a matter of discretion and every State is by reason of its territorial supremacy competent to exclude aliens from the whole or any part of its territory, discrimination in this regard on the basis of the alien's race, religion, sex or colour has been condemned by States as immoral and as not being consonant with the concept of human dignity.

Opinions of Writers

National legislations that mark discrimination against aliens residing in or emigrating from particular geographical areas, or against those belonging to a particular race, are in the view of **Hyde**, "tokens of arrogance that defy explanation and produce resentment on the part of the States whose nationals happen to be signed out for exclusion."[19] **Fenwick** says: "the exclusion of certain races as being unassimilable is . . . a political rather than a legal question."[20] Broadly, in the view of publicists, since international law does not forbid a State to exercise the largest discretion in formulating tests of undesirability of aliens seeking admission into its territory, discriminatory exclusion laws could be challenged merely on grounds of policy rather than on those of legality. Discrimination on account of race, colour and religion is also condemned by civilized nations as an anachronism in the present day world. In the view of **Hudson** and **Brierly**, respect for human rights is an important element in securing peaceful and friendly relations among nations.[21]

Practice of Member States of the Committee

In the matter of admission of aliens, the States participating in the Committee do not appear to practise any discrimination merely on account of the individual's religion, sex or colour. But Japan takes the view that such discriminatory treatment may be called for towards a State which indulges in such practice.

Practice of States other than Member States of the Committee

Generally foreign visitors and those who seek admission for temporary stay are permitted to enter into a State. Taking advantage of the fact that the law of nations has not as yet forbidden a State to exercise largest discretion in establishing tests of undesirability of aliens seeking entrance into its territory, several Western States have been excluding certain classes of aliens as undesirable for purposes of immigration. Originally the United States permitted unfettered immigration and it was only after World War I that

19 Hyde: International Law, Vol. I, 218.
20 Fenwick: International Law, Vol. I, 3rd ed., 269.
21 Lauterpacht: International Law and Human Rights, (London 1950), 154.

quantitative legislative restrictions were introduced. In 1921 as a rule of emergency, and in 1924 as a definitive legislative policy of selective immigration the number of immigrants was limited by the establishment of quotas for the various countries. Thereafter restrictions became increasingly stringent culminating in the provisions of the Immigration and Nationality Act of 1952 (popularly known as Mc Carren Act). According to this Act only the alien applicant who fulfils the legal prerequisites and comes within the quota is entitled to admission. The quotas were computed by means of a complicated method, taking into account the respective numbers of immigrants prior to 1920.[22] Generally, aliens who are ineligible for American citizenship have been excluded. The practical effect of such a scheme according to Secretary Hughes was to single out Japanese immigrants for exclusion. Likewise, the matter of Chinese and Asiatic immigration has been regulated by the so-called "barred-zone" provisions of the immigration laws which with exceptions exclude foreign nationals of the Asiatic barred zone including natives of certain islands near Asia and a portion of the Asiatic mainland defined in the law as lying between specified parallels of latitude and meridians of longitude. The 'barred zone' includes the eastern portions of Baluchistan and Afghanistan, all but the extreme northern portion of Oman, most of India, Turkestan, Nepal, Bhutan, Siam, former French Indo-China and the Malaya Peninsula. It also includes the islands of Ceylon, Sumatra, Java, Borneo, Celebes, Timor, and New Guinea.[23] But natives of the barred zone in certain enumerated occupations of status together with their legal wives and children below the age of 16 accompanying them or following to join them are exempt from the above excluding provision.[24]

The laws and regulations of Australia, Canada and South Africa exclude aliens of the Asiatic races from their territories as prohibited immigrants. Also the laws of Brazil and Canada, as those of the United States of America, have adopted the quota system regulating the entry of alien immigrants. It appears that Panama imposes a heavier re-entry tax on the nationals of some States, especially the Chinese.[25]

22 Nussbaum: American-Swiss Private International Law, (New York, 1958), 13.
23 Moore: Digest, op. cit., Vol. IV.
Clement L. Bouve: Exclusion and Expulsion of Aliens in the United States. 85-111.
24 Hyde: International Law, op. cit., 224-25.
25 Re Munshi Singh, British Columbia Court of Appeal, 1914 20 B.C.R. 243; Mackenzie, Norman and Laing; Canada and the Law of Nations (1938) 269-272. The Immigration Restriction Act 22 of 1913 of South Africa. The Australian Immigration Acts 1901-1930; Ex parte Gurwitz (1937) Netal P.D. 185; Lay v. La Nacion (1939), 37 Registre Judicial 227.

It may be observed that to exclude all aliens impartially raises no issue of discrimination whereas the exclusion of the citizens of a particular State or region or race unjustifiably denies to that State a right or privilege accorded to others. Such discriminatory exclusions and immigration policies which have been of late showing reversion to the practice of excluding aliens for political, economic or racial reasons, are regarded as violative of the spirit of international law and are not in keeping with that State's membership in the international community. Further, the total exclusion of nationals of one particular State might diplomatically be regarded as an affront or as an unfriendly act towards the State concerned.

Article 4

Admission into the territory of a State may be refused to an alien:

(1) who is in a condition of vagabondage, beggary, or vagrancy;

(2) who is of unsound mind or is mentally defective;

(3) who is suffering from a loathsome, incurable or contagious disease of a kind likely to be prejudicial to public health;

(4) who is a stowaway, a habitual narcotic user, an unlawful dealer in opium or narcotics, a prostitute, a procurer or a person living on the earnings of prostitution;

(5) who is an indigent person or a person who has no adequate means of supporting himself or has no sufficient guarantee to support him at the place of his destination;

(6) who is reasonably suspected to have committed or is being tried or has been prosecuted for serious infractions of law abroad;

(7) who is reasonably believed to have committed an extraditable offence abroad or is convicted of such an offence abroad;

(8) who has been expelled or deported from another State; and

(9) whose entry or presence is likely to affect prejudicially its national or public interest.

Commentary

Excludable Aliens

Article 4 incorporates a widely recognised rule of State practice regarding the exclusion of certain undesirable aliens. Under

Clause (1), a State may exclude certain socially unfit persons who are generally excluded by the immigration laws of most States. This category includes among others, paupers, professional beggars, and persons who have no settled homes, etc. Similarly Clause (2) entitles a State to refuse admission to aliens who are mentally defective. This category generally comprises idiots, imbeciles, insane persons, epileptics etc., as these are regarded as physically and socially unfit. Normally an individual who has been certified by the medical officer at the port of entry as being mentally defective is denied admission into the State concerned. Clause (3) empowers a State to exclude individuals afflicted with loathsome or virulently contagious disease such as tuberculosis, cholera, trachoma etc. In the interests of the health of the nation and in order to avoid their becoming a public charge these persons are not permitted to enter the State. Under Clause (4), a State has the right to exclude certain morally unfit persons such as stowaways, drug addicts, persons engaged in illegal opium trade, individuals seeking admission into the State for purposes of prostitution, persons procuring or attempting to procure or import prostitutes and persons who generally live on the earnings of prostitution. Clause (5) excludes from admission persons who have no financial support or who have no other means of supporting themselves after reception into the State, lest they should become a public charge. By way of exception to this rule certain unaccompanied children, if otherwise unobjectionable, are admitted by some States if they are not likely to become a public charge in the State of residence. Clause (6) establishes the right of a State to exclude an alien criminal who has served his sentence and also a person who is reasonably suspected to have perpetrated a crime or one who has escaped from jail or police custody before being convicted of a crime involving moral turpitude. Under Clause (7), those who are suspected to have committed extraditable offences abroad or those who have been already convicted of such offences and who have undergone their punishments could be refused admission. It may be added that persons convicted of or those who admit having committed certain well defined political crimes are excluded from the ambit of this rule. Clause (8) incorporating another rule of State practice lays down that an alien who has been previously deported from a State may not be received in a State. This sub-clause includes foreign nationals arrested and deported in pursuance of the applicable laws of the land and aliens who have been formally ordered to be deported. Clause (9) establishes the right of a State to refuse admission to an alien if his presence on its territory is most likely to endanger its national interests, including disturbance to its peace and tranquillity. General-

ly most States deny admission to anarchists, members of illegal organisations and other undesirable individuals of like character.

Practice of Member States of the Committee

As in other States, Iraq and India claim unlimited discretion in the matter of exclusion of aliens from their territories, without assigning any reasons therefor. Only unobjectionable non-immigrant aliens are admitted into the countries of the Committee. The Participating Countries of the Committee claim the right to deny admission to certain categories of aliens for political, economic, health, moral and other reasons, but not on merely racial grounds. Burma and Egypt exclude the entry of unskilled labourers, and those likely to endanger public security and the general morality of the respective States. Undesirable persons are not allowed to enter Ceylon, Indonesia, Iraq and Japan. Indigent people, those suffering from incurable disease, those who are guilty of extraditable crimes, those who have been previously expelled from Syria, those who are likely to endanger the security of the country, prostitutes and their collaborators and the smugglers of opium, hashish and other narcotic drugs are denied admission into the Syrian Region of the United Arab Republic. But aliens seeking entry into Syria for purposes of medical treatment are normally received provided that they have adequate means to support themselves and that they have obtained the necessary prior permission for the purpose from the Ministry of Foreign Affairs.

Practice of States other than Member States of the Committee

Practice of States gives expression to the maxim that a sovereign nation has the broadest right as inherent in sovereignty and indispensable to self-preservation to refuse admission to all aliens into its territory at will and that a State is under no duty to admit all aliens. No State can question its authority to determine as to what aliens or categories of aliens are undesirable and excludable. Most States have on their statute books immigration laws which contain provisions concerning excludable aliens. From an international point of view the immigration laws generally contain two features: (1) the broad definition of the term immigrant and (2) the mode and extent of the restriction placed upon immigration generally.

The immigration laws of the United States generally exclude the following aliens: insane individuals, paupers or vagrants, diseased persons, criminals, polygamists, anarchists, members of unlawful organisations, prostitutes and procurers, indentured labourers, persons likely to become a public charge, persons previously deported, persons excluded from admission, persons financially assisted to come to the United States, stowaways, children unaccompanied, natives of the Asiatic barred zone, illiterates and accompanying aliens in certain cases.[25a] Under the laws of the United Kingdom undesirable foreigners are not permitted to enter her territories. The undesirable aliens, according to her laws and regulations, are those who had been convicted of a felony or misdemeanour or had been in receipt of parochial relief. They also exclude alien immigrants who are afflicted with disease and who have not the means of decently supporting themselves or their dependents. The laws and regulations of most of the States exclude more or less similar classes of aliens from admission for the same reasons set out above. Further, in times of war or national emergency in the interests of public safety, exceptional restrictions if not prohibitions in addition to normal restrictions, are imposed upon the entry of aliens into the State concerned, which include withholding of immigration visas, passport or tourist visas and documents of like character.

Article 5

A State may admit an alien seeking entry into its territory for the purpose of transit, tourism or study, on the condition that he is forbidden from making his residence in its territory permanent.

Commentary

Visits of short duration are to be permitted

This Article embodies a principle which States mostly follow in actual practice. Generally, States make a distinction between aliens who intend to settle down permanently in the country and those who intend only to travel as tourists, students or trainees.[26] The latter category of aliens are not subjected to stringent restrictions and qualifications.

Practice of Member States of the Committee

Burma and Iraq permit the entry of both the classes of foreigners without any distinction but India and Indonesia differentiate between tourists and permanent settlers. Broadly, the laws relating to entry of non-immigrant aliens are less stringent. Although immigration to Ceylon is generally not permitted, her laws make no distinction between the tourists, whether they are for a short or for a prolonged visit. In India admission for permanent settle-

[25a] Hyde: International Law, Vol. I, 221-226.
[26] Oppenheim: International Law, Vol. I, op. cit., 676.

ment is generally not feasible. In Indonesia and in the Egyptian Region of the United Arab Republic foreigners seeking admission for permanent settlement are granted permission for the purpose only if the latter are considered to be capable of contributing to the culture or wealth of the country concerned. Aliens are admitted into the Syrian Region of the United Arab Republic on condition that they will not seek employment during their stay in Syria. Once they obtain the authorization for permanent residence they are at liberty to look for a job therein. Japan makes a distinction between the permanent residents, the aliens who enter for prolonged visit and those who enter as mere tourists for short stay. In the Egyptian Region of the United Arab Republic a distinction is generally made between ordinary visitors and immigrants. Its immigration policy favours foreigners who are likely to contribute to the national wealth either culturally or financially. Further, in order to attract more and more tourists to the country it has rationalized its visa and customs regulations and other formalities as well.

Practice of States other than Member States of the Committee

The generality of State practice establishes the rule that an alien is not allowed to settle down in a country without having asked for it and having obtained the necessary authorization for the purpose. Tourists are normally admitted into a State if they satisfy the routine police and visa regulations of the State concerned. Some States permit the entry of aliens for permanent settlement only if they are specialists and skilled technicians. For instance, the Mexican Immigration Law admits technicians, and Singapore permits the entry of foreign specialists for specified periods. Normally entry permits are granted to such foreign specialists only when suitable nationals are not available.[27] Immigrants to the United States are required to comply with the terms and conditions laid down in the Immigration Law of 1924. Non-immigrants are generally required to comply with the applicable police and visa regulations which are less cumbersome and stringent than those that are applicable to immigrants.[28] The term immigrant is defined in these terms—". . . Any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign continuous territory, (5) a **bona fide** alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade between the United States and the foreign State of which he is a national under and in pursuance of the provisions of a treaty of commerce and navigation, and his wife, and his unmarried children under twenty-one years of age, if accompanying or following to join him."[29] Further, the United States like most States admits freely into its territory those American residents who are returning to the United States from a temporary visit abroad. It may be added that although Immigation Law of the United States normally prohibits immigration of the aliens of the Asiatic barred zone, certain categories of individuals from the barred zone are nevertheless permitted to enter. These persons include **inter alia**, government officials, religious teachers including missionaries, lawyers, chemists, civil engineers, medical practitioners, teachers, students, artists, merchants and travellers for curiosity and pleasure.[30]

27 The Hindustan Times, Delhi, February 23, 1959.

28 The United States has recently eased its visa restrictions to encourage more foreign tourists. Under the new regulations, a foreigner can have an existing United States visa renewed instead of having to apply for a new one when his old visa expires. The Times, London, May 15, 1961.

Article 6

A State shall have the right to offer or provide asylum in its territory to political refugees or to political offenders on such conditions as the State may stipulate as being appropriate in the circumstances.

Commentary

The right of asylum

This Article establishes the right of a State to grant asylum on its territory to foreign nationals fleeing from political, racial or religious persecution in their own State. Just as a State possesses the undoubted right to grant or refuse admission to political refugees into its territory, it has also the right to stipulate conditions which a political fugitive is expected to comply with after his entrance into the host State. Under international law it is the duty of every State to prevent all individuals including fugitive aliens living on its territory from endangering the territorial integrity of

29 Hyde: International Law, op. cit., Vol. I, 226-227; Sections 3, 43 Stat 153, 154, as amended on July 6, 1932, 47 Stat 607, 8 U.S.C.A. E. 203.

30 Hyde: International Law, op. cit., Vol. I, 225-227.

another State by organizing expeditions or by preparing common crimes against that State.[31]

Practice of Member States of the Committee

While the laws of Indonesia, Iraq and the U.A.R. have specifically provided for the grant of asylum to political refugees, those of Burma, Ceylon, India and Japan are silent in this regard. But Burma and Japan have in fact been granting asylum to political offenders. According to Iraq and the U.A.R. asylum to political refugees is a well established institution under customary international law. The Participating Countries of the Committee are of the view that the right of asylum is nothing more than the liberty of every State to grant a political refugee asylum requesting for it, that the fugitive has no legal right at international law to demand such asylum and that the only international legal right involved herein is that of the State of refuge itself to grant asylum at will.

Universal Declaration of Human Rights and Asylum

Article 14(1) of the Universal Declaration of Human Rights, approved by the General Assembly of the United Nations in 1948, which provides that "Every one has the right to seek and to enjoy in other countries asylum from persecution", does not, in the view of the Participating Countries of the Committee, impose any legal obligation on a State to grant asylum to political offenders and to receive persecuted aliens on its domain.

Vigilant Supervision of the political refugee

As regards the duty of surveillance of a political refugee by the receiving State there does not appear to be unanimity among the Member Countries of the Committee. While the laws of Burma and Ceylon are silent in this regard, the law of Japan does not admit of such surveillance at all. Both India and the U.A.R. are not in favour of surveillance of political refugees by the host State. Iraq and Indonesia take the view that this may be resorted to only if it becomes necessary. Where a political refugee misuses the hospitality of the host State, Burma, Ceylon and Japan are inclined to the view that he may be deported, but according to Indonesia and Iraq, he could be tried and punished just like any other criminal offender. On the other hand, the U.A.R. takes the view that the State concerned should forthwith draw his attention to such impropriety before a decision in favour of other appropriate action could be taken. But if he still presisted in such objectionable poli-

31 Oppenheim: International Law, Vol. I, op. cit., 678

tical activities, such refractory alien could be deported. In any case the deportation should not amount to extradition in disguise.

Practice of States other than Member States of the Committee

The right of political asylum has been developed during the 19th century largely under the influence of the Belgian practice. Belgium incorporated the principle of non-extraditability of political offenders in its Extradition Law in 1833. This principle has been embodied in course of time in the extradition laws of several other States. Further, several countries began incorporating the Belgian principle into their extradition treaties either verbatim or with minor variations.[32] As this right has always been upheld by the practice of States since the 19th century, it has crystallized into a rule of customary international law according to which, in the absence of extradition treaties stipulating to the contrary, a State is under no legal duty to refuse admission to a fugitive alien into its territory or in case he has been admitted, to expel or deliver him up to the prosecuting State. Moreover, States have always been upholding their competence to grant asylum if they choose to do so. In **re Fabijan,** it was held that if in the matter of the grant of asylum the jurisdiction of a territorial State was restricted, such a restriction could be possible only from the relevant provision of a treaty between the parties concerned.[33] The so-called right of asylum according to general State practice is nothing more than the freedom of a State to grant or refuse at its discretion asylum to an alien requesting for it. It may be added that the right of a State to grant asylum has been recognized as an institution of humanitarian character.[34] To sum up, the right of asylum does not mean that the individual has any right to claim the favour of asylum from a State, nor does it connote that a State is under any semblance of legal duty to grant it when sought for since under international law a State has the unlimited discretion to decide whether or not to grant such asylum to an alien.

Asylum in modern Constitutions

From the fact that Constitutions of several States contain provisions for the grant of asylum to political offenders, one cannot deduce that the granting of this privilege has become a general principle of law recognized by civilized nations. However, this so-called right belongs to the State and not to the refugee concerned.

32 Oppenheim: International Law, op. cit., Vol. I (1957), 679.

33 In re Fabijan, Annual Digest and Report of Public International Law Cases, 1933-34, 360-372.
Oppenheim: International Law, Vol. I, op. cit., 677.

34 Article 3 of the Convention on Political Asylum adopted in 1933 by the Pan American Conference.

In the United States, although normally a distinction is made between individuals who voluntarily seek refuge in its territory from political persecution in their own country, and those who are compelled to emigrate to the United States under compulsion exercised by the authorities of their Government, the practice reveals that she grants refuge to persons whose lives are believed to be in actual jeopardy by reason of their political activities in their home State, and that such individuals applying for sanctuary therein are customarily admitted for a reasonable period under a liberal interpretation of the immigration laws, provided they can establish to the satisfaction of the competent authorities that their personal safety is actually in danger, and that the offences for which they have been indicted are not such as would render them inadmissible under the regulations or orders of the United States.[35]

Article 7

(1) Subject to the conditions imposed for his admission into the State, and subject also to the local laws, regulations and orders, an alien shall have the right—

(i) to move freely throughout the territory of the State; and

(ii) to reside in any part of the territory of the State.

(2) The State may, however, require an alien to comply with provisions as to registration or reporting or otherwise so as to regulate or restrict the right of movement and residence as it may consider appropriate in any special circumstances or in the national or public interest.

Note : The Delegation of Indonesia expressed preference for the text adopted at the Colombo Session in Clause (1) of this Article, which reads as follows : (1) "Without prejudice to the competence of a State to regulate the right of sojourn and residence which shall include the liberty to compel an alien to comply with its requirements as to registration, an alien shall be entitled to travel freely, sojourn, or reside in the territories of the State in conformity with the laws and regulations in force therein".

Commentary

Alien's freedom of movement

Under this Article although the host State has, in the absence of treaty obligations to the contrary, the undoubted right to regu-

35 Hackworth: Digest of International Law, Vol. III. 734; Hyde: International Law, op. cit., Vol. I, 229.

late the admission of aliens to its territory by imposing such terms and conditions as may be deemed by it to be consonant with its national interests and also it has the authority to regulate his movement during his sojourn or stay within its borders, the alien shall have, subject to the applicable local laws, regulations and executive orders, the right to move about freely therein and shall have the freedom to reside in any part of the host State.

Registration of aliens

Further, as it is not uncommon for a State to require the registration of foreign nationals sojourning or residing in its territory, this Article establishes the right of the host State to demand from the alien compliance with its laws and regulations relating to alien registration, periodical reporting, etc., which are intended to keep track of the aliens within its borders. Furthermore, as under clause (2) of this Article, the State of residence, if its national interests so require, has the right to restrict the alien's right of movement and of residence, clause (2) when read clause (1) of the Article serves to limit the ambit of the alien's freedom to choose the place of residence, his right to move from place to place etc., depending upon the peace and tranquillity of the host State as well as the discretion of that State to decide for itself whether or not it can allow such freedom of action to the alien after the latter's reception. This Article gives expression to the general State practice on this subject.

Opinions of writers

Affirming the normal practice of States in this regard, **Oppenheim** states : "A State can . . . as Great Britain did in the former times and again during the First World War and since, compel them to register their names for the purpose of keeping them under control."[36] The views of several other writers are to the same effect.

Practice of the Member Countries of the Committee

Subject to exigencies or emergencies aliens in the Member Countries of the Committee are permitted to travel about or to reside in any part of the State they visit. Registration of aliens is required in all the countries participating in the Committee. Under the Aliens Registration Law, an alien entering Japan must notify his presence to the mayor of the city concerned within 60 days after his arrival, and this is done in the form of a request for permission to stay. Any change of address will have to be

36 Oppenheim: International Law, Vol. I, op. cit., 689.

notified to the authorities within 15 days of such change. Foreigners in the Egyptian Region of the U.A.R. are required to notify their arrival to the Foreigner's Department. They are expected to furnish the authorities with all the relevant information required by the latter, including the purpose and the possible duration of the visit. A Residence Card must be obtained in case the stay is likely to last more than six months. As regards the alien's obligation to register at every town he visits in the host State, there is no unanimity in the practice of the Member States of the Committee. For instance, while an alien in the U.A.R. is normally expected to notify the authorities of any change of address, he is not required to do so in Burma, Ceylon, Iraq and Japan. Even in the U.A.R. exceptions to the general rule are permissible, for instance, tourists are not required to notify the change of address. Although an alien in India is not enjoined to register his arrival or presence at each and every place of his visit, he is nevertheless expected to keep the authorities informed of his movements in the country. Despite the requirement that a visitor to Indonesia is bound to register only at the place of entry, the managers of hotels or boarding houses are under a duty to maintain registers of all aliens staying in their hotels or boarding houses as the case may be. Normally, the duty of the alien to register emanates from the State's right to regulate or restrict the movement and residence of aliens within its borders. Thus Indonesia, like most other States takes the view that a State possesses the right to regulate the alien's right of sojourn or residence on its territory. An alien's right to travel about freely in the country or to reside anywhere within her borders must be subject to his complying with the applicable laws and regulations including those relating to registration therein.

Practice of States other than Member States of the Committee

It is not uncommon for a State to require registration of foreign nationals sojourning or residing within its borders. Some States compel aliens to register their names only in times of national emergency such as war or internal disturbances merely for the purpose of keeping track of them. This power is inherent in the sovereignty of the State and is deemed essential for its self-preservation.

During 1917-1918, several States of the United States of America passed suitable laws empowering the governor to require registration of aliens as and when the United States becomes a

belligerent or when public necessity requires such a step.[37] Some States of the United States have passed registration laws during 1939-1940, e.g., the Pennsylvania Alien Registration Act of 1939 provides for the limitation, regulation and registration of aliens as a distinct group for reasons of security of the nation. Moreover, in several States of the United States of America even the municipalities imposed the duty of registration on aliens residing within their jurisdiction. Aliens need not carry cards and may only be punished for wilful failure to register. Section 31 of the United States Act of Congress approved on June 28, 1940 makes it obligatory on the part of every alien "now or hereafter in the United States 14 years of age or older, who remains in the United States for 30 days or longer, to apply for registration and to be finger-printed." Provision is also made in the same section for the registration by parents or legal guardians of alien children under 14 years of age. The Supreme Court of the United States of America has on several occasions reaffirmed the undoubted right of the United States Congress "to provide a system of (alien's) registration and identification . . . and to take all proper means to carry out the system which it provides" in this regard.[38]

In the United Kingdom normally the Secretary of State is empowered to make regulations relating to the landing and embarking of aliens and the conditions to be imposed upon them. In addition to or in substitution for the general restrictions, an alien or a class of aliens could be subjected to such special restrictions as the Secretary of State may deem fit in the public interest to order [Aliens Order, 1920, Art. (II) (1)]. Such special restrictions relate to residence, reporting to the police, registration, occupation, employment, the use or possession of any machine, apparatus, arms and explosives, or other articles, as well as other matters deemed necessary. The Aliens Order of 1920 deals with the following subjects: duty of a householder with whom an alien stays, alien's registration, certain particulars to be supplied by the alien, his exemption from registration, issue of registration certificate and the duties of keepers of premises.[39] In September 1939

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37 Conn. Gen. Stats. (1930), Tit. 59. See. Fla Comp. Gen., Laws (1927), Sec. 2075; Iowa Code (1938), Sec. 503; La. Gen. Stats. (DART, 1939), tit. 3, Sec. 482; Me. Rev. Stats. (1930), ch. 31, Sec. 3; N. H. Pub. Laws. (1926) Ch. 154; N.Y. Cons. Laws. (Executive Law), Sec. 10.

38 142, U.S. 651, 459: 149. U.S. 698, 705-707.

39 Halsbury's Laws of England, Third Revised Edition, Vol. XV London 1950, 256-257.

an additional restriction requiring an alien to furnish particulars about his business address to the registration officer was imposed[40]

Principles embodied in certain Conventions

The same principle has been adumbrated in the Inter-American Convention on the Status of Aliens (1928), Article 2 of which declares that "Foreigners are subject as are nationals to local jurisdiction and laws, due consideration being given to the limitations expressed in conventions and treaties".[41] The International Conference on Treatment of Foreigners held in Paris in 1929, excluded from its consideration problems relating to the admission of aliens, although the proceedings indicate approval of an unperfected text which provided, in part in these terms: "Each of the High Contracting Parties remains free to regulate the admission of foreigners to its territory and to make this admission subject to conditions limiting its duration, or the rights of foreigners to travel, sojourn, settle, choose their place of residence, and move from place to place".[42]

Article 8

Subject to local laws, regulations and orders, an alien shall have the right—

(1) to freedom from arbitrary arrest;

(2) to freedom to profess and practise his own religion;

(3) to have protection of the executive and police authorities of the State;

(4) to have access to the courts of law; and

(5) to have legal assistance.

Note : (a) The Delegation of Ceylon was of the view that in clause (2) the expression "to freedom of religious belief and practice" should be substituted;

(b) The Delegations of Burma and Indonesia suggested retention of clause (2) of the Draft adopted at the Colombo Session which provides that :

"Aliens shall enjoy on a basis of equality with nationals protection of the local laws".

The Delegations of Iraq and Japan had no objection to the retention of this clause.

40 Order dated September 18, 1939, S.R. & O. 1939 No. 1059.
41 Hudson: International Legislation, Vol. IV, 2374.
Briggs: The Law of Nations, op. cit., 530.
42 League Document C.I.T.E. 62, 1930, II, 5, 419-421.
Briggs: The Law of Nations, op. cit., 536.

Commentary

Alien's rights to liberty, freedom of religion and protection for his person and property

Following the general trend and considerations of Articles 7, 11 and 12, Article 8 guarantees to aliens certain essential rights relating to their liberty, freedom of conscience, protection from executive and judicial organs of the State of residence. All these four articles, generally speaking, aim to secure to an individual certain "essential rights" which Mr. Garcia Amador describes as "fundamental human rights"[43] According to the jurisprudence of the General Claims Commissions, established under bilateral agreements between the United States and certain Latin American States, these were known as the "Minimum Standards of International Law" which every State must normally guarantee to foreign nationals on its territory. A vast majority of the modern written Constitutions have incorporated these provisions, among others, as "Fundamental Rights" of the citizens. Broadly, the rights and freedoms set out in these four articles are made available to citizens and non-citizens alike in conformity with the applicable local laws, regulations and orders. From the fact that these rights and freedoms are usually subject to such limitations and restrictions as the laws, regulations and orders expressly prescribe for reasons of internal security, public order, health and morality of the State of residence, it is clear that they are not absolute rights. Further, it may be added that although the leading Western nations had all along been asserting that these essential rights of aliens flowed from the duty of States to alien residents under customary international law, scores of bilateral treaties and agreements have been, at the same time, concluded by these nations providing for the enjoyment of these rights and privileges for the nationals of the contracting parties within the territories of the other contracting party in accordance with the standards of reciprocity and national treatment.[44]

Freedom from arbitrary arrest

Under clause (1) of Article 8, the alien has the right to freedom from arbitrary arrest. The term "freedom from arbitrary arrest" indicates that an alien cannot be arrested unless he has acted in violation of a valid local law. In

43 Yearbook of International Law Commission, 1958, Vol. II, 71.
44. Neer Claim (1928).
Schwarzenberger: International Law, Vol. I, 3rd ed., 200-205.
Per Judge Black in Hines v. Davidowitz et al. (1941) 312, U.S., 52.

case of arrest, he has the right to be informed of the grounds of such arrest, or the reasons for such arrest. He must be produced before the appropriate authorities of the State within a reasonable period of time after his arrest for adjudication of the alleged offence. He has the right to choose and employ a counsel for purposes of his defence. Finally, the appropriate rules of procedure must have been complied with by the authorities concerned. Deviation from the rules of natural justice may give rise to a claim for damages as under international law failure to fulfil an international obligation gives rise to international responsibility of the State concerned.

Freedom of religion

Subject to the local laws, regulations and orders, clause (2) secures for the alien the right to profess and practise his own religion. Normally, the right to profess connotes the right to talk freely about one's own religion and the right to practise the same indicates the right to give expression to one's faith by means of private or public religious pursuits.

Alien's protection by the State organs

Incorporating a well established rule of customary international law, clause (3) guarantees to the alien the protection of the administrative or executive organs of the State of residence. Since an alien after his entry into a State falls under the territorial jurisdiction of that State, international law imposes on the latter the duty of affording reasonable protection for his life, liberty and property. Experience has shown that international controversies of the gravest moment have arisen in the past from the wrongs to another's subjects inflicted, or permitted by a government.[45] Failure to safeguard adequately the life, freedom, human dignity or property of aliens has given rise to international responsibility of the State concerned.[46] According to modern State practice, aliens normally enjoy the protection of the State organs on a footing of equality with the nationals.

Right of access to courts of law

Giving expression to practice of States and a rule of traditional international law, clause (4) specifically lays down that an alien is entitled to have the right of access to the local courts of law for the vindication of his legal rights. As in the absence of a provision of this character, the alien's essential rights may tend to

45 Hines v. Davidowitz et Al (1941), 312 U.S. 52.
46 Schwarzenberger: International Law, Vol. I, op. cit., 200-201.

diminish in importance, this right is regarded as indispensable for the benefit of aliens. In order to enjoy the freedom of access to the courts of law, the alien, just like the nationals, must comply with the requirements prescribed by the local law.

Right to employ counsels

Following the general trend and considerations of the preceding clauses, clause (5) establishes the right of the alien to choose and employ lawyers both for purposes of pursuit and defence of his rights and interests in the State of residence on terms of equality with the nationals.

Opinions of writers

Borchard says: "The resident alien does not derive his rights directly from international law, but from the municipal law of the State of residence, though international law imposes upon that State certain obligations which under the sanction of responsibility to the other States of the international community is compelled to fulfil . . . The establishment of the limit of rights which the State must grant to alien is the result of the operation of custom and treaty, and is supported by the right of protection of the alien's national State. This limit has been fixed along certain broad lines by treaties and international practice. It has secured to the alien a certain minimum of rights necessary to the enjoyment of life, liberty and property, and so controlled the arbitrary action of the State."[47]

Oppenheim says: "In consequence of the right of protection over its subjects abroad which every State enjoys, and the corresponding duty of every . . . State to treat aliens on its territory with a certain consideration, an alien . . . must be afforded protection for his person and property . . . Every State is by the Law of Nations compelled to grant to aliens at least equality before the law with its citizens, as far as safety of person and property is concerned. An alien must in particular not be wronged in person or property by officials and courts of a State. Thus the police must not arrest him without just cause . . . "[48]

Practice of Member States of the Committee

According to the law and practice of the Member Countries of the Committee an alien is normally permitted to enjoy personal liberty on a par with the nationals. Broadly, the law of each State

47 Borchard: The Diplomatic Protection of Citizens abroad, (1915), 25-39.
48 Oppenheim: International Law (London, 1937), 5th edn. 547-548.
Moore: Digest, op. cit., Vol. IV, 2-28.

provides for protection against arrest and detention in certain cases. For instance, Article 22 of the Constitution of India confers four rights upon an individual, citizen or non-citizen, who has been arrested. He shall not be detained in custody without being informed as soon as practicable, of the grounds of his arrest. He shall have the right to consult and to be represented by a legal practitioner of his choice. He has the right to be produced before the nearest magistrate within a period of 24 hours of such arrest. Normally, he shall not be detained in custody beyond the period of 24 hours without the authority of a magistrate. An alien enemy and an individual detained under the provisions relating to preventive detention are not entitled to the rights enumerated above.[49] Similarly, Article 9 of the Constitution of Indonesia confers upon every individual the right of freedom of movement and residence within the borders of Indonesia; and Article 12 lays down that no individual shall be arrested or detained unless by order of the competent authority and in the cases and the manner prescribed by law.[50] Likewise, Article 31 of the Constitution of Japan declares that no person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed except in accordance with the procedure prescribed by law; Article 33 provides that no arrest shall be effected except upon a valid warrant therefor clearly indicating the offence for which the arrest is being made unless the individual has been apprehended redhanded committing the alleged offence, and Article 34 lays down that no person shall be arrested or detained without being at once informed of the charges against him nor shall he be detained without adequate cause.[51] Under Article 5 of the Constitution of Pakistan "no person will be deprived of life or liberty save in accordance with law". Articles 6 and 7 lay down the safeguards relating to arrest and punishment for an act which was not punishable by law when the act was done, nor may a person be subjected to a punishment greater than that prescribed by law for an offence when that offence was committed. A person arrested shall not be detained in custody without being informed, as soon as may be of the grounds for such arrest; and such person shall not be denied the right of legal consultation and defence. Further, a person arrested or detained in custody is given the right to be produced before the nearest magistrate within a period of twenty-four hours and no further detention is allowed except on the order of a magistrate. These safeguards are, however, not applicable to an enemy alien or to any person who is arrested or detained under any law providing for preventive detention.[52]

49 Shukla: Commentaries on the Constitution of India, (Lucknow, 1960) 3rd ed., 77-85.

50 Peaslee: Constitutions of Nations (Netherlands, 1956), Vol. II. 2nd ed., 373.

51 Peaslee: Ibid., 514.

Moreover, besides the insertion of provisions relating to essential rights in the Constitutions or public laws of the Member Countries of the Committee, there is also an effective and easy procedure for enforcing them. The Constitutions or public laws of Burma, Ceylon, India and Pakistan give this right to the judiciary. In these countries the Supreme Court and the High Courts have been empowered to issue certain judicial writs for the enforcement of any rights guaranteed in the Constitutions. If an individual is subjected to arrest, imprisonment or any other physical coercion in a manner that does not admit of legal justification, with the aid of a writ of **habeas corpus** he can obtain his release from such detention. Similarly, in Indonesia liberty could be regained by means of appropriate petitions to the judicial or executive authorities as the case may be and in Iraq and the United Arab Republic, it is the procedure of "objections against provisional detainment" that is being used for the same purpose.[53]

Normally, an alien is entitled to freedom of conscience and the right freely to profess and practise his own religion. As in the case of nationals, the alien's right to freedom of religion is subject to public order, morality and health. For instance, Article 20 of the Constitution of the Union of Burma, Article 25 of the Constitution of India, Articles 18 and 43 of the Provisional Constitution of the Republic of Indonesia and Articles 19 and 20 of the Constitution of Japan provide for the right to freedom of religion to all individuals within the borders of their respective territories subject to the above qualifications.[54] In Iraq too, the alien's right to freedom of conscience is subject to public order, discipline and public morality as determined by the executive authorities of the State. In the United Arab Republic an alien has this freedom on a footing of equality with the national minorities.[55]

Every Member State of the Committee grants to aliens equal protection of laws. This right of protection is subject to applicable

52 Choudhuri: Constitutional Development in Pakistan (Lahore, 1951), 233-234.

53 Report of the Asian African Legal Consultative Committee, Third Session (Colombo) 1960, 113.

54 Peaslee: Constitutions of Nations, op. cit., Vol. I, 281-282, Vol. II, 374 & 376.
Basu: Commentary on the Constitution of India, Vol. I, (Calcutta, 1955); Third ed., 318-322.

55 Report of Asian African Legal Consultative Committee, Third Session, 113.

laws, regulations and orders. An alien in these countries is entitled to the protection of the executive and judicial organs of the State, and more particularly the protection of the local police force on a footing of equality with the nationals. For instance, Article 8 of the Constitution of Indonesia guarantees to all persons within the territory of Indonesia equal protection of person and property.

As the aliens are entitled to equality before the law, they have the concomitant rights of access to local courts of law and judicial protection for their persons and property. For instance, Article 13 of the Constitution of Indonesia lays down that every one is entitled in full equality to a fair and just hearing by an impartial judge for the determination of his rights and obligations and of any criminal charge against him. Under Article 14 of the Constitution of India, the guarantee of equality before the law extends to all persons, citizens as well as aliens, within the territory of India.[56] Article 5 of the Constitution of Pakistan incorporating the concept of equality before the law guarantees to all individuals the equal protection of laws.[57] In the United Arab Republic aliens enjoy the right of equal protection of law. Denial of justice is a punishable offence, and a judicial officer could be punished for this offence.[58]

Moreover, an alien has the right of legal consultation and defence in all the Member Countries of the Committee. This right is very important for the enjoyment of an individual's right to life, liberty and property. For instance, the Constitutions of India and Pakistan specifically provide that an individual shall have the right to choose and employ legal practitioners of his choice. This right and privilege is available to an alien on a footing of equality with the nationals of the State concerned.

Practice of States other than Member States of the Committee

Britain, France, Germany and the United States of America have been upholding the view that under customary international law, a State is bound to safeguard the life and property of aliens on its territory in accoradnce with the requirements of the minimum standard of international law. Several awards of the international arbitral tribunals have upheld the existence of such a minimum standard of international law. Certain South American States were held liable for having failed to safeguard adequately the life, free-

56 Peaslee: Constitutions of Nations, op. cit., Vol. II, 373-374; Anand: Constitution of India, New Delhi (1957), 70 & 145.

57 Chowdhuri: Constitutional Development of Pakistan, op. cit., 232.

58 Report of the Asian African Legal Consultative Committee, Third Session, 113.

dom, human dignity or property of aliens on their territories.[59] Some publicists criticise the minimum standard of international law as being vague and imprecise and that "powerful States have at times exacted from weak States a greater degree of responsibility than from States of their own strength. Further, they maintain that even those international tribunals which had accepted and applied this standard could not define the term "minimum standard of international law."[60] Vehemently opposing the minimum standard of international law, the Latin American States have been asserting that aliens who establish themselves in a country are entitled to enjoy all civil rights on a footing of equality with the nationals and that they cannot claim any greater measure of protection than that accorded by a State to its own nationals.[61]

The modern State practice concerning the nature and extent of an alien's essential rights has been set out in Guerrero's Report in 1926. He takes the view that although "customary law lays down certain rules which clearly express the definite will of States regarding the rights which they agree to accord to foreigners (and) the manner in which foreigners are to be treated", and that "the right to life, the right to liberty and the right to own property" are recognised by the international community "as being the minimum which a State should accord to foreigners in its territory", it cannot be maintained that the international community has recognized "the right to claim for the foreigners more favourable treatment than is accorded to nationals." Moreover in his view, "the maximum that may be claimed for a foreigner is civil equality with nationals" and that "this does not mean that a State is obliged to accord such treatment to foreigners unless that obligation has been embodied in a treaty."[61a] In view of the fact that the resident alien does not derive his essential rights directly from international law but from the municipal law of the host State concerned, several bilateral treaties have been concluded between States which provide **inter alia** that the nationals of either contracting party within the territories of the other contracting party, shall be permitted to travel therein freely and to reside at places of their choice, to enjoy liberty of conscience, to hold both private and public religious services, to

59 United States (Neer Claim) v. Mexico: Briggs: The Law of Nations, op. cit., 613-614.
Walter A. Noyes Claim (United States v. Panama).
Katz & Brewster: The Law of International Transactions and Relations, op. cit., 76-78.

60 Borchard: The Diplomatic Protection of Citizens Abroad, op. cit., 178; Amador, F. V. Garcia-Report on International Responsibility, A/CN. 4/96, 20, January 1956, 74-76.

61 Amador, F. V. Garcia: Report on International Responsibility, ibid., p. 75.

61a Briggs: The Law of Nations, op. cit., 564.

enjoy full protection and security for their persons and property; to enjoy freedom of access to the courts of justice, to administrative tribunals and agencies in all degrees of jurisdiction established by law both in pursuit and in defence of their rights, and last but not least, to choose and employ lawyers and representatives in the prosecution and defence of their rights before such courts, tribunals and agencies. Further, these treaties provide that the individuals accused of crime shall be brought to trial promptly, shall enjoy all the rights and privileges which are accorded by the applicable laws and regulations and that while within the custody of the authorities they shall receive reasonable and humane treatment. Moreover, these treaties provide that the nationals of either contracting party shall be permitted to exercise all the above rights and privileges, in conformity with the applicable laws and regulations, upon terms no less favourable than are or may thereafter be accorded to the nationals of the other contracting party and no less favourable than are or may hereafter be accorded to the nationals of any third country. However, they contain provisions to the effect that the above rights and privileges shall be subject to the right of each party to apply measures that are necessary to maintain public order and to protect the public health, morals and safety.[62] More recently, even multilateral conventions have been concluded by nations for the same purpose.[63] Further, the law and practice of most States establish the fact that foreign nationals are normally granted a minimum of rights, which in specific terms mean a modicum of respect for the life, liberty, dignity and property of foreign nationals as well as the availability of unhindered access to the national courts of law and reasonable means of redress in the case of manifest denial, delay or abuse of justice.[64] For instance, under Article 128 of the Constitution of Belgium "every foreigner within the territory of Belgium shall enjoy protection of his person and property, except as otherwise established by law;"[65] and Article 141 of the Constitution of Brazil "assures Brazilians and foreigners

62 Treaty of Friendship, Commerce and Navigation, concluded between the United States and the Italian Republic (1948); United States Treaties and other International Agreements, list No. 1965; Treaty of Friendship, Commerce and Navigation entered into between the United States of America and Japan (1953), United States Treaties and other International Agreements, Vol. 4, list No. 2065.

63 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); European Treaty Series, No. 5, European Yearbook, Vol. I (1955), 317-341; Robertson: "The European Court of Human Rights," The American Journal of Comparative Law (1960), Vol. 9, No. 1, 1-28.

The Treaty Establishing the Benelux Economic Union (1958); Katz & Brewster: The Law of International Transactions and Relations, op. cit., 82.

64 Schwarzenberger: A Manual of International Law, 4th ed., Vol. I (London, 1960), 99.

65 Peaslee: Constitutions of Nations, op. cit., Vol. I, 168.

residing in the country the inviolability of the rights respecting life, liberty, individual security and property."[66] Similarly, under the first ten amendments and the Fourteenth Amendment to the Constitution of the United States of America, aliens enjoy the same rights as American citizens.[67] In **Wong Wing v United States** (1876), Mr. Justice Shiras stated that the provisions of the Fourteenth Amendment to the Constitution of the United States "are universal in their application to all persons within the territorial jurisdiction without regard to any difference of race, of colour, or of nationality, and equal protection of the laws is a pledge of the protection of equal laws. Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all person within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor he be deprived of life, liberty or property without due process of law."[68]

The term "alien's freedom from arbitrary arrest", as interpreted and applied by various national courts and international tribunals and also according to outstanding writers on international law connotes the following rights of an alien as a matter of international law: There must be some grounds for his arrest; in cases of arrest, suspicions must be verified by a serious inquiry; an arrested person must be given an opportunity to communicate with the consul of his State if he requests for it; he is entitled to be brought before a judge within a reasonable period following his arrest; he must be treated in a manner fitting his station, and which conforms to the standard habitually practised among civilized nations during such detention; he is entitled to be informed of all the charges against him; he must be enabled to defend himself with the aid of counsel; he is entitled not to be exposed to undue delay in the proceedings; he is entitled to a fair trial before an impartial tribunal; the provisions of the local law must not be disregarded and the same is true with respect to relevant treaty provisions; he must be given opportunity sufficiently to confront the witnesses against him; he must be given opportunity to summon witnesses in his own behalf and to interrogate them and he must not be exposed to cruel and inhuman treatment during the proceedings nor

66 Peaslee: ibid; 234.

67 Orfield & Re: Cases and Materials on International Law (London) 1956, 495.

68 163 U.S. 228; 16 S. ct. 977 (1876) Yick Wo v. Hopkins, 118 U.S. 356, 369; 6 S. ct., 1064, 1070.

by way of punishment after the proceedings.[69] Thus according to the decision of U.S.-Mexican General Claims Commission in the **Chattin Claim (1927)** the following acts and omissions would give rise to international responsibility of a State: illegal arrest of an alien, irregularity of court proceedings such as absence of proper investigations, insufficiency of confrontations, with-holding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearing in open court a mere formality, a continued absence of seriousness on the part of the court, insufficiency of the evidence against the accused, intentional severity of the punishment flowing from the unfairmindedness of the judge and mistreatment of the alien in prison.[70] In the **Tribolet case (1930),** the U.S.-Mexican General Claims Commission held that the execution of an alien without trial, without having been accorded the right of being heard, without having given at any time an opportunity to defend himself, or to present evidence to establish his innocence and in short, without having been proven guilty of any crime would result in grave injustice to the alien concerned.[71] In the case of **Michael J. Malamatnis et al** (United States v. Turkey) (1957) Fred K. Nielsen, American Commissioner, took the view that "International law requires that, in connection with the execution of penal laws, an alien must be accorded rights such as are guaranteed under the law of civilized countries generally both to aliens and nationals. Most important among these are the requirements that there must be some grounds for arrest and trial, or as is said in domestic law, probable cause. A person is entitled to be informed of the charge against him. He must be given a reasonably prompt opportunity to defend himself. He must not be mistreated during his period of imprisonment.[72]

Broadly, a State has the undoubted right to regulate the religious teachings or practices of the individuals on its territory. This

69 Orfield: "What constitutes fair criminal procedure under municipal and international law," 12 University of Pittsburgh Law Review (1950) 35-44. Briggs: The Law of Nations, op. cit., 566-567. Faulkner Claim (1926) (United States v. Mexico). Roberts Claim (1926) (United States v. Mexico) Boliggs—ibid; 549-552. Chattin Claim (1927) (United States v. Mexico) Briggs: ibid; 666-674 Tribolet Claim (1930) (United States v. Mexico) Briggs: ibid; 547-548 Chevreau Claim (1933) (France v. United Kingdom) Birggs: ibid .. 566-567.

70 Chattin Claim (United States v. Mexico.)
Katz & Brewster: The Law of International Transactions and Relations, op., cit., 68-73.

71 Tribolet Claim (United States v. Mexico):
Briggs: The Law of Nations, op. cit., 547-548.

72 Hackworth: Digest of International Law, Vol. III, 646.

right emanates from its competence to determine its own internal policy.[73] The United States of America took the following view in this regard—"It is fundamental that sovereign States have the right to control the internal order of their affairs in such manner as they deem to be to their best interests, free from unwarranted interference by other powers.[74] From the above it follows that the State has the right even to forbid the religious teachings or practices of foreigners, if in its opinion they are likely to disturb public order, public morals or its political institutions. However, so widespread has become the habit of tolerance among the members of the international community that any attempt to curtail the freedom of worship of resident aliens would be regarded as being out of accord with the spirit of the modern world and contrary to the practice of civilized nations. Even States having certain State religions do not normally deny aliens the right to freedom of religion, in so far as their religious practices do not disturb law and order within their domains. The Constitutions of several nations contain provisions which guarantee to aliens the right to freedom of religion almost on a footing of equality with the nationals. Clause (7) of Article 141 of the Constitution of Brazil, for example, assures Brazilians and foreigners residing in the country the inviolability of the liberty of conscience and creed, and also the free exercise of religious sects as long as they are not contrary to public order or good morals of the State. Further, under clause 8 of Article 141, no one shall be deprived of any of his rights by reason of religious, philosophic or political convictions, unless he shall invoke it in order to exempt himself from any obligation, duty, or service required by the law of Brazilians in general, or shall refuse those which the same law may establish as substitutes for those duties in order to meet a conscientious excuse."[75] Mr. Buchanan, the United State's Secretary of State, sets out the religious policy of his country in these terms: "I would pray to God that the Governments of all countries like that of our own happy land, might permit knowledge of all kinds to circulate freely among the people. It is our glory that all men in the United States enjoy the inestimable right of worshipping God according to the dictates of their own conscience."[76] According to the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948, freedom of religion should be granted to all in-

73 Moore: A Digest of International Law, Vol. II, 171.
Hyde: International Law, Vol. I, op. cit., 702.

74 View of the U.S. Department of State dated February 12, 1935;
Hackworth: Digest of International Law, Vol. III, 647.

75 Peaslee: Constitutions of Nations, Vol. I op. cit., 234-235.

76 Moore: A Digest of International Law, Vol. II, 171.

dividuals, whether aliens or nationals.[77] By the terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1950, the Contracting Parties guarantee to all persons within their jurisdiction, several rights including the freedom of thought, conscience and religion.[78] By reason of the fact that a State has the right to regulate the religious training and worship of all the inhabitants on its territory, nations have been entering into treaties of friendship and commerce which normally guarantee to their nationals the right to freedom of conscience, free profession and practice of their own religions during their stay or sojourn within the territories of the other party to such treaty or arrangements. The Treaty of Friendship, Commerce and Consular Rights concluded between the United States of America and Norway (1928) and the treaty that was entered into between the United States of America and Poland on June 15, 1931 could be given as examples of such treaties. More recently, the same purpose is being achieved mostly by means of bilateral treaties of friendship, commerce and navigation. The treaty between the United States of America and the Italian Republic concluded on February 2, 1948 and that between the United States of America and Japan entered into on April 2, 1953 could be cited as examples. These treaties normally provide that the nationals of each contracting party shall within the territories of the other contracting party, be permitted to exercise freedom of conscience and of worship, that they may whether individually, collectively or in religious corporations or associations conduct freely their religious services, provided that their religious teachings or practices are not contrary to public morals or public order. Moreover, they also set out that each of the contracting parties shall have the right to apply such measures as may be deemed necessary to maintain public order and protect the public health, morals and safety.[79]

The term "religious freedom of aliens" as interpreted and applied by nations appear to include the following rights and privileges:—The right to enjoy liberty of conscience, and religious worship, protection from all kinds of disabilities or persecution on account of their religious faith, belief or worship and the right to

77 The Universal Declaration of Human Rights does not impose any legal obligation on the members of the international community, but it appears to have considerable moral force.
78 Robertson: The European Court of Human Rights, op. cit., I.
79 Article 9 of the Treaty of Friendship, Commerce and Navigation, concluded between the United States of America and Italian Republic (1948); Clauses 2 and 3 of Article I of the Treaty of Friendship and Navigation and Commerce entered into between the United States of America and Japan.

hold or conduct, without annoyance or molestation of any kind, both private and public religious services and rites of a ceremonial nature in their national language or any other language which is customary in their religion, either within their own houses or within any other appropriate buildings, provided that their teachings or practices are not contrary to public morals or public order; the right and opportunity to lease, erect or maintain in convenient situations buildings appropriate for religious purposes; the right to collect from their co-religionists voluntary offerings for religious purposes; the right to impart religious instructions to their children either singly or in groups or to have such instructions imparted by persons whom they may employ for such purpose; and the right to bury their dead in accordance with their religious practices or customs in suitable and convenient burial-grounds established and maintained by them with the approval of the competent authorities, subject to applicable mortuary and sanitary laws and regulations.[80] Moreover, most of the treaties provide that the nationals of each contracting party shall be granted rights with reference to freedom of conscience and the free exercise of religion which shall not be less favourable than those enjoyed in each contracting State by the nationals of the nations most favoured in this respect.[81]

Generally speaking, as a result of customary international law, treaties and the exercise of the right of diplomatic protection of the alien's home-State, States have been granting aliens within their territories the same measure of protection for their persons and property as are possessed and enjoyed by their own nationals. In the absence of such executive and judicial protection, the alien's right to life, liberty, dignity and property may be jeopardized.[82] Justice Black of the United States describes the source of the rights of aliens and the corresponding duty of every State in the following terms: "Apart from treaty obligations, there has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all nations to alien residents—duties which our State Department (i.e., of the

80 Note from Mr. Litvinov, People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics to the Government of the United States, dated Nov. 16, 1933.
81 Article 9 of the Treaty between Germany and the Union of Soviet Socialist Republics signed at Moscow on Oct. 12, 1925. Hackworth: Digest of International Law, Vol. III, Articles XI (1) & (2) of the Treaty of Friendship, Commerce and Navigation concluded between the United States and Italian Republic; Hackworth: Digest of International Law, 1948, Vol. III, 649.
82 Oppenheim: International Law, Vol. I, op. cit., 689-690.
Schwarzenberger: A Manual of International Law, Vol. I, op. cit., 90 & 99.

United States) has often successfully insisted foreign nations must recognize as to our nationals abroad. In general, both treaties and international practices have been aimed at preventing injurious discriminations against aliens".[83] Moreover, if an alien suffers an injury in consequence of the failure of a State to provide the necessary protection and security for his person and property as required by international customary or conventional law, that State incurs international responsibility; and such a lapse has been regarded by the international community as an international delinquency.[84] One of the most important and delicate of all international relationships recognized immemorially as a responsibility of government, has to do with the protection of the just rights and interests of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment may arise from wrongs to another's subjects inflicted or permitted by a government.[85] In the **Neer Case** (1926) the duty of protection was set out by the General Claims Commission as follows:—"The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental actions, so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial."[86]

Moreover, international arbitral tribunals have repeatedly awarded indemnities in favour of aliens because of the wanton killing of aliens by local officials,[87] and the failure of the local administration to apprehend, prosecute and punish the persons who had committed wrongs against aliens.[88] They have founded international responsibility on account of the failure of the local

83 Hines v. Davidowitz et Al (1941), 312 U.S. 52;
Borchard: The Diplomatic Protection of Citizens Abroad, op. cit., 25, 37, 73 & 104.

84 Oppenheim: International Law, Vol. I, op. cit., 330.
"A State is responsible for any failure on the part of its organs to carry out the international obligations of the State which cause damage to the person or property of a foreigner in the territory of the State"; League of Nations, Acts of the Conference, Minutes of the Third Committee, 1930 V, 26-32, 236.

85 Per Justice Black in Hines v. Davidowitz et Al.

86 General Claims Commission established under bilateral agreements between the United States of America and Mexico.
Schwarzenberger: International Law, Vol. I, op. cit., 200-201.

87 The Youmans case (1926), Briggs: The Law of Nations, op. cit., 705-711.

88 The Janes case (1926); Schwarzenberger: International Law, Vol. I, op. cit., 201.

authorities to provide adequate protection to the foreigners who had needed it,[89] and upon the failure of the government of the State of residence to use due diligence to prevent injury to aliens.[90]

Although the overwhelming weight of authority of publicists sustained by the practice of States is in favour of granting aliens the national standard of treatment in respect of protection for their persons and property, diplomacy, international practice and arbitral decisions have established the rule that equality of treatment, while **prima facie** a fair defence, is not conclusive of international duty and responsibility. Thus, "bad faith, fraud, outrage resulting in injury cannot be defended on the ground that it is the custom of the country to which nationals must also submit", nor can it be maintained that the State concerned normally does not provide any protection whatever even for its own nationals.[91]

As regards the British State practice Lord Phillimore stated in **Johnstone** v **Pedlar** (1921) as follows:—"An alien **ami** (friend), once he is resident within the realm, is given the same rights for the protection of his person and property as a natural born or naturalized subject x x x. An alien **ami** complaining of a tort is in the position of an ordinary subject, and that no more against him than against any other subject can it be pleaded that the wrong complained of was, if a wrong done by command of the king or was a so called act of State. From the moment of his entry into the country the alien owes allegiance to the king till he departs

89 Chapman case (1930); Briggs: The Law of Nations, op. cit., 697-703.

90 Borchard: Diplomatic Protection of Citizens Abroad, op. cit., 213-228.

91 Although at the Hague Codification Conference of 1930, the Third Committee rejected by a vote of 23 to 17, a Chinese proposal intended to limit the international responsibility of State for the protection of aliens to the standard of treatment accorded by a State to its own nationals, it now appears that most of the newly independent States are in favour of placing the alien in respect of his right to life, liberty, personal property and protection and security therefor in conformity with the national laws and regulations, on a footing of equality with their nationals; League of Nations, Act of the Conference, Minutes of the Third Committee, 1930, V 17, 185-188. Borchard: "The Minimum Standard of the Treatment of Aliens", Proceedings of the American Society of International Law (1939), 54-57.
Oppenheim: International Law, Vol. I, op. cit., 687-688.
According to Survey of International Law, "the controversy, which was largely responsible for the negative result of The Hague Codification Conference, on a subject of whether a State can adduce the fact of non-discrimination as a reason for relieving it of its responsibility for the treatment of aliens has now been resolved so far as fundamental human rights and freedoms are concerned. The principle authoritatively asserted by arbitral tribunals that the plea of non-discrimination cannot be validly relied upon if the State does not measure up to a minimum standard of civilization has now found expression in the provisions of the Charter relating to human rights and fundamental freedoms. These must be deemed to be co-extensive with the minimum standard of civilization." United Nations Doc. A/CN.4/1, Nov. 5, 1948; Case Concerning Certain German Interests in Polish Upper Silesia (Merits) 1926. Rep. P.C.I.J. Series A. No. 7, 32-33.

from it, and allegiance, subject to a possible qualification . . . draws with it protection, just as protection draws allegiance."[92]

With regard to the practice of the United States, Mr. Butler, the Attorney General of the United States of America stated in 1857 that "Aliens coming within our territory are entitled to the same protection in their personal rights as our own citizens and no more";[93] and as to protection of property rights of foreign nationals, Mr. Adams, the Secretary of State of the United States of America stated that "there is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of a country in friendship with their own to the protection of its sovereign by all the efforts in his power." He added that, that was the common rule of intercourse between all civilized nations.[94] Moreover, in **Matarazzo** v **Hustis** (1919) it was held that "an alien coming into the United States and residing here, even temporarily, is entitled to the protection of, and is subject to the provisions of, the Statutes of the United States and of treaties made with, while in force, are the supreme law of the land."[95]

Notwithstanding the claim of the leading Western nations that in accordance with the minimum standard of international customary law, every nation has certain minimum duties to perform with regard to alien's right to life, right to liberty and the right to own property, they too, like most other nations, have been entering into numerous treaties of amity and commerce: of friendship, commerce and consular rights or of friendship, commerce and navigation which promise and guarantee broad rights and privileges including most constant protection and security for the persons and property to the nationals concerned sojourning or resident within the territories of the contracting parties. By stipulating that the treatment of foreigners shall be in conformity with the applicable national laws and regulations, and also in conformity with the national and most favoured nation standards of treatment, these treaties have been aiming at prevention of injurious discriminations against aliens.[96] For instance,

92 (1921) 2. A.C. 262 (Great Britain, House of Lords); Briggs: The Law of Nations, op. cit., 554-555.
93 Moore: A Digest of International Law Vol. IV, 2.
94 Moore: A Digest of International Law, Vol. IV, 5.
95 Hackworth: Digest of International Law, Vol. III, 552.
96 Per Black J. in Hines v. Davidowitz et Al (1941), op. cit., Dispatch of Mr. Polk, Acting U.S. Secretary of State to Ambassador H.P. Fletcher, dated Dec. 13, 1918; Briggs: The Law of Nations, op. cit. 565; Report on Responsibility of States for Damage Done in their territories to the Person or Property of Foreigners (Guerrero Report), League of Nations Doc. 1926 V. 3. 20; American Journal of International Law, special supplement (1926), 176-180.

Clause I of Article II of the Treaty of Friendship, Commerce and Navigation concluded between the United States and Japan on April 2, 1953 provides as follows: "Nationals of either Party within the territories of the other Party shall be free from unlawful molestations of every kind, and shall receive the most constant protection and security, in no case less than that required by international law."[97]

Clause (1) of Article III of the Treaty of Friendship, Commerce and Navigation signed between the United States and Germany on October 29, 1954 provides as follows:—"Nationals of either Party within the territories of the other Party shall be free from molestations of every kind, and shall receive the most constant protection and security. They shall be accorded in like circumstances treatment no less favourable than that accorded to nationals of such other Party for the protection and security of their persons and their rights. The treatment accorded in this respect shall in no case be less favourable than that accorded to nationals of any third country or that required by international law."[98]

Since the middle of the nineteenth century, the Western nations appear to have been providing foreigners within their territories the freedom of access to their courts of law on a basis of equality with their nationals as a complementary right to the foreigners' right to protection and security for their persons and property. In the exercise of the freedom of access to the national courts of law, they have been enjoying the liberty to choose and employ legal practitioners of their choice. Hence some publicists take the view that the rights of access to courts of law and to judicial protection for the alien's person and property are some of the requirements of the minimum standard of international customary law which every nation should accord to aliens within its territory.[99] Closely related to these rights is the right to equal

97 United States Treaties and other International Agreements, Vol. 4, Part 2 (1953) (List No 2863, 2067).
98 United States Treaties and other International Agreements, Vol. 7, Part 2 (1956), (List No. 3593), 1842. Article III of the Treaty between the United States and Italy of February 26, 1871; Article I of the Treaty between the United States and Japan of Feb. 21, 1911 and Article V of the Treaty of Friendship, Commerce and Navigation concluded between the United States and the Italian Republic on February 2, 1948 provide for the protection and security of aliens' persons and property in the host State; Hyde: International Law, Vol. I, op. cit., 657.
Briggs: The Law of Nations, op. cit., 542
99 Schwavrzenberger: A Manual of International Law, Vol. I, op. cit., 99; Briggs: The Law of Nations, op. cit., 567.
Borchard: The Diplomatic Protection of Citizens Abroad, op. cit., 73.

protection of the laws. "Equal protection of the laws means subjection to equal laws applying to all in the same circumstances."[100] Several modern Constitutions specifically lay down that the State shall not deny to any person within its territories the equal protection of its laws. For instance, Article 3 of the Basic Law for the Federal Republic of Germany promulgated on May 23, 1949, provides as follows:—(1) All men shall be equal before the law; (2) Men and women shall have equal rights; (3) No one may be prejudiced or privileged because of his sex, descent, race, language, home land and origin, faith or his religious or political opinions. [101]

As regards the alien's freedom of access to the national courts, the Supreme Court of the United States said in the course of its opinion in the case of **Barbier** v **Connolly** (1885) as follows: "The Fourteenth Amendment, in declaring that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended . . . that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts.[102]

In **Takahashi** v **Fish and Game Commission** Justice Black stated that the United States Congress has broadly provided: "All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licences, and exactions of every kind, and to no other, 16, Stat. 140, 144, 8 U.S.C. s 41.

The protection of this section has been held to extend to aliens as well as to citizens. Consequently the section and the Fourteenth Amendment on which it rests in part protects all persons, "against State legislation bearing unequally upon them either because of alienage or colour. . . The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy

100 Lindsley v. National Carbolic Co., (1910), 220 U.S. 61.
101 Peaslee: Constitutions of Nations, Vol. II, 30-31.
102 113 U.S. 27, 31 (1885);
Hackworth: Digest of International Law, Vol. III, 564.

that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws."[103] By Section 156 of the Judicial Code of the United States, "the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter, and character, might take jurisdiction" is accorded to "aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts.[104]

Describing the British practice, Viscount Cave said in the case of **Johnstone** v **Pedlar** (1921) as follows: "Counsel for the appellant contended for the broad proposition that, where the personal property of an alien friend resident in this country is seized and detained by an officer of the Crown, and his act is adopted and ratified by the Crown as an act of State, the alien is without legal remedy. In my opinion this proposition cannot be sustained x x x an alien **ami** (friend) complaining of a tort is in the position of an ordinary subject, and that no more against him than against any other subject can it be pleaded that the wrong complained of was, if a wrong done by command of the king or was a so-called act of State. From the moment of his entry into the country the alien owes allegiance to the king till he departs from it, and allegiance . . . draws with it protection, just as protection draws allegiance."[105] In the case of **Massein** v **The King** (1934) Justice Maclean of the Canadian Exchequer Court said as follows: "My conclusion is that in England and here (Canada), an alien may maintain a petition of right. The friendly alien has access to our courts like any subject. . . This is far from saying that an action could not be maintained by a petition of right by any friendly alien against the Crown . . . I might point out that under the Customs Act an alien is subject to the same penalties and forfeitures and enjoys the same rights and remedies as a subject; no distinction is of course made between them. . . A friendly alien while in this country, as a matter of law, is in the allegiance of the Crown, and so long as he remains in this country, with the permission of the sovereign, express or implied, he is a subject to local allegiance, with a subject's rights and obligations. This principle was discussed at great length in the House of Lords in **Johnstone** v **Pedlar**,

103 334 U.S. 410, 68 S. Bt. 1138 (1948);
Hurd v. Hodge, 334 U.S. 24; 68 S. Bt. 847;
Katz & Brewster: The Law of International Transactions and Relations, op. cit., 125-135.
104 Hackworth: ibid., 565.
105 (1921) 2. A.C. 262;
Briggs: The Law of Nations, op. cit., 552-555.

(1921) 2. A.C. 262, and I would refer to that authority".[106] Similarly, the right of action against the government of the State is accorded to foreigners in several other countries.[107] Further, about 64 per cent of the national Constitutions contain provisions relating to the right of making petitions to the State officials as one of the fundamental rights of the individual.[108] It appears that in several national Constitutions, this right of petition is available to aliens more or less on a footing of equality with the nationals.[109] Apart from the right of suit against the government, the aliens are accorded the right to sue private persons; the right to be parties to suits by private individuals; the right to give evidence; the right to summon witnesses in their defence; the right to choose and employ counsel for purposes of prosecuting and defending their rights and interests and also defending themselves if accused of crime and the right to the full and equal benefit of all the national laws and proceedings for the security of their persons and property on a footing of equality with the nationals.[110]

As observed above in the treaties of amity and commerce concluded between nations, mutual freedom of access to the local

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106 Annual Digest and Reports of Public International Law Cases (1938-1940) case No. 124, 372-374.

107 Denmark, Dominican Republic, France, Honduras, Japan and Norway could be cited as instances in this regard.
Hackworth: ibid, 565-566.

108 Peaslee: Constitutions of Nations, Vol. I, op. cit., 7.

109 Article 26 of the Constitution of the Argentine Republic provides for the right of all individuals; nationals and aliens—to petition the authorities.

110 Suits against private individuals include nationals, aliens and nationals and aliens: Katalla Co. v. Rones, 186, Fed. 30, 108 C.C.A., 132; Barrow Steamship Co. v. Kane, 170 U.S. 100, 18 Sup Ct. 526; 42 L. Ed. 964. Compania Mineva y. Compradora de Metales Mexicaro, S.A.V. American Metal Co., Limited, et. al; 262 Fed. 183, 187.

In Cunard S.S. Co., Limited v. Smith (1918) 255 Fed. 846, 848, the Circuit Court of Appeals for the Second Circuit said that "the law is . . . well established that aliens who are sui juris, except alien enemies, may maintain actions to vindicate their rights and redress their wrongs when brought in the proper courts. It has been held in numerous cases that one alien may sue another alien in the State courts, even on contracts made abroad or for a tort committed in a foreign community."

In Martinez v. Fox Valley Bus Lines, Inc. (1936), Annual Digest 1935-1937 case No. 151, Mr. Holly, District Judge of Illinois took the view that since even an alien who is unlawfully in the country must live he must have the right to earn a living by following the ordinary occupations of life including the right to make the ordinary contracts incident to existence. Further, in his view so long as he is permitted by the Government of the United States to remain in the country, he is entitled to the protection of the laws in regard to his rights of person and property including the protection of the Fourteenth Amendment to the Constitution of the United States of America. But in Coules v. Pharris (1933) (Annual Digest, 1933-1934 case No. 123), the Supreme Course of Wisconsin held that an alien who has entered unlawfully cannot sue.
Oppenheim: International Law, Vol. 1, op. cit., 688-689.
Hackworth: Digest of International Law, Vol. III, 567-568.
Katz & Brewster: Law of International Transactions and Relations, 129.

courts together with cognate rights and privileges on a basis of equality with nationals, are being assured to the nationals of each contracting party within the territories of the other contracting party. For instance, Article IV of the treaty concluded between the United States of America and Japan (1935) provides: "(1) Nationals and Companies of either Party shall be accorded national treatment and most-favoured-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction both in pursuit and in defence of their rights . . ."[111] Article VI of the Treaty of Friendship, Commerce and Navigation entered into between the United States of America and the Federal Republic of Germany in 1954 provides: (1) Nationals of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in respect and in defence of their rights . . . "[112]

Principles embodied in certain Conventions

The Declaration of the International Rights of Man adopted by the Institute of International Law at its meeting in New York in 1929 provided in Article 1 as follows:

"It is the duty of every State to extend to every person an equal right to life, to liberty, and to property, and to accord to all persons within its treritory the full and complete protection of its law without distinction of sex, race, language, or of religion."[113]

The Inter-American Convention on the rights and duties of States (1933): Provides in clause (2) of Article 9 that:

"Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not

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111 United States Treaties and other International Agreements (1953), Vol. 4, Part 2, 2067.

112 United States Treaties and other International Agreements (1956), Vol. 7, Part 2, 1845.
Similar provisions are found in the treaty between the United States and Honduras concluded on Dec. 7, 1927 (Article 1) and that between the United States and the Italian Republic entered into on Feb. 2, 1948; Hackworth: Digest of International Law Vol. III, 562; Briggs: The Law of Nations, op cit., 530-531 & 542-547.
Clause (4) of Article V provides inter alia that "the nationals . . . of either Contracting Party . . . shall be at liberty to choose and employ lawyers and representatives in the prosecution and defence of their rights before such courts, tribunals and agencies . . . exercise all those rights and privileges, in conformity with the applicable laws upon terms no less favourable than the terms which are or may hereafter be accorded to the nationals . . . and no less favourable than are or may hereafter be accorded to the nationals . . . of any third country."

113 Hackworth: Digest of International Law, Vol. III, 641-642.

claim rights other or more extensive than those of the nationals."[114]

European Convention for the protection of Human Rights and Fundamental Freedoms (1950)

By the terms of the Convention, the Contracting Parties guarantee to all persons within their jurisdiction a number of rights and freedoms, including the right to life; the right to liberty and security of the person; freedom from torture, slavery and servitude; freedom from arbitrary arrest, detention, or exile; the right to fair and public hearing by an independent and impartial tribunal in questions of the determination of civil rights and obligations or of any criminal charge; freedom from arbitrary interference in private and family life, home, and correspondence; freedom of thought, conscience, and religion; freedom to join trade unions; the right to marry and found a family.[115] By the conclusion of a Protocol on March 22, 1952, three additional rights were added: the right to property, the right of parents to choose the education to be given to their children, and the right to free elections.[116]

Under Article 24 of the Convention any Member State may refer an alleged breach of the Convention by any other Party to the European Commission of Human Rights consisting of a number of members equal to that of the High Contracting Parties. Under Article 25, the Commission may receive petitions from "any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention."[117]

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114 Signed at Montevideo on Dec. 26, 1933; Hackworth: Digest of International Law, Vol. III, 640.

115 Robertson: "The European Court of Human Rights," Vol. 9, 1, The American Jounal of Comparative Law (1960), 1-2. These rights and freedom were taken from the Universal Declaration of Human Rights adopted by the General Assembly on Dec. 10, 1948, though they are defined in greater detail. Unlike the latter which is only a solemn statement of intentions of considerable moral value but without legal effect, the former, i.e., European Convention contains precise legal obligations.

116 Robertson: "The European Convention on Human Rights—Recent Developments," British Year Book of International Law (1951) 359-365.

The European Convention entered into force on Sept. 3, 1953. All the 15 members of the Council of Europe are now Parties with the exception of France, i.e., Austria, Belgium, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, The Saar, Sweden, Turkey, the United Kingdom and Denmark. Robertson: The European Court of Human Rights, op. cit., 1.

117 This jurisdiction of the Commission is, however, subject to two conditions: that the Party against which the complaint is made has declared that it recognizes the right of the individual petition and that at least five other States have made similar declarations. It may be added that in fact, since nine out of the 15 members of the Council of Europe have recognized the competence of the Commission to receive individual petitions, this remedy is now available to about 90 million Europeans. Moreover, as a condition of its exercise is the previous exhaustion of local remedies, several applications have been turned down for reasons of non-compliance with the rule of exhaustion of local remedies; Robertson: The European Court of Human Rights, op. cit., 2.

Benelux Economic Union (1958)

The Treaty establishing the Benelux Economic Union provides in its Article 2 that:

"2. They shall enjoy (the nationals of each High Contracting Party) the same treatment as national of that State as regards:

(a) freedom of movement, sojourn and settlement; x x x

(g) exercise of civil rights as well as legal and judicial protection of their person, individual rights and interests."[118]

Article 9

A State may prohibit or regulate professional or business activities or any other employment of aliens within its territory.

Note : The Delegation of Iraq was of the view that the words "shall be free to" should be inserted in place of the word "may". The Delegation of Pakistan wished to keep its position open.

Commentary

State's right to regulate alien's economic activities

This Article emphasizes the right of the host State to regulate or even to prohibit the professional, business or similar activities of the aliens on its territory. The practice followed by most of the States which is in accord with this Article shows that the State of residence has the right to limit or prohibit the right of aliens to participate in certain professions and industries.[119]

Opinions of Writers

Hyde expresses his views in the matter in these terms: "A State may exercise a large control over the pursuits, occupations and modes of living of the inhabitants of its domain. In so doing it may doubtless subject resident aliens to discrimination without necessarily violating any principle of international law. x x x

A State may reasonably exercise a rigid control over the practice of learned professions within its territory. Thus, it may prescribe tests of the fitness of persons to be permitted to practise,

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118 Katz & Brewster: The Law of International Transactions and Relations, op. cit., 82.

119 Moore: Digest op. cit., Vol., 13.

and that regardless of their nationality. Unless restrained by treaty, it may not unlawfully discriminate against aliens nor is it under any obligation to accept as assurances of fitness the degrees issued by foreign institutions of learning . . . The territorial sovereign must be free to establish for itself the extent and mode of recognising the attainments of persons trained in foreign countries. x x x

The practice of a particular profession, such as that of the law, may be fairly deemed to entail a connection with and devotion to the State within whose territory that privilege is sought to be exercised that is incompatible with the retention of allegiance to a foreign country. x x x

In a word, it seems to be clear that a State is on strong ground when it lays down the conditions under which learned professions may be practised within its territorial domain, and when also, in the course of so doing it sees fit to confine the privilege of practice to individuals who are its own nationals."[120]

Practice of Member States of the Committee

The Member Countries of the Committee, like other nations, claim the right to prohibit or restrict the participation of aliens in professions and gainful employments within their territories. Generally speaking, Ceylon, India, and Japan do not normally exclude foreign nationals from engaging in commercial or professional activities within their borders. Burma, Indonesia and Iraq exclude aliens from participating in certain professions, trades and occupations. Foreigners in Burma and Iraq are normally permitted to seek only temporary employments. Japan is in favour of engaging foreign experts or specialists for periods of short duration. Foreigners too are permitted to enter government service in Ceylon, India and Indonesia. Since in Burma and Iraq permanent positions in the service of the State are generally reserved for the nationals, foreigners can only become temporary government employees. Broadly, all the Member States of the Committee do not subject resident aliens to discrimination in respect of their professional or other occupational activities. But according to the United Arab Republic, the State of residence must have absolute discretion in the matter.[121]

120 Hyde: International Law, Vol. I, 656, 661-662.

121 Report of the Asian African Legal Consultative Committee. (Colombo, 1960), 113-114.

As observed above, according to Hyde, the State of residence has the right to subject resident aliens to discrimination without necessarily contravening any principle of international law; Hyde: International Law, Vol. I, 656.

Practice of States other than Member States of the Committee

A State has the undoubted right to exclude foreign nationals from professions and industries within its borders. Such a right seems to be firmly established not only by the weight of the authority of writers, but also by the sustained practice of States. Broadly, communities and groups seem to manifest a tendency towards reserving profitable economic activities for their own members.[122] In almost all countries, the restrictions are now, in a period of economic nationalism, much more severe.[123] From the above, it necessarily follows that a State possesses the right to regulate the professional and occupational activities of aliens, if it decides to permit them to participate in the said economic activities on its domain; and that a State may subject resident aliens even to discriminations without necessarily infringing any principle or rule of international law.[124] It may be observed that from the speeches and statements made by the delegates at the International Conference on Treatment of Foreigners, one can discern the prevalence of variant employment policies among the States of the international community.[125] Moreover, experience has shown that in recent years a growing number of States have been imposing national prohibitions or extensive restrictions upon the participation of foreigners in professions, gainful employments or commercial transactions within their borders. In some countries aliens entering their territories for purposes of obtaining gainful employments are required to register with the appropriate authorities of the State of residence, within a certain period of time after their arrival. After the expiry of that period of time, if he wants to seek any permanent employment he is required to produce a permit. It may be added that the issuance of a certificate or a work permit referred to above, is dependent upon a number of factors which include **inter alia** the employment situation in a given profession, occupation or industry, the number of aliens already present in the country and the granting of reciprocal treatment to its own nationals by the alien's home State.[126] The Belgian Law of February 20, 1939, concerning the protection of the profession of architect makes a clear distinction between architects of Belgian nationality

122 Katz and Brewster: The Law of International Transactions and Relations, op. cit., 122.

123 Oppenheim: International Law, Vol. I, 690.

124 Hyde: International Law, Vol I, 656.

125 This Conference was convened under the asupices of the League of Nations. League of Nations Publications, C. 97. M. 23. 1930 II (1930 II.5) 122-152.
Hyde: International Law, Vol. I, 656.

126 Hackworth: Digest, Vol. III, 625-626.

and those of foreign nationality. Article 7 gives persons of Belgian nationality who satisfy the conditions set out in that article the right to bear the title of architect and to exercise that profession. That article does not apply to aliens. Article 8, para (1) permits foreign architects to exercise their profession in Belgium to the extent their country of origin grants reciprocity. In **Van Bogart and the Royal Association of Architects of Antwerp v Belgian State (Minister of Education) (1952)** the **Conseil d'Etat** of Belgium took the view that in the absence of a reciprocity treaty with his home State, no authorization to a foreign architect to practise his profession in Belgium could be granted under para (1) of Article 8 of the Belgian Law of February 20, 1939. Further in its view, para 2 of Article 8 of the said Law makes it possible to authorize persons of foreign nationality to act as architects in Belgium. It added that "the terms of the provision referred to above, as well as the preparatory work relating thereto, show clearly that such an authorization is not unlimited, but may be granted only in respect of a specific undertaking or for enterprises requiring the aid of foreign specialists."[127] In **Delgrance v. Belgian State (Minister for Economic Affairs) (1953)**, a German national's application to the Belgian Minister for Economic Affairs for a permit to practise the profession of translator-interpreter in Belgium was rejected on the ground that in the opinion of the Aliens Department of the Ministry of Justice he did not comply with the required moral standards therefor.[128]

In the case of **In re Galetzky (1951)** the **Conseil d'Etat** of France took the view that an alien is prohibited from exercising an industrial or commercial profession in France without obtaining a special permit therefor.[129] **In Sebe v Case Altimir (1937)**, the Court of Appeal of Montpellier, France held that an alien who had entered into a contract of employment in France without the necessary permit as required by a Law of August 11, 1926, could not entertain an action against his employer for damages suffered in connection with an accident in the course of his employment, as provided by Art. 1 of the Law of April 9, 1898. [130] The **Tribunal Correctionnel** of Domfront, in **Syndicat des pharmaciens de l'orne, Bellet** and **Morellet v Valenza (1938)** held that an Italian national who possessed the necessary French qualifications to practise the profession of a chemist was nevertheless precluded from doing so in the absence of reciprocity on the part of Italy, as required by Art. 2(2) of the French Law of April 19, 1898. Art. 2(2) of the said law provided: "Aliens, although possessing the French chemist's diploma, are precluded from exercising the profession of a chemist in France unless, by way of reciprocity, French nationals possessing a chemist's diploma issued by the country to which the alien belongs, are allowed to act as chemists in that country."[131] Further, under the Decrees of June and November 1938, the French Government has been empowered to fix, for each category of industry or commerce, the percentage of aliens permitted to be employed therein, and an alien is prohibited from practising an industrial or commercial profession in France without obtaining a special permit. Furthermore, the Decree of February 2, 1939, sets forth certain cases in which aliens must be refused a permit to exercise a commercial profession.[132]

127 International Law Reports (1953), 302-303.
128 Ibid., 303-304.
129 International Law Reports (1951), Case No. 85, 291.
130 Annual Digest and Reports of Public International Law Cases (1938-1940), Case No. 128, 377.

The right of a State to refuse permission to an alien to participate in the commercial activities of the State was discussed by the Administrative Court of Appeal of Munster, West Germany, in the **Residence of Alien Trader Case** in 1954. The Court **inter alia** said: "It is significant that Articles 11 and 12 of the Constitution confer the rights of unrestricted movement, choice of occupation and place of work only on all Germans, and not on foreign nationals. . . . The authorities are entitled to take into account the fact that a particular trade is overcrowded and that it is therefore undesirable for aliens to engage in it. . . ."[133]

With regard to alien's right to practise professional accountancy work in the Philippines, Section 12 of Act No. 3105 provides as follows: "Any person who has been engaged in professional accountancy work in the Philippine Islands for a period of five years or more prior to the date of his application, and who holds certificates as certified public accountant or as chartered account, or other similar certificates or degrees in the country of his nationality, shall be entitled to registration as certified public account and to receive a certificate of registration as such certified public accountant from the Board, provided such country or State does not restrict the right of Filipino certified public

131 Annual Digest, (1938-1940), Case No. 129, 377-378.
132 In re Galetzky (1951), International Law Reports (1951), 291.
133 International Law Reports (1954), 209-210.