and subject to the conditions provided for by law and by the general principles of international law”. In addition, contracting states are entitled “to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties” (paragraph 2). The Court recently declared, in an (in)-admissibility decision, that the right to a peaceful enjoyment of possessions does not entail the right for an alien who owns property in another country *to reside permanently* there in order to use his/her property; restrictions applicable to an alien’s right of residence in a country are compatible with Article 1 of Protocol No. 1 provided they are not absolute nor permanent.¹¹⁵ It thus remains uncertain whether or not Article 1 of Protocol No. 1 guarantees a right of entry into a foreign country (through the granting of a visa for example) to aliens who own property. If such a right were to exist, its scope would nevertheless be limited under Article 1 of Protocol No. 1 itself.

The “general principles of international law” referred to in the second sentence of the first paragraph are those protecting the property of *aliens*, and aliens alone, against arbitrary expropriation and against nationalisation without compensation.¹¹⁶ This interpretation was confirmed in *James v. the United Kingdom*, in which the Court, relying on the *travaux préparatoires*, found that the protection of general international law was restricted to aliens.¹¹⁷ Thus, in theory, compensation may be more generous for aliens than for nationals. However, the effect of such findings is limited in practice to the unlikely situation where the Court would decide to have recourse to the general principles of international law. In such a case these principles prescribe a specific treatment of aliens’ property, and the treatment in question would be different from that provided to nationals at the national level.¹¹⁸ As revealed by the case-law, this is unlikely to be the case. In three of the rare cases decided by the Court concerning the property of aliens (in two of these cases the applicants were companies), the Court decided the issue of deprivation and control of property in the light of the principle of lawfulness (i.e., the domestic law) and/or the general interest of the community or the payment of taxes. Thus, in *Beyeler v. Italy*, the

Court found the deprivation of property to be unlawful because of “the element of uncertainty in the statute and the considerable latitude it afforded the authorities”.¹¹⁹ It further found that such interference could not be justified on the ground of national interest and that “Irrespective of the applicant’s nationality, such enrichment was incompatible with the requirement of a “fair balance”.¹²⁰ In *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, the Court considered the interference to the peaceful enjoyment of property to result from the tax authorities exercising their powers of control under domestic legislation, and that “the most natural approach” was thus “to examine Gasus’s complaints under the head of ‘securing the payment of taxes’, which comes under the rule in the second paragraph of Article 1”.¹²¹ Thus, the Court relied on the right of states to “enforce such laws as it deems necessary ... to secure the payment of taxes” (i.e., procedural tax laws), and it found no violation of Article 1 of Protocol No. 1. Similarly, in *AGOSI v. the United Kingdom*, it relied on the right of states “to enforce such laws as it deems necessary to control the use of property in accordance with the general interest”, i.e., the procedure for the control of the use in the United Kingdom of gold coins.¹²²

In all cases involving Article 1 of Protocol No. 1, the Court examines, first, whether the interference was lawful (i.e., whether the domestic law was sufficiently accessible, precise and foreseeable); second, whether it sought to achieve a legitimate aim; and third, whether the means employed were proportionate to the legitimate aim pursued. As demonstrated by *AGOSI v. the United Kingdom* and *Gasus Dosier*, the Court exercises a limited review of the “general interest” justifying interference (e.g. the procedure regulating the control of the use in the United Kingdom of gold coins, and the procedural tax laws) and seems to be more willing to review the proportionality of the means employed (“as it deems necessary”). In this regard, it recognises that a “fair balance” must be struck between the demands of the community’s interest (or general interest) and the interest of the individual. The Court’s case-law further suggests that it is rarely prepared to interpret “as it deems necessary” restrictively, particularly where the property owner is not a national of the state. As a result, states are permitted a wide margin of discretion in the choice of the means employed and of the community’s interest justifying interference. *Beyeler v. Italy* stands out against this trend. This is likely to be because of the particular facts and circumstances surrounding the case: the applicant was

an individual, the community's interest of universal culture was at stake, the domestic law was unclear, and the government had acted late and inconsistently. Thus, in spite of the reference to "general principles of international law" in Article 1 of Protocol No. 1, allowing for a more favourable treatment to aliens, the Court has so far been reluctant to decide cases involving aliens on this ground. One can only conclude that as things stand, Article 1 of Protocol No. 1 offers limited scope to aliens.¹²³

It follows from the above discussion that the ECHR contains specific restrictions on admission and expulsion. These restrictions are special sanctions against aliens. They are therefore discriminatory, unless objectively and reasonably justifiable. Notwithstanding Article 1 of Protocol No. 1, Article 4 of Protocol No. 4, Article 1 of Protocol No. 7, and Article 5 of the ECHR, states' power to expel aliens is almost unlimited. It is thus elsewhere in the ECHR that protection of aliens against refusal of entry and/or expulsion must be found. Such protection is crucial for only through a right to live in a particular country will aliens fully enjoy their basic human rights. Several provisions of the ECHR have been interpreted successfully by the Strasbourg organs so as to offer special protection for aliens in a way which had not been foreseen by the drafters of the ECHR or its organs of interpretation (e.g., Articles 8 and 3 in connection with Article 13).

C. Alienage and the Strasbourg case-law

The Strasbourg organs have been interpreting certain provisions of the ECHR so as to offer special protection to aliens. Such interpretation has taken place against the background of an absence of a right to live in a particular country, except one's own. This last section examines the scope of these provisions. Rights under the ECHR may be conceptualised as being of three kinds: absolute, qualified or limited.¹²⁴ Absolute rights are rights considered so fundamental that no derogation whatsoever may ever apply to them. In other words, once established, no defence may be argued against a breach of such rights. This is the case, in particular, of Articles 2 and 3, considered to be "absolute rights"; but also of Articles 4 (1) and 7.¹²⁵ Mahoney recently described a violation of these rights as "bad-faith abuse of governmental power".¹²⁶ Other rights and freedoms have their scope qualified or limited under the ECHR, thereby presenting states with an opportunity to limit the scope of the non-discriminatory clause. Quali-

fied rights are rights that are moderated by the operation of other rights or by the needs of society, and for which the contracting states are left a considerable margin of discretion (e.g., Articles 8-11). In Mahoney's words, violations of these rights are described as "good-faith limitations on liberty which nevertheless go beyond what is 'necessary in a democratic society'."¹²⁷ Limited rights under the ECHR are rights which can be limited in strictly defined circumstances and ways (e.g., Articles 5-6), and states are generally permitted a lesser margin of discretion when implementing such rights.

Absolute rights

Absolute rights under the ECHR include the right to life (Article 2), the prohibition of torture and inhuman or degrading treatment (Article 3), the prohibition of slavery and servitude (Article 4 (1)), and the prohibition of retroactive offences or penalties (Article 7). Neither Article 4 nor Article 7 has given rise to much case-law,¹²⁸ and there is nothing to suggest that the Strasbourg organs would consider the position of aliens in relation to these rights to be any different from that of other individuals.¹²⁹ Yet, Article 3, and Article 2 to some extent, stand out as exceptions to this rule. In particular, the position of aliens under the ECHR has come to be the subject of increased scrutiny under Article 3 in cases involving expulsion, including cases of police custody.

Expulsion of aliens under Articles 2 and 3

The right to life and/or prohibition against torture may be at stake in cases where the direct consequence of a measure of expulsion of an alien entails the violation of Article 2 and/or 3 of the ECHR.¹³⁰ This may happen in four situations.¹³¹

1. The most common situation is where an alien is subject to an expulsion order to a country where "substantial grounds have been shown for believing that s/he would face a real risk of being subject to treatment contrary to Article 3" or of being killed on return in circumstances that amount to a breach of Article 2.¹³² This is the test adopted in *Soering v. the United Kingdom*, a case of extradition to a country where the applicant was going to be subjected to the death penalty in the State of Virginia.¹³³ The Court found that capital punishment *per se* did not violate the right to life nor that it constituted ill-treatment contrary to Article 3.¹³⁴ However, it

concluded that in the light of the particular circumstances surrounding the case (i.e., the length of detention prior to execution, the conditions on death row, the age and mental state of the applicant, the possibility of extradition to Germany) “substantial grounds” had been shown that Jens Soering would face a “real risk” of being subjected to treatment contrary to Article 3 if returned to the requesting state.¹³⁵ The Court also made it clear that in all such cases it is the responsibility of the sending state which is engaged, never that of the receiving state.¹³⁶ The Soering test was extended to situations where an alien is subject to an expulsion order and the treatment to be expected in the country of destination suggests a real and present risk to the life of the applicant other than the risk of being subjected to the death-row phenomenon, e.g., lack of medical care or very extreme poverty. In all such cases, both the Commission and the Court have considered the matter under Article 2 as raising issues “indissociable from the substance” under Article 3, but have chosen to decide the cases under Article 3.¹³⁷

The requirement of “substantial grounds” has been interpreted by the Strasbourg organs to mean that reasonable grounds exist that expulsion is going to take place, i.e., whether the alien is going to be expelled for certain and imminently and whether the country of destination will subject this person to such treatment.¹³⁸ In particular, the Court considers that the mere possibility of ill-treatment is not sufficient, and it requires that the individual be singled out from a situation of general violence.¹³⁹ It also considers the risk of being sent on to a (first or) third country to be relevant.¹⁴⁰ When considering the element of “real risk”, the Court recognises a “real risk” when “the foreseeable consequences” of the contracting party’s decision to expel is that the applicant will be subject to treatment contrary to Article 3 in the final country of destination. In assessing such foreseeability, the Court requires a high degree of proof, particularly in cases involving national security.¹⁴¹ In cases involving victims of torture, it recently accepted that “inconsistencies and contradictions in the testimonies of the applicants and their witness” but did not consider that this lack of precision “by itself impinged upon the credibility of the testimony”.¹⁴²

Once “substantial grounds” and “real risk” have been shown, ill-treatment must be found to reach a minimum level of severity in order to fall under Article 3. The Court has held that:

The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and the context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.¹⁴³

For the Court, the distinction between degrading treatment and torture proceeds mainly from a difference of intensity in the suffering. In *Ireland v. the United Kingdom*, the Court defined torture as “deliberate inhuman treatment causing very serious and cruel suffering”.¹⁴⁴ So far, the Court has recognized only four cases of torture.¹⁴⁵ In the landmark case *Selmouni v. France*, a case of ill-treatment of an alien in police custody, the Court considered Article 1 of the United Nations Convention Against Torture (1984) to be relevant to an assessment of the treatment suffered, in particular the requirements of “severe pain or suffering” and that this pain be “intentionally inflicted”.¹⁴⁶ It then took the view that “the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies”, of which Article 3 is one of the most fundamental.¹⁴⁷ The Court has not so far referred to “torture” in cases of expulsion; rather it has generally relied on the notion of inhuman or degrading treatment.¹⁴⁸ For the punishment or treatment to be inhuman or degrading, the suffering or humiliation involved must attain a particular level and in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment.¹⁴⁹ It follows that in expulsion cases, the Strasbourg organs have recognised the application of Article 3 from the cumulative effect of ill-treatment, which if taken individually would not reach the threshold of severity required by Article 3. Thus, for instance, in *D. v. the United Kingdom*, the Court stressed the “very exceptional circumstances” and the “compelling humanitarian considerations at stake” and concluded that expulsion to a country where lack of medical care would have the effect of reducing even further life expectancy of an applicant suffering from AIDS constituted a violation of Article 3.¹⁵⁰ In *B.B. v. France*, the Commission reported that confronting alone an illness such as AIDS at an advanced stage would constitute degrading treatment;¹⁵¹ however, it rejected a similar claim because the illness of the applicant was not yet in an advanced stage.¹⁵² In *Tanko v. Finland*, the Commission accepted that the enforcement of an expulsion order which would result in subjecting the applicant to a risk of losing his eyesight in view of the inadequate facilities

for treating him and possibly operating on him in the country of destination, could in principle constitute a violation of Article 3.¹⁵³ And, in *Fadele v. the United Kingdom*, the Commission recognised that extreme poverty and poor living conditions in the country of destination may also raise an issue under Article 3.¹⁵⁴

2. The second situation which may raise a problem under Article 3 of the ECHR is in cases of successive expulsion of an alien. The Commission recognised this situation very early on: in certain circumstances, the repeated expulsion of a foreigner without any identification and travel papers, and whose state of origin is unknown or refuses re-entry to its territory, may raise a problem with respect to Article 3.¹⁵⁵ The risk of successive expulsion has since become regulated, at least in Europe, by a series of readmission agreements, the Schengen Convention (now the protocol integrating the Schengen *acquis* into the framework of the European Union), and the Dublin Convention in cases of asylum-seekers, in an attempt to reduce the phenomenon of “chain *refoulement*”.¹⁵⁶ But the result remains unsatisfactory and the successive expulsion of aliens continues to raise concern under Article 3. This is particularly the case when it appears that in the process of removal the alien runs the risks of being sent to a third “unsafe” country. The definition of “safe country” was discussed by the European Union ministers responsible for immigration matters in the Resolution on a Harmonised Approach to Questions concerning Host Third Countries.¹⁵⁷ It was agreed that all of the following requirements should be fulfilled for a country to be considered as safe:

- the life and freedom of the returnee is not threatened in the third country on the basis of the grounds established in the 1951 Convention Relating to the Status of Refugees;
- s/he must not be exposed to torture or inhuman or degrading treatment on any ground;
- s/he had protection in the third country, or has had an opportunity to seek protection; and
- s/he has effective protection in the third country against *refoulement*.

The Court has pronounced on this issue in *T.I. v. the United Kingdom*, when it extended the duty of non-expulsion under Article 3, read in conjunction with Article 1, to cases of “indirect removal ... to an intermediary

country, which is also a Contracting State”, thereby reminding European Union member states of their legal obligation to secure the protection of the rights guaranteed under the ECHR irrespective of their engagements under European Union law.¹⁵⁸

3. The third situation is where an alien is subject to an expulsion order but is in no physical condition to travel or s/he is being ill-treated during the expulsion. Quite early on, the Commission recognised that the expulsion of an alien whose life is in danger at the time of transportation, e.g., through hunger strike, could raise an issue under Article 2 or 3, irrespective of the applicant's voluntary self-infliction of the danger.¹⁵⁹

4. The fourth situation concerns the manner in which an expulsion is carried out. Article 3, in particular, has been relied on successively in several cases of ill-treatment of aliens in police custody pending deportation or “for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”.¹⁶⁰ The Court has long recognised that the infliction of intense physical and mental suffering constituted inhuman treatment, and that any conduct designed to arouse in victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibility breaking their physical or moral resistance constituted degrading treatment.¹⁶¹ Thus, in the context of detention, the Commission has found that the withholding of food, water, and medical treatment from detainees in the hands of Turkish forces was inhuman treatment.¹⁶² And in *Herczegfalvy v. Austria*, it found that a treatment contrary to Article 3 could result not only from specific allegations but also from the cumulative effect of conditions of detention.¹⁶³ In *Ribitsch v. Austria*, a case of police custody, the Court recognised that any recourse to force should be made “strictly necessary”, failing which the treatment would be found to diminish human dignity and violate Article 3.¹⁶⁴ It follows that the unnecessary and disproportionate recourse to force, e.g., beating and kicking but also mouth- and nose-taping, or even drug administering, by the police and immigration officers during the execution of an expulsion or extradition order could constitute a violation of Article 3. Furthermore, in *Hurtado v. Switzerland*, again a case of police custody, the Commission found to be contrary to Article 3 the situation of an applicant who had had to wear soiled clothing and who was not given medical attention until eight days after his arrest.¹⁶⁵

And in *Price v. the United Kingdom*, the Court found admissible an application introduced by a disabled person whose prison cell was not adapted to her disability needs, i.e., too cold, the bed was too high, and the sink and toilet were inaccessible.¹⁶⁶ It follows that a minimum level of hygiene and adequate medical treatment must also be respected during the execution of an expulsion or extradition order. In addition, the Court recently considered that “greater firmness [was required] in assessing breaches of the fundamental values of democratic societies”.¹⁶⁷ Thus, faced with a case of physical and psychological abuse in police custody, the Court decided to refer to the definition of torture provided in Article 1 of the United Nations Convention Against Torture, i.e., severe pain or suffering intentionally inflicted on a person. It concluded that the “physical and mental violence ... committed against the applicant’s person caused ‘severe’ pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purpose of Article 3 of the Convention”.¹⁶⁸ Thus, acts of violence committed against anyone while in police custody may today amount to torture, even if in the past such treatment may not have reached this threshold but would have amounted to inhuman or degrading treatment.¹⁶⁹

Protection against ill-treatment during detention under Article 3 of the ECHR is further supplemented by the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment 1987 (hereinafter the CPT).¹⁷⁰ This instrument establishes a system of prevention whereby an independent committee of experts is allowed to visit public places of detention (e.g., police stations, prison, detention centres, transit zones of airports) and to report on the conditions and treatment during detention “with a view to strengthening ... the protection of such persons from torture and from inhuman or degrading treatment or punishment”.¹⁷¹ The two systems of protection are nevertheless separate, and a negative finding by the committee under the CPT does not necessarily result in a finding of violation by the Court under Article 3 of the ECHR.¹⁷²

In all cases of expulsion under Article 3 (or 2) there is a crucial element of urgency. Interim measures of protection may be indicated under the Rules of Procedure of the new Court (rule 39).¹⁷³ The rule is clearly designed to deal with emergency situations. Interim measures may only be granted by (a Committee of) the new Court (previously the Commission) in cases

where an alien can show that “irreparable” or “irretrievable” damage would occur if s/he were expelled prior to a decision being taken on his/her case. The “irreparable” or “irretrievable” character of the damage is difficult to prove because the Court requires a certain degree of probability (i.e., factual or material evidence) that the applicant will risk being subjected to ill-treatment if returned to his or her country of origin before a decision is taken on the case.¹⁷⁴ Applications for interim measures have a suspensive effect in all cases of expulsion. They are generally not legally binding but the authority indicating the measures has the power to persuade states that these are both necessary and desirable. Thus, notwithstanding some rare cases, they are usually complied with by states.¹⁷⁵

Cases of expulsion also raise the question of “just satisfaction to the injured party” under Article 41 of the ECHR. The Court’s case-law reveals that this is normally granted by the Court in the form of the judgment finding that the state would be responsible of a violation of Article 3 if it were to expel the alien and/or that the state is responsible for a wrongful application of the procedural safeguards embraced in the notion of positive obligation under Article 3. States have complied with these judgments in very different terms. In the United Kingdom, for instance, compliance has generally resulted in the withdrawal of the expulsion order and in the alien being authorised to remain on exceptional grounds and granted exceptional leave to remain (ELR).¹⁷⁶ In Austria, however, aliens allowed to remain following the withdrawal of an expulsion order on the basis of Article 3 have been refused residence permits and denied the right to work.¹⁷⁷ Regrettably, the Court has so far been reluctant to extend the grounds for awards of “just satisfaction” under Article 41 to include minimum social protection.¹⁷⁸ Thankfully, many cases never reach the final stage of judgment by the Court and are struck off because governments agree to withdraw the expulsion order and to grant some sort of status to the applicant following an application to the Court.¹⁷⁹

Basic means of subsistence under Articles 2 and 3

Article 2 may also be relevant concerning access to the basic means of subsistence of “everyone”, including aliens, in the country of residence; but such cases have so far received lukewarm support from the Strasbourg organs. For instance, the Court declared inadmissible an application against Italy introduced by a national from Iraq who had been severely injured by a

mine (while on a clearing mission), which had been manufactured and sold by Italy to Iraq.¹⁸⁰ However, this cautious attitude towards aliens may change following the Court's judgment in *Osman v. the United Kingdom*, admittedly not an immigration case.¹⁸¹ In this case, the applicant alleged that his right to life had been breached by the United Kingdom because the police knew or ought to have known that the applicant and his family were at risk from a man called Mr Paget-Lewis. Mr Paget-Lewis had shot dead the husband of the first applicant and injured the second applicant. In interpreting the phrase "no one shall be deprived of his life intentionally" (Article 2 (1)), the Court held that Article 2 requires "the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction".¹⁸² It further explained that in certain circumstances this would mean "a positive obligation on the authorities to take preventive operation measures to protect an individual whose life is at risk from the criminal acts of another individual".¹⁸³ And the Court concluded that it would be "sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge".¹⁸⁴ Thus, the Court accepted that there could be a breach of Article 2 even where the state was not guilty of gross negligence or intentional disregard to the duty to protect life. Under this principle, it is not excluded that a state could become liable under Article 2 of the ECHR if it deprived an individual from his basic rights of subsistence. Such a broad interpretation is already accepted in countries, such as in India where the courts have recognised that the provision of the Constitution on the protection of the right to life included not only the freedom not to be killed but also the right to food, social security, and even the right to electricity.

Article 3 also has the potential of being applicable to an assessment of the minimum standard of treatment of aliens allowed to remain in a member state of the Council of Europe (e.g., on the ground that expulsion would be contrary to Article 3). However, the Court has so far refused to extend the scope of protection of aliens under Article 3 to cover such cases.¹⁸⁵ Thus, states remain free under Article 3 to deny a residence permit or the right to work or a minimum social protection to aliens allowed to remain on their territory. However, as previously indicated, both Articles 3 and 5 require that a minimum standard of treatment be respected for aliens in police custody. Furthermore, as will be discussed in the remaining of this

section, other provisions of the ECHR, in particular Articles 6, 8, 13 and 14, provide certain standards in the treatment of aliens allowed to remain in a member state on the basis of Article 3.

Refusal of entry of a discriminatory character under Article 3

Discrimination may, under certain circumstances, be so serious that it constitutes in itself (and without reference to Article 14) degrading treatment contrary to Article 3. The principle was held in the context of refusal of entry of citizens of a state in the *East African Asians Cases* where the Commission found that racial discrimination “could, in certain circumstances, in itself amount to degrading treatment within the meaning of Article 3”.¹⁸⁶ The degree of severity of the treatment in this case was found to result from the combined effect of factors, including the fact that the applicants’ continued residence in Africa became illegal and that being United Kingdom citizens they had nowhere else to go should the United Kingdom refuse them entry. This opinion was confirmed in *Abulaziz, Cabales and Balkandali v. the United Kingdom*, though the Court introduced a further requirement of intent to be shown for discrimination to amount to a violation of Article 3.¹⁸⁷ In spite of the Commission’s emphasis in the *East African Asians Cases* on “the special circumstances” surrounding the case, *Harris et al.* refute the idea that “more ordinary cases of racial discrimination would not be degrading in breach of Article 3”.¹⁸⁸ They further argue that discrimination on other grounds than race may also be degrading in breach of Article 3 on the ground that Article 14 has offered special protection against such discrimination.¹⁸⁹ In a similar line of arguments, the Commission recognised the applicability of Article 3 (in conjunction with Article 14) in the case of gypsies whose nationality may be uncertain and are therefore refused identity papers and forced to leave a territory for failing to present any personal document.¹⁹⁰

Non-respect of a procedural requirement

The Court has also recognised that the non-respect of a procedural element of Article 3 *per se* may result in a violation of Article 3.¹⁹¹ In *Selmouni v. France*, for instance, it started by confirming its case-law that Article 3 entails both a negative and positive obligation on the part of states. It then went on to recognise that “positive obligation” means that the state which is accused of violating Article 3 (or any other article such as Article 2 or 5) must proceed immediately to an official and effective investigation aiming

at identifying and punishing the offenders and that the applicant must have access to this procedure of investigation.¹⁹² It follows that the non-respect of a procedural obligation specific to Article 3 (or Article 2) can result in a violation of Article 3 (or 2) in just the same way as the non-respect of the substantive obligation would. Thus, *Selmouni v. France* confirms the possibility of “double-violation” of a provision of the ECHR, in this case Article 3.¹⁹³ It follows that the procedural guarantees inherent in Article 3 (or 2) have the effect of reinforcing the right to an effective remedy under Article 13 of the ECHR.

Right to an effective remedy

Considering that expulsion and extradition procedures remain outside the ambit of Article 6 of the ECHR and that Article 1 of Protocol No. 7 is limited to aliens lawfully resident in the territory of a contracting state, Article 13 of the ECHR has proved to be an important provision in terms of guaranteeing certain procedural safeguards to aliens.¹⁹⁴ Article 13 provides that “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority”. Thus, Article 13 provides a more general obligation on states to provide an effective remedy than Article 6, and the Court, when faced with the choice, often chooses to consider the complaint under Article 13.¹⁹⁵ The rationale for Article 13 is to secure, at the national level, a remedy to enforce the substance of the rights and freedoms guaranteed in the ECHR, in whatever form that remedy takes in the domestic legal order.¹⁹⁶ Aliens do not have the right to an effective remedy against any decision concerning entry, settlement or expulsion because the ECHR does not guarantee such a right (to enter, to settle or to be free from expulsion). Thus, an alien may only claim a right to an effective remedy under national law against a decision refusing entry or settlement or a decision on expulsion if this decision allegedly violates a Convention right, such as Article 2, 3 or 8, and both claims must be brought together. Article 13 does not require the finding of an actual violation by the national authority prior to a remedy becoming effective. This way, even if at the end of the procedure the Court finds no violation of the ECHR, the defendant state was nevertheless obliged to provide an effective remedy for the examination of the alleged violation.¹⁹⁷ According to the Court, Article 13 does not require a remedy in domestic law in respect of any supposed claim under the ECHR by an individual; the claim needs to be “arguable” (*défendable*).¹⁹⁸ The Court

considers the notions of “arguability” (Article 13) and “manifestly ill-founded” (Article 35 (3)) to be conceptually different; however, it applies the same threshold in regard to both notions.¹⁹⁹ It follows from this interpretation that an alien would only have a right to an effective remedy against a decision of expulsion if his/her claim of an alleged violation of the ECHR is arguable, i.e., is found to be manifestly well-founded by a national authority.

According to the Court, for a remedy to be effective in the domestic legal order, it must meet three standards.²⁰⁰

- First, it must exist institutionally.²⁰¹ Thus, in *Aydin v. Turkey*, a case of alleged rape and ill-treatment of a female detainee and failure of authorities to conduct an effective investigation into her complaint that she was tortured in this way, the Court held that “the requirement of a thorough and effective investigation into an allegation of rape in custody at the hands of a state official ... implies that the victim be examined, with all appropriate sensitivity, by medical professionals with particular experience in this area and whose independence is not circumscribed by instructions given by the prosecuting authority as to the scope of the examination”.²⁰²
- Second, for a remedy to be effective, it must be adequate, i.e., the remedy must be organised in such a way as to allow the competent national authority to deal with the substance of the complaint and to grant appropriate relief. However, the particular form of remedy is left to the discretion of states to decide. The Court has nevertheless set specific guidelines in the context of Article 3. In *Chahal v. the United Kingdom*, a case of deportation to India of six Sikh separatists for national security reasons, the Court held that “Given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling state”.²⁰³ The Court found no such guarantees in the case of *Chahal*, and concluded “on the contrary, the Court’s approach was one of satisfying themselves that the Home Secretary had balanced the

risk to Mr Chahal against the danger to national security'.²⁰⁴ Thus, in the context of Article 3, adequate remedy means that the national authority must be able to assess the element of risk primarily with reference to those facts which were known or ought to have been known to the state at the time of expulsion.

- Third, for a remedy to be effective, it must be available to the individual. In the context of a claim against expulsion under Article 13 in conjunction with Article 3, this means two things: the rejected asylum-seeker must have access to the appeal procedure, i.e., s/he must be in position to initiate such appeal as a party,²⁰⁵ and the appeal must have a suspensive effect.²⁰⁶

In accordance with the general principle of good faith, these principles constitute guarantees that member states must at all cost refer to when applying their own procedural rules, whether by way of incorporation in domestic legislation or by way of application in national practice.

In sum, as far as protection against expulsion is concerned, the Court refuses to pay any attention to the "person"; nationality and conduct of the applicant are clearly irrelevant factors to a determination of a violation of Article 2 or 3 under the ECHR.²⁰⁷ Assessment of the treatment feared by the applicant alone is relevant to the Court and it applies the same principles settled some ten years ago to the different facts of each case. The ECHR has become an important instrument of protection against expulsion. However, the Court is reluctant to extend the scope of protection under Article 3 (or 2) to include the entitlement to a legal status, including minimum subsistence rights. As a result, the integration of aliens into the member states of the Council of Europe remains almost entirely at the discretion of states. As stated by Blake, not only is there a need for a legal status but also the ECHR has the capability to develop such a status.²⁰⁸

Qualified rights

Qualified rights are rights which may be restricted by the operation of other rights or by the needs of society. The qualifications to rights can be explained as follows:²⁰⁹

- Any restriction on the right must be prescribed by law.

- The restriction must be justified by one of the aims explicitly recognised in the ECHR.
- The restriction must be proved to be “necessary in a democratic society”, i.e., it must fulfil a pressing social need, pursue a legitimate aim, and there must be a reasonable relationship of proportionality between the means employed and the aim pursued.
- In addition, the restriction must comply with the non-discriminatory clause.

The most common qualified rights under the ECHR are the right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), and freedom of assembly and association (Article 11). Other qualified rights include also the right to marry (Article 12), the right to education (Article 2 of Protocol No. 1) and the right to freedom of movement (Article 2 of Protocol No. 4). Of these rights, Article 8 has shown by far to be the most relevant to aliens.

Private and family life under Article 8

Article 8 of the ECHR guarantees the right to respect for everyone's private and family life.²¹⁰ The Commission and the Court originally recognised the relevance and applicability of Article 8 of the ECHR to aliens seeking entry into the territory of a contracting state in order to join their respective wives lawfully residing there.²¹¹ This principle was extended to cases of minors seeking entry in the territory of a contracting state in order to join their parents.²¹² The Court relied for the first time on Article 8 in a case of deportation in *Berrehab v. Netherlands*.²¹³ This was confirmed in several other instances, such as *Moustaquim v. Belgium*.²¹⁴ Finally, the Court even recognised the application of Article 8 to cases specific to France, i.e., permanent exclusion from the French territory.²¹⁵ Thus, Article 8 imposes serious limitations on the scope of a contracting state's power of removal or of refusal of entry of an alien. Considering the sensitivity of the matter, the Court recognised that such limitations did not, however, “impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory”.²¹⁶

The principles applied by the Court in assessing the scope of states' obligations under Article 8 were summarised in *Gül v. Switzerland* as follows:

The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, none the less, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.

The present case concerns not only family life but also immigration, and the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest. As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.

Moreover, where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice of married couples of the country of their matrimonial residence and to authorise family reunion in its territory. In order to establish the scope of the State's obligations, the facts of the case must be considered.²¹⁷

Beyond the scope of these principles, specific criteria in the application of Article 8 are lacking.²¹⁸ The Court follows a case-by-case approach, and a survey of the case-law reveals consistency in its approach. In each case before it, the Court first establishes the existence of an interference with the right to respect for private and family life under Article 8 (1), prior to considering whether the interference can be justified as "necessary in a democratic society" under Article 8 (2), keeping in mind the wide margin of appreciation enjoyed by states in complying with the ECHR.

Although Article 8 protects both private and family life, for many years the Court's approach has been to rule exclusively on the basis of family life within the context of Article 8 (1), while implicitly referring to elements of private life when considering the requirement of "necessary in a democratic society" under Article 8(2).²¹⁹ In this regard, it has been willing to interpret the concept of family quite widely.²²⁰ The Court has so far explicitly recognised the existence of family life between members of the nuclear family, that is, spouses and, parents and their minor children.²²¹ It seems also to have implicitly recognised family life from ties between near relatives in the context of the family reunion of an alien.²²² *Chorfi v. Belgium*

offers the first instance in which the Court decided to consider the relevance of Article 8 (1) in the light of private and family life. There, it recognised that “private life ... encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature”.²²³

It is clear for the Court that the “essential object of Article 8 is to protect the individual against arbitrary action by the public authorities”, that is, the state must not interfere with the enjoyment of the right to private and family life; states are nevertheless left with a wide margin of appreciation.²²⁴ For the Court, refusal to enter into the territory of a contracting state in order to be reunited with a family member or removal from the territory of a contracting state leading to the breakup of family life may only constitute “interference” if three requirements are met. First, there must be an effective family life. Second, the state against which the proceedings have been brought must in fact be the author of the violation.²²⁵ Third, obstacles must exist against continuing a normal family life elsewhere, including the alien's country of origin. The Court's approach to the question whether it is reasonable to expect aliens to develop normal family life elsewhere is particularly restrictive towards aliens seeking entry for the purpose of family creation, i.e., the members of the family have never lived together or have lived apart for a very long time. The Court systematically affirms the principle that Article 8 cannot be held to impose on states a duty to respect immigrants' choice of residence and to authorise family reunion on their territory. It then proceeds to balance the applicant's right to family life against the state's right to control immigration at the early stage of establishing interference. As a result, no interference has yet been found by the Court.²²⁶ The Court has adopted a more liberal approach towards aliens already present in the territory of a member state. It usually recognises the act of expulsion, deportation or permanent exclusion of a territory *per se* to constitute an interference, provided the act is certain and enforceable.²²⁷ And, in contrast with cases of entry, the Court will usually balance the individual's rights against the community's interest after a lack of respect for the right to private and family life has been found, that is to say only when considering whether the interference is “necessary in a democratic society” in the light of Article 8 (2).²²⁸

It is regrettable that the Court failed to provide adequate reasons for distinguishing between cases of entry and cases of removal of aliens, for

such distinction seems difficult to reconcile in practice. Any refusal to admit a family member, particularly a child, to the territory of a member state, indeed, suggests a strong expectation that the person lawfully residing in the territory will have to return to his/her country of origin. It thus seems extraordinary that the Court chose to differentiate these cases.²²⁹ It follows that in cases of entry, interference will be established only if the individual shows that the state has overstepped its wide margin of appreciation. This makes proof difficult to establish in cases where the family does not even live together, and the individual seeking leave to enter has more links with the country of origin than with the country in which the rest of the family resides. The burden of proof is less stringent in cases of removal. This is because the individual is already living with his/her family in the country in question. Thus interference will not be difficult to establish. It is only in these cases that the Court will give careful consideration to all factors connecting the individual to the state of residence against the "pressing social need".

According to Article 8 (2), the right to respect for private and family life is not unlimited. Interference by a public authority with the exercise of the right to respect for private and family life may indeed be justified if it is "in accordance with the law" and is "necessary in a democratic society", i.e., it is proportionate to the legitimate aim pursued.²³⁰ The requirement that the interfering measure be necessary in a democratic society necessitates the Court to balance the individual's rights against the community's interests while at the same time keeping in mind the wide margin of appreciation afforded to national authorities in the field of immigration. In cases of aliens seeking not to be removed because this would result in separating them from family members already in the country, the Court requires the state to show that the interfering measure responds to a pressing social need, and in particular is proportionate to the legitimate aim pursued.²³¹ In its earlier cases, the Court considered that when serious offences have been committed by fully integrated aliens, or by aliens who have been resident for many years in the state in question, "other circumstances of the case relating to both applicants or to one of them only, are enough to compensate for this important fact".²³² And, the Court considers elements of family life but also private life, e.g., the length of the stay in question, to be particularly relevant. As a result, it has often found the interfering measure to be disproportionate in cases involving integrated aliens. However, this approach has evolved in later cases. In particular, the length of the stay in

the state in question alone is no longer considered sufficient element to prevent removal.²³³ Further factors combined with that element are necessary, such as, for instance, strong family ties and being born in the country in question,²³⁴ the gravity of the offence, and the persistence of the offending behaviour, the age of the offender and the medical and psychological disorder of the offender.²³⁵

Thus, the Court continues to apply the principle established in the landmark cases, i.e., provided strong family links exist only exceptional circumstances can justify the removal of an integrated alien; criminal sentence in the country of integration is generally regarded as sufficient.²³⁶ The Court seems to prefer a subjective appreciation of the degree of separation experienced by the applicant to any specific criteria when balancing the individual's rights against the community's interests.²³⁷ Its appreciation has developed from a focus on elements supporting integrated aliens' rights, such as length of stay, schooling and, social and business ties, to other elements. It seems now to give primary consideration to the existence of strong and effective family ties.²³⁸ It is now also looking more closely at the seriousness of offences.²³⁹ It seems however that although Article 8 protects "everyone" against interference by a public authority, the formal status of the applicant may be circumstantial in the finding by the Court of a violation of Article 8. Indeed, it follows from the Court's approach towards integrated aliens that persons recognised as refugees under the 1951 Convention Relating to the Status of Refugees and persons granted a residence permit on the ground of Article 3 of the ECHR would have no difficulty convincing the Court that a return to their (by definition unsafe) country of origin would either constitute a serious obstacle against establishing family life there, or be disproportionate to the protection of the community's interest. But this is often unnecessary. Once it has found a violation of Article 3 of the ECHR, the Court does not consider it necessary to investigate a complaint in the light of Article 8, and such cases have so far been decided on the basis of Article 3.²⁴⁰ The Court has dealt with a complaint under Article 8, outside the scope of Article 3, in only two cases. Both were cases where the applicant was a beneficiary of subsidiary protection seeking entry of a young family member. In both cases, the complaint was dismissed at the early stage of Article 8 (1), i.e., on the ground that no interference with the right to respect for private and family life existed.²⁴¹ The situation therefore remains uncertain in cases where the applicant is a displaced person or the beneficiary of a residence permit on grounds other

than Article 3 of the ECHR. Should the Court ever deal with such a case beyond the point of interference, one could say that, in view of the temporary nature of the situation of these persons, the Court would most likely give greater weight to the control of asylum over the applicant's right. This is because strong links with the country of refuge would be difficult to establish. Thus, however liberal the Court's approach, which was developed in the landmark cases, may be to integrated aliens, it may become illiberal in practice when applied to displaced persons, asylum-seekers and other persons in need of protection. Nevertheless, recent cases show that the Court is now scrutinising more closely the seriousness of offences and looking predominantly at elements of family life. This being the case, the interest of the state would most certainly prevail over the applicant's rights, in cases where serious offences have been committed and there is little evidence of family ties in the country of integration. In such situations, only refugees and persons protected on the basis of Article 3 of the ECHR would find themselves protected against removal. In a situation where the person in need of protection has not committed a serious offence, the balance of interest would most likely weigh in her favour.

Freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association under Articles 9-11

Articles 9 to 11 may also raise particular issues for aliens in cases of expulsion but there is little case-law to illustrate this. Just as in the case of other rights and freedoms guaranteed under the ECHR, the Commission has confirmed that Articles 9 to 11 do not grant aliens a right of settlement in a member state of the Council of Europe; thus expulsion does not constitute an interference with the freedoms guaranteed under Articles 9 to 11.²⁴² However, the refusal of entry or the expulsion of aliens may violate Articles 9 to 11 of the ECHR if it is aimed at restricting the exercise of their right to freedom of thoughts, conscience, religion, expression, assembly or association. Under paragraph 2 of Articles 9 to 11, states are nevertheless recognised as possessing the power to limit such freedoms in ways that "are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others". In addition, Article 16 allows states to impose restrictions on the political rights of aliens, notwithstanding the freedom guaranteed in Articles 10 and 11.²⁴³ Thus, "the prohibition of political demonstrations by migrant workers in the host state

against the Government of their country of origin might be justified on the basis of Article 16 'if in the interest of good relations with other states'.²⁴⁴ However, as demonstrated by *Piermont v. France*, the Court is willing to interpret the concept of "aliens" narrowly. In particular, it rejected the application of Article 16 to a national of a member state of the European Union (i.e., Germany) and an MEP, thereby finding that the expulsion measure constituted an interference which was unjustified under Articles 56, 16 or 10 (2). It concluded therefore that the measure of expulsion "was not necessary in a democratic society, there has been a breach of Article 10".²⁴⁵ Furthermore, Article 9 combined with Article 16 in relation to Article 14 may also be restricted for aliens.²⁴⁶ It follows that Articles 9 to 11 are of rather limited use to aliens who do not possess the nationality of a member state of the European Union. As pointed out by Cholewinski, "The rights of non-nationals to freedom of expression, assembly, and association have received more positive attention in the recently adopted Convention on the Participation of Foreigners in Public Life at the Local Level".²⁴⁷

The right to marry under Article 12

Closely related to the notion of family life in Article 8 is the right to marry and to found a family under Article 12 of the ECHR. Unlike Article 8, Article 12 has been interpreted strictly by the Strasbourg organs and has proved to be of limited application to aliens.²⁴⁸ Although the Commission has sometimes considered the right to found a family as an "absolute right" in that the state may not indeed interfere with the right itself, the exercise of the right to marry is in fact subject to national laws. Hence, states are left with a wide margin of appreciation in the "exercise" of the right to marry and to found a family.²⁴⁹ Thus, in the case of a Dutch couple who wanted to adopt a foreign child, the Commission recognised that adoption fell within the ambit of Article 12, thereby recognising that the conditions on the right to adopt imposed by national laws were subject to control by the Strasbourg organs.²⁵⁰ However, having considered the conditions laid down in the Dutch Aliens Circular, i.e., only foreign children under school age could be fostered, and the difference in age between the foreign child and each of the potential parents should not exceed forty years, the Commission found that the Dutch authorities did not violate the right to found a family under Article 12 as regulated by Dutch law. In addition, it found the authorities not liable for any discriminatory treatment under Article 14 in conjunction with Article 12, since the difference of

treatment (between the adoption of a foreign child and a Dutch child) had an objective basis and a legitimate purpose in the interest of foreign foster children (i.e., foreign foster children should receive their basic school education at the same age as Dutch children in order to facilitate their integration).

The right to education

In the *Belgian Linguistic Cases* the Court held that Article 2 of Protocol No. 1 did not require the state to create any particular type of education but rather that it recognised to everyone within the jurisdiction of a contracting state the right “to avail themselves of the means of instruction existing at a given time”.²⁵¹ This right refers to all level of education.²⁵² Thus, aliens lawfully resident in a contracting state have the right of access to the existing education facilities. This right does not include “a right for parents to have education conducted in a language other than that of the country in question”.²⁵³ However, it does include the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.²⁵⁴ It follows that “members of religious or philosophical minorities have the right to establish their own schools”.²⁵⁵ Read in connection with Article 14 of the ECHR, Article 2 of Protocol No. 1 would suggest that education should be available to nationals and aliens alike, including their children, unless there is an objective and reasonable justification for differential treatment.²⁵⁶ This would be the case, in particular, in order to facilitate the integration of children of aliens into the society, as provided under international law.²⁵⁷

Article 2 of Protocol No. 1 does not go as far as to guarantee a right of entry into or establishment in a country in order to receive education there. In the case *15 Foreign Students v. the United Kingdom*, the Commission found that “Article 2, first sentence, does not grant a right for an alien to stay in a given country. An alien’s ‘right to education’ is independent of his right, if any, to stay in the country and does not protect or, as a corollary, include this latter right. The refusal of permission to remain in the country cannot be regarded as an interference with the right to education, but only as a control of immigration which falls outside the scope of Article 2”.²⁵⁸ However, the Commission did not exclude the possibility that Article 2 might be at issue in a case where expulsion would result in the applicant being denied any elementary education in his/her country of destination.²⁵⁹

Article 2 may not be interpreted as recognising a right of entry in a contracting state either. In this respect, the Commission also rejected the interpretation that Article 2 may include the right to enter to teach.²⁶⁰

The right to leave a country under Article 2 (2) of Protocol No. 4

Article 2 of Protocol No. 4 provides for "Freedom of movement". The scope of paragraph 1 of this provision has already been discussed in the context of derogations against the principle of non-discrimination between nationals and aliens.²⁶¹ Here it is more the scope of paragraph 2 of Article 2 which calls for consideration. It provides that "Everyone shall be free to leave any country, including his own". As in the case of Articles 8 to 11, the rights guaranteed in paragraph 2 of Article 2 (but also paragraph 1) are subject to those restrictions which are "in accordance with the law" and are "necessary in a democratic society" on limited grounds. Also, as in the case of Articles 8 to 11, these restrictions are subject to the principle of proportionality and to the doctrine of the "margin of appreciation". Thus, it has happened that an alien legally detained in a contracting party has been refused to leave that country pending criminal proceedings on grounds of "*ordre public*" or "for the prevention of crime".²⁶² In addition, the Commission has expressed the view that the right to leave a state's territory does not impose a duty on the state to facilitate entry into any one country in particular.²⁶³

Limited rights

Limited rights are rights which may only be limited in very specific circumstances and ways, and unlike in the case of qualified rights, states have a lesser margin of discretion when securing these rights to everyone within their jurisdiction.

Right to a fair trial

Article 6 of the ECHR guarantees procedural rights, including the right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (paragraph 1). The provisions of this article apply, as indeed all other provisions of Section I of the ECHR, to "everyone" within the jurisdiction of a contracting party, i.e., nationals and aliens. It is nevertheless difficult for aliens to invoke successfully Article 6 (1) in respect of expulsion or refusal to grant a residence permit in a

state, because the provisions of Article 6 only apply to certain proceedings.²⁶⁴ As far as aliens are concerned these proceedings are of two types:

- Article 6 (1) may apply in cases where an applicant is being returned to a third country where s/he may be subjected to treatment contrary to Article 6 (1). The extraterritorial effect of Article 6 was recognised in *Soering v. the United Kingdom* concerning the extradition to the United States of Mr Soering, who was claiming that the absence of legal aid in the state of Virginia would prevent him from securing legal representation as required by Article 6.²⁶⁵ The Court found that it “does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of fair trial in the requesting country. However, the facts of the present case do not disclose such a risk”.²⁶⁶ This approach was confirmed in *Drozdz and Janousek v. France and Spain*, where the Court stated that although States Parties to the ECHR do not have to ensure that the guarantees of Article 6 will be respected in the receiving country, “the Contracting States are, however, obliged to refuse their co-operation [in the administration of justice] if it emerges that the conviction is the result of a flagrant denial of justice”.²⁶⁷ The same standard of “flagrant denial” was recently used by the Commission in a case of detention pending expulsion, *M.A.R. v. the United Kingdom*.²⁶⁸ The applicant complained that his expulsion to Iran would constitute a violation of Articles 2, 3, 5 and 6. He had been granted refugee status in the United Kingdom, but following two successive convictions for drug related offences, he was ordered to be deported to Iran. The applicant argued, in particular, that his drug convictions exposed him to the risk of being charged, tried and sentenced to death by the Islamic Revolutionary Court in an arbitrary way, i.e., to the risk of “flagrant denial of justice”. The Commission declared the application admissible in respect of Article 6 on that ground, i.e., “flagrant denial of justice”.
- Article 6 (1) may also apply in asylum and expulsion proceedings, but this interpretation has not yet been recognised by the Court. Indeed, for many years the Commission refused to recognise the application of Article 6 (1) to cases of entry, establishment and expulsion of aliens from the territory of a contracting state on the ground that its scope is restricted to “the determination of civil rights and obligations or ... any

criminal charge" and that immigrations proceedings do not involve civil rights and obligations nor do they amount to a determination of a criminal charge.²⁶⁹ It nevertheless reversed this well-established case-law in its recent admissibility decision in *Maaouia v. France*.²⁷⁰ This case involved a national from Tunisia sentenced to six years' imprisonment for armed robbery and armed assault with intent. Following his release, a deportation order was made against him. Unaware of the order, he refused to leave French territory and was sentenced to one year's imprisonment, following which an order of exclusion was made against him. The applicant complained that the length of the proceedings for the rescission of the exclusion order was unreasonable, and therefore in breach of Article 6 (1) of the ECHR. The Commission found the application admissible and, for the first time, decided to refer such a case to the Court. In a restrictive judgment, the Court simply confirmed the classical case-law of the Commission that Article 6 (1) does not apply to such proceedings.²⁷¹ In particular, it found that the proceedings for the rescission of an exclusion order did not concern the determination of civil rights. It relied for this on the existence of Article 1 of Protocol No. 7, which contains procedural guarantees applicable in the expulsion of aliens (a protocol ratified by France) to exclude any such guarantee from Article 6 (1).²⁷² Furthermore, it considered that exclusion orders did not concern the determination of a criminal charge either, as confirmed by the criminal legal systems of the member states of the Council of Europe.²⁷³ In their dissenting opinion, Judges Loucaides and Traja expressed the regret that "both the Court and the Commission have shown great reluctance to interpret in a liberal way the concept of 'civil rights and obligations'". In the absence of a definition of the word "civil" in the ECHR, they decided to refer to Article 31 (a) of the Vienna Convention on the Law of Treaties as tools for interpretation, and they suggested that, in the *context* of Article 6 (1), the word "civil" simply means "non-criminal". They pointed to the fact that the Court itself has been willing to extend the concept of "civil rights and obligations" to matters falling outside the strictly defined private law sphere, e.g., claims for social security and social assistance, judge's pension.²⁷⁴ Thus, in the light of the *object and purpose* of the ECHR, Article 6 (1) should be given the broadest possible meaning; the principle of *good faith* supports this approach.

Conclusion

According to Article 1 of the ECHR, *everyone* within the jurisdiction of a contracting party benefits from the rights and freedoms enumerated therein. In theory, therefore, alienage constitutes no ground for discrimination under the ECHR. In reality, however, the classical divide between aliens and nationals has remained and aliens continue to be in a vulnerable position under the ECHR. This is particularly true concerning their political and residence rights. Thus, aliens are denied political rights irrespective of their length of residence in a country and certain other rights and freedoms of aliens may be limited on a number of grounds (e.g., family life, freedom of association). Safeguards against the expulsion of aliens are only procedural and may be overridden, even if they are lawfully present in a country. At the centre of this divide lies the absence of a generous and progressive concept of equality. Fundamental values of justice call for the inclusion of the experiences of aliens in the application of the ECHR. The existing clause on non-discrimination does not expressly provide “nationality” as a ground but it is an open-ended provision. However, its scope is limited to the rights and freedoms guaranteed in the ECHR. In spite of this assessment, the mere fact that states agree to the ECHR limits their sovereignty with respect to the treatment of aliens. Restrictions on sovereignty are further manifested in the supervisory and enforcement mechanism of the ECHR.

Notes

- 1 As amended by Protocols Nos. 3, 5, 8 and 11, which entered into force on 21 September 1970, 20 December 1971, 1 January 1990 and 1 November 1998 respectively.
- 2 Protocol No. 1 (adopted in 1952, in force since 1954); Protocol No. 4 securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (adopted in 1963, in force since 1968); Protocol No. 6 concerning the abolition of the death penalty (adopted in 1983, in force since 1985); and Protocol No. 7 (adopted in 1984, in force since 1988).
- 3 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (adopted in 1994, in force since 1 November 1998).
- 4 A. Bayefsky, "Protecting the world's exiles: the human rights of non-citizens", *Human Rights Quarterly* 22 (2000), at 281. Refer also to Vincenzi's question "Aliens' rights: A contradiction in terms?", in C. Vincenzi, "Cooperation in aliens law: The implications for individual enforcement", in Schermers, H.G. *et al.* (eds.), *Free Movement of Persons – Legal Problems and Experiences* (1993), at 227.
- 5 G. Goodwin-Gill, *International law and the movement of persons between states* (1978), 58-63.
- 6 I. Brownlie, *Principles of public international law* (1998), 526-31. R. Cholewinski, *Migrant workers in international human rights law* (1997) 40-47.
- 7 G. Goodwin-Gill, *op. cit. supra* note 5, 75-87.
- 8 R. Higgins, "The European Convention on Human Rights", in *Human rights in international law* (Theodor Meron, ed., 1984), 495-549, at 537.
- 9 For a traditional perspective on international law, see *Oppenheim's International Law*, Jennings & Watts eds. (9th ed., 1996), paras. 620, 376, 379.
- 10 A 25 (1978), para. 239.
- 11 [1970] ICJ Reports, 3.
- 12 *Loizidou v. Turkey*, A 310 (1995), para.75. See also, G. Cohen-Jonathan, "L'affaire Loizidou devant la Cour européenne des Droits de l'Homme. Quelques observations", *Revue générale de droit international public* (1998), 123, and J. Andriant-simbazovina, "L'élaboration progressive d'un ordre public européen des droits de l'homme. Réflexions à propos de la jurisprudence de la Cour européenne des Droits de l'Homme de 1988 à 1995", *Cahiers de droit européen* 33 (1997), 670.
- 13 R. Higgins, *Problems and process, international law and how we use it* (1994), at 96.
- 14 In *D. v. the United Kingdom* (judgment of 2 May 1997, Reports of Judg. and Dec. 1997-III No. 37, para. 48), the Court explained that even if the applicant never entered the United Kingdom in the technical sense, he had been within the jurisdic-

tion, in custody, at Gatwick airport, and for the Court it was sufficient that "he had been physically present there".

- 15 R. Wallace, *Companion to the European Convention on Human Rights – Vol. I* (1999), at 4.
- 16 *Soering v. the United Kingdom*, judgment of 26 June 1989, A 161 (1989).
- 17 *Oppenheim's, op. cit. supra* note 9, para. 626.
- 18 G. Goodwin-Gill, *The refugee in international law* (2nd ed. 1996), 167-170. See also UNHCR's submission the European Court of Human Rights in *T.I. v. the United Kingdom*, Appl. No.43844/98, admissibility decision of 7 March 2000, reproduced in *International journal of refugee law*, 12 (2) 2000, 268, at 270.
- 19 Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (1995), at 3. In this regard Article 53 ("Safeguard for existing human rights") provides "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."
- 20 As of 18 April 2001, Protocol No. 1 remains unsigned (and therefore also unratified) by Andorra, and unratified by Armenia, Azerbaijan, Georgia and Switzerland. Protocol No. 4 ("securing rights and freedoms other than those already included in the Convention and in the First Protocol thereto") remains unsigned by Andorra, Greece, Liechtenstein, Malta and Switzerland; in addition, it is still unratified by Armenia, Azerbaijan, Spain, Turkey and the United Kingdom. Protocol No. 6 ("concerning the Abolition of the Death Penalty") remains unsigned by Turkey and is still unratified by Armenia, Azerbaijan and Russia. Finally, Protocol No. 7 remains unsigned by Andorra, Belgium, Liechtenstein, Malta, and the United Kingdom; in addition it remains unratified by Armenia, Azerbaijan, Germany, Ireland, the Netherlands, Poland, Portugal, Spain and Turkey. Protocol No. 12 on non-discrimination will enter into force when ten states have ratified it.
- 21 See also Article 17 prohibiting any abuse of the rights and freedoms guaranteed in the ECHR. Thus, any limitation of a right or freedom guaranteed under the ECHR must be strictly interpreted within the extent that is provided in the ECHR.
- 22 S. Livingstone, "Article 14 and the Prevention of Discrimination in the ECHR", *European Human Rights Reports* (1) 1997, at 33. He refers to the case of *Lindsay v. the United Kingdom*, in which the Commission recognised a measure of positive discrimination (in the area of taxation policy) as being justified to encourage married women into the labour market.
- 23 *Handyside v. the United Kingdom*, judgment of 7 December 1976, A 24, para. 48. For a more recent statement by the Court, see, e.g., *Aksoy v. Turkey* (judgment of 18 December 1996, Reports of Judg. and Dec. 1996-VI No.26, 2260, para. 51). Cf. also Articles 1 (obligation to secure human rights), 13 (right to an effective remedy) and 35 (1) (exhaustion of domestic remedies) but also Articles 38 and 39 (friendly settlement).

- 24 M. Shaw, *International law* (4th ed., 1997), at 258. *Tyrer v. the United Kingdom*, judgment of 25 April 1978, A 26, para. 31. The Court has also underlined the decisive role of the object and purpose when interpreting the provisions of the ECHR (see, e.g., *König v. Federal Republic of Germany*, judgment of 28 June 1978, A 27, para. 88). For an excellent (critical) assessment of the use by the Court of the principles of interpretation, see O. de Schutter, "L'interprétation de la Convention européenne des Droits de l'Homme : un essai en démolition", *Revue de Droit international et de sciences diplomatiques et politiques*, 70 (1992), 83-127.
- 25 *Selmouni v. France*, judgment of 28 July 1999, HUDOC <http://hudoc.echr.coe.int>, para. 101.
- 26 *Ibid.*, para. 80. Through this finding, the Court was re-emphasising the fact that priority ought to be given to effective protection over excessive formalism (para. 77).
- 27 G. Cohen-Jonathan, "Un arrêt de principe de la « nouvelle » Cour européenne des Droits de l'Homme: Selmouni v. France (28 juillet 1999)", *Revue générale de droit international public* 2000-1, 181, at 192.
- 28 A. Drzemczewski, "A major overhaul of the European Human Rights Convention control mechanism: Protocol No. 11", *Collected Courses of the Academy of European Law – Recueil des cours de l'Académie de droit européen*, 1995 Volume VI Book 2 (1997), 121-210.
- 29 Steiner and Alston, *International human rights in context* (2000), at 804.
- 30 Article 46, ECHR.
- 31 P. Mahoney, "Speculating on the future of the reformed European Court of Human Rights", *Human Rights Law Journal* 20 (2000), 1-4.
- 32 Shearer, *Starke's International Law* (1994), at 314. R. Plender, *International migration law* (1988), at 1. L. Henkin, "An agenda for the next century: the myth and mantra of state sovereignty", *Virginia Journal of International Law* (1994), 115-120.
- 33 R. Plender, *op. cit. supra* note 32, at 1. *Oppenheim's, op. cit. supra* note 9, para. 400.
- 34 EC Treaty, as amended by the Amsterdam Treaty 1997, Articles 18, 19, 39, 40, 43.
- 35 EC Treaty, as amended by the Amsterdam Treaty, Title IV.
- 36 See generally, C. Beyani, *Human rights standards and the movement of people within states* (2000).
- 37 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for

the prevention of crime, for the protection of health or morals, or for the protection of rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

- 38 Goodwin-Gill, *op. cit. supra* note 5, 147-159.
- 39 This power includes the right to expel, deport or extradite aliens; it does not extend to one's own nationals (e.g., Article 3 of Protocol No. 4 to the ECHR). See generally, *Oppenheim's, op. cit. supra* note 9, 940-8. See also, Swiss Delegation of the CAHAR, "Obligations incumbent on states under public international law with respect to the readmission of their own nationals and aliens", Council of Europe, *CAHAR (96) 12*, (1996), 3-44.
- 40 This duty is often regulated in the form of bilateral or multilateral readmission agreements. In the case of refugees, it is suggested that this duty ceases "until such time as the refugee willingly returns to that state". A. Grahl-Madsen, "Protection of refugees by their country of origin", *Yale Journal of International Law* 11 (1986), 362-395, at 362.
- 41 *Ibid.*, at 376.
- 42 See, in particular, the *Nationality Decrees Case* ((1923) PCIJ Ser. B, No. 4) and the *Lotus Case* (PCIJ Ser. A, No. 10), referred to in G. Goodwin-Gill, *op. cit. supra* note 5, at 4.
- 43 E.g., visa requirements for Bosnian refugees during the Bosnian conflict, accelerated procedures for nationals from "safe countries of origin" or who have passed through a "safe third country", persons granted temporary protection instead of refugee status because they are coming as a part of a mass influx.
- 44 T. Einarsen, "Discrimination and consequences for the position of aliens", *Nordic Journal of International Law* 64 (1995), at 441-446.
- 45 G. Goodwin-Gill, *op. cit. supra* note 5, 57, 195-7.
- 46 Article 1 (3) and Articles 55 and 56 of the United Nations Charter.
- 47 E.g., Article 2 of the UDHR 1948, Article 2 (1) of the ICCPR, Article 2 (2) ICESCR.
- 48 In *Rasmussen v. Denmark*, judgment of 28 November 1984, A 87, the Court considered that since the list of grounds of discrimination in Article 14 was not exhaustive, it was not necessary to determine the basis for the different treatment between a husband and a wife.
- 49 *Abdulaziz case*, judgment of 28 May 1985, A 94, paras. 65, 71-72.
- 50 This observation is reinforced by the fact that it is a prerequisite to membership that "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms" (Article 3, Statute of the Council of Europe). This view is

- reiterated in Article 1 of the ECHR: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms" defined in the ECHR.
- 51 *Belgian Linguistic Case (Merits)*, A 6 (1968), 34; *Marcks v. Belgium*, judgment of 13 June 1979, A 31, para. 33.
- 52 *Supra* note 49, paras. 74-80.
- 53 *Ibid.*, para. 72.
- 54 E.g., *Darby v. Sweden*, judgment of 23 October 1990, A 187, para. 33, where the Government did not argue that the distinction in treatment between resident and non-resident non-nationals for the purposes of a religious tax had a legitimate aim.
- 55 *Moustaquim v. Belgium*, judgment of 18 February 1991, A 193 (1991).
- 56 This protocol brings the ECHR closer to the ICCPR. In particular, Article 26 guarantees an "autonomous right" to freedom from discrimination "in law or in fact in any field regulated and protected by public authorities". See T. Einarsen, *op. cit. supra* note 44, at 434; Steiner and Alston, *op. cit. supra*, note 29, 788; G. Moon, "The draft discrimination protocol to the European Convention on Human Rights: a progress report", *European Human Rights Law Review* (1) 2000, 49-53.
- 57 1970, para. 34.
- 58 Article 12, EC Treaty, as amended by the Amsterdam Treaty.
- 59 Title IV of the EC Treaty, as amended by the Amsterdam Treaty. P. Craig & G. de Burca, *European Union Law – Text, cases and materials* (2nd ed. 1998), 364-368, 707-711.
- 60 *Belgian Linguistics* case and *Marckx* case, *op. cit. supra* note 51.
- 61 H. Lambert, "Seeking asylum on gender grounds", *International Journal of Discrimination and the Law* 1 (2) 1995, 153-178.
- 62 R. B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (1984), 94.
- 63 Article 16 reads as follows: "Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting parties from imposing restrictions on the political activity of aliens."
- 64 *Collected edition of the "Travaux préparatoires" of the European Convention on Human Rights*, Vol. III (1976), 266. See also the Commission's statement in *Piermont v. France*, Commission Report, A 314 (1995), para. 58: "those who drafted [Article 16] were subscribing to a concept that was then prevalent in international law, under which a general, unlimited restriction of the political activities of aliens was thought legitimate".
- 65 R. Wallace, *op. cit. supra*, note 15, 51. Harris at al., *op. cit. supra* note 19, 508.
- 66 Judgment of 20 March 1995, A 314 (1995).
- 67 *Ibid.*, para. 64.

- 68 Harris *et al.*, *op. cit. supra* note 19, at 509. Judges Rysdøl, Matscher, Sir John Freeland and Jungwiert, in a joint partly dissenting opinion, criticised the lack of reasoning of the decision and found that Article 16 should have been regarded as having at least some relevance by the Court, since the applicant was clearly an alien in the eyes of French law, and therefore in the sense of Article 16. They did however add that though relevant, Article 16 did not grant states unfettered discretion; in particular they must respect the principle of proportionality.
- 69 E.g., confinement in an airport transit lounge and nearby hotel (*Amuur v. France*, judgment of 26 June 1996, Reports of Judg. and Dec. 1996-III No.11, 826).
- 70 Outside the restrictions contained in Article 5 (1) *a-f*, states may derogate from the right to liberty and security "In time of war or other public emergency" (Article 15). The Court assesses the necessity of such derogations in a restrictive way. See, e.g., *Aksoy v. Turkey* (*supra* note 23): 14 days in custody (and without judicial intervention) was held to be too long even during a state of emergency – although it did allow suspected terrorists to be held for up to seven days without judicial control in *Brannigan and McBride v. the United Kingdom* (judgment of 26 May 1993, A 258-B). See also *Cakici v. Turkey* (judgment of 8 July 1999): unacknowledged detention of at least three weeks violates Article 5 even in a state of emergency.
- 71 Exceptions to Article 5 (1) are not mutually exclusive (*Eriksen v. Norway*, judgment of 27 May 1997, Reports of Judg. and Dec. 1997-III No. 37, para. 76). Thus an alien could be lawfully detained following a criminal conviction by a competent court (5 (1) *a*) pending deportation (5 (1) *f*).
- 72 *Supra* note 69.
- 73 *Ibid.*, para. 42 (referring to *Guzzardi v. Italy*, judgment of 6 November 1980, A 39, para. 92).
- 74 *Ibid.*
- 75 Commission's report in *Agee v. the United Kingdom*, Appl. No. 7729/76, DR 7/164.
- 76 *Amuur, supra* note 69, para. 43.
- 77 *Ibid.*, para. 50.
- 78 *Ibid.*, para. 53.
- 79 *Winterwerp v. the Netherlands*, judgment of 24 October 1979, A 33, paras. 39 and 46.
- 80 *Amuur, supra* note 69, para.43.
- 81 Judgment of 15 November 1996, Reports of Judg. and Dec. 1996-V No. 22, para. 112.
- 82 Detention should also be interrupted as soon as a decision has been made that deportation or extradition will not take place and grounds for further detention would have to be found elsewhere in Article 5 (1) *a-e*.
- 83 *Supra* note 81, para. 117.

- 84 *Ibid.*, para. 122. However, the advisory panel was not found to provide sufficient safeguard under Article 5 (4) and Article 13 taken in conjunction with Article 3.
- 85 See also Committee of Ministers of the Council of Europe, Recommendation No. R (94) 5 on guidelines to inspire practices of the member states of the Council of Europe concerning the arrival of asylum-seekers at European airports.
- 86 The requirement of promptness was found to be met by delays of a maximum of seven hours but not by a delay of ten days, in *Fox, Campbell and Hartley v. the United Kingdom*, judgment of 30 August 1990, A 182, para. 42, and *Van Der Leer v. the Netherlands*, judgment of 21 February 1990, A 170-A, para. 31, respectively.
- 87 Appl. No. 9174/80, DR 40/42.
- 88 See generally, Harris et al., *op. cit. supra* note 19, 128-160. See also C. Giakoumopoulos, "Detention of asylum-seekers in the light of Article 5 of the European Convention on Human Rights", in *Detention of asylum-seekers in Europe: Analysis and perspectives* (J. Hughes and F. Liebaut eds., 1998), 161-182.
- 89 *Supra* note 87.
- 90 *Sanchez-Reisse v. Switzerland*, judgment of 21 October 1986, A 107, para. 57: the right to seek judicial review must be an effective right, and *Hood v. the United Kingdom*, judgment of 18 February 1999, para. 69: it must also be an enforceable right.
- 91 *Chahal, supra* note 81, para. 127.
- 92 *Ibid.*, para. 128.
- 93 *Ibid.*, para. 131.
- 94 *Ibid.*, paras. 132 and 130.
- 95 E.g., in *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, A 12, the Court found a violation of Article 5 (4) even though detention under Article 5 (1) was lawful.
- 96 See, however, the exceptional circumstances of the case *Cakici v. Turkey (supra* note 70) where the Court found a violation of Article 5, on the ground of the unacknowledged detention of the *applicant's brother*, and a violation of Article 13, on the ground of the *applicant* having been denied an effective remedy in respect of his brother disappearance.
- 97 *Tsirlis and Kouloumpas v. Greece*, judgment of 29 May 1997, Reports of Judg. and Dec. 1997-III No.38, 909.
- 98 N. Blake QC, Key-note speech, *Proceedings of the Second Colloquy on the European Convention on Human Rights and the protection of refugees, asylum-seekers and displaced persons*, Council of Europe, Strasbourg, 2000, 84.
- 99 *Ibid.*
- 100 The *travaux préparatoires* reveal that in the English version "lawfully" was preferred over "legally" and that in the French version, "*régulièrement*" was preferred

- over "*légalement*", to reflect the wide discretionary powers enjoyed by most administrative authorities to control the entry and residence of aliens. See, A. Drzemczewski, *The position of aliens in relation to the European Convention on Human Rights* (1984), 10.
- 101 Situation at 18 April 2001. Some states have further restricted the application of Article 2 of Protocol No. 4 by making certain reservations.
- 102 *Paramanathan v. the Federal Republic of Germany*, Appl. No. 12068/86, DR 51/237.
- 103 H. G. Schermers, "Human rights and free movement of persons: the role of the European Commission and Court of Human Rights", in Schermers *et al.* eds., *op. cit. supra* note 4, 238.
- 104 A. Drzemczewski, *op. cit. supra* note 100, 11. This is also the interpretation of "lawfully resident" given by the Commission in the context of Article 1 of Protocol No. 7 (see *infra*).
- 105 Appl. No. 7011/75, DR 4/215, at 235.
- 106 J.-M. Henckaerts, "The current status and content of the prohibition of mass expulsion of aliens", *Human Rights Law Journal* (15) 1994, 301.
- 107 *A v. the Netherlands*, Appl. No. 14209/88, DR 59/274.
- 108 *Becker*, *supra* note 105, at 235.
- 109 Protocol No. 7 was adopted with the intention of bringing the protection afforded under the ECHR closer to that under the International Covenant on Civil and Political Rights which provides a similar guarantee in its Article 13.
- 110 R. Cholewinski, *op. cit. supra* note 6, 398-399. Harris *et al.*, *op. cit. supra* note 19, 565-566.
- 111 Appl. No. 19373/92, DR 74/199, at 209.
- 112 See Explanatory Memorandum to Protocol No. 7.
- 113 See *infra*.
- 114 The scope of this provision could equally have been discussed as a qualified right under section 2.C. (*infra*), which is concerned with considerations of interpretation by the Strasbourg organs. However, I have chosen to deal with it here because Article 1 (1) expressly refers to the "general principles of international law" which only benefit aliens.
- 115 *Ilic v. Croatia*, Application No. 42389/98, decision of 19 September 2000 (HUDOC <http://hudoc.echr.coe.int>).
- 116 *Oppenheim's*, *op. cit. supra* note 9, 910-27.
- 117 Judgment of 21 February 1986, A 98, para. 62. See also *Beaumartin v. France*, judgment of 24 November 1994, A 296-B. In the first edition of Human Rights File

No. 8 (*op. cit. supra* note 100, at 12), Drzemczewski quotes the following passage from a report prepared by the committee of Experts from 18 July 1951:

“The Swedish Delegation pointed out – and requested that the fact be mentioned in these conclusions – that the general principles of international law referred to under Article 1 of the Protocol only applied to relations between a state and non-nationals.

At the request of the German and Belgian Delegations, it was agreed that the general principles of international law, in their present connotation, entailed the obligation to pay compensation to non-nationals in cases of expropriation.”

118 P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), 636.

119 Judgment of 5 January 2000 (HUDOC <http://hudoc.echr.coe.int>), para. 110.

120 *Ibid.*, paras. 120-121.

121 Judgment of 23 February 1995, A-306-B, para. 59.

122 Judgment of 24 October 1986, A-108, para. 51.

123 Y. Winisdoerffer, “Margin of appreciation and Article 1 of Protocol No. 1”, *Human Rights Law Journal* (19) 1998, 18-20.

124 In contrast with Drzemczewski, I do not consider Articles 5 and 6 to constitute “minimum rights”, mainly because I do not see the ECHR as guaranteeing a “hierarchy” of rights. Instead, I suggest that every right and freedom in the ECHR constitutes a “minimum right” in the sense that the ECHR provides a basic floor below which nobody is allowed to fall without violating the relevant standard. There is a separate question with regard to the applicability of these rights. In practice, some rights are recognised to be so fundamental as to call for absolute protection, while others are “defined in too general terms to be fully ‘self-executing’.” See H. Waldock, “The effectiveness of the system set up by the European Convention on Human Rights”, *Human Rights Law Journal* 1 (1980), 1, at 9.

125 It has been argued that the notion of “absolute rights” does not exist, because every right may be said to be limited to some extent for reasons of contextual limitations (e.g., Article 3) or expressed limitations (e.g., Articles 8-11). While conceptually an interesting argument (as developed, e.g., by M. Addo and N. Grief in “Some practical issues affecting the notion of absolute right in Article 3 European Convention on Human Rights”, *European Law Review* 23 (1998), 17-30, and in “Is there a policy behind the decisions and judgments relating to Article 3 of the European Convention on Human Rights?”, *European Law Review* 20 (1995), 178) the distinction between absolute and qualified rights remains nevertheless valid and useful as a theoretical framework. Furthermore, some of the conclusions reached by Addo and Grief need to be reconsidered in the light of recent judgments by the Court relating to Article 3, in particular *Selmouni v. France* (see G. Cohen-Jonathan, *op. cit. supra* note 27).

126 P. Mahoney, *op. cit. supra* note 31, 2.

127 *Ibid.*

128 R. Wallace, *op. cit. supra* note 15, 10-11 and 32-33.

129 E.g., *Jamil v. France*, judgment of 8 June 1995, A 317-B, in which the Court found a violation of Article 7 (1) in the case of Brazilian national sentenced to imprisonment in France on grounds of prevention of drug trafficking.

130 International law distinguishes between expulsion and extradition. Expulsion is an administrative measure in the form of a government order directing an alien to leave the territory; it is often used interchangeably with deportation. Extradition is "the delivery of an accused or a convicted individual to the state where he is accused of, or has been convicted of a crime, by the state on whose territory he happens for the time to be". *Oppenheim's, op. cit. supra* note 9, 940-962. However, in the context of this study I shall use the word "expulsion" to mean any measure aiming at removing an alien from the territory in which s/he is present, i.e., deportation (including *reconduction à la frontière* – the accompanying of a person to the border of the expelling country), extradition and *refoulement*.

131 The case-law shows that the Strasbourg organs have relied primarily on Article 3 to decide such cases. But see, e.g., *M.A.R. v. the United Kingdom* (Appl. No. 28038/95, admissibility decision of 16 January 1997): the Commission found admissible the complaint that the applicant's expulsion to Iran would constitute a violation of Article 2 because of a real risk of being sentenced to death there; *Tatete v. Switzerland* (Appl. No. 41874/98, judgment of 6 July 2000, friendly settlement, HUDOC <http://hudoc.echr.coe.int>): illegal immigrant suffering from AIDS and claiming that sending her back to the Democratic Republic of the Congo would be in breach of Article 2; and *Körsal v. the Netherlands* (Appl. No. 31725/96, decision of 19 September 2000, HUDOC <http://hudoc.echr.coe.int>): a case of death of a Turkish national following ill-treatment during arrest and police custody declared admissible by the Commission under both Articles 2 and 3.

132 *T.I. v. the United Kingdom, supra* note 18. See also, e.g., *Soering v. the United Kingdom, supra* note 16, para. 91, and *Chahal v. the United Kingdom, supra* note 81, para. 80.

133 *Soering, supra* note 16, para. 91.

134 *Ibid.*, para.103. But see *M.A.R. v. the United Kingdom, supra*, note 131, in which the Commission declared admissible under Article 2 an application on the ground that the applicant could face death penalty if returned to Iran. Note also that for States Parties to Protocol No. 6 (the United Kingdom was not a party at that time), there would be a violation of this protocol in the event of such a person being expelled to a country where s/he would be subjected to a real and present risk of death penalty.

135 *Soering, supra* note 16, para. 111.

136 *Ibid.*, para.91.

137 *D. v. the United Kingdom, supra* note 14, para. 59. See also *Bahaddar v. the Netherlands*, Commission report (Application No. 25894/94, judgment of 19 Feb-

ruary 1998, Reports of Judg. and Dec. 1998-I No. 64), and *T.I. v. the United Kingdom*, *supra* note 18.

- 138 Note also that admissibility requirements are particularly stringent. For instance, in *Vijayanathan and Pusparajah v. France*, judgment of 27 August 1992 (A 241-B), the Court failed to recognise the applicants as "victims" of a violation because no expulsion order had yet been made against them. See, H. Lambert, "Protection against *refoulement* from Europe: human rights law comes to the rescue", *International and Comparative Law Quarterly* 48 (1999) 515-544, at 523-530. However, the recent tendency seems to require less formalism. In particular, the Court considers the following as constituting exceptions to the admissibility criteria that all domestic remedies available must be exhausted: the existence of particular or special circumstances (e.g., *Akdivar v. Turkey*, judgment of 16 September 1996, Reports of Judg. and Dec. 1996-IV No. 15, 1192; *Aksoy v. Turkey*, *supra* note 23) and the ineffectiveness of an investigation into the allegation of a violation of Article 3 (*Yasa v. Turkey*, judgment of 2 September 1998, Reports of Judg. and Dec. 1998-VII No. 88, 2411; *Selmouni v. France*, *supra* note 25). See G. Cohen-Jonathan, *supra* note 27, at 196-199.
- 139 *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, A 215, para.111.
- 140 *T.I. v. the United Kingdom*, *supra* note 18.
- 141 See, e.g., *Chahal v. the United Kingdom*, *supra* note 81 (successful case), *H.L.R. v. France*, Reports of Judg. and Dec. 1997-III No. 36, 745 (unsuccessful case) and *Cruz Varas v. Sweden*, judgment of 20 March 1991, A 201 (1991) (unsuccessful case). See, generally, H. Lambert, *op. cit. supra* note 138, at 538-540.
- 142 *Selcuk and Asker v. Turkey*, judgment of 24 April 1998, Reports of Judg. and Dec. 1998-II No. 71, paras. 26 and 56.
- 143 *Soering*, *supra* note 16, para.100.
- 144 *Supra* note 10, para.167.
- 145 *Aksoy*, *supra* note 23; *Aydin v. Turkey*, judgment of 25 September 1997, Reports of Judg. and Dec. 1997-VI No. 50, 1866; *Selmouni*, *supra*, note 25; and *Dikme v. Turkey*, Appl. No. 20869/92, judgment of 11 July 2000 (HUDOC <http://hudoc.echr.coe.int>).
- 146 *Selmouni*, *supra* note 25, paras. 97-100.
- 147 *Ibid.*, para. 101.
- 148 In terms of protection against ill-treatment in the event of an expulsion, it does not really matter whether Article 3 applies on the basis of torture or inhuman or degrading treatment, except perhaps that the Court will be more sympathetic towards a case of torture or death. However, outside expulsion cases, the difference between torture, inhuman and degrading treatment is mainly relevant for the Court in matters of compensation because the treatment has already occurred.

- 149 *Tyrer*, *supra* note 24, paras. 29-30. Thus, in *Jabari v. Turkey* the Court recognised that stoning for adultery in Iran constituted treatment contrary to Article 3 (Appl. No. 40035/98, judgment of 11 July 2000, HUDOC <http://hudoc.echr.coe.int>).
- 150 *Supra* note 14. See also, e.g., *Ahmed v. Austria*, judgment of 17 December 1996 (Reports of Judg. and Dec. 1996-VI No.26, 2195), and *H.L.R. v. France*, *supra* note 141. It further follows from *D. v. the United Kingdom* (*supra*, note 14) but also, for instance, *H.L.R. v. France* (*supra* note 141) that the Court does not consider the source of the ill-treatment in the receiving country to be relevant to a determination under Article 3.
- 151 Reports of Judg. and Dec. 1998-VI No. 89, 2595, at 2610.
- 152 *Karara v. the United Kingdom*, Appl. No. 40900/98, HUDOC <http://hudoc.echr.coe.int>.
- 153 Appl. No. 23634/94, admissibility decision of 19 May 1994.
- 154 Appl. No.13078/87, DR 70/159.
- 155 E.g., *Giama v. Belgium*, Appl. No. 7612/76, DR 21/73; *Harabi v. the Netherlands*, Appl. No. 10798/84, DR 46/112.
- 156 As highlighted by the UNHCR in written submissions to the Court in *T.I. v. the United Kingdom* (*supra* note 18). See also Swiss Delegation of the CAHAR, "Obligations incumbent on states under public international law with respect to the re-admission of their own nationals and aliens", CAHAR (96) 12, Council of Europe (1996), 1-44.
- 157 London, 30 November-1 December 1992. See now, under discussion, the Commission proposal for a Council Directive on minimum standards of procedures in Member States for granting and withdrawing refugee status, 20 September 2000, COM (2000) 578 final, Annex I and II.
- 158 *Supra* note 18. The case was nevertheless declared inadmissible by the Court on the facts of it.
- 159 E.g., *Brückmann v. the Federal Republic of Germany*, Appl. No. 6242/73, DR 46/202.
- 160 Article 5 (1) c and f.
- 161 *Ireland v. the United Kingdom*, *supra* note 10.
- 162 *Cyprus v. Turkey*, Appl. Nos. 6780/74 and 6950/75, Commission's report, 4 EHRR 482, at 541.
- 163 Commission's report, A 244 (1992), para. 254. However, the Court found the compulsory administration of drugs (and food) not to be in violation of Article 3 in cases of therapeutic necessity (judgment of 24 September 1992). The drafters of the ECHR nevertheless considered "the injection of drugs as torture or at least inhuman or degrading treatment". See, D. Anker, *Law of asylum in the United States* (3rd ed. 1999) at 489.

- 164 Judgment of 4 December 1995, A 336, para. 38. See also *Hurtado v. Switzerland*, judgment of 26 January 1994, A 280-A (1994) (friendly settlement), in which the Commission found the physical force used during an arrest not to be disproportionate in the circumstances.
- 165 *Hurtado v. Switzerland*, *supra* note 164. See also *Conka v. Belgium*, Appl. No. 51564/99, HUDOC <http://hudoc.echr.coe.int> (asylum-seekers were marked on their arms with ID numbers in indelible ink).
- 166 Appl. No. 33394/96, decision of 12 September 2000, HUDOC <http://hudoc.echr.coe.int>.
- 167 *Selmouni v. France*, *supra* note 25, para. 101. See also M. O'Boyle, "Establishing the new European Court of Human Rights: progress to date", *Human Rights Law Review* 4 (3) 1999, at 6-7.
- 168 *Selmouni*, *supra* note 25, para. 105. See also *Dikme v. Turkey*, *supra* note 145.
- 169 M. O'Boyle, *op. cit. supra* note 167, 3-8.
- 170 This convention entered into force on 1 February 1989 following the required seven ratifications.
- 171 See Article 1 of the text of the CPT, and Explanatory Memorandum. For more details on the work of the CPT, refer to its annual General Reports of activities. See also, e.g., A. Cassese, "A new approach to human rights: the European Convention for the Prevention of Torture", *American Journal of International Law* 83 (1989), 128-153; M. Evans and R. Morgan, "The European Convention for the Prevention of Torture: 1992-1997", *International and Comparative Law Quarterly* 46 (1997), 663-675.
- 172 *Aerts v. Belgium*, judgment of 30 July 1998, Reports of Judg. and Dec. 1998-V No. 83, 1939.
- 173 This rule is the same as the old rule 36 provided under the Rules of Procedures of the European Commission of Human Rights.
- 174 H. Lambert, *op. cit. supra* note 138, at 530-532.
- 175 *Ibid.* Note that rule 39 orders could become binding under the new Court following a review of the rules of the Court in 2001.
- 176 E.g., *Chahal*, *supra* note 81.
- 177 E.g., *Ahmed*, *supra* note 150.
- 178 See, e.g., separate opinion of Mr Cabral Barreto to the European Commission of Human Rights' report on the case *B.B. v. France* (*supra* note 149, at 2616), criticising the Court's approach. Unlike the European Court of Human Rights, the Inter-American Court of Human Rights has often declared injunctions against a violator state. See G. Cohen-Jonathan, *op. cit. supra* note 27, at 200, note 35.
- 179 E.g., *Paez v. Sweden*, Reports of Judg. and Dec. 1997-VII No. 56, 2436; *B.B. v. France*, *supra* note 151; *Abdurahim Incedursun v. the Netherlands*, Appl. No. 33124/96; *Tatete v. Switzerland*, *supra* note 131.

- 180 *Tugar v. Italy*, Appl. No. 22869/93, decision of inadmissibility, 18 October 1995.
- 181 Judgment of 28 October 1998, Reports of Judg. and Dec. 1998-VIII No. 95, 3124.
- 182 *Ibid.*, para. 115.
- 183 *Ibid.*
- 184 *Ibid.*, para. 116.
- 185 Refer to my comments on "just satisfaction", *supra*.
- 186 Appl. Nos. 4715/70, 4783/71 and 4827/71, DR 13/17.
- 187 *Supra* note 49.
- 188 Harris et al., *op. cit. supra* note 19, at 82.
- 189 *Ibid.*, 83.
- 190 *Kalderas Gypsies v. the Federal Republic of Germany and the Netherlands*, Appl. Nos. 7823-7824/77, DR 11/221.
- 191 E.g., *Selmouni*, *supra* note 25. See, G. Cohen-Jonathan, *supra* note 27, 181-203.
- 192 *Selmouni*, *supra* note 25, para. 79. See also, previously, *Kurt v. Turkey*, judgment of 25 May 1998 (Reports of Judg. and Dec. 1998-III No. 74, 1152), *Chahal*, *supra* note 81, and *McCann v. the United Kingdom*, judgment of 27 September 1995, A 324 (1996).
- 193 Since then, see also *Dikme v. Turkey* (*supra* note 145) and *Jabari v. Turkey* (*supra* note 149).
- 194 Note also that in other contexts, such as detention, Article 5 provides more stringent procedural obligations for states to guarantee a remedy. A. Drzemczewski and Ch. Giakoumopoulos, "Article 13", in *La Convention européenne des Droits de l'Homme* (Decaux, Imbert, Petiti, eds., 1995), 455-474.
- 195 E.g., *Selcuk and Asker v. Turkey*, *supra* note 142.
- 196 *Boyle and Rice*, judgment of 27 April 1988, A 131, 23, para. 52; referred to, for instance, in *Soering* (*supra* note 16, para. 120). The Court does not require incorporation of the ECHR into domestic law. However, as remarked by Judges De Meyer and Pettiti, "The object and purpose of the European Convention on Human Rights was not to create, but to recognise rights which must be respected and protected even in the absence of any instrument of positive law. It has to be accepted that, everywhere in Europe, these rights 'bind the legislature, the executive and the judiciary, as directly applicable law' and as 'supreme law of the land'." Separate opinion, *The Observer and Guardian Case*, judgment of 26 November 1991, A 216 (1992).
- 197 *Klass v. the Federal Republic of Germany*, judgment of 6 September 1978, A 28 (1978), para. 64. Van Dijk and Van Hoof, *supra* note 118, 698.
- 198 *Silver v. the United Kingdom*, judgment of 25 March 1983, A 61, para. 113. *Boyle and Rice*, judgment of 27 April 1988, A 131, para. 52.

- 199 *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, A 172 (1990), para. 33.
- 200 *Silver v. the United Kingdom*, *supra* note 198, para. 113. See also Recommendation No. (98) 13 of the Committee of Ministers of the Council of Europe on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the ECHR.
- 201 The national authority does not need be a judicial authority, but if it is not, its powers and procedural guarantees are relevant in determining whether the remedy before it is effective. The key element for the Court is the capacity of the authority to provide an effective remedy in fact. *Silver v. United Kingdom*, *supra* note 198, para. 113. See also *Leander v. Sweden*, judgment of 26 March 1987, A 116 (1987), paras. 29-30, and *Klass*, *supra* note 197, para. 67.
- 202 *Supra* note 145, para. 107.
- 203 *Supra* note 81, para. 151.
- 204 *Ibid.*, para. 153. See also, e.g., *Smith and Grady v. the United Kingdom*, judgment of 29 September 1999: judicial review does not provide effective remedy. In cases not involving national security, the Court has nevertheless been willing to regard judicial review as adequate remedy under Article 13 in cases involving the United Kingdom (e.g., *D. v. the United Kingdom*, *supra* note 14, para. 70 referring to *Soering v. the United Kingdom*, *supra* note 16, and to *Vilvarajah v. the United Kingdom*, *supra* note 139) but not in the case of Turkey (e.g., *Jabari v. Turkey*, *supra* note 149).
- 205 Commission's report on *Plattform "Ärzte für das Leben" v. Austria*, judgment of 21 June 1988, A 139 (1988). See also Recommendation No. R 98 (13) of the Committee of Ministers of the Council of Europe, Explanatory Memorandum, para. 16. In this regard, the denial to asylum-seekers of the right to legal assistance or the right to basic subsistence could be in violation of Article 13, in conjunction with Article 3, by preventing the asylum-seeker from appealing. See judgment by the Court of Appeal in the United Kingdom, *R v. Secretary of State for Social Security, ex parte Re B and Joint Council for the Welfare of Immigrants (JCWI)*, [1997] 1 WLR 275.
- 206 *Soering v. the United Kingdom*, *supra* note 16, para. 123. Confirmed, e.g., in *Vilvarajah v. the United Kingdom*, *supra* note 139, and *D. v. the United Kingdom*, *supra* note 14.
- 207 Conduct may nevertheless be relevant under Article 13.
- 208 N. Blake, *op. cit. supra* note 98, 78-90.
- 209 J. Cooper and T. de la Mare, "Bringing and defending a case under the Human Rights Act 1998", Bracton Law Lecture, University of Exeter, 26 October 2000.
- 210 My discussion on Article 8 is largely based on the following two publications: H. Lambert, "The European Convention on Human Rights and the right of refugees and other persons in need of protection to family reunification", Council of Europe, *CAHAR (99) 1*, and H. Lambert, "The European Court of Human Rights and the

- right of refugees and other persons in need of protection to family reunion", *International Journal of Refugee Law* 11 (3) 1999, 427-450. See also Committee of Ministers of the Council of Europe, Recommendation No. R (99) 23 on family reunion for refugees and other persons in need of international protection.
- 211 *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, *supra* note 49.
- 212 *Gül v. Switzerland*, judgment of 19 February 1996, Reports of Judg. and Dec. 1996-I No. 3, 159. See also, e.g., *Nsona v. the Netherlands*, judgment of 28 November 1996 (Reports of Judg. and Dec. 1996-V No. 23, 1979), and *Ahmut v. the Netherlands*, judgment of 28 November 1996 (Reports of Judg. and Dec. 1996-VI No. 24, 2017).
- 213 Judgment of 21 June 1988, A 138 (1988).
- 214 *Supra* note 55. See also *Beldjoudi v. France*, judgment of 26 March 1992, A 234-A (1992); *Bouchelkia v. France*, judgment of 29 January 1997, Reports of Judg. and Dec. 1997-I No. 28, 47; and *Boujlifa v. France*, judgment of 21 October 1997, Reports of Judg. and Dec. 1997-VI, 2250.
- 215 *Mehemi v. France*, judgment of 26 September 1997, Reports of Judg. and Dec. 1997-VI No. 51, 1959, and *El Boujaidi v. France*, judgment of 26 September 1997, Reports of Judg. and Dec. 1997-VI No. 51, 1980.
- 216 *Gül*, *supra* note 212, para. 38, first held in *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, *supra* note 49, para. 68.
- 217 *Gül*, *supra* note 212, para. 38.
- 218 Concurring opinion by Judge Pettiti in *Nasri v. France*, judgment of 13 July 1995, A 320 (1995).
- 219 E.g., *Moustaquim v. Belgium*, *supra* note 55, paras. 46-47, and *Beldjoudi v. France*, *supra* note 214, paras. 79-80.
- 220 In the context of family reunion, the court has recognised that family life between parents and children does not cease following the divorce of a married couple (e.g., *Berrehab v. the Netherlands*, *supra* note 213), nor does it cease as a result of living apart (e.g., *Moustaquim v. Belgium*, *supra* note 55).
- 221 M.E. Mas, "La protection des enfants mineurs en Europe", 4 *Bulletin des droits de l'homme* 1995, 30-41.
- 222 *Nsona*, *supra* note 212. This reasoning is consistent with the Court's decisions in cases involving nationals where it has long recognised the existence of family life between near relatives. See, *Marckx*, *supra* note 51.
- 223 Judgment of 7 August 1996, para. 25, in which the Court referred to its judgment in *Niemietz v. Germany*, A 251-B (1992). This judgment was confirmed in, e.g., *Bouchelkia*, *supra* note 214, and *Mehemi*, *supra* note 215.
- 224 *Gül*, *supra* note 212, para. 38. First stated in *Abdulaziz*, *supra* note 49, para. 67.
- 225 E.g., *Cruz Varas v. Sweden*, *supra* note 142. See also *Nsona*, *supra* note 212, where the Court found no interference with the right to respect for family life because the

- state could not be blamed for the applicants' deceitful act regarding the identity of the nine-year old child.
- 226 See, e.g., *Abdulaziz*, *supra* note 49, *Gül*, *supra* note 212, *Ahmut*, *supra* note 212, and *Nsona*, *supra* note 212. Note however that in both *Gül* and *Ahmut*, the Commission reported an interference.
- 227 *Vijayanathan and Pusparajah v. France*, *supra* note 138.
- 228 E.g., *Berrehab*, *supra* note 213, para. 23, and *Moustaquim*, *supra* note 55, para. 36.
- 229 See Storey's reference to the "elsewhere" approach and the "connections" approach, in H. Storey, "The right to family life and immigration case-law at Strasbourg", *International and Comparative Law Quarterly* 39 (1990) at 329-330.
- 230 For a measure to be "in accordance with the law", it must have a legal basis in domestic law, i.e., be certain and sufficiently clear. This requirement was never disputed before the Court in cases involving aliens.
- 231 E.g., *Abdulaziz*, *supra* note 49, para. 67, and *Berrehab*, *supra* note 213, paras. 28-29. Note that in cases of entry, the Court tends to carry out the balance when determining the existence of an interference, and where no obstacles exist in developing normal family life elsewhere, the applicant is usually expected to return there.
- 232 *Beldjoudi*, *supra* note 214, para. 75.
- 233 *Nasri*, *supra* note 218 (about 30 years in France); *Boughanemi*, judgment of 24 April 1996, Reports of Judg. and Dec. 1996-II No. 8, 593 (20 years in France), and *Chorfi*, *supra* note 223 (25 years in Belgium).
- 234 As successfully demonstrated in *Beldjoudi*, *supra* note 214, and *Mehemi*, *supra* note 215, but not in *Boughanemi*, *supra* note 233, nor in *Chorfi*, *supra* note 223.
- 235 See *Moustaquim*, *supra* note 55 (147 offences committed but at a time when Mr Moustaquim was a minor, so deportation measure was found to be disproportionate) and compare it with *Chorfi*, *supra* note 223 (drug offence was found to be serious enough to justify interference) and *Bouchelkia*, *supra* note 214 (rape with violence and theft was found to be grave enough to justify interference).
- 236 *Moustaquim*, *supra* note 55, and *Berrehab*, *supra* note 213.
- 237 E. Corouge, "Expulsion des étrangers et Article 8 de la Convention européenne des droits de l'homme", *Revue française de Droit administratif* 13 (2) 1997, 320.
- 238 See, e.g., *Bouchelkia*, *supra* note 214, *Mehemi*, *supra* note 215, and *Nasri*, *supra*, note 218.
- 239 See, e.g., *Boughanemi*, *supra* note 233, and *Chorfi*, *supra* note 223. Note that on 23 February 2001, the Parliamentary Assembly's Committee on Migration, Refugees and Demography called for such expulsion to take place only in "highly exceptional cases" because it considers such measure to be "disproportionate and discriminatory" (Doc. 8986; see <http://stars.coe.int>).

- 240 E.g., *Chahal*, *supra* note 81, and *D.*, *supra* note 14.
- 241 E.g., *Gül*, *supra* note 212, and *Nsona*, *supra* note 212.
- 242 *Agee v. the United Kingdom*, *supra* note 75.
- 243 Note also that “Article 9 of the ECHR ... guarantees to everyone the ‘right to freedom of thought, conscience and religion’, but ... does not specify the provision of positive assistance to promote or facilitate this right”. R. Cholewinski, *op. cit. supra* note 6, at 367.
- 244 *Ibid.*, at 375.
- 245 *Piermont*, *supra* note 66, para. 78.
- 246 The same is true of the right to vote and the right to stand for election which according to Article 1 of Protocol 3 combined with Article 16 in relation with Article 14 may be restricted for non-nationals. See, R. Cholewinski, *op. cit. supra* note 6, at 377.
- 247 *Ibid.*, at 376.
- 248 Thus in *Abdulaziz*, *supra* note 49, the right of the applicants to enter and establish in the United Kingdom in order to join their wives settled in the United Kingdom had not been argued on the basis of Article 12 but of Articles 8 and 14.
- 249 See, Harris et al., *op. cit. supra* note 19, 440 (n.16) and 435-436, referring to the Commission's decision in *X. v. the United Kingdom*, Appl. No. 6564/74, DR 2/105.
- 250 *X v. the Netherlands*, Appl. No. 8896/80, DR 24/176. See also, *X and Y v. the United Kingdom*, Appl. No. 7229/75, DR 12/32.
- 251 *Supra* note 51, 31.
- 252 *Ibid.*, 22.
- 253 *Ibid.*, 32. Van Dijk and Van Hoof argue that at least as far as elementary education is concerned, Article 2 should be interpreted as to include the state duty “to create additional facilities within the existing education institutions for the benefit of those aliens having taken up residence in the territory for a considerable time who do not yet have sufficient command of the language in which education is conducted; otherwise the right to education will remain illusory for them for a long time”. They further question the extent to which aliens “without a residence permit can derive from this provision a right to education”. Again they maintain that at least with regards to elementary education, they should be recognised “equal access to existing educational institutions”, especially in cases where they have been authorised to remain on humanitarian grounds for an indefinite period of time. Van Dijk and Van Hoof, *op. cit. supra* note 118, at 654.
- 254 This guarantee aims at safeguarding the possibility of pluralism in education, an essential element in the preservation of the “democratic society” as conceived by the ECHR. *Efstratiou v. Greece*, judgment of 18 December 1996, Reports of Judg. and Dec. 1996-VI No .27, 2347.
- 255 Harris et al., *op. cit. supra* note 19, at 548.

- 256 Van Dijk and Van Hoof, *op. cit. supra* note 118, 645.
- 257 Under the auspices of the Council of Europe, these standards are provided in the European Social Charter, the European Convention on Establishment, and the European Convention on the Legal Status of Migrant Workers. See Cholewinski, *op. cit. supra* note 6, 359-361.
- 258 Appl. No. 7671/76, DR 9/185.
- 259 *Ibid.* See also more recently *Fadele v. the United Kingdom* (*supra*, note 154) declared admissible by the Commission. The dispute was the subject of a friendly settlement.
- 260 *Church of X v. the United Kingdom*, Appl. No. 3798/68.
- 261 *Supra*, section 1.B, p. 11.
- 262 E.g., *Schmidt v. Austria*, Appl. No.10670/83.
- 263 Appl. No. 6779/74 (unpublished).
- 264 Outside the scope of immigration, i.e., in civil or criminal procedures, there is nothing in the Strasbourg case-law to suggest that Article 6 would apply differently to nationals and aliens. See, e.g., *Biba v. Greece* (Appl. No. 33170/96, judgment of 26 September 2000, HUDOC <http://hudoc.echr.coe.int>), where the Court recognised a violation of Article 6 (1) combined with Article 6 (3) *c* in a case of criminal proceedings. The case involved an illegal immigrant from Albania who was found guilty of murder, theft with violence and illegal stay in Greece, and who was condemned to life imprisonment on the ground that he had no means of subsistence. Yet, he was refused free legal aid to lodge an appeal in the Court of Cassation.
- 265 *Supra* note 16.
- 266 *Ibid.*, para.115.
- 267 Judgment of 26 June 1992, A 240, para.110. This case involved a national from Spain and a national from Czechoslovakia, both sentenced to 14 years' imprisonment in France following a conviction for armed robbery.
- 268 *Supra* note 131.
- 269 E.g., *Farmakopoulos v. Greece*, Appl. No. 11683/85, DR 64/52 (Article 6 does not apply to extradition proceedings), *X, Y, Z, V and W v. the United Kingdom*, Appl. No. 3325/67 (entry); *P. v. the United Kingdom*, Appl. No. 13162/97 (asylum); *Agee v. the United Kingdom*, *supra* note 75 (deportation).
- 270 Appl. No. 39652/98, decision of 22 March 2000, HUDOC <http://hudoc.echr.coe.int>.
- 271 Judgment of 5 October 2000, HUDOC <http://hudoc.echr.coe.int>.
- 272 *Ibid.*, paras. 37-38. However, as pointed out by Judges Loucaides and Traja in their dissenting opinion, "Article 1 of Protocol No. 7 was aimed at the establishment of a protection *vis-à-vis* the administration which in any case could not serve as a substitute for the judicial guarantees of Article 6 or even minimise the negative effects

resulting from the absence of the latter. The protection in question may very well be supplementary to the judicial guarantees of Article 6.”

273 *Ibid.*, para. 39.

274 See *Feldbrugge v. the Netherlands*, judgment of 29 May 1986, A 99, and *Lombardo v. Italy*, judgment of 26 November 1992, A 249-B.

Human rights files

- No. 1 Introduction to the European Convention on Human Rights: the rights secured and the protection machinery (1978)
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