ship is very generally prescribed as a pre-requisite to jury service. According to Hackworth: "Forty-four jurisdictions have legislation pertaining to the subject of aliens as jurors. Thirty-two provide that a juror must be a citizen, or cannot be an alien or may be challenged for alienage . . . Twelve States have statutes requiring a juror to be a qualified voter; and since an alien cannot so qualify, he is excluded . . . Indiana also provides that either a grand juror or juror in a criminal trial, may be challenged for alienage."[172]

As observed above, in some countries aliens are permitted to hold public office in some branches of social welfare service. For instance, Article 29 of the Constitution of the Republic of Nicaragua (1950) lays down that aliens may hold public office in the branches of social welfare and artistic planning, or in those that require special technical knowledge provided such offices do not involve authority or jurisdiction. To take public office is one of the rights of citizens of Nicaragua (Art. 32). Under Article 33, the following are the obligations of the citizens: To register in the Electoral Registers; To vote in popular elections and to perform council offices unless lawfully excused.[173] Under Section 3 of Article VII of the Constitution of the Philippines, no person may be elected to the office of President or Vice-President unless he be a natural-born citizen of the Philippines. Section 4 of Article VI lays down that no person shall be a senator unless he be a natural born citizen of the Philippines. Under Section 6 of Article VIII, no person may be appointed as a member of the Supreme Court of the Philippine Islands unless he has been five years a citizen of the Philippines.[174] Under Articles 34 & 35 of the Constitution of the Union of Soviet Socialist Republics, the Soviet of the Union and the Soviet of Nationalities are elected by the citizens of the USSR.[175] In accordance with Section 1 of Article II of the Constitution of the United States of America, no person except a natural born citizen, or a citizen of the United States, shall be eligible to the office of President and neither shall any person be eligible to that office who shall not have been fourteen years a resident within the United States.[176]

Citizenship of the United States has been prescribed as a pre-requisite to the holding of several kinds of public offices and to

172 Hackworth: Digest, Vol. III, 561.
173 Peaslee: Constitutions of Nations, Vol. III, 7.
174 Peaslee: Ibid., 168, 172-73, 175.
175 The Supreme Soviet of the U.S.S.R. under Art. 33 of the Constitution consists of two Chambers: The Soviet of the Union and the Soviet of Nationalities—Peaslee: Ibid., Vol. III, 489, 491.
176 Peaslee: Ibid., Vol. III, 587.

the holding of positions on public boards and agencies, such as; Federal Farm Loan Board; Board of Advisors; Federal Industrial Institution for Women; Federal Radio Commission; United States Tariff Commission, etc. Further under the American Foreign Service Regulations, candidates for examination for appointment as foreign service officers must have been citizens of the United States for 15 years.[177]

The right of aliens to be appointed in public offices is normally determined by the Constitution or public laws and regulations of each country.[178] According to Cutler, nineteen States of the United States including Alaska and Hawaii have prohibitive constitutional laws or statutory provisions excluding aliens from the right of holding public offices. Several countries also have similar provisions excluding aliens from public appointments. The practice of States reveals that every foreigner born and residing in a country owes to that country allegiance and obedience to its laws as long as he remains in it, as a duty imposed upon him by the mere fact of his residence and the temporary protection which he enjoys, and is as much bound to obey its laws as nationals.[179] As regards the policy of the United States, Mr. Blaine, the Secretary of State stated in 1881 that "Every person who voluntarily brings himself within the jurisdiction of the country, whether permanently or temporarily, is subject to the operation of its laws, whether he be a citizen or a mere resident, so long as in the case of the alien resident, no treaty stipulation or principle of international law is contravened."[180]

As a rule, States do not permit aliens to engage in political activities within their borders. The practice of States establish the principle that it is within the prerogative of each State to punish political offences committed by foreign nationals on its domain, whether such offences are seditious or violent acts or publications inciting thereto. Advising its nationals in Korea against their intermeddling in the local politics, the Government of the United States

177 Hackworth: Digest, 559-560—It may be noted that under the foreign service regulations of most of the countries a male member for the foreign service who proposes to marry an alien must obtain the prior permission of his Government who has the right to inform the officer concerned that, if he marries such an alien he will have to resign. And as a rule a woman member of the foreign service will be required to resign upon marriage with a foreigner. For instance, Regulation No. 2 of the Foreign Service Regulations of the United Kingdom, like those of several other countries, imposes such restrictions on the marriage of a member of Foreign Service with a foreign national; The Foreign Office List and Diplomatic and Consular Yearbook for 1961, 83.
178 Hackworth: Digest, op. cit., 560.
179 Report of Mr. Webster, U.S. Secretary of State, to the President of the United States, (December 3, 1851); Moore: Digest, Vol. IV, 11.
180 Moore: Ibid., 13.

stated by a circular in 1897 in these terms: "The repeatedly expressed view of the Government of the United States is that it behoves loyal citizens of the United States in any foreign country whatsoever, to observe the same scrupulous abstention from participating in the domestic concerns thereof, which is internationally incumbent upon his Government. They should strictly refrain from any expression of opinion or from giving advice concerning the internal management of the country, or from any intermeddling in its political questions. If they do so, it is at their own risk and peril. Neither the representative of this Government in the country of their sojourn nor the Government of the United States itself, can approve of any such action on their part, and should they disregard this advice it may perhaps not be found practicable to adequately protect them from their own consequences. Good American citizens quitting their own land and resorting to another, can best display their devotion to the country of their allegiance, and best justify a claim to its continued and efficient protection while in foreign parts, by confining themselves to their legitimate avocations whether missionary work or teaching in schools, or attending the sick, or other calling or business for which they resort to a foreign country."[181]

In the opinion of Wharton, an alien under indictment for a political offence which had been committed at the instance of his own government, cannot plead by way of defence that he did the alleged offence at the command of his own government. He adds that "a foreigner cannot say that he is not bound to obey the laws of the State where he is sojourning. But if the act for which he is convicted is one enjoined by his own sovereign, then that sovereign must be held responsible."[182] As early as 1858, Mr. Cass, U.S. Secretary of State, in his dispatch to Mr. Clay, U.S. Minister to Peru stated: "If an alien, on going into a country sees that the former Government has been expelled or overturned by revolution and a new one set up in its place, he must submit to the authority thus established . . . if he resists the authority of the party in possession on the ground that another has the right of possession, he departs from his neutrality, and so violates the duty he owes to both the belligerents as well as to the laws of his own country."[183] Upon being informed that some American nationals in Australia had been participating in certain anti-government political associations, on May 15, 1931 the American Consul-

181 Moore: Ibid., 15.
182 Moore: Ibid., 15.
183 Moore: Ibid., 12.

General at Sydney, Australia was advised that the Government of the United States "cannot countenance any attempt of American citizens to foment disorders in foreign territory and that it will not be disposed to intervene to prevent their just punishment by the appropriate authorities."[184] Further, in **United States** v **Chandler** (1947), the District Court for the District of Massachusetts, United States took the following view in the matter: "All strangers are under the protection of a sovereign State while they are within its territory, and owe a local temporary allegiance in return for that protection." The Court added that while domiciled in the foreign State, the alien owed a qualified allegiance to it, that he was obligated to obey its laws and that he was equally amenable with citizens of that country to the penalties prescribed for their infraction.[185]

The practice of other States, like that of the United States, also establishes the above principle that an alien resident, whether permanently or temporarily, in a foreign State owes to the government of that State a local and temporary allegiance as long as he remains in it; that he is bound to obey all the laws in force; and that if he violates a law in force therein, he becomes liable for arrest and punishment according to the practice obtaining in that country. Likewise, if he participates in anti-government political activities in violation of the law of the State of residence, he becomes liable for punishment by the appropriate authorities and also he becomes liable for prosecution for treason in the same manner as the nationals of the receiving State. Thus two British trade union leaders Tom Mann in Germany and Ben Tillet in Belgium were arrested and deported to Great Britain for their attempt to spread trade unionism in those countries. Britain did not dispute the right of the State of residence concerned to expel the foreigners who had been obnoxious to the government. The Canadian Government expelled two foreign nationals called Carranza and Dubose, both on general grounds and for reasons connected with the maintenance of British neutrality during the Spanish-American War. According to Finlay, one of the Law Officers of the United Kingdom Government, "every State has by international law the right to expel aliens whose presence is considered dangerous."[186]

The question of resident alien's liability for prosecution for treason was discussed by courts of several countries. In in re

184 Hackworth: Digest, Vol. III, 554.
185 Annual Digest, (1947), Case No. 60, 128-129.
186 McNair: International Law Opinions, Vol. II, 111-112.

Friedman (1947) the Belgian Court of Cassation said: "Article 118 **bis** of the Penal Code (of Belgium) applies both to Belgian nationals and to aliens, even if the latter have enemy nationality. If it is proved that an alien has resided in Belgium under the protection of a permit of residence, (this will impose) duties towards the receiving State on him." Thus, under the law of Belgium aliens resident in Belgium could be tried for crimes against the external safety of the State (Art. 118 **bis** of the Penal Code). Article 4 of the Law of July 10, 1934, authorizes prosecution in Belgium for such crimes even when they have been committed outside the territory of the Kingdom by an alien.[187]

In **Re Penati** (1946) the Italian Court of Cassation held "According to Article 3 of the (Italian) Penal Code (of 1930), Italian criminal law binds all those, who whether they are Italian nationals or aliens, reside in Italy subject to the exceptions provided by Italian public law or by international law. There is no rule of Italian public law or of international law which exempts from punishment an alien who commits an act in Italy which constitutes a crime against the existence of the State, against its military defence, and against the duty of loyalty of the citizens towards the State which he attempts to undermine. Not only does no rule of this kind exist, but it is legally inconceivable, for no State can allow aliens who enjoy its hospitality to carry out activities which are contrary to its vital interests in the military and political sphere."[188]

In **Public Prosecutor** v **Drechsler** (1946) the Supreme Court of Norway made aliens resident in Norway liable to punishment for treason under Article 86 of the Norwegian Criminal Code of 1902 which reads as follows:

"(1) Any one who illegally bears arms against Norway or during a war in which Norway is engaged or with such war in view assists the enemy in word or deed or weakens Norway's ability to fight or that of any State allied with Norway, shall be sentenced to detention for at least three years or to imprisonment for not less than three years up to imprisonment for life.

(2) A Norwegian citizen domiciled abroad shall not be punished for committing any act which he was bound to do in obedience to the law of the country of his domicil."[189]

187 Annual Digest: Ibid., (1947), 127-128.
188 Annual Digest, (1946), Case No. 30, 74-75.
189 Annual Digest, Ibid., 73-74.

In several other cases the Norwegian Supreme Court held that aliens resident in Norway were liable to be tried and convicted for treasonable activities under the Criminal Code of Norway.[190] In **Johnstone** v **Pedlar** (1921) the House of Lords of the United Kingdom said that from the moment of his entry into the country until his departure from it, the alien owed allegiance to the Crown and that by reason of the said temporary allegiance, he could be tried, convicted and executed for any act of high treason.[191] Further, in **Joyce** v **Director of Public Prosecutions** (1946) the House of Lords affirmed the conviction of an American citizen who while holding a British passport had adhered to the "King's enemies" i.e., the Germans during the Second World War, and helped the latter through his anti-British broadcasting activities. The House of Lords took the view that the said American citizen having resided for many years in England owed a temporary allegiance to the British Crown even as a resident alien, that his possession of a British passport conferring privileges on him implied necessarily his continued allegiance to the British Crown, and that by his adherence to "the King's enemies" he became subject to the charge of high treason in the same manner as any other subject of the United Kingdom.[192]

The practice of the United States of America, like that of the United Kingdom, affirms the principle that an alien resident in a foreign State becomes liable for prosecution for treason if he wages war against that State, renders comfort to its enemies or engages in conspiracies against that State to which he is deemed to owe allegiance for the duration of his residence.[193] Upon being informed that an American citizen of Greek parentage had been arrested in Greece by the Greek authorities and was being held for trial by court martial on a charge of having participated in revolutionary activities, the American Legation in Paris was instructed on March 10, 1935 by the Government of the United States as follows: "While it was desirous of having its representatives extend their good offices with a view to assuring proper treatment and just trial, it could not properly intervene with the Greek Government on behalf of American citizens who had contravened

190 Public Prosecutor v. Thompson and Another (1946)
Public Prosecutor v. Karlsson (1946)
Annual Digest, Ibid., 74 footnote.
191 (1921) 2 A.C. 262 (H.L.); Katz and Brewster: op. cit., 104-108.
Dejager v. The Attorney-General for Natal, (1907) 2 A.C. 326.
192 (1946) 2 A.C. 347 (H.L.); Briggs: The Law of Nations, 578-Judge Lauterpacht: "Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens", 9 Cambridge Law Journal (1947), 330-348.
193 Opinion of Wharron; Moore: Digest, Vol. IV, 14.

Greek law in such a serious matter as rebellion unless there was strong reason to believe that otherwise a grave miscarriage of justice would result . . . that in extending good offices it should bear in mind that the Supreme Court of the United States had held that aliens domiciled in the United States owe to the Government a local and temporary allegiance which continues during the period of their residence and that they may become liable for prosecution for treason in the same manner as citizens of the United States."[194]

As observed above, States have been granting aliens within their territories certain essential personal and civil rights by means of bilateral treaties on the basis of reciprocity. Although there has been an increasing willingness on the part of States to yield extensive civil rights including occupational and residential privileges to foreign nationals by means of conventional arrangements, they are unwilling to admit aliens to the exercise of political rights. Most of the treaties[195] of friendship, commerce and navigation and other types of commercial treaties expressly prohibit aliens from participating in political affairs within the territories of the contracting parties. For instance, Clause (3) of Article VIII of the Treaty of Friendship, Commerce and Navigation entered into between the United States and Japan on April 2, 1953 provides: "Nationals and companies of either Party shall be accorded national treatment and most-favoured-nation treatment with respect to engaging in scientific, educational, religious and philanthropic activities within the territories of the other Party, and shall be accorded the right to form associations for that purpose under the laws of such other Party", and Clause (5) of Article XXI provides: "Nothing in the present Treaty shall be deemed to grant or imply any right to engage in political activities."[196] Clause (2) of Article VIII of the Treaty of Friendship, Commerce and Navigation* of October 29, 1954 provides: "Nationals and companies of either Party shall be accorded within the territories of the other Party, national treatment and most-favoured-nation treatment with respect to engaging in scientific, educational, religious and philanthropic activities and shall be accorded the right to form associations for that purpose under the laws of that country. Nothing in the present Treaty shall be deemed to grant or imply any right to engage in political activities."[197]

194 Hackworth: Digest, Vol. III, 554-555.
195 Hyde: International Law, Vol. I, 650.
196 United States Treaties and Other International Agreements (1953), Vol. 4, Part 2, 2070-2079.
* Concluded between the United States of America and Germany.
197 Ibid., (1956), Vol. 7, Part 2, 1848-1849.

Principles embodied in certain Conventions

Project No. 16: Diplomatic Protection prepared by the American Institute of International Law, (1925), provides:

"The American Republic to which the diplomatic claim is presented may decline to receive this claim when the person in whose behalf it is made has interfered in internal or foreign political affairs against the government to which the claim is made. The Republic may also decline if the claimant has committed acts of hostility toward itself."[198]

Article 7 of the inter-American Convention on the Status of Aliens signed on February 20, 1928, provides:

"Foreigners must not mix in political activities, which are the exclusive province of citizens of the country in which they happen to be; in cases of such interference, they shall be liable to the penalties established by local law."[199]

Article 11

Subject to local laws, regulations, and orders and subject also to the conditions imposed for his admission into the State, an alien shall have the right to acquire, hold and dispose of property.

Note : The Delegation of Indonesia, whilst accepting the provisions of this Article, stated that according to the new laws of Indonesia aliens cannot acquire title to property though they can hold property.

Commentary

Property rights of aliens

Article 11 deals with the acquisition of property by aliens and the protection of their vested rights. According to publicists, minimum standard of international law in favour of foreigners requires a modicum of respect for the property of foreign nationals within the territories of a State.[200] Giving expression to the well established principle of international law, this Article lays down that a foreigner shall have the right to acquire, hold and dispose of property in the State of residence. However, since under international

198 Amador, F.V. Garcia: Report on International Responsibility, A/CN.4/96, February 20, 1956, Annex 7, 3.
199 Hackworth: Digest, Vol. III, 561. It may be added that at the First Meeting of the Ministers of Foreign Affairs held in October 1939 at Panama, the American Republics reaffirmed their adherence to the principle of exclusion of foreigners from the enjoyment and exercise of strictly political rights as a general rule of international public law to be incorporated in the Constitutions and laws of States: Supplement to the American Journal of International Law, Vol. 35 (1941), 10.
200 Schwarzenberger: Manual, op. cit., 99.

law a State possesses the undoubted right to regulate the private ownership and control of property of all individuals on its domain, the above property rights of aliens are subject to the overriding operation of the national laws of that State. In a word, the property rights of aliens in a State are subject to the power of the host State to control and use all its wealth and resources as it likes.[201]

Opinions of Writers

Vattel states that "Every State has the liberty of granting or refusing to foreigners the power of possessing lands or other immovable property within her territory. If she grants them that privilege all such property possessed by aliens remains subject to the jurisdiction and laws of the country, and to the same taxes as other property of the same kind. The authority of the sovereign extends over the whole territory; and it would be absurd to except some parts of it, on account of their being possessed by foreigners. If the sovereign does not permit aliens to possess immovable property, nobody has a right to complain of such prohibition; for he may have good reasons for acting in this manner, and, as foreigners cannot claim any right in his territories . . . they ought not to take it amiss that he makes use of his power and of his rights in the manner which he thinks most for the advantage of the State. And, as the sovereign may refuse to foreigners the privilege of possessing immovable property, he is doubtless at liberty to forbear granting it with certain conditions annexed."[202]

As regards the property rights of aliens, **Moore** quotes the views of Mr. Adam, Secretary of State of the United States, which read as follows:—"There is no principle of the law of nations more firmly established than that which entitled 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. This (has been the) common rule of intercourse between all civilized nations."[203]

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201 It must be added that although a State has the power to control and use all the wealth and resources within its territories, publicists take the view that in the exercise of this power, it is obligated to act in accordance with recognized principles of international law as well as international agreements if any and with due regard for existing legal rights or interests, with adequate, prompt and effective compensation as one remedy, if the exercise of the power impairs them; Hyde: "Permanent Sovereignty over National Wealth and Resources", American Journal of International Law, Vol. 50, (1956), 854.

202 Katz & Brewster: The Law of International Transactions & Relations 114.

203 Moore: Digest, Vol. IV, 5.

Hyde observes: "A State enjoys an exclusive right to regulate matters pertaining to the ownership of property of every kind which may be said to belong within its territory. Thus it may determine not only the processes by which title may be acquired, retained or transferred, but also what individuals are to be permitted to enjoy privileges of ownership."[204]

Practice of Member States of the Committee

The Constitutions of most States contain provisions respecting property rights of the inhabitants residing within their borders. For instance, Clause (1) of Article 23 of the Constitution of Burma guarantees the right of private property and of private initiative of all the inhabitants—nationals and aliens alike—in the economic sphere. However, under Clause (2) of the same Article no person shall be permitted to use the right of private property to the detriment of the general public.[205] Clause (1) of Article 31 of the Constitution of India enacts that no person shall be deprived of his property except by authority of law.[206] Several legislative enactments and decisions of the courts of law of Ceylon tend to safeguard the property rights of individuals in Ceylon.[207] Under Article 2 of the Provisional Constitution of the Republic of Indonesia, every one within the territories of Indonesia has the right to own property individually as well as in association with others; no one shall be arbitrarily deprived of his property.[208] The public law of the United Arab Republic lays down that private property and homes are inviolable in accordance with the law.[209] The law of Iraq safeguards the right of ownership. No person's goods or property shall be expropriated except for the public benefit, and in the circumstances and in the manner prescribed by law, and on condition that just compensation is paid.[210] Article 29 of the Constitution of Japan provides: "The right to own or to hold property is inviolable . . . Private property may be taken for public use upon just compensation therefor."[211] As regards the protection of property rights of individuals in Pakistan, Article 15 of the Constitution

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204 Hyde: International Law, Vol. I, 650.

205 Peaslee: Constitutions of Nations, Vol. I, 7, 282.

206 It may be added that clause (1) of Article 31 while recognizing the superior right of the State to take the private property of an individual, requires the authority of law before the property of the individual can be expropriated. Such power of expropriation can be exercised only by authority of law and not by a mere executive fiat or order; Shukla: Commentaries on the Constitution of India, (Lucknow, 1960) 3rd ed., 111.

207 Peaslee: Constitutions of Nations, Vol. III, 816.

208 Peaslee: Ibid., Vol. II, 374.

209 Peaslee: Ibid., Vol. I, 813 and Vol. III, 363, 364.

210 Peaslee: Ibid., Vol. II, 416.

211 The Constitution of Japan and Criminal Statutes (Japan, 1958), 8.

of the Islamic Republic of Pakistan provides: "No person shall be deprived of his property save in accordance with law. No property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which provides for compensation therefor and either fixes the amount of compensation or specifies the principles on which and the manner in which compensation is to be determined and given."[212]

In Burma, Ceylon and India, aliens are permitted to hold and inherit real porperty. On the basis of reciprocity, Japan permits foreign ownership of real property in Japan. According to the new laws of Indonesia although aliens are permitted to hold property, they are prohibited from acquiring title to real property. Iraq imposes restrictions on alien ownership of agricultural land. In the United Arab Republic, under the Land Reform Law, no foreigner can own agricultural land more than 200 acres per head. This restriction does not apply to buildings and properties of like nature. Alien's right of succession to real property is permitted subject to the maximum limit of 200 acres per head as referred to above. In the Syrian Region of the U.A.R., no alien could be an owner of buildings unless he has obtained the necessary permission therefor from the authorities. Further, no foreigner is permitted to own agricultural lands. However, an alien's right of succession to agricultural land is permitted.

While under the laws of Burma, Japan and the U.A.R., aliens could not be the sole or part owners of ships which sail under their respective national flags; those of Ceylon, India and Indonesia, do not impose any such restrictions in this regard. On the basis of the standard of reciprocity certain aliens in Iraq are permitted to be sole or part owners of ships registered in Iraq.[213]

Practice of States other than Member States of the Committee

Practice of States reveals that aliens are generally permitted to acquire property, but such property rights of individuals are regulated by the national legal systems concerned. Since a State has the right to regulate matters pertaining to the acquisition and ownership of property of every kind within its territory, it enjoys

212 Brohi: Fundamental Law of Pakistan (Karachi, 1958), 805.
It may be added that Article 15 contains two essential parts, the one prohibiting the deprivation of property "except in accordance with law" and the other prescribing that a law which authorises compulsory acquisition of property or the taking of its possession must provide for compensation either by fixing amount or by specifying the principles on which and the manner in which compensation is to be determined and given. Brohi: Ibid., 402-404.

213 Report of the Asian African Legal Consultative Committee (Third Session, 1960), 123-24.

the competence to determine not only the process by which title can be acquired, retained or transferred, but also what individuals are to be permitted to enjoy privileges of ownership.[214] Recognizing this principle of international law, Mr. Kellogg, United States Secretary of State, stated as follows: "Every sovereign State has the absolute right within its own jurisdiction to make laws governing the acquisition of property acquired in the future. This right cannot be questioned by any other State. If Mexico desires to prevent the future acquisition by aliens of property rights of any nature within its jurisdiction, this Government has no suggestion whatever to make."[215] The term 'property' interpreted and applied by the national courts of several States includes not only personal property and real property but also intangible and incorporeal rights such as patents, copyrights, leases, accounts and choses in action. In short, every thing which can command an exchangeable value would be designated as property.[216]

States do not seem to be disposed to prevent the acquisition of or succession to movable property by foreign nationals. However, several States exclude aliens "from the acquisition of certain classes of movables such as airplanes and ships, as well as impose other restrictions having for their purpose the conservation of the country's vital economic resources."[217] For instance, under the laws of the United Kingdom and the United States of America, an alien cannot be sole or part owner of ships.[218] The Act of June 5, 1920 lays down that no rights under the mortgage of a vessel of the United States may be assigned to any person not a citizen of the United States without the approval of the United States Shipping Board.[219] Further, a vessel of the United States may not be sold by order of a District Court of the United States in any suit **in rem** in admiralty to any person not a citizen of the United States.[220] In a word, personal property may generally be held and inherited by foreign nationals, subject to certain limitations in the public interest. In the case of **Fergus et el v Tomalinson, as**

214 Hyde: International Law, Vol. I, 650.

215 However, he takes the view that when any Government seeks to divest aliens of property rights, which have already been legally acquired, their home State has the right to make representations and efforts to avoid such action.
Hyde: International Law, Vol. I, 650 footnote.

216 Brohi: Fundamental Law of Pakistan, 408.

217 Freeman: The International Responsibility of States for Denial of Justice (1938), 512; Briggs: The Law of Nations, 568.

218 Oppenheim: International Law, Vol. I, 680.
Hackworth: Digest, Vol. III, 624-625.

219 41 Stat. 1004; 46 U.S.C. ss 961 (d); Hackworth: Digest, Vol. III, 624.

220 41 Stat. 1004; 48 U.S.C. ss 961 (e); Hackworth: Ibid., 625.

Administrator (1928), the Supreme Court of Kansas said: "But alienage is not at common law any obstacle to the acquisition of title to personal property by next of kin . . . No reason is apparent, therefore, why the husband in the instant case, although a British subject, may not inherit his wife's personal estate. The question needs no further elucidation."[221] It may, however, be added that under an Oregon Statute, the right of aliens residing outside of the United States or its territories to take personal property or the proceeds thereof by descent or inheritance was made dependent upon the existence of a reciprocal right under the law of the alien's country. Thus in **In re Braun'a Estate,** the Supreme Court of Oregon held that it was incumbent upon the claimants, non-resident citizens of Germany, to prove that Germany granted such reciprocal right to American citizens.[222] But, in the case of **Emery et al** v **Cooley, Administrator et al,** it was held by another court that where real property is sold under the direction of the terms of a will it becomes personalty and non-resident aliens may take the proceeds despite statutory prohibitions against the inheritance of real property by aliens.[223]

Although aliens are normally permitted to hold and inherit personal property, States have been concluding commercial treaties which **inter alia** grant the nationals of the respective countries the right freely to dispose of and to succeed to personal property on an equal footing with the nationals of the country in which the property is situated. For instance, Article 14 of the Consular Convention concluded between the United States of America and Sweden in June 1910 provides: "The citizens of each of the Contracting Parties shall have power to dispose of their personal goods within the jurisdiction of the other, by sale, donation, testament, or otherwise, and their representatives, being citizens of the other Party, shall succeed to their personal goods, whether by treatment or **ab testamento,** and they may in accordance with and acting under the provisions of the laws of the jurisdiction in which the property is found take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein such goods are shall be subject to pay in like cases."[224]

Similar provisions have been included in bilateral treaties of friendship, commerce and navigation entered into between the

221 Hackworth: Ibid., 666; 126 Kans. 427, 268 Pac. 849, 850 (1928).
222 Hackworth: Ibid., 666-667 footnote.
223 Hackworth: Ibid., 667 footnote.
224 Hackworth: Ibid., 668.

United States and Italy in 1948, the United States and Japan in 1953, and the United States and Federal Republic of Germany in 1954. The ownership of immovable property by aliens is frequently limited. Several States appear to be unwilling to permit the succession to and retention of title to immovable property within their borders by individuals other than their own nationals or by aliens who are non-residents. International law does not impose upon any State the duty to permit aliens to acquire title to real property although as a matter of fact this right is granted in some States by virtue of its own municipal laws and bilateral treaties.[225] In several decisions, courts in the United States have held that rights in real property are governed by local law in the absence of applicable treaty provisions. In **Orr** v **Hodgson** one United States court took the following view: "It has become the settled law of this country that, in the absence of a treaty to the contrary, a State may lawfully prohibit aliens from owning or acquiring any lands or any interest therein, within its borders."[226] Further, courts in the United States seem to recognize that the right of succession to real property is a matter for the determination of the country or State in which the land is situated and that it is governed by the laws in force therein at the time of the owner's death. Thus, in **United States** v **Crosby** Mr. Justice Story stated: "the Court entertained no doubt on the subject; and are clearly of opinion, that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate."[227]

The United States is not at the present time disposed to yield by treaty, for the benefit of the nationals of a foreign contracting State, the privilege of acquiring lands within the territories of the United States except where such acquisition is by way of succession to the rights or interests in such lands as are possessed by the nationals of such States. The law of the United States relating to alien ownership of land has been laid down in 4 U.S.C.A. ss 1501-1512. Under ss 1501 of that law, "no alien or person who is not a citizen of the United States, or who has not declared his intention to become a citizen of the United States in the manner provided by law shall acquire title to or own any land in any of the territories of the United States except as hereinafter provided. The prohibition of this section shall not apply to cases in which the right to hold or dispose lands in the United States is secured by

225 Hyde: International Law, Vol. I, 651
Freeman: The International Responsibility of States for Denial of Justice (1938), 512.
226 4 Wheat 453; Hackworth: Digest, Vol. III, 671 footnote.
227 7 Cranch 114; Hackworth: Ibid., 672 footnote.

existing treaties to citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force and no longer."

Under ss 181 of the Act of February 25, 1920, Ch. 85, ss 1, 41 Stat. 437, "deposits of coal, phosphate, sodium, potassium, oil, oil-shale, or gas and lands containing such deposits owned by the United States including those in national forests, but excluding lands acquired under sections 513-519 of Title 16, and those in incorporated cities, towns and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale resources, except as hereinafter provided, shall be subject to disposition in the form and manner provided by sections 181-184, 185-188, 189-194, 201, 202-209, 211-214, 223, 224-226, 226(d), 226(e), 227-229(a), 241, 251, 261-263 of this title to citizens of the United States, or to associations of such citizens, or to any corporations organized under the laws of the United States, or of any State, or territory thereof, or in the case of coal, oil, oil-shale or gas, to municipalities. Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country (United States) shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of the said section."[228]

Moreover, since the common law rules relating to succession to real property have been incorporated into the common law of the several States of the United States, an alien in those States can take real property by devise subject to forfeiture but he cannot be allowed to inherit it. At present all States have modified the common law rules either by Statute or Constitution. In twenty States aliens are permitted to acquire and hold real property by testate and intestate succession. Other States, however, accord equal treatment only to alien friends, aliens who are eligible to citizenship, resident aliens, or aliens who have declared their intention to become citizens. Aliens who do not come within these special classifications have either no rights or else their rights are limited.[229]

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228 As amended by Act of Feb. 27, 1927, Ch. 66, ss. 3, 44 Stat. 1058; Act of Aug. 8, 1946, Ch. 916, ss. 1, 11; 60 Stat. 950, 30 U.S.C.A. ss, 181, Katz & Brewster: The Law of International Transactions and Relations, 182.

229 Boyd: "Treaties Governing the Succession to Royal Property by Aliens", 51, Mich. L. Review, 1005 (1953).

In **Veuve Proust v. Kaing** (1949) the Tribunal de Paix Nantes of France held that in the absence of reciprocity, a Chinese national was not entitled to the benefit even of the provisions of the French law of September 1, 1948 which gave tenants security of tenure. The court said that "since Article 4 of the Law of September 1, 1948, does not expressly grant alien tenants security of tenure, the general rules of law in the matter must be applied . . . Accordingly, an alien can enjoy that security only if his national law grants analogous privileges to French nationals: if a diplomatic convention exempts him from the condition of reciprocity, or if a general clause of diplomatic treaty provides directly or indirectly for the assimilation of the alien to the French nationals."[230] French citizens in the United States may acquire real estate by inheritance or otherwise except where State laws forbid aliens to hold real property.[231]

An alien may not hold real estate in Mexico within a hundred kilometres of the frontier, nor within fifty kilometres of the coast; nor may he be interested in a Mexican company owning land in these zones. Further, foreigners are not to own more than forty-nine percent of the stock of companies formed to exploit rural agricultural lands. Any interest greater than this may be retained until death, after which if the heir is not qualified to hold as a Mexican citizen, he is allowed five years for disposal.[232] Article 27 of the Constitution of Mexico of January 31, 1917 (as amended) provides that the "general capacity to acquire ownership of lands and waters of the nation shall be governed by the following provisions: "(1) Only Mexicans by birth or naturalization and Mexican corporations have the right to acquire ownership of lands, waters, and their appurtenances, or to obtain concessions for working mines or for the utilization of waters or mineral fuel in the Republic of Mexico. The nation may grant the same right to aliens, provided they agree . . . to consider themselves as Mexicans in respect to such porperty."[233] Article 14 of the Organic Law of 1925 sustains the title of those owners of the subsoil who had performed some positive act of ownership. The rights of others could be confirmed only as fifty year concessions since by the Constitution of 1917, "the 'direct ownership of certain enumerated mineral substances, including oil, gas and petroleum is vested in the nation and is inalienable and unprescriptible.[234]

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230 Annual Digest (1949), 259-260.
231 Cutler: The Treatment of Foreigners, Vol. 27, A.J.I.L. (1933), 239-243.
232 Ibid., 241.
233 Peaslee: Constitutions of Nations, Vol. II, 667.
234 Cutler: Op. cit., 241-242.

The Constitution of Poland provides in Article 95, paragraph 2 that "aliens shall enjoy on condition of reciprocity equality of rights with citizens of the Polish State and are subject to duties equal to those of the latter, unless Polish citizenship is expressly required by Statute." Under Article 99, "Statutes will determine the right of the State compulsorily to buy up land and to regulate dealings in land and also that it is only by statute that it can be determined how far rights of citizens and of their legally recognized associations to use freely land, waters, minerals and other natural resources may be limited for public reasons."[235]

Since no rule of international law imposes on a State the duty of according to the nationals of another State the right to acquire and hold real property within its borders, States conclude mostly bilateral treaties for this purpose. Many of the treaties between the United States and other powers contain provisions relating to acquisition of real property by their nationals within the territories of the other party. For example, Article I of the Treaty of Friendship, Commerce, and Consular Rights between the United States and Honduras, signed on December 7, 1927, provides that the nationals of each country in the territory of the other shall be permitted "to own, erect or lease and occupy appropriate buildings and to lease lands for residential, scientific, religious, philanthropic, manufacturing, commercial and mortuary purposes." It also provides in Article IV: "Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn."[236] Similar provisions are to be found in a large number of treaties to which the United States is a party.[237]

235 Sazonow v. District Land (Reform) Board of Bailystok, Annual Digest, (1919-1922), 247.
236 Hackworth: Digest, Vol. III, 672.
237 Arts. VII and VIII of the Treaty of Friendship, Commerce and Navigation concluded between the United States and the Italian Republic on February 2, 1948 could be cited as an example. Briggs: The Law of Nations, 544-545.

Several States take the view that with the yielding to an alien of the privilege of acquiring and holding property of any kind within its territories, the territorial sovereign finds itself subjected to a corresponding obligation to make reasonable endeavour to protect the same, and to abstain itself through any of its agencies, from conduct injurious to it.[238] They argue that when a State has permitted an alien either to engage in business or otherwise lawfully to acquire property, it cannot thereafter arbitrarily or unreasonably curtail his rights or confiscate the property. The United States has expressed its position on this question in the following terms: "When a nation has invited intercourse with other nations, has established laws under which investments have been lawfully made, contracts entered into and property rights acquired by citizens of other jurisdictions, it is an essential condition of international intercourse that international obligations shall be met and that there shall be no resort to confiscation and repudiation. . ."[239] Although the law of nations demands respect for private property, it recognises the right of the State to derogate from this principle, when its superior interest so requires. Thus, it allows expropriation for reasons of public benefit in time of peace and requisition in time of war.[240] In the view of some States, if a country wishes to nationalize a foreign-owned property it must make payment to foreign owners of the property nationalized.[241] It may be added that many modern Constitutions contain provisions which provide **inter alia** that private property shall not be taken for public use, without payment of compensation therefor.[242]

Principles embodied in certain Conventions

European Convention on Establishment[243]

Chapter II

Exercise of Private Rights

Article 4

Nationals of any Contracting Party shall enjoy in the territory of any other Party treatment equal to that enjoyed by nationals of

238 Hyde: International Law, Vol. I, 655.
239 Orfield & Re: Cases and Materials on International Law (1955), 532; Anderson: "Basis of the Law Against Confiscating Foreigner-owned Property", Vol. 21, A.J.I.L. (1927), 685-695.
240 Cheng: General Principles of Law (London, 1953), 37.
241 Wilson: "Property Protection Provisions in United States Commercial Treaties": Vol. 45, A.J.I.L. (1951), 83-87.
242 The Fifth Amendment to the Constitution of the U.S.A. contains such a provision.
243 Signed in Paris on December 13, 1955.

the latter Party in respect of the possession and exercise of private rights, whether personal rights or rights relating to property.

Article 5

Notwithstanding Article 4 of this Convention, any Contracting Party may, for reasons of national security or defence, reserve the acquisition, possession or use of any categories of property for its own nationals or subject nationals of other Parties to special conditions applicable to aliens in respect of such property.

Article 6

(1) Apart from cases relating to national security or defence,

(a) Any Contracting Party which has reserved for its nationals, or, in the case of aliens including those who are nationals of other Parties, made subject to regulations the acquisition, possession or use of certain categories of property, or has made the acquisition, possession or use of such property conditional upon reciprocity shall, at the time of the signature to this Convention, transmit a list of these restrictions to the Secretary-General of the Council of Europe indicating which provisions of its municipal law are the basis of such restrictions. The Secretary-General shall forward these lists to the other Signatories;

(b) After this Convention has entered into force in respect of any Contracting Party, that Contracting Party shall not introduce any further restrictions as to the acquisition, possession or use of any categories of property by nationals of the other Parties, unless it finds itself compelled to do so for imperative reasons of an economic or social character or in order to prevent monopolisation of the vital resources of the country. It shall in this event keep the Secretary-General fully informed of the measures taken, the relevant provisions of municipal law and the reasons for such measures. The Secretary-General shall communicate this information to the other Parties.

(2) Each Contracting Party shall endeavour to reduce its list of restrictions for the benefit of nationals of the other Parties. It shall notify the Secretary-General of any such changes and he shall communicate them to the other Parties.

Each Party shall also endeavour to grant to nationals of other Parties such exemptions from the general regulations concerning aliens as are provided for in its own legislation.[244]

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244 Unification of Law, Vol. I, International Institute for the Unification of Private Law (Rome, 1957), 165-167.

Article 12

(1) The State shall, however, have the right to acquire, expropriate or nationalise the property of an alien. Compensation shall be paid for such acquisition, expropriation or nationalisation in accordance with local laws, regulations and orders.

(2) The State shall also have the right to dispose of or otherwise lawfully deal with the property of an alien under orders of expulsion or deportation.

Note : (1) The Delegation of Japan did not accept the provisions of this Article. According to its view, "just compensation" should be paid for all acquisition, nationalisation or expropriation and not "compensation in accordance with the local laws, regulations and orders." The Delegation could not accept the provisions of Clause (2) as such a provision would be contrary to the laws of Japan.

(2) The Delegation of Indonesia reserved its position on Clause (2) of this Article.

(3) The Delegation of Pakistan stated that though it accepted the provisions of this Article, the view of the Delegation was that acquisition, nationalisation or expropriation should be in the national interest or for a public purpose.

Commentary

Right of expropriation of foreign-owned property

Clause (1) of Article 12 embodies the principle that where a State has permitted an alien to acquire lawfully property on its territory, it must not thereafter arbitrarily deprive him of his property. This is known as the doctrine of respect for acquired rights, and respect for acquired rights is one of the recognised principles of international law. However, respect for acquired rights is not an absolute right. The enjoyment of acquired rights is permissible only in conformity with the national legal system. Further, the law of nations does not deny to a State the right to launch upon social and economic measures designed to serve the common welfare of its people, nor does it prohibit a State from determining its own system of economic structure intended to achieve the general welfare of its people. Thus, although the law of nations demands respect for private property of aliens, it also recognises the right of a State to derogate from this principle if its superior interests so require. It allows requisition and expro-

priation for reasons of public utility in time of peace and in time of war.[245] As a matter of fact, private property rights of aliens as well as of nationals are continually being seriously restrained, modified or suppressed in the exercise of what is known as "police power" or "eminent domain". If expropriation is exercised by the competent organ of a State in conformity with the general national legislation, principles of good faith, juridical equality between aliens, absence of discrimination against aliens as such, and conditional upon payment of compensations, such expropriation would be in keeping with dictates of international law and practice of the civilized nations of the present day world.[246]

Clause (2) of this Article gives expression to the effect of a well recognized rule of international law and State practice according to which an alien is under the jurisdiction of the State in which he happens to be, and is responsible to it for acts he commits on its territory. The foreign State has the right to dispose of or otherwise deal with the property of an alien who has been under orders of expulsion or deportation. If the host State's action in this regard is not arbitrary or unreasonable, if exercised in accordance with its applicable laws, regulations and the principle of good faith and if there has been no denial or delay of justice, his home State's right of protection over its nationals abroad does not arise.

Opinions of Writers

Oppenheim says: "The rule is clearly established that a State is bound to respect the property of aliens. This rule is qualified, but not abolished, by two factors: the first is that the law of most States permits far-reaching interference with private property in connection with taxation, measures of police, public health, and the administration of public utilities. The second modification must be recognised in cases in which fundamental changes in the political system and economic structure of the State or far-reaching social reforms entail interference, on a large scale, with private property. In such cases neither the principle of absolute respect for alien private property nor rigid equality with the dispossessed nationals offer a satisfactory solution of the difficulty. It is probable that, consistent with legal principle, such solution must be sought in the granting of partial compensation."[247]

245 Portuguese-German Arbitration (1919) Award II (1930); 2. United Nations Reports of International Arbitral Awards, 1035-1039; Norwegian Shipping Claims case (1922).

246 Standard Oil Co. case (1926); League of Nations, Bases of Discussion, 1929, Vol. 3, 33-37.

247 Oppenheim: International Law, Vol. I, 352.

Hyde says: "A State has the power to control and use its natural wealth and resources. It may thus enter into binding agreements for development of its national wealth and resources. In the exercise of this power, it is obligated to act in accordance with recognised principles of international law as well as international agreements with due regard for existing legal rights or interests, with adequate, prompt and effective compensation as one remedy, if the exercise of the power impairs them.

Such a formulation is essential to a measure of understanding among States exporting and importing capital whether or not a majority of the (General Assembly of the United Nations) places an article on self-determination in the Draft Human Rights Covenants, applicable to the taking of private property, it is wise to insure this minimum certainty of measuring of its legal implications."[248]

Practice of Member States of the Committee

Expropriation of foreign owned property for public purposes is permissible only against compensation under the laws of the countries in the Committee. Clause (4) of Article 23 of the Constitution of the Union of Burma lays down: "Private property may be limited or expropriated if the public interest so requires but only in accordance with law which shall prescribe in which cases and to what extent the owner shall be compensated. And Clause (5) states that subject to the conditions set out in the last preceding clause, individual branches of national economy or single enterprises may be nationalized or acquired by the State by law if the public interest so requires.[249] Article 27 of the Provisional Constitution of the Republic of Indonesia provides: "(1) Expropriation of any property or right for the general benefit cannot take place, except with indemnification and in accordance with regulations as established by law. (2) If any property has to be destroyed by public authority or has to be rendered useless either permanently or temporarily for the general benefit, such actions can only be taken with indemnification and in accordance with regulations as established by law, unless this law determines to the contrary."[250] Article 10 of the Iraqi Constitution provides: No person's goods or property shall be expropriated except for the public benefit, and in the manner prescribed by law, and on condition that just compensation is paid. Another paragraph of this

248 Hyde: "Permanent Sovereignty over National Wealth & Resources", Vol 50, American Journal of International Law (1956), 854.

249 Peaslee: Constitutions of Nations, Vol. 1, 282.

250 Peaslee: Ibid., Vol. II, 374.

Article adds that goods or property may not be seized and prohibited goods be not confiscated except in accordance with law and that the general confiscation of movable and immovable property are absolutely forbidden.[251] In Iraq any criminal's property, be he a national or an alien, could be confiscated without making any discrimination between nationals and aliens . . . Under Article 31(2) of the Constitution of India, "no property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate." Thus, although the Constitution of India provides for the State's power of compulsory acquisition and requisitioning of private property of nationals and aliens alike against compensation, yet the determination of the quantum of the compensation payable for the property taken has been left to the legislature. Under the Constitution (Fourth Amendment) Act of 1955, it is no more open to the Indian courts to go into the question of appropriation of private property by the State and enquire whether the true value of the property appropriated has been ensured.[252] Under Clause (3) of Article 29 of the Constitution of Japan, private property may be taken by the State for public use upon just compensation therefor.[253] In **Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha** (1953), the High Court of Tokyo (First Civil Affairs Section) said in part:

"(a) There is an established principle of international law that in the event of a violent social reform or revolution in a State, whether or not the property of the nationals of that State is confiscated, property belonging to foreign nationality can only be expropriated with compensation. Moreover, such compensation must be "adequate, efficient and immediate compensation." This has been confirmed by the practice of many States, by precedents, and by the writings of acknowledged authorities.

"(b) As to whether the courts of a third country must recog-

251 Peaslee: Ibid., 116.
252 Bela Banerji, 1954, S.C.R. 41. Prior to the Constitution (Fourth Amendment) Act, 1955, the Courts in India had the power to go into the question on the ground that the compensation provided for by the State was not adequate. According to the practice of the Indian courts "compensation" means "a just equivalent of what the owner has been deprived of taking into account all the elements which make up the true value of the property appropriated."
253 The Constitution of Japan and Criminal Statutes, 8.

nize the effect of a law which is, as the nationalization law was, properly enacted by another State, or whether it is permissible to examine the validity or invalidity of such a law and then possibly refuse to recognize it, the practice of the various States is still divided, and no universally accepted principle of international law that the effect of a foreign law may be adjudged invalid by the courts of a State has yet been established . . . This Nationalization Law was enacted in Iran's own interests and in accordance with the Resolution of the General Assembly of the United Nations relating to the exploitation of the natural resources of the various countries. Furthermore, as stated in the conclusions, in view of the fact that the Nationalization Law is not a completely confiscatory law, contrary to the rights and interests of foreign nationals, but a law of expropriation subject to payment of compensation the courts feel bound to hold that it cannot try the validity or invalidity of such a law by examining the compensation and securing whether or not it is "adequate, effective and immediate". If, however, we take the view that we cannot pass on the validity or invalidity of such a law, we do in effect thereby actually recognize the validity of the law."[254]

Clause (1) of Article 15 of the Constitution of the Islamic Republic of Pakistan lays down that no person shall be deprived of his property save in accordance with law; and under Clause (2), no property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which provides for compensation therefor and either fixes the amount of compensation or specifies the principles on which and the manner in which compensation is to be determined and given. Clause (4) of the article provides that "property" in Clause (2) of the article shall mean immovable property, or any commercial or industrial undertaking, or any interest in any such undertaking.[255] Commenting on the scope of Article 15, Brohi observes as follows: "This Article has two essential parts, the one prohibiting the **deprivation** of property except in accordance with law, and the other prescribing that a law which authorises compulsory **acquisition** of property or the taking of its possession must provide for compensation either by fixing the amount or by specifying the principles on which and the manner in which compensation is to be determined and given. Broadly considered, the first part corresponds to the power which in American jurisprudence is called the

254 International Law Reports (1953), 305-313; Katz & Brewster: The Law of International Transactions & Relations, 830.
255 Brohi: Fundamental Law of Pakistan, 805.

"police power" of the State and the second, the power of "eminent domain."[256]

In the case of **Mira Khan and others** v **Meharban Husain and others** (1951) it has been held that the term "acquisition" is a wide concept, meaning procuring or taking property permanently or temporarily and it does not necessarily mean acquisition of legal title by the State in the property taken possession of. The court declined to impose upon the term "acquisition" a narrow meaning on the ground that such a construction would introduce a technicality which would unnecessarily curtail the meaning of the expression, with the result that a law enacted to deal with requisition would be valid even if it did not make provision for payment of any compensation. In the words of Mr. Rahman C. J.: "In the context of immovable property, acquisition may be accepted as transference of the ownership rights to the acquiring authority, as contrasted with requisition which would vest a temporary right of use of the property in that authority. The right of possession is but part of the full right of ownership. **Omne majus continct in se minus**—the greater contains the less, is a well-known maxin of the law."[257]

Practice of States other than Member States of the Committee

Some States take the view that when a State has permitted an alien either to engage in business or otherwise lawfully to acquire property, it cannot thereafter arbitrarily or unreasonably curtail his rights or confiscate the property.[258] The Secretary of State Huges has expressed the position of the United States on this question in the following terms: "When a nation has invited intercourse with other nations, has established laws under which investments have been lawfully made, contracts entered into and property rights acquired by citizens of other jurisdictions, it is an essential condition of international intercourse that international obligations shall be met and that there shall be no resort to confiscation and repudiation."[259] Although the law of nations demands respect for private property, it recognizes the right of the

256 Brohi: Ibid., 404: The American courts have evolved the doctrine of "police power", "eminent domain" and "taxation power" as limiting the application of "due process" clause. Police power, eminent domain and taxation power are those powers, the exercise of which whether by the Government of the Federation or the States is not held to be in conflict with the due maintenance of the protection of the "due process of law" which is given to the individual by the Constitution of the United States in its 5th and 14th Amendments: Brohi: Ibid., 365-366.

257 Pakistan Legal Decisions (1956), Karachi 338; Brohi: op. cit., 411.

258 Stowell: International Law (1931), 171.

259 Orfield and Re: Cases and Materials on International Law (London, 1956), 532.

State to derogate from this principle, when its superior interest so requires. Thus, it allows expropriation for reasons of public utility in time of peace and requisition in time of war.[260] Expropriation of private property, whether national or foreign for reasons of public benefit was recognized by the Permanent Court of Arbitration in the **Norwegian Shipping Claims case (1922)** [261] and the Permanent Court of International Justice in the **German Interests Case (Merits) (1962).**[262] The right was described by the Permanent Court of Arbitration in these terms: "The power of a sovereign State to expropriate, take or authorise the taking of any property within its jurisdiction which may be required for the public good or for the general welfare (has the status of a legal right)."[263] Thus, a government may take foreign-owned property for its own use making that property its own. If a country wishes to nationalize any foreign-owned property it must pay compensation to the foreign owner of the property nationalized. This rule seems to have been established not only by the overwhleming weight of opinions of publicists, but also by the sustained practice of Western nations and of international judicial tribunals. The Soviet Union too accepted in a series of treaties the rights of new investors in that country. According to the Secretary of State Hull of the United States, "the taking of property without compensation is not expropriation. It is confiscation." While admitting that all sovereign nations have the right to expropriate private property within its territories, he added that the universally recognised principles of the law of nations require that such expropriation be accompanied by provision on the part of a State for adequate, effective and prompt payment of compensation for the properties seized.[264]

As regards the right of a State to nationalize foreign owned property within its territory, it appears that the United Kingdom, like the United States, normally does not question the general right of a government to expropriate in the public interest and on payment of adequate compensation, but in its view this right does not justify expropriations essentially arbitrary in character. While confiscation is theoretically prohibited in modern times, the doctrine of just compensation for property taken has been embodied in the Constitutions of most countries of the world.[265] Clause (xxi) of

260 Portugo-German Arbitration (1919), Award II (1930), Vol. 2 U.N. Reports of International Arbitral Awards, 1035-1039; Cheng: General Principles of Law, 37-38.

261 Orfield and Re: Cases and Materials on International Law, 502-505.

262 Rep. of P.C.I.J. 1926, Ser. A, No. 7, 22.

263 Cheng: General Principles of Law, 38.

264 Hyde: International Law, Vol. 1, 710-711.

265 Cutler: The Treatment of Aliens, op. cit., 240; Hyde: International Law, Vol. I, 714.

the Commonwealth of Australia Constitution Act of 1900 confers on the Commonwealth Parliament the power of—"acquisition of property on just terms from any State or person for any purpose in respect of which Parliament has power to make laws."[266] Sub-Clause (2) (vi) of Article 44 of the Constitution of Ireland provides: "The property of any religious denomination or any educational institution shall not be divested save for necessary works of public utility and on payment of compensation." Under Clause (3) Article 14 of the West German Constitution (1948), "Expropriation shall be admissible only for the well-being of the general public. It may be effected only by legislation or on a basis of law which shall regulate the nature or extent of compensation. Compensation shall be determined after just consideration of the interests of the general public and participants. Regarding the extent of compensation an appeal may be made to ordinary courts in case of dispute." And Article 15 provides, "Land and landed property, natural resources, and means of production may for the purpose of socialization be transferred to public ownership or other forms of public controlled economy by law which shall regulate the nature and extent of compensation. . ."[267] The doctrine of just compensation for property taken has been embodied in the Constitutions of every republic of the American continent.[268] For instance, Article 63 of the Constitution of the Republic of Nicaragua lays down that no one may be deprived of his property except by judicial judgment, a general tax, or for public use or social interest according to law and upon prior payment in cash of just compensation.[269]

As regards the law of England, Blackstone observes: "So great is the regard of the law for private property, that it will not authorize the least violation of it . . . the Legislature alone can and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained.[270] Thus property in England can be compulsorily acquired for public purposes only if a Statute authorises the executive organ of the State to do so. It is an established rule of construction of instruments that express words must exist in such a Statute

266 Basu: Commentary on the Constitution of India (Calcutta, 1955), Vol. I, 343.
267 Basu: Ibid., 343-344.
268 Hyde: International Law, Vol. I, 714.
269 Peaslee: Constitutions of Nations, Vol. III, 10.
270 Blackstone's Commentaries, Book I, 139; Basu: Commentary on the Constitution of India, 342-343.

before the intention to authorize the taking of property without compensation could be given effect to. In the case of **De Keysers' Royal Hotel Ltd., v. The King** (1920) the House of Lords stated **inter alia:** "When powers covered by this Statute (i.e., Defence of Realm Regulations) are exercised by the Crown it must be presumed that they are so exercised under the statute, and therefore subject to the equitable provision for compensation which is to be found in it . . . if the commandeering of the buildings in this case had not been expressly done under statutory powers . . the Crown must be presumed to have acted under these statutory powers and thus given to the subject the statutory right to compensation."[217] **Prima facie** the subject or national of a State at peace with the **United Kingdom** is, while resident in that country, entitled to the protection of the Crown accorded to British subjects.[272] This rule applies also to foreign owned property in the United Kingdom.

The law of the United States relating to the taking of property is regulated by the Fifth and Fourteenth Amendments to the Constitution of the United States of America. The provision in the Fifth Amendment to the Constitution of the United States that private property shall not "be taken for public use, without just compensation" is unconditional in scope and extends to aliens as well as to citizens. Likewise, aliens are protected by the provision in the Fourteenth Amendment prohibiting the States from depriving "any person of life, liberty, or property, without due process of law."[273] The American law permits the Government to take property of an alien for public benefit with just compensation. Under the American law, such a taking would normally be in the form of an assertion of the power of eminent domain.[274] **In Berman v Parker** (1954), an act authorizing the establishment of a District Columbia Redevelopment Land Agency and the adoption of a comprehensive land use plan was held valid under the "Due Process Clause." The particular taking of plaintiff's commercial property in the execution of such a land use plan was held a proper exercise of the power of "eminent domain" for a public purpose, though the plan contemplated redevelopment of the property taken under the management of a private agency and the possible uses under the plan included commercial purposes.[275] In the **United States v. Kansas City Life Insurance Co.,** (1950), the claimant was held entitled to just compensation for

271 (1920) A.C. 508; Brohi: Fundamental Law of Pakistan, 414-415.
272 Johnstone v. Pedlar (1921), A.C. 262; Katz & Brewster: The Law of International Relations and Transactions, 101-108.
273 Hackworth: Digest, Vol. III, 653.
274 Katz & Brewster: Op. cit., 779.
275 348 U.S. 26; 75 S.Ct. 98 (1954).

destruction of agricultural value of his land by government's maintenance of Mississippi river in that vicinity continuously at high water level in the interest of navigation.[276]

According to the practice of States and the law of nations the taking of foreign owned property with compensation is known as "expropriation". There are frequent instances in the past where in time of peace, the expropriation or destruction of the immovable property of foreign nationals has been deemed to require the payment of full compensation.[277] In **Anglo-Iranian Oil Co., Ltd., v. Jaffrate** (The Rose Mary) (1953) the Supreme Court of Aden held that the Iranian Law of 1951 was confiscatory in that it failed to provide "any compensation", and was therefore in violation of international law which was part of the common law of Aden.[278] In **Anglo-Iranian Oil Co. Ltd. v. Societa S.U.P.O.R.** (1954) the Civil Tribunal of Rome (Italy) said in part: "In the Italian legal system as shown by several decisions, there is a recognized power of expropriation even in relation to immovables which the administration had undertaken by contract not to expropriate. The exercise of such power, therefore, could not be regarded as contrary to Italian public order. In Italy, furthermore, the right to extract minerals is a personal right the expropriation of which is not subject to compensation. But a right to indemnity is recognized by the Iranian law of 1951 which indicates that it is subject to a preliminary administrative procedure and ultimately to judicial control. This law is not contrary to the Iranian Constitution which provides for equitable compensation, and in the proceedings before the International Court of Justice Iran recognized not only the right to indemnity, but also the possibility of its enforcement through ordinary Iranian courts under Iranian law, such recognition binds the Iranian State towards plaintiff. However, neither by Italian law nor by generally recognized norms of international law is it required that the quantum of the idemnity be effectively adequate to the value of the object taken. It is enough that there is compensation. There was, furthermore, a public economic interest in the nationalisation, and therefore the law cannot be held "political" and denied effect in Italy. This also showed that the law was not discriminatory, while its alleged confiscatory character was disproved by the motivation (protection of Iranian public interest) and the recognition of the right to compen-

276 339 U.S. 779; 70 S.Ct. 885 (1950); Katz & Brewster: Op. cit., 780.

277 The Sicilian Sulphur Monopoly case (1838); The Finlay case; The Reverened Jonas King case (1853); Orfield and Re: Cases and Materials on International Law, 533-534; Moore: Digest, Vol. VI, 262-264.

278 1 Weekly Law Reports 246; International Law Reports (1953), 316.

sation. The text of the law shows no intention to persecute, and there is no room for research into the underlying subject motives of the legislatures not revealed by the text."[279]

Nationalization of foreign-owned property in modern times

Under customary international law, every sovereign State has the right to nationalize all property, whether owned by nationals or foreigners, situated on its domain. In the case of foreign owned property, such nationalization must be done in good faith, it must be for purposes of promotion of general welfare of the masses, the State must pay just compensation to the foreign owners of the property nationalized and there must be no discrimination against foreign owners as such. Such nationalization or expropriation of foreign-owned property is not unlawful.[280]

In modern times nationalization of foreign-owened property has become more and more widespread. The practice of expropriating foreign property by nationalization has spread from Soviet Russia to other countries in Europe, Latin America, Asia and Africa. In the view of some writers the Mexican expropriations and the Soviet nationalizations could be regarded as the forerunners of many incidents of nationalization of private property and that the Iranian nationalization of the property of the Anglo-Iranian Oil Company, a corporation whose majority stock is owned by the British Government will not be the last governmental nationalization of foreign-owned private property. Further, in their view, it would seem that no part of the world may be immune from this rapidly growing phenomenon. It may be added that even industrially advanced countries like France and the United Kingdom, have themselves entered upon the nationalization of certain of their own industries, some of whose stock was owned by aliens. [281]

Requirements of compensation in modern times

Although several nations claim that customary international law requires that once a foreigner has been permitted to acquire property or property interests in a country in full compliance with its municipal law, and it cannot thereafter take or destroy such existing or vested property rights with adequate compensation yet the realities of the modern world would make it impossible in many cases to adhere to the principle of full compensation. The principle of just compensation has to give way to considerations of debtor's

279 Katz & Brewster: The Law of International Transactions and Relations, 828.

280 Cheng: General Principles of Law, 49-50.

281 Kuhn: Nationalization of Foreign-Owned Property and its Impact on International Law, Vol. 45, A.J.I.L. (1951), 709-712.

political and economic instability or its capacity to pay. Immediately after the Second World War, the industrially advanced nations began to appreciate that the actual attainment of compensation for their nationals in cases of the nationalization of their property must be dependent upon a variety of factors, such as the economic and political instability as well as the ability to pay off the debtor country. This consideration was instrumental for settling the claims of the United States nationals against the Federal People's Republic of Yugoslavia by the agreement of July 19, 1948, under which the United States accepted a lump sum payment of seventeen million dollars in full settlement of the claims of American property owners whose property in Yugoslavia had been nationalized, although the actual market value of that property was much greater. Further, this new settlement is known as **en bloc** method of settlement, whereby one settlement is made on behalf of all interested nationals instead of an individual protection being offered to each property owner resulting in individual awards. Several important changes result from this type of an overall compensation agreement: (a) the property owner now looks to his own government for compensation; (b) although provision is made for part-payment of an award, complete payment cannot be made until all claims have been filed and adjudicated, since until that time the amount of ademption to which all claimants must submit will be unknown. This results from the fact that the **en bloc** settlement is likely to be less than the full market value of the property nationalized.

Under the International Claims Settlement Act of 1950, the Government of the United States has set up an International Claims Commission with power "to examine, adjudicate, and render final decisions, with respect to claims of the Government of the United States and of its nationals, not only under the terms of the agreement between the United States and Yugoslavia, but also under the terms of any agreement thereafter concluded with other Governments (excepting those at war with the United States in World War II) arising out of the nationalization or other taking of property, where the Government of the United States has agreed to accept from that Government a sum in **en bloc** settlement thereof." The Act expressly provides that in the decisions of claims, in addition to the provisions of the particular agreement, the Commission is to apply "the applicable principles of international law, justice and equity."[282]

282 Orfield and Re: Cases and Materials on International Law, 534-535; Minnesota Law Review, Vol. 36 (1952) Kuhn: "Nationalisation of Foreign-Owned Property and its Impact on International Law, op. cit., 710.

The post-war (War II) nationalization agreements concluded between the Government of the United Kingdom and the Latin American countries provide for the payment of just and equtable compensation for the expropriation of British owned properties in that part of the world. The actual compensation paid as a result of the Anglo-Mexican Agreement concerning the expropriation of British owned oil properties in Mexico appears to have amounted only to about one-third of the real value of the oil properties taken. In the Anglo-Argentinian and the Anglo-Uruguayan Purchase Agreements the compensation agreed upon appears to represent about 60 per cent of the capital value involved. In the agreement between the United Kingdom and Poland, and in the agreement concluded between the United Kingdom and Czechoslovakia (1949) the compensation stipulated is understood to be one-third of the value of the British investments nationalized by Poland and Czechoslovakia. In the agreement between the United Kingdom and Yugoslavia (1949) the settlement appears to represent 50 per cent of the value of the British investments in Yugoslavia. By and large, it is said that the United Kingdom agreed to insist merely on the principle of compensation in case of expropriation ranging from one to two-thirds of the value of British investments in the countries concerned, but not on the latter of its contractual rights. It has been content to waive portions of British claims, taking into account equitable considerations such as the general post war difficulties and the scarcity of foreign exchanges in such under-developed countries.

It may be added that in the agreements between France and Belgium, France and Canada, France and Switzerland, and France and the United Kingdom regarding the French nationalized gas and electricity industries, the compensation appears to have amounted to 70 per cent of the value of the holdings of these contracting parties in these nationalized properties. Further, it was agreed that the aliens were to be treated in respect of payment of compensation on the same footing as the French nationals. Furthermore, it was agreed that in the event of France subsequently granting more favourable treatment to creditors of any other country a most favoured reservation comes into operation.[283]

Views taken by International Judicial Tribunals

Earlier judicial pronouncements emphasized the principle of just compensation. In the **Norwegian Shipping Claims Case** (1922)

283 Orfield and Re: Cases and Materials on International Law, 534-535. Schwarzenberger: "The Protection of British Property Abroad" Vol. 5, Current Legal Problems (1952), 295.

(United States of America v. Norway), the Permanent Court of Arbitration held that just compensation must be paid to the alien claimants, both under the municipal law of the United States and the law of nations. In **Spanish Zones of Morocco Claims** (1924) (Great Britain v. Spain) the Special Arbitral Tribunal held that under international law an alien could not be deprived of his property without just compensation. The same view was taken by the Special Arbitral Tribunal in the case of **Goldenberg & Sons v. Germany** (1928) (Rumania v. Germany). [284] In the **Chorzow Factory case** (1928), the Permanent Court of International Justice adopting the above view held that expropriation was lawful under international law only if fair compensation had been paid. It said that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[285]

Principles embodied in certain Conventions

European Convention on Establishment (1955)

Chapter VI

. . . . Nationalization

Article 23

Without prejudice to the provisions of Article I of the Protocol to the Convention on the Protection of Human Rights and Fundamental Freedoms, nationals of any Contracting Party shall be entitled, in the event of expropriation or nationalisation of their property by any other Party, to be treated at least as favourably as nationals of the latter Party.[286]

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284 17 A.J.I.L. 362 & 368; Annual Digest (1923-24) No. 85, 157-163.

285 The doctrine of just compensation has been challenged, however, by a number of governments and some writers. Some reject not only the principle of "full" or "just" compensation but also the theory of "some compensation" or "compensation". Some argue that the requirement of compensation applies only in the case of expropriation which involves discrimination against aliens or against particular aliens. Others lay emphasis upon the freedom of States to expropriate property in the course of a general programme of economic or social reform without payment of "compensation" or at least without payment of "full" or "prompt" compensation.
Katz & Brewster: The Law of International Transactions & Relations, 833; Friedman: Expropriation in International Law (1953); Wortley: Expropriation in Public International Law (1959); Rep. P.C.I.J. Ser. A No. 17; Schwarzenberger: International Law, Vol. I (1957), 3rd ed., 654.

286 Unification of Law, International Institute for the Unification of Private Law, (Rome, 1957), Vol. I, 177.

Article 13

(1) An alien shall be liable to payment of taxes and duties in accordance with the laws and regulations of the State.

(2) An alien shall not be subjected to forced loans which are unjust or discriminatory.

Note: 1. Clause (1) of this Article was accepted by all Delegations except that of Japan. The Delegation of Japan wished a proviso to that clause to be inserted to read as follows:

"provided that the State shall not discriminate between aliens and nationals in levying the taxes and duties."

2. Clause (2) was accepted by the Delegations of Burma, India, Indonesia and Iraq. The Delegate of Ceylon wished the clause to be drafted as "An alien shall not be subjected to forced loans." The Delegate of Pakistan suggested the following draft: "An alien shall not be subjected to loans in violation of the laws, regulations and orders applicable to him." The Delegate of the United Arab Republic was of the view that the draft should be as follows: "An alien shall not be subjected to unjust forced loans."

Commentary

Liability of aliens to payment of taxes

Article 13 gives expression to a general rule of State practice relating to the alien's liability for taxation and other cognate payments in the State of residence. Under international law, not only the State has the power to tax all persons within its border, but also it may even impose discriminatory taxes. However, a discrimination against or between aliens would be regarded as an unfriendly act towards the home State of the aliens affected and would no doubt give rise to protest and reprisal. Therefore, the privilege of discriminatory taxation is not resorted to in the modern times. Forced loans or confiscatory levies have been regarded as unreasonable in time of peace or in the absence of an exceptional emergency. Under Article 13 an alien shall be liable to payment of all taxes and duties established by law. In this regard their liability is as much as that of the nationals of the State of residence. Similarly under Clause (2) of this Article, an alien must not be subjected to forced loans which are unjust and discriminatory in character. In a word, for tax purposes, alien individuals are to be treated on a footing of equality with the nationals of the State of residence..

Opinions of Writers

Oppenheim says: "A State has wider powers over aliens of the latter kind (i.e., individuals who take up their residence in another State or for some length of time), it can make them pay rates and taxes. . . ."[287]

Hackworth observes: "In general, States have authority as an incident of sovereignty, to tax aliens resident within their territory and their property there situated. In theory, States are presumed to limit the taxation of non-resident aliens to their property situated within the jurisdiction of the taxing State and the income derived from sources therein."[288]

Hyde states: "In levying taxes to defray the expenses of government, no duty is imposed upon a State to leave unburdened either property owned by aliens, or persons who may themselves be aliens. Nor does any principle of international law forbid the territorial sovereign to impose, in some instances, a heavier burden upon the interests of such individuals than is placed upon those of its own nationals. The existing practice in so far as it is manifested by conventional arrangements tends, however, to place aliens generally upon an equal footing with nationals. Save in cases indicating a marked abuse of power, or a disregard of the terms of a treaty, the United States does not appear to find in the taxation of its nationals or of their property abroad reasons for diplomatic remonstrance or interposition. An abuse of power is seen when the laws of the taxing State are violated, or when a tax is fairly to be deemed confiscatroy in character or when the imposition of a tax marks the duplication of a previous collection by a governmental entity in **de facto** control of the area to which such tax appertains." . . . In general, all immovable property within the territory of a State, regardless of the residence or nationality of the owner, is, with a few notable exceptions which are explainable on precise grounds, subject to taxation; likewise, all movable property therein, provided it may be fairly regarded as incorporated in the mass of property there belonging. Difficulties may arise in ascertaining whether a particular chattel falls within such a category, and is to be so regarded. Normally the problem is oftentimes one of fact rather than law. . . . Personal taxes levied upon individuals subject thereto may assume a variety of forms. When they are levied upon aliens, the law of nations appears to offer few restrictions beyond the possible requirement that the tax be in a broad

287 Oppenheim: International Law, Vol. I, 680.
288 Hackworth: Digest, Vol. III, 575.

sense uniform and general in its operation. Such individuals may be subjected, for example, to the payment of a poll tax, or of an income-tax; and in the latter case, in the treatment of the resident alien, the tax may doubtless be assessed according to the amount of income from whatsoever source derived, and whether or not from assets outside of the taxing State. It may be doubted, moreover, whether any rule of international law forbids discrimination on grounds of alienage."[289]

Practice of Member States of the Committee

In all the Member Countries of the Committee except in Japan aliens are expected to pay taxes, rates and duties in accordance with the laws and regulations of the State. According to Japan aliens shall be liable to payment of taxes and duties in accordance with the municipal laws and regulations of the State concerned and that the State should not discriminate against aliens in this regard. Burma, India, Indonesia and Iraq take the view that aliens shall not be subjected to forced loans which are unjust or discriminatory. While according to Ceylon an alien shall not be subjected to forced loans which are unjust, in the view of Japan, aliens shall not be subjected to forced loans. Pakistan takes the view that an alien shall not be subjected to loans in violation of the laws, regulations and orders applicable to him. According to the United Arab Republic, he shall not be subjected to unjust forced loans.

Practice of States other than Member States of the Committee

Practice of most States confirms the rule that a State has the power to impose taxes upon all immovable and movable property within its jurisdiction regardless of the residence or nationality of the owner. This power is inherent in the sovereignty of the State of residence the exercise of which unless abused cannot in general be made the subject of diplomatic remonstrance. Generally the State has wider powers over resident aliens than those aliens who are merely travelling about the country or stay only temporarily on the territory in regard to the payment of rates and taxes.[290] The view of the United States of America in this regard was clearly expressed by Mr. Hamilton Fish, the United States Secretary of State, in 1876 in the following terms: "Foreigners who have chosen to take up their residence, to purchase property, or to carry on business in a foreign country, thereby place themselves under the jurisdiction of the laws of that country, and may fairly be called upon to bear their fair share of the general public burdens, when

289 Hyde: International Law, Vol. I, 663-664, 666, 671-672.
290 Oppenheim: International Law, Vol. I, 680.

property imposed upon them and other members of the community alike. As a general proposition, the right to tax includes the power to determine the amount which must be levied, and the objects for which that amount shall be expended. These powers are incident to sovereignty, the exercise of which, unless abused, cannot in general be made the subject of diplomatic remonstrance."[291] The United States Acting Secretary of State, Mr. Porter, stated in 1885 as follows: "Taxation may no doubt be imposed in conformity with the law of nations, by a sovereign on the property within his jurisdiction of a person who is domiciled in and owes allegiance to a foreign country. It is otherwise, however, as to a tax imposed not on such property, but on the person of the party taxed when elsewhere domiciled and elsewhere on a citizen. Such a decree is internationally void, and an attempt to execute it by penalties on the relatives of the party taxed gives the person so taxed a right to appeal for diplomatic intervention to the government to which he owes allegiance. To sustain such a claim it is not necessary that the penalties should have been imposed originally and expressly on the person so excepted from jurisdiction. It is enough if it appears that the tax was levied in such a way as to reach him through relatives."[292] Mr. Nielsen, the Solicitor for the Department of the State of the United States, took the following view in 1921: As a general rule, it may be stated that nations possess the exclusive right of imposing taxes upon property situated within their territories and of determining the purpose to which the revenues derived from such taxes shall be devoted. If, therefore, the taxes are general and uniform in their operation, and make no discrimination against the property of the citizens of a particular country, it would not ordinarily be within the province of the government of that country to make any representations in regard thereto."[293]

Practice of most States indicates that all movable and immovable property situated within the territory of a State, regardless of the nationality or residence of the owner are normally subject to taxation.[294] In the case of movable property, according to the practice of the United States, if that movable property may fairly be regarded as incorporated in the mass of property situated in the United States, then that property becomes liable to payment of taxes.

291 Mr. Fish's dispatch to Mr. Cushing, Minister to Spain, dated January 12, 1873; Moore: Digest, Vol. IV, 21.

292 Moore: Digest, Ibid., 22.

293 Hackworth: Digest, Vol. III, 576.

294 Burnet v. Brooks, 288 U.S. 378; Winans v. Attorney-General, (1904) A.C. 287, 290.

According to the law of the United States, real estate and tangible personal property are situated in the United States if they are physically situated therein. Certificates of stock, bonds, bills, notes and other written evidence of intangible property which are treated as being the property itself are property situated in the United States physically situated therein.[295] Further, it has been held that a vessel having no permanent location within another State of the Union, possesses an artificial **situs** for purposes of taxation at the domicile of the owner.[296] The courts of the United States held that moneys, notes and evidences of credit may be taxed in the State where they are employed and found, irrespective of the legal home of the owner.[297]

Personal taxes levied upon individuals subject thereto may assume a number of forms. When they are levied upon aliens, the law of nations appears to offer few restrictions beyond the possible requirement that the tax be in a broad sense uniform and general in its operation. Such individuals may be subjected for example, to the payment of a poll-tax, or of an income-tax; and in the latter case, in the treatment of the resident alien, the tax may undoubtedly be assessed according to the amount of income from whatever source derived, and whether or not from assets outside of the taxing State.[298] As a general rule, the question of the liability of a foreign national to payment of income tax depends upon residence rather than citizenship.[299] In the matter of internal charges or taxes, resident aliens are generally accorded treatment on a footing of equality with the nationals. For instance, under the International Revenue Code of 1939, resident aliens are liable equally with citizens of the United States to the payment of income tax on their entire income. This is true even though the alien's income is derived wholly from sources without the United States. However, such aliens are allowed a credit for "the amount of any such taxes paid or accrued during the taxable year to any foreign country, if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country."[300] When a tax is levied upon the income of a non-resident alien, it is obviously in the nature of a tax upon his

295 Hackworth: Digest, Vol. III, 590.

296 Southern Pacific Co. v. Kentucky, 222, U.S. 63; Hyde: International Law Vol. I, 666 footnote.

297 New Orleans v. Stempel, 175 U.S. 309; Metropolitan Life Ins. Co. v. New Orleans, 205 U.S. 395; Burke v. Wells, 208 U.S., 14; Hyde: International Law, Vol. I, 666-667 footnote.

298 Hyde: International Law, Vol. I, 671-672.

299 Hackworth: Digest, Vol. III, 575 footnote.

300 53 Stat. 556; 26 U.S.C. ss 11, 12, 131(a) (3); Treasury Regulations 103 (Income tax 1940), Secs. 19. 11-2, 211-1; Hackworth: Digest, Vol. III, 579.

property within the control of the territorial sovereign rather than a personal tax.

In the United States for federal tax purposes, alien individuals are divided into resident aliens, non-resident aliens engaged in business in the United States, and non-resident aliens not engaged in business in the United States. The latter are further divided into non-resident aliens having gross United States income of not more than $15,400 and those having in excess of $15,400 of such income. Resident alien individuals are generally taxable the same as United States citizens upon income from all sources, whether within or without the United States. Non-resident aliens engaged in United States business at any time during the year are taxable at regular rates on income, including capital gains, from sources within the United States, less foreign taxes paid and other allowable deductions. Non-resident aliens not engaged in trade or business in the United States pay tax at a flat 10 per cent rate on their "fixed or determinable annual or periodical income" (including certain capital gains) if such income does not exceed $15,400 during the taxable year. If it does, the regular tax rates apply, but the aggregate tax may not be less than the tax computed at the 10 per cent rate.[301] A property tax may be uniformly applied to aliens in inter-State and foreign commerce as well as citizens in inter-State commerce. Under the commerce clause of the United States Constitution a franchise tax may not be imposed upon aliens engaged solely in foreign commerce. A direct income-tax such as California's, which applies to

301 Non resident alien individuals are covered by the United States Internal Revenue Code of 1954, ss. 871-874.

It may be added that no comprehensive definition of the term "engaged in trade or business within the United States" is provided by the Internal Revenue Code of 1954 or the decided cases. The decided cases serve only as examples of what the courts have accepted or rejected as constituting United States business. Thompson, Smith: "Foreign Business Operating in the United States", Legal Problems of International Trade, Edited by Paul O. Proehl, (Illinois, 1959), 282-310.

The meaning of the term "resident alien" under the income tax laws of the United States (Internal Revenue Code of 1939) is stated as follows in section 19.211-2 of Treasury Regulations 103 (Income Tax, 1940): "An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances; Hackworth: Digest, Vol. III, 580.

local profits of tax-payers engaged solely in foreign commerce will be upheld.[302] It may be added that "the net estate of a resident alien dying in the United States is subject to the same tax as that imposed upon the estate of a citizen."[303]

Although in the matter of internal charges or taxes, resident aliens in most States are generally accorded treatment on a footing of equality with the nationals, the commercial treaties and treaties of friendship, commerce and navigation concluded between nations also contain provisions relating to the liability of the nationals of either contracting party within the territories of the other, to taxation and other charges. These provisions seek to grant national standard of treatment in the matter of taxation. Further, these treaties contain most-favoured-nation clauses providing that each signatory will give the other's nationals any advantage in taxation which it grants to the nationals of any third country. Friendship and non-discrimination are the essence of the provisions, and they provide the foundation for equal treatment in all possible respects by each country of the nationals of the other. Article 1 of the treaty of December 8, 1923 concluded between the United States of America and Germany provides: "The nationals of either High Contracting Party within the territories of the other shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by its nationals."[304] Article IX (1) of the Treaty of Friendship, Commerce, and Navigation entered into between the United States of America and the Italian Republic on February 2, 1948 provides: "Nationals, corporations and associations of either High Contracting Party shall not be subjected to the payment of internal taxes, fees and charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of the other High Contracting Party:

(a) more burdensome than those borne by nationals, residents and corporations and associations of any third country;

302 Thompson: Foreign Business in the United States, op. cit., 303.

303 Hackworth: Digest, Vol. III, 589; Hyde: International Law, Vol. I, 673.

304 44 Stat. 2132; Hackworth: Digest, Vol. III, 577. Interpreting the term 'within' in Art. 1 of the Treaty of 1929, the State Department of the United States observed as follows: "Except in isolated cases a German national resident without the United States but temporarily in the United States for business or pleasure, can hardly be said to be within the United States within the meaning of the above provision" of the Treaty of December 8, 1923; Hackworth: Ibid., 577 footnote.

(b) more burdensome than those borne by nationals, corporations and associations of such other High Contracting Party, in the case of persons resident or engaged in business within the territories of such other High Contracting Party, and in the case of corporations and associations engaged in business therein, or organised and operated exclusively for scientific, educational, religious, or philanthropic purposes. . . ."[305]

Similarly several bilateral treaties also provide that no higher or other duties, charges or taxes of any kind shall be levied within the territories of either party, upon any personal property, money or effects of their respective nationals, on the removal of the same from their territories reciprocally, either upon the inheritance of such property, money or effects, or otherwise, than are or shall be payable in each State upon the same, when removed by a national of such State, respectively.[306]

It may be added that the Economic Committee of the League of Nations pointed out that tax discriminations against aliens may amount to their eviction even aside from the special difficulties arising from double taxation. It recommended the granting of national treatment in the matter of all taxes, duties (except on imports and exports) and other fiscal charges, no matter by what authority levied. This is to apply to charges on the person or property, on all rights and interests, including commerce, industry and occupations.[307]

During the nineteenth century foreigners domiciled in a country were not exempted from any contribution that was considered as necessary for the protection of the country. The home States of the individuals affected emphasized in particular upon the principle of equality of treatment of aliens and nationals. Thus, Mr. Dodson of the British Foreign Office advised on January 8, 1851 that British subjects in foreign countries are not exempt from forced loans in respect of their real or personal property "provided such loans are enforced as a general measure throughout (the Lombardo-Venetian Kingdom) applicable alike to Natives and Foreigners". Similarly Phillimore advised on December 24, 1866 that "subjects

305 Briggs: The Law of Nations, 545.

306 Article VII of the Convention of April 26, 1826 concluded between the U.S.A. & Denmark, 8 Stat. 342; Hackworth: Digest, Vol. 3, 669.

307 Report of Government Experts, League of Nations Doc. C.562.M.178, 1928 II; Cutler: "The Treatment of Aliens", op. cit., 236-237.

domiciled and resident in a belligerent State, which they do not choose to leave in time of war, should bear their share in the expense of defending the country in which they reside from the attack of an enemy and are liable to pay a 'war tax'." Collier, Coleridge and Twiss advised on August 26, 1870, "that British subjects having property in France are not entitled to any special protection for their property or to exemption from military contributions, to which they will be liable in common with the inhabitants of the place in which they reside or in which their property may be situated. This applies whether they are resident in France or not."[308] However, practice of most States in recent times clearly indicates that aliens must not be subjected to payment of forced loans or confiscatory charges in peace time or in the absence of exceptional emergency. Broadly, such impositions on aliens would be regarded as unreasonable in the modern times. As a matter of fact, even exorbitance of amount, unfairness and looseness of amount and gross misapplication of taxes have been made the grounds of diplomatic protest, despite the internal nature of these taxes.[309]

Principles emobodied in certain Conventions

European Convention on Establishment (1955)

CHAPTER VI

Taxation . . .

Article 21

1. Subject to the provisions concerning double taxation contained in agreements already concluded or to be concluded, nationals of any Contracting Party shall not be liable in the territory of any other Party to duties, charges, taxes or contributions, of any description whatsoever, other, higher or more burdensome than those imposed on nationals of the latter Party in similar circumstances; in particular, they shall be entitled to deductions or exemptions from taxes or charges and to all allowances, including allowances for dependents.

2. A Contracting Party shall not impose on nationals of any other Party any residence charge not required of its own nationals. This provision shall not prevent the imposition in appropriate cases

308 McNair: International Law Opinions, (Cambridge, 1956), Vol. II, 136-137.

309 Cutler: Ibid, 236.

of charges connected with administrative formalities such as the issue of permits and authorisations which aliens are required to have, provided that the amount levied is not more than the expenditure incurred by such formalities.[310]

Article 14

(1) Aliens may be required to perform police, fire-brigade or militia duty for the protection of life and property in cases of emergency or imminent need.

(2) Aliens shall not be compelled to enlist themselves in the armed forces of the State.

(3) Aliens may, however, voluntarily enlist themselves in the armed forces of the State with the express consent of their home State which may be withdrawn at any time.

(4) Aliens may voluntarily enlist themselves in the police or fire-brigade service on the same conditions as nationals.

Note : The Delegation of Indonesia reserved its position on the whole Article. The Delegation of Iraq reserved its position on clause (3) of this Article. The Delegation of Japan wished clause (3) of this Article to be deleted.

Commentary

Liability of aliens to be compelled to serve in auxiliary forces, national and civic

Article 14 establishes the right of the State of residence to compel resident aliens to serve in auxiliary forces such as militia parties, national and civil guards to maintain social order during emergency. But they shall not be compelled to enlist themselves in the military service of the State. It is a well-established principle of international law that citizens or subjects of the country residing in another, though bound by their temporary allegiance to many common duties, must not be compelled to serve in the regular armed forces of that country. There is no principle more distinctly and clearly settled in the law of nations than the rule that resident aliens not naturalized are not liable to perform military service. Such a rule is firmly established not only by the overwhelming weight of authority of outstanding writers on international law, but also by

310 International Institute for the Unification of Private Law, Unification of Law, Vol. I, (Rome, 1857), 177.

the sustained practice of States.[311] However, they can, if permitted, voluntarily join the regular armed forces of the host State. When they are enlisted to serve in the military, police, fire-brigade and other services of similar character, whether voluntarily or not, they shall be entitled to similar conditions of service as the nationals.

Opinions of Writers

Hall says: "The broad rule has . . . been mentioned that as an alien has not the privileges, so on the other hand he has not the responsibilities attached to membership of the foreign political society in the territory of which he may happen to be. In return, however, for the protection which he receives and opportunities of profit or pleasure which he enjoys, he is liable to a certain extent, at any rate in moments of emergency, to contribute by his personal service to the maintenance of order in the State from which he is deriving advantage, and in some circumstances, it may even be permissible to require him to help in protecting it against external dangers."[312]

Moore says: "The voluntary enlistment of an alien in the military service raises in itself no international question. The modern tendency, however, is to exclude aliens from such service, and this seems to be in harmony with sound principles."[313]

Oppenheim says: "A State has wider powers over aliens of the latter kind; it can make them pay rates and taxes, and can even compel them in case of need, and under the same conditions as citizens, to serve in the local police and the local fire brigade for the purpose of maintaining public order and safety. On the other hand, an alien does not fall under the personal supremacy of the local State; therefore he cannot, unless his own State consents, be made to serve in its army or navy, and cannot, like a citizen, be treated according to discretion."[314]

Hackworth states: "The right of admission to service in the military forces of the United States is generally limited to citizens or to persons who have declared their intention to become citizens."[315]

311 Moore: Digest, Vol. IV, 52-53.
312 Hall, William Edward: A Treatise on International Law, (1895) 4th Ed., 215.
313 Moore: Digest, Vol. IV, 50.
314 Oppenheim: International Law, Vol. I, 680-682.
315 Hackworth: Digest, Vol. III, 598.

Fenwick observes: "International law recognizes a distinction between the status of those aliens who are merely transient visitors in a foreign country and those who have established a permanent residence there with apparent intention of remaining indefinitely. Not only must domiciled aliens obey the local laws and pay the normal taxes, whether upon person or upon property imposed by the State, but should the necessity arise they may be called upon by the State to perform such public duties as police and militia service, as distinct from military service, as well as to submit to special measures, such as quarantine regulations, restricting their personal liberty and the enjoyment of their property in the interest of the public welfare. Domicile thus creates a sort of qualified or temporary allegiance. A delicate question is presented when the State in which the alien is domiciled goes to war with the State of which he is a citizen. In such a case, while the alien may not be drafted into military service, he is at the same time bound not to contribute by an overt act to the success of the State of his nationality; and he may be punished for high treason and may be subjected to other penalties imposed by State law upon such offences."316

Practice of Member States of the Committee

In most of the Participating Countries of the Committee, resident foreign nationals may be required to serve in police, fire-brigade and other auxiliary forces of similar character for purposes of protection of the place of residence as well as property from depredation in times of national catastrophies or danger. According to Burma, Ceylon and the United Arab Republic, aliens may with the express consent of their home State voluntarily enlist themselves in the military service of the State of residence, but such consent can be withdrawn at any time.

Practice of States other than Member States of the Committee

Practice of most States reveals that aliens can lawfully be compelled to serve in auxiliary forces such as militia, patrols, national and civic guards. Thus Herbert Jenner, the Law Officer, gave the following opinion on February 21, 1831 to the British Government: ". . . I have the honour to report that individuals who are permanently resident in a foreign country, cannot upon general principles, claim to be exempted from assisting in the defence of the State, in which they may have established themselves. The principal if not the only ground upon which such a claim can be

316 Fenwick: International Law, (New York, 1948), 3rd Ed., 271.

maintained, is that which is founded upon treaty; and in many cases similar to the present, His Majesty's Government have declined to interfere where no such privilege or exemption had been conceded by treaty. I am therefore humble of opinion, that neither the situation of the British residents in Antwerp, nor the service which they are called upon to perform are such as to justify an extraordinary interference in their behalf for the purposes suggested by them."317 Similarly, Mr. Dodson, another Law Officer of the British Government reported on May 9, 1836 as follows: ". . . I am of opinion there is nothing repugnant to the Law of Nations on the requisition of the Belgian Government that British subjects should serve in the Civic Guard in common with the native inhabitants of Belgium. Every State unless bound by treaty to the contrary has a right to call upon foreigners living under its protection, and enjoying the benefits of its Laws, to assist in providing for the maintenance of order in the country."318 Upon the liability of aliens residing in Leghorn to be compelled by the Austrian Government to serve in the local national guard, Mr. Harding, the British Law Officer, gave the following opinion on December 6, 1860: "In the absence of any treaty stipulations, I see nothing contrary to the law or practice of nations in the compelling of foreign residents to serve in common with natives, under ordinary and reasonable limitations, in the militia or national guard; more especially in time of peace."319 The same view was taken by the United States of America also. For instance, Mr. Davis, the United States Assistant Secretary of State, stated on February 17, 1870 in his dispatch to the American Consul at Curacao as follows: "When complaint was made during our late rebellion that British subjects were compelled to serve in the Virginia and Missouri militia, Lord Lyons was instructed by his Government "that there is no rule or principle of international law which prohibits the Government of any country from requiring aliens resident within its territories, to serve in the militia or police of the country, or to contribute to the support of such establishment. This appears to be the kind of service required of American citizens, in common with all others, in the island of Curacao. The commutation for such service—eight dollars per annum—appears to be moderate and reasonable. It is therefore not deemed advisable at present to raise any question upon this subject."320 Mr. Fish, the Secretary of State of the United States, gave the following

317 McNair: International Law Opinions, Vol. II, 115.
318 McNair: Ibid., 115 footnote.
319 McNair: Ibid. 115-116.
320 Moore: Digest, Vol. IV, 57-58.

instructions to the American Minister on April 6, 1871: "I must decline to enter into the question to what extent and under what circumstances do our citizens, native or naturalized (in the absence of treaty stipulations), owe military service to a foreign government in whose dominions they are domiciled for commercial or other purposes. They certainly do not stand on the same footing as mere travellers or temporary sojourners. I do not perceive any good reason why a government (in the absence of treaty stipulations) may not require from domiciled foreigners the discharge of such civic duties as service upon juries, in the ordinary municipal arrangements for the prevention and extinguishment of fires, and other duties of like character."[321] As regards the liability of aliens to be compelled to serve in the regular armed forces of the country in which they happen to be, Lord McNair observes as follows: "the problem was comparatively new in 1822, and that no general principles had been established."[322] Mr. Robinson, the British Law Officer, gave the following opinion on September 18, 1822: "I have the honour to report that the claim of exemption from the military defence of the country in which individuals are domiciled is not to be maintained on general and absolute principles, as a privilege belonging to foreigners so domiciled, because the condition of their establishment there must depend on the laws and customs of the country; and the principal if not the only grounds of exemption are those that may be founded on treaty, or custom, or the transient purposes of occasional residence, which are protected by the general courtesy of States. The practice of different governments differs materially as to the manner of forming the military service, and although the nature of such service in this country may not afford instances of foreigners being constrained to serve in person, I think the result of former references on this subject would not warrant one to advise that there are any general principles of exemption so recognized as to furnish a certain and safe basis for the claim of such privileges on behalf of British subjects domiciled abroad. In the present case, much may depend on the terms on which British merchants may have been allowed to reside in the Netherlands in times of amity between the two governments; and the correspondence which has passed on this subject will probably elucidate the specific grounds on which this exemption has been claimed. On the information which I at present possess I feel a great difficulty in suggesting any observations that can be opposed with effect to the demand of the Netherlands Government."[323] However,

321 Moore: Ibid., 58.
322 McNair: International Law Opinions, Vol. II, 113.
323 McNair: Ibid., 113-114.

in his opinion on the subject of a law passed by the Government of the Canton de Vaud, compelling all foreigners of whatever country to perform military service, or to pay a tax in lieu thereof, Mr. Dodson, the British Law Officer stated as follows: "I am of opinion that Her Majesty's Government would be justified in claiming exemption from general military service as contradistinguished from the civic-service of the country, for British subjects who may be temporarily resident in the Canton de Vaud. But with respect to the particular case of Mr. Freeman who appears to be permanently settled in the Canton, having married a native of the country, and purchased a large landed property there, it appears to me that Her Majesty's Government cannot, in the absence of any treaty, claim for him an exemption from the tax referred to. The question as to how far the government of a State is entitled to require the military services of foreigners resident within its dominions is at all times one of great delicacy; but the above is the best opinion I am able to form as applicable to the circumstances of the present case."[324]

Respecting the question of the liability of British subjects to perform military service in the United States, the British Law Officers, Harding, Atherton and Palmer, delivered on September 30, 1861, their joint opinion in these terms: "Whilst Her Majesty's Government might well be content to leave British subjects, voluntarily domiciled in a foreign country, liable to all the obligations ordinarily incident to such foreign domicile (including, where imposed by the municipal law of such country, service in the Militia, or National Guard, or Local Police, for the maintenance of internal peace and order, or even to a limited extent, for the defence of the territory from foreign invasion), it is not reasonable to expect that Her Majesty's Government should remain entirely passive under the treatment to which we understand British subjects are actually exposed in various States of the former Union; such, for instance, as being embodied and compelled to serve in regiments, perhaps nominally of 'Militia', but really exposed not only to the ordinary accidents and chances of war, but to be treated as rebels or traitors in a civil war, involving many questions in which they, as aliens, cannot, simply by reason of their domicile, be supposed to take interest; as to which they may be incompetent to form an opinion; and in the determination of which they are precluded from freedom of choice and action. No State can justly frame laws to compel aliens, resident within its territories, to serve, against their will, in armies

324 McNair: Ibid., 114-115.

ranged against each other in a civil war. **A fortiori,** in the absence of any such law, they cannot justly enforce the service."[325]

Mr. Seward, Secretary of State of the United States, in his dispatch to Mr. Gamble stated in 1862 that he could hardly suppose that there existed anywhere in the world, the erroneous belief that aliens were liable to military duty in the United States. Halleck in his 'International Law' describes the Anglo-American practice as follows: "In 1861, during the American Civil War, the British Government declared that if enforced enlistments of British subjects for the war were persisted in, the Government would be obliged to concert with other neutral powers for the protection of their respective subjects; but neither in the Northern or Southern States was the discharge of any British subject enlisted against his will refused on proper representation. There is no rule of international law prohibiting the government of any country from requiring aliens to serve in the militia or police, yet at the above-mentioned date the British Government intimated that, if the United States permitted no alternative of providing subsitutes, the position of British subjects to be embodied in that militia would "call for every exertion being made in their favour on the part of Her Majesty's Government." The British Government in 1862 informed Mr. Stuart that as a general principle of international law neutral aliens ought not to be compelled to perform any military service (i.e., working in trenches), but that allowance might be made for the conduct of authorities in cities under martial law and in daily peril of the enemy, and in 1864 the British Government saw no reason to interfere in the case of neutral foreigners directed to be enrolled as a local police for New Orleans. By the United States Act, April 14, 1802, naturalized aliens are entitled to nearly the same rights and are charged with the same duties as the native inhabitants; and aliens not naturalized, if they have at any time assumed the right of voting at a State election or held office, are, according to the opinion of Mr. Attorney-General Bates, liable to the acts for enrolling in the national forces. (See also, Act 3rd March 1863, and Act 24th February 1864; Proclamation of President May 8, 1863). This was acted on during the American Civil War, and tacitly acquiesced in by the British Government."[326]

Although the right to serve in the military forces of a country is generally limited to nationals or to individuals who have declared

325 McNair: Ibid., 125.

326 Wheaton: A Digest of International Law (Washington, 1886), Vol. II, 502-503.
Moore: Digest, Vol. IV, 54-55.

their intention to become nationals, in several commercial treaties concluded between nations, the compulsory enrolment of foreign nationals in the forces of the host State likely to be used for purposes other than police duties has been expressly guarded against. Provisions have been incorporated in a number of treaties between the United States of America and other countries granting exemption from compulsory military service to the nationals of the respective countries in the armed forces of the other. It may be added that certain treaties also contain provisions granting exemption with respect to forced loans, requisitions and military exactions. In this regard, the Acting Secretary of State of the United States, stated on August 9, 1918 as follows: "It may be argued that the number of treaties providing for the exemption of citizens or subjects of the contracting parties from military service abroad is evidence of a practice among nations to draft aliens into their forces. I cannot, however, concur in this argument, as it seems to me that these treaties may as well be regarded as evidence that nations might, in the exigency of war, be inclined to break the law and practice of nations under which aliens are exempted from compulsory military service abroad in an international war. A review of the diplomatic history of the United States in respect to compulsory military service discloses that, so far as the history of the United States is concerned, most countries whose subjects or ctiizens have been affected by military service in the United States have strongly protested against such service, as has the United States when the case was reversed. It will be observed that the military service against which the strongest protest is made is that of service in an international war or in a great war like the Civil War, which partook of the nature of an international war, rather than service in the militia in peace time, or in the police force for the preservation of order, or in the exigency of a besieged city under military law. It should be borne in mind, however, that the legislation of the United States while, of course, binding upon persons within its territory, and the announcements of Secretaries of State of the United States are not sufficient upon which to base a conclusion as to the rule of international law on this subject. . . From this convenient summary it will be observed that it is not the practice of nations to compel aliens to serve in their armies."[327]

However, a number of more recent treaties concluded by the United States contain provisions similar to those in Article VI of the Treaty of December 8, 1923 with Germany which provides: "In

327 Hackworth: Digest, Vol. III, 599 footnote.