the event of war between either High Contracting Party and a third State, such Party may draft for compulsory military service nationals of the other having a permanent residence within its territories and who have formally according to its laws declared an intention to adopt its nationality by naturalization, unless such individuals depart from the territories of said belligerent Party within sixty days after a declaration of war."[328]

In **Polites** v. **The Commonwealth and Another** and **Kandiliotes** v. **The Commonwealth and Another** (1945), the High Court of Australia had occasion to review the extent of the liability of resident aliens for compulsory military service in time of war. Mr. Justice Starke summed up the practice of States in this regard in these terms: "(1) It is not permissible to enrol aliens, except with their own consent, in a force to be used for ordinary national or political objects. (2) Aliens may be compelled to help to maintain social order, provided that the action required of them does not overstep the limits of police, as distinguished from political action. (3) They may be compelled to defend the country against an external enemy when the existence of social order or of the population itself is threatened, when, in other words, a State or part of it is threatened by an invasion or savages or uncivilized nations."[329]

The Australian practice has been set out also by Mr. Justice Williams in **Polites** v. **The Commonwealth and Another**, and **Kandiliotes** v. **The Commonwealth and Another** (1945) wherein he stated that "It is submitted that there is an accepted rule of public international conduct, evidenced by international treaties and conventions, authoritative textbooks and practice, having the general hallmarks of assent and reciprocity (per Lord Macmillan in **Compania Naviera Vascogado** v. **S.S. Cristina**, (1938) A.C. 485 at p. 497) that any nation, when at war, will not compel the nationals of another State who are within its jurisdiction to enlist and serve in its armed forces. As at present advised, it appears to me that the treaties and conventions, authoritative textbooks and practice are sufficient to establish the rule of conduct in question."[330]

328 Hackworth: Ibid., 601.
Nevertheless, the former United States practice of granting general exemption from military, as shown by pre-war treaties, seems to be giving place to a policy of agreeing to the drafting of declarants who remain in the country during the war. This appears to be a product of World War and the treaties which allowed the drafting by the Allies of the another's resident nationals.

329 Annual Digest and Reports of Public International Law Cases (1943-45), 216.

330 Annual Digest and Reports of Public International Law Cases (1943-45), 217.

It is a universally accepted rule of international law that an individual may voluntarily enter the military service of a foreign government. Such a rule is firmly established also by the sustained practice of States. For instance, the United States Department of State replied on December 13, 1922, to a communication from the Turkish Government requesting that all Ottoman subjects in the military service of the United States be discharged, with the privilege of re-enlistment, as follows: "As pointed out in the Secretary's note to you, dated May 3, 1922, any Ottoman subjects who may now be in the Army of the United States are in it at their own request and not as the result of compulsion. I am aware of no such rules as that suggested by the Ottoman Department of Foreign Affairs, forbidding one country to employ in its military service subjects or citizens of a foreign country who freely offer themselves for such service. Under the laws of the United States an Ottoman subject who has declared his intention of becoming an American citizen may freely enter into a contract of enlistment in the United States Army, and such a contract is not believed by this Government to be in any way affected by a subsequent withdrawal of the declaration of intention."[331]

The practice of most other States also indicates that an alien may waive his alienage and voluntarily enlist in a foreign army, if permitted to do so by the laws of that country. Moreover, in the view of the United States, as those of most States, under the law of nations a person voluntarily enlisting himself in the armed forces of a foreign government owes that government temporary allegiance and must look to it for protection. Having accepted services in the armed forces of a foreign State, he cannot look for protection to his own government against the legitimate consequences of his conduct.[332]

Principles embodied in Certain Conventions

The Inter-American Convention concerning the Status of Aliens (1928)

Article 3

Foreigners may not be obliged to perform military service; but those foreigners who are domiciled, unless they prefer to leave the country, may be compelled, under the same conditions as nationals, to perform police, fire-protection, or militia duty for the

331 Hackworth: Digest, Vol. III, 601.
332 Hackworth: Ibid., 601 footnote.

protection of the place of their domicile against natural catastrophies or dangers not resulting for war.[333]

European Convention on Establishment (1955)

CHAPTER VI

. . . Compulsory Civilian Services . . .

Article 22

Nationals of a Contracting Party may in no case be obliged to perform in the territory of another Party any civilian services, whether of a personal nature or relating to property, other or more burdensome than those required of nationals of the latter Party.[334]

Article 15

(1) A State shall have the right in accordance with its local laws, regulations and orders to impose such restrictions as it may deem necessary on an alien leaving its territory.

(2) Such restrictions on an alien leaving the State may include any exit visa or tax clearance certificate to be procured by the alien from the authorities concerned.

(3) Subject to the local laws, regulations and orders, a State shall permit an alien leaving its territory to take his personal effects with him.

Note : The Delegate of Pakistan reserved his position on Clause (3). The Delegates of Ceylon and United Arab Republic wished the following clause to be retained in this Article:

"An alien who has fulfilled all his local obligations in the State of residence, shall not be prevented from departing from the State of residence."

Commentary

Alien's departure from the host State

Article 15 embodies the principle that a State shall not prevent an alien from leaving its territory, provided he has fulfilled all his local obligations such as payment of rates, taxes, fines, private

333 This Convention was signed at Havana on February 20, 1928; The United States excepted this Article from its ratification of the Convention; 46 Stat. 2754; Hackworth: Digest, Vol. III, 600 footnote. It may be added that the European tendency seems to be towards total exemption from military charges, as well as from training and service. Cutler: "The Treatment of Foreigners" op. cit., 232-233.

334 Unification of Law, op. cit., 177.

debts and the like. Freedom of departure of aliens from the State of residence is one of the well recognized principles of international law.[335]

As a State holds only territorial and not personal supremacy over aliens within its boundaries, arbitrary refusal to permit aliens to depart from a country is regarded as a violation of the elementary principles of international law and practice. Further, this Article affirms the right of an alien subject to the local laws and regulations to take his personal effects away with him when he leaves the State of residence. In a word, grossly unfair restrictions on the departure of aliens and outright arbitrary impositions on his right to take his personal property away with him may be regarded as violative of human rights and fundamental freedoms.

Opinion of Writers

Oppenheim states: "Since a State holds only territorial and not personal supremacy over an alien within its boundaries, it can never, in any circumstances, prevent him from leaving its territory, provided he has fulfilled his local obligations, such as payment of rates and taxes, of fines, of private debts, and the like. An alien leaving a State can take his property away with him on the same conditions as a national, and a tax for leaving the country, or tax upon the property he takes away with him, cannot be levied."[336]

Practice of Member States of the Committee

Requirement of exit visa or tax clearance certificate

The Participating States of the Committee take the view that a State has the right to impose such restrictions as it sees fit on an alien leaving its territory. Such restrictions or requirements may include an exit visa or a tax clearance certificate from the alien before leaving the State. Under the laws of Burma and Indonesia, an alien must obtain a permit before leaving the country, whereas in Ceylon and India, it is not necessary. In Japan, although this is not necessary, he may be required to produce an 'Exit Visa'. In Iraq such permit may sometimes be required. Normally Ceylon and the

335 From the rule that an enemy alien possesses the freedom of departure from the belligerent State even in time of war, it necessarily follows that an alien has this right in time of peace. Thus Vattel writing in 1758, stated that it was a point of good faith on the part of a belligerent not to detain enemy subjects who had entered the State under an implied promise of being able to return in freedom and safety and he found it a general practice among nations to allow merchants full time to wind up their affairs and withdraw from the country; Vattel: Droit des gens, Book III, s. 63; Fenwick, International Law, 601.

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

United Arab Republic do not require the alien to produce an exit visa before leaving the State, but under exceptional circumstances, this may be considered necessary from nationals as well as foreigners leaving these States. Burma favours the view that restrictions and prohibitions may be imposed upon the departure of criminals, who wish to escape from the country. The Immigration Control Order of Japan does not contain anything concering the prohibition of the departure of foreign nationals from Japan, but an alien who is alleged to have committed a crime may not be permitted to leave the country. Restrictions on the departure of an alien from Ceylon and the United Arab Republic are not imposed except when the individual concerned is required in connection with a crime he is alleged to have perpetrated, but they take the view that an alien who has fulfilled all his local obligations in the State of residence, shall not be prevented from departing from the State of residence.

Practice of States other than Member States of the Committee

The policy of the United States was clearly stated by its Official Representative in Geneva in 1955 in these terms: "The United States recognizes that Chinese in the United States who desire to return to the People's Republic of China are entitled to do so and declares that it has adopted and will further adopt appropriate measures so that they can expeditiously exercise their right to return." The practice of several State's shows that generally a foreign national leaving a State is allowed to take his property away with him on the same conditions as the citizens or subjects of the country. However, before he is allowed to take his personal property, money or effects, he is expected to have fulfilled all his local obligations. For instance, in the **Umbreit** (1908) case, the Wisconsin Supreme Court said it was the duty of the State to protect its citizens by preventing the removal of the assets of his debtor found within the State in order that he might be able to satisfy his claim in the State of his domicile.[337] It may be added that bilateral commercial treaties concluded between nations generally provide **inter alia** for the freedom of removal of property by the nationals of each contracting party from the territory of the other. For instance, Article VII of the Convention of April 26, 1826 concluded between the United States of America and Denmark provides: "The United States and His Danish Majesty mutually agree that no higher or other duties, charges or taxes of any kind shall be levied in the territories or dominions of either party, upon any personal property, money or effects of their respective citizens or subjects, on the removal of the same from their territories or dominions 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 citizen or subject of such State, respectively."[338]

337 Discotogesellschaft v. Umbreit, 208 U.S. 570, 578-580, 581-582. Hackworth: Digest, Vol. III, 666.

Principles embodied in certain Conventions

European Convention on Establishment (1955)

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 the latter Party in respect of the possession and exercise of private rights, whether personal rights or rights relating to property.[339]

In 1957, the United Kingdom concluded conventions with Sweden, Germany, Israel, and Belgium. One of the principles incorporated in these conventions is that the persons who go from the territory of one party to that of the other should keep that which they have acquired under the legislation of the former party or enjoy corresponding rights under the legislation of the latter.

Article 16

(1) A State shall have the right to order expulsion or deportation of an undesirable alien in accordance with its local laws, regulations and orders.

(2) The State shall, unless the circumstances warrant otherwise, allow an alien under orders of expulsion or deportation reasonable time to wind up his personal and other affairs.

(3) If an alien under orders of expulsion or deportation fails to leave the State within the time allowed, or, after leaving the State, returns to the State without its permission, he may be expelled or deported by force, besides being subjected to arrest, de-

338 Hackworth: Digest, Vol. III, 669; Arts. I and V(2) of the Treaty of Friendship, Commerce and Navigation concluded between the United States of America and the Italian Republic in 1948 also provides for this right i.e., freedom of removal of property by aliens; Briggs: The Law of Nations, 530-531, 542-543; State practice points to the fact that a tax for leaving the country or a special tax upon the property that are taken away by an alien is not normally levied.

339 Unification of Law, op. cit., 165.

tention and punishment in accordance with local laws, regulations and orders.

Commentary

The expulsion or deportation of aliens

Clause (1) of Article 16 deals with the undoubted right of a State to expel aliens from its territories for reasons bearing upon the public welfare of the State. The right to expel aliens rests upon the same foundations as the right to exclude aliens. According to Borchard, the right of expulsion is not limited by treaties which guarantee to the citizens of the contracting parties the right of residence and travel, or of trade, and other rights.[340] A State may decide for itself whether the continued presence within its territory of a particular alien is so adverse to the national interests that the country needs to rid itself of him. A conclusion in the affirmative gives rise to the privilege of expulsion.[341] It may be added that the right of a State to expel aliens from its territory naturally includes stateless persons also.[342] In the exercise of this right there must be, as in the case of admission of aliens, no discrimination against the citizens of a particular foreign State as such.

Expulsion must be effected in a reasonable manner

Under Clause (2) of this Article, expulsion or deportation must, for humanitarian reasons, be effected in a reasonable manner and without unnecessary injury to the alien affected. Although a State may exercise its right of expulsion according to its discretion, it must not abuse its right by proceeding in an arbitrary manner. In the case of expulsion or deportation of an alien who has been residing within the State for some length of time and has established some business or professional connections there, this Article provides that he must be given some reasonable time to wind up his interests. Further, it is implied that an alien under an expulsion order should not normally be exposed to unnecessary indignity prior to expulsion. In the view of McNair, although a State has the right to expel aliens from its territory, it is accountable to other States for any hardship or loss thus inflicted beyond what is inevitable in the fact of expulsion.[343] According to Article XXX of the regulations of the Institute of International Law (1892): "The

340 Borchard: The Diplomatic Protection of Citizens Abroad, (1915), 48-49. Briggs: The Law of Nations, 536.
341 Hyde: International Law, Vol. I, 230.
342 McNair: International Law Opinions, Vol. II, 109.
343 McNair: International Law Opinions, Vol. II, 109.

act of decreeing expulsion shall be notified to the expelled individual. The reasons on which it is based must be stated in fact and in law."[344] Thus, it appears that as the alien's home government has the right to inquire into the reason for and the manner of expulsion of its national, where the procedure applied in the course of expulsion has manifested a harsh treatment against the national of a foreign State, his home government could be justified in making diplomatic representation and protest against such capricious or unreasonable exercise of the power of expulsion.

Forcible expulsion of aliens

Although expulsion must be effected in a reasonable and humane manner and without unnecessary injury and indignity to the alien affected, under Clause (3) of this Article, the State has the right to waive the above requirements in certain cases of expulsion. Where an alien under expulsion order refuses to leave the State or is likely to evade the authorities, or after having left, returns without authorization, force may be used for the purpose of his expulsion. Thus if necessary, he may be, in accordance with the applicable laws, regulations and orders, arrested, detained, punished and forcibly deported.

Opinions of Writers

Bonfils writes: "A State has the right to expel from its territory aliens, individually or collectively, unless treaty provisions stand in the way. . . . In ancient times, collective expulsion was much practised. In modern times it has been resorted to only in case of war. Some writers have essayed to enumerate the legitimate causes of expulsion. The effort is useless. The reasons may be summed up and condensed in a single word: **The public interest of the State. Bluntschli** wished to deny to States the right of expulsion, but he was obliged to acknowledge that aliens might be expelled by a simple administrative measure. (French law of Dec. 3, 1849, Arts 7 & 8—Law of Oct. 19, 1797, Art. 7) An arbitrary expulsion may nevertheless give rise to a diplomatic claim."[345]

Hall says: "If a country decides that certain classes of foreigners are dangerous to its tranquillity, or are inconvenient to it socially or economically or morally, and if it passes general laws forbidding the access of such persons, its conduct affords no ground for complaint. Its fears may be idle; its legislation may be harsh; but its action is equal. The matter is different where for identical

344 Hyde: International Law, Vol. I, op. cit., 232.
345 Manual du Droit Int. Public, s. 442; Moore: Digest, Vol. IV, 68.

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344 Hyde: International Law, Vol. I, op. cit., 232.
345 Manual du Droit Int. Public, s. 442; Moore: Digest, Vol. IV, 68.

reasons individual foreigners, or whole class of foreigners who have already been admitted into the country, or who are resident there, are subjected to expulsion. In such cases the propriety of the conduct of the expelling government must be judged with reference to the circumstances of the moment."[346]

Taylor states: "Every independent State possesses, certainly in theory, the right to grant or refuse hospitality. Undoubtedly such a State possesses the power to close the door to all foreigners whom for social, political or economic reasons it deems it expedient to exclude; and for like reasons it may subject a resident foreigner or a group of them to expulsion, subject of course to such retaliatory measures as an abuse of the excluding or expelling powers may provoke. At the very beginning of our national life the government of the United States recognized the fact that "every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations in peace or war. A memorable example of the exercise of this power in time of peace was the passage of the Alien Law of the United States in the year 1798. . . . It may always be questionable whether a resort to this power is warranted by the circumstances, or what department of the government is empowered to exert it; but there can be no doubt that it is possessed by all nations, and that each may decide for itself when the occasion arises demanding its exercise."[347]

"**Darut** in his monograph on the expulsion of aliens, states that the right of the State to order a foreigner immediately to leave its territory, as it was established in France by the law of Dec. 3, 1849, and as it generally is found in the legislation of countries with the exception of England and Greece, has been the subject of protests by some writers, who regard it either as an infraction of the so-called right of asylum, or as an invasion of the imprescriptible rights of the individual man. **Darut**, however, maintains that the right of expulsion is an incident of sovereignty, and is essential to the preservation of the ends for which the State exists."[348]

Practice of Member States of the Committee

The laws of Burma and India relating to expulsion of foreigners have provided their executive authorities with ample discretion

346 Hall, William Edward: A Treatise on International Law, 4th Ed., (Oxford, 1895), 223-224.

347 Taylor, Hannis: A Treatise on International Public Law, (Chicago, 1901), 231-232.
Moore: Digest, Vol. IV, 68.

348 Darut: De l, Expulsion des Etrangers, Aix. 1902.

in the matter. Expulsion or deportation from Ceylon is regulated by Sections 28 and 31 of the laws of Ceylon. Undesirable persons can be deported from Indonesia. Article 10 of the Residents Act of 1938, sets out the grounds on which aliens could be deported from Iraq, and in Iraq's view for reasons of national interest and security the State of residence possesses the undoubted right to expel or deport aliens from its territory. There are provisions in the laws of Japan for the deportation of aliens. In the view of Japan, a State has the right to order expulsion or deportation of an undesirable alien for reasons of security or public order, but it must be in accordance with its applicable laws and regulations. However, aliens permanently settled in Japan cannot be deported unless a special permission for the purpose has been obtained from the Ministry of Justice. Though, there are no specific grounds which could justify deportation of foreigners from the United Arab Republic, yet under certain general principles expulsion is permissible. For instance, when aliens endanger the security, public order, or morality of the country, and when they are unable to look after themselves, they could be deported. Although in the United Arab Republic deportation was originally used only as a punishment, now a foreigner committing certain crimes renders himself liable for deportation.

According to Burma, an alien in transit through a State without the necessary travel documents could be expelled. In such matters, Ceylon, India and Indonesia do not make any distinction between aliens and nationals. In Iraq and Japan foreigners in transit are treated just as aliens. In the matter of deportation the laws of the United Arab Republic make no distinction between a resident alien and the one in transit. Theoretically speaking, a political refugee could be deported from Burma to a country where he might be persecuted, but in practice, she refrains from doing so. A political refugee could be deported from Ceylon to a country where he might be exposed to persecution. Such cases in Indonesia will normally receive sympathetic consideration. According to India and Iraq, if the political refugee's conduct deserves or justifies such a course of action, he could be deported to that country. Japan states that he could be sent to a country of his choice. Just as in the case of extradition, deportation of a political refugee to such a country is not permissible under the laws of the United Arab Republic.

According to the general practice of Burma, Ceylon, India, and Indonesia, if no State could be found to receive an expelled alien, he would be sent to the State to which he belongs, but if he is a stateless person he could be detained in the country concerned. In

Iraq and Japan they are liable for detention. Under the laws of the United Arab Republic, according to the discretion of the Ministry of Justice, such an alien could be put under surveillance or house arrest, until he could be deported, and the deportation order remains valid until its cancellation by the very authority that issued it.

The law of Burma contains provisions to deal with the question of unauthorized return of an expelled alien. The Constitution of Ceylon provides for safeguards against such occurrences. Under Section 11-2 (a) of the relevant law of India entry of the expelled person will not be permitted. If an expelled alien returns unauthorizedly to Indonesia, he becomes liable for deportation. As no alien could enter Iraq without a valid visa, the expelled alien seeking unauthorized entry will become liable for prosecution. Once an alien is deported from Japan he cannot enter again. In the United Arab Republic, during the pendency of a deportation order, if that alien returns unauthorizedly, he renders himself liable for punishment. However, the Ministry of the Interior has the right to decide upon the re-admission of an expelled alien.

No safeguards are provided for in the Constitution of India against arbitrary, harsh and unjustified expulsion of aliens from India. In Indonesia though there are no explicit safeguards against such expulsion, they could appeal to the Ministry of Justice, and in Iraq they could approach the executive authorities or recourses could be had even to the courts of Iraq in this regard. Aliens subjected to such arbitrary expulsion have the right of appeal to the courts of law in Japan. A foreigner who is aggrieved by an arbitrary, harsh and unjustified expulsion order may prefer an appeal to the Council of State for the cancellation of the harsh or illegal order.

Burma, India, Indonesia, Iraq and Japan are of the view that the government of the State of residence has discretion in regard to expulsion or deportation of foreign nationals from its domain. Ceylon takes the line that for reasons of public security, an alien may be expelled from a State. The United Arab Republic thinks that deportation is to be viewed purely as an exceptional security measure designed for the public welfare, and that it is not meant to be a penalty or wholesale measure or screen for the furtherance of private interests. All States in the Committee except Pakistan agree that the home State of an expelled alien must not refuse to receive him back into its territory.[349]

349 Report of the Asian African Legal Consultative Committee, Third Session (Colombo 1960), 148-150.

Practice of States other than Member States of the Committee

The right of States to expel aliens from their territories for reasons of public welfare as well as peace, tranquillity and safety is generally recognized. States enjoy a wide discretion as to the grounds for expulsion, for instance, Belgium expelled in 1896 Mr. Ben Tillet, a British subject for organizing a strike in Belgium. The British Law Officers took the view that the right of the Belgian Government to expel Mr. Ben Tillet was undoubted.[350] Similarly, Tom Mann was expelled in 1896 from Germany for advocating the spread of Trade Unionism in Germany.[351] Mr. Jaurès, the French Socialistic leader was expelled from Germany for advancing the socialist opposition to the Government's foreign policy.[352]

In 1901, George Kennan, an American citizen was expelled by the Russian Government for his criticisms of the Russian Government in a book which he had published some years ago in relation to the penal institutions of Siberia.[353] According to Chapter 313 of Volume II of the Russian law, foreigners who have come into Russia can be expelled only upon the decision of a court of law or by order of the higher police authorities. Further, foreigners whose behaviour is suspicious and those who are not desirable as residents within Russia may be expelled by order of the Minister of the Interior.[354] The Canadian Government expelled two persons called Carranza and Dubose, both on general grounds and for reasons connected with the maintenance of British neutrality during the Spanish-American war.[355] The British and American practice also establishes the right of a State to expel from its territory aliens unless there are treaty provisions to the contrary. Some States which value individual liberty and abhor arbitrary powers of the State organs and officials, do not readily expel aliens. The Government of the United Kingdom had, until December 1919, no power to expel even the most dangerous alien without the recommendation of a court of law, or without an Act of Parliament making provision for such expulsion, except during war, occasions of imminent national danger or great emergency. American practice was emphasized by Secretary of State Mr. Gresham in 1894, in these words: "This Government does not propose to controvert the principle of international law, which authorises every independent State to expel

350 McNair: International Law Opinions, Vol. II, 111-112
351 Ibid., 111-112.
352 Moore: Digest, Vol. IV, 69-70.
353 Moore: Ibid., 94-95.
354 Moore: Ibid., 95
355 McNair: International Law Opinions, Vol. II, 112.

objectionable foreigners or classes of foreigners from its territory. The right of expulsion or exclusion of foreigners is one which the United States, as well as many other countries, has upon occasion exercised when deemed necessary in the interest of the Government or its citizens."[356]

Although it is generally recognized that States possess the power to expel, deport or reconduct aliens, expulsion or reconduction must normally be effected in a reasonable manner and without unnecessary hardship to the individual affected. The reasonable exercise of the privilege of expulsion would appear to demand some respect for the consequences of the connection between the alien and his habitat. Thus, the procedure that may not be inequitably applied to a transient visitor, may on the other hand, work grave hardship to one who through protracted residence within the territory of the expelling State, has dug his roots deep into its commercial or economic life as a participant therein. While this circumstance should not, and does not, deprive the territorial sovereign of its privilege as such, it justifies the challenging of the methods and manner that ignore the injury necessarily entailed when a permanent resident is compelled on short notice to depart from the country.[357] In cases of arbitrary and unreasonable expulsions of resident aliens, the home States of the expelled individuals have made diplomatic representations to the States concerned and asked for the reasons for the expulsions. Thus, Mr. Root, Secretary of State of the United States, stated in 1907 that: "The right of government to protect its citizens in foreign parts against a harsh and unjustified expulsion must be regarded as a settled and fundamental principle of international law. It is no less settled and fundamental that a government may demand satisfaction and indemnity for an expulsion in violation of the requirements of international law."[358]

Arbitrariness in the methods applied in the particular case, rather than in the choice of the individual concerned or in the determination to expel him, usually constituted the main cause of foreign protests and it has been subjected to sharpest criticism.[359] In several such cases, the home States of the aliens exacted indemnities from the States concerned for the arbitrary and unreasonable expulsion of their subjects. Great Britain obtained from Nicaragua in 1895 an indemnity for the expulsion of twelve British subjects who had been arrested and expelled for alleged participation in the Mosquite rebellion.[360] In **Ben Tillett** case (1896), the British Law Officer took the following view: "The right of the Belgian Government to expel Mr. Ben Tillet is undoubted. But the arrest and detention and the various circumstances of hardship with which they were accompanied are, in our opinion, altogether in excess of anything which could be justified as incidental to the right of expulsion . . . In cases of urgency, arrest as a preliminary to expulsion, may possibly be justified as a measure of precaution. In this case it seems to have been quite unnecessary. . . The arrest was followed by a detention quite unnecessary in its duration . . . we suggest that the Belgian Government ought to express regret for what has occurred, and make some compensation to Mr. Tillett."[361] In the **Maal Case** (1903), Umpire Plumley of the Netherlands-Venezuaelan Mixed Claims Commission held that, although every government has the right to exclude or expel foreigners from its territory if they are obnoxious and prejudicial to the public order or the welfare of the State, nevertheless this must be accomplished with due regard to the convenience and the personal and property interests of the person expelled. In this case, the foreigner while under arrest, had been "subjected to the indignity of being stripped of all his clothing and made the subject of much mirth and laughter on the part of the bystanders." Observing that the State had failed to regard the person of another as something to be held scared," the Umpire awarded $500 to the Netherlands Government "solely because of these indignities" perpetrated against its national in Venezuela. In **Boffolo case** (1903) between Italy and Venezuela, the arbitrator summed up the general right of expulsion and the mode of its exercise in these words: "(1) A State possesses the general right of expulsion; but (2) Expulsion should only be resorted to in extreme instances, and must be accomplished in the manner least injurious to the person affected; (3) The country exercising the power must, when occasion demands, state the reasons of such expulsion before an international tribunal, and an inefficient (insufficient) reason or none being advanced, accepts the consequences."[362]

356 Hyde: International Law: Vol. I, 230.

357 Lauterpacht: The Function of Law in the International Community (1933), 289.
Oppenheim: International Law, Vol. I, 691-92; In re Manoel de Campes Moledo: Annual Digest & Reports of Public International Law Cases (1929-1930), Case No. 164.

358 Communication to the Minister in Caracas, Feb. 28, 1907, For Rel. 1908, 774, 776; Hackworth: Digest, Vol. II, 690.

359 Hyde: International Law, Vol. I, 231.

360 Fenwick: International Law, 269.

361 McNair: International Law Opinions, Vol. II, 112.

362 Briggs: The Law of Nations, 535. It may be added that the **Institut de Droit International**, while recognizing the right of expulsion to the full extent, has adopted a project designed to temper its practical application; Taylor: A Treatise on International Public Law, 233.

The deportation, as distinct from expulsion, of an alien who has entered or attempted to enter the territory of a State in violation of its immigration or exclusion laws is regarded as merely incidental to their enforcement. Within such a category may be placed the cases of aliens who, after having failed to comply with conditions upon which their admission was permitted, as by having overstayed a brief period of permitted sojourn, or by having failed to maintain the status on which their entrance was permitted, are in due course, obliged to leave the country. According to the existing statutory law of the United States, the deportation of an alien is made the consequence not merely of an unlawful entrance into its territory, but also of the commission of certain classes of offences within a specified period after entrance, and of others, at any time thereafter.[363] Further, the penalty for the alien's intrusion into local politics may also be deportation. In some States destitute aliens, vagabonds, suspicious aliens without papers of legitimation, foreign criminals who have served their term of imprisonment, and individuals of similar character, are without any formalities, arrested by the police and reconveyed to the frontier for the purpose of banishment. It appears that the home State of such aliens has the duty to receive them, since a State cannot refuse to receive such of its nationals[364] as are expelled from other States. The legislation and judicial practice of many countries show that an alien may not be deported to a country or territory where his person or freedom might be threatened on account of his race, religion, nationality or political views.[365]

Principles Embodied in certain Conventions

Lausanne Convention respecting Conditions of Residence, signed by Turkey, the British Empire, France, Italy, Greece, Rumania and Yugoslavia (1923).

Article 7. (ii) Turkey reserves the right to expel, in individual cases, nationals of the other Contracting Powers, either under the order of a Court or in accordance with the laws and regulations relating to public morality, public health or pauperism, or for reasons affecting the internal or external safety of the State. . . . .

The expulsion shall be carried out in conditions complying with the requirements of health and humanity.[366]

363 Hyde: International Law, Vol. I, 235.

364 Oppenheim: International Law Vol. I, 694-95; Hackworth: Digest, Vol. III, ss. 293-302.

365 Article 33 of the Geneva Convention on the Status of Refugees (1951), United States ex rel. Weinberg v. Schlotfeld (1938), 26 F. Suppl. 283.

366 Signed at Lausanne on July 23, 1923, 28 League of Nations Treaty Series, 159; Briggs: The Law of Nations, 537.

Inter-American Convention on the Status of Aliens (1928)

Article: "For reasons of public order or safety, States may expel foreigners domiciled, resident, or merely in transit through their territory. . . ."[367]

European Convention on Establishment (1955)

CHAPTER I

. . . Expulsion

Article 3

1. Nationals of any Contracting Party lawfully residing in the territory of another Party may be expelled only if they endanger national security or offend against **ordre public** or morality.

2. Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit for the purpose before a competent authority or a person specially designated by the competent authority.

3. Nationals of any Contracting Party who have been lawfully residing for more than ten years in the territory of any other Party may only be expelled for reasons of national security or if the other reasons mentioned in paragraph 1 of this Article are of a particularly serious nature.

Supplementary Protocol*

Section 1

(a) Each Contracting Party shall have the right to judge by national criteria;

(3) the circumstances which constitute a threat to national security or an offence against **ordre public** or morality;

(b) Each Contracting Party shall determine whether the reasons for expulsion are of a "particularly serious nature". In this connection account shall be taken of the behaviour of the individual concerned during his whole period of residence.

367 Adopted at Havana on February 20, 1928.
Hudson: International Legislation, Vol. IV, 2374.

* Under Art. 32 of this Convention, the supplementary protocol attached to this Convention shall form an integral part of it.

Section III

(a) The concept of "ordre public" is to be understood in the wide sense generally accepted in continental countries. A Contracting Party may, for instance, exclude a national of another Party for political reasons. . . .

(b) The Contracting Parties undertake, in the exercise of their established rights, to pay due regard to family ties.

(c) The right of expulsion may be exercised only in individual cases.

The Contracting Parties shall, in exercising their right of expulsion, act with consideration, having regard to the particular relations which exist between the Members of the Council of Europe. They shall in particular take due account of family ties and the period of residence in their territories of the persons concerned."[368]

Article 17

A State shall not refuse to receive its nationals expelled or deported from the territory of another State.

Note : The Delegate of Pakistan suggested the addition of the word "normally" before the word "refuse".

Commentary

Deported alien must be readmitted into his home State

Giving expression to a well-established principle of customary international law and State practice, this Article makes it obligatory on the part of every State to receive back on its territory its nationals expelled or deported from another State.

Opinions of Writers

Oppenheim says: The home State of an individual has the duty "of receiving on its territory such of its citizens as are not allowed to remain on the territory of other States. Since no State is obliged by the Law of Nations to allow foreigners to remain within its boundaries, it may, for many reasons, happen that certain individuals are expelled from all foreign countries. The home State of expelled persons is bound to receive them on the home territory."[369]

368 Katz & Brewster: The Law of International Transactions and Relations, 80-81; Unification of Law, op. cit., 165, 187-189.

369 Oppenheim: International Law, Vol. I, op. cit., 646, 695.

Hyde observes: "The effective expulsion of an alien normally calls for co-operative acquiescence by the State of which he is a national. Thus it is generally deemed to be its duty to receive him if he seeks access to its territory. Nor can it well refuse to receive him if during his absence from its domain he has lost its nationality without having acquired that of another State."[370]

Practice of Member States of the Committee

All the Member States of the Committee except Pakistan take the view that the home State of the expelled or deported alien shall not refuse to readmit him if he wants to return to his country. According to Pakistan a State must not normally forbid the entrance of its expelled nationals. Thus it may be possible for the State to deny him admission in case of necessity.

Practice of States other than Member States of the Committee

Practice of most States establishes the rule that the alien's home State must not refuse to take back its own national who is expelled from abroad. Deportation takes place normally to the individual's country of origin. Some States do not resort to deportation of an alien who is able to establish that no foreign State will receive him on its domain. In **United States ex rel. Hudak v. Uhl.**, the court took the view that the petitioner, a national of Poland was not entitled to insist to be deported to Canada.[371] During the Second World War the Courts in the United States in some cases ordered the handing over of the deported individuals belonging to countries under enemy occupation, to the appropriate authorities of their governments-in-exile.[372] In **Staniszewski v. Watkins** (1948) a District court in the United States held that since the alien who was detained as an undesirable alien was a stateless person and that no State could be found to receive him, he ought not to be deported.[373]

Principles embodied in certain Conventions

I. The **Lausanne Convention** respecting Conditions of Residence concluded by Turkey, the British Empire, France, Greece, Italy, Japan, Rumania and Yugoslavia (1923).

Article 7: ". . . The other Contracting Powers agree to receive the persons thus expelled, and their families at any time. . ."[374]

370 Hyde: International Law, Vol. I, 231.
371 Annual Digest (1935-37), Case No. 161, 342-344.
372 Moraitis v. Delany, Annual Digest (1941-42), Case No. 96, 318-326; Hackworth: Digest, Vol. III, ss. 293-302
373 Annual Digest, 1948, Case No. 80, 265-268.
374 Signed at Lausanne on July 23, 1923, 28 League of Nations Treaty Series, 159.

II. **Inter-American Convention on the Status of Aliens (1928)**

Article 6: ". . . States are required to receive their nationals expelled from foreign soil who seek to enter their territory."[375]

Article 18

Where the provisions of a treaty or convention between any of the signatory States conflict with the principles set forth herein, the provisions of such treaty or convention shall prevail as between those States.

Commentary

The principles embodied in the Report of the Committee contain recommendations concerning the status and treatment of aliens and the various Articles of this Report set out what the Committee considers to be the appropriate mode of treatment under the general principles of international law in the light of the practice of the States. This Article recognises the position that States may by bilateral or multilateral arrangements vary their rights and obligations under the general principles of law. Article 18 provides that where there are such treaties and conventions the provisions of them will override the general principles embodied in these Articles.

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375 Adopted at Havana on Feb. 20, 1928; Hudson: International Legislation, Vol. IV, 2374; Briggs: The Law of Nations, 530; Harvard Law School: Research in International Law; Nationality, Responsibility of States, Territorial Waters (1929), 233.

LEGALITY OF NUCLEAR TESTS

(Summary of discussions prepared by the Secretariat)

The Prime Minister of India in his inaugural address at the First Session of this Committee held in New Delhi in April 1957 drew the attention of the jurists of the world to the fact that nuclear tests were being carried out by various powers in different parts of the world. He posed the question as to whether such tests, which according to all scientific evidence had harmful effects on the well-being of peoples of the world, could be regarded as legal from the point of view of international law. The views and opinions expressed by jurists and authors on the question of legality of use of nuclear weapons, as also the legality of the tests which are carried out to perfect such weapons, do not appear to be uniform. In view of this position and having regard to the fact that nuclear tests are still being carried out in parts of Asia and Africa in spite of protests from the peoples of these continents, this Committee decided at its Third Session held in Colombo in January 1960 to undertake a study of the question of Legality of Nuclear Tests under Article 3 (c) of its Statutes, as being a matter of common concern among the Participating Countries. The Committee directed its Secretariat to collect background material and information on the subject including scientific data as may be available and to place the same before the Committee at its Fourth Session. At the Fourth Session held in Tokyo in February 1961, the Committee considered the subject on the basis of the Report prepared by the Secretariat and the Delegates of the United Arab Republic, India, Ceylon, Indonesia, Iraq, Japan, Burma and Pakistan made statements on the question of legality of nuclear tests indicating the scope of the subject under consideration of this Committee and the basic principles on which further material need to be collected. After a general discussion on the subject, the Committee unanimously decided that the consideration of the subject of Legality of Nuclear Tests was a matter of utmost urgency and that the subject should be placed as the first item on the Agenda of the Fifth Session of the Committee to be held in Rangoon in January 1962. The Committee further decided that the Secretariat of the Committee should continue its study of this subject and that the Governments of the Participating Countries should be invited to give their comments on the topics for discussion prepared by the Secretriat. The Committe also decided that the statements made by the Delegates at the Tokyo Session should be circulated amongst the Governments of the Participating Countries and that the views of the

Governments should be ascertained on the legal questions raised by the Delegates in their statements.

In the course of the discussion, the Delegate of the **United Arab Republic** said that the harmful effects of nuclear tests had been established by scientific data and drew the attention of the Committee to the effects of the three nuclear tests conducted by France in the African Sahara in 1960. The first atomic bomb, exploded by France on February 13, 1960, had harmful effects on the territory of Ghana and the second and third atomic bombs exploded by France on 1st April and 27th December 1960, had harmful effects on the territory of the United Arab Republic. He pointed out that France had conducted these three nuclear tests in defiance of a resolution adopted by the General Assembly of the United Nations on 23rd November 1959 which requested France to refrain from such tests. He stated that nuclear weapons were illegal and contrary to the existing rules of international law and many international instruments such as the Declaration of St. Petersburg of 1868, the Declaration of the Brussels Conference of 1874, the Convention of the Hague Peace Conference of 1899, the Geneva Protocol of 1925 and the Geneva Convention of 1949. The basic principle of international law agreed upon in these conventions was that the only legitimate object of war was to defeat enemy's military forces and that the destruction of life and property which went beyond this objective was illegal. Nuclear weapons were, therefore, against this basic principle of international law because they were poisonous, caused unnecessary suffering and were employed with disregard to the distinction between combatants and non-combatants. Nuclear weapon tests were, in his opinion, also illegal when conducted by a country in its colonies or in trust territories or even in its own territory. Nuclear tests conducted by a country in its colonies were contrary to Articles 73 and 74 of the United Nations Charter as Members of the United Nations, having committed themselves to the respect of certain international standards in their relations with their colonies, had no right to expose the people of these territories to disasters by undertaking nuclear tests. Nuclear tests conducted in trust territories were contrary to Chapter XII of the Charter of the United Nations concerning the trusteeship system and the terms of the trusteeship agreements as the trustee authority had no right to use the territory it held on trust from the United Nations, for the purpose of undertaking nuclear tests. With regard to nuclear tests undertaken by a State in its own territory, he said that any State conducting such tests should be considered as committing a

harmful illegal act directed not only against neighbouring States but also against all countries of the world. He emphasized the well-known rule of international law that the responsibility of a State may arise as the result of an abuse of a right enjoyed by virtue of international law and pointed out that according to this principle nuclear tests should be considered as illegal because these tests undoubtedly entail risks and dangers to the peoples of other countries. Nuclear tests carried out on the high seas were also illegal because they were contrary to the principle of the freedom of the seas and its corollaries, namely, freedom of navigation, freedom of fisheries, freedom to lay submarine cables and freedom to fly over the high seas. In conclusion, he said that he hoped that the Committee would adopt, in the present Session, a resolution outlawing nuclear tests and recommending Member States to strengthen their efforts for the suspension of these tests and for the prohibition of nuclear weapon bases in Africa and Asia.

The Delegate of INDIA referred to the statement made by the Prime Minister of India on nuclear tests at the First Session of this Committee and expressed his regret that these had still continued. Realizing the grave importance and urgency of the subject, the Committee had decided to direct its Secretariat to prepare background material on the subject so that the matter could be discussed at the present Session. On behalf of his delegation, he expressed his appreciation of the manner in which the Secretariat had discharged the task entrusted to it and said that at the outset it was essential to appreciate the scope of the subject under consideration. The Committee was not concerned with the controversial and debatable question of the legality of the use of nuclear weapons in time of war, but was concerned with the question of the legality of nuclear tests in time of peace. Are nuclear tests conducted by a country within its territory or elsewhere which are likely to cause harm to inhabitants of other countries permissible according to international law? That was the question which was under consideration. He pointed out that the legality of the carrying on of nuclear tests in one's own territory, if such tests caused harm to persons outside the territory, depended on the application of the rule of international customary law which imposed an obligation on a State "not to allow knowingly its territory to be used for acts contrary to the rights of other States." If that rule applied, he said that that testing State would have committed an international tort and would be responsible to other States and persons for the consequences of its illegal action. The Committee was therefore concerned with considering whether any known or

accepted principles of international law could be applied to the situations arising out of these tests. If the existing principles were inapplicable or inadequate, the Committee would have to consider whether any extensions of the existing principles could be worked out so as to impose responsibility on the testing States. Finally, the Committee would have to consider whether international law, which had in the past met new situations by evolving new principles, could not in the present case similarly attempt to counter the grave threat to which States were exposed by these tests, by formulating a suitable doctrine with new principles to meet the new situation. He said that the Committee could safely proceed on the assumption that the adverse biological and genetic effects, and the widespread economic damage resulting from the fallout from nuclear tests could not be denied and go on to consider the important question of responsibility of the State in respect of injury of different kinds to persons and property outside its territory. A State should not use its territory in a manner contrary to the rights of other States. The Anglo-American municipal law and doubtless other systems of municipal law prevented an owner of property from doing acts on his property and dealing with it in a manner dangerous to neighbouring owners. A similar doctrine would broadly speaking be applicable in international law and the State harbouring dangerous things on its territory or entering upon adventures on its territory likely to cause damage outside its territory would incur legal responsibility to other States. He emphasised that this responsibility should extend to every kind of damage whatsoever—biological, metereological, economic and otherwise—which could proximately be traced to the acts of the State on its own territory. Such acts would be international torts. In view of the unpredictable nature of the harmful effects likely to be caused by future tests, it was a matter for consideration as to whether these testing States could even temporarily deprive other States of the freedom of navigation on parts of the high seas and air space by declaring them to be danger zones. In conclusion, he said that these were only a few of the problems which States which do not indulge in these tests would have to consider by reason of the ever growing competition in "cosmic irresponsibility" which was reaching a point when it threatened to affect seriously the life and health of the populations of the rest of the world.

The Delegate of CEYLON said that Ceylon had always been against these tests, because his country felt that as long as these tests were capable of causing, and had in fact caused, the adverse global, biological, genetic and economic effects that had been so

ably set out in the general note prepared by the Secretariat, these tests should be condemned by the Committee and condemned in no uncertain terms. As these tests had caused great misery to countries such as Japan, Ghana and the United Arab Republic, no words of protest would, in his opinion, be too strong. He said that his country felt that these tests should be strongly condemned and emphasized that his country, though small, had never hesitated to protest and to protest in the strongest terms, against any attempt by any power to endanger the people and the economy of other countries. He said that his country had no doubt whatsoever that the tests that have been held so far were violative of the principles of the freedom of the seas and the use of air space above it. With regard to the use of mandated and trust territories for the staging of these tests, he felt that this was a flagrant violation of the sacred trust that had been placed in the trustee countries and emphasized that the carrying out of such tests should be condemned without hesitation. With regard to tests carried out within the territory of the testing State, he said that these tests were legitimately the concern of other States because the available evidence showed that the extinction of the human race by the continuance of these tests was a distinct probability and jurists should therefore condemn such tests as illegal and contrary to the interests and welfare of mankind. He pointed out that the problem concerned the future of mankind on this planet and emphasized that this Committee should not hesitate to register its emphatic protest in one united voice. He declared that this Committee should not only condemn such tests as illegal but should keep this subject in constant review, carry on a relentless struggle to outlaw such tests and bring before the bar of world opinion every nation that had been, or is, or will be, guilty of this grave crime against humanity. In conclusion, he said that he endorsed every word uttered by the distinguished Delegate of the United Arab Republic in his concluding remarks and supported the resolution proposed by him to outlaw nuclear tests and to liquidate nuclear bases in Asia and Africa.

The Delegate of INDONESIA said that the question of the legality of nuclear tests was a new subject in international law as the nuclear tests themselves date back only to the last two decades but the importance of the subject could hardly be exaggerated as the future of mankind and civilization may hinge upon the timely arrest of these tests. He pointed out that the tests which had been conducted so far had mostly been carried out in the Asian African region and the Asian African States were therefore the parties who were most directly concerned with the question. The considera-

tion of the subject by the Committee had become imperative in view of the fact that notwithstanding the strong protests by the Asian African States, France had held in succession three tests in the Sahara and there had been no indication so far that she would depart from her ill chosen path even in the face of a resolution of the General Assembly of the United Nations expressing grave concern over the tests and urging the discontinuance of these tests. He pointed out that the question under consideration was the legality of nuclear tests in time of peace and not the legality of the use of nuclear weapons in time of war. He wished to make it perfectly clear that the remarks which he was going to make related only to the kind of nuclear tests as described in the Secretariat paper and that the Secretariat should, in his view, be commended for the excellent paper they had prepared for the Committee. With regard to the legality of such tests in time of peace, he had no doubt whatsoever that they were illegal and that they should be prohibited. The dangers to which mankind was exposed by the continuance of such tests had been amply described in the Secretariat paper and had been established beyond doubt by the studies of the Japanese scientists on the spread of radioactivity in Japan after the tests held by the United States in the Marshall Islands. With regard to nuclear tests held by the testing State within its territory, he pointed out that in exercising its sovereign right a State was under an obligation to prevent its territory being used for activities detrimental to the interests of other States and fully agreed with the view of the preceding speakers that the customary rule of international law should be applicable to such cases. A State holding such tests committed, in his view, an illegal act, an international tort, and the damage done to the life and health of persons and property in other States should be compensated. With regard to nuclear tests conducted in non-self governing territories, he fully agreed with the preceding speakers that the carrying out of such tests were a violation of the obligations of the United Nations Charter as laid down in Articles 73 and 74. By detonating the nuclear weapons in non-self governing territories, the administering authority had violated the provisions of the U.N. Charter and it should therefore be regarded as illegal. He pointed out that while a State had a certain measure of sovereignty over a non-self governing territory which may be termed conditional sovereignty, an administering authority of a trust territory did not have sovereignty as it was holding the territory as a trustee under the supervision of the United Nations. The conducting of nuclear tests in trust territories was a contradiction of the basic principles of trusteeship and constituted, in his view, an arrogation of sovereign rights which the

administering authority did not possess. They should therefore be regarded as illegal. Finally, nuclear tests conducted on the high seas violated, in his view, the four freedoms of the sea. He was of the opinion that nuclear tests on the high seas were an infringement of the freedom of the high seas and were therefore illegal. In conclusion, he said that he fully agreed with the suggestion made by the distinguished Delegate of the United Arab Republic that the Committee should adopt a condemnatory resolution at this Session.

The Delegate of IRAQ said that Iraq was opposed to all tests of nuclear weapons wherever they were carried out but his country viewed with particular concern and anxiety the nuclear tests carried out by France in the Sahara desert which should be particularly condemned by this Committee. He did not share the view that a State was free to use its own territory for testing weapons, because he believed that there was ample evidence that such tests caused injury to life, health and property of nationals of other States and were therefore contrary to the general rules of international law. He was of the opinion that if nuclear tests carried out by a State on the high seas resulted in the infliction of actual injury to the life, health or property of other States by means of radioactive fallout, they would constitute an international tort. Nuclear tests carried out in a trust territory were, in his view, contrary to the letter and spirit of the pertinent articles of the United Nations Charter and the trusteeship agreement. Finally, he was of the opinion that the Committee should pass a resolution condemning these tests as a crime against humanity and recommending the initiation of international legislation to this effect.

The Delegate of JAPAN said that the people and the Government of Japan were deeply concerned with this subject because they were the only people in the world who had suffered from the damage done by atomic bombs dropped during the war and had very strong feelings that all nuclear tests should be prohibited. Several resolutions had been adopted by both Houses of the Diet calling for the prohibition of atomic and hydrogen bombs and the Government of Japan had made strong diplomatic representations whenever and wherever atomic or hydrogen bomb tests had taken place; his Government had done so against the United States, the Soviet Union, the United Kingdom and France, and if the need arose, his Government would do so again in the future. On behalf of his delegation, he wished to make it clear that the use of nuclear weapons in time of war should be prohibited as a matter of lex

ferenda. Having made this point clear, he wished to then take up the question of more immediate and direct concern to the Committee, namely, the legality of nuclear tests in time of peace. He said that the views of Japanese scientists summarized in the background paper of the Secretariat indicated the harmful effects of radioactive contamination, but the United Nations Scientific Committee which was also entrusted with this task did not draw in its Final Report a clear conclusion regarding the harmful effects of radioactive contamination resulting from such tests. As the opinions of scientists differed with regard to the effects of radioactive contamination resulting from such tests, his delegation felt that nuclear tests should be condemned from a purely humanitarian point of view until a more detailed and long-term study had been carried out on the genetic effects of radioactive substances on human beings and their environment. With regard to nuclear tests carried out in the territory of the State conducting such tests, he was of the opinion that if the existence of the harmful effects beyond the territory of the testing State could be proved by scientific evidence, the testing State could be held to be liable for an international delinquency. With regard to nuclear tests carried out on the high seas, he felt that the carrying out of nuclear tests in an area vital for navigation or fisheries would be contrary to existing international law. With regard to nuclear tests carried out in the United Nations trust territory, he felt that it was contrary to the spirit of the Charter of the United Nations for a trustee authority to use the trust territory for such tests. In his concluding remarks he emphasized again the urgent need for suspending nuclear tests on humanitarian grounds.

The Delegate of BURMA made a brief statement in which he condemned the holding of nuclear tests on moral grounds. He emphasized that the effects of nuclear tests were evil and harmful to mankind and that the carrying out of such tests, despite protests, was immoral. On behalf of the Burmese delegation, he said that he endorsed without reserve the views expressed on the subject by the distinguished Delegates of the United Arab Republic, India and Ceylon.

The Delegate of PAKISTAN said that the splitting of the atom, which should have been a boon to man now hangs over his head like the sword of Damocles. Man was out to conquer the Moon and Venus but had yet to conquer his worst enemy—himself. He saw in this issue the great moral and ethical crisis of our time. He refrained from making any comments on the legal issues involved and

pointed out that this was a political issue of the utmost importance. In his opinion any thought unrelated to the political realities of the day was a form of escapism. He pointed out that talks were being held by the nuclear powers in Geneva and every effort was being made there to reach an agreement on the banning of nuclear tests. Under these circumstances, his delegation would not commit itself to any position or situation which would prejudice the Geneva discussions in any manner and further obscure the political atmosphere or make it more complicated or confused than it was today. He therefore refrained from making any comments on the subject and said that he would abstain from any voting on the matter.

The Observer from Ghana and the Observer from the International Law Commission of the United Nations in his personal capacity as a jurist also made brief statements on the subject of legality of nuclear tests on being invited to do so by the Committee. The Observer from GHANA said that the three major nuclear powers had agreed to suspend further tests but France had broken this moratorium and this tended to make any agreement on the cessation of nuclear tests more complicated. His government felt that since this Committee was composed of members who were not nuclear powers, it was especially appropriate that the Committee should use any moral force it had to make its voice heard in the councils of the world and bring moral pressure on the nuclear powers to make them not only suspend but finally stop any further nuclear tests. If this Committee could pass a resolution or initiate any move to that effect, Ghana would be very pleased to associate herself with it. The Observer from the INTERNATIONAL LAW COMMISSION, speaking in his personal capacity as a jurist, said that in order to find a legal basis for imputing international responsibility for damage caused by nuclear tests, one would have to resort to the legal notion of abuse of rights. A State may not exercise its rights in a manner as to produce harm to others. A State's territory may be used for any kind of experiment but if the State's territory was used or rather abused and the abuse of the right caused damage, international responsibility would automatically arise and the State would be responsible for injuries done to the territory of other States or to persons in the territory of other States. In this connection he drew the attention of the Committee to the decision in the **Trail Smelter Arbitration** and paid a tribute to Professor Gidel, who had strongly condemned these tests. In conclusion, he expressed his gratitude to the Committee for inviting him to address this Session.

The Committee finally decided that the Secretariat should

ascertain the views of the governments of the Participating Countries and prepare a Report on the subject for the consideration of the Committee at its Fifth Session at which the subject will be given top priority and finalized.

OTHER DECISIONS OF THE COMMITTEE

Report of the International Law Commission—Twelfth Session

During its Twelfth Session held in Geneva from 25th April to 1st July 1960, the International Law Commission had considered the subjects of Consular Intercourse and Immunities, **Ad Hoc** Diplomacy and State Responsibility. The fourth item on the agenda viz., the Law of Treaties had not been considered by the Commission at that Session.

The Report of the Commission was placed before the Committee in accordance with Article 3 (a) of its Statutes. The Committee having considered the views expressed by the delegates of the Participating Countries and the statement made by the Observer on behalf of the International Law Commission decided that the subject of Consular Immunities and Privileges be taken up for discussion by the Committee at its Fifth Session on the basis of the draft articles prepared by the International Law Commission and directed the Secretariat to collect background materials on the subject.

With regard to the subject of State Responsibility, the Committee, having heard the views expressed by the delegates of the Participating Countries and the statement made by Mr. F. V. Garcia Amador, Special Rapporteur of the International Law Commission on State Responsibility, decided that the subject should be placed on the agenda of its Fifth Session. The Committee also directed the Secretariat to rearrange the draft articles contained in its Memorandum on the subject and to re-draft the same, if possible, in conformity with the principles contained in the Articles on Status of Aliens finally adopted by the Committee at this Session. The Committee further directed the Secretariat that the Draft prepared by the Harvard Law School on the subject of State Responsibility in 1960 and the provisional draft that may be prepared by the International Law Commission on the subject together with the report of Mr. Garcia Amador in his capacity as Rapporteur of the Commission, be placed before the Committee at its next Session together with the Memorandum prepared by the Secretariat.

The subject of Law of Treaties was briefly discussed by the Committee at this Session. The Committee, however, considered that it would be desirable for the Secretariat to undertake collection of materials and preparation of commentaries on the Draft Articles

prepared by the International Law Commission on the subject of the Law of Treaties. The Committee directed that the materials prepared by the Secretariat on this subject should be placed before it at its Fifth or Sixth Session depending on the number of subjects on the Agenda of the Fifth Session.

The Committee decided that in order to facilitate the work of the Secretariat and to ensure greater co-ordination between this Committee and the Governments of the Participating Countries in the matter of examination of the work done by the International Law Commission, the Governments of the Participating Countries should be requested to furnish copies to the Secretariat of the comments which they send to the International Law Commission on the Draft Articles prepared by the Commission on the various subjects.

Arbitral Procedure

At the Second Session held at Cairo, the Committee decided to take up for consideration the subject of Arbitral Procedure as a matter arising out of the work done by the International Law Commission. The International Law Commission at its Tenth Session had finalised its recommendations on the subject and had drawn up Model Rules on Arbitral Procedure. The Committee directed the Secretariat to prepare a questionnaire on the subject to serve as a basis for discussion. At the Third Session held in Colombo, the Committee generally discussed the subject on the basis of the questionnaire prepared by the Secretariat and appointed a Sub-Committee to prepare a preliminary report. Since all the Governments had not furnished their replies to the questionnaire, the Committee was not in a position to discuss the subject fully during the Third Session. The Committee accordingly decided that the preliminary report prepared by the Sub-Committee and the written answers that had been or would be received from the Governments should be placed before the Committee for further consideration at its Fourth Session.

The Committee generally discussed the subject at the Fourth Session. Since all the Governments had not furnished their comments, the Committee postponed consideration of the subject until its Fifth Session and directed its Secretariat to prepare a general report on the subject summarising the views of the delegations expressed either at the Colombo Session or communicated later in the memorandum. The Committee decided to formulate its own model rules on Arbitral Procedure that would be acceptable or are generally acceptable to the Member States.

Dual Nationality

The subject of Dual Nationality was referred to the Committee by the Government of the Union of Burma under the provisions of Article 3 (b) of the Statutes of the Committee. The Governments of Burma, Japan and the United Arab Republic submitted memoranda on the subject and the United Arab Republic also presented a Draft Agreement for the consideration of the Committee.

During the First Session held in New Delhi, the Delegations of Burma, Indonesia and Japan made brief statements on the problem of dual nationality but the Committee decided to postpone further consideration of the subject as the Delegations of India, Ceylon, Iraq and Syria had reserved their position on this subject.

During the Second Session held in Cairo, the views of the Delegations were ascertained on the basis of a questionnaire prepared by the Secretariat. The main topics which were discussed during the Second Session were: (1) the acquisition of dual nationality; (2) the position of a resident citizen who is simultaneously a citizen of another State and the rights of such a citizen; (3) the position of non-resident citizen possessing dual nationality; and (4) the position of an alien possessing dual nationality. The Delegations were of the opinion that it would be desirable to reduce the number of cases of persons possessing dual nationality by means of enacting suitable national legislation or concluding international conventions. It was, however, felt that unless there was uniformity in nationality laws and unanimity of the fundamental principles of nationality, it would be very difficult to achieve the desired objective by means of a multilateral convention. The Committee decided that the Secretariat should prepare a report on the subject on the basis of the discussions held during the Session and that this report together with the draft agreement submitted by the United Arab Republic should be taken up for consideration during the Third Session.

At the Third Session held in Colombo, the Committee had a general discussion on the subject and the unanimous view of the Delegations was that some preparatory work should be done by the Governments of the Participating Countries on the basis of the report of the Secretariat before the Committee could finally make its recommendations on the subject. The Committee therefore decided to request the Governments of the Participating Countries to study the Report of the Secretariat and the Draft Agreement submitted by the Delegation of the United Arab Republic and to communicate their views to the Secretariat in the form of memoranda

indicating the particular problems which have arisen in this regard and suggesting specific points which they desire the Committee to take up for particular study and consideration.

At the Fourth Session held in Tokyo, the Committee gave further consideration to the subject and decided to request the Delegation of the United Arab Republic to prepare a revised draft of the Convention in the light of the comments received from the Governments of the various Participating Countries for consideration at the Fifth Session of the Committee. The Committee also directed its Secretariat to request the Governments which have not given their comments to do so as early as possible and thereafter to forward the comments to the Delegation of the United Arab Republic.

Rules of Conflict of Laws Relating to International Sales and Purchases

The subject of Conflict of Laws relating to International Sales and Purchases was referred to the Committee by the Government of India under the provisions of Article 3 (c) of the Statutes of the Committee as being a matter of common concern on which exchange of views and information was desirable between the Participating Countries. The Committee considered the subject at its Fourth Session held in Tokyo and referred it to a Sub-Committee with a view to examine in what manner the Committee should treat the problem concerning rules of conflict of laws relating to international sales and purchases. On the recommendations of the Sub-Committee, the Committee decided that (i) the subject to be discussed by the Committee be limited to the rules of private international law (or judicial precedent) on international sales and purchases of corporal movables, (ii) the Secretariat be directed to request the Governments of the Participating States to forward to the Secretariat the texts of the rules of private international law (or judicial precedent) in its municipal laws with regard to (a) formation (conclusion of contract), (b) capacity, (c) effects (including transfer of property), and (d) jurisdiction, and (iii) the Secretariat be requested to prepare a report on the information given by the Governments of the Participating States which is to be sent to the Governments well in advance, in order to allow the Committee to continue the discussion of the problem on the basis of that report at the next Session.

Relief Against Double Taxation

The subject relating to Relief Against Double Taxation was referred to the Committee by the Government of India under the

provisions of Article 3 (a) of the Statutes of the Committee for exchange of views and information between the Participating Countries. The Committee took up the subject for consideration at the Fourth Session and appointed a Sub-Committee to examine in what manner the Committee should treat the problem of avoidance of Double Taxation and Fiscal Evasion. The Sub-Committee fully discussed the subject on the basis of a general note prepared by the Secretariat of the Committee. The Committee, accepting the recommendations of the Sub-Committee, decided that the Secretariat should request the Governments of the Participating States to forward to the Secretariat the texts, if any, of agreements for avoidance of Double Taxation and Fiscal Evasion concluded by them and the texts of the provisions of its municipal laws concerning the subject. The Committee also directed the Secretariat to draw up the topics of discussion (questionnaires with short comments) and send it to the Governments of the Participating States.

The Committee decided to continue with the help of such materials the examination of the present problem of exchanging their views on the aforementioned topics of discussion prepared by the Secretariat at the next Session.

Future Work of the Committee

The Committee decided to take up for consideration at its next Session the subject of "Enforcement of Judgments, the Service of Process and the Recording of Evidence among States both in Civil and Criminal Cases" referred to the Committee by the Government of Ceylon under the provisions of Article 3 (b) of the Statutes of the Committee. It also decided to undertake a study on the subjects of (1) "Regulation of Industry and Commerce, including Connected Labour Problems in the Participating Countries", (2) "Control of Exports and Imports" and (3) "Foreign Exchange Control" as a part of its programme of activities for 1961 and 1962. These subjects were referred to the Committee by the Government of India under the provisions of Article 3 (a) of the Statutes of the Committee for exchange of views and information between the participating countries.

The Committee also decided that the Secretariat should begin to make a compilation of the digests of the Constitutions important legislations and treaties of Member Countries as also the decisions of the superior courts of these countries on questions of public and private international laws and other legal questions of common concern.

Co-operation with other Organisations

The Committee recommended that the Legal Counsel of the United Nations should be invited to attend its Fifth Session with a view to foster increasing co-operation between the United Nations and this Organisation. It also recommended that the International Law Commission should be invited to send an Observer to the Committee's Fifth Session and that the Committee's Secretariat should maintain contacts and exchange published documents with other Organisations, such as the Inter-American Council of Jurists, and the International Law Association. The Committee further recommended that the League of Arab States should be invited to send Observers to the Sessions of the Committee.

The Committee, at the invitation of the International Law Commission also decided at its Fourth Session to send an Observer at the Thirteenth Session of the International Law Commission. The Committee nominated His Excellency Mr. Sabeq, Attorney-General of the United Arab Republic and the Leader of its Delegation to the Committee to represent the Committee at that Session of the Commission in the capacity of an Observer.

PART II

LEGAL AID

Introductory Note

The subject of Free Legal Aid was referred to the Committee by the Government of Ceylon under the provisions of Article 3 (c) of the Statutes of the Committee as being a matter of common concern on which exchange of views and information was desirable between the Participating Countries. At the First Session held in New Delhi the Commitee appointed the Member for Ceylon as Rapporteur on the subject. At the Second Session held in Cairo the Committee decided that the Delegation of Ceylon should continue to act as Rapporteur on the subject and requested all other Delegations to furnish the Rapporteur with statements of the laws and practice prevalent in their respective countries on the subject. The Governments of Burma, India, Indonesia, Japan, Pakistan, and the United Arab Republic submitted memoranda on the subject, and at the Third Session held in Colombo the Rapporteur presented his Report on Free Legal Aid. The Committee considered the Rapporteur's Report and directed the Secretariat to circulate the same amongst the Governments of the Participating Countries. The Committee decided that any specific questions which may be raised by the Governments of the Participating Countries on this Report should be placed before the Committee for consideration at its Fourth Session. The Committee considered the subject at its Fourth Session held in Tokyo, and on the recommendations of a Sub-Committee, decided to publish the Report of the Rapporteur together with all other materials contained in the Brief of Documents and to present the same to the Governments of the Participating Countries.

RAPPORTEUR'S REPORT ON LEGAL AID

(By Mr. Justice H. W. Thambiah, Q.C. Rapporteur)

The Rapporteur called for information through the Secretariat to acquaint himself with the legal aid organisations obtaining in the Member Countries. The Secretariat has furnished reports from the following Member Countries: BURMA, INDIA, INDONESIA, JAPAN, PAKISTAN and the UNITED ARAB REPUBLIC. The system of legal aid obtaining in Ceylon is prepared by the Rapporteur and is annexed to Appendix.

The Rapporteur submits his Report and thanks the Committee for the honour conferred upon him by appointing him as Rapporteur on this subject.

The recommendations in the Report do not represent the views of the country of the Rapporteur.

The recommendations are purely tentative for the consideration of the Committee.

H. W. THAMBIAH

1. The very existence of free government depends upon making the machinery of justice so effective that the citizens of the democracy shall believe in its impartiality and fairness. Where society constitutes both rich and poor, legal aid for the needy should be provided so as to ensure that belief.

2. Many Constitutions of the world enshrine the principle of equality before the law. Jennings, in his work on the Law of the Constitution (3rd Ed., page 49) says :

> "In England, the right to sue and be sued, to prosecute and be prosecuted, for the same kind of action should be same for all citizens of full age and understanding, and without distinction of race, religion, wealth, social status, or political influence."

3. In spite of the benevolence of the judges to help the underprivileged in cases that come up before them, still those who cannot afford to engage the services of a competent lawyer, cannot expect to have equal justice in a court of law. Individual efforts by charitable minded lawyers to help the poor cannot meet the needs of the poor.

4. The Magna Carta, the Englishmen's Charter of Justice, states that :

> "To none will we sell, to none will we deny, to none will we delay right or justice."

The VIth Amendment to Article 7 of the American Constitution declares that :

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence."

Article II of the Soviet Constitution reads as follows :

> "In all Courts of the U.S.S.R. cases are heard in public, unless otherwise provided for by law, and the accused is guaranteed the right to defence."

5. The Preamble to the Charter of the United Nations states that one of the avowed objects of the United Nations is to re-affirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and all nations, large or small.

6. The intricacies of the law, the tangled growth of precedent and legislation, the recondite mysteries of the writings of the jurists, the customary usages, often conflicting and uncertain, make the administration of the law, one of the most difficult tasks in modern times.

7. Mr. Justice Sutherland summed up the need of the layman for counsel in these trenchant words :

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he may not be guilty, he faces the danger of conviction because he does not know how to establish his innocence. If

that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

8. The matter becomes more complicated when a layman is pitched against a trained lawyer. A layman is usually no match for a skilled prosecutor whom he confronts in the court room. He needs the aid of counsel, lest he be the victim of over-zealous prosecutors, of the law's complexity, or of his own ignorance, or bewilderment. These are some of the reasons why the right to be represented by counsel in a court of law is a fundamental right. If the right to sue or be sued in a court of law is to be treated in the tribunals as a fundamental right, the auxiliary right to be represented, is also an auxiliary fundamental right without which the earlier right will be just a mockery.

9. The granting of legal aid is essential in any democracy or any form of government that believes in equal justice to all. The world is gradually becoming aware that the grant of legal aid is essential, if there is going to be equality before the law. In some ancient systems of law, legal battles were fought by means of sinews hired by the combatants. This in turn gave way to the present legal system by which eminent lawyers were engaged by men who have long purses. Is justice to be denied to the poor merely because they are unable to find the fees to pay a competent lawyer or even a lawyer of moderate competence? From whatever angle one considers this question, it is an inescapable conclusion, that legal aid should be granted to poor litigants who are unable to provide the means to prosecute or to defend their suits.

10. In this Report some of the fundamental issues involved in formulating a scheme for legal aid are discussed. An organisation which will facilitate the grant of legal aid to foreigners who seek such aid in the countries who are Members of this Committee is also adumbrated. Further work is necessary to finalise this scheme.

Legal aid defined

11. Legal Aid is essentially an organised effort on the part of the Bar and the Society to provide the service of lawyers free or for a token charge, to persons who cannot afford to pay the lawyer's fees. Such services may consist not only of granting professional consultation but also may include assistance in negotiation, the preparation of legal documents and representation in court.

12. The poor are handicapped not only in engaging the services of a lawyer but also in defraying the necessary expenses for the conduct of the litigation. In the course of litigation, it may be necessary to make investigations, preparatory to litigation, which

may involve expenditure of money. It may be necessary to find the means to summon witnesses who will be called upon to give evidence in a court of law. Under certain systems of law, a deposit of money in court for the maintenance of such witnesses is necessary. When witnesses come to give evidence, they have to be maintained in a place where the court is situated till the case ends. It may also be necessary under certain systems of law, to provide security for costs before a person brings an action against another. In criminal cases, it may be necessary to find money to provide bail. These are all expenses which a litigant has to incur in litigation. Therefore, the mere granting of assistance of counsel will not be sufficient, unless some provision is made to meet most of the expenses which have been set out.

Legal aid as it exists in certain countries

13. In the twentieth century, it has dawned upon many nations to provide some type of legal aid service to those citizens who are unable to provide the money for such purposes. In some countries, legal aid is in an embryonic stage whereas in other countries it has reached different stages of maturity.

14. In Appendix I, the legal aid as it exists in Western Democracies is given in bare outline.

15. In Appendix II, the legal aid as it exists in the Member-Countries of the Asian-African Legal Consultative Committee is set out.

16. The Rapporteur takes this opportunity to thank the Member Countries who sent a resume of the legal aid systems in those countries.

17. A survey of the legal aid systems obtaining in the Member Countries of the Asian-African Legal Consulative Committee reveals that legal aid is still in its infant stage in these countries. A concerted effort should be made by the Member Countries to provide legal aid not only to their citizens but also to those non-citizens whose country affords their citizens reciprocal treatment by granting legal aid.

18. In Appendix III, a draft convention to be entered into by the Member States of this Committee to grant legal aid to one another's nationals is appended.

19. In this Report the essentials of legal aid are discussed in broad outline. The type of legal aid which a country can provide for a citizen will depend on its legal system, the organisation of its Bar, the amount of money which the country can afford to spend

on legal aid, the form of government, and various other factors. Hence, the form of legal aid obtaining in one country may not be suitable to another. But in broad outline, there are certain essentials of legal aid. Hence, the Rapporteur has endeavoured to discuss some of the essentials of legal aid in this Report so that each Member-State may devise the form of legal aid service which is most suited to it. At the end of this Report, a working scheme to grant legal aid to foreign nationals of the Member State of this Committee who seek such assistance in another Member State is adumbrated.

Persons to whom legal aid should be given

20. Since the expenses to grant free legal aid should either come from the coffers of the State or from the community chest, or through the funds provided by charitable organisations, an eclectic attitude should be adopted in granting legal aid to persons. In the first place, legal aid should not be made available to those who due to their penurious circumstances are unable to provide the necessary expenses to conduct their litigation. Hence, in many countries, the means test is applied. In considering this test, the disposable income of a person who seeks legal aid and the disposable capital, are matters that are taken into account.

21. By disposable income is meant the income that the applicant gets after deducting the necessary expenses from his gross income. If the members of his family are also earning and are sharing a common hearth and roof, the question will arise as to whether in computing the disposable income of an applicant, account should not be taken of the income earned by the other members. This is particularly applicable to countries where the common joint family system exists either **de jure** or **de facto.** If such a system should exist, and if the members of the family share the same hearth, and bring into hotchpot their earnings, it is nothing but reasonable that the disposable income of the applicant, should be considered by adding the disposable incomes of each earning member and dividing the aggregate sum by the number of individuals who provide such income. Such tests have been applied in certain countries.

22. What is meant by necessary expenses which have to be deducted from the gross income to arrive at the disposable income will naturally vary according to the locality of the place, and from State to State. In countries where there is a scheme of compulsory insurance, usually the amount contributed towards such a scheme is deducted from the gross income in order to compute the disposable income. Since a parent is under a legal obligation to provide

maintenance for his wife, certain sums, although they may not be quite commensurate with the amounts he spends on his wife and children, are deducted from his gross income in order to arrive at the disposable income.

23. The income tax payable, and interest paid on loans which are secured, which could easily be proved, such as loans obtained on pawns or mortgages, are also deducted in arriving at the disposable income. In this matter the practice of each country will naturally vary, and each country has to determine what items should be deducted from the gross income to arrive at the disposable income.

24. A person may not have a sufficient disposable income but still may have enough disposable capital to proceed with his case. There is no reason why in such a case, legal aid should be given to such persons. Therefore, as stated earlier, not only the disposable income test is applied but also the disposable capital test is resorted to before a person is granted legal aid. In computing the disposable capital, the residing house, provided it does not exceed a certain value is often deducted. The following items are also deducted, such as :

(a) the necessary wearing apparel,
(b) essential implements of trade or agriculture,
(c) the subject matter of the action,
(d) debts created by mortgage bonds and crown debts.

Also certain articles which have a religious significance, such as the "thali" worn in South India or in Ceylon or the engagement or wedding ring among those people who are in the habit of exchanging such rings, are not taken into computation in arriving at the disposable capital.

25. In considering the disposable capital, it would not be just to take into account any capital which is owned by the children in their own right. Further, in certain countries, in computing the disposable capital, the question as to whether the capital is in an available state is taken into account. A person may have landed property but he may not be in a position either to raise the money or to sell the property in view of the restrictions placed upon the grant. Such properties are also excluded from the computation of disposable capital. In computing the disposable capital, the capital of the husband and wife often are aggregated together if they are not legally separated.

26. The quantum of the disposable income or the disposable capital which a person should have, to enable him to ask for legal

aid, is a matter that has to be fixed by the legislature of each country. This again may vary from place to place in each country, as the income in a village would not be the same as the income in a metropolitan area. Since a certain amount of flexibility should be allowed in such a matter in any legislation that is passed, it is best to allow this matter to be regulated by regulations which may be altered from time to time.

Partial legal aid

27. Should legal aid be extended to persons whose means are above the limit set out for poor persons who obtain free legal aid but whose income is not sufficient for them to proceed with litigation without selling all that they have or reducing themselves to a state of penury? Broadly speaking, in any Welfare State which could afford to grant legal aid to such persons, such aid should be given. But a Welfare State may have other pressing problems, and the grant of legal aid to this class of persons, may enlarge the scope of the legal aid, and may cause a heavy strain on the coffers of the State. In countries where legal aid has not been developed, this step is not recommended, since the State should feel its way and find out how far it could give legal aid first to those who cannot afford any money at all to proceed with their litigation. It is only when that class is served the matter has to be considered as to whether the class envisaged earlier should be given legal aid.

28. When such legal aid is given, it is often called partial legal aid because the applicant is asked to contribute part of the expenses. The amount, that a person who receives partial aid, has to contribute has to be fixed on a sliding scale according to the income or capital of that person. This, again will vary from place to place and from State to State and is a matter that has to be regulated by some regulation which could easily be changed.

29. If the disposable income or disposable capital is above a particular ceiling limit, then no legal aid should be given to that person. But legal aid in serious criminal cases should be given to all citizens who cannot afford the services of a lawyer.

Prima facie case test

30. It is not sufficient for a person to establish that his means are such, that he should be given free legal aid. In a civil case, he should further show that he has a **prima facie** case, either to prosecute or to defend an action. A State, a charitable institution or lawyers cannot be expected to give free legal aid or partial legal aid to persons who are engaged in vexatious litigation and whose

chances of success are remote. Hence, in addition to the means test, the **prima facie** test is to be applied in all civil cases. When it is stated that a person should have a **prima facie** case, it is not meant that there should be certainty of success or even a high probability of winning the case. But a circumspect lawyer who examines the evidence, both documentary and oral available in a case, has to form a fair estimate as to whether a person has got a **prima facie** case either to defend or to proceed with an action. If such a case is established, then a person should get legal aid, provided of course, he satisfies the other tests.

31. The **prima facie** test case cannot be applied with strictness in criminal cases. In criminal cases when a person is prosecuted, it may not be possible to predict the result of the case or to formulate a defence. Further, in considering the grave consequences that would accrue to the person who is facing a grave criminal charge, the State should often provide legal aid in all cases where a person is charged with serious offences.

32. Where a person is charged with a statutory offence or a minor offence, it is not necessary that free legal aid should be given, unless some complexity of the law or fact makes a judicial officer to take the view that legal assistance is necessary in the interests of justice. In such cases, if a judicial officer who hears the case asks for assistance, a poor person should not be placed in a less advantageous position than a person who could afford to defend himself and the necessary assistance should be given.

Test of reasonableness

33. A further test is also applied in granting legal aid. There may be cases where the means and merits of the case are such that an applicant is entitled to legal aid, but the amount involved may be so trivial or obtaining a decree may be a sheer wastage of time as his opponent may not have the means to satisfy the decree. It may be that, although a person is entitled to legal aid, still the litigation may be so protracted that very heavy expenses will be involved which will not be commensurate with the fruits of the litigation, even if successful. In such cases, it must be left to a certifying authority to refuse legal aid. Provision is found in many systems of legal aid obtaining in various countries that it must be reasonable in all the circumstances of the case to grant legal aid. In criminal cases, naturally, this test will have little significance because in those types of serious criminal cases, in which legal aid is given, it will be in the interest of justice to grant such legal aid. This test is therefore chiefly applied to civil matters. In criminal matters also

this test is applied. If the nature of the crime is such that a person will lose his life or liberty in the event of a conviction, the test of reasonableness is easily satisfied.

Legal aid to juristic persons in countries which follow the Anglo-American system of jurisprudence

34. In Anglo-American jurisprudence and systems based on it, juristic persons are either corporations aggregate or corporations sole. By corporations sole is meant certain public offices which are personified. Corporations aggregate consist of companies and other incorporated societies. In such systems the question as to whether legal aid should be given to juristic persons does not loom large. No question arises as to whether legal aid should be given to corporations sole. In dealing with corporations aggregate, their resources are such that normally no legal aid need be given. But in countries which follow the civil law system, certain foundations, charitable institutions are personified. In such cases, the question arises as to whether legal aid should be given to charitable institutions, scholarship foundations, hospitals, poor relief and parish authorities, etc. In the Netherlands, Luxemburg and Venezuela, legal aid has been granted to such institutions. In Argentina, anybody who wants to apply for the help of the court in charitable matters generally is given legal aid. The question as to whether legal aid should be given to juristic persons has been a disputed one among continental jurists and this dispute has found its echo in the various legislations of the world. A number of States, such as Brazil expressly state that juristic persons are not capable of receiving legal aid.

35. The Polish States have refused to give legal aid to juristic persons. Dr. Cohn submits that in this respect the Polish States have obviously followed the opinion prevailing among the German processualist theoreticians, who have long unsuccessfully opposed the view of the German courts according to which juristic persons are excluded from the benefits of legal aid.

36. In England, the United States of America, Scotland and the Dominions, legal aid in favour of juristic persons have never been and perhaps probably for a long time, will not be considered seriously. It is submitted that this approach is a salutary one.

Are both parties entitled to legal aid?

37. The question as to whether legal aid should be granted to both parties, if each party satisfies the conditions under which such aid is given, is a vexed one.

38. Under the Italian Law, legal aid is never granted to both parties to an action. (See Italy, Royal Decree Concerning Free Legal Aid to the Poor of December 20th, 1923: No. 3282. Article 15, Sub-section 2—L. 174). A few countries, however, grant legal aid to the defendant if it has already been granted to the plaintiff in the same action, provided he satisfies the conditions under which it is given. In such cases, a less exacting inquiry is held so far as the defendant is concerned. Thus, in Luxemburg and in Brazil the defendant is not required to show that his case is a **causa probablis.** In countries where legal aid is given only to one person, one proceeds on the assumption that both parties to an issue could not have a **causa probablis.** Dr. Cohn states that this is an erroneous view. He states as follows: (59 Law Quarterly Review, p. 364) :

> "It is quite possible that both parties do, indeed, have a good cause. As long as witnesses have not been heard and their doubtful points of law have not been decided or a difficult clause in the contract being authoritatively interpreted, it is quite possible that both parties have indeed a **causa probablis.** Every day cases are brought before courts which counsel on each side must have believed that his client had a good cause. Equally unfounded is the restriction of legal aid to plaintiff only, which is distinctly found in a number of North American States. The poor defendants deserve protection nor less urgently than the poor plaintiffs."

39. While agreeing with Dr. Cohn on the desirability of granting legal aid to both parties, if they satisfy the requirements and conditions of such aid, in practice, this question seldom arises. The certifying authority has to make up his mind one way or the other as to whether legal aid should be given to a person. But there may be cases where both parties deserve legal aid. In such cases, there should be a requirement that in dealing with the merits of the case, the same certifying authority should look into the cases of both parties.

40. A number of countries provide that before a decision about the application of the grant of legal aid is made, both parties should be heard and an attempt should be made to elicit the true facts as far as possible on their statements and documents. Usually the certifying authority tries to bring about a settlement after hearing both parties. But should there be a requirement that in every case both parties should be heard before a certifying authority decides that legal aid should be given to one party or the other or both, the grant of legal aid becomes dilatory and cumbersome. In English and Scottish law the opponent of both parties has to be informed of the grant

of legal aid. This is done in the expectation that this will often prove a strong motive in favour of an amicable settlement of the dispute between the parties. But a majority of States require neither a hearing of both parties, nor a notification and allow the application on an **ex parte** hearing.

41. In some countries a nominal fee is charged in all cases in which a poor litigant applicant wishes to submit a case for consideration. Although the sum may be small, it may be an incentive for a person not to bring frivolous claims in a court of law and ask for legal aid. The imposition of a small fee may deter a person from bringing actions in the lower courts after picking up small quarrels and molesting people.

Legal aid to non-citizens and Stateless persons

42. In a country there will be not only citizens and the persons who belong to other States, but also the so-called "stateless" persons. Among the foreigners who belong to other countries, some of them may be resident and others may be non-resident. The question arises whether legal aid should be granted to foreigners and stateless persons.

43. The class that has often been described as "Stateless" persons may be found in many countries. The treatment meted out to some of these stateless persons has ranged from equality to sub-human treatment and has led to international conflicts and disagreements in the world. The United Nations drew up a Convention containing a Charter of the Stateless Persons in New York on February 28, 1954 [See U.N. Document A/CONF. 2/108/Art. 16(ii)]. These documents provide that each contracting country in which a stateless person or a refugee is habitually resident, as the case may be, shall treat such persons as "a national in matters pertaining to access to courts, including legal assistance". Further, any State that claims to be one of the civilized nations, should not deny legal aid to its stateless persons. It is submitted that legal aid should be granted to all stateless persons.

44. In dealing with foreigners, many countries have entered into conventions to grant reciprocal legal aid. Thus, England by April, 1953 had entered into some 20 legal aid conventions with foreign countries (See 97 Solicitors' Journal, p. 336). So far as the Asian countries are concerned, it is desirable that conventions should be entered into between the Member States to provide reciprocal legal aid. A draft convention on this matter is set out in the Appendix to this report to be adopted by the Member Countries.

45. Among foreign nationals, a distinction has to be made between resident and non-resident nationals. In many countries, there are organisations which look after the interests of non-resident foreign nationals. A few of the organisations which cater for this class are: Aegious, organised by the Italian Red Cross; B'Rith Church World Service; Family Welfare Associations; Hebrew Immigrant Society; International Catholic Migration Commission; International Red Cross; International Social Services; Lutheran Refugee Service; St. Raphael's and some others.

46. Many non-governmental organisations have considered this matter. In 1954, the Committee on Legal Aid of the International Bar Association conducted a survey of legal aid facilities throughout the world. The results of this survey were published in a small booklet called "Littlewood Report" which was submitted at the Monaco Conference. This Report disclosed that little or no difference was made in the service provided to citizens and non-citizens in the countries that provide legal aid, although in certain countries reciprocity of legal aid has been insisted upon.

47. Mr. Orison S. Marden submitted a Paper to the International Bar Association at Oslo in 1956 on the "Ways and Means of Improving Legal Aid Facilities for Foreign Nationals, Whether Resident or Non-Resident". After referring to the "Littlewood Report" in this paper he said :—

> "Where any difference exists, it should be remedied as expeditiously as possible in the interests of international harmony and goodwill."

48. In 1950, Dr. Raphael Agababien of Iran submitted a Paper on "International Legal Assistance". He strongly urged that legal assistance should be given to aliens through the offices of the Red Cross. This matter was further discussed at the Fourth International Conference of the International Bar Association held at Madrid in 1952. At this Conference, it was resolved that "all member associations be urged to assist the Committee of the International Red Cross in the attempt to see that legal aid and advice is provided to foreigners and stateless persons, such assistance to be provided through existing organisations."

49. In England, legal aid has been made available not only to those resident in England and Wales irrespective of nationality but also to non-residents who require aid in the English courts. In the Case of **Ammar** v. **Ammar** (1954) (2 All England Reporter, p. 365) legal aid was granted to a husband who lived in Cyprus to sue for divorce in the Scottish courts. The English Legal Aid Act

of 1949 places the foreign litigant on the same footing as the resident litigant in the matter of receiving legal aid. Hence, there should be no distinction between resident or non-resident foreign nationals in this matter.

50. There may be difficulties which a certifying authority may encounter in granting legal aid to foreign nationals. Under many systems of law, when a person is not resident in a country, he may have to give security of costs. A foreign national who asks for legal aid may not have the necessary funds to grant security for costs. If the other party has to give security for costs, he should be relieved from such an obligation on grounds of equity and justice.

51. Another difficulty that would arise is to find out the means of a foreign national. Information on this matter could be obtained through the various diplomatic channels.

52. A set up of an International Legal Aid Association has been envisaged. A Committee has been appointed by the International Bar Association to furnish a Report on this matter. It will be of great interest to those who are interested in legal aid to read this Report when it is submitted. It may be that the Asian and African countries may not be in a position to launch expensive schemes in granting legal aid to foreign nationals in view of the other pressing social problems in their countries. It is submitted that so far as these countries are concerned, conventions should be entered into on the basis of reciprocity. A draft convention on this matter is annexed as Appendix III.

Scheme to grant legal aid to nationals of Member States

53. It is submitted that a step in the right direction will be taken if the Member Countries after entering into bilateral conventions to grant mutual legal aid to non-nationals set out a working scheme. A scheme is suggested at the end of this Report.

The cases in which legal aid should be given

54. As legal aid cannot be rationed, in strict theory, in all cases, where a person satisfies the requirements of legal aid, such aid should be made available. But on grounds of economy, such a step would be detrimental to countries which have to spend large sums on other welfare schemes. Hence, those countries who do not have large sums of money to devote for legal aid purposes, should confine themselves in granting legal aid only to a limited class of cases. A distinction should be made between civil and

criminal cases. Under the term civil cases are included not only civil litigation in courts but also those civil suits tried in statutory tribunals and criminal courts.

55. In civil matters legal aid should be given only to those types of cases where the poor and needy habitually figure, such as maintenance cases, divorce cases, cases involving the custody of infants, workmen's compensation cases, action to obtain damages arising out of the wilful or negligent act of a person, action to recover wages, etc. For a start, legal aid may be given in these cases before a State launches on a more ambitious scheme.

56. In many countries, legal aid is refused in certain types of cases which are fought out merely for the purpose of prestige or purification of public life than to obtain relief by way of actual compensation. Such cases are defamation, slander, election petitions, cases where a member of the public files an action against a public officer for holding office without authority. These and other similar actions, although desirable, are still not of such urgency and importance as to deserve legal aid. Hence, many countries have refused legal aid in these types of cases. After excluding these cases where legal aid will not be granted, every country that starts a scheme of legal aid, is well advised to include in a schedule, which may be altered from time to time, the types of cases in which legal aid should be given in civil matters.

57. In criminal matters, since the liberty of the subject is involved, a more generous approach should be made. But there are certain types of criminal cases where a person is charged with a statutory offence which does not involve any term of imprisonment if the person is found guilty. In such cases, legal aid is not necessary. In cases, which will end in incarceration, if the person charged is convicted, legal aid should be granted. Here again, a country that starts legal aid for the first time, should be careful to grant it only in serious types of criminal cases as the grant of legal aid in all types of criminal cases may be cumbersome and expensive.

58. The question arises whether in criminal cases legal aid should be given at the earliest opportunity or only in the trial court where the matter would be heard. Since it is of utmost importance that a person should have legal aid at the earliest opportunity, and since timely intervention by a legal expert may bring about the discharge of a prisoner at an early stage, legal aid should be given at the very inception. Hence, many countries have provided that