

# Written Evidence – Response to House of Lords Select Committee on Extradition Law

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## Executive Summary

**A. (I) Is the UK permitted to make a reservation to Article 12(2) of the European Convention on Extradition vis-à-vis particular States to the effect that additional documents, and more specifically *prima facie* evidence of the offence for which extradition is requested (i.e. signed witness statements), have to be submitted by the requesting State?**

The European Convention on Extradition ('ECE') contains a provision concerning reservations according to which reservations have to be made either upon signature or upon ratification or accession. The late formulation of a reservation would render it invalid. However, modern practice, including under the auspices of the Council of Europe, exceptionally recognises the possibility that the late formulation of a reservation can be valid, if unanimously accepted by other contracting states. A reservation by the UK concerning Article 12 to the effect that *prima facie* evidence of the offence for which extradition is requested (i.e. signed witness statements) has to be submitted by particular requesting States parties would be consistent with the object and purpose of the ECE, but its late formulation would not meet the narrow circumstances in which late formulations of reservations have been accepted, and in any event, such late formulation would require the unanimous acceptance of other contracting States in order to be valid.

Although the formulation of a late reservation would render the reservation invalid, a number of alternative routes may be available. *First*, the UK may denounce the ECE (pursuant to its Article 31) with a view to immediately re-acceding to it and formulating a reservation to Article 12 when acceding. Although such an approach is controversial, there is no rule of customary international law prohibiting it. However, as at 1 January 2014, the UK is party to the Fourth Additional Protocol to the ECE ('Fourth Protocol'). A denunciation of the ECE automatically entails the denunciation of the Fourth Protocol (pursuant to the Fourth Protocol's Article 14(3)), and upon accession to the ECE and to the Fourth Protocol a reservation formulated to the ECE concerning *prima facie* evidence in relation to Article 12 of the ECE would have legal effects only in the relationship of the UK with ECE parties that are not parties to the Fourth Protocol. The UK will be unable to formulate a valid reservation to the Fourth Protocol (concerning Article 12 of the ECE) that applies to the relationship between the UK and other Fourth Protocol parties, because the Fourth Protocol permits only specified reservations but not one in relation to Article 12 to the effect examined here. *Second*, the UK could try to elicit the establishment of an agreement between ECE parties concerning the interpretation of Articles 12 or 13 to achieve the desired result by triggering the subsequent practice of ECE parties in the treaty's application.

**A. (II) What is the effect of doing so on the UK's ECE treaty relations with other States party?**

If the late formulation of a reservation is accepted unanimously by all other contracting states, it would be subject to the opposability rules concerning reservations. Between the UK and those that accept the reservation, if they have not raised an objection to the reservation by the end of twelve months after they were notified of the reservation or by the date on which they expressed their consent to be bound by the treaty, whichever is later, the ECE would apply with the reservation. The reservation would modify Article 12 to the extent of the reservation for the reserving State in its relations with the accepting party; and would modify Article 12 to the same extent for the accepting party in its relations with the reserving State. In contrast, between the UK and those that object to the reservation, either the ECE would not enter into force between them, if the objecting states choose to oppose it, or Article 12 will not apply to the extent of the reservation.

If the UK attempted to make a reservation that was in fact not permitted (for instance, because it has been formulated late without the unanimous acceptance of all other parties) and as a result was invalid, and then sought to rely on that reservation notwithstanding its invalidity, the UK would be in breach of its obligations under the ECE.

**B. Can the UK consider itself not bound by the ECE in relation to another ECE party that it regards as not performing the ECE in good faith?**

Assuming that an ECE (or Fourth Protocol) party is not performing the treaty in good faith, under customary international law and the VCLT the UK remains bound by the ECE or the Fourth Protocol (as applicable). The only available responses open to the UK as a result of non-performance of the ECE by another State are the following.

*First*, under customary international law on the law of treaties, only in case of a material breach by another State party, if the UK is specially affected by that material breach, will the UK be entitled to suspend the operation in whole or in part of the ECE (or the Fourth Protocol, as applicable) in its relationship between itself and the defaulting State. The suspension of the treaty's operation will release the UK and the defaulting State from the obligation to perform the treaty in their mutual relations during the period of the suspension, but will not otherwise affect the legal relations between the parties established by the treaty.

*Second*, it is arguable – albeit not beyond doubt – that the UK may withhold performance of its treaty obligations until such time as the other party performs, assuming that the obligations in question are synallagmatic, in the sense that the performance of some treaty obligations may be conditioned upon performance of the same or closely linked obligations under the same treaty (under the *exceptio inadimpleti contractus*). This is a matter of treaty interpretation. However, it is doubtful that the obligations in the ECE (or the Fourth Protocol, as applicable) are synallagmatic in this way.

*Third*, under customary international law on state responsibility, if the UK is injured by an internationally wrongful act pertaining to the breach (material or not) of an obligation under the ECE (or the Fourth Protocol, as applicable), it may take a countermeasure against the responsible ECE party (or party to the Fourth Protocol) in the form of suspending

compliance with its international obligations under the ECE (or to the Fourth Protocol) or another international obligation owed to the responsible State. The wrongfulness of such suspension would be precluded for as long as the internationally wrongful act persists, but the obligations whose performance is suspended would remain an applicable legal standard between the responsible State and the State taking the countermeasure. However, countermeasures in order to be lawful have to fulfill a number of conditions, and hence their lawfulness will depend on the circumstances of each case. If they are not lawful, the wrongfulness of the countermeasures will not be precluded, and the UK would violate its international obligations and would engage international responsibility.

**Question A, Part (I): Is the UK is permitted to make a reservation to Article 12(2) of the European Convention on Extradition vis-à-vis particular States to the effect that additional documents, and more specifically *prima facie* evidence of the offence for which extradition is requested (i.e. signed witness statements), have to be submitted by the requesting state?**

1. The Vienna Convention on the Law of Treaties ('VCLT')<sup>1</sup> has entered into force for a number of parties to the ECE, including for instance the UK and Russia. However, it does not apply to the ECE (as between ECE parties that are parties to the VCLT), because the VCLT applies only to treaties, which are concluded by states after the entry into force of the VCLT with regard to such states (VCLT Article 4). Hence, the following analysis examines rules of customary international law, which may coincide in content with some rules set forth in the VCLT.

2. The UK expressed its consent to be bound by European Convention on Extradition ('ECE') on 13 February 1991 without making a reservation to Article 12(2) to the effect that additional documents, and more specifically *prima facie* evidence of the offence for which extradition is requested (i.e. signed witness statements), have to be submitted by the requesting state. The question thus arises as to whether customary international law permits the 'late formulation of reservations', meaning after the State formulating the reservation has expressed its consent to be bound by the treaty.

3. Under customary international law, as reflected in VCLT Article 2(1)(d), a reservation is a 'unilateral statement, however phrased or named, made by a State, when [signing or expressing consent to be bound by a treaty], whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'. A reservation can be formulated only up to the point when the State that formulates it expresses its consent to be bound by the treaty.<sup>2</sup> This is supported by the fact that the time factor is part of the definition of a reservation in VCLT Article 2(1)(d), and part of the customary rule of permissibility of reservations reflected in VCLT Article 19 ('[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation [...]'). If

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<sup>1</sup> Vienna Convention on the Law of Treaties (done in Vienna 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

<sup>2</sup> *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 69 at 85, para. 35.

reservations are formulated late, they are of no legal effects and are null and void.<sup>3</sup>

4. There are two exceptions to this rule. *First*, a treaty may expressly permit that reservations are formulated late (*lex specialis*).<sup>4</sup> However, this is not the case for the ECE. Article 26 entitled 'Reservations' reads:

1. Any Contracting Party may, *when signing this Convention or when depositing its instrument of ratification or accession*, make a reservation in respect of any provision or provisions of the Convention.
2. Any Contracting Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the Secretary General of the Council of Europe.
3. A Contracting Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision. [Emphasis added]

Therefore, Article 26 explicitly *requires* that reservations to the ECE are made either upon signature or when the Contracting Party expresses its consent to be bound by ratification or accession and so this first exception is not available in this case.

5. *Second*, modern practice indicates that the other contracting States may *unanimously* accept a late reservation, in the absence of, or even contrary to, treaty provisions concerning reservations, which require that reservations are formulated up to the point when consent to be bound is expressed, such as Article 26(1) of ECE.<sup>5</sup> The consent of the other contracting States can be perceived as 'a collateral agreement extending *ratione temporis*' the formulation of reservations<sup>6</sup> or a treaty amendment.

6. If the late formulation is opposed, the State proposing the late formulation of a reservation remains bound, in accordance with the initial expression of its consent. If the late formulation is unanimously accepted (even tacitly),<sup>7</sup> the normal rules regarding acceptance of and objections to reservations, as codified in VCLT Articles 20-23, apply with regard to the content of reservations whose formulation took place late.<sup>8</sup>

7. The unanimous acceptance can be express or tacit. Tacit acceptance can be presumed if no contracting State opposes the late formulation within a period of time after which a tacit acceptance can be assumed. The VCLT does not touch on the requisite amount of time, nor

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<sup>3</sup> Text of the Guide to Practice, comprising an introduction, the guidelines, and commentaries thereto, an annex on the reservations dialogue and a bibliography, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10/Add.1), ILCYB 2011-II, ('ILC Commentary to Guide to Practice of Reservations to Treaties'), p. 180, para. 18.

<sup>4</sup> A treaty containing such clause under the auspices of the Council of Europe: Article 30(1), Convention on Mutual Administrative Assistance on Tax Matters, CETS 127 (done in Strasbourg 25 January 1988, in force 1 April 1995).

<sup>5</sup> Letter to governmental official in a Member State, UN Secretariat, 19 June 1984, *UN Juridical Yearbook*, 1984, p. 183; ILC Commentary to Guide to Practice of Reservations to Treaties, p. 177, para. 9 and p. 178, para. 13.

<sup>6</sup> *Ibid*, p. 177, para. 9.

<sup>7</sup> *Ibid*, p. 182, para. 2.

<sup>8</sup> *Ibid*, p. 181, para. 23.

is practice of depositaries in general established.<sup>9</sup> The United Nations Secretary-General ('UNSG') has elaborated a continuous practice to deal with the late formulation of reservations, including in relation to periods within which the other contracting States are to be consulted and after which a tacit acceptance can be assumed.<sup>10</sup> In contrast, the Council of Europe Secretary-General, who acts as depositary to the treaties concluded under the auspices of the Council of Europe, including the ECE, has not developed a continuous practice in this respect.

8. In 2011, the International Law Commission ('ILC') adopted the Guide to Practice on Reservations to Treaties, which was submitted to the UN General Assembly on 16 December 2013 that took note of the Guide to Practice, annexed it to its Resolution, and encouraged its widest possible dissemination.<sup>11</sup> The Guide is not binding, but some of its Guidelines either constitute a codification of existing law (VCLT or customary international law) or a progressive development of the law. The Guide proposes a 12 month period following the date on which the notification by the depositary was received, unless the treaty otherwise provides or the well-established practice of the depositary differs (Guideline 2.3.1). This proposition is a progressive development of international law,<sup>12</sup> but is guided by the VCLT: it has been guided by and parallels the 12 month period for objecting to a permissible reservation under VCLT Article 20(5).<sup>13</sup>

9. Despite the lack of practice in the Council of Europe as to the precise time-frame during which contracting States have to be consulted and oppose the late formulation of a reservation, reservations to a number of treaties concluded under the auspices of the Council of Europe have been formulated late, including to the ECE, without any opposition having been raised by other contracting States.<sup>14</sup> But, these instances are exceptional: some have been attributed (by the state formulating them) to an administrative error; others have been formulated soon after the expression of consent to be bound and before the treaty has entered into force for the reserving state.

10. Hence, a late formulation of a reservation to Article 12 of the ECE by the UK would face a number of hurdles: *first*, if such reservation were to have legal effect, it would have to be unanimously accepted by all other contracting states to the ECE; *second*, owing to the fact that such reservation would not fall within the limited and exceptional circumstances in which late formulation has been accepted, it is unlikely that it will be accepted unanimously;

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<sup>9</sup> ILC Commentary to Guide to Practice of Reservations to Treaties, p. 182, para. 5.

<sup>10</sup> See, Memorandum from the United Nations Legal Counsel addressed to the Permanent Representatives of States Members of the United Nations, 4 April 2000 (LA 41 TR/221 (23-1)). ILC Commentary to Guide to Practice of Reservations to Treaties, p. 183, paras. 6-8.

<sup>11</sup> GA Resolution 68/111, Reservations to treaties, adopted on 16 December 2013, para. 3.

<sup>12</sup> ILC Commentary to Guide to Practice of Reservations to Treaties, p. 183, para. 9.

<sup>13</sup> *Ibid*, paras. 8-9.

<sup>14</sup> While Portugal ratified the ECE on 25 January 1990, on 12 February 1990, Portugal formulated a reservation to Article 1 of ECE (before the entry into force of the Convention for Portugal on 25 April 1990). In response Belgium (a signatory since 13 December 1957) only objected to Portugal's reservation explaining that it is not compatible with the Convention's object and purpose, but there is no evidence that Belgium opposed the reservation's late formulation. On 17 June 2003, South Africa supplemented with a Note Verbale the reservation it made to Article 2 of ECE on 11 June 2003 (i.e. after its accession on 12 February 2003) according to which '[it] regrets the belated communication of the reservation and declaration regarding the European Convention on Extradition, which is the result of an unfortunate administrative oversight.'

*third*, during the time between the proposed late reservation and when a unanimous acceptance or an opposition occurs (arguably within twelve months from the date of notification by the Secretary-General of such proposed reservation), there will be legal uncertainty as to the reservation's validity.

11. The question arises as to whether the UK could make an 'interpretative declaration' that Article 12 of the ECE requires that *prima facie* evidence of the offence for which extradition is requested (i.e. signed witness statements) has to be submitted by the requesting State. The VCLT does not define the term 'interpretative declaration'. The ILC Guide to Practice on Reservations to Treaties defines interpretative declarations as 'unilateral statement[s], however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions' (Guideline 1.2).

12. Interpretative declarations can be made at any time after the adoption of the treaty's text, unless the treaty provides that they can be formulated only at a specific time (Guideline 2.4.7). However, such a declaration by the UK would actually purport to modify the effect of Article 12 of ECE in its application to the UK vis-à-vis other ECE parties, rather than to specify or to clarify the meaning or scope of a treaty provision. It would thus constitute a reservation, despite its title as a 'declaration',<sup>15</sup> and the rules concerning the late formulation of reservations, as explained above, would apply.

13. In any event, the UK could endeavour to establish an agreement between parties to the ECE concerning the interpretation of Article 12. This agreement can be achieved through subsequent practice in the application of the ECE, i.e. UK's conduct and the reactive practice of other parties (by positive conduct or tacit acceptance by silence or omission, in circumstances where some reaction would have been the natural conduct).<sup>16</sup> Although not all parties to the treaty being interpreted need to have engaged in the practice, the practice has to establish the agreement of all parties concerning the treaty's interpretation.<sup>17</sup>

14. Alternatively, the UK could make an interpretative declaration to ECE Article 13<sup>18</sup> pursuant to which it understands this provision to allow the requested State to require the requesting state to submit *prima facie* evidence in relation to the charge made in cases where the requested State cannot conclude that the request as originally formulated is properly founded. Such declaration would purport to clarify the meaning of Article 13, and would be

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<sup>15</sup> See 'however phrased or named' in the definition of a reservation (VCLT Article 2(1)(d)); *Case of Belilos v. Switzerland*, Judgment (Merits and Just Satisfaction), 10328/83, 29 April 1988, para. 49. The ILC Guide to Practice on Reservations to Treaties distinguished reservations from interpretative declarations on the basis of the legal effects that the author of the unilateral statement purports to produce (Guideline 1.3).

<sup>16</sup> Conclusion 9(2), Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-sixth session, 6 August 2014, ILCYB 2014, Vol. II, pp. 168-217; I.C. MacGibbon, Some Observations on the Part of Protest in International Law, 30 BYIL (1953) at 307; Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, para. 272.

<sup>17</sup> I.M. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 2<sup>nd</sup> ed., 1984), p. 48; R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008) 239.

<sup>18</sup> ECE Article 13 reads: 'If the information communicated by the requesting Party is found to be insufficient to allow the requested Party to make a decision in pursuance of this Convention, the latter Party shall request the necessary supplementary information and may fix a time-limit for the receipt thereof.'

permitted. If such declaration, along with other subsequent practice in the application of the ECE, establish the agreement of treaty parties as to the interpretation of the treaty (to the effect of this interpretative declaration), this subsequent agreement would be taken into account together with the context of the ECE in the interpretation of the Convention, as part of the general rule of treaty interpretation under customary international law set forth in VCLT Article 31(3)(b).<sup>19</sup>

15. The UK could denounce the ECE (pursuant to its Article 31) with a view to immediately re-accessing to it formulating a reservation to Article 12 when depositing the instrument of accession. Such an approach is controversial, as it would essentially defeat the system of reservations in general,<sup>20</sup> but also Article 26 of the ECE specifically. However, there is no rule of customary international law (or in the VCLT) that prohibits such practice.

16. As at 1 January 2015, the UK, Albania, Latvia and Serbia are States party to the Fourth Additional Protocol to the European Convention on Extradition ('Fourth Protocol'),<sup>21</sup> all of which are party to the VCLT,<sup>22</sup> and as between them the VCLT applies to the Fourth Protocol (VCLT Article 4). Under the VCLT the late formulation of reservations is impermissible, as explained in paragraph 3 earlier in this section. Although the VCLT does not specify the legal effects of an impermissible reservation, the correct interpretation of the VCLT is that such a reservation is invalid, and produces no legal effects,<sup>23</sup> while the UK will remain bound by the Fourth Protocol without the impermissible reservation formulated late.

17. In any event, Article 13 of the Fourth Protocol permits reservations only to specific provisions:

'3. No reservation may be made in respect of the provisions of this Protocol, with the exception of the reservations provided for in Article 10, paragraph 3, and Article 21, paragraph 5, of the Convention as amended by this Protocol, and in Article 6, paragraph 3, of this Protocol. Reciprocity may be applied to any reservation made.'

A reservation to Article 2 of the Fourth Protocol, which replaces Article 12 of the ECE, is impermissible, and if formulated – even late – it would be invalid. The UK formulated a (permissible) reservation when it deposited the instrument of its ratification of the Fourth Protocol on 23 September 2014, but none contemplating a reservation concerning *prima facie* evidence in relation to Article 12 of the ECE.

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<sup>19</sup> Sinclair, *supra* note 17; Gardiner, *supra* note 17; Conclusion 9(2), Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-sixth session, 6 August 2014, ILCYB 2014, Vol. II, pp. 168-217; Guidelines 4.7.1-4.7.3, ILC Guide to Practice on Reservation to Treaties.

<sup>20</sup> Council of Europe CADHI, Practical Issues regarding Reservations to International Treaties adopted at the 19th meeting (Berlin, 13-14 March 2000), para. 8; A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 3<sup>rd</sup> edition, 2013), p. 142.

<sup>21</sup> Fourth Additional Protocol to the European Convention on Extradition (done in Vienna 20 September 2012, entered into force 1 June 2014), CETS No. 212.

<sup>22</sup> Information available at UN Treaty Collection:

[https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en)

<sup>23</sup> Guideline 4.5.1, ILC Guide to Practice on Reservations to Treaties. See also reasoning of the ILC: ILC Commentary to Guide to Practice of Reservations to Treaties, p. 510, para. 6, and p. 515, para. 18.

18. Even if the UK formulated late a reservation to the ECE whose late formulation was unanimously accepted by ECE contracting States, reservations made to the provisions of the ECE, which are amended by the Fourth Protocol, such as Article 12 of the ECE, do not apply as between the parties to the Fourth Protocol (see its Article 13(2)). The reservation will apply only between parties to the ECE that are not parties to the Fourth Protocol, in accordance with the rules of opposability.

19. As a result, even if the UK, denounces the ECE with a view to immediately acceding to it with a reservation, such denunciation automatically entails denunciation of the Fourth Protocol (Article 14(3) of the Fourth Protocol), and upon accession to the ECE and the Fourth Protocol a reservation formulated to the ECE concerning *prima facie* evidence in relation to Article 12 of the ECE would first have legal effects only in the relationship of the UK with ECE parties that are not parties to the Fourth Protocol, while second the UK will be unable to formulate a valid reservation to the Fourth Protocol (concerning Article 12 of the ECE) other than those prescribed by the Fourth Protocol (Article 13(3)).

**Question A, Part (II): What is the effect of doing so on the UK's ECE treaty relations with other States party?**

1. In the event that a reservation formulated late is accepted unanimously by all other contracting States to the ECE, it would have to be otherwise permissible and it would be subject to the opposability rules concerning reservations. A reservation concerning Article 12 to the effect that additional evidence is required to be submitted by specific ECE parties when they request extradition from the UK would not be incompatible with the object and purpose of the ECE and would be a permissible and valid reservation (VCLT Article 19(c).<sup>24</sup>

2. Between the UK and those that accept the reservation (even tacitly, if they have not raised an objection to the reservation by the end of twelve months after they were notified of the reservation or by the date on which they expressed their consent to be bound by the treaty, whichever is later), the ECE would apply with the reservation (unless the treaty provides otherwise). The reservation would modify for the reserving State in its relations with that other party Article 12 to the extent of the reservation; and would modify Article 12 to the same extent for that other party in its relations with the reserving State.

3. In contrast, between the UK and those that object to the reservation, either the ECE would not enter into force between them (if the objecting States choose to oppose such entry into force) or the provision to which the reservation has been made will not apply to the extent of the reservation. Given that the reservation being considered here specifically will refer to particular ECE parties, their reaction (acceptance or objection) is important.

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<sup>24</sup> This is supported by the fact that the Belgium, Luxembourg and the Netherlands have all made reservations according to which they do not apply Article 28 of the ECE in the relationships between themselves (i.e. specifically formulating a reservation in relation to particular states) and no other contracting State has objected to it (on the basis that the reservations are incompatible with the object and purpose of the ECE owing to the fact that they are formulated in relation to particular parties). See reservations by Belgium on 3 June 1997, by Luxembourg on 16 November 1976, and by the Netherlands on 14 February 1969.



4. On the other hand, if the UK attempted to make a reservation to ECE Article 12 requiring *prima facie* evidence from particular ECE parties that was not permitted (because it has been formulated late without the unanimous acceptance of all other parties) and as a result was invalid, and then sought to rely on that reservation notwithstanding its invalidity, the UK would be in breach of its obligations under the ECE.<sup>25</sup> As a result, if the breach was material, other State parties specially affected by the UK's material breach would be entitled to suspend the operation of the ECE in their relationship with the UK, and injured States would be entitled to resort to countermeasures against the UK pursuant to the law of international responsibility.

**Question B: Can the UK consider itself not bound by the ECE in relation to another ECE party that it regards as not performing the ECE in good faith?**

1. Assuming that an ECE (or Fourth Protocol) party is not performing the treaty in good faith, under customary international law and the VCLT the UK remains bound by the ECE or the Fourth Protocol (as applicable). The only available responses open to the UK as a result of non-performance of the ECE by another State are the following.

2. First, under customary international law on the law of treaties (and under the VCLT), only *material breaches entitle* other parties to respond. A material breach is a breach of a provision essential to the accomplishment of the treaty's object and purpose. The type of response, which can only involve the unilateral suspension of the treaty's operation (not its termination), depends on the nature of the ECE, as a treaty.

3. Multilateral treaties can create bilateralisable relationships between treaty parties, or they can establish standards that are not reciprocal (integral treaties).<sup>26</sup> In the case of a treaty that creates bundles of bilateral relationships between the parties, the specially affected states are entitled to unilaterally suspend the treaty's operation in whole or in part in their relationship with the defaulting state (VCLT Article 60(2)(b)). In contrast, integral treaties that contain provisions relating to the protection of the human person are not subject to the unilateral (or unanimous) suspension of their operation in response to their material breach (VCLT Article 60(5)). Under the VCLT, only treaty provisions of humanitarian character, as opposed to all treaties of integral character, such as treaties that establish uniform conduct for states, are not subject to unilateral suspension of their operation. Although it could be argued that the treatment of treaty provisions of humanitarian character should be extended to all integral treaties, the fact that only some but not all integral treaties are referred to in VCLT Article 60(5) allows the *a contrario* argument that the operation of those not mentioned in that provision are unilaterally suspendable, and thus subject to the same rule as treaties establishing bilateralisable obligations (VCLT Article 60(2)(b)). It is not clear whether this is the state of customary international law, but an argument to this effect is logical. Thus the most that can be argued in relation to customary international law and responses to material

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<sup>25</sup> The mere formulation of an impermissible reservation does not engage the international responsibility of the State that has formulated it. Guideline 3.3.2, ILC Guide to Practice on Reservation to Treaties.

<sup>26</sup> A third type of treaties are interdependent treaties: those where a material breach of the treaty's provisions by one party radically changes the position of every party with respect to the further performance of their obligations under the treaty (VCLT Article 60(2)(c)). Examples of such treaties are disarmament treaties. This type of treaty is not examined further here, as the ECE is obviously not an interdependent treaty.

breaches of treaties is that it is not as yet clear that integral treaties are non-suspendable and are to be treated differently from treaties that establish bilateralisable obligations.

4. Traditionally, extradition as a subject matter is dealt with on the basis of reciprocity, and it could be argued that the ECE is a treaty that creates dyads of bilateral obligations concerning extradition between its parties. The ECE is not a treaty aimed at protecting human persons. Rather, the object and purpose of the treaty found in its Preamble<sup>27</sup> is to ‘achieve a greater unity’ between the members of the Council of Europe ‘by the conclusion of agreements and by common action in legal matters; considering that the acceptance of uniform rules with regard to extradition is likely to assist this work of unification.’ That is not to say that individuals involved in extradition proceedings do not have human rights that are relevant in the context of extradition;<sup>28</sup> rather that the cause of engagement of the parties to the ECE is not to protect individuals as such, but to establish uniform rules as between states as to their cooperation in relation to extradition proceedings. In light of the treaty’s object and purpose, the ECE establishes self-existent standards of uniform application, but does not as such contain provisions of humanitarian character for the protection of human persons. This protection is rather provided to individuals involved in extradition procedures under the Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’).<sup>29</sup>

5. Thus, even assuming that the ECE is classified as an integral treaty, rather than as a treaty that establishes dyads of bilateralisable relationships between its parties, in the current state of customary international law, it is only in the event of a *material* breach by another State party to the ECE that the UK would be *entitled*, if it is a specially affected State, to suspend the ECE’s operation in whole or in part in its relationship with the defaulting state.<sup>30</sup> The suspension of the treaty’s operation would release the parties between whom the treaty’s operation is suspended from the obligation to perform the treaty in their mutual relations

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<sup>27</sup> The International Court of Justice has identified the object and purpose in the treaty’s Preamble: *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, 3 February 1994, ICJ Reports 1994, p. 6, at para. 52; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 13 July 2009, ICJ Reports 2009, p. 21 at para. 79; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422 at para. 68; *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Merits, Judgment, 31 March 2014, para. 56. See also method for identifying the object and purpose of the treaty proposed by the ILC: Guideline 3.1.5.1, Guide to Practice on Reservations to Treaties, adopted by the ILC at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/66/10, [75]), ILCYB 2011-II.

<sup>28</sup> For detailed analysis of human rights of individuals involved in extradition proceedings: D. Azaria, Code of Minimum Standards of Protection to individuals involved in Transnational Proceedings, Expert Report, PC-TJ (2005) 07, Council of Europe, European Committee on Crime Problems (CDPC), Committee of Experts on Transnational Criminal Justice (PC-TJ), Strasbourg, 16 September 2005, available at: [http://www.coe.int/t/dghl/standardsetting/pc-oc/PC-TJ%20\\_2005\\_%2007%20E.%20Azaria.%20Code%20of%20Minimum%20standards.pdf](http://www.coe.int/t/dghl/standardsetting/pc-oc/PC-TJ%20_2005_%2007%20E.%20Azaria.%20Code%20of%20Minimum%20standards.pdf). See also D. Azaria, Minimum standards of protection to individuals involved in transnational proceedings, in *Extradition – European Standards* (Council of Europe 2007), pp. 95-155.

<sup>29</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, (signed at Rome 4 November 1950, entered into force on 3 September 1953) 213 UNTS 221 (as subsequently amended).

<sup>30</sup> However, it could be argued that some provisions in the ECE are of humanitarian character and are thus not subject to unilateral suspension in response to the ECE’s material breach. For instance, the principle of speciality (ECE Article 14) or the principle of *non bis in idem* (ECE Article 9). Even if such argument is unsustainable, a partial suspension of the operation of an ECE provision could be permitted under custom, but could constitute at the same time a violation of the ECHR. For instance, ECHR Article 5(1)(f), 5(2), 5(4)-(5).

during the period of the suspension, but does not otherwise affect the legal relations between the parties established by the treaty.

6. Second, it is arguable – albeit not beyond doubt – that the UK may withhold performance of its treaty obligations until such time as the other party performs under the *exceptio inadimpleti contractus* ('*exceptio*'). It has been argued that the *exceptio* exists outside the VCLT and customary international law set forth therein concerning responses to material breaches. Whether the *exceptio* exists is important because it applies also to *immaterial* breaches of treaty obligations, and is not subject to the conditions concerning treaty law responses to material treaty breaches or concerning countermeasures under the law of international responsibility, discussed below.<sup>31</sup> The *exceptio* would apply only to treaty obligations that are synallagmatic, meaning treaty obligations whose performance is conditioned upon performance of the same or a closely linked treaty obligation by another treaty party.<sup>32</sup> This would be a matter of interpretation of the primary treaty obligations in question.<sup>33</sup> However, even assuming that the *exceptio* exists in this limited manner under international law (custom or a general principle of law), the obligations in ECE do not appear synallagmatic. This is consistent with the treaty's object and purpose (see paragraph 3 in this section).

7. Third, under the customary international law on state responsibility, an injured State may resort to countermeasures in response to an internationally wrongful act pertaining to a breach (material or not) of a treaty obligation, such as an obligation under the ECE. Such response can take the form of suspending compliance with international obligations (under the same treaty or another international obligation outside the treaty breached) owed by the State taking the countermeasure to the responsible State. The wrongfulness of such suspension would be precluded for as long as the internationally wrongful act persists.

8. Countermeasures differ from treaty law responses to material breaches. Under treaty law responses to a material breach the treaty's operation is suspended and the treaty does not constitute an applicable legal standard between the relevant parties. In contrast, under countermeasures the treaty obligations apply, but the wrongfulness of non-performance is precluded for as long as the circumstances that preclude the wrongfulness subsist.

9. However, countermeasures in order to be lawful have to fulfill a number of conditions under customary international law. *First*, in principle they may only be taken by an injured state (or international organization).<sup>34</sup> *Second*, they must be targeted only against the

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<sup>31</sup> J. Crawford and S. Olleson, The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility, 21 *AustYBIL* (2001) 55–74; D. Azaria, The Exception of Non-Performance, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2014).

<sup>32</sup> See the pleadings of the Hellenic Republic before the ICJ in relation to the *exceptio*: Counter-Memorial of Greece, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, 19 January 2010, paras. 8.7 and 8.26. See also Declaration of Judge Bennouna, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, ICJ Reports 2011, p. 709.

<sup>33</sup> Text of the draft articles on responsibility of States for internationally wrongful acts with commentaries thereto, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 31–143 at 72, para. 9.

<sup>34</sup> *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité). Portugal contre Allemagne. Lausanne, 30 Juin 1930*, RIAA, vol. II, pp. 1035–1077 (30 June 1930) at 1057; *Gabčvkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, p. 7, at para. 83. Contra supporting that customary international law permits States (and international

responsible state (or international organization).<sup>35</sup> *Third*, the State taking countermeasures must call upon the wrongdoing State to comply with its obligations of cessation and reparation, notify it of the decision to take countermeasures, and offer to negotiate.<sup>36</sup> *Fourth*, countermeasures have to be temporary and reversible.<sup>37</sup> *Fifth*, they have to be proportionate to the injury suffered taking into account the gravity of the breach and the rights in question.<sup>38</sup> *Sixth*, countermeasures are not forcible and may not affect ‘fundamental human rights’ obligations, humanitarian character obligations prohibiting reprisals, and *jus cogens* norms.<sup>39</sup> *Seventh*, countermeasures may not be taken, if the internationally wrongful act has ceased and the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties including provisional measures.<sup>40</sup>

10. Finally, an argument could be made that owing to an implied term in the ECE or the Fourth Protocol (as applicable) according to which the UK is not obliged not to require *prima facie* evidence supporting the extradition request, if the requesting State exercises *its rights* under the ECE or the Fourth Protocol (as applicable) in bad faith. This would be a

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organisations) other than the injured State to resort to countermeasures: L.-A. Sicilianos, Countermeasures in Response to Grave Violations of Obligations owed to the International Community, in J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility*, (Oxford University Press, 2010), 1137–1148 at 1148.

<sup>35</sup> Article 49(1), Text of the draft articles on the responsibility of States for internationally wrongful acts, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 26–30.

<sup>36</sup> Article 52(1), Text of the draft articles on the responsibility of States for internationally wrongful acts, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 26–30; *Responsabilité de l’Allemagne à raison des dommages causés dans les colonies portugaises du sud de l’Afrique (sentence sur le principe de la responsabilité) (Portugal contre Allemagne)*, RIAA, vol. II, pp. 1011–1033 (31 July 1928) at 1026; *Gabčvkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, p. 7, at para. 84. Urgent countermeasures may be taken with a view to preserving the rights of the injured State: Article 52(2), Text of the draft articles on the responsibility of States for internationally wrongful acts, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 26–30. Judge Bennouna referred to the obligation to notify and to offer to negotiate although he did not expressly suggest that he considered it to be of customary nature: Declaration of Judge Bennouna, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, ICJ Reports 2011, at 710.

<sup>37</sup> Articles 49(2)-(3) and 53, Text of the draft articles on the responsibility of States for internationally wrongful acts, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 26–30; Text of the draft articles on responsibility of States for internationally wrongful acts with commentaries thereto, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 31–143 at 130–131, para. 7; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, 5 December 2011, ICJ Reports 2011, p. 644 at para. 164; *Gabčvkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, p. 7, at para. 87.

<sup>38</sup> Article 51, Text of the draft articles on the responsibility of States for internationally wrongful acts, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 26–30; *Responsabilité de l’Allemagne à raison des dommages causés dans les colonies portugaises du sud de l’Afrique (sentence sur le principe de la responsabilité) (Portugal contre Allemagne)*, RIAA, vol. II, pp. 1011–1033 (31 July 1928) at 1011; *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, RIAA, Vol. XVIII, pp. 417–493 (9 December 1978) at para. 83; *Gabčvkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, p. 7, at para. 83. O.Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford: Clarendon Press, 1988) pp. 83–95.

<sup>39</sup> Article 50, Text of the draft articles on the responsibility of States for internationally wrongful acts, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 26–30. For definition of peremptory norms of international law and the law of treaties: VCLT Articles 53, 64, and 71.

<sup>40</sup> Article 52(3), Text of the draft articles on the responsibility of States for internationally wrongful acts, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 26–30; *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, RIAA, Vol. XVIII, pp. 417–493 (9 December 1978) at paras. 91 and 94-96.

matter of interpreting the primary rules contained in the ECE or the Fourth Protocol (as applicable). However, this argument is unsustainable. There is no evidence that such a term specifically exists in the ECE (or the Fourth Protocol as applicable).